Mercy Hospital *and* Service Employees International Union Healthcare Minnesota *and* Angel Marie Robinson. Cases 18–CA–155443 and 18–CA–163045

August 20, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

On May 6, 2016, Administrative Law Judge Geoffrey Carter issued the attached decision. The General Counsel filed exceptions and a supporting brief,[1] the Respondent filed an answering brief, and the General Counsel filed a reply brief. The Respondent filed cross-exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent 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 only to the extent consistent with this Decision and Order.[2]

For the reasons stated by the judge, we adopt the judge's decision to defer the Section 8(a)(5) allegations in Case 18–CA–155443 to arbitration, and we also adopt his decision not to defer the three independent Section 8(a)(1) allegations in that case. The judge dismissed two of those three allegations, and there are no exceptions to those dismissals. See supra footnote 1. Regarding the third allegation, we adopt the judge's finding, for the reasons he states, that the Respondent violated Section 8(a)(1) when Manager Charles Stillings told employee Angel Robinson that she should not ask questions during team huddle meetings but only in private in Stillings' office and only on behalf of herself.[3]

For the reasons discussed below, we reverse the judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act when Intensive Care Unit (ICU) Manager Karen Schulz told employee Robinson that, should Robinson transfer to the ICU, she would be monitored for behavior and attendance. We also reverse the judge's finding that this same conduct independently violated Section 8(a)(1) of the Act. Accordingly, we dismiss these allegations.

A. Facts

The Respondent operates a medical center providing acute care and clinical health services. Robinson began working for the Respondent in its Environmental Services Department (EVS department) in September 2006. Although she was not a union steward, Robinson often expressed work-related concerns to her supervisors in team huddle meetings and by email. In late 2013, Robinson was called into a meeting with EVS Department Manager Chase Giboney, who preceded the current EVS department manager, Charles Stillings. Giboney told Robinson that she was behaving disrespectfully at huddles by asking too many questions, rolling her eyes, sitting with arms crossed, and breathing heavily.[4] Robinson was not disciplined for this conduct, however.

On October 16, 2014, Robinson received a performance review that generally praised her work but also stated that she needed to improve her "communication with supervisors, her acceptance of direction and constructive criticism." In late May or early June 2015, during a team huddle meeting, Robinson asked about new work assignments for the EVS department in the Respondent's forthcoming mother-baby birthing center. Stillings later approached Robinson and told her that she should ask Stillings directly about the new assignments and not ask about them during team huddle meetings.

On June 29, 2015, Robinson received a "Level 1 conversation" regarding her attendance. Level 1 conversations are the first step in the Respondent's disciplinary

[1] The General Counsel did not except to the judge's dismissal of allegations that the Respondent violated Sec. 8(a)(1) of the Act by telling an employee that the Respondent did not have to include Environmental Services Department positions in a rebid or by telling a union steward that the Respondent was going to continue filling open positions by "best fit" rather than seniority.

[2] We shall modify the judge's recommended Order to conform to our decision, and we shall substitute a new notice to conform to the Order as modified.

[3] Member Kaplan notes that the judge relied on *Babcock & Wilcox Construction Co.*, 361 NLRB 1127 (2014), in deciding not to defer the independent Sec. 8(a)(1) allegations to arbitration. He expresses no opinion whether that case was correctly decided and notes that pre-arbitral deferral of the only allegation now before the Board on exceptions would be inappropriate under pre-existing precedent.

[4] Our dissenting colleague suggests that this admonishment by Manager Giboney was related to a 2013 complaint made at a team meeting by Robinson on behalf of her colleagues, concerning their work starting times, or else to other protected conduct. However, it is impossible to draw any firm conclusions from the record here. Robinson gave some very general, and at times speculative, testimony that the Giboney meeting was because of a litany of conduct, including her asking too many questions, eye rolling, sitting with her arms crossed, and not making eye contact. She offered no additional detail on the conduct or its context, or of what exactly occurred during the meeting. While the judge broadly concluded that Robinson played a "somewhat active role" in raising workplace concerns, he conspicuously made no specific connection between this "somewhat active role" and Giboney's admonishment.

process. Although they do not constitute official discipline, are not included in the employee's personnel file, and cannot be used as the basis for further corrective action, Level 1 conversations remain in effect for 6 months. In August 2015, Robinson transferred to a certified nursing assistant (CNA) position in the Family Care Unit. On October 19, 2015, Family Care Unit Manager Michelle Haaland upgraded Robinson's Level 1 conversation to a Level 2 conversation because Robinson continued to accrue unexcused absences.

In late October 2015, Robinson sought a transfer to a CNA position in the Intensive Care Unit. In accordance with the parties' collective-bargaining agreement, Robinson was entitled to the position because she was the most senior qualified applicant. Robinson then had a "meet-and-greet" with ICU Manager Karen Schulz. Even though the most senior qualified applicant cannot be denied a transfer, the meet-and-greet meeting—a regular practice at the Hospital—allows the department manager and the transferee to get to know one another. Before the meeting, Schulz contacted Haaland and Stillings, Robinson's former managers. According to Schulz, both Haaland and Stillings mentioned that Robinson had some attendance and behavior issues.

The meet-and-greet was conducted by Schulz and ICU Supervisor Pamela Sandberg. Schulz began by asking questions about Robinson's work experience and why Robinson wanted to join the ICU. The meet-and-greet continued with an overview of CNA duties in the ICU, with Sandberg stating that the workload was significant and that CNAs often had to "hustle" to get the work done. Schulz then brought up Robinson's past attendance and behavior problems and stated that teamwork was of critical importance in the ICU. According to Robinson, Schulz further stated that she had some concerns because Stillings had told her that Robinson was "inappropriate, rude and disrespectful" and was "not a team player." Robinson became upset and defensive, stating that her past absences should have been covered by her FMLA[5] leave. Schulz responded that she would continue to monitor Robinson and utilize corrective action should any attendance or behavior problems persist.

Robinson declined the position in the ICU, stating that she "could never work for someone like [Schulz]." Robinson subsequently transferred to a position in the operating room.

[5] Family and Medical Leave Act of 1993.

B. Discussion

1. The Section 8(a)(1) allegation

The judge found that Robinson engaged in "protected concerted and union activities during EVS department team huddle meetings." The judge did not specify the activities he found protected. However, in his findings of fact, the judge found that (i) Robinson "took a somewhat active role in expressing [work-related] concerns (in team huddle meetings and by email)," and (ii) in a team huddle meeting in late May or early June 2015, Robinson asked about new work assignments for the EVS department in the forthcoming mother-baby birthing center, and Robinson subsequently told Manager Stillings that she had asked about the new work assignments "[n]ot just [for] me, but other people wanted to know what exactly the job was going to be before they apply for it."

The judge then found that the Respondent violated Section 8(a)(1) of the Act in October 2015 when Schulz told Robinson that Stillings described Robinson as being inappropriate and disrespectful and when Schulz informed Robinson that her performance in the ICU would be monitored. In the judge's opinion, these remarks reasonably tended to interfere with, restrain or coerce Robinson in the exercise of her Section 7 rights by chilling her willingness to engage in union or other protected concerted activities. For the following reasons, we disagree.

The relevant inquiry under Section 8(a)(1) is an objective one: whether the employer's statements or actions would tend to coerce a reasonable employee and chill the exercise of that employee's Section 7 rights. See *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981); *Idaho Pacific Steel Warehouse Co.*, 227 NLRB 326, 331 (1976). Here, the evidence is insufficient to support a finding that Schulz's statements during the meet-and-greet reasonably tended to chill Robinson in exercising her Section 7 rights.

First, Robinson had no reason to believe Schulz had any first-hand knowledge of her protected conduct. The meet-and-greet interview took place 4 or 5 months after Robinson engaged in protected concerted activity by inquiring about work assignments in the mother-baby birthing center during a team huddle and doing so on behalf of others as well as herself. There is no evidence that ICU Manager Schulz was present at that team huddle, which took place in the EVS department, nor is there evidence Schulz was aware that Robinson had previously

played a "somewhat active role" in raising work-related concerns.[6]

Nor would Robinson have reasonably believed that Stillings had told Schulz about Robinson's protected conduct.[7] Robinson did know that Schulz had spoken with Stillings, but Schulz told Robinson what Stillings had said about her, i.e., that she could be inappropriate, rude, and disrespectful. Schulz did not refer to Robinson's protected activities, and there is no evidence Stillings disclosed Robinson's protected activities to Schulz. Further, Stillings' negative characterization of Robinson's work was open-ended enough that one would not reasonably assume it encompassed her protected inquiry regarding the mother-baby birthing center assignments, which occurred at least 4 months earlier, particularly given that there were other concerns about her conduct. And, although the judge found that Robinson took "a somewhat active role" in raising work-related concerns, the nature of this role is scarcely elaborated in the record, and there is no indication of recent workplace advocacy by Robinson. It is therefore difficult to infer that Stillings' broadly negative characterization of Robinson's work referred to this "somewhat active role."

Second, and importantly, a reasonable employee in Robinson's position would have recognized that there was ample reason unrelated to protected conduct for a prospective manager to be concerned about Robinson's conduct and to voice that concern at a "meet-and-greet" interview. Over the course of the past 2 years, Robinson had been warned about indulging in nonverbal expressions of impatience and displeasure at team huddle meetings, such as rolling her eyes, sitting with arms crossed and breathing heavily; she had received a performance review that noted her need to improve "communication with supervisors, . . . acceptance of direction and constructive criticism"; and she had been disciplined twice for poor attendance. A reasonable employee in Robinson's position would assume that Schulz, as the manager of the department into which Robinson was seeking to transfer, would have informed herself of these matters. And she also would have realized that there was a basis other than her protected activities—the last concrete example of which was at least 4 months earlier—for Stillings to inform Schulz that her behavior could be inappropriate, rude and disrespectful.

We recognize that Schulz mentioned Stillings to Robinson as a source of information and that Stillings violated Section 8(a)(1) when he told Robinson she could not ask questions in team huddles and could only ask questions for herself. However, given that Schulz said nothing to Robinson about Robinson's protected activities, and in light of the reasons set forth above why any prospective manager would reasonably express concern about Robinson's conduct and attendance—reasons unrelated to Robinson's protected activity—we find that a reasonable employee in Robinson's position would have understood Schulz's statements to be prompted by those concerns rather than by her protected activity. Accordingly, we find that Schulz's statements would not *reasonably* have tended to chill Robinson in the exercise of her Section 7 rights, and therefore they did not violate Section 8(a)(1) of the Act.[8]

2. The Section 8(a)(3) and (1) allegation

The judge also found that the Respondent violated Section 8(a)(3) and (1) of the Act by presenting Robinson with a "Hobson's Choice" between either accepting the ICU position and facing discipline for future protected concerted activity, or declining the position even though she was entitled to it as the most senior qualified applicant.[9] According to the judge, by presenting Robin-

[6] Member Kaplan agrees that Robinson engaged in protected concerted activity during a team huddle in May or June 2015, when she inquired about work assignments in the mother-baby birthing center on behalf of other employees as well as herself. He finds no need to decide whether Robinson otherwise engaged in protected concerted activity when she raised unspecified work-related concerns during previous team huddles and in emails.

[7] Our dissenting colleague asserts that Stillings' knowledge can be imputed to Schulz. However, he makes this argument in connection with whether the record establishes that the alleged constructive denial of Robinson's transfer to ICU was motivated by unlawful animus. As we discuss below, we find that the General Counsel has not proved the first element of a constructive denial-of-transfer theory—that the burdens imposed on Robinson caused or were intended to cause a change in her working conditions so unpleasant as force her to decline the transfer—and therefore we do not reach the question of unlawful motive. We therefore need not decide whether knowledge can be imputed in connection with an unlawful-motive analysis. But with respect to the analysis of the alleged coercive statement, which turns on reasonable perception and not on motive, the lack of evidence that Schulz had knowledge of Robinson's protected activity makes it less likely that a reasonable employee would have believed that Schulz's statements were aimed at discouraging such activity.

[8] Robinson's own testimony regarding her interview with Schulz focused primarily on Schulz's remarks concerning Robinson's attendance record, and Robinson made no mention of her protected activity as a potential cause of Schulz's comments. Although Robinson's understanding of Schulz's motivation is not dispositive under the applicable objective standard, the fact that Robinson did not perceive Schulz's remarks as a response to her protected activity bolsters our finding that a reasonable employee would not have perceived Schulz's remarks in that light.

[9] The judge did not find that had Robinson accepted the position, she would have faced discipline for future *union* activity. Thus, even accepting the judge's analysis, we have difficulty understanding how he found a violation of Sec. 8(a)(3). In any event, for the reasons stated in the text, we disagree that Robinson's transfer was conditioned on her ceasing *either* union *or* protected concerted activity.

son with this Hobson's Choice, the Respondent constructively denied Robinson the transfer to ICU by conditioning the transfer on the cessation of Robinson's protected concerted activity.

We assume, without deciding, that the General Counsel's theory of the violation—a "constructive denial of transfer" under a Hobson's Choice rationale or otherwise– is viable. But we disagree that Robinson was presented with a Hobson's Choice. Under the Hobson's Choice theory of constructive discharge, "an employee's voluntary quit will be considered a constructive discharge when an employer conditions an employee's continued employment on the employee's abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition." *Intercon I (Zercom)*, 333 NLRB 223, 223 fn. 4 (2001) (citing *Hoerner Waldorf Corp.*, 227 NLRB 612 (1976)). Thus, there are two elements to a Hobson's Choice constructive discharge: conditioning continued employment on the abandonment of Section 7 rights, and a quit that results from the imposition of that condition. Here, without passing on whether the second element of a Hobson's Choice is present, we find that the record does not support a finding that the Respondent conditioned Robinson's transfer to the ICU on her abandonment of Section 7 rights.

Neither Manager Schulz nor Supervisor Sandberg said anything about Robinson's protected concerted activity at the meet-and-greet interview. Sandberg told Robinson that the workload in ICU was significant and that CNAs often had to "hustle" to get the work done. Schulz brought up Robinson's past attendance and behavior problems and said that teamwork was critically important in the ICU. And Schulz also said she had been informed that Robinson was "inappropriate, rude and disrespectful" and was "not a team player." We have found that a reasonable employee in Robinson's shoes would have attributed Schulz's statements to legitimate concerns about Robinson's attendance and conduct unrelated to her protected activity. Further, any potential inference that Schulz was conditioning the transfer on Robinson's abandonment of protected conduct would be speculative at best, and a Hobson's Choice theory requires that the employee be faced with a "clear and unequivocal" choice. *Chartwells, Compass Group*, 342 NLRB 1155, 1157 fn. 15 (2004); *ComGeneral Corp.*, 251 NLRB 653, 657–658 (1980).

Accordingly, we find that the evidence fails to show that the Respondent conditioned Robinson's transfer to the ICU on her willingness to abandon her Section 7 rights. We therefore reverse the judge's "Hobson's Choice" unfair labor practice finding.

The judge also found that, even absent a Hobson's Choice, the General Counsel would have prevailed under a traditional constructive discharge theory because the "Respondent knew, or should have known, that the prospect of working under such adverse conditions would induce Robinson to decline the opportunity to transfer to the ICU." Again, we disagree.

Here, too, we assume the viability of the General Counsel's "constructive denial of transfer" theory and consider Board law addressing constructive *discharges*.[10] To prove a constructive discharge, the General Counsel must establish two elements. "First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his [or her] working conditions so difficult or unpleasant as to force him [or her] to resign. Second, it must be shown that those burdens were imposed because of the employee's union [or other protected concerted] activities." *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976). In determining whether the second element of the *Crystal Princeton Refining* test has been met, the Board applies the standard set forth in *Wright Line*.[11] *Davis Electric Wallingford Corp.*, 318 NLRB 375, 376 (1995).

Adapting this standard to the situation presented here, the first issue is whether the Respondent imposed working conditions on Robinson so difficult or unpleasant as to force her to decide not to transfer to the ICU. We find it did not. The Respondent imposed nothing on Robinson. Rather, Robinson was generally given a realistic preview of the challenges of working in the ICU. Robinson was told that the workload in the ICU is significant, that CNAs often have to "hustle" to get their work done, and that she would be expected to maintain a certain standard of behavior and attendance. This did not constitute the imposition of inordinately difficult or unpleasant working conditions.

More broadly, the issue is not whether Schulz failed to embrace the idea of Robinson working for her, or even whether Schulz would have preferred that Robinson not work for her. Rather, the question is whether the General Counsel has established that the conditions imposed by Schulz were, and were intended to be, difficult or unpleasant enough to force Robinson to decline the job. The General Counsel has not made that showing. Rather, the record establishes only that Robinson was alerted to conditions that would tend to be characteristic of a

[10] Member Kaplan would not recognize "constructive denial of transfer" as a basis for finding that the Act has been violated, but he agrees that even if such a theory were cognizable, Robinson was not constructively denied a transfer in violation of the Act.

[11] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

demanding workplace: that work in the Intensive Care Unit is challenging, and that her attendance and conduct would be monitored. See *Intercon I (Zercom)*, supra, 333 NLRB at 223 fn. 3 ("unbearable" working conditions must be present for constructive discharge). Because the first part of the constructive discharge standard has not been met, we find it unnecessary to reach the second part of the standard.

For these reasons, we reverse the judge and dismiss this allegation.

ORDER

The National Labor Relations Board orders that the Respondent, Mercy Hospital, Coon Rapids, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing employees that they cannot ask questions in group huddle meetings and can only ask questions for themselves individually and not on behalf of other employees.

(b) In any like or related manner interfering with, restraining, or coercing its 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) Within 14 days after service by the Region, post at its facility in Coon Rapids, Minnesota, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 12, 2015.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegations in paragraphs 11(a)–(j) and 14 of the consolidated complaint are severed and dismissed. The Board shall retain jurisdiction over this proceeding for the limited purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute underlying the allegations in paragraphs 11(a)–(j) and 14 of the consolidated complaint has not, with reasonable promptness after the issuance of this Order, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair or regular or Board law does not reasonably permit the award.

Dated, Washington, D.C. August 20, 2018

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER PEARCE, dissenting in part.

Contrary to my colleagues, I agree with the judge that the Respondent violated Section 8(a)(1) by making coercive statements to employee Angel Robinson regarding a transfer to the Intensive Care Unit (ICU), and Section 8(a)(3) and (1) by constructively denying Robinson that transfer. In all other respects, I agree with the majority.

A. Background

Angel Robinson—to the displeasure of management—was a vocal advocate concerning employees' terms and conditions of employment. For example, in 2013, after the Union filed a grievance concerning the Respondent's reorganization of the Environmental Services (EVS) department, Robinson voiced concerns in employee huddles (staff meetings) that the Respondent's failure to post certain EVS assignments, and its changes to working start times potentially violated the collective-bargaining agreement. Soon after, EVS Department Manager Chase Giboney called Robinson into a sit-down meeting, along with supervisor Charles Stillings and two union repre-

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices 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."

sentatives. At the meeting, Giboney discussed Robinson's "disrespectful" demeanor at team huddles meetings as evidenced by her "asking too many questions," rolling her eyes, not making eye contact, sitting with her arms crossed and breathing heavily.[1]

In May 2015, after an arbitrator had sustained the Union's 2013 grievance, the Respondent gave EVS employees an opportunity to rebid new positions in the department. On May 18, the Respondent created four new positions in the EVS department in the mother-baby birthing center, which were not included in the rebid process. At a team huddle meeting in late May 2015, Robinson asked supervisor Chadica "Rudy" Hanumun why the new positions were not included in the May 15 rebid and inquired what work the new positions would entail. Subsequently, EVS Department Manager Charles Stillings reprimanded Robinson for her conduct at the team huddle, stating that "if you have questions, you can only ask for yourself and you need to come to my office and ask me." As found by the judge, and agreed to by my colleagues, Stillings' reprimand sent the clear "message that [the] Respondent did not welcome Robinson's attempts to discuss employee concerns at team huddle meetings," and reasonably tended to interfere with, restrain, or coerce her union or protected activities in violation of Section 8(a)(1).

It is against this backdrop that, in early October 2015, Robinson sought a transfer to a CNA position in the ICU. In accordance with the parties' collective-bargaining agreement, Robinson was entitled to the position as the most senior qualified applicant. Before meeting with Robinson to discuss the new position in the standard "meet and greet" session, ICU manager Karen Schulz contacted Michelle Haaland and Stillings, Robinson's former managers, for feedback on Robinson's work. Haaland reported that because Robinson had only worked in the Family Care Unit for a short time (since August 2015), she did not know much about Robinson; however, she saw no specific performance problems. Stillings, who had made the unlawful statement to Robinson, advised Schulz that Robinson had received a Level 1 conversation for attendance "as well as some disciplinary action," and that there had been issues with Robinson's performance and behavior.[2]

On October 13, Schulz and ICU supervisor Pamela Sandberg conducted a meet and greet session with Robinson. After inquiring about Robinson's work experience and interest in the ICU, Schulz and Sandberg explained the CNA duties. They noted that the ICU workload was heavy and stated that CNAs often had to "hustle" to get work done. Schulz then referenced Robinson's past attendance and behavior problems and stated that teamwork was of critical importance in the ICU. Schulz further stated that Stillings had told her that Robinson was "inappropriate, rude and disrespectful" and "not a team player." When Robinson disagreed with these characterizations, Schulz responded that she was relying on what Stillings had told her and that if Robinson came to the ICU Schulz would continue to monitor her and "go right to corrective action" if Robinson was rude, disrespectful, inappropriate, absent, or tardy. In light of Schulz's assertions about her performance, and her threats of disciplinary action, Robinson declined the ICU position, concluding that she "could never work for someone like [Schulz]."

B. Analysis

1. Section 8(a)(1) violations: Schulz's statements to Robinson

The test for evaluating whether an employer's statement or conduct violates Section 8(a)(1) is whether it has a reasonable tendency to interfere with, restrain or coerce employees in their union or protected activities. *MEI-GSR Holdings, LLC*, 365 NLRB No. 76, slip op. at 2 (2017). The test is an objective one; neither the employer's intent nor the employee's subjective reaction is relevant. Id. (citing *Helena Laboratories Corp*, 228 NLRB 294, 295 (1977)).

[1] The majority asserts that it is "impossible to draw any firm conclusions from the record" as to what precise events precipitated the meeting with Giboney and Stillings, and whether Giboney's admonishment of Robinson concerned her protected conduct. I disagree. The record supports the judge's implicit finding that Robinson's "somewhat active role in expressing concerns (in team huddle meetings and by email)" led to that admonishment. Robinson testified that her questions at team huddles concerned working conditions, including the Respondent's desire to change starting times for employees and failure to follow contractual procedures with regard to job postings. And the Respondent has not demonstrated that Robinson's assertedly "disrespectful" conduct (i.e. her physical reactions to the Respondent's positions) referred to anything other than her protected conduct.

[2] In her October 2014 performance review, Robinson was acknowledged as "one of the better cleaners in the EVS department." The review noted that she needed to improve her attendance, "communication with supervisors," and "acceptance of direction and constructive criticism." At the time of her review, Robinson had received only one "Level 1 conversation" (on September 15, 2014) for failing to complete her shift in a timely manner. A Level1 conversation is an informal verbal warning that is placed in the manager's file for documentation purposes, and remains active for 6 months. Thus, this Level 1 conversation would have expired by March of 2015, well before Robinson sought the transfer to the ICU.

On June 30, 2015, Robinson received a "Level 1 conversation" for having eight unscheduled absences in the preceding 5 months. While this conversation was "active" at the time of the October 2015 "meet and greet," it was not part of Robinson's personnel file and could not be used for disciplinary purposes.

A straightforward application of this standard compels a finding that Schulz's statements to Robinson at the meet and greet would reasonably tend to chill Robinson in the exercise of her protected rights, especially when considered in context. Rather than simply describe the CNA job already awarded Robinson, Schulz: invoked Stillings (who had coercively prohibited Robinson from engaging in protected concerted activity) and repeated his comments that Robinson was inappropriate, rude, disrespectful and not a team player; informed Robinson that she would rely on Stilling's representations; and threatened to closely monitor and swiftly discipline Robinson for any perceived infractions. Schulz thereby made clear that Robinson would constantly work under a cloud created by a supervisor clearly hostile to Robinson's protected activity. As the judge found, "[s]ince Stillings' negative assessment of Robinson was based (at least in part) on Robinson's protected concerted and union activities during EVS department team huddle meetings, and Schulz emphasized that she was relying on what she had been told by Stillings, Schulz'[s] remarks to Robinson … had a reasonable tendency to interfere with, restrain or coerce Robinson's willingness to engage in union or protected activities."[3] See *Brookdale University Hospital*, 335 NLRB 1094, 1095 (2001) (supervisor violated Section 8(a)(1) by telling shop steward that he would be monitoring him closely because the steward filed a grievance on behalf of another employee).

Accordingly, I agree with the judge that the Respondent violated Section 8(a)(1) when Schulz informed Robinson that Stillings had reported that she was "inappropriate, rude and disrespectful " and not a "team player." Likewise, I would find that Schulz's threat to monitor Robinson's conduct closely and go right to discipline if Robinson engaged in additional infractions, was unlawful.

2. The Section 8(a)(3) violation: Constructive Refusal to Transfer Robinson

Similarly, and contrary to my colleagues, I agree with the judge that the Respondent violated Section 8(a)(3) and (1) by constructively denying Robinson a transfer to which she was entitled, although I reach that conclusion under the Board's traditional test rather than the "Hobson's choice" theory on which the judge primarily relied.[4]

In a traditional constructive discharge case, the Board applies a two-prong test:

> First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be shown that those burdens were imposed because of the employee's union activities.

Yellow Ambulance Service, 342 NLRB 804, 807 (2004) (quoting *Crystal Princeton Refining*, 222 NLRB 1068, 1069 (1976)). Under the first prong, the "test for intent is not limited to whether the employer specifically intended to cause the employee to quit, but includes whether, under the circumstances, the employer reasonably should have foreseen that its actions would have that result." *American Licorice Co.*, 299 NLRB 145, 148 (1990). The second prong recognizes that a constructive discharge is unlawful only if it is implemented because of an employee's union or protected concerted activity.

Applying the first prong of the traditional test, the record establishes that the conditions Schulz imposed on Robinson's acceptance of the new position were so onerous or distasteful that Robinson was forced to refuse the transfer. Moreover, the Respondent either knew or should have known that Schulz's conditioning the acceptance on the onerous conditions would result in Robinson's declining to accept the transfer.[5] It is undisputed that Robinson, as the most senior, qualified applicant for the position, was entitled to the ICU position. Yet, Schulz aggressively sought to dissuade Robinson from accepting the transfer by: (1) invoking Stillings in her assessment that Schulz had "major concerns" about Robinson's work ethic and attitude and repeating Stillings'

[3] Contrary to the majority, I find that a reasonable employee in Robinson's position would have ample reason to infer that Schulz had knowledge of her protected activities based on Schulz's conduct. First, Robinson knew that Schulz had consulted with Stillings, as discussed above. Second, Schulz repeated Stillings' description of Robinson's reputation as "inappropriate, rude, and disrespectful," and "not a team player," despite a lack of evidence in Robinson's employment record to support this description. Thus, Robinson would have reasonably concluded that, by repeating Schulz's description of Robinson, she was referencing Robinson's protected conduct. See *Kentucky Electric Steel Acquisitions*, 346 NLRB 185, 189–190 (2005) (employer's references to employee's "bad attitude" and failure to be a "team player" are evidence of its animus towards employees' protected conduct).

[4] I find it unnecessary to pass on the applicability of the "Hobson's choice" theory here.

[5] While the first prong of the test refers to "a change in [the employee's] working conditions," the Board has held that constructive discharge should not be read "so narrowly as to apply only when an employer has changed an employee's working conditions." See, e.g. *American Licorice Co*., 299 NLRB 145, 148–149 (1990) (finding a constructive discharge where an employee resigned due to the employer's refusal to allow her to transfer shifts because she could not afford childcare on her current shift.); *St. Joseph's Hospital*, 247 NLRB 869, 873, 880 (1980) (finding a constructive discharge where the employer refused an employee's request for reduction in work hours to accommodate her student schedule). Although the Respondent did not change Robinson's working conditions (as she never accepted the ICU position), its implicit conditioning of her transfer on her acceptance of monitoring and swift disciplinary action was tantamount to doing so.

characterization of Robinson as "inappropriate, rude and disrespectful," and "not a team player"; (2) threatening to closely monitor her conduct; and (3) stating that she would go right to corrective action if she found Robinson to be rude, disrespectful, inappropriate, tardy or absent. In short, despite Robinson's entitlement to the job, Schulz made the terms of that transfer so unattractive that Robinson was essentially forced to reject it.[6] See *Yellow Ambulance Service*, 342 NLRB 804, 807 (2004) (quoting *Crystal Princeton Refining*, 222 NLRB 1068, 1069 (1976)).

Turning to the second prong of the test, the record demonstrates that the Respondent's efforts to dissuade Robinson from accepting the ICU position were connected to her prior protected conduct during team meetings and in emails to supervisors. More specifically, it was Stillings' comments that led Schulz to tell Robinson that she was "inappropriate, rude and disrespectful," and "not a team player." This description, in and of itself, evinces antiunion animus, given that Stillings had previously singled Robinson out for her protected conduct at group huddle meetings. Further, there was no evidence supporting such a description in Robinson's disciplinary record.[7] See *Intercom I* (*Zercom*), 333 NLRB 223, 223–224 (2001) (judge found "reference to [employee's] 'negative attitude' was a euphemism for her prounion activity, and that [employee] could infer that the Respondent's unlawful conduct was a form of retaliation for her union activities"). Finally, Schulz's threat at the meet and greet to closely monitor and swiftly discipline Robinson provides additional evidence that Schulz herself was motivated by animus.[8]

In sum, I would agree with the judge's common sense conclusion that any reasonable employee would decline a position where her new boss was predisposed to find fault with her performance from the outset (based on her prior protected conduct), and had promised to swiftly discipline her for any such future "misconduct." Accordingly, I would find that the Respondent violated Section 8(a)(3) by constructively denying Robinson a transfer to which she was entitled.

Dated, Washington, D.C. August 20, 2018

Mark Gaston Pearce, Member

NATIONAL LABOR RELATIONS BOARD

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 inform employees that they cannot ask questions in group huddle meetings and can only ask

[6] I disagree with the majority's assertion that Schulz described, at most, an "unpleasant" workplace, rather than creating a sufficiently compelling reason for Robinson to refuse the transfer. Schulz's preconditions constituted thinly veiled threats of unlawful surveillance and retaliation in the event that Robinson decided to accept the position and engage in any future "misconduct" (i.e., protected concerted conduct). When viewed in context—at a "meet and greet," intended simply to familiarize Robinson with the new job to which she was entitled—Schulz's negative predisposition towards Robinson compelled her to refuse the position.

[7] As noted above, at the time of the October 13 meet and greet, Robinson had only one "Level 1" conversation in effect for unexcused absences.

[8] While the majority asserts that there is no direct evidence that Schulz knew of Robinson's protected conduct at team huddles, direct evidence is not required. As the Board noted in *Bruce Packing Co*., 357 NLRB 1084, 1086–1087 (2011), enfd. in pertinent part 795 F.3d 18 (D.C. Cir. 2015), "[t]he Board ordinarily imputes a supervisor's knowledge of an employee's union activities to the employer unless it is affirmatively established that the supervisor who obtained such knowledge did not pass the information on to others." See also *Ready Mixed Concrete Co*., 317 NLRB 1140, 1146 at fn. 18 (1995), enfd. 81 F.3d 1546 (10th Cir. 1996); *C & L Systems Corp.*, 299 NLRB 366, 378 (1990), enfd. 935 F.2d 270 (6th Cir. 1991). Here, there is no credited evidence that Stillings (who undisputedly knew of Robinson's protected conduct) did not pass on the information to Schulz. To the contrary, the judge found: "it stands to reason that Schulz requested more detail about Robinson's behavior and then (per her usual practice) confronted Robinson with that information in the interview."

Moreover, it is undisputed that Stillings' assessment of Robinson (i.e. that she was "inappropriate, rude and disrespectful" and "not a team player") was influenced by his antiunion animus, and figured substantially in Schulz's ultimate decision to dissuade Robinson from taking the job. Thus, even absent direct evidence of knowledge of Robinson's protected conduct, such knowledge can be imputed to Schulz because Stillings had "direct input" into the decision making process. See *Bruce Packing Co*, 357 NLRB at 1086 ("case law is clear that the antiunion motivation of a supervisor will be imputed to the decision-making official, where the supervisor has direct input into the decision").

questions for themselves individually and not on behalf of other employees.

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

MERCY HOSPITAL

The Board's decision can be found at www.nlrb.gov/case/18-CA-155443 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Rachael Simon-Miller and Kaitlin Kelly, Esqs., for the General Counsel.
John Hauge and Grant Collins, Esqs.,[1] for the Respondent.
Justin Cummins, Esq., for Charging Party SEIU Healthcare Minnesota.

DECISION

GEOFFREY CARTER, Administrative Law Judge. This consolidated case involves two disputes. In Case 18–CA-155443, the parties primarily lock horns over whether the collective-bargaining agreement sets restrictions that Mercy Hospital (Respondent) must follow when filling work assignments in its Environmental Services (EVS) department (the case also includes three alleged unlawful statements, two of which relate to the work assignments issue).[2] As part of its defense, Respondent asserts that the dispute should be deferred to arbitration.

In Case 18–CA–163045, the parties contest the question of whether Respondent violated the Act when employee Angel Robinson applied for, and later declined, a transfer to a certified nursing assistant (CNA) position in the Intensive Care Unit. The General Counsel asserts that Respondent made unlawful threats during Robinson's "meet and greet" interview with ICU department managers. The General Counsel also alleges that Respondent constructively denied Robinson a transfer to the ICU by forcing Robinson to make a Hobson's Choice between accepting the transfer despite the unlawful threats, or declining the transfer despite the fact that she was entitled to it under the collective-bargaining agreement as the most senior applicant.

As explained below, I agree with Respondent's deferral argument as to the Section 8(a)(5) allegations in Case 18–CA–155443—deferral is appropriate because those allegations turn on contract interpretation, where an arbitrator has expertise. Under the Board's decision in *Babcock & Wilcox Construction Co.*, 361 NLRB 1127, 1138–1139 (2014), however, the 8(a)(1) allegations in Case 18–CA–155443 may not be deferred to arbitration because the Union and Respondent did not explicitly authorize an arbitrator to decide those types of allegations in the collective-bargaining agreement, or otherwise. Accordingly, I decided those allegations on the merits, finding that Respondent did not violate the Act when it stated its position about how it would handle work assignments, but also finding that Respondent did violate the Act when it told Robinson that she was not allowed to ask questions in front of other employees at team huddle meetings.

As for Case 18–CA–163045, I agree with the General Counsel that Respondent violated the Act by making unlawful statements to Robinson during her interview with ICU managers, and by constructively denying Robinson a transfer to the ICU.

STATEMENT OF THE CASE

This case was tried in Minneapolis, Minnesota, on February 9–12, 2016. The Service Employees International Union Healthcare Minnesota (the Union), filed the charge in Case 18–CA–155443 on July 6, 2015,[3] and filed amended charges on August 17 and October 9, 2015. Angel Marie Robinson, an individual, filed the charge in Case 18–CA–163045 on October 15, 2015, and filed an amended charge on December 3, 2015. On October 30, 2015, the General Counsel issued a complaint in Case 18–CA–155443. On December 4, 2015, the General Counsel issued a consolidated complaint covering both of the cases listed above.

In connection with Case 18–CA–155443, the General Counsel alleged that Respondent violated Section 8(a)(5) and (1) of the Act by taking the following actions without notifying and bargaining with, or obtaining the consent of, the Union:

> In about May 2015 and through its agent Crothall Healthcare, unilaterally creating and posting new positions in the mother-baby birthing center, and thereby modifying Article 14(f) of the collective-bargaining agreement;[4] Since about late May

[1] Sandra Francis, Esq. also appeared as counsel for Allina Health System. Allina Health System includes a group of seven hospitals, one of which is Respondent. (See GC Exh. 2 (p. 1).)

[2] The terminology itself is part of the dispute. The General Counsel and the Union maintain that "work assignments," "workweek schedules," and "positions" are all synonyms that are used interchangeably in the workplace. Respondent, by contrast, asserts that the three terms all have separate and distinct meanings. For ease of reference, in this decision I use the term "work assignment" to refer to an employee's specific job duties or work area in the EVS department, and the term "position" to refer to the employee's general job title (e.g., environmental services aide; certified nursing assistant). In so doing, I do not take a position on which side is correct regarding whether or not the disputed terms (work assignment, position, workweek schedule) are synonyms.

[3] All dates are in 2015 unless otherwise indicated.

[4] As directed in an order granting (in part) Respondent's motion for a bill of particulars (see GC Exh. 1(o)), the General Counsel clarified that on or about May 18, 2015, Respondent posted four new positions in the EVS department to cover additional work that resulted from the opening of the new mother-baby birthing center. (See R. Exh. 24.)

> 2015 and through its agent Crothall Healthcare, unilaterally failing to post vacant positions, and thereby modifying Article 18 of the collective-bargaining agreement;[5]
>
> Since about late May 2015 and through its agent Crothall Healthcare, unilaterally creating and filling positions by "best fit" rather than using "seniority as far as practicable and consistent with proper hospital management" or whether the employee "possesses the necessary capabilities to perform the work," and thereby modifying Article 14(f) of the collective-bargaining agreement;
>
> Since about late May 2015 and through its agent Crothall Healthcare, unilaterally changing the employee work weeks of employees in the EVS department, and thereby modifying Article 14(f) of the collective-bargaining agreement;
>
> In about late May 2015, dealing directly with employees by announcing new positions in the mother-baby birthing center and directly soliciting employees to fill those positions;
>
> In about late May 2015, dealing directly with an employee regarding an open EVS position; and
>
> On or about June 12, 2015, dealing directly with employees at a team huddle meeting by instructing employees that they should speak with EVS department manager Charles Stillings if the employees wanted to switch work shifts.

(GC Exhibit (Exh.) 1(g), (q).)

The General Counsel also alleged in Case 18–CA–155443 that Respondent violated Section 8(a)(1) of the Act by:

> In about late May 2015, threatening an employee that Respondent did not have to include EVS positions in a rebid;
>
> In about early June 2015, threatening an employee that the employee was not allowed to ask questions in the presence of other employees at team huddle meetings; and
>
> On or about June 8, 2015, threatening a union steward (who was also an employee) that Respondent was going to continue filling open positions by "best fit," and not seniority.

(GC Exhibit (Exh.) 1(g), (q).)

In connection with Case 18–CA–163045, the General Counsel alleged that Respondent violated Section 8(a)(3) and (1) of the Act by, in retaliation for employee Angel Robinson's union or other protected activities, engaging in the following misconduct during a job interview on or about October 13, 2015:

> Threatening that EVS department manager Charles Stillings advised Intensive Care Unit (ICU) department manager Karen Schulz that Robinson was inappropriate, disrespectful and not a team player;
>
> Threatening that if Robinson obtained a job in the ICU department, Robinson would face close surveillance by Schulz;
>
> Threatening that if Robinson obtained a job in the ICU department, Robinson would be disciplined for engaging in Union or other protected concerted activities; and
>
> Through its misconduct during the interview, constructively denying Robinson a transfer to a job in the ICU department.

(GC Exh. 1(q).)

Respondent filed a timely answer (and a timely amended answer) denying the alleged violations in the consolidated complaint, and asserting (among other affirmative defenses) that the allegations in Case 18–CA–155443 should have been deferred to the grievance and arbitration procedure in the collective-bargaining agreement.

On the entire record,[6] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT[7]

I. JURISDICTION

Respondent, a Minnesota corporation with an office and place of business in Coon Rapids, Minnesota, operates a medical center providing acute-care and clinical health services. During the past fiscal year, Respondent purchased and received goods and services at its Coon Rapids, Minnesota facility that are valued in excess of $50,000 and came directly from points outside the State of Minnesota. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and is a healthcare institution within the meaning of Section 2(14) of the Act. Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Collective-Bargaining Relationship

Since about 1968, Respondent has recognized the Union as exclusive collective-bargaining representative of employees in the following appropriate bargaining unit:

> [A]ll full-time and regular part-time nonprofessional employees listed in Appendix C of the parties most recent collective-bargaining agreement, employed by Respondent at its Coon

[5] As directed in an order granting (in part) Respondent's motion for a bill of particulars (see GC Exh. 1(o)), the General Counsel clarified that this allegation relates to the following positions/assignments in the EVS department that Respondent allegedly failed to post: "2 Heart"; evening project worker; float position; PM turndown position (evening shift, awarded in or around May 2015); mother-baby birthing center position (day/evening shift, awarded in or around August 2015); and an operating room position (evening shift, awarded in or around October 2015). (See R. Exh. 24 (referencing GC Exhs. 18–19); R. Exh. 25.)

[6] The transcripts and exhibits in this case generally are accurate, but I hereby make the following corrections to the record: p. 12, l. 24: "interest" should be "inference"; p. 86, l. 14: "plaintiffs" should be "parties"; p. 129, l. 11: "for" should be "four"; p. 138, l. 11: "for" should be "four"; p. 258, l. 17: "Paul" should be "Paula"; p. 343, l. 19: "member" should be "memory" and p. 669, l. 24: "you" should be "you don't."

[7] Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case.

> Rapids, Minnesota facility, excluding all other employees, office clerical employees, and guards and supervisors as defined by the Act.

The Union and Respondent have negotiated and executed successive collective-bargaining agreements, including a collective-bargaining agreement that is effective from April 16, 2015, to February 28, 2018. (GC Exhs. 1(q) (pars. 7–8), 1(bb) (pars. 9–10), 2 (Articles 1, 31 and Appendix C); see also Tr. 33–34, 486, 903.)

Apart from the dispute in this case, the Union and Respondent have enjoyed a good working relationship that generally has allowed them, either informally or in connection with the grievance process, to discuss and often resolve issues of concern as they arise. (Tr. 51, 109–111, 257, 621–623, 632.)

To the extent that the need to use the grievance and arbitration procedure arises, Article 7 of the collective-bargaining agreement states as follows:

> Any claim of an employee arising out of the interpretation, application, or adherence to the terms or provisions of this Agreement or arising out of disciplinary and discharge actions taken by [Respondent] shall be subject to the Grievance and Arbitration Procedure.

(GC Exh. 2 (Art. 7).) More generally, Article I of the collective-bargaining agreement recognizes that the Union is the sole representative of all employees in the bargaining unit, and states:

> There shall be no discrimination by the Union or [Respondent] against any employee because of membership or nonmembership in the Union or because of the assertion of rights afforded by [the collective-bargaining agreement]; and
> . . .
> [Respondent] agrees not to enter into any agreement or contract with its employees who are in classifications covered by [the collective-bargaining agreement], either individually or collectively, which conflicts with any of the provisions of [the collective-bargaining agreement].

(GC Exh. 2 (Art. I, Secs. C–D).)

B. September 2013—Respondent Decides to Reorganize the EVS Department and Establish New Workweek Schedules

Although the bargaining unit includes a number of different employee classifications, for the most part, the allegations in this case relate to the EVS department, which provides custodial services throughout the hospital. EVS department employees do not report to the manager of the hospital unit in which they work (e.g., the mother-baby birthing center, the ICU, etc.), but rather, report to the manager of the EVS department.

In July 2013, Respondent arranged for Crothall Healthcare (Crothall) to manage the EVS department (before that point, Respondent managed the EVS department directly). Shortly thereafter, Crothall evaluated the EVS department to identify more efficient and effective ways to deliver EVS services. Based on its evaluation, Crothall proposed to: reorganize the EVS department; change the workweek schedules of some EVS employees; and change some EVS employee duties to better fit the Crothall model. (GC Exh. 4, p. 13–14.)

On September 11, 2013, representatives of the Union and Respondent met to discuss the implementation of Crothall's plan to reorganize the EVS department. In that meeting, the Union asserted that based on Article 14(f) of the collective-bargaining agreement, Respondent could only implement the proposed new workweek schedules if Respondent conducted a "rebid" under which EVS employees would select their schedules by seniority. (GC Exh. 4, p. 15; see also GC Exh. 2 (stating, in Art. 14(f) of the collective-bargaining agreement, that "[i]n the establishment of workweek schedules, the Hospital shall give preference to employees in accordance with seniority as far as practicable and consistent with proper hospital management").) Initially, Respondent disagreed with the Union, but by the end of the meeting, the Union left with the impression that Respondent agreed to conduct a rebid of EVS workweek schedules by seniority. (GC Exh. 4, pp. 15–17.)

In a meeting on September 17, 2013, Respondent advised the Union that it would not conduct a rebid of EVS workweek schedules. Notwithstanding the Union's objections, Respondent subsequently proceeded to establish new workweek schedules in the EVS department without following seniority order. (GC Exh. 4, p. 19.)

C. Fall 2013—the Union Files a Grievance about Respondent's Decision to Establish Workweek Schedules in the EVS Department without Regard to Seniority

On September 24, 2013, the Union filed a grievance to assert that Respondent violated Articles 14, 16, and 18 of the collective-bargaining agreement when Respondent decided to assign new job duties and start times to EVS employees without regard to seniority. As a remedy for the alleged violation, the Union requested that "EVS Members should be allowed to bid on their start times and job duties in seniority order" and should be made whole for any and all losses. (GC Exh. 3.)

Respondent and the Union agreed to move directly to step 2 of the grievance procedure, and conducted the step 2 grievance meeting via teleconference on October 14, 2013. On December 4, 2013, Respondent denied the Union's grievance, finding that "the union has failed to establish an agreement was reached [on September 11, 2013] or that [Respondent] was otherwise required to conduct a rebid allowing employees to select assignments by seniority." (R. Exh. 3 (p. 2).)

D. March 16, 2015—Arbitrator Sustains Union's Fall 2013 Grievance about Workweek Schedules in the EVS Department

On March 16, 2015, an arbitrator sustained the Union's fall 2013 grievance and ordered Respondent to "establish workweek schedules for [the EVS department] in seniority order and to make all affected employees whole [for] all lost pay or other contractual benefits."[8] (GC Exh. 4, p. 22.) In reaching that decision, the arbitrator did not rule on whether Respondent violated Article 14(f) of the collective-bargaining agreement

[8] The arbitration hearing occurred on January 16, 2015. (GC Exh. 4, p. 2.) The record does not establish why there was a thirteen month delay between the December 4, 2013 step 2 grievance decision and the arbitration hearing.

when Respondent established new workweek schedules without regard to seniority as part of the September 2013 reorganization of the EVS department. Instead, the arbitrator determined that the Union and Respondent reached an agreement in September 2013 to bid the new workweek schedules in the EVS department by seniority, and decided that Respondent could not be allowed to renege on or rescind that agreement. The arbitrator declined the Union's request to apply his decision to any future disputes. (Id. at 20–22.)

E. The May 15, 2015 Rebid

In April 2015, representatives of Respondent and the Union met to discuss how Respondent would conduct the rebid in the EVS department as directed by the arbitrator. The Union and Respondent agreed that as part of the rebid process, employees would be able to select their shift start times and work assignments in seniority order. Respondent asserted, however, that the rebid would be a one-time-only event based on the arbitrator's decision, and thus for any future openings Respondent would only post information about the shift and whether the employee on that shift would be working on a full-time or part-time basis (i.e., the FTE of the shift), and would not post information about work areas or duties.[9] (Tr. 41–42, 87–89, 133, 627–632; R. Exhs. 5, 37–38.) The Union and Respondent also agreed that although Respondent planned to add positions in the EVS department for the new mother-baby birthing center, those positions would not be included in the rebid because the new mother-baby birthing center was not yet open. (Tr. 105–106, 133.)

On May 4, Respondent announced the upcoming rebid by explaining as follows in a memorandum that was distributed to all EVS department employees:

> As a result of an arbitrator's decision we will be conducting a re-bid in Environmental Services in which you will bid on positions with an expected job assignment attached. This means you will be able to review all the Duty Lists for the department. Then in order of seniority you will be able to choose the Duty List (assignment) that is of interest to you. This will become your primary assignment, where you would be regularly scheduled. There may be an occasion where you could be pulled to another area based on ill calls, vacations, LOAs or open positions, similar to our current process.
>
> . . .
>
> You may <u>not</u> increase or decrease your FTE during this bid process. You may take any position, on any shift, that is available when you bid—it just has to be the same FTE as you currently are.
>
> . . .
>
> All changes will be effective on the schedule that begins June 13, 2015, unless otherwise agreed between the employee and the manager.

(GC Exh. 12 (emphasis in original); Tr. 133–134.)

As scheduled, EVS department employees participated in the rebid on May 15, with each employee appearing at a predetermined time and selecting a shift and work assignment in seniority order. Through the rebid process, several employees received different shifts or work assignments because more senior employees in the department bumped them from their previous shifts or assignments. (Tr. 42–43, 132, 135–140, 178, 221–222, 291–292, 395–396, 407, 418–419, 633, 784; GC Exhs. 5, 13.)

F. Respondent's Handling of Job Vacancies, Job Postings and Work Assignments after the May 15, 2015 Rebid

In the days and months after the May 2015 rebid, the Union became concerned that Respondent was handling job vacancies, job postings and changes to work assignments in a manner that violated the collective-bargaining agreement. Article 14(f) of the collective-bargaining agreement states, in pertinent part:

> **Seniority Preference:** In the establishment of workweek schedules, the Hospital shall give preference to employees in accordance with seniority as far as practicable and consistent with proper hospital management. The Union will be notified and given an opportunity to discuss new or changing workweek schedules with the Employer prior to implementation.

(GC Exh. 2 (Article 14(f) (emphasis in original).) Article 18 of the collective-bargaining agreement, meanwhile, states as follows, in pertinent part:

> **Job Vacancies:** Vacancies or new positions shall be awarded to the senior employee applicant where the employee currently possesses the necessary capabilities to perform the work. Qualifications for the job shall be posted by the Employer, and the posting shall include the shift and number of hours for the position. . . .
>
> **(1) Posting of Vacancies:** All job vacancies within the bargaining unit shall be posted by the Employer for seven (7) calendar days in a manner and/or in locations accessible and visible to all Employees. Job vacancies shall be posted in the department where the vacancy exists. Postings shall include the following information:
>
> a. Minimum qualifications based on the job requirements.
> b. Classification, facility, FTE status, shift, department, and starting wage.
> c. The date of the posting

(GC Exh. 2 (Article 18) (emphasis in original).)

Respondent took the following actions (among others) in the EVS department in 2015, after the May 15 rebid:

> 1. On or about May 18, Respondent created four new positions in the EVS department: one part-time position on the day shift (FTE 0.5 – posting 10488BR); two full-time positions on the day shift (FTE 1.0 – posting 9736BR);[10] and one

[9] Although one of the Union's representatives denied that there was any discussion about the rebid being a one-time event (see Tr. 42), I have credited the testimony of Respondent's witness on that point because her testimony is corroborated by both the Union's and Respondent's notes from the April 2015 meetings. (See R. Exhs. 5, 37–38; Tr. 87–89, 627–632.)

[10] Although there were two full-time positions on the day shift, the positions shared a single posting number (9736BR). Recruiters who handle these postings for Respondent describe this posting practice as

full-time position on the evening shift (FTE 1.0 – posting 9755BR). In or about late May 2015, Respondent, through Stillings, advised employees in a team huddle meeting[11] that the work assignments for those positions would be in the mother-baby birthing center. When Robinson asked why the positions were not included in the May 15 rebid, Stillings replied that the new positions did not have to be included in the rebid because the new building for the mother-baby birthing center was not open yet. (Tr. 178–181, 293–294, 434–435, 785; GC Exh. 28(z); see also Tr. 294 (explaining that while the new mother-baby birthing center was not yet open for business, EVS employees were doing some work there to clean up sheetrock dust); GC Exh. 37, p. 23 (table of information, including a description of expected job duties, that Stillings sent to the recruiters before the new positions were approved and formally posted); Tr. 459–464 (discussing GC Exh. 37); Findings of Fact (FOF), Section II(E) (noting that the Union and Respondent agreed that the new positions in the mother-baby birthing center would not be included in the May 15 rebid).)[12]

2. In or about late May 2015, Robinson asked supervisor Chandica "Rudy" Hanuman during a team huddle meeting about what kind of work employees would do in the new positions that Respondent posted on May 18 for the EVS department. Hanuman responded that he thought Stillings already told Robinson that information. Later in the shift, Stillings "beeped" Robinson, who responded by calling Stillings on the telephone. The following discussion occurred:

> Stillings: I heard that you were inquiring about the mother-baby jobs again in the huddle. I thought I already told you that those are mother-baby jobs.
> Robinson: Yes. Not just me, but other people wanted to know what exactly the job was going to be before they apply for it.
> Stillings: Well, if you have questions, you can only ask for yourself and you need to come to my office and ask me.

(Tr. 295–296.)[13]

3. On or about May 18, employee Elona Decker applied for a full-time evening position in the EVS department (posting 9755BR). Through Stillings, Respondent advised employees that the position came with a work assignment that would be in the new mother-baby birthing center. In late May 2015, Stillings notified Decker that she was the senior applicant for the evening position, and offered Decker the opportunity to take a "PM Turndown" and "public areas" work assignment in the EVS department (instead of a work assignment doing discharges). The PM Turndown/public areas work assignment was not posted or offered to other employees (based on seniority or otherwise). (Tr. 222–226, 293, 430–432, 800–801, 827–828; GC Exhs. 26, 28(z).) Robinson also applied for position 9755BR and had more seniority than Decker, but Respondent did not consider Robinson for position 9755BR because Robinson already held a full-time evening shift position in the EVS department.[14] To the extent that Robinson (or any other employee) desired a different work assignment on their same shift, Respondent advised the employees to speak to Stillings, who could place employees in different work assignments based on "best fit." (Tr. 292, 296–299, 301–302, 791–794; GC Exh. 21.)

4. In late May 2015, Respondent allowed employee Marichu Harris to take a work assignment as an evening project worker (after employee Karen Cullen left that work assignment), without posting the evening project worker assignment or filling the work assignment in seniority order. (Tr. 178–179, 182, 304–305, 787, 789–791, 822–823; see also Tr. 619–620, 667–669 (noting that later, Respondent decided to post the project worker assignment because it realized that there is language in the collective-bargaining agreement that requires Respondent to fill that assignment by seniority); GC Exh. 2, p. 111 (Appendix C of the collective-bargaining agreement, regarding filling permanent project worker assignments by seniority).)

5. On or about June 8, Stillings told union stewards Karen Cullen and Rita Matthews that Respondent could place employees in work assignments, or switch employee work assignments, based on best fit (for the position and/or for the hospital). (Tr. 152–154; see also Tr. 112–114 (noting that

"funneling," where a single posting number covers more than one position. One advantage of funneling is that employees only need to apply for one posting number to be considered for multiple positions. On the other hand, one disadvantage of funneling is that employees may not know when a single posting covers multiple positions. (Tr. 534–536, 559–560, 586–587.)

[11] Team huddle meetings are staff meetings in the EVS department, at which an EVS department manager and/or EVS department supervisor notifies employees about the work to expect in the hospital for the day, and makes other work-related announcements. Team huddle meetings generally last for 5–15 minutes, and are held in the break room. Employees may ask questions in team huddle meetings. (Tr. 135, 142–143, 227, 423–424, 442–444, 801.)

[12] Stillings did not rebut Robinson's testimony on this point. (See Tr. 800 (Stillings testimony limited to saying that he did not "threaten" any employees during a late-May meeting or recall any employee at the meeting asking about rebidding EVS positions).)

[13] I did not credit Stillings' testimony about this team huddle meeting or his remarks to Robinson after the meeting. Regarding the meeting itself, Stillings admitted that he was not present until the "tail end" of the meeting. Based on that admission, I find that Stillings was not in a position to hear the complete exchange between Hanuman and Robinson. (Tr. 801–802.)

As for what Stillings said to Robinson after the team huddle meeting, Stillings testified that he merely repeated Hanuman's suggestion that Robinson speak with Stillings if she had any questions about the mother-baby center work assignments. (Tr. 803.) That testimony does not ring true because if Stillings heard Hanuman tell Robinson she should present her questions to Stillings (as Stillings asserted at Tr. 802), there was no need for Stillings to repeat that basic suggestion to Robinson after the meeting. By contrast, it is more believable that Stillings contacted Robinson after the meeting to tell her to stop asking questions in team huddle meetings about the new positions in the mother-baby birthing center.

[14] Robinson and Stillings disagree about what was said when they spoke about position 9755BR, but that disagreement is not material to my analysis. (Compare Tr. 300 with Tr. 792–794.)

Cullen is both an employee and a union steward); 483–484 (Stillings testimony that Respondent uses "best fit" when making work assignment decisions); 634 (director of human resources Nancy Watson reiterated to Matthews that Respondent would not post work assignments).)

6. On or about June 12, Stillings advised employees in a team huddle meeting that if they were not happy with their positions/work assignments, they should speak to him because he would try to move people to make them more content with their area. (Tr. 303; see also Tr. 395, 421, 424–425, 466–467, 470–472, 815–816, 819–820, 839–840.)

7. In or about mid June 2015, Robinson advised Stillings that she was interested in the "2 Heart" work assignment, which Robinson believed would become available if Marichu Harris took the evening project worker assignment. Stillings responded that employee Patricia Wagner had the 2 Heart assignment.[15] When Robinson objected that Respondent did not post the 2 Heart assignment, and that she (Robinson) had more seniority than Wagner, Stillings advised Robinson to talk to Wagner about the issue. Robinson followed Stillings' suggestion, and Wagner reluctantly agreed to switch work assignments with Robinson after Robinson stated that she would file a grievance if she did not receive the 2 Heart assignment.[16] Stillings approved the changes to Robinson's and Wagner's work assignments, and thus Robinson began working on 2 Heart, and Wagner began working in the basement (both of which were during the evening shift). (Tr. 304–308, 422–423, 438, 442, 448–449, 794–795; see also GC Exhs. 18–19, 30; Tr. 154.)

8. In fall 2015, Stillings and Hanuman approached EVS department employee Lizzie Johnson and asked her if she would be interested in switching to a day shift assignment in the mother-baby birthing center (Cullen was vacating that position/assignment). Johnson, who was in a daytime floater/relief assignment that she selected in the May 2015 rebid, said she would think about it. A few days later, Hanuman again asked Johnson if she wanted to switch to the mother-baby birthing center assignment, and Johnson agreed. Respondent did not post the work assignment that it offered to Johnson. (Tr. 396–398, 407–410; GC Exh. 5.) Later in fall 2015, Johnson requested two different work assignments on the day shift. Respondent, however, gave the work assignments to employees who had less seniority than Johnson. (Tr. 399–402, 410–411.)

9. In October 2015, Stillings contacted employee Patricia Wagner and asked if she would be interested in taking an operating room work assignment if one became available. When Wagner asked if she was the most senior person and would have to apply for the work assignment, Stillings responded that it shouldn't be a problem to put Wagner in the assignment, and that he would contact Wagner if and when the assignment opened up. Two weeks later, Stillings contacted Wagner again and offered her the operating room work assignment. Wagner accepted the assignment after Stillings assured her that he could put her in the assignment regardless of seniority. (Tr. 419–421, 439, 449–450, 807.)

The Union maintains that Respondent violated Articles 14(f) and 18 of the collective-bargaining agreement and/or past practice when Respondent took the actions listed above. Respondent, on the other hand, maintains that the collective-bargaining agreement and past practice do not require Respondent to follow seniority order when changing employee work assignments in the EVS department (as opposed to when changing employee workweek schedules or filling vacant shifts/positions, when seniority preference applies). To resolve this dispute, on June 9, 2015, the Union filed a grievance and asserted that Respondent was making job assignments in violation of the collective-bargaining agreement and the March 2015 arbitration award. Respondent denied the Union's grievance at both step 1 and step 2 of the grievance and arbitration procedure. (Tr. 44-45, 47–48; GC Exhs. 6–8 (June 9, 2015 grievance; June 30, 2015 step 1 grievance denial; September 1, 2015 step 2 grievance denial).) While the grievance was pending, the Union also filed an unfair labor practice charge concerning Respondent's handling of job assignments. (GC Exh. 1(a) (unfair labor practice charge filed on July 6, 2015).)

G. Angel Robinson—Employment and Disciplinary Background

Angel Robinson began working for Respondent in the EVS department in September 2006, and became a member of the Union at that time. Although Robinson did not have an official role with the Union (e.g., as a steward), Robinson took a somewhat active role in expressing concerns (in team huddle meetings and by email) to Crothall Healthcare management about various changes that Crothall made after it began managing the EVS department in 2013. (Tr. 277, 279–280, 286.)

In or about late 2013, EVS department manager Chase Giboney[17] requested a meeting with Robinson. Two union

[15] Stillings called Wagner to his office and offered her the 2 Heart assignment because Marichu Harris was on vacation. Wagner had not applied for or requested the 2 Heart work assignment. Stillings told Wagner that when Harris returned, they all could discuss who would be doing which work assignment. Wagner accepted Stillings' offer. (Tr. 421–422, 436–438.)

[16] I note that contrary to Robinson and Wagner, Stillings testified that he gave Robinson the 2 Heart work assignment directly (i.e., without first giving it to Wagner), and then a couple of days later gave the basement assignment to Wagner. (See Tr. 794, 797–799.) I have credited Wagner's and Robinson's accounts because they corroborated each other by testifying that Wagner received the 2 Heart assignment from Stillings, and then relinquished it after Robinson told Wagner that she (Robinson) had more seniority and would file a grievance if she did not get the 2 Heart assignment. It stands to reason that such a confrontation was memorable for both Robinson and Wagner – indeed, Wagner remained cautious about seniority issues in October 2015, when Stillings contacted her about taking an operating room work assignment. Ultimately, however, this conflict in testimony may not be material – under either Stillings' or Robinson's/Wagner's scenario, the fact remains that Respondent did not post either the 2 Heart or the basement work assignment (or take any other steps) to ensure that it made the assignments based on seniority order.

[17] Giboney served as the EVS department manager from approximately July 2013 to January 2015. Stillings was an EVS department

stewards accompanied Robinson to the meeting, and Stillings also attended for Respondent. At the meeting, Giboney advised Robinson that he believed Robinson was being disrespectful at huddles by asking too many questions, rolling her eyes, not giving eye contact, sitting with her arms crossed, and breathing heavily. Robinson was not disciplined for her alleged misconduct. (Tr. 289–291.)

On September 15, 2014, Robinson received a "Level 1 conversation" for taking too much time to complete certain cleaning duties on September 1, and for not completing some of her job duties on September 4 (and neglecting to tell the patient flow coordinator about the job duties that she did not complete). (R. Exh. 17.)

In a performance review that Robinson received on October 14, 2014, Respondent noted that Robinson was one of the better cleaners in the EVS department. Respondent stated, however, that Robinson needed to improve her attendance, as well as "her communication with supervisors, and her acceptance of direction and constructive criticism." (R. Exh. 16.)

On June 30, 2015, Robinson received a "Level 1 conversation" for having eight unscheduled absences in the preceding 5 months. The level 1 conversation remained active in until December 29, 2015. (R. Exh. 20; see also Tr. 681 (noting that a Level 1 corrective action for attendance is pretty common for employees); Union Exh. 8 (explaining that a Level 1 conversation will not be included in an employee's personnel file, cannot be used in later corrective actions, and does not lead to a formal corrective action plan).)

H. August 2015—Robinson Transfers to a Certified Nursing Assistant (CNA) Position in the Family Care Unit

In August 2015, Robinson transferred to a 0.6 FTE day/evening position as a CNA in the Family Care Unit.[18] To obtain that position, Robinson applied on the Allina Knowledge Network (AKN), Respondent's internet-based system for posting vacancies. When a recruiter determined that Robinson was the most senior internal applicant for the position, the recruiter scheduled a "meet and greet" interview with Michelle Haaland, the patient care manager of the Family Care Unit. Although Robinson essentially was guaranteed the CNA position based on seniority, the meet and greet interview served the purpose of enabling Haaland and Robinson to get acquainted and discuss the specific job duties that Robinson would perform if Robinson accepted the position.[19] (Tr. 308–310, 670–674.) Before the interview, Haaland (consistent with her usual practice) spoke briefly with Robinson's manager (Stillings) to advise him that Robinson had applied for the CNA position, and to ask if there was anything she should know about Robinson. Stillings advised Haaland that Robinson had some performance and attendance issues.[20] (Tr. 673–675, 679–681.)

Haaland and Robinson conducted the meet and greet interview as scheduled. During their 10–minute conversation, Haaland did not speak with Robinson about her specific attendance issues, but did discuss the attendance process and advise Robinson that she (Haaland) follows and enforces Respondent's attendance policies. Robinson and Haaland also discussed scheduling, and Robinson left the interview with the impression that she would generally work more evenings during the week, and work day shifts on the weekends. (Tr. 310–311, 675–676.) Later, Robinson accepted the CNA position in the Family Care Unit. (Tr. 676.)

For the most part, Robinson worked in the Family Care Unit without incident. However, Robinson did receive a "Level 2 verbal warning" on October 19 due to additional unscheduled absences in September.[21] (R. Exh. 21; Tr. 355, 677.) In addition, Robinson was disappointed to learn that she was assigned to work more day shifts each week than she expected. (Tr. 311, 676.)

I. October 2015—Robinson Interviews for a CNA Position in the Intensive Care Unit (ICU)

In light of her unhappiness with working day shifts more often than expected, Robinson became interested in considering other CNA positions at the hospital. Accordingly, when a recruiter notified Robinson that she was the most senior applicant for a 0.5 FTE evening position in the ICU that she had applied for, Robinson responded that she was still interested in the position and asked the recruiter to set up a meet and greet interview with ICU manager Karen Schulz. (Tr. 311, 356, 713.)

Before the meet and greet with Robinson, Schulz (consistent with her usual practice) notified Robinson's current manager (Haaland) that Robinson had applied for a CNA position in the ICU. Haaland advised Schulz that since Robinson was new to the Family Care Unit, Haaland did not know much about Robinson but had not had any specific performance problems with her. Haaland also noted that she understood Robinson had some performance issues and a corrective action for attendance when Robinson was in the EVS department. Haaland suggested that Schulz contact Stillings for more information about those issues.[22] (Tr. 677–679, 686–687, 712; see also Tr. 712–

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supervisor in that timeframe. In or about January 2015, Stillings took over as the EVS department manager. (Tr. 456, 460, 766, 810.)

[18] Although she was leaving the EVS department, Robinson asked Stillings if she could remain a "casual" EVS employee, which would enable her to work an occasional shift in the EVS department if the EVS department needed someone. Stillings agreed. (Tr. 354; R. Exh. 23.) There is no evidence that Stillings subsequently called Robinson in to work a shift in the EVS department as a casual employee.

[19] Meet and greet interviews are customarily used when the most senior applicant does not work in the department where the position is located. If the most senior applicant for a position already works in the department, the manager will initiate a more informal discussion to simply confirm whether the applicant desires the position. (Tr. 673, 711–712.)

[20] Although Stillings testified as a witness during trial, none of the parties asked him what he told Haaland when Haaland asked if there was anything she should know about Robinson.

[21] There is no evidence that Respondent prepared a corrective action plan in connection with the October 19 verbal warning. (See R. Exh. 21; compare U. Exh. 8 (stating that a level 2 verbal warning "will be used for purposes of establishing a corrective action plan").)

[22] I have not credited Schulz' testimony that Haaland also advised her that Robinson: (a) had a more recent attendance occurrence and would be receiving a Level 2 verbal warning; and (b) had some issues with attitude (while in the Family Care Unit) that led to a conversation; and (c) had some disciplinary issues while she worked in the EVS

713 (explaining that Schulz normally contacts the job applicant's current manager because she wants to find out if the manager has any concerns and find out if the employee is on current corrective action, and then discuss those with the applicant so "they know what the position in the ICU is and they know what my expectations are").

When Schulz contacted Stillings about Robinson and asked if he had any concerns, Stillings responded that Robinson had received a Level 1 conversation for attendance as well as some disciplinary action, and that there had also been issues with Robinson's performance and behavior. Based on what Schulz learned from Stillings, Schulz had concerns about Robinson as an applicant to join the ICU because Schulz believed that "[t]hose are serious issues when somebody . . . is in corrective action and [has] received discipline in the past." (Tr. 714–715, 722–724; see also GC Exh. 42 (October 26, 2015 email that Stillings sent about EVS staffing, in which he stated: "Within the last 2 months, we lost 8 individuals through terms, resignations, and transfer to other departments and plan on losing 2 more to transfers. These individuals have had several conversations with EVS leadership about their negative behaviors and rumor spread[ing] that essentially poisoned the department").)[23] Schulz advised ICU patient care supervisor Pamela Sandberg that Robinson's former managers indicated that Robinson had some performance and attendance issues. (Tr. 685, 688, 700.)

On October 13, Robinson met with Schulz and Sandberg for the meet and greet interview. Initially, Schulz used an interview sheet to ask Robinson a series of questions about topics such as Robinson's work history and experience, why Robinson wanted to come to the ICU, and how Robinson manages a busy work load. Sandberg then described the job duties that Robinson would be expected to perform as a CNA in the ICU, which included being in charge of several patient rooms, assisting patients with self care, and stocking supplies. When Robinson remarked that the job duties seemed liked a lot, or even too much, for one CNA, Sandberg confirmed that the work load was significant and that CNAs have to hustle through the whole shift to get their work done. (Tr. 311–315, 689–690, 693, 715–717; see also R. Exhs. 39, 41.)

A few moments later in the interview, Schulz described the ICU and her expectations for its staff. As part of that discussion, Schulz emphasized the importance of attitude, professionalism, teamwork and fulfilling the commitment to care, particularly in light of the complex level of care that ICU patients require. Schulz then asserted that she was aware of Robinson's attendance, discipline and behavior issues, and stated that she (Schulz) had some major concerns because Stillings told her that Robinson was inappropriate, rude and disrespectful, and was not a team player. After Robinson responded that she was not like Schulz described and asserted that her absences should have been covered by the Family Medical Leave Act (FMLA), Schulz advised that she was relying on what she had been told, and would continue to monitor the issues closely and go right to corrective action if she found Robinson to be rude, disrespectful, inappropriate, tardy or absent in the ICU.[24] (Tr. 315–318,

department. (See Tr. 713–714.) Haaland did not corroborate any of these statements when she testified.

I found Haaland to be credible regarding her account of what she told Schulz about Robinson. Haaland essentially testified that she only gave a brief and narrow description of Robinson and her track record at the hospital. The circumspect description that Haaland provided to Schulz about Robinson is fully consistent with the fact that Haaland acknowledged that she did not know Robinson very well because Robinson was new to the Family Care Unit, and with the fact that Haaland suggested that Schulz contact Stillings for more information.

[23] No one asked Stillings what he said to Schulz in this conversation about Robinson, even though Stillings testified as a witness at trial. However, I do find that the October 26 email (GC Exh. 42) sheds light on Stillings' frame of mind about Robinson (one of the employees who transferred from the EVS department) when he spoke to Schulz approximately 2 weeks earlier.

I note here that I have considered Respondent's argument that Stillings did not harbor animus towards Robinson, as shown by the fact that he agreed to Robinson's request to be a "casual" employee in the EVS department, and the fact that he did not undercut Robinson's transfers to CNA positions in the Family Care Unit and (later) the Operating Room. (See R. Posttrial Br. at 35–36, 47–48, 63–64.) Respondent's argument, however, presumes that I must find that Stillings took every opportunity to act on whatever animus he held towards Robinson. To the contrary, it is plausible that Stillings was willing to have Robinson work in the EVS department once in awhile as a casual employee if that need arose. It is also plausible that Stillings had different conversations about Robinson with the managers of the Family Care Unit (Haaland), the ICU (Schulz) and the OR (Dooher), depending on what those managers asked and how much detail they requested about Robinson's time in the EVS department.

[24] I did not credit certain portions of Schulz' and Sandberg's testimony about the meet and greet interview with Robinson and about what Stillings told Schulz about Robinson. First, both Schulz and Sandberg maintained that Schulz did not tell Robinson that Stillings described her as inappropriate, rude, disrespectful and not a team player. (Tr. 694, 719.) I do not find that testimony to be credible. Schulz admitted that Stillings told her Robinson had behavior issues in the EVS department (see Tr. 722–723). Given Schulz' expectations for ICU staff, I do not believe that Schulz would have accepted Stillings' report without asking for information about the nature of Robinson's alleged behavior issues. Instead, it stands to reason that Schulz requested more detail about Robinson's behavior, and then (per her usual practice) confronted Robinson with that information in the interview. (See R. Exh. 41 (Schulz' notes from Robinson's interview, indicating that Schulz raised the issue of Robinson having received "previous discussions regarding performance and behavior"). To the extent that Sandberg attempted to support Schulz in her denial, I did not credit that testimony because it was not consistent with the evidence, and because Sandberg was at the interview (her first for a CNA position) in a supporting role, and thus deferred to Schulz on these issues. (See Tr. 693. 703; see also R. Exh. 39 (Sandberg's interview notes, which omit the fact that Schulz spoke to Robinson about prior behavior issues).)

Second, I did not credit Schulz' and Sandberg's testimony that when they spoke to Robinson about monitoring her attendance, they were simply telling her that they monitor the attendance of all ICU staff closely. (Tr. 694, 702, 723.) Sandberg's interview notes contradict that testimony by indicating that Schulz told Robinson "[w]e are aware of your attendance issues and disciplinary path. We will continue to monitor closely." (R. Exh. 39.) Based on those notes, the message was clear that Robinson's attendance was a point of concern, as opposed to a more general message that Respondent tracks all staff attendance. Indeed, when Schulz and Sandberg later interviewed employee H.H. for the CNA position, they did not bother to discuss attendance at all be-

357–358, 368, 691–692, 694, 699–700, 717–719; R. Exhs. 39, 41; see also Tr. 709 (Schulz testimony that teamwork in the ICU is very important to her because the ICU cares for critically ill patients).) After the interview ended, Robinson notified the Union about her experience in the interview. When the recruiter called a few days later to offer Robinson the position in the ICU (based on seniority), Robinson declined the position because of her experience in the interview and her conclusion that she could never work for someone like Schulz.[25] (Tr. 249, 318–321, 368–369, 696–697, 720, 731; R. Exh. 43(a), (c).)

J. October 2015—Robinson Interviews for a CNA Position in the Operating Room

After Robinson declined the CNA position in the ICU, the recruiter advised Robinson that she was the most senior applicant for a 1.0 FTE day/evening CNA position in the operating room. Accordingly, Robinson scheduled a meet and greet interview with operating room manager David Dooher. (Tr. 321, 358–359, 734, 738–739; R. Exhs. 43(a), 43(c).)

Before the meet and greet interview, Dooher (consistent with his usual practice) contacted Haaland to find out if Robinson had any outstanding corrective actions in her file. Haaland generally provided Dooher with the same information that she provided to Schulz, stating that Robinson was a good employee but had received a corrective action for attendance. (Tr. 677–679, 738.)

On or about October 20, Robinson met with Dooher for their meet and greet interview. Dooher explained that although Robinson was applying for a CNA position, CNAs in the operating room primarily cleaned and stocked the operating room, and transported patients and items to and from the operating room. Since Robinson (like other operating room CNAs) would not be doing much direct patient practice if she accepted the operating room position, Dooher explained that Robinson likely would not be able to maintain her certification after one year unless she worked overtime in another unit that offered direct patient practice. Finally, Dooher noted that to the extent that Robinson had a Level 2 verbal warning for attendance on her record, that disciplinary process would continue, but would not have an effect on his hiring Robinson. Robinson told Dooher that she wanted to think things over before deciding whether to take the CNA position in the operating room. (Tr. 322, 363, 369–371, 739–741; R. Exh. 14.)

After the meet and greet with Dooher, Robinson was concerned about the prospect of not being able to maintain her certification, which she had only recently obtained. Robinson voiced her concerns about that issue to the Union and to the recruiter, but ultimately decided to accept the CNA position in the operating room when the recruiter contacted Robinson a couple of days after the interview. (Tr. 277, 367, 740–741; R. Exhs. 14, 43(a)–(b).)

DISCUSSION AND ANALYSIS

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860–861 (2014); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 861. To the extent that I have made them, my credibility findings are set forth above in the findings of fact for this decision.

B. Respondent's Request that the Dispute in Case 18–CA–155443 be Deferred to Arbitration

1. Background

On December 23, 2015, Respondent filed a motion to sever Case 18–CA–155443 from the consolidated complaint and defer those allegations to arbitration under the grievance and arbitration procedure set forth in the collective-bargaining agreement. (GC Exh. 1(t)–(u) (motion and memorandum of law).) The General Counsel opposed Respondent's motion. (GC Exh. 1(v).) After conducting a conference call regarding the parties' positions on Respondent's motion, on January 7, 2016, Deputy Chief Administrative Law Judge Arthur Amchan denied Respondent's motion to sever and defer Case 18–CA–155443. (GC Exh. 1(x).)

On January 12, 2016, Respondent filed a request for special permission to appeal Judge Amchan's January 7, 2016 order. (GC Exh. 1(z).) The General Counsel opposed Respondent's request. (GC Exh. 1(aa).) On February 9, 2016, the Board issued an order denying Respondent's request for special permission to appeal Judge Amchan's order, finding that Respondent failed to establish that Judge Amchan abused his discretion

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cause H.H.'s manager did not report any concerns about H.H.'s attendance. (See fn. 25, infra.)

And third, I did not give any weight to Schulz' and Sandberg's testimony that Schulz did not tell Robinson she would be watching her closely and would impose discipline if Robinson engaged in any union or protected activities. (Tr. 694, 719.) I do not doubt that Schulz did not explicitly use the terms "union or protected activities" when she spoke to Robinson. That narrow denial, however, is beside the point. The question remains as to whether Respondent violated the Act when Schulz confronted Robinson with Stillings' assessment that Robinson was disrespectful, rude, inappropriate and not a team player, and stated that she (Schulz) would continue to monitor that issue (and others) closely and would take corrective action if Robinson engaged in similar behavior in the ICU.

[25] A few days later, Schulz and Sandberg interviewed employee H.H., who was the next most senior applicant for the CNA position in the ICU. H.H.'s current manager did not report any concerns about H.H.'s behavior, performance or attendance, and thus Schulz and Sandberg did not discuss those issues in H.H.'s interview. H.H. subsequently was offered and accepted the CNA position in the ICU. (Tr. 697–698, 702–703, 720–721; R. Exhs. 40, 42.)

in denying Respondent's motion.[26]

During trial and in its posttrial brief, Respondent renewed its request that Case 18–CA–155443 be severed and deferred to arbitration. (Tr. 24–27, 30–31, 514–517; R. Posttrial Br. at 42–60.) The General Counsel (and the Union) oppose Respondent's request.

2. Applicable legal standard for prearbitration deferral

It is well established that before considering the merits of the allegations in the complaint, I first must resolve the threshold issue of whether the Board should defer the dispute to the grievance-arbitration procedure set forth in the collective-bargaining agreement. *St. Francis Regional Medical Center*, 363 NLRB No. 69, slip op. at 17 (2015); *United Hoisting & Scaffolding, Inc.*, 360 NLRB 1258, 1261 (2014); see also *Collyer Insulated Wire*, 192 NLRB 837 (1971) (articulating the Board's rationale for pre-arbitration deferral).

On December 15, 2014, the Board determined that it will not defer 8(a)(3) or 8(a)(1) allegations to the arbitral process "unless the parties have explicitly authorized the arbitrator to decide the unfair labor practice issue, either in the collective-bargaining agreement or by agreement of the parties in a particular case." *Babcock & Wilcox Construction Co.*, 361 NLRB 1127, 1138–1139 (2014). The Board held that this new standard would only apply prospectively, and thus would not apply to contracts existing at the time of its decision. Id. at 13–14; see also *Babcock & Wilcox Nuclear Operations Group, Inc.*, 363 NLRB No. 50, slip op. at 2 fn. 1 (2015).

If that initial question is satisfied, and/or if the allegations in the dispute are Section 8(a)(5) allegations, the Board considers six factors in deciding whether to defer a dispute to arbitration:

> (1) whether the dispute arose within the confines of a long and productive collective-bargaining relationship;
> (2) whether there is a claim of employer animosity to the employees' exercise of protected rights;
> whether the agreement provides for arbitration in a very broad range of disputes;
> (3) whether the arbitration clause clearly encompasses the dispute at issue;
> (4) whether the employer asserts its willingness to resort to arbitration for the dispute; and
> (5) whether the dispute is eminently well-suited to resolution by arbitration.

St. Francis Regional Medical Center, 363 NLRB No. 69, slip op. at 17 (citing *San Juan Bautista Medical Center*, 356 NLRB 736, 737 (2011); see also *Babcock & Wilcox Construction Co.*, 361 NLRB 1127, 1127 fn. 2 (noting that the Board did not address the standard for deferral in Section 8(a)(5) cases).

3. Overview of the dispute in Case 18–CA–155443

Under Article 14(f) of the collective-bargaining agreement, Respondent "shall give preference to employees in accordance with seniority as far as practicable and consistent with proper hospital management" when establishing workweek schedules. (FOF, Section F.) Most of the dispute underlying Case 18–CA–155443 arises from the interpretation of Article 14(f), and whether it (or past practice) requires Respondent to follow seniority order when making work assignments to employees in the EVS department. Specifically, for several allegations, the General Counsel asserts that Respondent violated the Act by unilaterally creating, posting and/or filling "positions" in the EVS department without following seniority. (See GC Exh. 1(g) (pars. 10(a), 10(c)–(d)).) Respondent, however, maintains that the "positions" in question were merely work assignments, and thus were not subject to the seniority requirements of Article 14(f).

The complaint also includes allegations that implicate Article 18 of the collective-bargaining agreement. Under Article 18 of the collective-bargaining agreement, Respondent (among other requirements) must post job vacancies for seven days, and must award vacancies or new positions to the senior employee applicant if that employee has the necessary capabilities to perform the work. (FOF, Section F.) The General Counsel alleges that Respondent did not comply with Article 18 because Respondent did not post vacant work assignments in the EVS department, and also filled those work assignments by "best fit," instead of awarding them to the most senior employee applicant capable of performing the work. (GC Exh. 1(g) (par. 10(b)–(c)) (alleging that Respondent violated both Article 14(f) and Article 18 by handling vacant work assignments in this manner).) The merits of the General Counsel's allegation turn on whether vacant work assignments in the EVS department qualify as vacant "positions" that are subject to the requirements of Article 18 (as well as Article 14(f), as discussed above).

The General Counsel also alleges (as a separate, but related theory of liability) that Respondent failed to comply with the terms of Article 18 of the collective-bargaining agreement when it combined, or "funneled," multiple job vacancies in the EVS department into a single job posting. (GC Exh. 1(g) (par. 10(b)).) That allegation requires an interpretation of the extent of Respondent's obligation to post vacancies under Article 18 – specifically, if Respondent has multiple vacancies for the same job title (e.g., environmental services aide), is it sufficient to post one announcement that covers multiple vacancies, or must Respondent post an announcement for each vacancy?

The direct dealing allegations in the complaint arise from the parties' dispute about the meaning of Articles 14(f) and 18. (See GC Exh. 1(g) (par. 10(h)–(j)).) Indeed, the direct dealing allegations are predicated on the General Counsel and the Union being correct that Article 14(f), Article 18 and/or past practice establish job posting, seniority and other requirements that Respondent must satisfy when making work assignments. Respondent, on the other hand, maintains that it is allowed to use its discretion when making work assignments, including speaking directly with employees about work assignments in the EVS department.

Finally, Case 18–CA–155443 includes three allegations that Respondent violated Section 8(a)(1) of the Act. Specifically, the General Counsel alleges that Respondent violated Section 8(a)(1) by: threatening an employee during a team huddle meeting that Respondent did not have to include EVS positions in a

[26] In a footnote to the Board's February 9, 2016 order, Board Member Miscimarra noted that the Board's ruling was "without prejudice to the parties' right to continue litigating the appropriateness of deferral to arbitration regarding claims addressed in the hearing."

rebid; threatening an employee (Robinson) that she was not allowed to ask questions in the presence of other employees at team huddle meetings; and threatening union stewards (at least one of whom was also an employee) that Respondent was going to continue filling open positions by "best fit" and not seniority. (See GC Exh. 1(g) (par. 5).)

4. Analysis of request for deferral—8(a)(1) allegations in Case 18–CA–155443

The collective-bargaining agreement underlying the dispute in this case took effect on April 16, 2015. (FOF, Section II(A).) Since the agreement arose after the Board's decision in *Babcock & Wilcox Construction*, the Board's new standard for pre-arbitration deferral of Section 8(a)(3) and 8(a)(1) allegations applies, and any Section 8(a)(3) or 8(a)(1) allegations in Case 18–CA–155443 cannot be deferred to the arbitral process unless the Union and Respondent explicitly authorized the arbitrator to decide the unfair labor practice issue, either in the collective-bargaining agreement or by agreement in this case.

Under the Board's new standard, the 8(a)(1) allegations in Case 18–CA–155443 may not be deferred to arbitration. In the collective-bargaining agreement, the Union and Respondent did not explicitly authorize the arbitrator to decide Section 8(a)(3) or Section 8(a)(1) allegations. Instead, the collective-bargaining agreement has general language that prohibits discrimination against employees because of union membership or nonmembership or because of the assertion of any rights under the agreement, and permits arbitration of "[a]ny claim of an employee arising out of the interpretation, application, or adherence to the terms or provisions of [the collective-bargaining agreement] or arising out of disciplinary and discharge actions taken by the Employer." (FOF, Section II(A).) That general language falls well short of explicitly authorizing an arbitrator to decide allegations that Respondent violated Section 8(a)(3) or Section 8(a)(1) of the Act. Since the Union and Respondent have not otherwise agreed to authorize an arbitrator to decide the Section 8(a)(1) allegations in Case 18–CA–155443 (indeed, the Union has opposed arbitration in Case 18–CA–155443 altogether), the 8(a)(1) allegations in that case are not deferrable and accordingly I shall decide those allegations on the merits.

5. Analysis of request for deferral—8(a)(5) allegations in Case 18–CA–155443

a. Long and productive bargaining relationship?

The Union and Respondent have shared a long and productive bargaining relationship that has existed since 1968, and has included several successive collective-bargaining agreements, the most recent of which remains in effect until February 2018. The evidentiary record also shows that although the Union and Respondent do not always agree, apart from the dispute in this case (concerning work assignments and job postings) the Union and Respondent generally have a good working relationship that often allows them to resolve disputes amicably. (FOF, Section II(A).) Compare *San Juan Batista Medical Center*, 356 NLRB at 737 (finding that the parties' dispute did not arise within the context of a long and productive bargaining relationship because the Union had represented the bargaining unit for only one year, the initial collective-bargaining agreement had only been in place for six months, and the parties settled four other charges before or during the hearing).

b. Claim of employer animosity to employees' exercise of protected rights?

The General Counsel's evidence that Respondent has animosity to employees' exercise of protected rights is based on its allegations in the consolidated complaint. In Case 18–CA–155443, the General Counsel alleged that Respondent: threatened an employee that Respondent did not have to include EVS positions in a rebid; threatened Angel Robinson that she was not allowed to ask questions in the presence of other employees at team huddle meetings; and threatened a union steward (who was also an employee) that Respondent was going to continue filling open positions by "best fit," and not seniority. In Case 18–CA–163045 (which Respondent has not requested be deferred), the General Counsel alleged that Respondent: threatened that EVS department manager Charles Stillings advised Intensive Care Unit (ICU) department manager Karen Schulz that Robinson was inappropriate, disrespectful and not a team player; threatened that if Robinson obtained a job in the ICU, Robinson would face close surveillance by Schulz; threatened that if Robinson obtained a job in the ICU, Robinson would be disciplined for engaging in Union or other protected concerted activities; and constructively denied Robinson a transfer to a job in the ICU.

These allegations, while serious, do not rise to the level of being so egregious that it would be futile for the parties to use the arbitration procedure in the collective-bargaining agreement. The Union and Respondent have a long history of using the grievance process (as well as informal meetings) to discuss and resolve issues of concern as they arise. (FOF, Section II(A).) In addition, shortly before the dispute in Case 18–CA–155443 arose, the parties used the arbitration procedure to resolve a dispute about changes that Respondent made to workweek schedules. When the arbitrator ruled in the Union's favor, Respondent duly conducted a rebid of positions and work assignments pursuant to the arbitrator's award. (FOF, Section II(B)–(E).) Given the parties' established history of using the grievance and arbitration procedure to resolve disagreements, I cannot find that it would be futile now for the parties resolve the dispute in Case 18–CA–155443 via arbitration. See *Babcock & Wilcox Nuclear Operations Group, Inc.*, 363 NLRB No. 50, slip op. at 2 (indicating that even when there are allegations of discrimination, the Board nonetheless has deferred cases where it is satisfied that the parties' grievance procedure could reasonably be relied upon to function properly and to resolve the current disputes fairly); *Clarkson Industries*, 312 NLRB 349, 352 & fn. 16 (1993) (finding that allegations of an unlawful threat and an unlawful disciplinary warning were "not so egregious as to render the use of the arbitration machinery uncompromising or futile"); compare *St. Francis Regional Medical Center*, 363 NLRB No. 69, slip op. at 2–3 (declining to defer a dispute to arbitration because the dispute involved the alleged discipline and discharge of a union steward and her unit member for activity related to processing the unit member's grievance, and thus demonstrated a sufficient degree of hostility

to make deferral inappropriate).

c. Does the agreement provide for arbitration in a very broad range of disputes?

The grievance and arbitration procedure that Respondent and the Union agreed to is set forth in Article 7 of the collective-bargaining agreement. By its terms, the grievance and arbitration procedure covers the following types of disputes:

> Any claim of an employee arising out of the interpretation, application, or adherence to the terms or provisions of this Agreement or arising out of disciplinary and discharge actions taken by [Respondent] shall be subject to the Grievance and Arbitration Procedure.

(FOF, Section II(A).)

d. Does the arbitration clause clearly encompass the dispute at issue?

The arbitration clause clearly encompasses the Section 8(a)(5) allegations in Case 18–CA–155443, which turn on the interpretation of Articles 14(f) and 18 of the collective-bargaining agreement (as well as alleged past practices). Those issues of contract interpretation are at the heart of determining the nature and scope of any rules that Respondent must follow when creating, filling and posting work assignments and job vacancies in the EVS department. Indeed, in a December 1, 2015 letter to Respondent, the General Counsel provided a similar summary of the dispute in Case 18–CA–155443, stating: "It is also the General Counsel's understanding . . . that Respondent is not disputing that [work] assignments have been changed and filled by best fit and without consulting the Union. The issue in this case is whether those actions are privileged by the contract and a past practice of the parties." (R. Exh. 24.)

e. Does the employer assert its willingness to resort to arbitration for the dispute?

Since filing its answer to the complaint on November 13, 2015, Respondent has repeatedly asserted its willingness to resort to arbitration for the dispute in Case 18–CA–155443. (See R. Posttrial Br. at 55; GC Exh. 1(n) (Affirmative Defenses, par. 2); GC Exh. 1(u) at 45 (Respondent's assertion, in its memorandum of law in support of its motion to sever and defer Case 18–CA–155443 to arbitration, that Respondent "[h]as been and continues to be willing to promptly arbitrate this dispute"); see also Analysis Section B(1) (outlining Respondent's additional requests to sever Case 18–CA–155443 and defer those complaint allegations to arbitration).)[27]

f. Suitability of the dispute to resolution by arbitration?

A dispute is well suited to arbitration when the meaning of a contract provision is at the heart of the dispute. Deferral is not appropriate when no construction of the contract is relevant for evaluating the reasons that the party seeking deferral advanced for failing to comply with the applicable contract provisions. Moreover, deferral is also not appropriate if the contract provision at issue is unambiguous. *San Juan Batista Medical Center*, 356 NLRB at 737 (collecting cases); see also *Doctors' Hospital of Michigan*, 362 NLRB No. 149, slip op. at 3 (2015).

As noted above, the meaning of Articles 14(f) and18 of the collective-bargaining agreement is at the heart of the dispute between Respondent and the Union about work assignments and job vacancies, and specifically about what guidelines Respondent must follow when work assignments open up. In the Union's view, "work assignments," "workweek schedules," "jobs" and "positions" are all synonyms that the Union and Respondent use interchangeably. Thus, according to the Union, Respondent must comply with the requirements of Articles 14(f) and 18 when making work assignments. In Respondent's view, however, Articles 14(f) and 18 of the collective-bargaining agreement only apply to "workweek schedules," "jobs" and "positions," which are distinct from work assignments. Thus, according to Respondent, the collective-bargaining agreement implicitly allows Respondent to use its discretion when making work assignments in the EVS department (with the exception of the project worker assignment, which is addressed explicitly in the collective-bargaining agreement).

The parties presented some of these questions of contract interpretation to an arbitrator in early 2015 in connection with the Union's grievance about Respondent's fall 2013 decision to establish new workweek schedules, but the arbitrator declined to rule on the meaning of Article 14(f) because the dispute could be resolved on other grounds. (See FOF, Sections II(C)–(D).) In my view, Case 18–CA–155443 affords a new opportunity for the Union and Respondent to use the arbitration procedure to resolve their dispute concerning how Articles 14(f) and 18 of the collective-bargaining agreement apply to work assignments and job postings in the EVS department.

In connection with my assessment that the Section 8(a)(5) allegations in Case 18–CA–155443 are suitable for resolution by arbitration, I note that the contract provisions at issue are not unambiguous. To the contrary, neither Article 14(f) nor Article 18 explicitly speaks to "work assignments" and how those should be handled when openings arise or employees wish to change assignments. Further, to the extent that the parties asserted during trial that past practice could clarify how work assignments should be handled, the competing evidence about past practice was far from clear because both the Union and Respondent presented viable evidence (e.g., previous job postings that do not specify specific work assignments vs. witness testimony that managers often told employees the work assignment that was associated with a new job posting) in support of their positions. It is appropriate for an arbitrator to use his or her expertise in contract interpretation to resolve these questions. See *San Juan Batista Medical Center*, 356 NLRB at 737 (indicating that a dispute is suitable for resolution by arbitration

[27] In light of Respondent's assurances that it is ready and willing to submit the dispute in Case 18–CA–155443 to arbitration, I find that Respondent is willing to waive any timeliness objections or other procedural defenses to the Union's grievance underlying the dispute (or to taking that grievance to arbitration). Cf. *Babcock & Wilcox Nuclear Operations Group, Inc.*, 363 NLRB No. 50, slip op. at 2 fn. 2. Consistent with my finding, I note that Respondent expressed its willingness to waive certain procedural objections if that would facilitate deferral to arbitration. See R. Posttrial Br. at 28 fn. 27 (noting that, if necessary to facilitate deferral, Respondent would be willing to waive any procedural objections related to an unfiled June 23, 2015 grievance that is part of the record as GC Exh. 9).

when "resolution of the dispute primarily requires interpretation of the collective-bargaining agreement"); see also *Babcock & Wilcox Nuclear Operations Group, Inc.*, 363 NLRB No. 50, slip op. at 3 fn. 4 (noting that arbitrators have the authority to find that customs and/or past practice may become part of the "law of the shop" and thus enforceable through arbitration).

g. Analysis of all factors

Considering all of the factors, I agree with Respondent that the 8(a)(5) allegations in Case 18–CA–155443 should be severed from the consolidated complaint and deferred to arbitration. Most of the factors clearly weigh in favor of deferral, insofar as: the Union and Respondent have a long and productive collective-bargaining relationship; the collective-bargaining agreement provides for arbitration in a broad range of disputes; the arbitration clause clearly encompasses the 8(a)(5) dispute; and Respondent has asserted its willingness to resort to arbitration to resolve the dispute.

I also find that all of the allegations in Case 18–CA–155443 are well suited for resolution by arbitration. As noted above, the meaning of Articles 14(f) and 18 of the collective-bargaining agreement is at the heart of the dispute between Respondent and the Union about Respondent's obligations when making work assignments. It is appropriate for an arbitrator to resolve those issues of contract interpretation.

That leaves only one remaining factor – the fact that there is a claim of animosity towards employees' exercise of protected rights. While that issue is not insignificant, I do not find that it tips the scales against deferral. The parties' have used the grievance and arbitration procedure successfully in the past, and I do not have a reason to believe that arbitration would be futile now.

I am mindful of the fact that the Board generally does not favor piecemeal litigation. See *St. Francis Regional Medical Center*, 363 NLRB No. 69, slip op. at 17. The Board's new requirements for when 8(a)(3) and (1) allegations may be deferred to arbitration, however, make it more likely that cases will be divided into deferrable and nondeferrable pieces. That prospect, however, is not a new one—to the contrary, the Board already has recognized that in particular cases, it may make sense to defer some allegations to the arbitration process, and resolve others on the merits (i.e., without deferral). See, e.g., *Clarkson Industries*, 312 NLRB at 351–353 & fn. 19–20 (finding that deferral was appropriate for unilateral change and subcontracting disputes, but not for an information request dispute or for an alleged unlawful threat and disciplinary warning). Such is the case here, where it makes sense to defer the 8(a)(5) allegations to arbitration (to interpret the meaning of Articles 14(f) and 18 of the collective-bargaining agreement),[28] while deciding three 8(a)(1) allegations in Case 18–CA–155443 on the merits, along with the 8(a)(3) and 8(a)(1) allegations in Case 18–CA–163045.

Accordingly, after considering all factors, I hereby order that the Section 8(a)(5) allegations in Case 18–CA–155443 be severed and deferred to arbitration. (See GC Exh. 1(q) (pars. 11, 14) (consolidated complaint); see also GC Exh. 1(g) (pars. 10, 12) (the original complaint in Case 18–CA–155443 that sets forth the same 8(a)(5) allegations).)

C. Case 18–CA–155443: Did Respondent Make any Statements in the EVS Department that Violated Section 8(a)(1) of the Act?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by making the following statements:

> (a) in about late May 2015, threatening an employee that Respondent did not have to include EVS positions in a rebid;
>
> (b) in about early June 2015, threatening an employee (Robinson) that she was not allowed to ask questions in the presence of other employees at team huddle meetings; and
>
> (c) on or about June 8, 2015, threatening a union steward (Cullen, who was also an employee) that Respondent was going to continue filling open positions by "best fit," and not seniority.

(GC Exh. 1(q) (par. 5(a)–(c)).)

2. Applicable legal standard

Under Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid or protection. Section 8(a)(1) of the Act makes it unlawful for an employer (via statements or conduct) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. The test for evaluating whether an employer's statements or conduct violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 861 (noting that the employer's subjective motive for its action is irrelevant); *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000).

3. Analysis

The evidentiary record shows that Respondent after the May 15 rebid, Respondent had several conversations with the Union and with employees about how it would fill work assignments going forward. I have found that Respondent made the following statements in those various conversations:

> (1) In or about late May 2015, Stillings advised employees in a team huddle meeting that new positions in the EVS department would be in the mother-baby birthing center. When Robinson asked why the positions were not included in the May 15 rebid, Stillings replied that the new positions did not have to be included in the rebid because the new building for the mother-baby birthing center was not open yet.
>
> (2) In or about late May 2015, Stillings contacted Robinson after a team huddle meeting in which Robinson had asked su-

[28] This includes the direct dealing allegations in Case 18–CA–155443, which, if the Union were to prevail, the arbitrator might remedy by ordering Respondent to stop dealing directly with employees and honor its contractual obligation to deal exclusively with the Union when filling work assignments. See *Public Service Co. of Oklahoma*, 319 NLRB 984, 984 (1995) (finding that an arbitrator has the ability to remedy allegations of direct dealing); *E.I. Du Pont Co*, 275 NLRB 693, 695 (1985) (same).

pervisor Chandica "Rudy" Hanuman questions about what kind of work employees would do in the new positions that Respondent posted for the EVS department. Stillings told Robinson that if she had questions, she could only ask for herself (i.e., not on behalf of other people) and needed to come to Stillings' office to pose her questions.

(3) On or about June 8, Stillings told employee/union steward Karen Cullen and union steward Rita Matthews that Respondent could place employees in work assignments, or switch employee work assignments, based on best fit (for the position and/or for the hospital).

(FOF, Section II(F).)

Respondent did not violate Section 8(a)(1) of the Act when Stillings stated that the new positions in the mother-baby birthing center did not need to be included in the May 2015 rebid. Nor did Respondent violate Section 8(a)(1) when Stillings asserted that Respondent could make or switch employee work assignments based on best fit (and not seniority). In each of those instances, Respondent was simply stating how it viewed its obligations under the collective-bargaining agreement and the March 2015 arbitration award (which ordered the May 2015 rebid).[29] In addition, concerning the new positions in the mother-baby birthing center, Stillings' statement reflected the Union's and Respondent's agreement that those positions would not be included in the May 2015 rebid because the new facility was not yet open. (See FOF, Section II(E).) And, perhaps most important, the employees who heard Stillings' statements on those issues remained free to disagree with Respondent's position, and also remained free to seek the Union's support in addressing any concerns. Under those circumstances, I cannot find that Stillings' statements on these points had a reasonable tendency to interfere with, restrain or coerce union or protected activities. Accordingly, I recommend that the allegations in paragraphs 5(a) and (c) of the complaint be dismissed.

I do find, however, that as alleged in paragraph 5(b) of the complaint, Respondent violated Section 8(a)(1) of the Act when Stillings told Robinson that she could only ask questions for herself and only after coming to Stillings' office to do so. Through that instruction, Stillings attempted to set limits on Robinson's ability to ask questions about the terms and conditions of employment not only for herself, but also for other employees. In so doing, Stillings sent a message that Respondent did not welcome Robinson's attempts to discuss employee concerns at team huddle meetings, and unlawfully made a statement that had a reasonable tendency to interfere with, restrain or coerce Robinson's union or protected activities. Cf. *Meyers Industries*, 281 NLRB 882, 887 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988) (explaining that protected concerted activities include "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management").

D. Case 18–CA–163045: Did Respondent Engage in Unlawful Misconduct when Robinson Applied for a Transfer to the ICU?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act by, in retaliation for employee Angel Robinson's union or other protected activities, engaging in the following misconduct during a "meet and greet" job interview on or about October 13, 2015:

(a) threatening that EVS department manager Charles Stillings advised ICU department manager Karen Schulz that Robinson was inappropriate, disrespectful and not a team player;

(b) threatening that if Robinson obtained a job in the ICU, Robinson would face close surveillance by Schulz;

(c) threatening that if Robinson obtained a job in the ICU, Robinson would be disciplined for engaging in Union or other protected concerted activities; and

(d) through its misconduct during the interview, constructively denying Robinson a transfer to a job in the ICU.

(GC Exh. 1(q) (pars. 5(d)–(f), 6).)

2. Applicable legal standard

The test for evaluating whether an employer's statements or conduct violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 847.

[29] I take no position on whether or not Stillings was correct in his statements about Respondent's obligations under the collective-bargaining agreement and March 2015 arbitration award. Instead, I simply find that Respondent was within its rights to advise employees of its position concerning the May 2015 rebid and the guidelines that apply when Respondent makes work assignments in the EVS department.

In connection with that point, I note that I am not persuaded by the General Counsel's arguments that Stillings' remarks were unlawful threats that undermined the Union because: Respondent would continue violating the collective-bargaining agreement; Respondent would disregard the March 2015 arbitration award; and Respondent indicated to employees that it was futile for employees to be represented by the Union. (GC Posttrial Br. at 30–31, 37–39.) This is not a case where Respondent elected to disregard a clear contract provision or arbitration award. See, e.g., *Paris Mode Handbags Corp.*, 266 NLRB No. 163, slip op. at 7 (1983) (not reported in Board volumes) (employer violated Sec. 8(a)(1) of the Act by telling employees it would no longer abide by the collective bargaining agreement). Nor is this a case where Respondent made an explicit statement that could reasonably be construed as asserting that it was futile for employees to be represented by a union. See *Goya Foods*, 347 NLRB 1118, 1128–1129 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008) (employer violated Section 8(a)(1) of the Act by telling employees, inter alia, that the employer would not negotiate with or recognize the union). To the contrary, union members and Respondent had a good-faith disagreement about the proper scope of the May 2015 rebid and Respondent's ongoing obligations when filling work assignments. Respondent did not violate Section 8(a)(1) of the Act when it merely stated its views on its obligations. See Sec. 8(c) of the Act (stating that the "expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act . . . , if such expression contains no threat of reprisal or force or promise of benefit").

The Board has recognized two constructive discharge theories: the "traditional" constructive discharge theory; and the "Hobson's Choice" theory. Under the traditional theory, a constructive discharge occurs when an employee quits because his or her employer has deliberately made working conditions unbearable and it is proven that (1) the burden imposed on the employee caused, and was intended to cause, a change in the employee's working conditions so difficult or unpleasant that the employee is forced to resign, and (2) the burden was imposed because of the employee's union activities. *Yellow Ambulance Service*, 342 NLRB 804, 807 (2004); *Intercon I (Zercom)*, 333 NLRB 223, 223 fn. 3 (2001). The Board has explained that regarding the first part of the legal standard, "the test for intent is not limited to whether the employer specifically intended to cause the employee to quit, but includes whether, under the circumstances, the employer reasonably should have foreseen that its actions would have that result." *Yellow Ambulance Service*, 342 NLRB at 807.

Under the Hobson's Choice theory of constructive discharge, an employee's voluntary quit will be considered a constructive discharge when an employer conditions an employee's continued employment on the employee's abandonment of his or her Section 7 rights and the employee quits rather than comply with the condition. *Titus Electric Contracting, Inc.*, 355 NLRB 1357, 1357 (2010); *Intercon I (Zercom)*, 333 NLRB 223, 223 & fn. 4. The Hobson's Choice at issue must be clear and unequivocal and the employee's predicament not one which is left to inference or guesswork. *Intercon I (Zercom)*, 333 NLRB at 224 & fn. 9.

3. Analysis

Before addressing the specific complaint allegations, it is helpful to note some important background facts related to Robinson's application to transfer to the ICU. Robinson was the most senior qualified applicant for the CNA position in the ICU. As a result, under the seniority rules set forth in the collective-bargaining agreement, Robinson was entitled to the CNA position in the ICU if she desired it. The meet and greet interview was just that—an opportunity for Robinson and ICU managers to get acquainted. There is no evidence that ICU managers had any discretion to decline Robinson's transfer request, regardless of how things went in the interview. (FOF, Section I.)

That background, however, raises the following question: what does a manager do if he or she does not want the most senior applicant to join the department? Certainly one option is for the manager to put his or her concerns aside, welcome the applicant to the department, and do his or her best to make things work. Some managers, however, might be tempted to try to induce the applicant to decline the position by making the position appear undesirable, with the hope that the next applicant in line is more to the manager's liking. As explained in more detail below, I find that Schulz followed the second path and used the meet and greet interview to induce Robinson to decline the opportunity to transfer to the ICU. In her efforts, Schulz engaged in conduct that violated Section 8(a)(3) and (1) of the Act.

As established in the evidentiary record, Robinson met with ICU department management on or about October 13 for a meet and greet interview. During that interview, ICU department manager Karen Schulz and ICU patient care supervisor Pamela Sandberg told Robinson the following:

> (1) That CNAs in the ICU have a significant work load that requires them to hustle through the whole shift to get their work done;
>
> (2) That attitude, professionalism, teamwork and the commitment to care are very important in the ICU because of the complex level of care that ICU patients require;
>
> (3) That she (Schulz) was aware of Robinson's attendance, discipline and behavior issues, and had some major concerns because Stillings (on whom Schulz relied) told her that Robinson was inappropriate, rude and disrespectful, and was not a team player;
>
> (4) That if Robinson came to the ICU, Schulz would monitor those issues (i.e., Robinson's attendance, discipline and behavior) closely and go right to corrective action if Robinson was rude, disrespectful, inappropriate, absent or tardy.

(FOF, Section II(I).) The evidentiary record also shows that when a recruiter later notified Robinson that the ICU department was offering Robinson the CNA position she applied for, Robinson declined because of her experience in the interview and her conclusion that she could never work for someone like Schulz. (Id.)

I find that Respondent violated Section 8(a)(1) of the Act when Schulz told Robinson that Stillings described Robinson as being inappropriate, rude and disrespectful, and as not a team player. I also find that Respondent violated Section 8(a)(1) when Schulz told Robinson that if she came to the ICU, Schulz would monitor Robinson's attendance, discipline and behavior closely, and would immediately proceed to corrective action if Robinson was rude, disrespectful, inappropriate, absent or tardy. Each of those statements put Robinson on notice that Robinson essentially would come to the ICU with a negative mark on her record based on Stillings' report to Schulz, and as a result would face close monitoring and swift discipline by Schulz. Since Stillings' negative assessment of Robinson was based (at least in part) on Robinson's protected concerted and union activities during EVS department team huddle meetings, and Schulz emphasized that she was relying on what she had been told by Stillings, Schulz' remarks to Robinson (as alleged in paragraphs 5(d), 5(e) and 5(f) of the complaint) were unlawful because they had a reasonable tendency to interfere with, restrain or coerce Robinson's willingness to engage in union or protected activities. See FOF, Section II(F) (point 2), (G) (describing instances where EVS department management confronted Robinson about her conduct in team huddle meetings); Analysis, Section C(3); see also *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 865 (explaining that it is unlawful for an employer to threaten employees with adverse consequences for supporting a union); *Brookdale University Hospital*, 335 NLRB 1094, 1095 (2001) (finding that the employer violated Section 8(a)(1) of the Act by threatening to closely monitor an employee's work because of his union activities).

Finally, I find that Respondent, through Schulz, constructive-

ly denied Robinson's request to transfer to the ICU. The Hobson's Choice theory is applicable here, because Schulz' remarks to Robinson clearly and unequivocally gave Robinson two unpalatable choices: (a) accept the transfer to the ICU, but with the understanding that Schulz would be monitoring her closely and would impose discipline if Robinson engaged in any of the "behaviors" that Stillings deemed a problem when Robinson was in the EVS department (i.e., protected concerted activities such as raising employee concerns in meetings with management); or (b) decline the transfer to the ICU, even though she was entitled to the position as the most senior qualified applicant.[30] It was unlawful for Respondent to put such a choice to Robinson, particularly where Schulz was motivated to do so at least in part by what she heard from Stillings' about Robinson's protected activities in the EVS department.[31] See *Intercon I (Zercom)*, 333 NLRB at 224 & fn. 9 (finding that the employer violated the Act by presenting the employee with Hobson's Choice of improving her "negative attitude" or being terminated, and noting that the term "negative attitude" was the employer's code word for union support). Since the Hobson's Choice induced Robinson to decline the transfer to the ICU (to which she was entitled based on seniority),[32] I find that Respondent violated Section 8(a)(3) and (1) of the Act by constructively denying Robinson's request to transfer to the ICU. [33]

[30] Although this case does not involve a constructive discharge, and instead involves an alleged constructive denial of a transfer, the same legal principles apply. I do not agree with Respondent that Robinson was never forced to make a Hobson's Choice because Robinson never worked in the ICU. See R. Posttrial Br. at 96–97. To the contrary, Schulz forced Robinson to make a Hobson's Choice between accepting a transfer to the ICU (and thereby also accepting the adverse working conditions that Schulz threatened to impose), or declining the transfer and working elsewhere in the hospital (but in so doing, foregoing her right to the transfer as the most senior applicant).

[31] It is entirely possible that Schulz was not aware that Robinson's conduct in the EVS department management was union or protected concerted activity (as opposed to some other kind of conduct that is not protected by the Act). That possibility does not matter, however, because Stillings was certainly aware that Robinson's conduct in team huddle meetings was protected by the Act, and Schulz relied on Stillings when she decided to confront Robinson about her "behavior." In short, Schulz' handling of Robinson's interview was tainted by her reliance on Stillings to identify concerns about Robinson transferring to the ICU.

[32] I am not persuaded by Respondent's argument that Robinson declined the CNA position in the ICU because Robinson preferred the CNA position in the OR. See R. Posttrial Br. at 97–99; see also *Easter Seals Connecticut, Inc.*, 345 NLRB 836, 838–839 (2005) (declining to find a constructive discharge because the evidence showed that the employee did not resign because of an unlawful Hobson's Choice, but rather because of another factor altogether). The evidentiary record shows that Robinson declined the ICU position before she learned from the recruiter that she was the most senior applicant for the OR position. (See FOF, Sections II(I)–(J) (discussing, inter alia, R. Exh. 43(a), 43(c), an audio recording and transcript of Robinson's conversation with the recruiter).) Thus, it was only the unlawful Hobson's Choice that caused Robinson to decline the transfer to the ICU.

[33] I note that the General Counsel would also prevail under the traditional constructive discharge theory. For the reasons that I have stated concerning the Hobson's Choice theory, I would find that Respondent deliberately informed Robinson that she would face unbearable working conditions (including close monitoring and swift discipline by Schulz) because of her history of engaging in protected concerted activities while in the EVS department. Respondent knew, or should have known, that the prospect of working under such adverse conditions would induce Robinson to decline the opportunity to transfer to the ICU.

CONCLUSIONS OF LAW

1. By, in or about late May 2015, threatening employee Angel Robinson that she was not allowed to ask questions of supervisors in the presence of other employees at team huddle meetings, Respondent violated Section 8(a)(1) of the Act.

2. By, on or about October 13, 2015, threatening Robinson that EVS department manager Charles Stillings told ICU manager Karen Schulz that Robinson was inappropriate, rude and disrespectful, and was not a team player (at least in part because of Robinson's union or protected concerted activities), Respondent violated Section 8(a)(1) of the Act.

3. By, on or about October 13, 2015, threatening Robinson that if she accepted a position in the ICU, Respondent would take corrective action if ICU manager Schulz determined that Robinson was inappropriate, rude or disrespectful (as Robinson allegedly had been in the EVS department while engaging in union or protected concerted activities), Respondent violated Section 8(a)(1) of the Act.

4. By, on or about October 13, 2015, threatening Robinson that if she accepted a position in the ICU she would face close monitoring by Schulz, at least in part because of Robinson's union or protected concerted activities, Respondent violated Section 8(a)(1) of the Act.

5. By, on or about October 13, 2015, constructively denying Robinson's request to transfer to a CNA position in the ICU, at least in part because of Robinson's union or protected concerted activities and to discourage employees from engaging in those activities, Respondent violated Section 8(a)(3) and (1) of the Act.

6. By committing the unfair labor practices stated in conclusions of law 1–5 above, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

7. The allegations in paragraphs 11(a)–(j) and 14 of the consolidated complaint are hereby severed and dismissed to allow the Union and Respondent to resolve those issues through arbitration as set forth in the collective-bargaining agreement. I recommend that the Board retain jurisdiction over those complaint allegations for the limited purpose described in the order accompanying this decision.

8. I recommend dismissing the allegations in paragraphs 5(a) and (c) of the consolidated complaint.

REMEDY

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

Respondent, having discriminatorily denied Angel Robinson a transfer to a CNA position in the ICU, must offer Robinson the opportunity to transfer to such a position or to a substantial-

ly equivalent position in the ICU, and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Respondent shall also compensate Robinson for the adverse tax consequences, if any, of receiving a lump-sum backpay award. Within 21 days of the date that the amount of backpay is fixed, either by agreement or Board order, Respondent shall file with the Regional Director for Region 18 a report allocating the backpay award to the appropriate calendar year(s). *Advoserv of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[34]

ORDER

Respondent, Mercy Hospital, Coon Rapids, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees that they are not allowed to ask questions of supervisors in the presence of other employees at team huddle meetings.

(b) Threatening Robinson that EVS department manager Charles Stillings told ICU manager Karen Schulz that Robinson was inappropriate, rude and disrespectful, and was not a team player, at least in part because of Robinson's union or protected concerted activities.

(c) Threatening Robinson that if she accepted a position in the ICU, Respondent would take corrective action if ICU manager Schulz determined that Robinson was inappropriate, rude or disrespectful (as Robinson allegedly had been in the EVS department while engaging in union or protected concerted activities).

(d) Threatening Robinson that if she accepted a position in the ICU she would face close monitoring by Schulz, at least in part because of Robinson's union or protected concerted activities.

(e) Constructively denying Robinson's request to transfer to a CNA position in the ICU, at least in part because of Robinson's union or protected concerted activities and to discourage employees from engaging in those activities.

(f) 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) Within 14 days from the date of the Board's Order, offer Angel Robinson the opportunity to transfer to a CNA position in the ICU or to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Angel Robinson whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(c) Compensate Angel Robinson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(d) Within 14 days after service by the Region, post at its facility in Coon Rapids, Minnesota, copies of the attached notice marked "Appendix."[35] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since May 16, 2015.

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

IT IS FURTHER ORDERED that the allegations in paragraphs 11(a)–(j) and 14 of the consolidated complaint are severed and dismissed. The Board shall retain jurisdiction over this proceeding for the limited purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute underlying the allegations in paragraphs 11(a)–(j) and 14 of the consolidated complaint has not, with reasonable promptness after the issuance of this Order, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair or regular or have reached a result that is repugnant to the Act.

Dated, Washington, D.C. May 6, 2016

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

[34] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[35] 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."

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 threaten employees that they are not allowed to ask questions of supervisors in the presence of other employees at team huddle meetings.

WE WILL NOT threaten employees who engage in union or protected concerted activities by telling them that they are inappropriate, rude, and disrespectful, and by telling them that they are not team players.

WE WILL NOT threaten employees that we will take corrective action if we believe that they are inappropriate, rude or disrespectful while engaging in union or protected concerted activities.

WE WILL NOT threaten employees that they will face close monitoring because of their union or protected concerted activities.

WE WILL NOT constructively deny Angel Robinson's request to transfer to a CNA position in the ICU, at least in part because of Robinson's union or protected concerted activities and to discourage employees from engaging in those activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Angel Robinson the opportunity to transfer to a CNA position in the ICU or to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Angel Robinson whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

WE WILL compensate Angel Robinson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 18, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

MERCY HOSPITAL

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/18-CA-155443 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.