Los Robles Regional Medical Center d/b/a Los Robles Hospital & Medical Center *and* Service Employees International Union Local 121 RN

Los Robles Regional Medical Center d/b/a Los Robles Hospital & Medical Center *and* West Hills Hospital d/b/a West Hills Hospital & Medical Center *and* Riverside Healthcare System, L.P. d/b/a Riverside Community Hospital *and* Service Employees International Union Local 121 RN

Riverside Healthcare System, L.P. d/b/a Riverside Community Hospital *and* Service Employees International Union Local 121 RN. Cases 21–CA–261288, 31–CA–261001, 31–CA–261680, 31–CA–261874, 31–CA–263992, and 31–CA–265832.

August 10, 2023

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND WILCOX

On July 8, 2022, Administrative Law Judge Lisa D. Ross issued the attached decision. The Respondents filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondents filed a reply brief. In addition, the General Counsel filed exceptions and a supporting brief, the Respondents filed an answering brief, and the General Counsel filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and inaccurate statement that abstentions from voting would result in "yes" votes for the Union. Instead, we affirm the judge based only on Hebert's statements that (1) unionizing would lead to a hiring freeze and make it difficult to get paid time off and (2) wages and cost-of-living increases would be frozen if employees unionized. We note that, in addressing the threat allegation, the judge provided extensive detail about the antiunion flyers Hebert handed out before making these statements, but the General Counsel did not allege that these flyers violated Sec. 8(a)(1).

We also affirm the judge's finding that Respondent Los Robles violated Sec. 8(a)(5) and (1) by withholding an annual cost-of-living increase from all members of the Professional Unit. We note that the judge did not address the General Counsel's related allegation that Respondent Los Robles violated Sec. 8(a)(3) and (1) by this same conduct. Because finding the 8(a)(3) violation would not materially affect the remedy, however, we find it unnecessary to pass on that allegation. Unlike his colleagues, Member Kaplan would pass on this allegation and dismiss it, because the General Counsel clearly failed to meet her burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). In doing so, he notes that Respondent Los Robles withheld this cost-of-living increase from represented and unrepresented employees alike, so there is no disparate treatment. And even assuming arguendo that the General Counsel met her initial *Wright Line* burden, the Respondent showed it would have withheld this increase regardless of any union activity due to the economic impact of the COVID-19 pandemic. Based on the circumstances, he is unwilling to infer that the Respondent withheld cost-of-living increases from employees nationwide simply to hide its animus towards one group of unionized employees.

In addition, we affirm the judge's finding, for the reasons stated in her decision, that Respondent Riverside Healthcare System, L.P. d/b/a Riverside Community Hospital (Respondent Riverside) violated Sec. 8(a)(5) and (1) when it unilaterally implemented new usage, storage, and access policies for its N95 masks and other personal protective equipment (PPE). Member Kaplan would not find that Respondent Riverside violated the Act by failing to provide the Union with notice and an opportunity to bargain over its decision to implement the new N95 and PPE usage and storage policies. He does not agree with the judge's finding that Respondent Riverside failed to demonstrate a dire shortage of N95 masks and other PPE, and he would find that exigent circumstances brought on by the COVID-19 pandemic excused Respondent Riverside's obligation to bargain over the decision to change the policies. Member Kaplan joins his colleagues, however, in finding that Respondent Riverside violated Sec. 8(a)(5) and (1) by failing to engage in effects bargaining regarding the changed N95 and PPE policies. See *Port Printing Ad & Specialties*, 351 NLRB 1269, 1270 (2007), enfd. 589 F.3d 812 (5th Cir. 2009).

Further, we agree with the judge, for the reasons stated, that Respondent Los Robles, Respondent Riverside, and Respondent West Hills Hospital d/b/a West Hills Hospital & Medical Center (Respondent West Hills) violated Sec. 8(a)(5) by unilaterally creating and implementing the Pandemic Pay Program and that Respondent Los Robles violated Sec. 8(a)(5) by unilaterally rescinding the Pandemic Pay Program for the Professional Unit on June 6, 2020. Member Kaplan agrees with these findings. However, because the Pandemic Pay Program was only designed as a temporary measure to address patient shortages during the initial stages of the COVID-19 pandemic, Member Kaplan would not order Respondent Los Robles to reinstate this program.

Finally, for the reasons stated in her decision, we adopt the judge's dismissal of the allegation that Respondent Los Robles violated Sec. 8(a)(5) by bypassing the Union and dealing directly with the therapists about weekend scheduling and her dismissal of the allegation that Respondent Los Robles violated Sec. 8(a)(5) by failing to provide the

[1] No exceptions were filed to the judge's dismissal of the allegations that Respondent Los Robles Regional Medical Center d/b/a Los Robles Hospital & Medical Center (Respondent Los Robles) violated Sec. 8(a)(5) and (1) by unilaterally expanding its centralized order entry (COE) system and by failing to provide information that the Union requested regarding unit employee Danica Dubaich's discipline.

[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We affirm the judge's finding that Respondent Los Robles, through Rehabilitation Services Vice President Kimberly Hebert, made coercive threats to therapists to dissuade them from organizing in violation of Sec. 8(a)(1). In so doing, we find it unnecessary to rely on Hebert's

Union with information it requested in connection with the expanded COE system. As to the alleged direct dealing violation, the judge found that the Respondent's January 7, 2020 email to the therapists addressed employee concerns regarding their work schedules and clarified that the therapists' schedules would remain unchanged in light of the Union's recent certification. The judge thus found that the January 7 email was responsive to employee confusion over work schedules and did not constitute an effort by the Respondent to deal directly with the therapists for purposes of establishing or changing those schedules. See, e.g., *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000) (a direct dealing violation occurs when, among other things, a respondent's communication with employees is "for the purpose of establishing or changing wages, hours, and terms and conditions of employment"). In these circumstances, we agree with the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(5) by dealing directly with employees.

In addition, as to the Respondent's alleged refusal to provide the Union with the relevant information it requested on July 3, 2020 regarding the COE system, we note that the Respondent timely and credibly asserted that the Union's information request was overly burdensome and sought an accommodation with the Union. The Union apparently rejected the accommodation offer and chose not to bargain over it. Instead, the Union provided a clarification to the Respondent about the extent of the information sought. The Respondent understood the Union to be seeking the same information as the initial request, and the judge ultimately found that this clarification did not reduce the overly burdensome nature of the Union's initial request. Nevertheless, the Respondent again sought accommodative bargaining with the Union over the cost of document production, but the Union declined to do so. Our colleague asserts that the Respondent should have at least provided the Union with the requested COE policies, as it would have taken an employee with specialized training only one hour to produce. As the judge found, however, the credited testimony establishes that it would have taken an employee with specialized training over 80 hours to produce all of the information requested by the Union in its July 3 information request. Further, the Respondent offered to provide the COE policies as part of a broader accommodative bargaining proposal, but the Union did not respond to this offer. In these circumstances, we affirm the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(5) by refusing to provide the Union with the information it requested on July 3, 2020. See *United Parcel Service of America*, 362 NLRB 160, 163 (2015) (finding that the employer did not violate Sec. 8(a)(5) because it reasonably "attempted to reach an accommodation with the [u]nion" and even "offered to furnish . . . a sample" of the requested information, but the union "rejected [these proposals] out of hand" and "continued to insist on receiving all of the requested information").

Contrary to her colleagues, Member Wilcox would find merit to both allegations. As to the former, she notes that Respondent Los Robles sent a January 7, 2020 email directly to employees—without copying the newly certified Union—soliciting employee feedback about schedules, a mandatory subject of bargaining. Significantly, the Respondent's answering brief admits that the email's reference to proposed schedules "was . . . a 'jumping off point' from which to incorporate therapists' 'ideas' and 'feedback' for potential future scheduling changes." See, e.g., *NLRB v. Ingredion Inc.*, 930 F.3d 509, 514-515 (D.C. Cir. 2019) ("Under Board precedent, an employer violates Sec[.] 8(a)(1) and (5) of the Act if it 'attempt[s] to arm itself for upcoming negotiations' by directly 'soliciting the sentiment of the employees on a subject to be discussed at the bargaining table.'") (quoting *Harris-Teeter Super Markets, Inc.*, 310 NLRB 216, 217 (1993)). She further notes that although Respondent Los Robles dealt directly with employees about post-probationary-period shift schedules before they were represented by the Union, this fact did not entitle Respondent Los Robles to deal directly after the Union was certified as their bargaining representative. See *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-684 (1944). As to the refusal-to-furnish-information allegation, Member Wilcox would find that Respondent Los Robles unlawfully refused to provide the Union with at least the first item of information that the Union had requested regarding the expanded COE system ("Policies regarding COE"). She disagrees with the judge's conclusion that this information was too burdensome to produce. Respondent Los Robles admits, and her colleagues do not dispute, that it would have taken an employee with specialized training 1 hour to produce this requested item of information. In her view, this amount of time cannot be deemed burdensome, particularly for a large employer with a dedicated labor relations staff like Respondent Los Robles.

to adopt the recommended Order as modified[3] and set forth in full below.

[3] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decisions in *Paragon Systems*, 371 NLRB No. 104 (2022); *Cascades Containerboard Packaging-Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021); and *Bottom Line Enterprises*, 302 NLRB 373 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994). Member Kaplan acknowledges and applies *Paragon Systems* as Board precedent, although he expressed disagreement there with the Board's approach and would have adhered to the position the Board adopted in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020).

In accordance with our decision in *Thryv, Inc*., 372 NLRB No. 22 (2022), we have also amended the make-whole remedy and modified the judge's recommended Order to provide that Respondent Los Robles shall compensate employees for any other direct or foreseeable pecuniary harms incurred as a result of its unlawful rescission of the Pandemic Pay Program and withholding of the annual cost-of-living increase for the Professional Unit. Compensation for these harms shall be calculated separately from taxable net backpay, 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). We shall substitute new notices to conform to the Order as modified.

Unlike his colleagues, Member Kaplan would require the Respondents to compensate these employees for other pecuniary harms only insofar as the losses were directly caused by the unlawful rescission of the Pandemic Pay Program and withholding of the annual cost-of-living increase for the Professional Unit, or indirectly caused by the unlawful action where the causal link between the loss and the unfair labor practice is sufficiently clear, consistent with his partial dissent in *Thryv, Inc.*, supra.

In her exceptions, the General Counsel requested that the Board add affirmative language to the Order requiring that Respondent Riverside rescind its unlawful N95 and personal protective equipment ("PPE") policies. Because Respondent Riverside already rescinded these policies on February 26, 2021, we find that such affirmative recission language is unnecessary, and the Order's cease-and-desist language is sufficient. Contrary to her colleagues, Member Wilcox would grant the General Counsel's request for the traditional affirmative language and leave for compliance the determination of whether the policies have been rescinded. In Member Wilcox's view, the record does not conclusively establish that Respondent Riverside has rescinded its unlawful N95 and PPE policies. She notes the Respondent's witness testified that, while the hospital still needed to conserve the supply of PPE and N95 masks, it was able to place the supplies back into the supply rooms on each of the units "[s]o that was back to *sort of* our original process prior to [the] pandemic." (emphasis added). In addition, the exhibit referenced by the witness placed limitations on the use of KN95 masks, among other PPE.

ORDER

A. The National Labor Relations Board orders that Respondent Los Robles Regional Medical Center d/b/a Los Robles Hospital & Medical Center, Thousand Oaks, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

(b) Making unilateral changes to unit employees' terms and conditions of employment at a time when the Respondent and the Union are not at a valid impasse in bargaining.

(c) Making threatening statements to its employees to dissuade them from organizing or otherwise exercising their Section 7 rights.

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

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

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining units:

RN UNIT:

INCLUDED: All full-time, part-time and per diem registered nurses working in RN job classifications identified in the Wage Scales applicable to Los Robles Hospital & Medical Center attached to [the] Agreement at the Hospital's facility at 215 West Janss Road, Thousand Oaks and 150 Via Merida Road in Westlake Village, or other buildings operating as "Los Robles Hospital & Medical Center," in Thousand Oaks or Westlake, California.

EXCLUDED: Employees in other bargaining units, non-professional employees, other professional employees, temporary, agency and registry employees, Home Health Nurses, the Employee Health Nurse/Injury Coordinator, the Medicare Billing Auditor, and all other employees, and confidential employees, guards and supervisors, as defined in the National Labor Relations Act.

PROFESSIONAL UNIT:

INCLUDED: All Professional employees, including Clinical Lab Scientists, Physical Therapists, Occupational Therapists, Speech Therapists, Pharmacists, Dieticians, and Social Workers, employed by the Los Robles Hospital and Medical Center at Main Campus and East Campus.

EXCLUDED: All other employees, registered nurses, physicians, managers, guards, and supervisors as defined by the Act, as amended.

(b) On request of the Union, rescind the Pandemic Pay Program that was unilaterally implemented on March 29, 2020.

(c) Rescind, for Professional Unit employees, the unilaterally implemented June 6, 2020 cancellation of the Pandemic Pay Program and the withholding of the April 2020 annual cost-of-living increase, and continue these terms and conditions of employment in effect until the parties reach an agreement or good-faith impasse in bargaining.

(d) Make Professional Unit employees whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of rescinding the Pandemic Pay Program and withholding the April 2020 annual cost-of-living increase, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(e) Compensate all affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 31, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each affected employee.

(f) File with the Regional Director for Region 31, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

(g) Post at its facility in Thousand Oaks, California, copies of the attached notice marked "Appendix A"[4] in

Further, we find merit in the Respondents' exception requesting removal of the judge's recommended remedy requiring that the notice be read aloud to employees, because it is not warranted in these circumstances. See *Postal Service*, 339 NLRB 1162, 1163 (2003).

[4] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by

English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 31, 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, 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 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 December 3, 2019.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

B. The National Labor Relations Board orders that Respondent Riverside Healthcare System, L.P. d/b/a Riverside Community Hospital, Riverside, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

(b) 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) Before implementing any further changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> INCLUDED: All full-time, part-time, and per diem registered nurses working in RN job classifications identified in the Wage Scales applicable to Riverside Community Hospital attached to [the] Agreement at the Hospital's facility at 4445 Magnolia Avenue, Riverside, California or buildings operating as "Riverside Community Hospital," in Riverside, California.
>
> EXCLUDED: Employees in other bargaining units, non-professional employees, other professional employees, temporary, agency and registry employees, and all other employees, and confidential employees, guards, and supervisors, as defined in the National Labor Relations Act.

(b) On request of the Union, rescind the Pandemic Pay Program that was unilaterally implemented on March 29, 2020.

(c) Post at its facility in Riverside, California, copies of the attached notice marked "Appendix B" [5] in English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 31, 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, 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

such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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."

[5] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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."

employees employed by the Respondent at any time since March 29, 2020.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

C. The National Labor Relations Board orders that Respondent West Hills Hospital d/b/a West Hills Hospital & Medical Center, West Hills, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

(b) 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) Before implementing any further changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> INCLUDED: All full-time, part-time, and per diem registered nurses working in RN job classifications identified in the Wage Scales applicable to West Hills Medical Center attached to [the] Agreement at the Hospital's facility at 7300 Medical Center Drive, or buildings operating as "West Hills Medical Center," in West Hills, California.
>
> EXCLUDED: Employees in other bargaining units, non-professional employees, other professional employees, temporary, agency and registry employees, and all other employees, and confidential employees, guards, and supervisors as defined in the National Labor Relations Act.

(b) On request of the Union, rescind the Pandemic Pay Program that was unilaterally implemented on March 29, 2020.

(c) Post at its facility in West Hills, California, copies of the attached notice marked "Appendix C"[6] in English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 31, 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, 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 March 29, 2020.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 31 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 complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 10, 2023

_____
Lauren McFerran, Chairman

_____
Marvin E. Kaplan, Member

_____
Gwynne A. Wilcox, Member

[6] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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."

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

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 unilaterally change our unit employees' terms and conditions of employment without first notifying Service Employees International Union Local 121 RN (the Union) and giving it an opportunity to bargain.

WE WILL NOT make unilateral changes to our unit employees' terms and conditions of employment at a time when we are not at a valid impasse in bargaining with the Union.

WE WILL NOT make threatening statements to you to dissuade you from organizing or otherwise exercising your Section 7 rights.

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

WE WILL, before implementing any further changes in wages, hours, or other terms and conditions of employment for our unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining units:

RN UNIT:

INCLUDED: All full-time, part-time and per diem registered nurses working in RN job classifications identified in the Wage Scales applicable to Los Robles Hospital & Medical Center attached to [the] Agreement at the Hospital's facility at 215 West Janss Road, Thousand Oaks and 150 Via Merida Road in Westlake Village, or other buildings operating as "Los Robles Hospital & Medical Center," in Thousand Oaks or Westlake, California.

EXCLUDED: Employees in other bargaining units, non-professional employees, other professional employees, temporary, agency and registry employees, Home Health Nurses, the Employee Health Nurse/Injury Coordinator, the Medicare Billing Auditor, and all other employees, and confidential employees, guards and supervisors, as defined in the National Labor Relations Act.

PROFESSIONAL UNIT:

INCLUDED: All Professional employees, including Clinical Lab Scientists, Physical Therapists, Occupational Therapists, Speech Therapists, Pharmacists, Dieticians, and Social Workers, employed by the Los Robles Hospital and Medical Center at Main Campus and East Campus.

EXCLUDED: All other employees, registered nurses, physicians, managers, guards, and supervisors as defined by the Act, as amended.

WE WILL, on request of the Union, rescind the Pandemic Pay Program that was unilaterally implemented on March 29, 2020.

WE WILL rescind, for Professional Unit employees, the unilaterally implemented June 6, 2020 cancellation of the Pandemic Pay Program and the withholding of the April 2020 annual cost-of-living increase, and WE WILL continue these terms and conditions of employment in effect until we reach an agreement or good-faith impasse in bargaining with the Union.

WE WILL make Professional Unit employees whole for any loss of earnings and other benefits suffered by reason of rescinding the Pandemic Pay Program and withholding the April 2020 annual cost-of-living increase, less any interim earnings, plus interest, and WE WILL also make them whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful changes, plus interest.

WE WILL compensate all affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 31, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each affected employee.

WE WILL file with the Regional Director for Region 31, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

LOS ROBLES REGIONAL MEDICAL CENTER D/B/A LOS ROBLES HOSPITAL & MEDICAL CENTER

The Board's decision can be found at https://www.nlrb.gov/case/31-CA-261001 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.

APPENDIX B

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 unilaterally change our unit employees' terms and conditions of employment without first notifying Service Employees International Union Local 121 RN (the Union) and giving it an opportunity to bargain.

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

WE WILL, before implementing any further changes in wages, hours, or other terms and conditions of employment for our unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

INCLUDED: All full-time, part-time, and per diem registered nurses working in RN job classifications identified in the Wage Scales applicable to Riverside Community Hospital attached to [the] Agreement at the Hospital's facility at 4445 Magnolia Avenue, Riverside, California or buildings operating as "Riverside Community Hospital," in Riverside, California.

EXCLUDED: Employees in other bargaining units, non-professional employees, other professional employees, temporary, agency and registry employees, and all other employees, and confidential employees, guards, and supervisors, as defined in the National Labor Relations Act.

WE WILL, on request of the Union, rescind the Pandemic Pay Program that we unilaterally implemented on March 29, 2020.

RIVERSIDE HEALTHCARE SYSTEM, L.P.
D/B/A RIVERSIDE COMMUNITY HOSPITAL

The Board's decision can be found at https://www.nlrb.gov/case/31-CA-261001 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.

APPENDIX C

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 unilaterally change our unit employees' terms and conditions of employment without first notifying Service Employees International Union Local 121 RN (the Union) and giving it an opportunity to bargain.

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

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment for our unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

INCLUDED: All full-time, part-time, and per diem registered nurses working in RN job classifications identified in the Wage Scales applicable to West Hills Medical Center attached to [the] Agreement at the Hospital's facility at 7300 Medical Center Drive, or buildings operating as "West Hills Medical Center," in West Hills, California.

EXCLUDED: Employees in other bargaining units, non-professional employees, other professional employees, temporary, agency and registry employees, and all other employees, and confidential employees, guards, and supervisors as defined in the National Labor Relations Act.

WE WILL, on request of the Union, rescind the Pandemic Pay Program that we unilaterally implemented on March 29, 2020.

WEST HILLS HOSPITAL D/B/A WEST HILLS HOSPITAL & MEDICAL CENTER

The Board's decision can be found at https://www.nlrb.gov/case/31-CA-261001 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.

Michelle Scannell, Lynn Ta and *Marissa Dagdagan, Esqs.,* for the General Counsel.

Paul Beshears, Jacqueline Thompson and *David Anderson, Esqs. (Ford Harrison LLP*), for Respondents.

Manuel Boigues, Alaina Gilchrist and *Max Casillas, Esqs. (Weinberg Roger & Rosenfeld),* for the Charging Party Union.

DECISION

STATEMENT OF THE CASE[1]

LISA D. ROSS, Administrative Law Judge. The Service Employees International Union Local 121 RN (Local 121 RN, the Charging Party or the Union) represents a unit of registered nurses (RNs) at West Hills Hospital & Medical Center (West Hills), Riverside Community Hospital (Riverside), and Los Robles Hospital & Medical Center (Los Robles)(Respondents). Local 121 RN also represents a unit of professional employees (the Professional Unit) at Los Robles.

On various dates between May 28, 2020, and November 25, 2020, the Union filed separate unfair labor practice (ULP) charges and amended charges against Respondents.[2] On February 26, 2021, the Regional Director for Region 31 (Region 31) consolidated all of the charges and issued a second consolidated complaint and notice of hearing.

The consolidated complaint alleged that all three Respondents violated Sections 8(a)(1) and (5) of the National Labor Relations Act (NLRA or the Act) when they unilaterally implemented a pandemic pay program without bargaining with

[1] Abbreviations are as follows: "Tr." for transcript; "Jt. Exh." for the parties' joint exhibits; "GC Exh." for General Counsel's Exhibits; CP Exh." for Charging Party Union's Exhibits; "R. Exh." for Respondent's Exhibits. Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based on my review and consideration of the entire record.

[2] On May 28, 2020, the Union filed ULP charges against Los Robles in Case 31–CA–261001. The charges were amended on September 10, 2020.

On June 3, 2020, the Union filed ULP charges against Riverside in Case 21–CA–261288. Those charges were amended on August 5, 2020, and again on January 4, 2021.

On June 12, 2020, Charging Party filed ULP charges against all three Respondents in Case 31–CA–261680.

On June 18, 2020, the Union filed ULP charges against Los Robles in Case 31–CA–261874. Those charges were amended on September 29,2020.

On August 3, 2020, the Union filed ULP charges against Los Robles in Case 31–CA–263993, which were amended on November 25, 2020.

Lastly, on September 3, 2020, the Union filed ULP charges against Los Robles in Case 31–CA–265832.

the Union.[3]

The consolidated complaint also alleged that Respondent Riverside violated Sections 8(a)(1) and/or (5) of the Act when it unilaterally implemented a new N95 usage and storage policy and unilaterally centralized its personal protective equipment (PPE) without bargaining with the Union.

Lastly, the consolidated complaint alleged that Respondent Los Robles violated Sections 8(a)(1) and/or (5) of the Act when it:

> (1) Unilaterally rescinded the pandemic pay program for the Professional Unit;
> (2) Made coercive/threatening statements to therapists to dissuade them from organizing;
> (3) Withheld an annual cost of living increase from members of the Professional Unit;
> (4) Bypassed the Union and directly dealt with therapists about their weekend schedules;
> (5) Unilaterally expanded the Centralized Order Entry (COE) system without bargaining with the Union which ultimately decreased the bargaining unit work available to the Pharmacists;
> (6) Refused to provide information requested by the Union about the expanded COE system; and
> (7) Refused to provide information requested by the Union about discipline issued to unit member Danica Dubaich.

Respondents filed their answer, denying all material allegations and setting forth multiple affirmative defenses to the complaint.

As one of their affirmative defenses, Respondents sought to dismiss this complaint, arguing that the Board lacked authority to issue or prosecute this complaint because Peter Robb (Robb), who was the Board's General Counsel when this complaint was issued, was unlawfully terminated from his position by President Biden. As a result, Acting General Counsel Peter Sung Ohr (Ohr) was not properly appointed and therefore lacked authority to issue this complaint and/or prosecute this case.

This case was tried via Zoom for Government videoconferencing from April 19 to April 23, 2021.[4] Counsels for the General Counsel, Respondent and the Charging Party presented witness testimony along with documentary evidence.

After the trial, the parties timely filed extensive post-hearing briefs. In their post hearing brief, Respondents again sought to dismiss this complaint, on the grounds that former General Counsel Peter Robb was unlawfully terminated, which meant that former Acting General Counsel Peter Sung Ohr was not properly appointed, and as such, Ohr lacked the authority to prosecute this complaint.

Counsel for the General Counsel moved to strike Respondents' aforementioned defense. Charging Party joined in counsel for the General Counsel's motion, however Respondents opposed it.

I conclude that the Board has jurisdiction/authority to issue/prosecute this complaint. Specifically, the Board previously determined that former General Counsel Peter Robb was properly terminated from his position which made former Acting General Counsel Ohr's appointment lawful.[5] Accordingly, to the extent Respondents seek dismissal on this ground, Respondents' motion is **DENIED**.

Lastly, although I denied Respondents' affirmative defense on the merits, I **DENY** counsel for the General Counsel's motion to strike Respondents' defense as Respondents are entitled, if they desire, to raise this issue/defense on appeal to the Board.

Turning back to the merits of the case, I have read and carefully considered the parties' post-hearing briefs. Based upon the entire record, including the testimony of the witnesses, my observation of their demeanor, and the parties' briefs:

I conclude that all three Respondents violated the Act when they unilaterally implemented a pandemic pay program without first bargaining with the Union.

I further conclude that Respondent Riverside violated the Act when it unilaterally implemented a new N95 usage and storage policy and unilaterally centralized its PPE without first bargaining with the Union.

Lastly, I conclude that Respondent Los Robles:

> (1) Violated Sections 8(a)(1) and/or (5) of the Act when it unilaterally rescinded the pandemic pay program for the Professional Unit without bargaining with the Union;
> (2) Violated Sections 8(a)(1) and/or (5) of the Act by making coercive/threatening statements to its therapists to dissuade them from organizing;
> (3) Violated Sections 8(a)(1) and/or (5) of the Act when it withheld an annual cost of living increase from the Professional Unit;
> (4) Did Not Violate Sections 8(a)(1) and/or (5) of the Act when it allegedly bypassed the Union and dealt directly with the therapists about their weekend schedules;
> (5) Did Not Violate Sections 8(a)(1) and/or (5) of the Act by allegedly unilaterally expanding the COE system without bargaining with the Union;
> (6) Did Not Violate Sections 8(a)(1) and/or (5) of the Act when it allegedly failed/refused to provide information requested by the Union about the expanded COE system; and
> (7) Did Not Violate Sections 8(a)(1) and/or (5) by allegedly failing/refusing to provide information requested by the Union about discipline issued to unit member Danica Dubaich.

I. JURISDICTION AND LABOR ORGANIZATION

West Hills, Riverside, and Los Robles are acute hospital facilities in Southern California. It is undisputed that, during the 12-month period ending December 31, 2020, West Hills derived gross income in excess of $250,000 and purchased and

[3] Implementing the Pandemic Pay Program without bargaining with the Union is the only allegation against West Hills.

[4] The undersigned sincerely apologizes to the parties/counsel for the delay in issuing this Decision, which resulted, in part, due to extended, intermittent leave taken pursuant to the Family and Medical Leave Act.

[5] See *Aakash, Inc. d/b/a Park Central Care & Rehabilitation Center*, 371 NLRB No. 46, slip op. at 1-2 (Dec. 30, 2021), see also *Exela Enterprise Solutions, Inc. v NLRB*, No. 21-60426, 2022 WL 1198200 (5th Cir. Apr. 22, 2022)(affirmed, in pertinent part, that former General Counsel Peter Robb's removal was lawful and that the NLRA did not restrict the President's power to remove the General Counsel at will).

received facility goods in excess of $5000 directly from points outside of the state of California.

It is also undisputed that, during the 12-month period ending July 17, 2020, Riverside derived gross income in excess of $250,000 and purchased and received facility goods in excess of $5000 directly from points outside of the state of California.

Lastly, it is undisputed that, during the 12-month period ending June 29, 2020, Los Robles derived gross income in excess of $250,000 and purchased and received facility goods in excess of $5000 directly from points outside of the state of California.

Accordingly, I find that Respondents have been employers engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act and have been health care institutions within the meaning of Section 2(14) of the Act.

Lastly, it is undisputed that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS[6]

A. General Background

1. Respondents' organization

Respondents are hospitals engaged in providing health care. Respondents are managed and operated by HCA Healthcare, Inc. (HCA), a health care services company. Sam Hazen (Hazen) is HCA's Chief Executive Officer (CEO).

I find that the following individuals have been agents of Respondent Riverside as defined in Section 2(13) of the Act: Labor Relations Director Joe Peccoralo (Peccoralo) and Patient Services Director Sarah Shupek (Shupek).

I also find that the following individuals have been supervisors of Respondent Los Robles as defined in Section 2(11) of the Act: Director of Labor and Employee Relations Jonathan Berke (Berke), Rehabilitation Services Manager Stefanie Brewer (Brewer), Rehabilitation Services Vice President Kimberly Hebert (Hebert), and Pharmacy Services Clinical Manager Daniel Liou (Liou). I find that Hazen is an agent of Respondent Los Robles within the meaning of Section 2(13) of the Act.

Lastly, I find that Natalie Mussi (Mussi) served as the CEO of Los Robles Health Systems. She has been a supervisor of Respondent Los Robles as defined in Section 2(11) of the Act and an agent of Respondent Los Robles as defined by Section 2(13) of the Act.

2. The Union's bargaining units

The Union represents the following employees of Respondent West Hills' RN Unit, which constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> INCLUDED: All full-time, part-time, and per diem registered nurses working in RN job classifications identified in the Wage Scales applicable to West Hills Medical Center attached to [the] Agreement at the Hospital's facility at 7300 Medical Center Drive, or buildings operating as "West Hills Medical Center," in West Hills, California.
>
> EXCLUDED: Employees in other bargaining units, nonprofessional employees, other professional employees, temporary, agency and registry employees, and all other employees, and confidential employees, guards, and supervisors as defined in the National Labor Relations Act.[7]

The Union also represents the following employees of Respondent Riverside's RN Unit, which constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> INCLUDED: All full-time, part-time, and per diem registered nurses working in RN job classifications identified in the Wage Scales applicable to Riverside Community Hospital attached to [the] Agreement at the Hospital's facility at 4445 Magnolia Avenue, Riverside, California or buildings operating as "Riverside Community Hospital," in Riverside, California.
>
> EXCLUDED: Employees in other bargaining units, nonprofessional employees, other professional employees, temporary, agency and registry employees, and all other employees, and confidential employees, guards, and supervisors, as defined in the National Labor Relations Act.[8]

Similarly, the Union represents the following employees of Respondent Los Robles' RN Unit, which constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> INCLUDED: All full-time, part-time and per diem registered nurses working in RN job classifications identified in the Wage Scales applicable to Los Robles Hospital & Medical Center attached to [the] Agreement at the Hospital's facility at 215 West Janss Road, Thousand Oaks and 150 Via Merida Road in Westlake Village, or other buildings operating as

[6] The Findings of Fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as in conflict with credited evidence or because it was incredible and unworthy of belief. In assessing credibility, I primarily relied upon witness demeanor. I also considered the context of the witness's testimony, the quality of their recollection, testimonial consistency, the presence or absence of corroboration, 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. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001), citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), rev'd. on other grounds 340 U.S. 474 (1951). Where necessary, specific credibility determinations are set forth below.

[7] GC Exh. 1(gg).

[8] Id.

> "Los Robles Hospital & Medical Center," in Thousand Oaks or Westlake, California.
>
> EXCLUDED: Employees in other bargaining units, non-professional employees, other professional employees, temporary, agency and registry employees, Home Health Nurses, the Employee Health Nurse/Injury Coordinator, the Medicare Billing Auditor, and all other employees, and confidential employees, guards and supervisors, as defined in the National Labor Relations Act.[9]

Thus, at all times since September 16, 2017, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the West Hills RN Unit, the Riverside RN Unit and the Los Robles RN Unit. That recognition has been embodied in successive collective bargaining agreements (CBAs) for each respective unit, the most recent of which has been effective from September 15, 2017, through September 15, 2020 (September 16, 2017, through September 15, 2020, for the West Hills RN Unit).[10]

Lastly, the Union represents the following employees of Respondent Los Robles' Professional Unit, which constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> INCLUDED: All Professional employees, including Clinical Lab Scientists, Physical Therapists, Occupational Therapists, Speech Therapists, Pharmacists, Dieticians, and Social Workers, employed by the employer at Main Campus and East Campus.
>
> EXCLUDED: All other employees, registered nurses, physicians, managers, guards, and supervisors as defined by the Act, as amended.[11]

Since December 19, 2019, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Professional Unit.[12]

III. 8(A)(1) and/or (5) ALLEGATIONS

A. All Respondent Hospitals

Respondents Violated Sections 8(a)(1) and/or (5) of the Act by Unilaterally Creating/Implementing a Pandemic Pay Program Without Bargaining with the Union

Facts

After reviewing the record, based upon the documentary evidence and the testimony of Union Executive Director Rosanna Mendez (Mendez), I find the following facts:

On March 4, 2020, California Governor Gavin Newsom declared a state of emergency due to the Coronavirus COVID-19 outbreak (COVID-19 or the pandemic). On March 13, 2020, President Trump declared a national emergency.

On March 19, 2020, Governor Newsom issued a statewide stay-at-home order, shutting down schools, restaurants, and other non-essential businesses. Due to the stay-at-home order, there were statewide (and nationwide) declines in patient volume in hospitals for non COVID related reasons, and a moratorium on elective surgeries.[13] The need for registered nurses and other hospital personnel fluctuated as a result.

On or about March 29, 2020, in response to the decrease in patient volume, all three Respondents implemented a temporary Pandemic Pay Program. The Pandemic Pay Program provided employees with the opportunity to earn income resulting from the loss of hours and/or the reduction in patient volume due to California's stay-at-home order and the resultant pandemic restrictions.

Specifically, bargaining unit and non-bargaining unit employees would receive 70% of their base pay if they were unable to work due to their schedules being reduced or if they could not be redeployed to other areas of the hospitals. Employees would receive 100% of their base pay if they had to be quarantined and worked in a patient care setting.[14]

On March 31, 2020, HCA CEO Hazen emailed all staff, which included all bargaining unit and non-bargaining unit employees at all three Respondent hospitals, stating, in relevant part:

> Over the past few weeks, we have experienced significant drops in patient volume as a result of COVID-19. . . . These circumstances have created situations where we do not have enough patients to support our workforce. Naturally, this has resulted in a reduction of hours for many of you. Our belief, at this time, is that these volume declines are temporary, and we hope we can return to taking care of more patients sometime in May, which should lead to scheduling work for you.
>
> . . .
>
> Many companies have had to use furloughs or even layoffs to deal with the dire economic consequences caused by this pandemic. We are not in that financial position and hope to avoid having to take these measures. . . . [W]e have made the following decisions to support you during this time of crisis.
>
> For full-time and part-time colleagues with reduced hours in clinical or non-clinical facilities or support services:
>
> In closure or call-off scenarios, we will work with you first to identify redeployment opportunities to keep team members working where volume levels are high.
>
> Those who cannot be redeployed will be eligible for a special pandemic pay program that continues paying 70 percent of base pay for up to 7 weeks (March 29th – May 16th). This is not a furlough. Instead, it is a pay continuation program to assist colleagues until we better understand the long-term implications of this pandemic on the organization. This program

[9] Id.
[10] GC Exhs.1(ee) and 1(gg).
[11] Id.
[12] GC Ex. 1(gg).
[13] See Jt. Exh. 9.
[14] Id.

> will also apply to our colleagues in areas that support the facilities.
>
> . . .
>
> For colleagues working in patient care facilities:
>
> we will pay 100 percent of base pay for scheduled hours regardless of where the exposure took place. Any colleague who does not work in a patient care facility and is quarantined per CDC guidelines may be eligible for short term disability, or leave of absence, while they are ill…. [15]

The pandemic program was scheduled to end on May 16, 2020.

It is undisputed that Respondents never gave the Union notice or an opportunity to bargain over the creation or implementation of the Pandemic Pay Program. Furthermore, Respondents admit that the creation/implementation of the program were mandatory subjects of bargaining because the program affected employees' wages, hours and other terms and conditions of their employment.[16]

In fact, all three RN Units at each of Respondents' hospitals had CBAs in effect at the time that the Pandemic Pay Program was implemented.[17] In addition, Los Robles' Professional Unit was certified in December 2019, and was in the midst of bargaining for a first CBA when the Pandemic Pay Program was implemented.[18]

In making the above findings, I relied on Respondents' admissions in their Answer coupled with the testimony of Mendez, who served as one of the Union's chief negotiators while bargaining with Respondents on the CBAs for all of the RN Units and Los Robles' Professional Unit. According to Mendez, prior to implementing the program, Respondents never notified her or anyone in the Union about the program or negotiated the Pandemic Pay Program with the Union during bargaining.[19] Her testimony was uncontroverted. Although Mendez admitted that, in or around May 2020, she and Los Robles' chief counsel Brett Ruzzo, exchanged emails about the program, there were no formal discussions or proposals about the program during bargaining either before or after the program was implemented.[20]

Lastly, I relied on Article 59.1 of the the parties' CBAs.[21] Although Article 59.1 gave Respondents the right to provide additional compensation to employees, it also required Respondents to "notify the Union and meet and confer over the proposed changes" before taking any action.[22]

Analysis

An employer violates Section 8(a)(5) if it makes a material, substantial or significant unilateral change in an employee's wages, hours, or other terms and conditions of employment without first giving the Union notice and an opportunity to bargain.[23]

I conclude that Respondents never gave the Union notice or an opportunity to bargain over the Pandemic Pay Program before they implemented it. The unconverted evidence reveals that, on/about March 29, 2020, Respondents unilaterally implemented the pay program for *all* employees: bargaining and non-bargaining unit employees without notice to or an opportunity to bargain over the program with the Union. While Respondents defend that, "at the time the program was announced, everyone – including the Union – *understood* that the program was temporary in nature and would end on May 16, 2020,[24] they failed to proffer any testimonial or documentary evidence that they *bargained* with the Union prior to implementing the program.

Respondents further argue that their Labor Relations Directors *notified* the Union about the program.[25] However, the problem with Respondents' argument is they *already decided* to implement the program *then afterwards* notified the Union. Thus, I find that, to the extent Respondents notified the Union about the program, it was nothing more than a fait accompli.[26] In short, since Respondents did nothing more than notify the Union of what they had already decided, they violated the Act by failing to bargain with the Union about the program prior to implementing it.

With respect to the RN units at the three hospitals, Respondents claim that they were privileged to unilaterally implement the pay program under the managements-rights clauses in each of the CBAs. Specifically, Respondents contend, despite their admission in their Answer, they did not have to bargain with the Union since the pay program did not increase employees' wages, was not a benefit, nor did it affect employees' terms or conditions of employment. I disagree.

Rather, the evidence clearly shows that the pay program was a new benefit for employees: if employees' hours were reduced or they were laid off due to any COVID related declines in patient volume, instead of being unemployed or furloughed, they would receive 70% (or 100% if they worked in patient care areas) of their salary for up to seven weeks (March 27 – May 16, 2020). As such, any benefit offered to employees from the employer constitutes a material change to employees' terms and conditions of employment. Thus, under Article 59.1 of the CBAs and using ordinary principles of contract interpretation to examine the plain language of the CBAs to determine whether

[15] Jt. Exh. 9.
[16] See GC Exh. 1(gg) at 5-6, 12, 19.
[17] Jt Exhs. 2, 3, and 4
[18] Tr. at 339, 350.
[19] Tr. at 347, see also Jt. Exh. 9.
[20] Tr. at 375.
[21] See Jt. Exh. 2 at 56, Jt. Exh. 3 at 55, and Jt. Exh. 4 at 59
[22] Id.
[23] See *NLRB v. Katz,* 369 U.S. 736, 743 (1962).
[24] See Tr. at 355, Jt. Exh. 9,
[25] See Jt Exhs. 18–20.
[26] See *In re Pontiac Osteopathic Hosp*., 336 NLRB 1021, 1023 (2001)(Board found respondent's unilateral changes to employees' PTO were nothing more than a fait accompli, which was not tantamount to giving the Union proper notice and an opportunity to bargain), see also *Gannett Co.,* 333 NLRB 355 (2001), citing *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982) ("[t]hus, '[w]here notice is given shortly prior to implementation of the change because of a lack of intent to alter its position, then the notice is merely informational about a fait accompli and fails to satisfy the requirements of the Act.'").

Respondents could act unilaterally (also known as the contract coverage standard adopted by the Board in *MV Transp., Inc.,* 368 NLRB 66 (2019)), I find that Respondents were required to bargain with the Union *prior* to implementing the pay program. They did not, thus Respondents violated the Act when they failed to bargain with the RN units.

I further find that Respondent Los Robles failed to bargain with the Union about the pay program involving its Professional Unit. Here, I credit Union representative Mendez's uncontroverted testimony that, while Union and Respondent's representatives were bargaining over the Professional Unit's first CBA, none of Respondent's representatives mentioned the pay program during negotiations.

Moreover, since no contract existed with the Professional Unit at the time the pay program was implemented, I agree with counsel for the General Counsel that Respondent was not privileged to make any unilateral changes in the Professional Unit's terms and conditions of employment absent showing that a good faith impasse existed between the parties or exigent circumstances existed that required Respondent to act unilaterally.[27]

Because there is no evidence that the parties were at an impasse in negotiations, Respondent Los Robles must show that there were extenuating, exigent circumstances which privileged it to act unilaterally.[28] I find there were not.

An employer *may* act unilaterally without first bargaining with the union when there are "extraordinary events which are 'an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.'"[29] Such extraordinary, emergency events include where, for example, the employer must make quick personnel decisions during/after a hurricane and a citywide evacuation.[30]

However, a loss of significant accounts or contracts, operating at a competitive disadvantage or supply shortages do not justify unilateral action absent a dire financial emergency.[31]

In this case, while Los Robles and the other Respondents unilaterally decided, at the beginning of the pandemic, to pay unit employees 70%/100% of their pay if they were laid off due to the decline in patient volume or if the employee contracted COVID, I do not find that Respondents were in such a dire, financial emergency or that it would have required Respondents to operate at a competitive disadvantage to privilege it to act unilaterally.

Even if there were exigent circumstances that allowed Los Robles and the other Respondents to unilaterally implement the pay program, Respondents were required to bargain with the Union over the effects of the program.[32] Respondents did not.

Accordingly, Respondents violated Sections 8(a)(1) and/or (5) of the Act by failing to bargain with the Union over its decision to implement the pandemic pay program and failing to bargain over its effects.

B. Riverside

1. Respondent Riverside Violated Sections 8(a)(1) and/or (5) of the Act when it Unilaterally Implemented a New N95 Usage and Storage Policy Without Bargaining with the Union

Facts

Respondent Riverside operates a 478-bed acute care hospital in Riverside, CA. Charging Party Local 121 RN represents all full time, part-time, and per diem RNs working in the RN job classification as described in the parties' CBA.[33]

All California employers must provide and pay for personal protective equipment (PPE) to protect employees from workplace hazards that can cause injury when work practices and administrative controls are not feasible or do not provide sufficient protection.[34] Standard PPE in hospitals include gloves, isolation gowns, goggles, different levels of face masks or respirators, and face shields.[35]

N95 masks are a type of respirator that provides higher levels of protection against aerosolized particles than surgical masks. N95 masks filter out 95 percent of airborne particles compared to no mask at all.[36]

N95 masks are specially fitted to the wearer's face through a fit test to ensure that the wearer uses a size that does not allow aerosols to penetrate the barrier. Riverside conducted yearly respirator fit tests for all employees.[37]

In contrast, surgical masks are not designed to form a seal to the wearer's face and aerosols may enter through openings between the mask and the wearer's face.[38]

Prior to March 2020, depending on the circumstances and the patient's disease/medical condition, Riverside's hospital staff wore PPE, including, but not limited to, gloves, level 1, 2 or 3 surgical masks, N95 masks, isolation gowns, goggles and/or face shields.

Face and N95 masks were widely available, and hospital staff could obtain N95 masks from the unit supply room on the floor where staff worked or on isolation carts for patients who were in ventiliated rooms. Hospital staff were trained on the use of PPE via a web-based powerpoint, called HealthStream,

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[27] See *Bottom Line Enterprise,* 302 NLRB 373, 374 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994).

[28] Id.

[29] *Hankins Lumber Co*., 316 NLRB 837, 838 (1995)(log shortage did not mitigate the duty to bargain with union), quoting *Angelica Healthcare Services*, 284 NLRB 844, 852-853 (1987), see also *RBE Electrics*, 320 NLRB 80, 81 (1995).

[30] *Port Printing & Specialties*, 351 NLRB 1269 (2007)(employer permitted to lay off unit employees without bargaining with union during/after impending hurricane).

[31] See *Intermountain Rural Electric Assn*., 305 NLRB 783 (1991), enfd. 984 F.2d. 1562 (10th Cir. 1993), see also *Farina Corp*., 310 NLRB 318, 321 (1993)(loss of accounts or contracts), *Triple A Fire Protection*, 315 NLRB 409, 414, 418 (1994)(operation at a competitive disadvantage), *Hankins Lumber*, supra (supply shortage).

[32] See *Complete Care at Green Knoll*, No. 22-CA-244307, 2021 WL 3471594 (2022)(citing *Tramont Manufacturing, LLC*, 369 NLRB No. 136, slip op. at 5 (2020)(employer must bargain over effects of unilateral decision with incumbent union regarding layoff practices).

[33] Tr. 290, see also Jt. Exh. 4, at 5.

[34] 29 CFR §§1910.132-1910.140; Cal. Code Regs. tit. 8 § 3380 (2021); *Bendix Forest Products Corporation v. Division of Occupational Safety and Health*, 25 Cal. 3d 465 (1979).

[35] Tr. at 225, 258.

[36] Tr. at 260.

[37] Tr. at 227, 261-262, 676.

[38] Tr. at 225-226, 260-261, 676.

which instructed staff on which masks or other PPE were required when, for how long and under what circumstances.[39]

In March 2020, in an attempt to prevent the COVID-19 virus from spreading in the state, Governor Newsom issued his statewide order shutting down most of the state's economy and mandating citizens stay home. At that time, people were contracting COVID-19 and no one was assured how the virus spread, what symptoms to expect and whether one's symptoms were mild or severe. Since no vaccine had been developed to combat the virus at the time, hospitals were instructed to have employees, patients and others wear masks to protect themselves from the virus.

To protect the supply of PPE and specifically N95 masks from overuse and employee theft, it is undisputed that, sometime in March 2020, Riverside restricted access to its PPE and moved it to a centralized location in the hospital.[40] Now, staff were required to walk to the Vintage Tower, go to a designated area, show their employee identification cards and answer qualifying questions to obtain an N95 mask for work.[41]

The qualifying questions essentially asked whether the nurse/staff took care of patients on a COVID floor, persons under investigation (PUI), or those having an aerosolizing procedure.[42] If staff did not meet above criteria, s/he may be denied an N95 mask.[43] It is undisputed that Riverside did not bargain with the Union over this PPE policy change.

Riverside RN Amberly Hsu (Hsu) testified that, in early to mid April 2020, some of her coworkers in her unit contracted COVID. Although Hsu worked on a non-COVID floor, she wanted an N95 mask to protect herself from contracting the virus.

In early May 2020, Riverside codified its policies and procedures to access/use N95 masks in the hospital through its mandatory powerpoint training module entitled "Infection Protection in the Age of COVID-19."[44] Now, when hospital staff accessed the HealthStream powerpoint training module, they were instructed to wear N95 masks and face shields when they cared for COVID-19 patients and PUIs or conducting an aerosolized procedure. Staff did not need to wear N95 masks if they were not working on a COVID floor or not treating COVID or PUI patients. Employees were required to certify that they would comply with the hospital's new mask requirements.[45]

However, days after the new training module went live, Respondent learned that the Centers for Disease Control and Prevention (CDC) and the California Department of Public Health (CDPH) allowed for hospital staff to wear less stringent surgical masks and face shields in treating COVID patients rather than the N95 masks that Riverside instructed in its web training.

As such, Respondent again modified its training powerpoint as follows: for non-COVID patient care, hospital staff were required to wear a level 1 mask and/or face shield, unless conducting an aerosolized procedure, then a N95 mask was required. For COVID-related patients, hospital staff were to wear either a level 1 surgical mask or a N95 mask plus a face shield, along with gown, gloves and hand hygiene.[46]

Finally, the last slide of the powerpoint required the employee to answer one True or False question.[47] However, unlike the previous module, the question also included a warning of discipline for failing to respond "True" to the test. The question read:

> Riverside Community Hospital requires all staff members to comply with the PPE requirements and Infection Prevention practices detailed in this training program to ensure the safety of fellow staff members and their families, patients and visitors to our Hospital.
>
> **Failure to comply with the PPE requirements and Infection Prevention practices detailed in this training program will subject the offending party to disciplinary action up to and including the termination of employment.**
>
> I have reviewed and I understand the PPE requirements and Infection Prevention practices listed on this training program. I understand that if I have any questions, it is my responsibility to contact Infection Prevention personnel: Tracy Sitton, Donna Chartrand, Jennie Johnson at 951-788-3482 or send an email to RCHO.Covi19@hCAHealthcare.com. True [or] False. GC Exh. 14 (emphasis added).

If the employee answered "False," the training module would not be marked as complete as required by Respondent.[48] It is undisputed that Respondent did not bargain with the Union over the modified PPE training module or the inclusion of discipline for failing to complete/comply with the PPE policy.

Returning to Hsu's testimony, because Hsu wanted an N95 mask to protect herself from COVID on the floor, she took the powerpoint PPE training on how to access/request/obtain an N95 mask. In so doing, Hsu learned that she was only entitled to a level 1 mask. Hsu did not believe a level 1 mask would be sufficient to protect herself from COVID.

Nevertheless, Hsu finished the online training and discovered that she was required to certify that she would comply with Riverside's PPE policy. While she did not agree with the policy, Hsu read at the end of the powerpoint that she would be subjected to disciplinary action, including termination, if she did not complete/comply with Respondent's PPE policy. Hsu was unable to complete the test due to a computer glitch.

In any event, after closing out of the training module, Hsu went down to Liason's office in the Vintage Tower to get an

[39] Tr. at 223, 267, 687, see also GC Exh. 15.

[40] Tr. at 227, 264, 562, 576-577, 677-678, 705. A discussion about relocating/centralizing the PPE will occur later in this decision in Section 2.

[41] Tr. at 229, 265-266, 309, see also R. Exh. 2.

[42] A person under investigation ("PUI") is a patient who is suspected of having a particular infection given their symptoms. Tr. at 242. As such, a PUI is treated as having that particular infection until the patient is "ruled out" pursuant to appropriate testing. Id.

[43] Tr. at 236-237, 267, 687.

[44] Tr. at 687-688, Jt. Exh. 5.

[45] Jt. Exh. 5, GC Exh. 14.

[46] Jt. Exh. 6, GC Exh. 14.

[47] GC Exh. 14.

[48] Tr. at 236.

N95 mask. Despite Hsu's reasons for wanting an N95 mask (protecting herself from coworkers who contracted COVID), she was denied an N95 mask because she worked on a non-COVID floor and was not treating high risk patients.

However, after returning to her floor and confirming from the shift the previous night that Hsu would be treating a high-risk patient that day, Hsu returned to the Liason's office, requested and received an N95 mask. I found Hsu's testimony credible.

At some point, RN and Union representative Jennifer Sanchez (Sanchez) learned about Respondent's new PPE policy (which required a level 1 mask versus an N95 mask if nursing staff were working on a COVID floor or treating COVID patients), that the PPE had been moved to a centralized location (versus being readily available in the supply room or on isolation carts), and the new powerpoint training module (subjecting staff to discipline for failing to complete/comply with the online PPE training). Sanchez testified that nurses' general concerns were that they were being forced to comply with Respondent's new PPE policy that they disagreed with and if they did not comply they would be disciplined.

On May 8, 2020, Sanchez emailed Director of Labor Relations Joseph Peccoralo (Peccoralo) inquiring about the new PPE policy and demanded that Riverside halt the training powerpoint. Sanchez highlighted to Peccoralo that Riverside's policy conflicted with California's Occupational Safety and Health Administration's (Cal/OSHA) policy on masks. Sanchez also submitted a grievance, an information request concerning the new policy and requested dates to bargain over the policy.[49]

Peccoralo responded on May 11, 2020, stating that the grievance process had expired and that Riverside had the exclusive right under the CBA to create/implement the PPE training.[50] Sanchez replied to Peccoralo again requesting bargaining dates over Riverside's PPE policy. In her email, Sanchez directed Pecoralo to the section of the CBA which required bargaining over changes to Riverside's PPE policy.[51] However, Sanchez did not hear back from Peccoralo.

Sanchez emailed Peccoralo a third time requesting dates to bargain over the PPE policy.[52] This time, Peccoralo replied to Sanchez asking why the parties needed to bargain over the policy to which Sanchez responded that the CBA required bargaining over changes to the PPE policy. At that point, Peccoralo told Sanchez that Respondent had no obligation to bargain over the training "designed to protect staff, families, patients and visitors at the hospital."[53] Sanchez promptly filed the instant ULP charge.

Analysis

I conclude that Riverside was not privileged to unilaterally implement its N95 access/usage policy during the pandemic. First, I agree with counsel for the General Counsel that rules concerning the use of PPE are mandatory subjects of bargaining.[54] Moreover, since employees would be subject to discipline for failing to follow the policies and procedures outlined in Riverside's Healthstream Powerpoint, I find that Respondent essentially concedes that its mask access/usage policy/procedure were mandatory subjects of bargaining.[55] As such, Riverside was required to bargain with the Union over its decision to implement its N95 mask access/usage policy/procedure.

As previously stated, while Respondent *may* act unilaterally when there are extraordinary, unforeseen events that have a major financial impact on it if the hospital failed to take immediate action,[56] supply shortages are not considered dire, extraordinary circumstances that justify unilateral action.[57]

While Riverside *believed* that N95 masks were in short supply, Respondent presented no empirical evidence that, in March 2020 at the beginning of the pandemic, masks were in such short supply at its Riverside facility or that masks were being stolen from its supply rooms at an alarming rate. Moreover, there was no evidence presented that Respondent had difficulty acquiring more N95 masks to warrant the need to ration masks to hospital staff per its usage policy. Other than Respondent's self-serving statements that it anticipated a *potential* shortage in N95 masks, there is no evidence that the supply of N95 masks were so dire that it privileged Respondent to unilaterally implement its N95 access/usage policy.

Respondent contends that it implemented the mask access/usage policy and training module based on CDC guidance at the time and under its management authority under Article 14's Management Rights clause that allowed Riverside to unilaterally fashion work rules that protect the *safety* and welfare of its employees.[58] However, because Respondent attached a threat of discipline, including termination, if staff failed to complete/comply with the new mask access/usage policy, I agree with counsel for the General Counsel that, with the addi-

[49] Jt Exh. 6 at 7-8.
[50] Id at 6-7.
[51] Id. at 3.
[52] Id. at 2.
[53] R. Br. at 8.

[54] See *Orchids Paper Prod. Co*, 367 NLRB No. 33 (2018) (requirement that employees wear fire-resistant clothing at all times was mandatory subject of bargaining); *Public Service Co. of Oklahoma*, 334 NLRB 487, 489 (2001) ("work and safety rules" are a mandatory subject of bargaining).

[55] *Virginia Mason Hosp.*, 357 NLRB 564, 566 (2011) (possibility of discipline for failing to meet new job requirements is a mandatory subject of bargaining).

[56] *Hankins Lumber Co*., supra at 838.

[57] Id.

[58] Article 14.1 states:

Except as modified, delegated or granted in this Agreement, the Hospital retains the exclusive right to manage the operations of the Hospital and to direct its working forces. Among those exclusive [management] rights, but not limited thereto is the right to hire, transfer, promote, discipline, suspend or discharge for just cause; assign and supervise employees; to determine and change starting times, quitting times and shifts, and the number of hours to be worked; to determine staffing patterns, to determine policies and procedures with respect to patient care; to determine or change the methods and means by which its operations are to be carried on; to carry out all ordinary functions of management; provided, however, that such rights shall not be enforced contrary to the provision of this Agreement. Jt. Exh. 3, Article 14 (emphasis added). See also *MV Transportation, Inc.,* 368 NLRB No. 66 (2019) (finding new safety policy covered by management-rights clause gave management the right to "adopt and enforce reasonable work rules").

tion of the threat of discipline, the mask policy directly affected unit employees' *job security*, requiring the parties to bargain per the CBA.[59] Most importantly, Respondent admits that subjecting employees to discipline if they fail to follow the N95 mask protocols directly affects employees' job security removing it from the purview of *MV Transportation's* contract coverage analysis.

Lastly, even assuming Respondent was privileged to unilaterally implement its mask usage policy, Riverside never bargained with the Union over the effects of its decision, which Respondent was required to do. Accordingly, Respondent violated Sections 8(a)(1) and/or (5) of the Act by unilaterally implementing its N95 access/usage policy without bargaining with the Union and/or by failing to bargain with the Union over the effects of implementing its policy.

2. Respondent Riverside Violated Sections 8(a)(1) and/or (5) of the Act when it Unilaterally Centralized its PPE equipment Without Bargaining with the Union

Facts

As previously stated in the facts in section 1 above, it is undisputed that, prior to March 2020, face and N95 masks were widely available throughout the hospital. Hospital staff could obtain N95 masks from the unit supply room or on isolation carts for patients in a ventilated room. Unit supply rooms were located on every floor and there were limited restrictions on using an N95 mask.

Sometime in/around March 2020, after Governor Newsom issued his statewide stay-at-home order, Respondent informed nurses and hospital staff that, due to the pandemic, N95 masks were difficult to obtain and supplies were being stolen from the hospital. As such, Respondent determined that they would centralize its PPE, and in particular, N95 masks, to preserve and safeguard its supply.

Respondent initially moved its PPE to the basement of the hospital. At some point thereafter, staff could obtain PPE from the patient care Liaison's office, however, as stated above, staff had to meet certain criteria in order to receive an N95 mask.

As the pandemic progressed, however, Riverside moved the PPE to the 3rd floor, as well as in the emergency department, and on all crash carts across the facility. Nurses were informed of these changes via flyers, emails, and updates from Respondent CEO Hazen.[60] Riverside also announced the PPE locations via nurses' computer screensavers.

Lastly, Respondent held virtual town halls meetings with staff on where/how to get PPE. However, it is undisputed that Riverside never bargained with the Union about relocating its PPE prior to centralizing it.

Meanwhile, it is undisputed that the parties held a labor management meeting every third Thursday every other month. On May 21, 2020, the parties held such a meeting. Sanchez, Erik Andrews (Andrews), Mary Miller (Miller) and Jessie Ferguson (Ferguson) participated on behalf of 121 RN. Peccoralo, Barbara Frank (Frank) and Director of Surgical Services Sarah Shupek (Shupek) appeared for Riverside.

Sanchez inquired about the policy for nurses checking out PPE, whether nurses would be disciplined for wearing N95 in non COVID units, and whether every person entering hospital was being treated as an asymptomatic COVID patient. Shupek responded by telling Sanchez that the hospital would provide N95 masks to nurses if they were taking care of COVID patients or if patients were undergoing an aerosolized procedure. Shupek never answered Sanchez's other concerns and the parties held no further discussions on the matter.[61]

It is undisputed that no formal bargaining negotiations occurred regarding Riverside's decision to relocate/centralize its PPE.

Analysis

Similar to the analysis regarding Respondent unilaterally implementing its N95 usage policy, I find that Riverside's decision to move and centralize its N95 masks and other PPE equipment violated Sections 8(a)(1) and/or (5) of the Act since Respondent's decision was not based on extraordinary, exigent circumstances that would have caused Respondent dire financial distress if it did not take such action. Moreover, even if Riverside was privileged to unilaterally move and centralize its N95 masks and PPE equipment, it was required to bargain with the Union over the effects of its decision. Respondent did neither. In short, Respondent violated the Act as alleged.

C. Los Robles

1. Los Robles Violated the Act when it Unilaterally Rescinded the Pandemic Pay Program for the Professional Unit

Facts

It is undisputed that, on March 31, 2020, all three Respondents implemented their temporary Pandemic Pay Program for bargaining and non-bargaining unit employees. The program was scheduled to end on/around May 16, 2020. As I previously concluded, Respondents failed to bargain with the Union for all of the RN units and the Professional Unit at Los Robles over its decision to unilaterally implement the pay program and the effects of implementing the program.

On May 12, 2020, due to the continued uncertainty surrounding the pandemic, Respondents intended to extend the pay program through June 27, 2020.[62]

On May 19, 2020, Union Executive Director Mendez

[59] Article 14.2 states:

The Parties agree that, except to the extent this Agreement specifically provides otherwise, the Hospital will have no duty to bargain with the Union over actions of the Hospital, not prohibited by this Agreement, which have some effect on bargaining unit employees, unless such actions directly affect the job security of bargaining unit members. In the event the Hospital does take some action, not prohibited by this Agreement, which directly affects the job security of bargaining unit members, the Hospital will, upon request, bargain with the Union about whether such action will be taken over a period not to exceed thirty (30) days from the date the Union was notified of the proposed action or became aware of the proposed action. Jt. Exh. 3, at 12 (emphasis added).

[60] See R. Exh. 2.

[61] As of February 26, 2021, PPE, including N95 masks, were returned to unit supply rooms. Tr. at 684-685.

[62] Even though all three Respondents decided to extend the pay program, this allegation specifically concerns Los Robles' decision to rescind extending the program to the Professional Unit.

emailed Respondents' representatives regarding extending the pay program.[63] In her email, Mendez explained that Respondents contacted the Union's parent organization and their sister local (not the Charging Party Union) with a bargaining proposal to extend the pay program for bargaining unit employees, including those in the Professional Unit at Los Robles, in exchange for certain economic concessions. Mendez considered Respondents' proposal as a threat.[64]

On May 20, 2020, Senior Labor Counsel Brett Ruzzo (Ruzzo) replied to Mendez by email, stating:

> As you are aware, we extended an offer to the union (through the International) to extend the Pandemic Pay to represented employees and avoid other certain benefit changes. We made an offer last week and revised that offer yesterday (prior to the union's rejection of the original offer). The high level details of our current offer is as follows:
>
> For the benefit of getting the Pandemic Pay on the same basis as non-union hourly employees and keeping the 401k match for 2020, the union agrees to zero wage increases in 2020 (including step increases).[65]

As such, Respondents' proposal was to extend the program to *represented employees,* including Los Robles' Professional Unit, in exchange for agreeing to the above-referenced economic concessions.[66]

> Mendez replied reiterating her position that she considered Respondents' proposal a threat:
>
> As you know, we are not required to open our closed contracts to bargain over concessions. Negotiations with our Union have not yet begun, but I sent dates with availability and am awaiting a response from HCA. Notwithstanding, in an effort to fully understand what the "revised" proposal being presented to our members is, as well as the impact to their wages, benefits and working conditions, please confirm the entirety of the proposal so that we can determine next steps.[67]

At the time of Mendez's reply email, the parties were in the midst of bargaining with the Professional Unit at Los Robles. Thus, Ruzzo concluded that the Union, through Mendez, only wanted to discuss extending the pay program for the RN units – the only unit at Los Robles with closed contracts.

However, Ruzzo's interpretation of Mendez's email was incorrect. Rather, based on Mendez's testimony at trial, and the totality of the series of emails between Mendez and Ruzzo, I find that Mendez was attempting to notify Respondents that: (1) Respondents notified the Union's international about extending the pay program and not Charging Party, (2) the parties never bargained about extending the pay program for the RN or the Professional Units, (3) Mendez considered Respondents' proposal to the Union a threat, and (4) Mendez was trying to understand Respondents' full proposal.

Nevertheless, on May 21, 2020, Ruzzo confirmed Respondents' offer to extend the program for the RN units in exchange for the Union accepting economic concessions.[68] In her reply email, Mendez rejected Respondents' proposal and chastised Ruzzo on Respondents' unilaterally telling bargaining unit employees about Respondents' efforts to negotiate on extending the pay program. Although Ruzzo and Mendez emailed each other about other terms to extend the pay program for bargaining unit employees, ultimately, Ruzzo concluded that the parties were at impasse on the issue. [69]

It is undisputed that, on or about June 6, 2020, Respondents ended the Pandemic Pay Program for unionized employees, including the RN units at all three hospitals and those in the newly certified Professional Unit at Los Robles. Respondent continued the pay program for all non-represented employees until August 2020.[70] It is also undisputed that, at the time the program ended for the Professional Unit, the parties were bargaining for a first contract.[71]

In making the above findings, I relied on Mendez's testimony as well as the plain reading of the series of Ruzzo's and Mendez's emails under the totality of the circumstances. I found Mendez's testimony credible on this point as she was straight forward in her testimony and her testimony was supported by the plain reading of her emails under the circumstances. Ruzzo was not called as a witness to testify in this matter.

Analysis

Even assuming I conclude that the parties' emails about extending the pay program were considered "bargaining," because the Professional Unit was newly certified, the Board's decision in *Bottom Line* applies.[72] Here, Respondent asserts that it was privileged to rescind the pay program for the Professional Unit because the parties had reached an overall bargaining impasse. I disagree.

Rather, I conclude that "…negotiations were not sufficiently exhaustive to find that an impasse had already been reached."[73] In fact, the evidence shows that there were back and forth emails between the parties on Respondents' proposal, and specifically the Union queried Respondents' representative (Ruzzo) about why it communicated with the Union's international and not Charging Party about extending the pay program, especially since the Professional Unit and Los Robles were bargaining for a first CBA at the time Respondent's proposal was

[63] GC Exh. 22.
[64] Id.
[65] Jt. Exh. 26.
[66] Jt. Exh. 26.
[67] Id.
[68] Id.
[69] Jt. Exh. 26.
[70] Tr. at 348, see also Jt. Exh. 1 at 14, GC Exh. 1(gg).
[71] Tr. at 348–349.
[72] See *Bottom Line Enterprise*, 302 NLRB 373, 374 (1991) enf'd sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). Counsel for the General Counsel is not alleging that Respondent committed a Section 8(a)(5) violation for ceasing the pay program for the RN units at West Hills, Riverside or Los Robles or for any non-bargaining employees.
[73] Id. at 379, citing *Carpenter Sprinkler Corp. v. N.L.R.B.*, 605 F.2d 60, 65 (2d Cir. 1979).

made.

Nevertheless, the Union requested further clarification on the proposal which it deemed a threat, the Union rejected the proposal but no further discussions ensued about the pay program when the parties began formal bargaining.

Like the judge in *Bottom Line*, I reject Los Robles' declaration of an impasse, because:

> [f]or the very nature of collective bargaining presumes that, while movement may be slow on some issues, a full discussion of other issues, which as in the instant case have not been the subject of agreement or disagreement, may result in agreement on stalled issues. 'Bargaining does not take place in isolation and a proposal on one point serves as leverage for positions in other areas.' *Korn Industries, Inc. v. NLRB*, 389 F.2d 117, 121 (4th Cir. 1967). Thus, 'had the respondent been willing to bargain further, much more might have been accomplished through the give and take atmosphere of the bargaining table.' *NLRB v. Sharon Hats, Inc*., 289 F.2d 628, 632 (5th Cir. 1961).[74]

In essence, I conclude that Los Robles and the Union failed to exhaust "all reasonable expectations of compromise" during formal bargaining, thus I conclude no impasse occurred.[75]

Accordingly, because I find there are no facts which show that the parties were at an overall bargaining impasse on the issue of extending the pay program nor were there extenuating, exigent or dire financial circumstances to cause it to rescind the pay program for the Professional Unit, Los Robles was not privileged to make any changes to (i.e., rescind) the terms and conditions of the pandemic pay program for the Professional Unit. Therefore, I agree with counsel for the General Counsel that Los Robles' decision to rescind the Pandemic Pay Program for the Professional Unit was an unlawful unilateral change violative of Sections 8(a)(1) and/or (5) of the Act. Furthermore, I conclude that Los Robles violated Sections 8(a)(1) and/or (5) of the Act when it failed to bargain with the Union over the effects of rescinding the pay program for the Professional Unit.

2. Los Robles Violated the Act when its Rehabilitation Services Vice President Made Coercive Threats to Therapists to Dissuade Them From Organizing

Facts

Based on the testimony of Occupational Therapists Scott Chikuami (Chikuami) and Julie Geran (Geran), I find the following facts:

Los Robles operates a hospital and medical center in Thousand Oaks and Westlake, California.A Board election for Los Robles' Professional Unit was scheduled to take place on December 11, 2019.

Prior to election day, in the afternoon of December 3, 2019, Vice President of Rehabilitation Services Kimberly Hebert (Hebert) and Supervisor Kaitlyn Miller (Miller) approached Chikuami, Occupational Therapist Shawn Kroker (Kroker), and two other therapists in the charting room (also known as the documentation room) on the second floor of Los Robles' Westlake East Campus.[76] Hebert asked if she and Miller could speak with the therapists, then they distributed flyers and spoke to them about the Union.[77]

One of the flyers indicated that two other local hospitals were still negotiating a contract over a year after voting in a union. The flyer concluded with the exhortation to "know the facts" before voting.[78]

The second flyer provided information about paying union dues and encouraged employees to "[v]ote NO on Election Day."[79]

After Hebert distributed the flyers, Geran walked into the room and heard Hebert tell the therapists that if an employee did not vote in the Union election, then their ballot would automatically be counted as a "yes" for the Union.[80] Hebert also told the therapists that union negotiations would be a long, arduous process and that if therapists joined the Union, there would be a hiring freeze which could affect their cost-of-living (COL) increases. According to Chikuami and Geran, Hebert told the therapists that their annual 2% COL increase would be frozen, that they would have difficulty requesting/receiving any paid time off (PTO), and they would not get any wage increases until a new union contract was drafted.

In making the above findings, I relied on Chikuami's and Geran's testimony over that of Hebert. Hebert initially denied all the statements attributed to her. Then, Hebert sought to clarify her testimony on cross examination. First, after initially stating that she gave the flyers to educate the therapists, Hebert reluctantly admitted that she also wanted to encourage the therapists to vote "no" in the election.

More importantly, Hebert often changed and "clarified" her testimony regarding what she told the therapists about the effects of the therapists' vote, the hiring freeze and wage and COL increases if the union was voted in.[81] As such, Hebert's inconsistent, changing, self-serving testimony made her overall testimony on this issue unbelievable, and as such, I gave it little

[74] Bottom Line, 302 NLRB at 379.

[75] Id., citing *D.C. Liquor Wholesalers*, 292 NLRB 1234 (1989).

[76] Tr. at 125–126.

[77] Tr. at 127-128.

[78] GC Ex. 17, at 1.

[79] GC Ex. 17, at 2.

[80] Tr. at 66.

[81] Specifically, after initially denying telling the therapists that abstaining from voting meant voting "yes" for the union, Hebert attempted to clarify her statement, testifying that she told therapists *words to the effect* that "if 10 employees vote yes and another 10 abstain from voting, only the 10 who voted would be counted." Next, after initially denying Chikuami's and Geran's version of events about a hiring freeze, Hebert changed her testimony, stating that, when she was asked about a hiring freeze, Hebert told the therapists she did not believe the hospital would implement a hiring freeze since Respondent needed more therapists to cover shifts. Then, Hebert clarified her statements about the COL and wages increases, testifying she told the therapists that their COL and wage increases may be *delayed* and that they should not count on the increases occurring at the normal time. I decline to credit Hebert's version of her statements because it was contradictory and self-serving. See *Reliable Electric Co.,* 330 NLRB 714, 721 (2000) (witnesses who were evasive, contradictory, unresponsive, and self-serving discredited).

to no weight.[82]

Contrary to Hebert, Chikuami gave short but direct answers to questions asked of he both on direct and cross examination. I was left with the impression that Chikuami was committed to telling the truth. Moreover, Chikuami's testimony was corroborated by Geran, who I also found credible. In contrast, Respondent never called Miller to corroborate what Hebert told the therapists, which made Hebert's testimony less than fully credible.

Lastly, as a current employee of Respondent, Chikuami's testimony has a special guarantee of reliability, because, by offering evidence that essentially accuses Respondent of wrongdoing, he places his economic security at risk.[83] Accordingly, I find that Hebert made the statements attributed to her.

Analysis

In assessing whether a remark constitutes a coercive threat, the appropriate test is "whether the remark can reasonably be interpreted by the employee as a threat."[84] The actual intent of the speaker or the effect on the listener is immaterial.[85] Rather, the Board considers the totality of the circumstances in assessing whether the reasonable tendency of an ambiguous statement is a veiled threat to coerce.[86] Accordingly, the basic test to find an 8(a)(1) violation is whether, under the totality of the circumstances, the employer's conduct may reasonably be said to restrain, coerce, or interfere with an employee's rights under Section 7 of the Act.[87]

As you might imagine, determining whether an ambiguous statement is an illegal threat versus an opinion about possible consequences has proven difficult. It must be assessed in a fact-specific manner, taking into account the employer's right to freedom of speech under Section 8(c) of the Act, balanced against the employee's right to be free from coercive threats under Section 7.

In balancing these competing interests, the Board has held that threats of more onerous working conditions violate Section 8(a)(1) of the Act[88]. Likewise, threats to employees that if they unionized they could lose their PTO also violates the Act.[89]

As stated earlier, I find Hebert made the statements attributed to her. As such, I conclude that her statements, made approximately eight (8) days before the union vote, that therapists who abstained from voting essentially voted "yes" for the Union, that therapists would have difficulty receiving PTO and that there would be a freeze on hiring as well as a freeze on wage or COL increases if employees voted in the Union, were unlawfully coercive and threatening which were intended to dissuade, interfere, and restrain Los Robles' therapists' from exercising their Section 7 rights. Accordingly, Respondent Los Robles violated Section 8(a)(1) of the Act.

3. Los Robles Violated the Act when it Withheld an Annual Cost of Living Increase from the Professional Unit

Facts

It is undisputed that all employees, including non-represented employees and those in Los Robles' Professional Unit, received a 2% annual COL increase every April since about 2015.[90] Although counsel for the General Counsel often referred to this increase as a "2% annual wage increase," based on the testimony in the record, I find that the annual 2% increase is a cost-of-living (COL) adjustment and not a wage/salary or performance-based increase.[91]

In April 2020, Los Robles did not provide the 2% COL increase to members of the Professional Unit. On April 28, 2020, after learning from Professional Unit members that they had not received their COL increase, Union Chief Negotiator Tina Bordas (Bordas) emailed Los Robles' Director of Labor and Employee Relations Jonathan Berke (Berke), inquiring about the increase.[92] Berke did not respond.

On May 1, 2020, during bargaining with Los Robles, Bordas raised the issue of the COL increase verbally with Respondent. Los Robles' outside attorney, Alan McKenna (McKenna), who also served as one of Los Robles' bargaining representatives, responded that he would look into the COL increases and get back to the Union about it.[93]

On May 8, 2020, Bordas again emailed McKenna about the COL increase. McKenna replied via email the same day, stating that the Professional Unit would not be receiving any COL increases:

> We have reviewed the Hospital's historical practice regarding annual pay (COL) increases to non-represented employees. The hospital has determined that it will maintain its pay practice for unit employees unless or until it reaches an agreement with 121RN on/over all wages in the new CBA, which we are currently negotiating. As of this date, non-represented employees have not been given an increase in 2020, when wage increases are provided, unit employees will be treated similar-

[82] *Reliable Electric Co.,* supra.

[83] See *Flexsteel Industries*, supra; *Gold Standard Enterprises,* 234 NLRB at 619 (testimony of current employees, particularly while management representatives are present, that accuses Respondent of wrongdoing has inherent reliability because these witnesses are testifying adversely to their pecuniary interests).

[84] *Smithers Tire & Auto. Testing of Tex.*, 308 NLRB 72 (1992).

[85] Id.

[86] *KSM Industries*, 336 NLRB 133, 133 (2001).

[87] *American Freightways Co.,* 124 NLRB 146 (1959) (basic test is whether the employer's conduct may reasonably be said to restrain, coerce, or interfere with an employee's rights under Section 7 of the Act).

[88] See *Holy Cross Health d/b/a Holy Cross Hospital*, 370 NLRB No. 16, slip op. at 4 (2020) (unlawful threat made when employer told employee that the presence of a union might limit employee's access to management and worsen FMLA flexibility policies); see also, *Novelis Corp.*, 364 NLRB No. 101 (2016), citing *Allegheny Ludium Corp.*, 320 NLRB 484, 484 (1995) (Board found unlawful coercive statements when employees told they would lose their flexible work schedules when threats omitted any reference to the collective bargaining process).

[89] *Horseshoe Bossier City Hotel & Casino*, 369 NLRB No. 80, slip op. at 7 (2020).

[90] Jt Exh. 14. I note that Clinical Lab Scientist Brett Booth (Booth) testified that he received annual COL increases since 2010. See Tr. at 316–317.

[91] Tr. at 316–317, 605-606.

[92] Jt Exh. 14.

[93] Tr. at 70-71, 212.

ly, absent our agreement on a wage package as part of the CBA.[94]

Prior to McKenna's email, it is undisputed that Los Robles did not notify the Union that the COL increases would not be paid to the Professional Unit.[95] Beyond Bordas' inquiry during bargaining on May 1, 2020, and McKenna's May 8, 2020, email, the COL increase was not discussed at any point during bargaining.[96]

It is also undisputed that, on June 18, 2020, Chelsea Velazquez, on behalf of Los Robles' Health System CEO Natalie Mussi (Mussi), emailed all Los Robles employees, announcing that Los Robles would be suspending the 2020 annual wage/salary (aka COL) increase for the majority of employees.[97]

It is also undisputed that, on September 17, 2020, Diane Boone, on behalf of HCA Healthcare, Inc. CEO Sam Hazen (Hazen), emailed all HCA Healthcare staff announcing that annual wage (aka COL) increases would be given in November 2020 to all *non-union represented* employees.[98] Los Robles did not pay an annual COL increase to the Professional Unit in 2020.

Analysis

Respondent violates Section 8(a)(5) of the Act when it makes a unilateral change in employment terms without first giving the union notice and the opportunity to bargain over the change.[99] If there is no CBA in place and the parties are engaged in bargaining for an overall agreement, as is the case here, Respondent must refrain from making *any* unilateral changes in employees' terms and conditions of employment unless bargaining on the overall CBA has reached impasse.[100]

However, there is a limited exception to the above general rule if the parties are engaged in first contract bargaining as is the situation in this case: Respondent *may* lawfully implement a unilateral change in employees' terms and conditions of employment where the proposed change concerns "a discrete event, such as an annually scheduled wage review . . . that simply happens to occur while contract negotiations are in progress."[101] Yet, even a change like an annual scheduled wage increase requires Respondent provide the Union with notice and an opportunity to bargain about the intended change.[102]

However, if Respondent's annual COL increase is a regular and longtanding past practice versus a random or intermittent event, its annual COL increase becomes a term/condition of employment regardless of the existence of a CBA and, as such, cannot be altered without offering the Union notice and an opportunity to bargain over the proposed change.[103] To prove a past practice, a party must show that the prior action occurred with such regularity and frequency that employees could reasonably expect the practice to continue or recur on a regular and consistent basis.[104]

In this case, I conclude that Respondent's COL increase is a past practice. The record reveals that Respondent gave bargaining unit and non-bargining employees a COL increase every year in the month of April since at least 2015. In fact, Clinical Lab Scientist Booth, a Professional Unit member, testified he received a COL increase every year in April since 2010.

Moreover, Respondent admits that the annual COL increases were a 2% across the board COL adjustment. Accordingly, Respondent was not privileged to change, alter or suspend the 2020 COL increase without first giving notice to the Union and giving the Union an opportunity to bargain.

Los Robles argues that, since Respondent was negotiating a CBA with the Professional Unit in April/May 2020, Respondent treated members of the Professional Unit the same as non-represented employees in that neither received a COL increase. However, Respondent offers an inaccurate comparison because, once Professional Unit employees *unionized*, regardless of whether the parties were bargaining for a first CBA, they cannot be treated like non-bargaining unit employees since Board precedent *required* Los Robles to give notice and bargain with the Union *before* supending the increase for Professional Unit employees. Respondent failed to do that in this case.

Respondent also contends that its actual past practice included "*conduct[ing*] an annual review of the Hospital's operations [to] determine *whether* discretionary cost-of-living wage increases are appropriate."[105] Following its argument, Respondent claims that, in conducting its annual review, it suspended all non-represented employees' COL increases across the board due to the decrease in patient volume due to the COVID pandemic. However, Los Robles ignores the fact that, *when bargaining*, Respondent was obliged to notify and bargain with the Union *before* unilaterally deciding to suspend the 2020 COL increases for Professional Unit employees regardless of whether there was a negotiated CBA. It did not do so.

Respondent also appears to suggest that counsel for the General Counsel is accusing it of discrimination by contending that Professional Unit employees should have *received* the 2020 COL increase when other non-represented employees retroactively received the increase. However, that is *not* the General Counsel's allegation. Rather, the relevant issue is whether Respondent was privileged to unilaterally suspend the 2020 COL increase for Professional Unit employees *without first notifying and bargaining with the Union.* I conclude Respondent was

[94] Jt. Exh. 15.
[95] Tr. at 71, 211–212.
[96] Tr. at 211–212, 214.
[97] GC Exh. 18.
[98] Jt. Exh. 16.
[99] *NLRB v. Katz*, 369 U.S. 736, 737 (1962).
[100] *Bottom Line*, supra at 374.
[101] *Stone Container*, 313 NLRB 336, 336 (1993).
[102] Id.
[103] *Sunoco, Inc.,* 349 NLRB 240, 244 (2007).
[104] *In re Caterpillar*, *Inc.*, 355 NLRB 521, 522 (2010), see also *Consolidated Communication Holding, Inc.*, 366 NLRB No. 152, slip op. at 4. See also *Atlanticare Management LLC*, 369 NLRB No. 28, slip op. at 1 (Feb. 11, 2020), quoting *United Rentals*, 349 NLRB 853, 854 (2007)("[f]actors relevant to determining a past practice include 'the number of years that the program has been in place, the regularity with which raises are granted, and whether the employer used fixed criteria to determine whether an employee will receive a raise, and the amount thereof.'"), see also *Windsor Redding Care Center, LLC*, 366 NLRB No. 127, slip op. at 4 (2018).
[105] R. Br. at 67-68.

not.

Accordingly, because awarding non-represented and/or Professional Unit employees an annual 2% COL increase was a past practice of Respondent's, which constituted a term/condition of employment, failing to bargain with the Union during contract negotiations *before* Los Robles unilaterally suspended the 2020 COL increase for Professional Unit members violated Sections 8(a)(1) and/or (5) of the Act.

4. Los Robles Did Not Violate the Act when it allegedly Bypassed the Union and Dealt Directly With Therapists about Weekend Schedules

Facts

Los Robles' therapy department is comprised of both occupational (OT) and physical therapists (PT), among others.[106] Therapy patients must receive therapy five days per week with no two consecutive days off.[107] Therefore, Los Robles must ensure that adequate occupational and physical therapy staff are available on the weekends to ensure patients receive the appropriate amount of therapy.[108] As a result, therapists are required to work weekend shifts.[109]

When therapists were initially hired, they were required to work a probationary period schedule Monday through Friday.[110] This probationary period gave Los Robles the chance to evaluate new therapists and make sure new hires had the working knowledge and skill to provide therapy to patients on the weekend when less staff were present.[111] While the probationary period was typically 90 days, the length varied – longer or shorter – depending on the therapist's ability to demonstrate the skills necessary to be moved to his or her weekend work schedule.[112]

At some point after the probationary period, all new therapist hires moved to a weekend shift.[113] It is undisputed that therapist applicants were told about the required weekend work both in the job descriptions from which they applied and during the application and interview process.[114]

Prior to 2019, most of Respondent's therapists worked only one weekend day per month.[115] However, from January 2019, therapists worked one of three schedules: (1) a Sunday through Thursday schedule; (2) a Tuesday through Saturday schedule; or (3) a schedule involving rotating weekends.[116]

In or around January 2019, Los Robles anticipated that its Acute Rehab Unit (ARU) would expand from a 20-bed unit to 40-bed unit.[117] As the unit began filling new beds, Hebert met generally with the OTs about the expansion of the ARU that would result in the need for more coverage.[118]

On May 6, 2019, Therapy Supervisor Kaitlin Miller (Miller) emailed staff about a "New OT Schedule." In the email, Miller stated that, as a result of the ARU expansion, Riverside needed to increase coverage on the weekends. All full-time therapists would have to work at least 2-4 weekend days and all per diem therapists would work 2 weekend days.[119]

However, the next day, May 7, 2019, Miller sent another email to the therapists thanking everyone for their feedback and informing them that she planned to "step back and relook" at any proposed schedule changes since she wanted to work with the therapy team and increase the "buy-in" from therapists on any schedule changes.[120] As such, therapists' schedues remained unchanged from their original January 2019 schedule.

On December 19, 2019, Local 121 was certified as the exclusive bargaining representative for the Professional Unit. Thus, all of the above emails between Hebert, Miller and the therapists occurred *prior to union certification.* In any event, bargaining for a first CBA began in late February 2020.

During the month between union certification and bargaining, on January 7, 2020, Hebert emailed therapists regarding their schedules and included a chart of the proposed schedule changes.[121] Hebert testified that she sought input from the therapists about any proposed schedule changes.

Moreover, Hebert explained that, because January 7 was the date that the therapy department usually posted its first schedule for the year, consequently, January 7, 2020, was the first schedule of the year *and* since the Union vote.[122]

Furthermore, according to Hebert, she emailed the therapists to allay confusion she received from therapists about their schedules and whether they could submit their PTO requests given the union certification and other talk about schedule changes.[123] As such, Hebert wanted to confirm that therapists' schedules "would be the same as it has always been" prior to May 6, 2019. I found Hebert's testimony credible in this regard.[124]

Hebert also emailed staff on January 10, 2020, regarding their concerns about per diem rates and weekend differentials therapists would receive for working weekend shifts. However, Hebert told staff she could not discuss per diem rates and weekend differentials as those topics were required to be negotiated with the Union.[125]

Also in early January 2020, Miller spoke with Chikuami

[106] Tr. at 500.
[107] Tr. at 507.
[108] Tr. at 506.
[109] Tr. at 507.
[110] Tr. at 504.
[111] Tr. at 504-505.
[112] Tr. at 505.
[113] Id.
[114] Tr. at 500-501. In April 2019, Los Robles hired Angela Jaeger (Jaeger) as an OT. She was informed of the weekend work requirement, to begin after her initial 90-day probationary period. Tr. at 502-505. In August 2019, Los Robles hired Chikuami as an OT. Chikuami admitted in his testimony that he received notice when he was hired and the job posting for the therapist position informed him that he might have to work weekends.
[115] Tr. at 507.
[116] Tr. at 503.
[117] Tr. at 506.
[118] Tr. at 529–530.
[119] See R Exh. 18.
[120] Tr. at 508-509, R. Exh. 19.
[121] Jt. Exh. 8, see also GC Exh. 11. The top chart was the proposed schedule change; the bottom chart was the current therapy schedule.
[122] Tr. at 509-510, Jt. Exh. 8.
[123] Tr. at 510.
[124] Id. See *Daikichi Sushi*, 335 NLRB 622, 622 (2001)(credibility findings need not be all-or-nothing propositions, and it is common for a fact finder to credit some, but not all, of a witness' testimony).
[125] GC Exh. 12.

about his schedule, notifying him that he would be transitioning from a Monday through Friday schedule (from his probationary period) to a Tuesday through Sunday schedule. Miller told Chikuami that there were two available rotating weekend schedules but that OT Jaeger, who was more senior than Chikuami, chose which of the two schedules she wanted, which meant that Chikuami received the remaining schedule. Chikuami's and Jaeger's new schedules went into effect on January 26, 2020.[126] Chikuami confirmed this series of events in his testimony.

OT Claudia Melgar (Melgar) began her employment in February 2020. As a new hire, she was subject to the probationary period schedule followed by a schedule that included weekend work.[127] On July 7, 2020, Clinical Manager Rehab Services Stefanie Brewer (Brewer) emailed Melgar to confirm that Melgar would be moving from her probationary schedule to a weekend schedule.[128] At this same time, another therapist resigned, thereby opening up a schedule different from what Melgar was going to be assigned. As a result, Melgar requested that she be allowed to take the resigned therapists' schedule which was granted.[129]

It is undisputed that the parties reached an agreement on a contract for the Professional Unit just prior to Christmas 2020. The CBA was ratified in early January 2021. Four articles were bargained over after the fact, with bargaining completed in March 2021.[130]

In making the above findings, I credited the Miller's emails at R. Exhs. 18 and 19 and Hebert's testimony concerning why she emailed therapy staff to advise them of potential schedule changes, as it is corroborated by the documentary evidence.[131] Although Union Representative Geran testified that, during bargaining with Respondent, no one from management ever discussed the OTs' weekend schedule outlined in GC Exh. 13 with the Union, I find that the schedule in GC Exh. 13 is consistent with and a memorialization of what Los Robles had previously told all new therapist hires: that after their probationary period, therapists would be required to work a weekend schedule. Geran admitted that, other than Jaeger and Chikuami's schedule change (due to them coming off their probationary period), her schedule remained the same.

Analysis

Counsel for the General Counsel alleges that Los Robles, through Hebert and Miller, directly communicated with its union-represented therapists and changed their weekend schedules without notifying and bargaining with the Union. I disagree.

Respondent violates Section 8(a)(5) of the Act by directly dealing with unionized employees when: (1) Los Robles communicates directly with union-represented employees, (2) for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining, and (3) such communication was made to the exclusion of the union.[132] However, counsel for the General Counsel cannot prove element two of their *prima facie* case.

First, the record evidence demonstrates that, based on the totality of the circumstances (e.g., the beginning of the new yearly schedule, the uncertainty of the potential expansion of the ARU unit at the same time that the new unit was certified), Hebert's January 7, 2020, email, which included a chart showing therapists' current schedule along with a proposed new schedule, sought "input" and "ideas" from the therapists about scheduling changes and not intended to directly communicate with the therapist without their union representatives. Indeed, Hebert's email also explained to therapists that, after receiving inquiries from therapists about being able to take time off, their schedules would remain unchanged which further supports that Hebert's purpose was to resolve confusion about schedules and not to directly deal with the therapists.

Similarly, Hebert's January 10, 2020, email clarified that she could have no discussions with the therapists about their per diem or weekend differential payments since both were subjects of bargaining between Los Robles and the Union.[133] There was no evidence that Hebert attempted to implement any changes to the therapists' terms and conditions of employment.

While counsel for the General Counsel argues that Los Robles adjusted OTs Chickuami's and Jaeger's schedules immediately after the Union election and failed to bargain with the Union over the changes, the evidence shows Respondent did not violate the Act.

Rather, the evidence reveals that Jaeger's and Chikuami's schedules were changed after they both completed their probationary periods in the normal course of new hire therapist's scheduling. Indeed, both therapists were told, and they both admitted in testimony that, upon their hire with Respondent, they would be given a weekend schedule. While the weekend schedule change occurred immediately after the therapists unionized, Respondent had not done anything different with Jaeger and Chikuami than they did with other therapists' schedules prior to unionization.

Moreover, the fact that Chikuami's and Jaeger's probationary periods lasted more than 90 days is irrelevant since the record shows that a newly hired therapist's probationary period varied, both in length and duration. What remained the same, however, is that a newly hired therapist would receive a weekend schedule after their probationary period ended.

Although Respondent was obliged to maintain the status quo in terms of the therapist's schedules while the parties negotiated a first CBA, the requisite status quo required Los Robles to continue applying its past scheduling practice; that being, scheduling new hires to a probationary schedule (Monday through Friday, no weekends) and, sometime thereafter, moving them to a weekend schedule.[134] I agree with Respondent

[126] Tr. at 130–132, 138-139, see also GC Exh. 13.
[127] Tr. at 515, 524.
[128] See Jt. Exh. 7.
[129] Tr. at 524-525, see Jt. Exh. 7.
[130] Tr. at 61.
[131] See GC Exhs. 11-12.
[132] *Southern California Gas Co*., 316 NLRB 979 (1995).
[133] *See Metalcraft of Mayville, Inc*., 367 NLRB No. 116, slip op at 30 (April 17, 2019) (finding respondent was not seeking to establish or change a term or condition of employment or undercut the union's role in bargaining, so no violation of the Act).
[134] *See Mail Contractors of Am, Inc.*, 346 NLRB 164, 175 (2005) citing *Consolidated Printers, Inc.*, 305 NLRB 1061, 1067 (1992); see also

that it maintained the status quo, i.e., its previous scheduling practice, as it related to Jaeger and Chikuami.

Lastly, I conclude that Respondent did not engage in direct dealing regarding OT Melgar's schedule. Rather, the evidence shows that Melgar began her employment in February 2020, and as a new hire, she worked a Monday through Friday schedule during her probationary period. Once Melgar completed her probationary period, as per Respondent's scheduling practice, Brewer emailed Melgar confirming that Melgar would move to a weekend schedule. Accordingly, I find Respondent committed no alleged direct dealing in violation of the Act.[135]

5. Los Robles Did Not Violate the Act when it allegedly Expanded the COE system

Counsel for the General Counsel avers that Respondent Los Robles failed to bargain with the Union when it unilaterally expanded its use of the Centralized Order Entry ("COE") in April and July 2020 after Los Robles' clinical pharmacists joined the Professional Unit. Respondent contends it did not violate Sections 8(a)(1) or (5) of the Act, because Los Robles expanded its COE well prior to when the Professional Unit certified. I agree with Respondent.

Facts

Based primarily on the testimony Los Robles' Pharmacy Department's Clinical Manager Daniel Liou (Liou), I find the following facts:

It is undisputed that Los Robles employed Clinical Pharmacists (staff pharmacists) who are members of the Professional Unit. Parisa Shahmohammadi (Shahmohammadi) was the Pharmacy Department's Operations Manager who, at all relevant times, also served as the acting Pharmacy Director.[136]

Staff pharmacists had three main duties: clinical, distributional, and order entry.[137] Order entry involved inputting the doctor's prescription orders into a computer system so the prescriptions would be on the patients' profiles and the nurses could administer the medication.[138]

Prior to 2014, staff pharmacists were primarily responsible for order entry and dispensing medication to patients.[139] However, sometime in 2014, Los Robles wanted their staff pharmacists to focus on the clinical functions of their jobs.[140]

As such, in 2017, Los Robles engaged third-party provider HealthTrust One (HealthTrust) to have outside pharmacists perform routine order entry duties (i.e, enter prescription medication orders) for certain medication orders – known as Centralized Order Entry (COE).[141] At the beginning, HealthTrust pharmacists (COE pharmacists) entered prescription medication orders for Los Robles' postsurgical recovery (PACU), labor and delivery, postpartum, medical, surgical, and orthopedics units.[142]

COE pharmacists did not belong to the Professional Unit, were not employees of Respondent and performed the COE work remotely.[143] COE pharmacists did not perform any clinical work or any medication distribution duties.[144] Rather, they only entered prescription medication orders.[145] COE pharmacists generally worked weekdays from 7:00 a.m. to 11:30 p.m. Pacific Time, and on weekends from 8:00 a.m. to 7:00 p.m. Pacific Time.[146]

It is undisputed that, since 2017, Respondent and HealthTrust held annual reviews of the COE program to determine whether the COE program would remain the same, or be expanded, modified, or reduced (i.e., increasing coverage hours, adding or subtracting units from coverage, etc.).[147] If changes were made to COE coverage, those modifications would be implemented the following year.[148]

In 2019, prior to the certification of the Professional Unit, Los Robles expanded the COE program twice. On/about June 24, 2019, Los Robles and HealthTrust held their annual review meeting to discuss additional COE coverage for Respondent.[149] As part of that meeting—and in response to concerns raised by the sole pharmacist working the graveyard shift about the volume of orders he was processing—Los Robles expanded COE coverage hours until 3 a.m. on weekdays and weekends.[150] However, *the decision to extend COE coverage hours were implemented a year later.*

In July and August 2019, again prior to the Professional Unit's certification, Los Robles held additional discussions with HealthTrust to expand COE to cover the Oncology, Master South, Rehabilitation Services, and Progressive Care departments.[151] However, per Los Robles' practice, *these expansions were implemented a year later—in July/August 2020.*

In December 2019, it is undisputed that Los Robles' professional staff voted to unionize and the Professional Unit was certified later that month. However, the COE expansion *decisions* occurred prior to the Unit certification but *would be implemented* in 2020—after the Unit's certification and bargaining began.

On April 8, 2020, per Respondent's June 24, 2019, expansion decision, Liou announced to staff pharmacists that Los Robles would be expanding COE coverage to additional areas of the hospital to include 2nd Floor Oncology, Master South Unit and Acute Rehab. Liou also distributed a Workflow chart which extended COE hours on weekdays from 7 a.m. to 3 a.m. (versus the previous 7 a.m. to 11:30 p.m. weekday hours) and weekends from 8 a.m. to 3 a.m. (versus the previous 8 a.m. to 7

SGS Control Servs., Inc., 334 NLRB 858 (2001) ("If the employer makes a decision to implement a change before becoming obligated to bargain with the union, it does not violate the Act by later…[implementing] that change.").

[135] Id.

[136] Tr. at 413, 471.

[137] Tr. at 374.

[138] Tr. at 374–375.

[139] Tr. at 417-418.

[140] Tr. at 414-418, 422, 456, see also R. Exh. 25.

[141] Tr. at 375, 422-423.

[142] Tr. at 377-378.

[143] Tr. at 374-375, 421-422.

[144] Tr. at 374, 395, 421.

[145] Tr. at 374.

[146] GC Exh. 7 at 4.

[147] Tr. at 423-424.

[148] Tr. at 424-425, 448.

[149] Tr. at 424-427, 429, see also R. Exh. 31.

[150] Tr. at 426-427.

[151] Tr. 428-431, 449-450, R. Exh. 32.

p.m. weekend hours).[152]

Although Staff Pharmacist Betty Wong-Kirk (Wong-Kirk), a member of the Professional Unit's bargaining team in 2020, testified that, when bargaining began in February 2020, the parties never discussed or bargained about the April 2020 expansion of the COE program, as stated above, it is undisputed that Respondent made its expansion decisions prior to the Unit's certification.[153]

On/about July 1, 2020, Liou announced the COE expansion to the Progressive Care and Emergency departments which had been decided by Los Robles a year prior.[154]

In August 2020, Liou provided a Workflow chart reflecting the additional departmental coverage outlined in the above paragraph.[155] In September 2020, Liou distributed another revised Workflow chart, showing the pharmacists' duties and COE coverage.[156] The September 2020 showed an Open Queue between 12:00 a.m. to 3:00 a.m. which, in essence, meant that COE pharmacists were available for an additional hour on Saturdays and provided overnight coverage for the sole pharmacist on the graveyard shift for all departmental areas.[157] Again, Los Robles' decision to implement this COE expansion occurred a year prior—during the July/August 2019 reviews, *prior to the certification of the Professional Unit.*

Nevertheless, after learning of the two COE expansions, Union Representative Corey Clark (Clark) emailed Labor Relations VP Berke demanding that Respondent cease and desist further expansion of COE coverage until it bargained with the Union.[158] Neither Berke, nor any other manager or supervisor, responded to Clark's email concerning COE coverage hours. Nor was COE coverage discussed during the July 2020 bargaining sessions.[159]

In making the above findings, I relied on Liou's testimony since he met with HealthLink's COE team during Respondent's annual COE reviews wherein he conveyed Los Robles' COE issues and concerns. I found Liou gave straightforward testimony, and he gave lengthy, explanatory answers to the questions asked of him which gave me the impression that he was committed to telling the truth. Even during counsel for the General Counsel's cross examination, Liou remained calm, was not evasive, and answered questions directly.

I also relied on documents found at GC Exhs. 7, 9 and 10, Jt. Exh. 27, and R. Exhs. 29, 31 and 32 which corroborated Liou's testimony. Although I found Wong-Kirk testified credibly, I note that, because Wong-Kirk is/was not a part of Los Robles management, she had no knowledge of or understanding about Respondent's COE expansion decisions or rationale that occurred prior to the certification of the Professional Unit. This made her testimony less than fully credible.

Analysis

I conclude that Respondent did not violate the Act in expanding its COE program, because the evidence demonstrates that the decision to expand COE coverage occurred prior to the certification of the Professional Unit thereby nullifying any obligation to bargain with the Union.

"If an employer makes a decision to implement a change before becoming obligated to bargain with the union, it does not violate the Act by its later implementation of that change."[160]

Here, the record clearly shows that, since 2017, Respondent held annual reviews to evaluate its use of COE, and consistent with those reviews, decided to expand COE coverage in 2018 and 2019 prior to the Professional Unit's certification. Although those decisions were *implemented* in 2020, Respondent had no obligation to bargain with the Union concerning the expansions since the expansion *decisions* predated the Unit's certification.[161]

Counsel for the General Counsel dismisses Respondent's argument that it was privileged to implement its COE expansion decision made prior to the Unit's certification, because, according to General Counsel, Respondent had not made a firm decision to expand its COE program.[162] However, the record clearly established that Respondent made a firm decision in April, July and August 2019 to expand its COE use accordingly. Although the decision makers for HealthLink and Los Robles failed to testify at trial as to when the decision was made, counsel for the General Counsel failed to call any witnesses to establish that date either. In any event, I credit Liou's testimony regarding Respondent's decision to expand the COE and the rationale behind it.

[152] Tr. at 378–381, 437-438, GC Exh. 7, at 2, 4, R. Exh. 28.

[153] Tr. at 381. Wong-Kirk further testified, and counsel for the General Counsel contends, that Respondent expanded its COE coverage in order to delay replacing four staff pharmacists who left Los Robles' employ in early/mid 2020. Tr. at 390-391. It is undisputed that, in July 2019, there were approximately 28 staff pharmacists employed by Respondent. Tr. at 446. During early and mid 2020, it is undisputed that three full time staff pharmacists left the Hospital: Marilyn Hill in March 2020, Michelle Lee in May 2020 and Cindy Liu in May 2020. One full-time pharmacist, Jorge Avila, transitioned from full-time to per diem status in February 2020. Tr. 447-448.

It is also undisputed that later in 2020, Los Robles re-hired three full-time pharmacists and transitioned one per diem pharmacist to full-time status. Tr. 389-390, 442. Liou testified that Respondent could not immediately replace the pharmacists due to the COVID pandemic and the reduction in the budget for hiring because of COVID. Nevertheless, the ratio of full-time, part-time and per-diem pharmacists between 2019 and 2021 remained the same. Tr. at 397, 446-447.

Lastly, it is undisputed that no staff pharmacist position was eliminated, no pharmacists were laid off, had their hours reduced or have been denied overtime due to Respondent's use or expansion of its COE program. Tr. at 433, 441-442.

[154] Tr. at 383–385, GC Exh. 9.

[155] Tr. at 386-387, see GC Exh. 10.

[156] Tr. at 439, see also R. Exh. 29.

[157] Tr. at 439-441, R. Exh. 29.

[158] Tr. at 168, see Jt. Exh. 27 at 5.

[159] Tr. at 169, 173–174.

[160] *Mail Contractors of Am., Inc.*, 346 NLRB 164, 175 (2005), citing *Consolidated Printers, Inc.*, 305 NLRB 1061, 1067 (1992), see also *SGS Control Servs., Inc.*, 334 NLRB 858 (2001) and *MGM Grand*, 2016 NLRB LEXIS 467, at *15 (2016) ("To implement such a change, an employer is not required, before the election, to inform the union or employees of its plans").

[161] *Mail Contractors of Am., Inc.*, supra, *MGM Grand*, supra.

[162] See *Starcraft Aerospace, Inc.*, 346 NLRB 1228 (2006) (Board dismissed the Section 8(a)(5) allegation because the hearing record showed that "a firm decision … was made prior to the December 11 election.").

Counsel for the General Counsel further argues that, in expanding the COE program, Respondent unlawfully transferred bargaining unit work (i.e, order entry duties), a mandatory subject of bargaining, from staff pharmacists to third party COE pharmacists without first bargaining with the Union.[163] The problem with counsel's argument, however, is that Respondent's decision to "transfer" pharmacists' order entry duties occurred prior to the establishment of the bargaining unit. Thus, the Board's decision *Outboard* and *Pittsburgh Medical*, cited by General Counsel, are inapplicable since both involved the employer's unilateral decision/change in work duties *when* the bargaining unit had already been established.

Here, COE pharmacists had always performed order entry duties, and the evidence reveals that Respondent decided to expand COE use *prior to* the certification of the bargaining unit itself. As such, Respondent could not have transferred out bargaining unit work to the detriment of the bargaining unit when the bargaining unit did not exist.[164]

In sum, I find Respondent committed no Sections 8(a)(1) or (5) violations in expanding its COE program.

6. Los Robles Did Not Violate the Act when it allegedly Failed/Refused to Provide Information Requested by Union regarding the Expanded COE system

Facts

In addition to demanding that Respondent cease and desist its use of the expanded COE program, on July 3, 2020, Union Representative Clark requested information from Labor Relations VP Berke about Respondent's use/expansion of the COE program.[165] Specifically, Clark asked for:

> 1. Policies regarding COE;
> 2. Coverage hours of COE from January 2020 through July 2020;
> 3. Any communications related to the expansion of COE hours or responsibilities; and
> 4. Any medication error reports related to COE coverage from January 2020 through July 2020.[166]

Clark did not initially hear back from Berke. Meanwhile, Berke asked Clinical Manager/Acting Pharmacy Director Shahmohammadi how much time it would take to gather any documents responsive to Clark's request and whether Respondent required an employee with specialized COE knowledge to identify/retrieve the requested information.[167]

Shahmohammadi subsequently told Berke that it would take approximately 81 work hours and a person with specialized COE knowledge to identify and gather the responsive information.[168] Specifically, Shahmohammadi told Berke (her answers underlined):

> 1. Policies regarding COE; 1 hr, requires someone with specialized training;
> 2. Coverage hours of COE from January 2020 through July 2020: approximately 40 hours
> by a specialized person;
> 3. Any communications related to expansion of COE hours or responsibilities: at least 10
> hrs, specialized person – need to access all email communication sent on this topic; and
> 4. Any medication error reports related to COE coverage from January 2020 through July
> 2020: at least 30 hrs, specialized person (Med safety Pharmacist or risk management).[169]

Clark followed up with Berke about her information request on July 20, 2020. By this time, Berke learned all that was necessary to process/retrieve the requested information and determined that it would be administratively burdersome to shoulder the hourly costs of having a specialized employee versus a clerk process and retrieve the requested information.

As such, on July 21, 2020, Berke conveyed to Clark what he learned from Shahmohammadi, told Clark that he believed compliance with her request would be burdensome and asked Clark whether the parties could bargain over the costs associated with producing the requested information.[170]

On July 30, 2020, Clark responded to Berke, stating she believed Respondent's time estimates were "excessive" and, because the Union had "never paid for policies in the past," it should not be expected to do so now.[171] However, when asked on cross examination whether she had direct knowledge of how to locate, collect and/or retrieve the requested information, Clark was hesitant and ultimately evaded directly answering Respondent counsel's questions.

Ultimately, I find Clark had no direct knowledge of where the information she requested was located or how the information was collected, stored or could be retrieved. Rather, I conclude that Clark learned what she thought she knew about how the COE documents were stored/retrieved from Staff Pharmacist Wong-Kirk since Clark testified to such. It is undisputed that Wong-Kirk had no direct knowledge of where the responsive COE documents were located or how the requested information was stored/collected or could be retrieved.

In any event, in her July 30 response to Berke, Clark clarified the documents the Union sought in an attempt to reduce the

[163] See *Outboard Marine Corp.*, 307 NLRB 1333, 1339 (1992) (unilaterally imposed changes unlawful where the change(s) are "material, substantial, and … significant," and have a "real impact" upon or are a "significant detriment to" the employees or their working conditions), *Pittsburgh Medical Center*, 325 NLRB 443, 443–444 (1998), *enforced mem.* 182 F.3d 904 (3d Cir. 1999)(transferring bargaining unit work is a mandatory subject of bargaining where the employer must bargain with the Union prior to transferring the work out of the unit).

[164] *See Mail Contractors of Am, Inc.*, 346 NLRB at 175, citing *Consolidated Printers, Inc.*, 305 NLRB 1061, 1067 (1992); see also *SGS Control Servs., Inc.*, 334 NLRB 858 (2001) ("If the employer makes a decision to implement a change before becoming obligated to bargain with the union, it does not violate the Act by later [implementing] that change.").

[165] Jt. Exh. 27.

[166] Id.

[167] Tr. at 471–473, 593–594, Jt. Exh. 27, at 3, R. Exh. 24.

[168] R. Exh. 24.

[169] Tr. at 472-477, R. Exh. 24.

[170] Tr. at 594-595, Jt. Exh. 27.

[171] Tr. at 17, Jt. Exh. 27.

burden of collecting the information. However, Berke interpreted Clark's clarification that she was basically asking for the same information that she had previously requested. Nevertheless, Clark threatened to file an ULP charge if Respondent failed to provide the requested information.[172]

Since the parties disagreed as to the time estimates and manhours necessary to produce the requested documents, Berke gave Clark a more detailed explanation of the exact time estimates and manhour requirements he received from Shahmohammadi hoping Clark would understand the burdensomeness of the Union's request.[173] Berke further offered to provide the COE policies to the Union at no cost if the Union agreed to bargain over the cost of the other requests.[174] Lastly, Berke requested that Clark explain the relevance of the information sought in her fourth request regarding the med error reports.[175]

Clark never responded to Berke's bargaining offer. Rather, on August 27, 2020, Clark recounted that the Union had never before paid for policies and provided general information as to the relevancy of the fourth category of information.[176]

Although Berke again explained to Clark that the documentation sought by the Union was not "easily accessible," Clark never responded to Berke's assessibility assertion and no further discussions were held on the matter. Thereafter, the Union filed this ULP charge.

In making the above findings, I credit Berke and Shahmohammadi's testimony as it was corroborated by the documentary evidence at Jt. Exh. 27 and R. Exh. 24. Shahmohammadi gave straightforward, clear and direct answers to the questions asked of her which gave me the impression that she was committed to telling the truth. Also, I find that Shahmohammadi, as Clinical Operations Manager, was in the best position to know what was necessary to identify and retrieve the requested documents.

In contrast, I found Clark less than fully credible as she hedged in her testimony about her knowledge of how to identify/retrieve the requested documents. Rather, I found that Clark based her knowledge about how to identify/retrieve the COE documents on unreliable, second-hand information (i.e., Staff Pharmacist Wong-Kirk).

Analysis

It is an unfair labor practice, under Section 8(a)(5) of the Act, for an employer "to refuse to bargain collectively with the representatives of its employees."[177] Similarly, the employer's duty to bargain includes a duty to provide information needed by the union in carrying out its statutory duties.[178] Information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative.[179] However, information concerning extra unit employees is not presumptively relevant; rather, relevance must be shown.[180]

The burden is "not exceptionally heavy" to show relevance regarding information on nonunit matters.[181] A broad, discovery-type of standard is used in determining relevance in information requests.[182] As such, the trier of fact must determine whether the Union's request for information is of "probable" or "potential" relevance.[183]

In this case, the Union requests information about Respondent's COE use; that is, its use of third-party pharmacists to perform order entry work, and documents showing how, when and why Respondent expanded the program. These requests amount to an effort to learn the nature, extent, cost, and duration of work being performed by non-employee contractors. As such, as nonunit information, the relevance of the request must be shown.[184]

Thus, to satisfy their burden, counsel for the General Counsel must demonstrate that: (1) the union demonstrated relevance of the nonunit information, or (2) the relevance of the information should have been apparent to Respondent under the circumstances.[185]

Here, I find that Union representative Clark's information requests are relevant because the Union was trying to determine the extent to which expanding the COE program will affect the work of unionized staff pharmacists. In addition, the Union received a complaint from Pharmacist Wong-Kirk about how COE pharmacists were handling increasing more order entry work (thereby taking work from staff pharmacists) which made the Union's information requests relevant to resolving Wong-Kirk's concerns and understanding when, how and why Los Robles expanded the COE program.

Respondent does not necessarily dispute that the requested documents are relevant. Rather, Los Robles contends that the production of the requested information was overly burdensome. In order to prevail on this defense, Respondent must present evidence to the Union of its burdensomeness contention.[186] A blanket assertion is insufficient.

In addition to proving its burdensomeness claim, Respondent must also seek an accommodation with the Union.[187] Specifically, if Respondent avers that production is overly burdensome due to cost, then "… the parties must bargain in good faith as to who shall bear such costs, and, if no agreement can be

[172] Tr. at 171, 597, 601, Jt. Exh. 27.

[173] Tr. at 480, 601-602, Jt. Exh. 27, R. Exh. 24.

[174] Jt. Exh. 27.

[175] Id.

[176] Tr. 170-173, 194, GC Exh. 6.

[177] 29 U.S.C. § 158(a)(5).

[178] *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011), see also *Detroit Edison Co. v. NLRB,* 440 U.S. 301, 303 (1979), *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-153 (1956).

[179] See *Southern California Gas Co.*, 344 NLRB 231, 235 (2005).

[180] *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994), *Pennsylvania Power Co.,* 301 NLRB 1104, 1105 (1991).

[181] *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), enfd. 715 F.2d 473 (9th Cir. 1983), see also *Shoppers Food Warehouse*, 315 NLRB at 259.

[182] *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006).

[183] *Transport of New Jersey,* 233 NLRB 694, 694 (1977) citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1105 (1991) ("the information need not be dispositive of the issue between the parties but must merely have some bearing on it.").

[184] *Disneyland Park,* 350 NLRB 1256, 1258 (2007).

[185] Id.

[186] *Mission Foods*, 345 NLRB 788, 789 (2005).

[187] *Goodyear Atomic Corp.*, 266 NLRB 890, 891 (1993).

reached, the Union is entitled in any event to access to records from which it can reasonably compile the information."[188]

In evaluating Respondent's requested accommodation, the Board considers the complexity and extent of the information requested, and the difficulty retrieving the information, in evaluating the promptness of response required of the employer.[189]

In this case, I find Respondent met its burden as well. The record reveals how Respondent detailed to the Union (in time and manhours) how burdensome it would be to identify/produce the four categories of responsive documents. Specifically, Clinical Manager Shahmohammadi explained what would be required to identify, retrieve and produce each of the Union's requested documents. Although counsel for the General Counsel and Charging Party contended that Respondent's time estimates were excessive, neither counsel nor the Union were in the best position to determine this. Nor did they call any other management witness who was in a position to dispute Shahmohammadi's estimates. Rather, I credited Shahmohammadi's testimony on the time estimates and the manpower needed to comply with the Union's document request.

In any event, the evidence demonstrates that Berke asked the Union to accommodate Los Robles by bargaining over the cost of document production, to which the Union refused and the parties' discussion on the issue resulted in impasse. While counsel for the General Counsel argues that the Union tried to clarify its document request in an effort to reduce the cost of production, the record shows that Union's clarification did not reduce the burden of producing the requested documents. As such, I find that, based on the complexity and extent of the information requested, and the difficulty identifying and retrieving the information, Respondent established its burdensomeness defense under the Act. Accordingly, I conclude that Los Robles did not violate the Act when it allegedly failed to provide the Union with information regarding expanding the COE system.

7. Los Robles Did Not Violate the Act when it allegedly Failed/Refused to Provide Information Requested by Union regarding discipline issued unit member Danica Dubaich

Facts

It is undisputed that, on February 20, 2020, Los Robles issued RN/union member Danica Dubaich (Dubaich) a Final Written Warning because she deserted a patient on an operating table.[190] Apparently, while in the surgical suite with a patient, Dubaich was looking for a supply item. Dr. Supple, a physician, expressed frustration with Dubaich's work performance but he did not express his frustration toward Dubaich directly. Nevertheless, Dubaich overheard Dr. Supple's comments, became extremely upset and left the operating room to complain about him, thereby abandoning the patient. Dubaich filed a grievance concerning Dr. Supple's comments and her written warning.[191]

On/about June 3, 2020, Union Representative Clark filed an information request to Berke to further investigate Dubaich's grievance.[192] Clark requested the following information:

> 1. Provide any RM module submitted by Danica [Dubaich] in relation to staff behavior;
> 2. Provide any emails sent to management by nurses regarding Dr. Supple's behavior; and
> 3. Provide any RM modules submitted by any staff regarding Dr. Supple's behavior.[193]

Clark did not receive a response from Berke.

On June 24, 2020, Clark followed up with Berke on her June 3 information request. Upon receipt, Berke reached out to then Director of Risk Management Gail Kent (Kent) and asked whether Los Robles could identify, retrieve and provide the requested information from the RM system.[194] Kent informed Berke that the RM system could not be searched by name but by incident number and that number would determine whether the information was releaseable.[195]

Berke relayed to Clark what Kent told him. Specifically, Berke told Clark that, regarding the first request, Los Robles' RM system could not search by submitter-name, i.e., Dubaich's name, to see if she submitted any RM events about Dr. Supple.[196] Instead, Berke asked Clark to provide the incident report identification numbers associated with the events at issue so that he could determine: (1) whether a report existed and (2) whether the record contained any protected health information, which would preclude its production.[197]

Regarding the second and third requests, since Berke believed those requests were irrelevant because the Union sought

[188] *Food Empl. Council*, 197 NLRB 651 (1972), see also *Safeway Stores, Inc.*, 252 NLRB 1323, 1324 (1980) quoting *Food Empl. Council*, 197 NLRB at 651 ("the employer has an affirmative duty to inform the Union that it believes the information request is overbroad and burdensome, at which point the parties should then bargain as to how the costs should be allocated.").

[189] *West Penn Power Co.*, 339 NLRB 585, 587 (2003), *Samaritan Medical Center*, 319 NLRB 392, 398 (1995).

[190] See GC Exh. 3.

[191] GC Exh. 2. Dubaich had previously complained about Dr. Supple in the past. Tr. at 158. Dr. Supple's first name was not listed in the record.

[192] Tr. at 158, see also Jt. Exh. 25, at 4.

[193] Id. The RM system is an electronic risk management system that allows Hospital employees to enter "events" into the system. Tr. at 627.

[194] Director of Patient Safety Kathleen Griffith (Griffith) testified that, after an event is logged into the system, only she, the Risk Management Coordinator (Kent), and individuals whom the Director or Coordinator grant access can access the RM system and review an event. Tr. at 628.

[195] Griffith also testified that events in the RM system could not be searched by the submitter's name or by event name. While someone could search events by the date or location, Griffith explained that events were not routinely entered by date or location. According to Griffith, even if someone retrieved a document, the system was unable to search an event by someone's name (i.e., could not search "Dubaich" or "Supple") within the document. Tr. 626–634. I found Griffith's testimony credible on this point because, as a management official responsible for the RM system, she is in the best position to know who can access the RM system and how to and whether someone can identify/retrieve the requisite events from the system.

[196] Tr. at 590–591, 616, Jt. Exh. 25.

[197] Tr. at 591, Jt. Exh. 25.

information about individuals outside of the bargaining unit and unrelated to Dubaich's discipline, he asked Clark to show how the requested information was relevant to Dubaich's grievance.[198]

Although Clark disagreed with Berke that the system could not be searched by name and questioned why Los Robles could not provide the requested information, I credit Kent's and Director of Patient Safety Kathleen Griffith's (Griffith) testimony on who could access the RM and how someone could search, identify and retrieve event information.[199]

In any event, Clark also told Berke that the information requested was relevant: (1) to support Dr. Supple's alleged impropriate conduct toward Dubaich; (2) because Clark received information that Dr. Supple previously engaged in inappropriate conduct similar to what Dubaich alleged, and (3) to determine whether Dr. Supple's behavior met with Respondent's behavior standards. Id.

In response, Berke reiterated to Clark that Los Robles could not search for the requisite documents by name or the date of the event and that he failed to see the relevance for requests two and three.[200]

On August 10, 2020, after Dubaich was scheduled to return from medical leave, Clark emailed Berke, claiming that Dubaich was disciplined after being "verbally abused" by Dr. Supple, and as such, the previous information requests were relevant to demonstrate Dr. Supple's character.[201] This rationale was different than how Clark previously described the relevance of the requested documents. In any event, Clark threatened to file an ULP charge if the requested information was not provided.[202] In response, Berke provided a date and time that Respondent was available to hear the grievance.

During Dubaich's grievance meeting, Clark again reiterated her position about the relevance of the information sought about Dr. Supple and why she believed the RM system could be searched via submitter name.[203] Berke again disputed that the information sought about Dr. Supple was relevant and that the RM system could not be searched by submitter name. To date, the requested information regarding Dubaich's grievance has not been provided.

Analysis

As stated in the Analysis section for Section 6 above, information concerning wages, hours, and other terms and conditions of employment for unit employees is presumptively relevant to the union's role as exclusive collective-bargaining representative.[204] I find that the Union's first information request is relevant since it involved terms and conditions of employment for RN Dubaich, a union member. Although the information in the Union's second and third requests about Dr. Supple technically involve non-union employees, I find that the information is so closely related to Dubaich's grievance (i.e., other employees who may have complained about Dr. Supple's inappropriate comments/behavior toward nurses/staff), that, even if the requests are not presumptively relevant, the Union demonstrated the relevance of the requests to Los Robles.

Once relevance is established, Respondent bears the burden of providing an adequate explanation or valid defense for its failure to provide the requested information in a timely manner.[205] Here, Respondent has met its burden.

Specifically, the evidence shows that Los Robles repeatedly told the Union it needed the right search terms (i.e., the incident number) in order to identify and retrieve the requested RM information. Despite Clark's insistence that Respondent could locate the information by name, the record clearly disputes Clark's assertions.

In any event, the Union never gave Los Robles the information it needed to be able to search the RM system and locate the requested documents, and as such, Respondent was unable to comply with the Union's information requests. As such, I find that Respondent proffered a valid defense to its failure to provide the requested information, and accordingly, did not violate the Act as alleged.

Conclusions of Law

1. Respondents West Hills Hospital & Medical Center, Riverside Community Hospital, and Los Robles Hospital & Medical Center are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act and are health care institutions within the meaning of Section 2(14) of the Act.

2. Respondents West Hills Hospital & Medical Center, Riverside Community Hospital, and Los Robles Hospital & Medical Center violated Sections 8(a)(1) and/or (5) of the Act when they unilaterally implemented a Pandemic Pay Program without first notifying and bargaining with the Union.

3. Respondent Riverside Community Hospital violated Sections 8(a)(1) and/or (5) the Act when it unilaterally implemented a new N95 usage and storage policy and unilaterally centralized its Personal Protective Equipment without first notifying and bargaining with the Union.

4. Respondent Los Robles Hospital & Medical Center violated Sections 8(a)(1) and/or (5) of the Act when it unilaterally rescinded the Pandemic Pay Program for employees of the Professional Unit without first notifying and bargaining with the Union.

5. Respondent Los Robles Hospital & Medical Center violated Section 8(a)(1) of the Act by making coercive/threatening statements to its therapists to dissuade them from organizing.

6. Respondent Los Robles Hospital & Medical Center violated Sections 8(a)(1) and/or (5) of the Act when it withheld the 2020 annual cost of living increase from employees of the Pro-

[198] Tr. at 591-592, Jt. Exh. 25.

[199] In fact, Clark admitted, on cross examination, that she had no knowledge of how the RM module system is searched, how modules could be collected or that she ever tried to search the RM system since she never had access to it. Tr. at 182-184. Thus, I do not find Clark's testimony concerning Los Robles' ability to search the RM modules credible.

[200] Tr. at 592-594, Jt. Exh. 25. There was a two-month delay in further communications between Clark and Berke because Dubaich was on medical leave.

[201] Jt. Exh. 25.

[202] Tr. at 162-163, Jt. Exh. 25.

[203] Tr. at 163-164.

[204] See *Southern California Gas Co.*, 344 NLRB 231, 235 (2005).

[205] *Coca-Cola Bottling Co.*, 311 NLRB 424, 425 (1993).

fessional Unit and failed to notify and bargain with the Union about withholding the 2020 annual cost of living increase from the Professional Unit.

7. By engaging in the conduct described above, Respondents have engaged in unfair labor practices affecting commerce.

8. Respondents did not otherwise engage in any other unfair labor practices alleged in the second consolidated complaint in violation of the Act.

Remedy

As a remedy for these unfair labor practices, Respondents are ordered to cease and desist from their unlawful conduct and take certain affirmative action designed to effectuate the purposes of the Act. Specifically, Respondents shall bargain with the Union as the exclusive collective-bargaining representative for the RN Units and Professional Unit regarding the unit employees' terms and conditions of employment that were unilaterally changed and/or implemented. Respondents shall, on request by the Union, rescind the changes that affected the RN Units and the Professional Unit employees' terms and conditions of employment that were unilaterally implemented.

Respondent Los Robles must cease and desist from making coercive/threatening statements to its therapists to dissuade them from organizing or otherwise exercising their Section 7 rights.

Respondent Los Robles also shall make each individual Professional Unit employee whole for any loss of earnings and other benefits suffered as a result of its rescinding the Pandemic Pay Program. The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent also shall be ordered to compensate each individual Professional Unit employee for the adverse tax consequences, if any, of receiving a lump sum award in accordance with *Don Chavas, LLLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). In accordance with *AdvoServ of New Jersey, Inc*., 363 NLRB 1324 (2016), Respondent is also ordered to file with the Regional Director for Region 31 within 21 days of the date the amount of backpay is fixed either by agreement or Board order, a report allocating backpay to the appropriate calendar year for each. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. In accordance with *Cascades Containerboard Packing-Niagara*, 370 NLRB No. 76 (2021), as modified 371 NLRB No. 25 (2021), Respondent also will be ordered to file with the Regional Director, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, copies of each individual's corresponding W-2 forms reflecting the backpay awards.

Respondent Los Robles must also make each individual Professional Unit employee whole for any loss of earnings and other benefits suffered as a result of its withholding the 2020 annual cost of living increase from employees of the the Professional Unit. The make-whole remedy for each individual Professional Unit employee shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Don Chavas, LLLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), Respondent also shall be ordered to compensate each individual Professional Unit employee for the adverse tax consequences, if any, of receiving a lump sum award. In accordance with *AdvoServ of New Jersey, Inc*., 363 NLRB 1324 (2016), Respondent is further ordered to file with the Regional Director for Region 31 within 21 days of the date the amount of backpay is fixed either by agreement or Board order, a report allocating backpay to the appropriate calendar year for each. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner. In accordance with *Cascades Containerboard Packing-Niagara*, 370 NLRB No. 76 (2021), as modified 371 NLRB No. 25 (2021), Respondent also will be ordered to file with the Regional Director, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, copies of each individual's corresponding W-2 forms reflecting the backpay awards.

Lastly, counsel for the General Counsel requested and I order that Respondent Los Robles schedule a meeting to ensure the widest possible attendance and have a Board agent read aloud the notice to all employees in the Professional Unit during worktime in the presence of Los Robles' supervisors and agents identified in this Decision. I conclude that the General Counsel has established that this remedy is required to enable employees to exercise their Section 7 rights free from coercion.[206] The notice will be read in both English and Spanish or read in English and translated into Spanish by a Spanish interpreter. Respondent also must allow a Union representative to be present at the date, time and location when the Board Agent reads the Notice in order that employees will be assured that they can learn about Union representation and support the Union if they choose.[207]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[208]

ORDER

Respondents West Hills Hospital & Medical Center, Riverside Community Hospital and Los Robles Hospital & Medical Center, its officers, agents, successors, assigns and representatives, shall:

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[206] See *United States Service Industries*, 319 NLRB 231, 232 (1995), citing *J.P. Stevens & Co. v. NLRB*, 417 F.2d. 533, 540 (1969)(public notice reading is an effective reassurance to employees that they are free to exercise their Section 7 rights).

[207] Id. (Board ordered notice reading in presence of union due to employer's "history of pervasive illegal conduct" during organizing campaigns), enfd., 107 F.3d 923 (D.C. Cir. 1997).

[208] 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.

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees by unilaterally implementing their Pandemic Pay Program without first notifying the Union and giving the Union an opportunity to bargain.

(b) 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.

Respondent Riverside Community Hospital, its officers, agents, successors, assigns and representatives, shall:

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees by unilaterally implementing a new N95 usage and storage policy and unilaterally centralizing its Personal Protective Equipment without first notifying the Union and giving the Union an opportunity to bargain.

(b) 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.

Respondent Los Robles Hospital & Medical Center, its officers, agents, successors, assigns and representatives, shall:

1. Cease and desist from

(a) Changing the terms and conditions of employment of its unit employees by unilaterally rescinding the Pandemic Pay Program for members of the Professional Unit without first notifying the Union and giving the Union an opportunity to bargain.

(b) Making coercive/threatening statements to its therapists to dissuade them from organizing.

(c) Withholding and changing the terms and conditions of employment of its Professional Unit employees by withholding a 2020 annual cost of living increase from the Professional Unit without first notifying the Union and giving the Union an opportunity to bargain.

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

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

(a) On request by the Union, bargain with the Union as the exclusive collective-bargaining representative for the RN Units and Professional Unit regarding the unit employees' terms and conditions of employment that were unilaterally implemented.

(b) On request by the Union, rescind the changes that affected the RN Units and the Professional Unit employees' terms and conditions of employment that were unilaterally implemented.

(c) Make any/all Professional Unit employees whole for any loss of earnings and other benefits suffered as a result of Respondent Los Robles rescinding the Pandemic Pay Program, in the manner set forth in the Remedy section of this Decision, compensate all unit employees for any adverse income tax consequences of receiving a lump- sum backpay award, and file with the Regional Director for Region 31, within 21 days, a report allocating the backpay award to the appropriate calendar years for each employee.

(d) Make any/all Professional Unit employees whole for any loss of earnings and other benefits suffered as a result of Respondent Los Robles withholding the 2020 annual cost of living increase from employees of the Professional Unit, in the manner set forth in the Remedy section of this Decision, compensate all unit employees for any adverse income tax consequences of receiving a lump- sum backpay award, and file with the Regional Director for Region 31, within 21 days, a report allocating the backpay award to the appropriate calendar years for each employee.

(e) Within 14 days after service by the Region, post at Respondent hospitals in West Hills, Riverside and Los Robles, California, copies of the attached notices for the requisite hospital marked "Appendix"[209] in both English and Spanish. If the locations involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the locations involved in these proceedings are closed due to the COVID–19 pandemic, the notices must be posted within 14 days after the location reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if customarily communicates with its employees by electronic means. Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by Respondents' authorized representative, shall be posted by Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees/members 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 Respondents customarily communicate with their employees/members by such means. Reasonable steps shall be taken by Respondents 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(s) has/have gone out of business or closed their facility/facilities involved in these proceedings, Respondent(s) shall duplicate and mail, at its own expense, a copy of the notice to all current and former members of the Union and current and former employees employed by Respondents at any time since January 1, 2017.

(f) Within 14 days after service by the Region, Respondent Los Robles also must hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which time the attached notice for it is to be read to all employees by a Board agent in the presence of Respondent Los Robles' supervisors and agents listed in this Decision. The notice will be read in both English and Spanish or read in English and translated into Spanish. A representative of the Union must be present during this meeting.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a re-

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

sponsible official on a form provided by the Region attesting to the steps that Respondents have taken to comply.

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

Dated, Washington, D.C., July 8, 2022.

APPENDIX A

NOTICE TO MEMBERS AND 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 unilaterally implement a Pandemic or any other type of pay program without first notifying and bargaining with the Union.

WE WILL NOT unilaterally change your terms and conditions of employment without first notifying the Union and giving the Union an opportunity to bargain.

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

WE WILL rescind, upon request of the Union, the Pandemic Pay Program, that we unilaterally implemented before notifying and bargaining with the Union.

WEST HILLS HOSPITAL & MEDICAL CENTER

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-261001 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.

APPENDIX B

NOTICE TO MEMBERS AND 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 unilaterally implement a Pandemic or any other type of pay program without first notifying and bargaining with the Union.

WE WILL NOT unilaterally implement any new policies involving Personal Protective Equipment or unilaterally decide to centralize that equipment without first notifying and bargaining with the Union.

WE WILL NOT unilaterally change your terms and conditions of employment without first notifying the Union and giving the Union an opportunity to bargain.

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

WE WILL rescind, upon request of the Union, the Pandemic Pay Program, that we unilaterally implemented before notifying and bargaining with the Union.

RIVERSIDE COMMUNITY HOSPITAL

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-261001 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.

APPENDIX C

NOTICE TO MEMBERS AND 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 unilaterally implement a Pandemic or any other type of pay program without first notifying and bargaining with the Union.

WE WILL NOT unilaterally change your terms and conditions of employment without first notifying the Union and giving the Union an opportunity to bargain.

WE WILL NOT expressly or impliedly, make any threatening or coercive statements to you to dissuade you from organizing or engaging in any protected concerted activities.

WE WILL NOT unilaterally rescind a Pandemic or any other type of pay program without first notifying and bargaining with the Union.

WE WILL NOT unilaterally withhold any annual cost-of-living increases from you and/or fail to notify and bargain with the Union about withholding any cost-of-living increases from you.

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

WE WILL rescind, upon request of the Union, the Pandemic Pay Program, that we unilaterally implemented before notifying and bargaining with the Union.

WE WILL make any/all Professional Unit employees whole for any loss of earnings and other benefits suffered as a result of our decision to unilaterally rescind the Pandemic Pay Program.

WE WILL make any/all Professional Unit employees whole for any loss of earnings and other benefits suffered as a result of our decision to unilaterally withhold the 2020 annual cost of living increase from Professional Unit employees.

WE WILL compensate any/all Professional Unit employees for the adverse tax consequences, if any, of receiving lump-sum awards as a result of our unilaterally rescinding the Pandemic Pay Program and/or our unilaterally withholding the 2020 annual cost-of-living increase from you.

WE WILL file with the Regional Director for Region 31, within 21 days, a report allocating the backpay award to the appropriate calendar years for each Professional Unit employee.

LOS ROBLES HOSPITAL & MEDICAL CENTER

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-261001 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.