Longmont United Hospital and Centura Health *and* National Nurses Organizing Committee/National Nurses United (NNOC/NNU). Case 27–CA–291664

September 18, 2024

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS PROUTY AND WILCOX

On March 28, 2023, Administrative Law Judge John T. Giannopoulos issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and Charging Party filed answering briefs, and the Respondent filed a consolidated reply brief. In addition, the General Counsel and Charging Party filed cross-exceptions with supporting briefs. The Respondent filed a consolidated answering brief, and the General Counsel and Charging Party filed reply briefs.

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 and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as further explained below, to amend the remedy, and to adopt the recommended Order as modified and set forth in full below.[2]

I.

The facts are more fully set forth in the judge's decision. As relevant here, a bargaining unit of registered nurses at Longmont United Hospital (the Longmont nurses) voted for representation by National Nurses Organizing Committee/National Nurses United (the Union) in July 2021. During the period that the Respondent was contesting the results of the election, it announced and implemented four wage and benefit increases for all employees in the Centura Health network of 19 hospitals, except for the Longmont nurses.[3]

The first three wage and benefit increases were announced and implemented on September 27, 2021, November 5, 2021, and March 2, 2022, while the Respondent was challenging the results of the election before the Board. On April 5, 2022, the Regional Director for Region 27 issued a Certification of Representation certifying the Union as the collective-bargaining representative of the unit of Longmont nurses. The fourth wage and benefit increase occurred on October 11, 2022, while the Respondent was in the process of challenging the Board's certification of the Union before the United States Court of Appeals for the District of Columbia Circuit, which ultimately found that the Respondent was unlawfully refusing to bargain with the Union.[4]

The wage and benefit increases were announced in memoranda from the senior leadership of Centura Health that were emailed to all employees across the multihospital network. In total, the Respondent sent four companywide notices announcing wage and benefit increases. Each announcement stated that the Longmont nurses were excluded from the increases, citing the Respondent's purported legal obligation to maintain the status quo with respect to the nurses' terms and conditions of employment while the representation question was pending.[5]

The judge found that the Respondent violated Section 8(a)(3) of the National Labor Relations Act by discriminatorily excluding the Longmont nurses from the wage and benefit increases because they were participating in the NLRB election process, violated Section 8(a)(1) of the Act by its corporatewide announcements of the discriminatory exclusions, and violated Section 8(a)(5) of the Act in connection with the October 11, 2022 wage increase.[6] The Respondent excepts to the judge's find-

[1] The Respondent 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.

[2] We shall modify the judge's recommended Order and substitute a new notice to conform to the amended remedy and the Board's standard remedial language.

[3] During the hearing, the parties stipulated that, for purposes of this case, Longmont and Centura are a single employer. We refer to them together as the Respondent.

[4] *Longmont United Hospital v. NLRB*, 70 F.4th 573 (D.C. Cir. 2023).

[5] For example, the September 27, 2021 memo stated, "For our Longmont United Hospital RN associates, we are legally required to maintain the 'status quo' until pending matters are resolved (consistent with the National Labor Relations Act, Sections 7 & 8)." The other memoranda contained virtually identical language.

[6] In connection with the October 11, 2022 wage increase, the judge found that the Respondent violated Sec. 8(a)(5) by unilaterally changing its past practice of conducting a fall wage review and providing employees with pay increases based upon the results of this review, without giving the Union a meaningful opportunity to bargain. In adopting this finding, we recognize that the factors considered by the Respondent in deciding what wage and benefit changes would result from the annual review may not have been identical each year, that the yearly improvements were not identical, and that not all the unit em-

ings. As explained below, we find, in agreement with the judge, that the Respondent violated the Act as alleged.

II.

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by excluding the Longmont nurses from receiving the wage and benefit increases announced in the Respondent's September 27, 2021, November 5, 2021, March 2, 2022, and October 11, 2022 memoranda to employees. The judge analyzed the complaint allegations under the framework established by the Supreme Court in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967).[7] *Great Dane* describes the distinct analytical framework to be utilized when applying Section 8(a)(3) and (1) to employer policies that facially discriminate between union and nonunion employees.[8] Where the discriminatory conduct is "inherently destructive" of employees' statutory rights, no proof of an antiunion motivation is required. Id. at 34. If, however, "the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct." Id. (emphasis in original). "[I]n either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that [it] was motivated by legitimate objectives since proof of motivation is most accessible to [it]." Id. (emphasis in original).

Applying the *Great Dane* framework, the judge found that the effect of the Respondent's exclusion of the Longmont nurses from the systemwide wage and benefit increases was at least comparatively slight and, accordingly, the burden shifted to the Respondent to show a legitimate and substantial business justification for its conduct. The judge further found that the Respondent did not establish a legitimate and substantial business justification for the Longmont nurses' exclusion, and thus that the Respondent violated Section 8(a)(3). For the reasons stated by the judge in his decision and as further explained below, we agree that the Respondent violated Section 8(a)(3) and (1) by excluding the Longmont nurses from the series of wage and benefit increases.[9]

ployees benefitted from each year's raise. Nevertheless, the crucial fact is that, every fall from 2017 through 2020, the Respondent followed a practice of conducting a wage and benefit review. This review was then followed by an attendant raise, the details of which varied depending on the review's findings. In the fall of 2022, after the Union had been certified as the Longmont nurses' exclusive bargaining representative, the Respondent chose not to follow that prior practice, and it provided the Union with neither notice nor an opportunity to bargain about the decision.

For the reasons explained below, Chairman McFerran finds, in agreement with her colleagues, that the Respondent violated Sec. 8(a)(3) by withholding the October 2022 wage increase from the Longmont nurses. Accordingly, she finds it unnecessary to pass on whether the Respondent also violated Sec. 8(a)(5) by its actions with respect to this wage increase as finding that violation would not materially affect the remedy.

[7] Because we adopt the judge's finding of the violation under *Great Dane*, we do not address whether the same violation could also be found under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[8] Such conduct is "discrimination in its simplest form," the *Great Dane* Court explained, while observing that the "act of paying accrued benefits to one group of employees while announcing the extinction of the same benefits for another group of employees who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on either present or future concerted activity." 388 U.S. at 32.

[9] The judge found that the Respondent failed to establish that it was motivated by legitimate objectives when it withheld the series of wage and benefit increases from the Longmont nurses. As a result, the judge did not reach the question of whether, under *Great Dane*, the Respondent's conduct was inherently destructive of employees' statutory rights. The General Counsel excepted, arguing that the withholding of the wage and benefit increases was inherently destructive. Given our agreement with the judge's findings, discussed below, we also do not reach the question of whether the Respondent's conduct was inherently destructive of employees' statutory rights.

Member Prouty, unlike his colleagues, would reach the issue and would find, as the General Counsel contended, that the Respondent's exclusion of the Longmont nurses from companywide wage and benefit increases was inherently destructive of employees' statutory rights. Preliminarily, Member Prouty would find that the General Counsel's amendment of the complaint to add the "inherently destructive" allegation was proper under *Redd-I, Inc.*, 290 NLRB 1115 (1988), as the newly alleged theory of the violation was closely related to the existing allegations of the same violation under a similar, though not identical, theory. On the substance, Member Prouty observes that both Board and court precedents support a finding that the Respondent's conduct was inherently destructive of employees' Sec. 7 rights. See, e.g., *United Aircraft Corp.*, 199 NLRB 658, 658, 662 (1972) (finding inherently destructive employer's withholding of scheduled wage increase based on employees' choice to unionize), enfd. 490 F.2d 1105, 1109–1110 (2d Cir. 1973) (observing, "[I]t is difficult to imagine discriminatory employer conduct more likely to discourage the exercise by employees of their rights to engage in concerted activities than the refusal to put a scheduled wage increase into effect because the employees, [shortly] before, selected a union as bargaining representative. Thus, the Board was amply justified in concluding that the [c]ompany's conduct in this case was 'inherently destructive' of important employee rights.") (cleaned up); *Great Atlantic & Pacific Tea Co.,* 166 NLRB 27, 29 (1967) (finding employer's withholding from employees about to vote in a representation election a paid holiday granted to unrepresented employees to be "discriminatory treatment of employees . . . violative of Section 8(a)(1) and (3) whether or not there is proof that [r]espondent was motivated by an unlawful purpose as it was 'inherently destructive of employee interests,' and no persuasive evidence of a legitimate purpose appears therefor") (cleaned up), enfd. on a different rationale, 409 F.2d 296 (5th Cir.1969); see also *Care One at Madison Avenue, LLC v. NLRB*, 832 F.3d 351, 358–359 (D.C. Cir. 2016) (enforcing Board's finding of 8(a)(3) violation in employer's restoration,

To begin, we note that the Board has applied the *Great Dane* framework to address alleged discrimination against employees who, like the Longmont nurses, are involved in a representation election. See *Woodcrest Health Care Center*, 366 NLRB No. 70, slip op. at 4–5 (2018) (applying *Great Dane* as law of the case on remand), enfd. sub nom. *800 River Road Operating Co., LLC v. NLRB*, 779 Fed. App'x. 908 (3d Cir. 2019). Moreover, where benefits are withheld due to a pending question of representation, the Board has developed legal rules that complement the Great Dane unfair labor practice framework.[10] The Board has held that "[a]s a general rule, an employer, in deciding whether to grant benefits while a representation election is pending, should decide that question as [it] would if a union were not in the picture." *Great Atlantic & Pacific Tea Co.*, 166 NLRB 27, 29 fn. 1 (1967), enfd. in rel. part 409 F.2d 296 (5th Cir. 1969). See also *Woodcrest Health Care Center*, supra, 366 NLRB No. 70, slip op. at 5 (citing cases); *Atlantic Forest Products*, 282 NLRB 855, 858 (1987). The Board applies the same standard to the circumstances under which the Respondent excluded the Longmont nurses from the increases in this case: while election objections are pending before the Board, see *Holland American Wafer Co.*, 260 NLRB 267, 267 fn. 1, 270–271 (1982); *Hospital Service Corp. d/b/a Blue Cross*, 219 NLRB 1, 17 (1975), and while an employer is challenging the Board's certification of a union in a federal court of appeals, see *Wells Fargo Alarm Services*, 224 NLRB 1111 (1976). Moreover, and contrary to the Respondent's position, when election-eligible employees are excluded from a systemwide benefit increase provided to their coworkers, the Board's evaluation of the employer's statutory duty does *not* turn on whether the benefits provided were part of a regular pattern or newly announced. See *Woodcrest Health Care Center*, 366 NLRB No. 70, slip op. at 5; *Associated Milk Producers*, 255 NLRB 750, 755 (1981) ("[T]he systemwide application does what a regular pattern of wage increases does in other circumstances—provides the evidence necessary to demonstrate that the increase was given free from union or other prohibited considerations.").

In attempting to meet its burden of establishing a legitimate justification for excluding the Longmont nurses from the series of wage and benefit increases, the Respondent asserts that it held a good faith (although inaccurate) belief that it was statutorily obligated to withhold the increases to maintain the status quo with respect to the nurses' terms and conditions of employment.[11] We reject that argument. It is well-established that neither an employer's good-faith belief that a pending representation election precludes the grant of wage or benefit improvements, nor the fear of being charged with unfair labor practices, justifies the withholding of improvements that normally would have been extended to the affected employees. See *Woodcrest Health Care Center*, supra, 366 NLRB No. 70, slip op. at 6; see also *Care One at Madison Avenue, LLC v. NLRB*, 832 F.3d 351, 359-360 (D.C. Cir. 2016) ("[R]eliance on 'dubious legal advice' does not excuse an employer's discrimination.") (citing cases), enfg. 361 NLRB 1462 (2014); *Pennsylvania Gas & Water Co.*, 314 NLRB 791, 793 (1994), enfd. mem. 61 F.3d 895 (3d Cir. 1995); *Otis Hospital*, supra, 222 NLRB at 403–404. Accordingly, we agree with the judge that the Respondent failed to carry its burden and thus violated Section 8(a)(3) and (1) of the Act by withholding the first three increases from the Longmont nurs-

shortly before election, of previously eliminated benefits for all employees except those in voting unit, noting "[a] showing of a targeted withholding of a significant employee benefit only from those employees who are in the process of exercising or are about to exercise protected rights may, without more, 'bear[ ] "its own indicia of intent"' to discourage employee exercise of those rights.") (citing *Great Dane*, above), enfg. 361 NLRB 1462 (2014); *Russell-Newman Mfg. Co. v. NLRB*, 406 F.2d 1280, 1282 (1969) (finding unlawful discrimination by employer's denial to represented employees of wage raise granted to unrepresented employees and stating that "[w]hen there is unjustified disparate treatment between represented and unrepresented employees designed to induce the former to abandon their union, Sec[.] 8(a)(3) has been violated" without a requirement for "specific evidence of [the employer's] intent" to discriminate), enfg. 167 NLRB 1112 (1967). Further, Member Prouty relies on the fragility of the Longmont nurses' representation—a nascent status that the Respondent was continuing to challenge—when the Respondent engaged in facially discriminatory conduct expressly because they had exercised their Sec. 7 rights by choosing to become represented. In sum, the Respondent's repeated exclusion of the Longmont nurses from wage and benefit improvements that they indisputably would have obtained if not for their choice of representation, and its timing relative to the ongoing proceedings, would have cemented in the Longmont nurses' minds—and those of employees throughout the Centura Health system—that employees' exercise of their Sec. 7 rights had resulted in direct and severe costs. As the Second Circuit observed, "it is difficult to imagine discriminatory employer conduct more likely to discourage the exercise by employees of their rights to engage in concerted activities." *United Aircraft Corp. v. NLRB*, 490 F.2d at 1109–1110. If this conduct is not inherently destructive, Member Prouty questions what conduct would be.

[10] Notably, the election-related rules apply to any wage and benefit increase provided to (or withheld from) employees in the context of representation proceedings, not only to instances in which employees who participate in a Board election are treated differently from employees not involved in a Board election. See *Otis Hospital*, 222 NLRB 402, 404–405 (1976), enfd. 545 F.2d 252 (1st Cir. 1976).

[11] We note the judge's skepticism of the sparse testimony supporting the Respondent's asserted belief, which neither established specifically who made the decision to exclude the Longmont nurses from the benefit increase nor provided any significant details as to how, when, or why the decision was made. We assume arguendo that the Respondent proved the asserted belief, which in any case cannot establish a defense, as we explain.

es on September 27, 2021, November 5, 2021, and March 2, 2022.

As to the fourth and final wage increase (announced on October 11, 2022, while the employer was challenging the Board's certification of the Union before the circuit court), the Respondent attempts to invoke as an affirmative defense the Board's *Shell Oil* doctrine, which allows employers to withhold certain benefit increases to employees *during bargaining*. *Shell Oil Co.*, 77 NLRB 1306, 1309–1310 (1948). But the *Shell Oil* doctrine does not apply where, as here, the employer is not bargaining but instead testing certification or otherwise refusing to bargain.[12] Our decisions make clear that an employer cannot both *refuse* to bargain with a union representing a group of employees and also rely on the fact that they *are* represented as the basis for withholding benefits that would otherwise be provided to them. See, e.g., *L.M. Berry & Co.*, 254 NLRB 42, 44 (1981); *B. F. Goodrich Co.*, 195 NLRB 914, 915 (1972).[13] Thus, the Respondent is left with only the legally insufficient assertion, already rejected, that it believed it was legally required to withhold the fourth wage increase. Accordingly, we further agree with the judge that the Respondent failed to carry its burden with respect to its withholding of the fourth wage increase from the Longmont nurses and thus that it also violated Section 8(a)(3) and (1) by that conduct.

III.

In addition to the 8(a)(3) allegation discussed above, the complaint alleges that the Respondent violated Section 8(a)(1) by announcing in the September 27, 2021, November 5, 2021, March 2, 2022, and October 11, 2022 memoranda that employees would receive certain wage and benefit increases, while also stating that the Longmont nurses who voted in the representation election were excluded from those increases. The judge found, and we agree, that these companywide announcements were themselves unlawful. By the memoranda, all Centura Health employees were informed that the wage and benefit increases would be withheld from the Longmont nurses. The Respondent's report of that discriminatory conduct would reasonably tend to chill all employees' willingness to exercise their statutory rights and thus independently violates Section 8(a)(1) of the Act. See *Hostar Marine Transport Systems*, 298 NLRB 188, 192 (1990); *Atlantic Forest Products*, supra, 282 NLRB at 858–859; *Holland American Wafer Co.*, supra, 260 NLRB at 271, 276. In its exceptions, the Respondent emphasizes that the announcements neither mentioned nor blamed the Union. However, the announcements made clear that the increases were withheld due to the pending representation proceedings and thus drew a clear connection between the Respondent's withholding of the increases and the employees' protected activity. See, e.g., *Wellstream Corp.*, 313 NLRB 698, 707 (1994); *The Gates Rubber Co.*, 182 NLRB 95, 95 (1970).

AMENDED REMEDY

The General Counsel requested remedies, including notice reading, notice mailing, and additional training for management and supervisors on the Act, that the judge denied, finding that the General Counsel had not shown that the Board's "standard remedies" were insufficient to remedy the unfair labor practices. The General Counsel's cross-exceptions renew the requests for notice reading and for additional training. The Charging Party joins the General Counsel's requests and further requests that the Respondent be required to mail copies of the notice to employees at all its facilities and to pay both the Charging Party's and the NLRB's legal expenses. We deny the Charging Party's request for reimbursement, as well as the General Counsel's request for additional training. However, in addition to adopting the remedies ordered by the judge, we grant the General Counsel's request that the notice be read aloud to the unit of Longmont nurses, and we order notice mailing to the current and former unit employees.[14]

We recently reaffirmed that, where a respondent's unlawful conduct is sufficiently serious and widespread, reading the notice aloud alerts employees of their rights "in a clear and effective way" and impresses upon them that, as a matter of law, the respondent "must and will respect those rights in the future." *Noah's Ark Processors, LLC, d/b/a WR Reserve*, 372 NLRB No. 80, slip op. at 6 (2023), enfd. 98 F.4th 896 (8th Cir. 2024); see also *Federated Logistics & Operations v. NLRB*, 400 F.3d 920, 930 (D.C. Cir. 2005), enfg. 340 NLRB 255 (2003) (notice reading helps ensure that employees fully perceive that the employer and its managers are bound by the requirements of the Act).

Here, we find that the unfair labor practices were sufficiently serious and widespread to justify a notice read-

[12] Because we find that the *Shell Oil* doctrine does not apply to the circumstances of this case, we do not reach the General Counsel's request to reconsider *Shell Oil*.

[13] Moreover, we note that the judge discredited the Respondent's testimony that the fourth wage increase was withheld partially in preparation for potential bargaining. That evidence, if credited, would have been a necessary predicate for any possible application of *Shell Oil* in such circumstances.

[14] Although the reading of the notice is limited to the Longmont United Hospital nurses' unit, we affirm the judge's order that the notice be posted at and distributed by email to employees at all 19 of the affected Centura Health facilities.

ing to the Longmont United Hospital nurses' unit. On four separate occasions, the Longmont nurses were singled out from the entire network of hospital employees and publicly excluded from receiving the same wage and benefit increases as their coworkers, simply because they sought to organize a union. The severity of the effect on employees' exercise of their statutory rights is undeniable. In addition, looking at the four companywide notifications, two of the memoranda were sent by Peter D. Banko, the Centura Health president and chief executive officer, and two were sent by Sebastien Girard, Respondent's senior vice president and "Chief People Officer."[15] The chilling tendency on employees' exercise of their rights, which was already severe, was compounded by the personal involvement of high-ranking officials in both committing the unfair labor practices and widely disseminating them. Accordingly, we order the Respondent to read the notice aloud to make the remedy fully effective and provide a counterweight to the significant chill created by the unlawful conduct.[16] Agents from the Board and the Union shall have the opportunity to be present for the notice reading. *Noah's Ark Processors*, supra, 372 NLRB No. 80, slip op. at 6.

Finally, in light of the substantial passage of time and turnover in the unit following the Respondent's unfair labor practices,[17] we shall order the Respondent to mail copies of the notice to all current and former employees employed in the affected unit since the Respondent's first unfair labor practice. See, e.g., *Sommerville Construction Co.*, 327 NLRB 514, 514 fn. 2 (1999), enfd. 206 F.3d 752 (7th Cir. 2000) (ordering notice mailing where there has been significant turnover in the employer's workforce since the collective-bargaining agreement was repudiated). The Respondent shall maintain proofs of those mailings.[18]

[15] One of Girard's communications was sent jointly with Eddie Sim, Respondent's Executive Vice President and Chief Operating Officer.

[16] In *Noah's Ark Processors*, we discussed the propriety of notice reading in the context of broad cease-and-desist orders, but we also made clear that a broad cease-and-desist order is not a predicate to ordering any other specific remedy. 372 NLRB No. 80, slip op. at 5 fn. 16. Indeed, the Board has previously found that notice reading is appropriate when issuing a narrow cease-and-desist order. See. e.g., *Libertyville Toyota*, 360 NLRB 1298, 1304–1305 (2014), enfd. sub nom. *AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015). Thus, although we find that the specific nature of the unlawful conduct at issue here does not necessitate a broad cease-and-desist order, that finding does not detract from our conclusion that the unfair labor practices were sufficiently serious and widespread to justify notice reading.

[17] The General Counsel presented uncontested testimony that 76 of the 119 nurses who signed authorization cards for union representation were no longer employed in the unit at the time of the hearing.

[18] Member Prouty would grant the General Counsel's remedial requests in an additional respect: he would order distribution of the notice to employees at the notice-reading meeting(s), prior to the notice's reading. See *CP Anchorage Hotel 2 d/b/a Hilton Anchorage*, 371 NLRB No. 151, slip op. at 13–14 (2022) (Member Prouty, concurring) (explaining that "requir[ing] that a printed copy of the notice be distributed to each employee, in each language in which it will be read, to follow along with (if they choose) during the reading . . . would further facilitate employee comprehension of the notice and thereby further enhance the remedial objectives of the notice reading") (citation omitted), enfd. 98 F.4th 314 (D.C. Cir. 2024); see generally id., slip op. at 9-15 (urging Board to adopt notice-reading to employees and prior distribution of notice as standard remedy). Member Prouty joins his colleagues in denying the requested supervisory-training remedy, but notes that he would be open to considering, in a future appropriate case, whether it would effectuate the policies of the Act to order that *employees* receive training from a Board agent, during working time, regarding their rights under the Act.

ORDER

Respondent Longmont United Hospital and Centura Health, as a single employer, Longmont, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Excluding the employees in a unit that has chosen union representation from increased or new wages, bonuses, and/or benefits that are implemented for other employees systemwide in order to discourage employees from supporting the Union.

(b) Unilaterally changing the terms and conditions of employment of its unit employees by ceasing its practice of conducting annual fall wage and benefit reviews and making improvements based on those reviews.

(c) Informing employees that employees who have chosen union representation or otherwise engaged in protected activity will not receive increased or new wages, bonuses, and/or benefits.

(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) Implement for unit employees the increased or new wages, bonuses, and/or benefits announced in the September 27, 2021, November 5, 2021, March 2, 2022, and October 11, 2022 memoranda, as set forth in the remedy section of the judge's decision as amended in this decision.

(b) Make current and former unit employees whole, with interest, for any loss of earnings and other benefits and any direct or foreseeable pecuniary harms suffered as a result of their exclusion from the increased or new wages, bonuses, and/or benefits announced in the September 27, 2021, November 5, 2021, March 2, 2022, and October 11, 2022 memoranda as further set forth in the remedy section of the judge's decision.

(c) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay

awards, and file with the Regional Director for Region 27, 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 years for each employee.

(d) File with the Regional Director for Region 27, 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 reflecting the backpay award.

(e) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Before making any changes to the 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:

> All full-time, regular part-time, and per diem registered nurses, including clinical coordinators, clinical documentation specialists, RN Wound Ostomy employees, house supervisors, education instructors II, RN unit educators, and RN educators, employed by the Employer at its facility located in Longmont, CO 80501; but excluding all RNs employed by other entities, registries or agencies providing outside labor to the Employer, office clerical employees, nurse administrators, managerial employees, confidential employees, guards, and supervisors as defined by the National Labor Relations Act.

(g) Restore the practice of conducting annual fall wage and benefit reviews and making improvements based on those reviews and negotiate with the union over any alteration of the practice of conducting these reviews.

(h) Post at Centura Health's nineteen facilities in Colorado and Western Kansas, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by 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, because the various memoranda in question were distributed to all of Respondent's Colorado and Western Kansas employees by email, the notice shall also be distributed by email to all employees working at those same facilities. The notice shall be further electronically distributed, such as by text message or by posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. If any of the Respondent's facilities have gone out of business or closed, 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 that facility at any time since September 27, 2021.

(i) Within 14 days of service by the Region, the Respondent shall duplicate and mail, at its own expense, a copy of the notice, signed by the Respondent's authorized representative, to all current employees and former employees employed by the Respondent in the nurses' unit at its hospital in Longmont, Colorado, since September 27, 2021. The notice shall be mailed to the last known address of each employee. The Respondent shall maintain proofs of mailings.

(j) Hold a meeting or meetings among the Longmont nurses in the certified unit during work time at Longmont United Hospital, scheduled to ensure the widest possible attendance, at which the attached notice marked "Appendix" is to be read to assembled employees by a high-ranking management official of the Respondent in the presence of a Board agent and, if the Union so desires, in the presence of an agent of the Union, or by a Board agent in the presence of a high-ranking management of-

[19] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted and, where ordered, read within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted and, where ordered, read within 14 days after the facilities reopen 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."

ficial of the Respondent and, if the Union so desires, in the presence of an agent of the Union.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 27 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this order.

Dated, Washington, D.C. September 18, 2024

_____
Lauren McFerran, Chairman

_____
David M. Prouty, Member

_____
Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT exclude the employees in a unit that has chosen union representation from increased or new wages, bonuses, and/or benefits that are implemented for other employees systemwide in order to discourage employees from supporting the Union.

WE WILL NOT change your terms and conditions of employment by ceasing our practice of conducting annual fall wage and benefit reviews and making improvements based on those reviews without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT inform you that employees who have chosen union representation or otherwise engaged in protected activity will not receive increased or new wages, bonuses, and/or benefits.

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 implement for our Longmont United Hospital registered nurses the increased or new wages, bonuses, and/or benefits announced in our September 27, 2021, November 5, 2021, March 2, 2022, and October 11, 2022 memoranda to employees.

WE WILL make current and former Longmont United Hospital registered nurses whole, plus interest, for any loss of earnings or other benefits suffered as a result of our excluding them from the increased or new wages, bonuses, and/or benefits announced in our September 27, 2021, November 5, 2021, March 2, 2022, and October 11, 2022 memoranda to employees, and WE WILL also make such employees whole for any other direct or foreseeable pecuniary harms suffered as a result of their unlawful exclusion, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 27, 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 years for each employee.

WE WILL file with the Regional Director for Region 27, 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 reflecting the backpay award.

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

> All full-time, regular part-time, and per diem registered nurses, including clinical coordinators, clinical documentation specialists, RN Wound Ostomy employees, house supervisors, education instructors II, RN unit educators, and RN educators, employed by the Employer at its facility located in Longmont, CO 80501; but excluding all RNs employed by other entities, registries or agencies providing outside labor to the Employer, office clerical employees, nurse administrators, managerial employees, confidential employees, guards, and supervisors as defined by the National Labor Relations Act.

WE WILL restore our practice of conducting annual fall wage and benefit reviews and making improvements based on those reviews, and bargain with the union over any change regarding the practice of conducting these reviews.

WE WILL, within 14 days of service by Region 27, mail a copy of this notice to the homes of all current and former Longmont United Hospital registered nurses employed by us at any time since September 27, 2021. WE WILL maintain proofs of mailing as required by the Board.

WE WILL hold a meeting or meetings among the Longmont nurses in the certified unit, scheduled to ensure the widest possible attendance of employees, at which this notice will be read to employees by a high-ranking management official of the Respondent in the presence of a Board agent and, if the Union so desires, in the presence of an agent of the Union, or by a Board agent in the presence of a high-ranking management official of the Respondent and, if the Union so desires, in the presence of an agent of the Union.

LONGMONT UNITED HOSPITAL

The Board's decision can be found at www.nlrb.gov/case/27-CA-291664 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.

Noor Alam, Esq., for the General Counsel.
Micah Berul, Esq., for the Charging Party.
Patrick R. Scully, Esq., Carissa J. Davis, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN T. GIANNOPOULOS, Administrative Law Judge.[1] Based upon an amended complaint and notice of hearing (complaint) issued on November 3, 2022, alleging that Longmont United Hospital and Centura Health as a single employer (Respondent) violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act), this matter was tried before me on November 15 and 16, 2022, in Denver, Colorado. The Complaint allegations, which were amended at trial, involve various wage and benefit increases which Respondent issued to employees, except for certain nurses at one hospital in Longmont, Colorado. At the time of the increases, these nurses had voted to be represented by the National Nurses Organizing Committee/National Nurses United, NNOC/NNU, (Union) for the purposes of collective-bargaining; Respondent is contesting the results of that election.

After considering the entire record, including my observation of witness demeanor, and having reviewed the briefs filed by the General Counsel and Respondent, I make the following findings of fact and conclusions of law.[2]

I. JURISDICTION AND LABOR ORGANIZATION

Longmont United Hospital (Longmont or Longmont Hospital) is a non-profit corporation with an office and place of business located in Longmont, Colorado, where it operates an acute-care hospital providing inpatient and outpatient medical care. In conducting its operations, Longmont derives gross revenues exceeding $250,000 and it purchases and receives goods or services exceeding $5000 directly from points outside the State of Colorado. I find that Longmont is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act. (GC 1(o); 1(r)) See *Longmont United Hospital*, 371 NLRB No. 162 (2022).

Centura Health (Centura) is a "multi-facility healthcare organization." *EEOC v. Centura Health*, 933 F.3d 1203, 1205 (10th Cir. 2019). Centura is a non-profit corporation with an office and principle place of business in Centennial, Colorado, where it provides healthcare services to patients and manages labor relations policies for various hospitals throughout the State of Colorado and Western Kansas. In the course and conduct of its business operations, Centura derives revenues in excess of $250,000 and purchase and receives at its Colorado facilities goods, materials, and services valued in excess of $5000 directly from points outside the State of Colorado. I find that Centura is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC 1 (o), 1(r))

Respondent admits that Longmont is part of the Centura network of hospitals, and during the hearing a stipulation was reached that, for the purposes of this case, Longmont and Centura are single employers. I so find accordingly. I also find that this dispute affects commerce and the National Labor Relations Board (NLRB or the Board) has jurisdiction pursuant to Section 10(a) of the Act. (Jt. 1; Tr. 14–16; Jt. 1; GC 1(r))

II. FACTS

A. The Union's petition, election, and certification

Although it is smaller in size, Longmont is a typical hospital.

[1] Transcript citations are denoted by "Tr." with the appropriate page number. Citations to the General Counsel, Respondent, and Joint exhibits are denoted by "GC," "R.," and "Jt." respectively. Transcript and exhibit citations are intended as an aid only. Factual findings are based upon the entire record and may include parts of the record that are not specifically cited.

[2] Testimony contrary to my findings has been specifically considered and discredited.

It offers a full array of medical services, including emergency room and acute-care floors, and is operated by a full slate of hospital staff. In about March 2021, Longmont's registered nurses started to unionize. After gathering a sufficient showing of interest, on April 20, 2021, the Union filed a petition to represent a unit of approximately 245 registered nurses at the hospital. The petition started a year-long process for the nurses until the Union was ultimately certified as the collective-bargaining representative of Longmont's registered nurses on April 5, 2022. However, Respondent is contesting the Union's certification. (Tr. 81–82, 85, 222–223; GC 2, 3.)

An initial hearing on the Union's election petition was held on May 10, 2021. While the appropriateness of the bargaining unit sought by the Union was not in dispute, the parties disagreed regarding the supervisory status of certain nurses working in different job classifications. A determination regarding their supervisory status was deferred to post-election proceedings, and the only issue addressed at the May 10 hearing was the method by which the representation election would be conducted. The Union wanted the election to occur by mail-ballot while the employer wanted an in-person election. On May 27, 2021, the Regional Director for NLRB Region 27 (Regional Director) issued a Decision and Direction of Election finding the then existing state of the Covid-19 pandemic warranted a mail-ballot election. Accordingly, the Regional Director ordered a mail-ballot election with ballots being mailed to employees on June 15, 2021. All ballots were to be returned by 1:00 p.m. on July 7, 2021, at which time they would be counted via videoconference. (GC 3.)

As scheduled, on July 7 the ballots were counted. A total of 192 ballots were returned. Of these, 93 employees voted for union representation and 84 voted against it; four ballots were deemed void. A total of 15 ballots were challenged: 11 ballots were challenged by the Board Agent running the election, and four were challenged by the Respondent. Because the number of challenged ballots were sufficient in number to affect the results of the election, no victor was declared on July 7. A week later, on July 14, Respondent filed an objection to the conduct of the election, asking that the election be set aside. In its objection, the company alleged that the Union, through the use of a scripted communication, engaged in the unlawful solicitation of ballots, which the employer asserted was objectionable per se and created the impression that the Board was not in complete control of the election and/or favored the Union. (GC 4, 5, 6.)

On July 26, 2021, the Regional Director issued a Decision on Challenged Ballots and Objection (Decision). In her Decision, the Regional Director overruled the Respondent's objection in its entirety, finding the company's offer of proof, if credited at hearing, was insufficient to set aside the election. (GC 6.)
Regarding the challenged ballots, the Regional Director sustained the challenges relating to four specific ballots, noting the parties agreed that these individuals were ineligible to vote. The parties had also agreed that four individuals working as nurse-educations were eligible to vote, so the Regional Director ordered that those four ballots be counted. The parties contested whether the votes of two other employees were properly cast, and they also disagreed as to whether the five nurses who worked as "house supervisors" were eligible to vote in the election. The Regional Director deferred ruling on these challenges until the ballots cast by the four nurse-educators were counted and a determination was made as to whether the remaining seven challenged ballots were determinative. (GC 6.)

On August 13, 2021, the ballots of the four nurse-educators were counted; all four had voted against union representation. Accordingly, a revised tally of ballots issued showing 93 votes for union representation, 88 votes against, with seven remaining challenged ballots. Because the remaining challenged ballots were still sufficient in number to affect the election results, a hearing was held on August 31, 2021, to resolve the challenges. After the hearing, a Hearing Officer's Report (Report) issued on October 20, 2021. The Report sustained the challenge to one ballot, finding the employee in question was no longer working in the unit at the time she mailed her ballot, even though she was on administrative leave. The Report recommended the six other challenges be overturned and those ballots be counted. Regarding the five house supervisors, the hearing officer found them to be statutory employees. The final challenge involved an employee who Respondent claimed had printed her name on the ballot envelope instead of signing it as required. The Report found this ballot was valid and that the employee had, in fact, signed the envelope, noting that the employee in question authenticated her signature during the hearing. (GC 8–9.)

On November 3, 2021, Respondent filed exceptions to the Report with the Regional Director, asserting primarily that the hearing officer erred in finding the one employee had properly signed her ballot envelope. On December 9, 2021, the Regional Director issued a Supplemental Decision on Challenges (Supplemental Decision) affirming the findings in the Report and ordering that the six remaining ballots be opened and counted. On December 21, 2021, Respondent filed with the Board exceptions to the Supplemental Decision, again arguing that the one employee printed her name, instead of signing the ballot envelope. On March 24, 2022, the Board issued an Order denying Respondent's exceptions. The next day, on March 25, the six remaining votes were opened and counted and a Second Revised Tally of Ballots issued. The Union won by one vote, 94 to 93. (GC 11–14.)

On April 5, 2022, the Regional Director issued a Certification of Representation certifying the Union as the collective bargaining representative of the following unit:

> All full-time, regular part-time, and per diem registered nurses, including clinical coordinators, clinical documentation specialists, RN Wound Ostomy employees, house supervisors, education instructors II, RN unit educators, and RN educators, employed by the Employer at its facility located in Longmont, CO 80501; but excluding all RNs employed by other entities, registries or agencies providing outside labor to the Employer, office clerical employees, nurse administrators, managerial employees, confidential employees, guards, and supervisors as defined by the National Labor Relations Act.

On May 2, 2022, the Union requested that Respondent start bargaining. *Longmont United Hospital*, 371 NLRB No. 162, slip op. at 2 (2022). However, Respondent disputed the propri-

ety of the certification and refused to do so. The Union filed a charge alleging that the company's actions violated Section 8(a)(1) and (5) of the Act and on July 12 the General Counsel filed a motion for summary judgment, which was opposed by Respondent. On September 30, 2022, the Board issued its decision and order finding that since May 10, 2022, and continuing to date, Respondent has been refusing to bargain with the Union in violation of Section 8(a)(1) and (5) of the Act. Id. On October 4, 2022, the Union again requested that Respondent begin bargaining for an initial contract. Respondent did not respond. Instead, on October 11, 2022, it filed a Petition for Review of the Board's decision with the United States Court of Appeals for the District of Columbia Circuit, in order to contest the validity of the Union's certification.[3] As of the date of this decision, the litigation in the Circuit Court is ongoing. (Tr. 182, GC 15, 22.)

B. Respondent excludes the Longmont nurses from increases in wages & benefits

Between September 2021 and October 2022, Respondent announced to employees, and implemented, wage and/or benefit increases on four different occasions: September 27, 2021, November 5, 2021, March 2, 2022, and October 11, 2022. Each announcement specifically states that the Longmont registered nurses are being excluded from the increases, with Respondent saying their exclusion is necessary in order to retain the status quo until pending matters are resolved, citing provision of the Act. As of the date of the hearing, the Longmont nurses have not received any of the wage/benefit increases outlined in these memoranda. Nor has Respondent assured the Longmont nurses that they will receive these increases once the election issues are resolved. (Tr. 241, 263.)

1. The September 27, 2021 announcement

On September 27, 2021, Peter D. Banko (Banko) the President of Chief Executive Officer of Centura, sent an email containing a memorandum address to "All Centura Caregivers," announcing compensation increases for fiscal year 2022.[4] Employees received Banko's correspondence on their work email. Cathy Roberts (Roberts), a Vice President and strategic human resources business partner for Centura, testified that Banko's email with the memorandum was sent to all of Respondent's employees/associates. This included employees working at the Longmont Hospital, along with associates who work at Respondent's other hospitals and related medical facilities. Respondent operates 19 hospitals/facilities in total. Three are located Western Kansas and 16 are scattered throughout Colorado. Longmont is Respondent's only facility where employees have unionized. (Tr. 95, 98–99, 215–216, 243–247, 252; GC 18, 24.)

The September 27 memorandum starts by acknowledging Respondent's "21,000 incredible caregivers on a mission to build whole person care and flourishing communities," and states that it is paramount for the company's senior leadership team to enable and support employees in "living your mission and achieving your full potential, both professionally and personally." The memo then recognizes that the previous 18 months presented challenges "on how we live, how we compassionately care, how we lead, and how we retain and recruit talent." It notes that housing costs, living expenses, a competitive job market and the employment landscape have directly impacted everyone, and states that Respondent had just completed a "thorough and detailed compensation review to ensure" the company maintains market competitiveness and delivers on its social justice commitments. The memo further states that, in fiscal year 2022 Respondent will be investing more than $66 million in caregiver compensation and raising the living wage. (GC 18.)

The memo then announces that all associates (except physicians, advanced practice providers,[5] executives at the Vice President level and above, temporary workers, and new employees hired after September 19, 2021) will be eligible for the following compensation adjustments: (1) a 3% annual across-the-board base pay adjustment to be awarded to 17,260 associates, given as either a 3% increase in base pay or a 3% lump sum payment, dependent upon the employee's base pay relative to their current pay grade range; (2) a market adjustment for some of Respondent's patient care positions (based upon evaluation for competitiveness for identical and/or equivalent jobs in the market);[6] and (3) a "living wage" increase for 4300 associates in Colorado and Western Kansas. (Tr. 253; GC 18.)

According to the memo, the pay adjustments were effective on October 3, 2021, and payable on October 22. The memorandum also notes that Respondent's CEO is working to actively review and develop a retention incentive program for some positions and says the company will review their plan on this issue on or before December 1, 2021. As for Longmont's registered nurses, the memorandum states that for "our Longmont United Hospital RN associates, we are legally required to maintain the 'status quo' until pending matters are resolved (consistent with the National Labor Relations Act, Sections 7 & 8)." Respondent implemented the wage adjustments outlined in the memo on October 3, 2021. (GC 18.)

Regarding the September 27 memo, Roberts testified she was part of the "discussion" in drafting the document, and said the considerations driving the increases outlined in the memo were: market conditions; work force conditions; along with both internal and external market data. Roberts noted that, at the time, there was significant volatility in the workforce, with a lot of resignations and high turnover in a number of key job roles. Roberts described the circumstances as fairly extraordinary. As for the statement in the memo referencing the exclusion of the Longmont registered nurses from any of the wage

[3] I take administrative notice of the DC Circuit docket and filings in *Longmont United Hospital v. NLRB*, No. 22-162. *McVey v. McVey*, 26 F.Supp.3d 980, 984 (C.D. Cal. 2014) (consolidating cases and noting that a court can take judicial notice of court filings pursuant to Fed. R. Evid. 201).

[4] It appears from the memo that Respondent's fiscal year begins with the start of the first pay period each October.

[5] "Advanced practice providers" refers to both nurse practitioners and physician's assistants. (Tr. 252.)

[6] The memorandum states that the average market adjustment for the 6047 eligible patient care associates is 5 percent on top of the 3 percent across-the-board increase.

adjustments, Roberts testified this was added to the memo for "clarity," as it was her understanding that the company was required to maintain the "status quo" because the election outcome was still pending. (Tr. 247–249, 263.)

After the memo was issued, on October 1, 2021, the Union's attorney sent an email to Respondent's counsel which included an attached letter addressed to Respondent's officials, including Banko. In the email the Union states that it will not file an unfair labor practice charge if the company includes the Longmont nurses "in the 3% across-the-board wage increase and appropriate market adjustments." In the letter, the Union writes that the Longmont nurses deserve to be included in the 3% across-the-board increase and market adjustment and notifies Respondent that the Union will not file unfair labor practice charges if the company provides the Longmont nurses with the increases. The letter further calls upon Respondent "to stop using our union efforts as an excuse to try to punish our RNs" and asks the company to "work with us to improve conditions at the hospital for the sake of our patients and community." The letter ends by saying that if "Centura is truly seeking to invest in our caregivers, then you must include Longmont RNs in this upcoming pay increase. We demand that Centura include Longmont RNs in the financial adjustment." (R. 3, 4.)

The Union's email and letter had no effect. While nurses at Respondent's other facilities received these increases, Longmont's registered nurses were excluded from receiving any of the adjustments. (Tr. 99–104; GC 1(o); 1(r).)

2. The November 5, 2021 announcement

On November 5, 2021, Banko issued another memorandum to "All Centura Caregivers" announcing additional compensation enhancements. The memo was sent to all employees working at Respondent's facilities throughout Colorado and Western Kansas, including the Longmont nurses, with the subject line: "Supporting you with new compensation enhancements and programs." The memo discusses various subjects and then announces various bonus and benefit changes for employees, but excluding the Longmont nurses. (Tr. 215; GC 19, 24.)

he memo begins with Banko expressing his gratitude for the way employees have extended whole person care to patients, neighbors, and communities during the preceding 19 months of the pandemic, saying that Respondent's caregivers have "brought our Mission, Vison, and Values to life." Banko next references the "Great Resignation," also referring to it as the "Big Quit." He wrote that it is "the ongoing trend that started in spring 2021" involving employees leaving their jobs, and that this phenomenon is "seriously impacting most industries—particularly retail, hospitality, and health care—all across the country," and that "right here in our own communities, we are experiencing significant labor shortages across many industries coupled with high unemployment." The memo next discusses the Covid-19 surge affecting Respondent's facilities, with Banko recognizing that Respondent is "asking a lot of you right now," and noting that employee workloads have been heavy, workforce challenges have impacted staffing, the vaccine mandate has added additional stressors, and the pandemic has generated profound challenges to every-day civility. Banko said that he and Respondent's senior management team continue in their "unwavering commitment" to employees as their first priority, and that as part of this commitment they have taken, and will continue to take, steps to "best support you and your families." Banko recognized the tireless efforts made by employees and said Respondent was transforming its culture along with redesigning work to meet the needs of employees and patients. He also stated that Respondent was supporting employees "in new ways through the enhancement of our total rewards structure and introducing new benefits as we continue our journey to become the system of choice of our caregivers." (GC 19.)

With his introduction complete, in the memo Banko next disuses the changes to employee wages and benefits, saying:

> Today, we are pleased to share that we are investing an additional $107 million to better support you with the following compensation and benefits changes:
>
> 1. Your continued growth, development and ability to live your personal mission is essential to our success. Effective Jan. 1, 2022, our annual Tuition Reimbursement benefit will increase from $3,000 to $5,000 for full-time associates and $1,500 to $2,500 for part-time associates.[7]
>
> 2. While it is vital to your health and wholeness to take time off to recharge and revitalize your spirit while connecting with the people and activities that inspire you, we recognize that the ongoing pandemic has impacted your ability to use your accrued Paid Time Off (PTO). We have heard your feedback and will offer a One-Time PTO Cash Out. Eligible associates may elect to cash out up to 80 hours of PTO (while maintaining a balance of at least 40 hours) to be paid between January and June 2022. More details about how to make your voluntary PTO cash out election will be shared soon.
>
> 3. Increased housing and living expenses have impacted all of us and have disproportionally impacted our co-workers-in Summit County. To support our associates and enhance our ability to recruit and retain top talent, we will offer a Summit County Housing Stipend for Eligible Summit County Associates, starting in January 2022. This is an investment of $1.6 million and details about this program will be shared with eligible associates in the coming weeks.
>
> 4. We continuously review our talent acquisition programs and offerings to attract top talent to our ministries. The current labor market and demand has provided an opportunity for us to look differently at our sign-on bonus methodology. As such, we are implementing Changes to Our Sign-on Bonus Structure to provide up-front bonus payments instead of incremental pay-outs. Associates currently receiving incremental payments as part of a sign-on bonus will receive more details about their sign-on bonus being paid in full by December 17. We will be investing $11.3 million in the payout of current associate sign-on bonuses. We will continue to evaluate and evolve the parameters of our sign-on bonus structure based on market dynamics.

[7] The memo includes a link directing employees to the company's current tuition reimbursement policy.

> 5. Based on your direct feedback, we previously shared our plans to develop a retention incentive bonus program to recognize your service and commitment. As part of this work, we will be providing a Market Based Bonus to 4,922 associates providing bedside patient care in high-need areas across our connected ecosystem totaling an $73.8 million investment. We completed a thorough market review to determine eligible positions, which will include nurses providing direct patient care in acute or emergent/urgent care settings for more than 50 percent of hours worked, respiratory therapists, and surgical techs. More details will be shared with eligible associates and their leaders.
>
> 6. As market pressures continue in varied roles, we will be investing an estimated $15 million across the health system in Additional Market Adjustments in March 2022 for select positions based on a revised, thorough market review in January and February 2022. This will not be an across the board increase.

The memo then directs employees to their local "leadership team" and "direct supervisor" and notes that the increases "may not apply to all associates, departments or locations." Regarding the unionized Longmont nurses the memo states:

> For our Longmont United Hospital RN associates, we are legally required to maintain the 'status quo' until pending matters are resolved (consistent with the National Labor Relations Act, Sections 7 & 8). I have heard you and l know that you have gone above and beyond from day one of the pandemic (and continue to do so), but this current period of time is cloudy for all of us.

It is undisputed that Respondent implemented the changes as outlined in the memo on about January 1, 2022, and the Longmont nurses were excluded from receiving any of these benefits. (GC 1(o); 1(r); GC 19.)

Regarding the November 5 memo, Roberts testified that the considerations driving the enhancements announced in the document involved changes in the workforce experienced by Respondent. Roberts said that the company had seen a number of changes in demographics, workforce availability, turnover, and vacancy rates. And, Roberts testified that employees were facing a number of challenges due to the pandemic, such as the availability of childcare. According to Roberts, none of the increases announced in the November 5 memo were regular or routine actions, but she said the company reviews a fluctuating market and sometimes the market requires various changes in employee benefits and sometimes it does not. (Tr. 254.)

Concerning the PTO cash-out, employees generally cannot cash-out their PTO. Instead, they use it as needed for time off work. Roberts testified that the one-time PTO cash-out was intended to give employees a way to access the economic cash value of their PTO, because Respondent could not allow them to take the time off from work during the pandemic. Regarding PTO benefits, Tricia Hartley (Hartley), a registered nurse who has worked at Longmont since 2004, testified that during the Covid-19 pandemic nurses were denied the ability to take vacations because of a staff shortage at Longmont; they were therefore unable to use their PTO during this time. Notwithstanding the language in the memo precluding Longmont nurses from this benefit, Hartley applied for the PTO reimbursement by submitting a form to human resources. Hartley said that, at first her PTO balance was reduced accordingly, and she believed that her balance was going to be cashed out. However, it was not cashed out; instead her PTO leave balance was restored.[8] (Tr. 107–108, 111–112, 159, 256–257.)

3. The March 2, 2022 announcement

Respondent announced yet another increase in pay and benefits on March 2, 2022. This announcement came via a memorandum from Sebastien Girard, Respondent's "Senior Vice President & Chief People Officer" to "All Centura Caregivers." As with the other announcements, this memo was sent to employees by email and was distributed to all workers at Respondent's facilities throughout Colorado and Western Kansas, including Longmont employees. (GC 20.)

The memo acknowledges Respondent's "21,000 incredible people" who have remained steadfast in their commitment to provide compassionate patient care and says that compensation, along with employee engagement and fulfillment, is a priority for Respondent's senior leadership team. Girard tells employees that "we are listening to your feedback and continue evolving to meet the needs of the current workforce." The memo says that Respondent's "people division" regularly reviews workforce trends to determine how to enhance employee "compensation, benefits, total rewards and overall well-being," and touts the "over $200 million in additional compensation and total rewards programs" provided to employees over the past 14 months, including base pay adjustments, increased tuition reimbursement, market and sign on bonuses for high need areas, and a one-time PTO cash out among other enhancements. The memo then announces $31 million in "compensation updates" to support employees in the form of market adjustments and a new total rewards program. (GC 20.)

Regarding the market adjustments, the March 2 memo says that Respondent completed a thorough and detailed compensation review to ensure the company maintains market competitiveness, looking at each position and market data to ensure Respondent is maintaining pay integrity. Based on this assessment, the memo states that the company "identified over 9,000 associates who will receive an adjustment in their base pay," which will take effect on March 6 and be payable on March 25 paychecks.[9] The memo reminds employees that the company

[8] Hartley also testified about a conversation where she was told her PTO would not be cashed out because of the status quo involving the Union. However, Hartley attributed this statement to two different individuals during her testimony, neither of whom are alleged in the Complaint to be Respondent's supervisors and/or agents. And, she initially said the conversation occurred over email, while later testifying it happened in person. Whether this conversation happened is not ultimately relevant as there is no dispute that the Longmont registered nurses were excluded from the PTO cash-out and the memo specifically says they were being excluded because of Respondent's desire to maintain the status quo pending the resolution of matters relating to the NLRB election.

[9] A side-bar to the memo tells employees to speak with their manager for specific questions and details, as "programs, policies, pay and

regularly reviews compensation, noting that Respondent implemented a 3 percent across-the-board pay adjustment for 17,260 associates in October 2021. The memo then goes on to announce that "two new total rewards programs—student loan assistance and childcare assistance—will be offered to associates beginning July 1," and says that more details regarding these programs will be forthcoming. And, as with the previous memos, Girard's March 2 memo mentions the Longmont nurses, saying that for "our Longmont United Hospital RN associates, we are legally required to maintain the 'status quo' until pending matters are resolved (consistent with the National Labor Relations Act, Sections 7 & 8)." (GC 20.)

Respondent admits that it implemented market adjustments for over 9000 employees effective March 6, 2022, and Longmont nurses were excluded from these adjustments. Respondent also admits that it implemented the student loan and childcare assistance programs to associates on about July 1, 2022, while excluding the Longmont registered nurses from these programs. ((GC 1(o); 1(r).)

4. The October 11, 2022 announcement

The final compensation increase announcement alleged in the Complaint occurred on October 11, 2022. On that date, Respondent issued another memorandum to "All Centura Caregivers" announcing a 3 percent across-the-board base pay increase. The memo was emailed to all Colorado and Western Kansas employees, including Longmont workers, and is from Girard and Eddie Sim, Respondent's "Executive Vice President and Chief Operating Officer." (GC 21.)

The October 11 memo starts by saying "historic inflation, labor shortages, supply chain disruptions, energy prices, geopolitical conflicts, and post-pandemic factors," are impacting global and national economic conditions which "are largely expected to weaken in the next six months." It then says that, over the next 12 to 24 months, hospitals and health systems are projected to have "some of the worst financials years in well over a decade" and that "over half of all hospitals" are estimated "to experience negative margins next year." In "the midst of these unprecedented challenges," the October 11 memo states that it is now more important than ever for Respondent to support employees who "continue to be our top priority." Acknowledging the importance of offering fair, just, and competitive compensations and wages, the memo announces that Respondent will make the following adjustments as part of the company's annual commitment: (1) a 3% annual across-the-board base pay adjustment for 17,800 associates, to be paid as either a 3% increase in base pay or a lump sum payment, depending upon an employee's base pay relative to their current pay grade;[10] and (2) another increase in the company's "living wage." The memo states that most associates are eligible for these wage increases, which will be effective as of October 2, 2022, and be reflected in employee paychecks on October 21. Physicians, executives at the Vice President level and above, along with advanced practice practitioners, temporary employees, and new employees hired after September 26, 2022 were excluded from these increases. (Tr. 251; GC 21.)

Regarding the Longmont nurses, the memo says "[f]or our Longmont United Hospital RN associates, we will continue to maintain the 'status quo' until pending matters are resolved (consistent with the National Labor Relations Act, Sections 7 & 8)." Respondent implemented the wage increases on October 2, 2022, as outlined in the memo. And, as with the other wage and benefit increases, the Longmont nurses never received the 3 percent across-the-board pay adjustment. (GC 21.)

Regarding the pay raises announced in the October 11 memo, Roberts testified the factors driving the increases were continued pressures in the labor market, including labor costs and shortages. As for the statement in the memo referencing the exclusion of Longmont nurses from the 3% increase in order to maintain the "status quo," Roberts said that she was aware the company was appealing the propriety of the Union's certification and that one of the considerations for including this phrase in the memo was the implications surrounding the company's appeal "and planning for if we needed to bargain." (250–251.) That being said, it is undisputed that Respondent has never engaged in bargaining with the Union. And, other than Roberts's testimony, no evidence was presented that the Respondent had formulated any bargaining strategy whatsoever, or that Roberts was involved in this strategy. (Tr. 250–251, 258, 264.)

On October 11, 2022, the Union sent a letter to Respondent containing the subject line "Cease and Desist–Unilateral implementation of wage increases that exclude our members." (GC 23.) In the letter, the Union refers to the fact that the October 11 memo specifically excludes the Longmont registered nurses from the announced pay raise and says, "[o]n this issue and this issue only, the Union assents to the raise." The Union further says in the letter that it expects Respondent to confirm that the raise will be implemented for the Longmont registered nurses. Respondent never responded to the Union's letter. It is undisputed that the Longmont nurses never received the 3% annual across-the-board base pay raise announced in the October 2022 memorandum. (Tr. 182; GC 23.)

C. Respondent's history of wage increases at Longmont before the union drive

Mary Reed (Reed), a Centura strategic human resources business partner, was called as a witness by Respondent to testify about wage increases issued to Longmont nurses before the union drive. According to Reed, Centura started managing the Longmont Hospital in July 2016. She said that, before the April 2021 union petition, Longmont's registered nurses did not have any regular wage adjustments or increases. Instead, Reed testified that in January 2017, as part of Centura's takeover, there was a review of all positions at Longmont, including the nursing staff, comparing them to the external market, and to ensure their wages were equitable and in alignment with other Centura facilities. The company then implemented changes to the Longmont employee wages, as needed, to corresponded with their market review. Reed said that these changes were targeted to Longmont only and did not affect all nurses. (Tr.

benefits may not apply to all associates, departments or locations." (GC 20.)

[10] The memo notes that 95 percent of eligible associates will receive an increase in their base pay while 5 percent will receive a lump sum payment.

220–221, 227.)

Reed further testified that during the fall of 2017, in about September, there was a market review conducted for all Centura employees, looking at both the external market and internal equity, with a corresponding wage adjustment. As a result of this review, 59 percent of Longmont nurses received some sort of wage adjustment. (Tr. 221, 228, 232.)

The company conducted another review of all employees, including those working at Longmont, in the fall of 2018, again around September. This review resulted in 72 percent of Longmont nurses receiving some kind of wage adjustment. During the fall of 2019, Respondent conducted another review of all associates, including employees working at Longmont, resulting in about 75 percent of Longmont nurses receiving a wage adjustment. Still another review occurred during the fall of 2020. All associates were again reviewed, including Longmont employees, resulting in 45 percent of Longmont nurses receiving a wage adjustment. Regarding these reviews and the resulting wage increases, Reed testified that Centura looks a different factors over time periodically including a market analysis, internal equity and industry reviews. According to Reed, whether a particular nurse received a wage increase depended upon the nurse's rate of pay, "compared to the parameters of the pay review at the time." (Tr. 224.) She identified two specific Longmont nurses who had not received any pay increases during this period. (Tr. 221–222, 233–235.)

Reed also testified that there were also "a few other" wages adjustments implemented for Longmont nurses since Centura took over management of the hospital, including a "a slight one in October 2017," but said she could not recall them "off the top of [her] head," nor could she estimate the number of nurses involved. (Tr. 224.) Finally, Reed stated that she had "heard" the reason the Longmont nurses did not receive a wage increase in September 2021 was because they organized with the Union and submitted a petition with the NLRB. (Tr. 240.)

Hartley testified about the wage increases she had received over the years while working at the hospital. According to Hartley, before Centura the Longmont nurses were paid pursuant to a clinical ladder and they received a regular raise every fall. Sometimes they would also receive a supplemental increase based upon additional nursing tasks they performed and other times they received additional cost-of-living increases. After Centura took over at the hospital, Hartley testified that she received two increases in 2017. One increase was an adjustment based upon the pay of other nurses in the Centura system, and then during the fall of 2017 Hartley said she received another increase. Hartley further testified that she also received wage increases during the fall of 2018 and the fall of 2019. As for 2020, Hartley said that she was at the top of the pay scale for nurses, so she received a one-time check in lieu of an increase to her hourly pay rate that year. Hartley believed she received this check in December. (Tr. 73–79.)

III. ANALYSIS

A. Section 8(a)(3) and (1) allegations

The complaint alleges that Respondent violated Section 8(a)(3) and (1) of the Act by excluding the Longmont registered nurses from receiving the wage and benefit increases announced in the September 27, 2021, November 5, 2021, March 2, 2022, and October 11, 2022 memoranda to employees. A violation of Section 8(a)(3) of the Act, "normally turns on an employer's antiunion purpose or motive." *800 River Rd. Operating Co. LLC v. NLRB*, 784 F.3d 902, 908 (3d Cir. 2015). However, under "certain circumstances, actual proof of an improper antiunion motive has been held to be unnecessary." Id. Some conduct is so "inherently destructive of employee interests that it may be deemed proscribed without need for proof of an underlying improper motive." *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967) (cleaned up).

There are two specific category of cases that fall within this rubric. *800 River Road Operating Co. LLC*, 784 F.3d at 908. When an employer's conduct is "inherently destructive" of employee interests no proof of antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that its conduct was motivated by business considerations. Id.; *Great Dane Trailers, Inc.*, 388 U.S. at 34. If the employer's actions could have adversely affected employee rights to some extent, the employer must establish that it was motivated by legitimate objectives; if it does not, the conduct constitutes an unfair labor practice without reference to intent. Id. "Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." *Great Dane Trailers, Inc.*, 388 U.S. at 34. Finally, if the employer is able to proffer a "substantial and legitimate business justification for the different treatment" this justification can still "be overcome by proof of antiunion motive, notwithstanding an otherwise legitimate justification." *800 River Road Operating Co. LLC*, 784 F.3d at 909.

In *Woodcrest Health Care Center*, 366 NLRB No. 70 (2018), enfd. sub. nom *800 River Road Operating Co. LLC v. NLRB*, 779 F.App'x. 908 (3d Cir. 2019), upon remand from the Third Circuit the Board applied the guidance in *Great Dane Trailers* to determine whether an employer violated Section 8(a)(3) and (1) of the Act by withholding benefits from one group of employees, who were voting in a representation election, while granting these benefits to the rest of its employees who were not involved in the union drive. I find this same analysis is applicable to the facts here.

1. The wage increases announced in the September 27, 2021 memo

Pursuant to the terms of September 27, 2021 memo, Respondent completed a "thorough and detailed compensation review" and then implemented: (1) a 3% annual across-the-board pay adjustment to 17,260 of its associates, across 19 different hospitals and facilities throughout Colorado and Western Kansas; and (2) an average market adjustment of 5 percent to 6047 eligible patient care associates at these same facilities.[11] Specifically excluded from both wage increases

[11] The record evidence supports a finding that registered nurses receive starting salaries that exceed the new "living wage" announced in

were the Longmont registered nurses. In the memo, Respondent states that the Longmont nurses were excluded in order to "maintain the 'status quo' until pending matters are resolved (consistent with the National Labor Relations Act, Sections 7 & 8)."

By the plain reading the memo, which was sent to all employees including those at Longmont Hospital, the nurses at Longmont were excluded from the two wage increases simply because they were the subject of the April 2021 unionization petition and involved in the subsequent union election. The memo's plain wording was confirmed by Reed, who testified that she "heard" the reason that the Longmont nurses were excluded from these wage increases was because they organized with the Union and the resulting NLRB petition. (Tr. 240) Under these circumstances, and applying the framework set forth in *Great Dane*, by implementing wage increases to employees across its system, while excluding the Longmont nurses from these wage increases, Respondent engaged in "discriminatory conduct which could have adversely affected employee rights to some extent." *Great Dane Trailers, Inc.*, 388 U.S. at 34; *Woodcrest Health Care Center*, 366 NLRB No. 70, slip op. at 4. Because Respondent engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden shifts to the company to show that its conduct was motivated by substantial and legitimate business objectives. Id. I find that Respondent has failed to carry this burden.

Respondent maintains that it withheld the wage increases from the Longmont registered nurses in order to maintain the status quo. However, other than the language in the memo, the only evidence presented by Respondent regarding the reason the Longmont nurses were excluded from the wage increases was the testimony of Roberts, who said that she was "part of the discussions" surrounding the drafting of the September 27 memo, that the language excluding the Longmont registered nurses was included in the document "for clarity," and that it was her understanding the company was required to maintain the status quo while the outcome of the election was pending. (Tr. 249.) Aside from this testimony, there was no evidence presented as to who actually made the decision to exclude the Longmont nurses "or establishing how, when, or why the decision was made." *Woodcrest Health Care Center*, 366 NLRB No. 70, slip op. at 4.

Moreover, even if the record supported Respondent's claim that it withheld the wage increases in order to maintain the status quo and avoid impacting the election or exposing itself to potential unfair labor practice charges, this is not "a legitimate justification." Id., slip op. at 5. As the *Woodrest Health Care Center* Board noted, quoting *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964), "[t]he danger inherent in well timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." Id. And the Board has long recognized that this rationale also applies to withholding of benefits, due to the coercive effect of withholding benefits from eligible voters while granting these benefits to other employees. Id. An "employer is required to proceed in the same manner as it would absent the presence of the union," and when it "follows this course of action it, in fact, maintains the status quo, in accordance with the rationale of *Exchange Parts.*" *Woodcrest Health Care Center*, 366 NLRB No. 70, slip op. at 5 (cleaned up). The Board has made it clear that "[i]n cases involving company or system-wide adjustments in benefits, these principles apply regardless of whether the adjustments are part of a regular pattern or . . . are made on a one-time basis. If the employer would have granted the benefits because of economic circumstances unrelated to union organization, the grant of those benefits" to employees engaged in union organizing activities would not have violated the Act. Id.

For this reason, any claim by Respondent that withholding the wage increases announced in the September 17 memo from the Longmont nurses was a result of its good-faith compliance with a reasonable interpretation of the law fails; any such interpretation of the law is not reasonable nor held in good faith. In the circumstances present here, there is simply no risk of violating the Act when an employer implements a system-wide increase, such as the one implemented here, because applying a wage increase system-wide "does what a regular pattern of wage increases does in other circumstances—provides the evidence necessary to demonstrate that the increase was given free from union or other prohibited considerations." *Woodcrest Health Center*, 366 NLRB No. 70, slip op. at 5 (internal quotation omitted). Systemwide changes in wages and benefits such as the ones that occurred here are considered by the Board to be free from improper considerations without inquiry as to their historical pattern. Id.

Respondent also cannot rely upon the Board's ruling in *Shell Oil Co., Inc.*, 77 NLRB 1306 (1948), which issued nineteen years before the Supreme Court's decision in *Great Dane*, to avoid a violation, as *Shell Oil* does not provide "a complete defense" to the company's actions as Respondent claims. (R. Br. at 23.) For purposes of an 8(a)(3) analysis *Shell Oil* simply stands for the proposition that "*[a]bsent unlawful motive*, an employer is privileged to give wage increases to his unorganized employees, at a time when his other employees are seeking to bargain collectively through a statutory representative." (italics in original) The Supreme Court in *Great Dane* provided the mechanism for determining whether an *unlawful motive* exists in situations such as the one presented here. And as set forth above, Respondent has not met its burden of providing a legitimate justification for its actions. *Woodcrest Health Care Center*, 366 NLRB No. 70 (2018).

By granting wage increases to employees across its hospital system throughout Colorado and Western Kansas, while excluding the Longmont registered nurses from these increases, Respondent engaged in discriminatory conduct which, to some extent, could have adversely affected employee rights. Because Respondent failed to meet its burden to show that, by excluding the Longmont nurses from these increases, it was motivated by

---

the September 27 memo. (Tr. 101, 129.) Therefore, the Longmont nurses were not affected by being excluded from the new living wage. The same holds true for the updated living wage announced in the October 11, 2022 memorandum.

substantial and legitimate business objectives, Respondent's conduct violated Section 8(a)(3) and (1) of the Act. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967); *Woodcrest Health Care Center*, 366 NLRB No. 70 (2018).

2. The bonuses and benefits announced in the November 5, 2021 memo

In the November 5, 2021 memo Respondent announced the implementation of: (1) a tuition reimbursement benefit increase; (2) a one-time cash out for employee paid time off (PTO); (3) changes to Respondent's sign-on bonus structure to provide up-front bonus payments instead of incremental pay-outs, which included a payout for nurses currently receiving incremental pay-outs; and (4) a market-based bonus to 4,922 associates providing beside patient care, including certain nurses, based upon a market review conducted by Respondent to determine eligible positions.[12] In the November 5 memo, regarding the Longmont registered nurses, Banko wrote:

> For our Longmont United Hospital RN associates, we are legally required to maintain the 'status quo' until pending matters are resolved (consistent with the National Labor Relations Act, Sections 7 & 8). I have heard you and l know that you have gone above and beyond from day one of the pandemic (and continue to do so), but this current period of time is cloudy for all of us.

The bonuses and benefits were implemented across Respondent's hospital system in Colorado and Western Kansas as outlined in the memo, except for the Longmont registered nurses.

The record evidence shows that, absent their involvement in the union petition and election, which Respondent was contesting, the Longmont registered nurses (like their colleagues at Respondent's eighteen other hospitals/facilities) would have been eligible for the benefits and bonuses outlined in the November 2021 memo. Therefore, Respondent's actions were discriminatory and "could have adversely affected employee rights to some extent." *Great Dane Trailers, Inc.*, 388 U.S. at 34; *Woodcrest Health Care Center*, 366 NLRB No. 70, slip op. at 4. Respondent therefore has the burden to show its conduct was motivated by substantial and legitimate business objectives; it has not done so. The only evidence proffered by Respondent for the exclusion of the Longmont registered nurses from these bonuses and benefits was Respondent's claim that it was legally required to maintain the "status quo" pending the resolution of its challenges to the union election results, in order to avoid potential unfair labor practice charges and/or to avoid effecting the election results in the event of a re-run election, which the company was seeking in its challenge to the election. As noted, "even if the record supported Respondent's claim that it withheld the benefit improvements in order to maintain the status quo and avoid impacting the election or exposing itself to potential unfair labor practice charges," these are not legitimate justifications, as the wage and benefit increases were implemented system-wide. *Woodcrest Health Care Center*, 366 NLRB No. 70, slip op. at 4. Longmont registered nurses therefore could have been provided these bonuses and benefits without any risk of altering the status quo. Respondent was obligated to "proceed in the same manner as it would absent the presence of the union." Id. It did not do so. In these circumstances, the Longmont nurses "could not have missed the fact that but for the union they would have been receiving the increases given to their brothers" and sisters at Respondent's other facilities. *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 99 (5th Cir. 1970). Accordingly, Respondent violated Section 8(a)(3) and (1) of the Act by excluding the Longmont registered nurses from these bonuses and benefits because of their involvement in the union election.

3. The pay increases and new benefits announced in the March 2, 2022 memo

Through the March 2 memo, Respondent implemented base pay market adjustments for over 9000 of its employees, to take effect on March 6, 2021. The same memo, which was addressed to "All Centura Caregivers" and was sent to employees throughout Colorado and Western Kansas, announced the implementation of two new "total rewards" programs, a student loan assistance program and a childcare assistance benefit, effective July 1, 2021. The Longmont registered nurses were excluded from both, with Respondent saying they were excluded because the company was "legally required to maintain the 'status quo' until pending matters are resolved (consistent with the National Labor Relations Act, Section 7 & 8)."

Again, the only factor used to exclude the Longmont registered nurses from the increased pay and new benefits, which were implemented across Respondent's system, was the fact that the Longmont nurses had voted in a union election and Respondent was continuing to contest the propriety of that election. Therefore, by implementing market pay adjustments and the total rewards program to various employees across its system, but specifically excluding the Longmont registered nurses, Respondent engaged in "discriminatory conduct which could have adversely affected employee rights to some extent." *Great Dane Trailers, Inc.*, 388 U.S. at 34; *Woodcrest Health Care Center*, 366 NLRB No. 70, slip op. at 4.

Respondent has not shown that its conduct was motivated by substantial and legitimate business objectives. Other than claiming it was necessary to withhold these benefits to maintain the status quo, Respondent has not presented any other evidence that its actions were motivated by substantial and legitimate business objectives. As previously noted, with respect to wage and benefit increases that are implemented system-wide in these circumstances, excluding employees who were engaged in union activity in order to maintain the "status quo" to avoid potential unfair labor practices or potentially impacting the union election is not a legitimate justification. *Woodcrest Health Care Center*, 366 NLRB No. 70, slip op. at 4. Applying wage or benefit increases system-wide provides the evidence necessary to demonstrate the increase was given free from union or other prohibited considerations. Id. As such, I find that Respondent has failed to carry its burden to show that it was motivated by substantial and legitimate business objectives when it excluded the Longmont registered nurses from the pay

[12] The memo also implemented a housing stipend for employees working in Summit County, Colorado. The Longmont nurses would not be eligible for this stipend since the Longmont Hospital is located in Boulder County.

increases and new benefits announced in the March 2 memo, and its conduct violated Section 8(a)(3) and (1) of the Act.

4. The wage increase announced in the October 11, 2022 memoranda

In the October 11 memo, Respondent implemented a 3% across-the-board pay adjustment for 17,800 associates, effective as of October 2, 2022.[13] The Longmont registered nurses were specifically excluded, with Respondent stating "[f]or our Longmont United Hospital RN associates, we will continue to maintain the 'status quo' until pending matters are resolved (consistent with the National Labor Relations Act, Sections 7 & 8)." The October 2022 across-the-board pay increase was implemented to employees across the 19 hospitals/facilities in Colorado and Western Kansas, and the Longmont registered nurses were specifically excluded because Respondent was still litigating the propriety of their unionization election and the April 2022 certification. As such, by implementing the 3% across-the-board increase, but specifically excluding the Longmont registered nurses, Respondent engaged in "discriminatory conduct which could have adversely affected employee rights to some extent." *Great Dane Trailers, Inc.*, 388 U.S. at 34; *Woodcrest Health Care Center*, 366 NLRB No. 70, slip op. at 4. And, Respondent has not met its burden to show that it was motivated by substantial and legitimate business objectives when it excluded the Longmont nurses from the October 2022 wage increase.

The evidence shows that, had the Longmont registered nurses not been involved in a union drive and the subsequent litigation surrounding the union election, they would have received the 3% increase along with the other nurses throughout Respondent's hospital system. Under these circumstances, maintaining a purported status quo to allegedly avoid a potential unfair labor practice charge and/or impacting the union election is not a legitimate justification. *Woodcrest Health Care Center*, 366 NLRB No. 70, slip op. at 5.

Also, I find any claim by Respondent that it was preparing for potential bargaining, and therefore had a substantial and legitimate business justification to withhold the October 11 wage increase, to be pretext. While Roberts testified that one of the considerations for referencing the "status quo" in the October 11 memo was because "we were also considering at the time the implications and planning for if we needed to bargain," I find her testimony to be suspect. Other than Roberts's testimony, which was self-serving, there was no documentary or other evidence presented that Respondent had formulated any bargaining strategy whatsoever.[14] *Matheson Fast Freight, Inc.*, 297 NLRB 63, 77 (1989) (lack of documentary evidence in control of respondent supports finding that bare claims made by company witnesses were not credible). Indeed, Respondent was refusing to recognize and bargain with the Union at the time the memorandum issued. Moreover, the October 11 memo specifically states that the reason the Longmont nurses were excluded from the wage increase was in order to "to maintain the 'status quo' until pending matters are resolved (consistent with the National Labor Relations Act, Sections 7 & 8)." (GC 21.) No mention was made in the memo about Respondent's need to plan for future bargaining. Cf. *City Stationery, Inc.*, 340 NLRB 523, 524 (2003) (Nondiscriminatory reasons for discharge, offered at trial, were pretextual as they differed from the reasons set forth in the employees' discharge letters). Accordingly, I find that, by excluding the Longmont registered nurses from the across-the-board wage increase that was implemented system-wide, as announced in the October 11 memo, Respondent violated Section 8(a)(3) and (1) of the Act.[15] *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967); *Woodcrest Health Care Center*, 366 NLRB No. 70 (2018).

B. The Section 8(a)(5) allegation

An employer is required to bargain with the representative of its employees in good faith with regard to wages, hours, and other terms and conditions of employment. *Alta Vista Regional Hospital*, 357 NLRB 326, 326 (2011), enfd. 697 F.3d 1181 (DC. Cir. 2012). "When a majority of the unit employees have selected the union as their representative in a Board-conducted election, the obligation to bargain, at least with respect to changes in terms and conditions of employment, commences not on the date of certification, but as of the date of the election." Id. at 326–327. Therefore, an employer acts at its own peril if it makes unilateral changes to unit employee working conditions while its objections to the unionization election are pending. *Mission Foods*, 350 NLRB 336, 344 (2007) (citing *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974)); *Fugazy Continental Corp. v. NLRB*, 233 U.S. App. D.C. 310, 725 F.2d 1416, 1421 (1984). Here, the only alleged 8(a)(5) violation involves the wage increase that was announced in the October 11, 2022 memorandum, well after the Union's certification.

"A wage increase program constitutes a term or condition of employment when it is an 'established practice . . . regularly expected by the employees.'" *Mission Foods*, 350 NLRB 336, 337 (2007) (quoting *Daily News of Los Angeles*, 315 NLRB 1236, 1239 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997)). In *Mission Foods*, since at least 1998, the employer had maintained a practice of granting employees a "structural scale increase" during the first quarter of every calendar year, which was based upon the company's assessment of the local job market. Id. at 336. The employer determined the amount of the increase by conducting a tele-

[13] The memo also announced a further increase in the living wage, but as previously noted the Longmont registered nurses receive starting salaries that exceed Respondent's living wage.

[14] While Robert's testified she was part of the "discussions" surrounding the drafting of all of the memos, there was no evidence presented that she was involved in devising Respondent's bargaining strategy, if such a strategy existed.

[15] Because Respondent has failed to establish that it was motivated by legitimate objectives when it withheld the various wage/benefit increases from the Longmont registered nurses in this matter, I find it unnecessary to determine whether Respondent's conduct was "inherently destructive" thereby allowing the Board to find a violation even if the employer introduces evidence that it's conduct was motivated by business considerations. *Great Dane Trailers, Inc.*, 388 U.S. at 34–35 (Court finds it unnecessary to decide whether the discriminatory conduct was "inherently destructive" or "comparatively slight" because the company did not come forward with evidence of legitimate motives for its actions.).

phone survey of other area companies to assess wage levels in the local market. Id. In September 2001, one month after winning a representation election, the union notified the company insisting that the first quarter wage increases be implemented in the normal course of business and that the union be given advanced notice and an opportunity to bargain. Id. Notwithstanding, the company unilaterally decided that no structural increases would be given in 2002; the company also changed the methodology it used for determining whether to grant a structural increase. Id. at 336–337.

Citing *Daily News of Los Angeles*, the Board in *Mission Foods* found that the employer was obligated to maintain the fixed elements of the structural wage increase program—the local wage survey and its timing—and to negotiate with the Union over the amount, which was the discretionary element of the increase. *Mission Foods*, 350 NLRB at 337. And by failing to do so, Board found that the employer violated Section 8(a)(1) and (5) of the Act. In finding that the structural wage increase was an established term and condition of employment, the Board noted the increase had been granted to employees for at least 4 years prior to its unilateral elimination and the timing of the increase was fixed, in that it was consistently granted during the first quarter of each year. Id. Furthermore, the "sole criterion for determining the amount of the structural wage increase was fixed (the local wage survey)." Id. And finally, the Board pointed to the fact that the majority of employees—at least 80 percent—received increases, which fell within a narrow range. Id.

Here, citing the testimony of Hartley, the General Counsel asserts that Respondent had an obligation to bargain with the Union before withholding the October 2022 wage increase from the Longmont registered nurses because "Respondent's annual across-the-board base pay adjustment was an established practice" as the evidence shows "Respondent had offered a base pay adjustment of 3 to 4 percent every year since at least September or October 2017, and only denied the adjustment to employees based on the fixed criteria of whether their pay was outside to [sic] the parameters of the pay review." (GC Br., at 5, 28–29.) However, Hartley's testimony does not support this conclusion.

At trial, Hartley testified that after Centura took over management of the Longmont Hospital she received a pay rate increase during the fall of 2017, 2018, and 2019. When asked if she recalled the amount of the increases for each of those years, Hartley responded "I don't. I'm sorry. They would be a percentage base, and they might have been three percent, four percent. I don't know the exact percent off the top of my head." (Tr. 77–78.) Hartley also testified that during 2020 she received a one-time check, in about December, because she was at the top of the pay scale for nurses and that the company does not give workers a pay rate increase at this point. (Tr. 76, 78–79.)

Hartley's testimony is insufficient to show that "Respondent had offered a base pay adjustment of 3 % to 4% every year since at least September or October 2017," as the General Counsel argues. Hartley specifically testified that she simply did not know the exact amount of the increase that she received from 2017 through 2019. And no documentary evidence was introduced to show the precise amount of wage increases that Hartley or her coworkers had received over the years.

That being said, Reed's testimony establishes that, after Centura took over management of the Longmont Hospital, every fall since 2017 Respondent has conducted a review of employee wages and then adjusted worker pay accordingly based upon the parameters of this review. Based upon these fall reviews: 59 percent of Longmont nurses received some sort of wage adjustment in 2017; 72 percent of Longmont nurses received a wage adjustment in 2018; 75 percent of Longmont nurses received a wage adjustment in 2019; and 45 percent of Longmont nurses received a wage adjustment in 2020.

Accordingly, I find that Respondent's practice of conducting a wage review each fall and giving employees a pay adjustments based upon these reviews was an established term and condition of employment which Respondent could not change absent bargaining with the Union. The wage reviews and attendant pay increases had been granted for at least 4 years prior to Respondent's unilateral elimination.[16] And the timing was fixed, occurring each fall. The sole criteria used for these increases was the fall wage review. And for most years, a majority of Longmont registered nurses received the increase.[17]

While it is unclear from the record as to the precise amount of the wage increases received by the Longmont nurses each year, I do not believe this omission precludes the finding of a violation. At the very least, Respondent was obligated to maintain the annual fall wage review, and then negotiate with the Union over the amount of any increase. *Mission Foods*, 350 NLRB at 337; *Daily News v. NLRB*, 73 F.3d 406, 412 (1996) (noting that "[a]s far back as 1971, this court held that an employer who had granted discretionary increases based on annual merit reviews was required to continue evaluating employees according to the plan."); *Lamonts Apparel, Inc.*, 317 NLRB 286, 288 (1995) (violation where, after employees voted to unionize, employer unilaterally changed its established practice of recommending wage increases based upon data compiled in its market survey).

Respondent's reliance upon *Shell Oil*, 77 NLRB 1306 (1948), claiming that it was privileged to withhold a wage increase as part of its bargaining strategy is unavailing. (R. Br. at 17, 22.) In *Shell Oil*, the employer was in the process of negotiating with the union when it unilaterally withheld wage increases from its unionized employees. Id. at 1309–1310. The "question of wages and hours was an integral part of negotiations then in progress," and the Board found no violation since it occurred "while a comprehensive contract was under consideration," noting that when an employer and union are engaged in collective bargaining "involving much higher stakes," there is "no obligation under the Act" for an employer to make the same wage increases available to both unionized and nonunionized employees. Id. at 1310. Here, by contrast, there was

[16] Respondent also conducted a review of wages in the fall of 2021, but as set forth above, the Longmont registered nurses were unlawfully excluded from any wage increases that resulted from this review.

[17] Although less than a majority of Longmont registered nurses received a wage increase in 2020 based upon the fall review, a significant number of them (45 percent) did.

no ongoing bargaining between Respondent and the Union. Instead, Respondent was refusing to meet and bargain with the Union altogether. *Longmont United Hospital*, 371 NLRB No. 162 (2022).

Respondent also cannot point to the fact that it was contesting the propriety of the Board's certification. "Respondent's desire to test the legal validity of the certification clearly did not justify withholding the wage increase without notice to the Union or giving it an opportunity to bargain." *Sweetwater Hospital Association*, 226 NLRB 321, 324 (1976); see also *Kentucky River Medical Center*, 340 NLRB 536, 544 (2003) ("the Respondent may be found to violate Section 8(a)(5), even if it is testing a certification). Accordingly, by unilaterally failing to continue its practice of conducting a fall wage review and adjusting the wages of the Longmont registered nurses in accordance with the parameters of that review, Respondent violated Section 8(a)(5) and (1) of the Act.

C. 8(a)(1) allegations

The Complaint alleges that Respondent violated Section 8(a)(1) of the Act by announcing in the September 27, 2021, November 5, 2021, March 2, 2022, and October 11, 2022 memoranda that employees will receive certain wage and benefit increases, while also stating that the Longmont's registered nurses who voted in the representation were excluded from those increases. (GC 1(o), ¶7, 9.) In the September 27, 2021, November 5, 2021, and March 2, 2022 memos, after describing the wage and benefit increases to be implemented to employees, Respondent wrote: "For our Longmont United Hospital RN associates, we are legally required to maintain the 'status quo' until pending matters are resolved (consistent with the National Labor Relations Act, Sections 7 & 8)." In the November 5 memo, Banko included the following sentence directly after this phrase, "I have heard you and l know that you have gone above and beyond from day one of the pandemic (and continue to do so), but this current period of time is cloudy for all of us." In the October 11, 2022 memo Respondent replaced the words "we are legally required," with the phrase "we will continue to maintain" saying, "[f]or our Longmont United Hospital RN associates, we will continue to maintain the 'status quo' until pending matters are resolved (consistent with the National Labor Relations Act, Sections 7 & 8)."

As described above, Respondent violated Section 8(a)(3) of the Act by excluding the Longmont registered nurses from the relevant wage and benefit increases because they were participating in the NLRB election process. Where an employer unlawfully withholds increases in wages or benefits "which it would have granted had there been no organizing campaign and so advis[es] its employees, the Respondent . . . violate[s] Section 8(a)(1) of the Act. This is so despite the fact that the Respondent may have believed that it could not grant any raises because of a pending election petition." *Holland American Wafer Co.*, 260 NLRB 267, 271–272 (1982). Furthermore, the Board has held that it is a violation of Section 8(a)(1) to put the onus on the very presence of the union for delays relating to the implementation of a wage increase. *Atlantic Forest Products, Inc.*, 282 NLRB 855, 859 (1987); *Hostar Marine Transport System*, 298 NLRB 188, 192 (1990); *Woodcrest Health Care Center*, 366 NLRB No. 70, slip op. at 6 (2018) (employer violated both Section 8(a)(1) and (3) by announcing and then implementing benefit increases for all employees except those eligible to vote in union election); *Lamonts Apparel, Inc.*, 317 NLRB 286, 288 (1995) (statement to employees during negotiations that where would be no annual adjustment increase because employees were now represented by a union and their wages were subject to collective bargaining is a violation of Section 8(a)(1)).

Here, through the various memoranda, Respondent announced that employees will receive wage and benefit increases, except the Longmont nurses whose wages and benefits will remain static at the existing "status quo" until election matters are resolved, referencing the National Labor Relations Act. This language points the finger at the very presence of the Union, and employees exercising their right to petition for a union election, as the reason why Longmont nurses will not receive the same wage and benefit increases as their colleagues. *Wellstream Corp.*, 313 NLRB 698, 707 (1994) (violation where superintendent told employee there "would be no raises as the Labor Board would not permit the Respondent to give raises during a union dispute."); *ACME Die Casting*, 309 NLRB 1085, 1125–1126 (1992) (Statement to employees that their pay raise is stalled because the employer was contesting the union's election victory constitutes a violation of Section 8(a)(1) as it puts the onus of the delay on the union's very presence). And, Respondent made these statements at a time when it was seeking a rerun election. *Holland American Wafer Co.*, 260 NLRB at 271–272 (noting that most of the employer's statements were made at a time when it was seeking a rerun election). As such, by announcing in the various memoranda that employees will receive wage and benefit increases, except for the Longmont registered nurses whose wages and benefits will remain static at the existing status quo until their union election matters are resolved, Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

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

2. The National Nurses Organizing Committee/National Nurses United (NNOC/NNU) (Union), is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times the Union has been the exclusive collective-bargaining representative of the following unit of Respondent's employees (unit):

> All full-time, regular part-time, and per diem registered nurses, including clinical coordinators, clinical documentation specialists, RN Wound Ostomy employees, house supervisors, education instructors II, RN unit educators, and RN educators, employed by the Employer at its facility located in Longmont, CO 80501; but excluding all RNs employed by other entities, registries or agencies providing outside labor to the Employer, office clerical employees, nurse administrators, managerial employees, confidential employees, guards, and supervisors as defined by the National Labor Relations Act.

4. By unilaterally changing its past practice of conducting a fall wage review and providing employees with pay increases

based upon the results of this review, without giving the Union a meaningful opportunity to bargain, Respondent violated Section 8(a)(5) and (1)

5. By informing employees that they would not be given increased or new wages, bonuses, and/or benefits because they participated in a representation election, Respondent violated Section 8(a)(1) of the Act.

6. By implementing increased or new wages, bonuses, and/or benefits to employees but excluding those employees who voted in a representation election because they exercised their rights guaranteed under Section 7 of the Act, Respondent violated Section 8(a)(3) and (1) of the Act.

7. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative actions, as further set forth in the Order below, designated to effectuate the policies of the Act. Because Respondent violated Section 8(a)(3) and (1) of the Act by withholding from unit employees increased or new wages, bonuses, and/or benefits as outlined herein, I shall order the Respondent to extend to unit employees those increased or new wages, bonuses, and/or benefits retroactively from the dates they were offered to Respondent's other employees. Respondent is further ordered to make unit and former unit employees whole for any losses suffered as a result of its unlawful conduct in the manner set forth in *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 outlined in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with the Board's decision in *Thryv Inc.*, 372 NLRB No. 22 (2022), Respondent shall also compensate affected employees for any other direct or foreseeable pecuniary harms incurred as a result of the unfair labor practices found herein. 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 outlined in *Kentucky River Medical Center*, 356 NLRB 6 (2010). To the extent Respondent's backpay obligations result in adverse tax consequences for affected employees due to their receiving lump-sum payments, Respondent is ordered to compensate those employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 27, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). In accordance with the Board's decision in *Cascades Containerboard Packaging—Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), the Respondent shall also be required to file with the Regional Director for Region 27 a copy of each backpay recipient's corresponding W-2 form reflecting the backpay award.

Having found Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its past practice of conducting an annual fall wage review and providing employees with pay increases based upon the results of this review, Respondent is ordered to rescind the unlawful changes. Respondent is further ordered to restore the status quo ante regarding these practices and to refrain from making any changes to the wages, hours, or other terms and conditions of employment of unit employees, without first bargaining with the Union to agreement or impasse.

The Respondent shall also be required to post the attached notice in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010), and *Durham School Services*, 360 NLRB 694 (2014). The Board generally limits the scope of its notice postings to only those facilities where the unfair labor practices occurred, in order to "insure that all employees who were affected by the Respondent's unfair labor practices will have an opportunity to read the notice." *United States Postal Service*, 345 NLRB 426, 426 fn.3 (2005). Here, because the various memoranda announcing the unlawful exclusion of unit employees from the increased or new wages and/or benefits were sent to all employees in Colorado and Western Kansas, I find that all employees who were emailed these memoranda were affected by Respondent's unfair labor practices. Therefore, Respondent is ordered to post the attached notice at all of its 19 hospitals/facilities in Colorado and Western Kansas.[18] For the same reason, I order that the notice also be distributed to employees at these facilities by email. *J. Picini Flooring*, 356 NLRB at 11 (in ordering electronic notices, the Board notes that "electronic notices will have the same scope as notices posted by traditional means; that is, distribution will be limited to the extent practicable to the location(s) where the unfair labor practices occurred.").

In the complaint, the General Counsel seeks additional remedies including a notice reading, notice mailing, and training for Respondent's managers and supervisors within the State of Colorado about Section 7 rights under the National Labor Relations Act. However, I find the General Counsel has not shown that the Board's standard remedies are insufficient to remedy the unfair labor practices found herein and I decline to order those additional remedies.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[19]

ORDER

Respondent Longmont United Hospital and Centura Health, as a single employer, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Failing and refusing to bargain collectively and in good faith with the National Nurses Organizing Committee/National Nurses United (NNOC/NNU), as the collective-bargaining representative in the following unit, by making unilateral

[18] The facilities in question are specifically set forth in GC Exh. 24.

[19] 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.

changes to employee wages, hours, and working conditions:

> All full-time, regular part-time, and per diem registered nurses, including clinical coordinators, clinical documentation specialists, RN Wound Ostomy employees, house supervisors, education instructors II, RN unit educators, and RN educators, employed by the Employer at its facility located in Longmont, CO 80501; but excluding all RNs employed by other entities, registries or agencies providing outside labor to the Employer, office clerical employees, nurse administrators, managerial employees, confidential employees, guards, and supervisors as defined by the National Labor Relations Act.

(b) Informing employees that they will not receive increased or new wages, bonuses, and/or benefits because they participated in a union representation election.

(c) Implementing increased or new wages, bonuses, and/or benefits to employees but excluding those employees who voted in a union representation election because they exercised their rights guaranteed under Section 7 of the Act.

(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 making any changes to the wages, hours, or other terms and conditions of employment of unit employees, bargain with the Union to agreement or impasse as the exclusive collective-bargaining representative of employees in the bargaining unit described above.

(b) Implement for unit employees the increased or new wages, bonuses, and/or benefits announced in the September 27, 2021, November 5, 2021, March 2, 2022, and October 11, 2022 memoranda, as further set forth in the remedy section of this decision.

(c) Make current and former unit employees whole, with interest, for any losses resulting from their exclusion from the increased or new wages, bonuses, and/or benefits announced in the September 27, 2021, November 5, 2021, March 2, 2022, and October 11, 2022 memoranda as further set forth in the remedy section in this decision.

(d) Make affected employees whole for any direct or foresee eable pecuniary harms suffered as a result of their exclusion from the increased or new wages, bonuses, and/or benefits announced in the September 27, 2021, November 5, 2021, March 2, 2022, and October 11, 2022 memoranda as further set forth in the remedy section in this decision.

(e) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 27, 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 years for each employee.

(f) File with the Regional Director for Region 27, 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 reflecting the backpay award.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its nineteen facilities in Colorado and Western Kansas, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 27, 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, because the various memoranda in question were distributed to all of Respondent's Colorado and Western Kansas employees by email, I shall order that the notice also be distributed by email to employees working at those same facilities. Further electronic distribution of the notices is ordered, such as by text message or by 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 its hospital in Longmont, Colorado, since September 27, 2021.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 27 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this order.

Dated, Washington, D.C. March 28, 2023

---

[20] If the facilities 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 facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facilities reopen 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."

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively and in good faith with the National Nurses Organizing Committee/National Nurses United (NNOC/NNU) (Union), as the collective-bargaining representative of our Longmont United Hospital registered nurses by making unilateral changes to their wages, hours, and working conditions.

WE WILL NOT inform employees that they will be excluded from increased or new wages, bonuses, and/or benefits because they participated in a union representation election.

WE WILL NOT implement increased or new wages, bonuses, and/or benefits to employees but exclude those employees who voted in a union representation election because they exercised their rights guaranteed under Section 7 of the Act.

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

WE WILL bargain with the Union to agreement or impasse before making changes in the wages, hours, or other terms and conditions of employees for our Longmont United Hospital registered nurses.

WE WILL implement for our Longmont United Hospital registered nurses the increased or new wages, bonuses, and/or benefits announced in our September 27, 2021, November 5, 2021, March 2, 2022, and October 11, 2022 memoranda to employees.

WE WILL make current and former Longmont United Hospital registered nurses whole, with interest, for any losses resulting from their exclusion from the increased or new wages, bonuses, and/or benefits announced in our September 27, 2021, November 5, 2021, March 2, 2022, and October 11, 2022 memoranda to employees.

WE WILL make affected employees whole for any direct or foreseeable pecuniary harms suffered as a result of their exclusion from the increased or new wages, bonuses, and/or benefits announced in the September 27, 2021, November 5, 2021, March 2, 2022, and October 11, 2022 memoranda to employees.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 27, 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 years for each employee.

WE WILL file with the Regional Director for Region 27, 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 reflecting the backpay award.

UNITED HOSPITAL AND CENTURA HEALTH

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/27-CA-291664 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.