JD–09–26
Worcester, MA

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

VHS ACQUISITION SUBSIDIARY NUMBER 7, INC.
D/B/A SAINT VINCENT HOSPITAL

and

Case Nos. 01–CA–290852
01–CA–298265
01–CA–307704
01–CA–309196
01–CA–310590
01–CA–314126
01–CA–325949
01–CA–326187
01–CA–326424

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DECISION

STATEMENT OF THE CASE

SUSANNAH MERRITT, Administrative Law Judge. This case was tried in Boston, Massachusetts, on the following dates: September 9, 12, 13, 23, 25, 26, and 27; November 18, 19, and 20; and December 9, 10, 11, and 12, 2024. This case was tried following the issuance by

the Regional Director of Region 1 of the National Labor Relations Board (the Board) of a consolidated complaint on March 13, 2024, and a second consolidated complaint (the complaints) on May 25, 2024.[1] Respondent filed timely answers to the consolidated complaint and, with one exception, the second consolidated complaint.[2]

The complaints were based on unfair labor practice charges filed by Charging Party Massachusetts Nurses Association (MNA or Union), which represents a unit of registered nurses (RNs) employed by Respondent VHS Acquisition Subsidiary Number 7, Inc. d/b/a Saint Vincent Hospital (Respondent or Hospital). The complaints allege that Respondent committed violations of Section 8(a)(1), 8(a)(3), 8(a)(4), 8(a)(5), and 8(d) of the National Labor Relations Act (the Act). Specifically, the Counsel for the General Counsel (hereafter the General Counsel) alleges that Respondent violated Section 8(a)(1) of the Act when it: denied union representatives access to its facility; informed employees that it would withhold bonus payments that it owed them under their shift incentive contracts; blamed the Union for Respondent's failure to make bonus payments; and threatened to have union representatives removed from its facility. The General Counsel also alleges that Respondent withheld bonus payments owed its employees under their shift incentive plan in violation of Section 8(a)(3), (4), and (1) of the Act, and failed and refused to provide the Union with information relevant to the Union's performance of its duties as the employees' exclusive collective bargaining representative in violation of Section 8(a)(5) and (1) of the Act.

In addition, the General Counsel alleges that Respondent, without affording the Union an opportunity to bargain with Respondent and/or without first bargaining to a good-faith impasse, violated Section 8(a)(5) and (1) of the Act by: requiring union representatives to give twenty-four hours' notice before visiting its facility; denying union representatives access to its facility;[3] denying on procedural grounds the majority of grievances filed by the Union; notifying the Union that a single individual would act as sole designee for all the steps in the parties' contractual grievance procedure; reducing the amount it paid its employees under the shift bonus incentive program; notifying the Union that it should refrain from contacting Respondent's Chief Nursing Officer (CNO) or any member of the administration directly with regard to all union and labor relations matters; bypassing the Union and dealing directly with its unit employees by

[1] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for General Counsel's post-hearing brief; "R. Br." for Respondent's post-hearing brief; and "CP Br." for Charging Party's post-hearing brief.

[2] On June 17, 2024, pursuant to Section 102.17 of the Board's Rules and Regulations, the General Counsel filed a Notice of Intent to Amend the second consolidated complaint to correct some typographical errors and add an additional allegation that Respondent violated Section 8(a)(1) and (5) on about May 16, 2022, when Christopher Borruso notified the Union that he would be Respondent's sole designee for all steps of the contractual grievance procedure. (GC Exh. 2.) On September 12, 2024, the undersigned granted the General Counsel's Motion at hearing. (Tr. at 69.) On September 26, 2024, Respondent requested an additional week to file its answer to the amended complaint, which the undersigned granted. (Tr. at 1078.) Despite the extension of time granted at hearing, Respondent failed to file an answer to the second consolidated complaint as amended.

[3] The General Counsel also alleges that Respondent violated Section 8(a)(3) of the Act by requiring union representatives to give twenty-four hours' notice before visiting its facility and denying union representatives access to its facility.

soliciting employees to enter into individual incentive agreement contracts; declaring impasse on and implementing its switch shift incentive program; declaring impasse on and implementing its winter extra shift program; and changing its policy regarding union access to its facility. Finally, the General Counsel alleges that Respondent violated Section 8(a)(1), 8(a)(5) and 8(d) of the Act by failing to continue in effect all the terms and conditions of the parties' collective bargaining agreement by refusing to allow the Labor Relations Connection (LRC) and the American Arbitration Association (AAA) to administer arbitrations after the selection of arbitrators without the Union's consent.

DEFERRAL

Respondent raises the affirmative defense that the General Counsel's allegations regarding denial of union access to the Hospital, threats to have union representatives removed from the Hospital, and arbitration administration[4] should be deferred to the parties'' grievance-arbitration procedure. (R. Br. at 19-20, 57.)

Deferral is an affirmative defense in which the burden of proof is assigned to the moving party. See *Rickel Home Centers*, 262 NLRB 731 (1982). The Board has found prearbitral deferral appropriate when: (1) the dispute arises within the confines of a long and productive bargaining relationship; (2) there is no claim of employer animosity to the exercise of employee statutory rights; (3) the parties' agreement provides for arbitration of a very broad range of disputes; (4) the arbitration clause clearly encompasses the dispute; (5) the employer has asserted its willingness to resort to arbitration for the dispute; and (6) the dispute is eminently well-suited to resolution by arbitration. *Wonder Bread*, 343 NLRB 55 (2004), citing *Collyer Insulated Wire*, 192 NLRB 837, 839 (1971); *San Juan Bautista Medical Center*, 356 NLRB No. 102, slip op. 2 (2011).

Applying the standard here, it is clear that the allegations in the complaint are inappropriate for deferral. First, the disputes did not arise within the confines of a productive collective-bargaining relationship, as the multiple disputes here took place in the context of nurses returning to work after a difficult and protracted strike. Additionally, the complaint contains multiple 8(a)(3) allegations alleging that the Hospital was hostile to unit employees' statutory rights. Significantly, there are several 8(a)(5) allegations accusing Respondent of unilaterally changing its grievance and arbitration procedure itself.[5]

Moreover, it is well-settled that in cases in which "an allegation for which deferral is sought is inextricably related to other complaint allegations that are either inappropriate for deferral or for which deferral is not sought, a party's request for deferral must be denied." *American Commercial Lines*, 291 NLRB 1066, 1069 (1988). Accord: *Arvinmeritor, Inc.*, 340 NLRB 1035 fn. 1 (2003) (denial of deferral when allegations were "closely intertwined"); *S.Q.I.*

[4] Specifically, Respondent contends that complaint paragraphs 10, 13, 15–16, 33 and 34 are appropriate for deferral.

[5] In addition, the complaint includes allegations involving information requests, which the Board has long held to be inappropriate for deferral. *Borenstein Caterers, Inc.*, 373 NLRB No. 23, slip op. at 7 (2024).

Roofing Inc., 271 NLRB 1 fn. 3 (1984) (denial of deferral when there was a "close inter-relationship" between allegations in the complaint).

Here the allegations in the complaint are closely related as they involve a series of alleged unfair labor practices, including several 8(a)(5) unilateral change allegations, that took place after the bargaining unit members returned to work after contentious contract negotiations and a prolonged strike.

In light of all of the above, I find that none of the allegations in the complaint are appropriate for deferral as an initial matter.

FINDINGS OF FACT AND ANALYSIS

At trial, the parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file post-hearing briefs. The parties have agreed to some stipulated facts, litigated the case, and filed post-hearing briefs, which have been carefully considered. Accordingly, based upon the entire record herein, including the stipulated facts, post-hearing briefs and my observation of the credibility of the witnesses,[6] I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent, a Delaware corporation with an office and place of business in Worcester, Massachusetts (the facility), where is engaged in the operation of an acute care hospital. Annually, Respondent derives gross revenues in excess of $250,000 and purchases and receives at its facility goods in excess of $5,000 directly from points outside the Commonwealth of Massachusetts. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act. Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, this dispute affects commerce, and the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

[6] Certain of my findings are based on witness credibility. A credibility determination may rest on various factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom. 56 Fed. Appx. 516 (D.C. Cir. 2003). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness' testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950). Where there is inconsistent evidence on a relevant point, my credibility findings are specifically addressed.

II. ALLEGED UNFAIR LABOR PRACTICES

A. ACCESS ISSUES

1. Facts

Respondent is owned by Tenet Healthcare Corporation, which owns, controls, or is affiliated with hospitals, surgery centers, and healthcare providers. (Tr. at 1417.) The Union began representing RNs at the Hospital in 1998, and the parties' first collective bargaining agreement took effect in 2000. (Tr. at 697.) The parties continued to negotiate successive collective bargaining agreements about every three years up through 2019. (Tr. at 698; Jt. Exh. 2.) While the parties were bargaining for a successor contract to the 2017–2019 collective bargaining agreement, unit employees went on strike from March 8, 2021, through December 17, 2021. (Tr. at 102.) The strike ended when the parties negotiated a successor collective bargaining agreement. A return-to-work agreement was also negotiated between the parties and a new contract went into effect on January 3, 2022. The majority of the striking nurses returned to work in mid-January 2022, per the return-to-work agreement. (Tr. at 102, 698.) A decertification petition was filed by a replacement worker and the election was held on February 28, 2022. The Union prevailed. (Tr. at 857, 600, 1425.)

The parties' collective bargaining agreement (CBA) contains a management rights clause[7] and a generally worded zipper clause.[8] Both of these clauses were unchanged from prior agreements; there is no evidence that the parties ever proposed or bargained over, any changes to the specific language in either of these clauses. There is also no evidence that the parties discussed the zipper clause as it related to past practices.

[7] "Except as there is contained in this Agreement an express provision specifically limiting the rights or discretion of the Hospital, all rights, functions and prerogatives of the management of the Hospital formerly exercised or exercisable by it remain vested exclusively in the Hospital administration. Without limiting the generality of the foregoing, the Hospital specifically reserves to itself the management of the Hospital and the following rights: to assign work; to direct the work force; to determine nurse qualifications and evaluate competency; to establish and require standards of performance and to promulgate reasonable rules of conduct; to determine staffing and patient load requirements; to determine and re-determine job content; to determine medical, nursing care and counseling standards, security measures, and operational and other policies; to hire; to promote; to suspend, demote, discharge or otherwise discipline nurses for just cause; to transfer nurses; to lay off nurses for lack of work or for other legitimate reasons; to promulgate and enforce all rules respecting operations, safety measure and other matters; to determine all equipment and supplies to be used; to utilize the services of auxiliary, on-call, temporary or volunteer nurses; and to decide the number and location of its facilities, provided that such rights do not conflict with any other specific term of this Agreement and are reasonably exercised." (GC Exh. 15 at 8.)

[8] "This Agreement contains the complete agreement of the parties, and no additions, waivers, deletions, changes or amendments shall be effective during the life of this Agreement, unless evidenced in writing, dated and signed by parties hereto. An oral waiver or a failure to enforce any provision in a specific case shall not constitute a precedent or preclude either party from relying upon or enforcing such provision in any other case." (GC Exh. 15 at 40.)

a) Access Provision

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act when it denied Union representative Marie Ritacco access to the Hospital from February 15, 2022 until March 17, 2022. The General Counsel also alleges that Respondent violated 8(a)(3), 8(a)(5), and 8(a)(1) by changing its policy regarding Union access to the Hospital, requiring Union representatives to give 24 hours' notice before visiting the Hospital, and by banning Union representative Wendy McGill from the Hospital from September 14, 2023, through November 9, 2023. The General Counsel also alleges that Respondent violated Section 8(a)(1) when it threatened to have McGill removed from the Hospital on October 20, 2023.[9]

The CBA's access provision has generally remained the same since the parties' first contract, which went into effect in 2000. (Tr. at 848.) That provision states:

> Duly authorized representatives of the MNA may visit the premises of the Hospital at reasonable times to discharge the MNA's duties as collective bargaining representative. Where reasonably possible, the MNA shall provide 24 hours' advance notice of such visit, otherwise, the MNA shall provide as much advance notice as possible under the circumstances. Upon arrival at the hospital, the visiting representative shall notify the Human Resources Office and while at the Hospital shall not interfere with the Hospital's operating needs or patient care.
>
> The MNA will not schedule or hold meetings of its entire membership, or portions thereof (defined as more than 10 bargaining unit members) on Hospital premises unless the MNA obtains advance approval from the Hospital's Director of Human Resources. Such approval shall not be unreasonably denied. (GC Exh. 15 at 8.)

b) The Hospital's Physical Layout and Historical Access Practices

Wendy McGill (McGill) is the Associate Director in the Union's Division of Labor Action and has represented the Hospital's bargaining unit employees since the spring of 2001. (Tr. at 840-842.) Over the years as the Union representative McGill has visited the Hospital to meet with individual employees, circulate Union information, update Union bulletin boards, and make rounds, as well as attend grievance meetings, bargaining sessions, and other meetings with management. When she has met with management representatives she has generally done so in one of the Hospital's conference rooms. There is a smaller conference room in the Human Resources Suite and there are larger conference rooms off the Hospital's atrium on the ground floor. (Tr. at 843.) The Hospital's atrium is open to the public and contains tables and chairs, a food court, a gift shop, and a large waterfall. (Tr. at 845–846.) Over the years, when McGill has met with bargaining unit employees, she has done so in employee break rooms, the atrium, or conference rooms as assigned by the Hospital. (Tr. at 843.)

[9] Complaint paras. 10, 13, 15, 16, and 33.

McGill testified without contradiction that despite the longstanding language regarding access in the parties' collective bargaining agreements, when she came into the Hospital to meet with employees from 2001 through 2017, she would do so without notifying anyone in management ahead of time or announcing that she had arrived at the Human Resources department. (Tr. at 848.) When McGill wanted to book a conference room or meet with management during this time, she would contact Human Resources Vice President Jan Peters (Peters) or Peters' assistant and make those arrangements. (Tr. at 851.) Sometime around 2017, Peters retired and McGill's main point of contact changed to labor and employee relations manager Kathy Noguiera (Noguiera). Sometime in 2018, during a phone call Noguiera asked McGill if she could start letting Noguiera know when she was at the Hospital and McGill agreed to start doing so. (Tr. at 853.)

After that conversation McGill would either call or email Noguiera to let her know that she would be at the Hospital later in the day or that she was just arriving at the Hospital, to make rounds or visit with unit members. McGill would not call or email about coming in if she had a previously scheduled meeting with management (a grievance meeting, for example), because management would have already been notified of the visit when arrangements for the meeting were made. (Tr. at 853–854.) McGill did allow that during this time frame there were times when she could provide 24 hours' notice prior to arriving at the Hospital and when that was the case she would do so, but she also testified that most of the time she would just notify the Hospital the same day as her visit.[10] As she put it: "[W]e have never treated it as if, oh, well, somebody reached out today. Look at my watch. I've got to wait and make sure that I say I'm – I have to give 24 hours' notice. So you're going to have to wait on this." McGill testified without contradiction that Nogueira never asked her to provide at least 24 hours' notice prior to visiting the Hospital. (Tr. at 853–854, 1225–1226.)

Noguiera left the Hospital in early 2020, when the parties were in the middle of contract negotiations and during the Covid 19 Pandemic (the Pandemic). Sometime around March 1, 2020, Lisa Crutchfield (Crutchfield) came in as the Chief Human Resources Officer (CHRO) and became McGill's main point of contact with the Hospital after Nogueira left. (Tr. at 855.) At that point due to Pandemic protocols Union representatives were not visiting the Hospital. (Tr. at 856.) Crutchfield resigned in early March 2021, around the same time that the unit employees went on strike. Anita Holbrook (Holbrook)[11] was hired as CHRO in May 2021, while the Unit employees were still on strike. (Tr. at 856–857, 356, 1203, 2059–2060.)

McGill only visited the Hospital two times during the strike, when she attended negotiating sessions in the summer of 2021 and the Union's bargaining team was escorted in and

[10] McGill testified: "Generally, I would call text or email Kathy generally on the same day, indicating that I would be coming by the hospital. Sometimes—most often it would be as I was arriving there, because I was –sometimes I wasn't sure if I was going to get there that day or what time I would arrive." (Tr. at 853.) [I think you already said this in the text]

[11] Anita Holbrook testified at hearing and has changed her last name to Perrier since the events at issue here. (Tr. at 2057.) Although she currently goes by Perrier, I refer to her in this decision as Holbrook for the sake of consistency and clarity.

out of the Hospital for both of those visits. (Tr. at 857–858.) After the contract was ratified and the nurses were returning to work in January 2022, McGill resumed visiting the Hospital in the same manner as she had previously although she went in a little less frequently since many of the Pandemic protocols were still in place. (Tr. at 858–859.) Marcelino La Bella (La Bella) had come in as the director of labor and employee relations while the employees were on strike and he became McGill's main point of contact after the strike. (Tr. at 859.)

c) Respondent Bans Marie Ritacco from the Hospital

In February 2022, Marie Ritacco (Ritacco) a nurse who was a bargaining unit member, took a leave of absence from the Hospital, so that she could spend a period of time working full time for the Union. This arrangement was provided for in the parties' collective bargaining agreement. (Tr. at 860, 2084.) Ritacco was familiar with the Union's role at the Hospital as she had previously been an active union member and had held elected positions with the Union, including over 15 years as grievance chair. (Tr. at 105, 860.)

On February 7, 2022, which was Ritacco's first day in her new role working for the Union, she emailed CHRO Holbrook at 7:23 a.m., informing her that she would be in the Hospital later in the day in order to carry out Union business. (GC Exh. 16.) Ritacco testified that she planned to post information on the Union bulletin boards and make herself available to any unit members who wanted to meet with her. At 10:42 a.m., Holbrook emailed Ritacco back stating: "As a reminder, the CBA requires that you provide 24 hours' notice whenever possible. Please ensure you provide adequate notice moving forward, and also please let me know when you arrive." (Tr. at 185, GC Exh. 16.)

Ritacco testified that when she started working full time for the Union, she would pass by the human resources suite upon entering the building and give the "hi sign" to the human resources secretary. (Tr. at 194.) During her February 7 visit Ritacco went about her business visiting break rooms on different units when she passed nurse Joanne Bouche (Bouche), who was at her computer in the hallway. Bouche, who was not with a patient, asked Ritacco if she had time to talk and Ritacco responded that she was headed to the breakroom for the next 15 to 20 minutes and that Bouche could stop by if she was on a break. Sometime afterwards, Bouche went to the breakroom and spoke with Ritacco. (Tr. at 201.)

Later that day, Holbrook asked Ritacco to meet with her in a back conference room in the human resources suite. (Tr. at 203, 2088.) In the meeting Holbrook accused Ritacco of interfering with patient care saying that Ritacco had bothered nurses while they were working. Ritacco told Holbrook that she had not interfered with patient care, but that a nurse had asked to talk with her when she had seen her in the hallway and that Ritacco told her to meet her in the breakroom if she was on a break. Ritacco relayed to Holbrook that the nurse had told her that she could take a break and that there were no patients in the vicinity when Ritacco spoke with the nurse in the hallway.[12] (Tr. at 204, 2122, 2127.) During this exchange Ritacco also told Holbrook

[12] Although Holbrook's testimony is generally consistent with Ritacco's, where their testimony differs I credit Ritacco as her testimony was straight-forward, specific, and based on first-hand knowledge. Holbrook's testimony, on the other hand, was generalized, vague, and much of it was based on second-hand knowledge. For example, Holbrook admitted that she did not remember her conversation

that if the Hospital continued to interfere with the Union's ability to meet with employees in appropriate ways "it would not be an easy road for the hospital." Holbrook asked Ritacco if she was making a threat and Ritacco told her she was not. (Tr. at 201–206, 2089.)

On February 8, 2022, at 1:23 p.m., Holbrook sent Ritacco another email in which she wrote that she was putting Ritacco on notice of her multiple violations of the access provisions in the collective bargaining agreement. The email sets forth:

> The first violation occurred yesterday, on February 7, 2022, when you failed to provide the hospital with 24 hours advance notice of your visit. When I notified you of the language in the access provision of the CBA, you responded that you would provide "24 hours' notice when possible." You made no effort to articulate why you could not have reasonably provided 24 hours' notice.
>
> The second violation also occurred yesterday, when you failed to advise me upon your arrival at the facility. There is no question that the CBA requires you to provide notice "Upon arrival at the Hospital."
>
> The third violation occurred today, February 8, 2022, when you once again failed to provide 24 hours' notice. Once again, it is unclear why you were unable to do so. Moreover, during our meeting you refused to explain why you believed it was not reasonably possible for you to provide 24 hours' notice. Moving forward, to the extent you fail to provide 24 hours' notice, the Hospital will expect you to be able to articulate why such notice was not reasonably possible.
>
> The fourth violation occurred today when you failed to notify the Hospital upon your arrival at the Hospital. Again, there is no question that this is required by the CBA. In our meeting, you claimed that the fact that you saw me in the atrium, after you had already arrived at the facility, was somehow sufficient to satisfy your obligation under the access language.[13] To be clear, it is not.
>
> Most significantly, a fifth violation occurred when you were observed on the 3rd floor soliciting nurses on their working time in work areas. Interfering with the work of nurses, while on their work time and in working areas, not only interferes with the Hospital's operating needs, it also negatively impacts patient care. During our meeting, you initially denied that you interfered with work of any nurse, then later admitted that you did approach a nurse, in a work area, while she was on the clock and had a patient assignment. Again, to be clear, there is no question that interfering with the work of any

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with Ritacco word for word, she did not recall the name of the nurse who Ritacco had reportedly spoken to in the hallway, she did not remember how many patients were assigned to the nurse in question, and she did not remember the name of the nurse supervisor who reported Ritacco's activity to her. (Tr. at 2088, 2123–2127.)

[13] Ritacco testified that she stopped by the Human Resources office every time she came into the Hospital with the exception of February 8, when she was on her way to the Human Resources suite and she ran into Holbrook in the atrium and said "good morning" to her. After Ritacco greeted Holbrook, she felt she had sufficiently checked in and did not stop by Human Resources. (Tr. at 194.)

> nurse, while she is on the clock or in a work area, is "interfere[nce] with the Hospital's operating needs or patient care."
>
> Lastly, during our meeting, you refused to agree to comply with the clear and unambiguous language in the CBA and even claimed that if the Hospital attempts to hold you accountable to the language in the CBA, "it will not be an easy road for the Hospital." To be clear, to the extent any additional violations are observed, the Hospital will consider revoking your access rights to the facility. (GC Exh. 17.)

Later that same day at 1:58 p.m., Ritacco sent an email to Holbrook stating that she would be in the Hospital the next day at 9 a.m. (GC Exh. 17.) Later that day at 3:46 p.m., Holbrook wrote back to Ritacco stating:

> I would really like to have this relationship start off on the right foot, part of which would be that we are both respectful of each other and agree to respect the language of the CBA and follow its rules. Therefore moving forward, to the extent you fail to provide 24 hours' notice, the Hospital will expect you to articulate why such notice was not reasonably possible. Please provide the reason you were not able to provide 24 hours' notice for the third day in a row." (GC Exh. 17.)

Although Ritacco wrote a response email that she intended to send to Holbrook on February 9, 2022 at 7:24 a.m., she accidentally sent it only to McGill instead. In the email Ritacco wrote: "I explained that to you yesterday. And I will be coming again tomorrow at 9 am for Association business." Holbrook never received the email. (GC Exh. 19; Tr. at 348.)

On February 9, 2022, Ritacco visited the Hospital again and she went into a break room in order to update Union postings. While she was in the breakroom she spoke to a nurse who was having lunch. Later that day a nurse asked Ritacco if she could join her in a meeting with the director of perioperative services Judy Phalen (Phalen). The nurse explained that the purpose of the meeting was to ask Phalen questions about taking leave under the Family Medical Leave Act (FMLA). Ritacco agreed to go to the meeting with the nurse. When Ritacco went with the nurse to the meeting, Phalen told Ritacco that she was not allowed to attend because she was not conducting a Weingarten meeting. Once Phalen told Ritacco she did not want her at the meeting, Ritacco left. (Tr. at 355–356; 206–208.)

On February 10, 2022 at 8:47 a.m., Ritacco sent an email to Holbrook stating that there was a change in her plans and that she would be in the Hospital later that day at approximately 3:30 p.m. (GC Exh 16 at 3.) However, because Holbrook had not received Ritacco's first email, she responded: "I'm not sure what you mean by change of plans, this is the only email I received from you since Tuesday. Please explain why you were unable to provide 24 hr notice." (GC Exh. 17 at 3.) Ritacco responded at 10:10 a.m., "Really. ? I thought I emailed you I would be there on Thursday morning but I have had requests from several nurses that I make myself available for union business this afternoon." (GC Exh. 17 at 3.) In response at 10:15 a.m., Holbrook wrote: "I have no record of any emails from you yesterday. Please forward them if you are able to locate them." (GC Exh. 17 at 3.) Although the email that Ritacco mistakenly sent to McGill was produced at trial, Ritacco did not forward the email to Holbrook after Holbrook asked her to.

(GC Exh. 19.)

Ritacco sent an email to Holbrook on February 10, at 10:16 a.m., telling Holbrook that she would be in the building the next morning. (GC Exh. 16 at 4.)

On February 10, 2022 at 6:36 p.m., Holbrook wrote an email to McGill and Ritacco accusing Ritacco of violating the CBA on at least five additional occasions since February 8 and asking McGill to respond with any steps she had taken to remedy Ritacco's "willful violations of her obligations under the collective bargaining agreement." Holbrook stated in the email that Ritacco failed to provide 24-hour notice prior to her hospital visit on February 9. She also stated that Ritacco violated the collective bargaining agreement by "interfering with hospital operations," because a nurse had complained that Ritacco's presence in the breakroom on February 9 had made her uncomfortable. Holbrook also counted Ritacco's presence in the lunchroom "with no MNA business to conduct" as another violation of the collective bargaining agreement. Holbrook also cited the fact that Ritacco had sent an email that morning that "there had been a change of plan" and that she would be coming into the Hospital at 3:30 p.m. that day as failing to notify Holbrook of her visit 24 hours in advance as Holbrook had no earlier indication of Ritacco's visit. Holbrook notes that although she asked Ritacco why she had not given 24 hours' notice, Ritacco never responded and arrived at the facility at around 2:00 p.m. anyway. Finally, Holbrook contended in the email that Ritacco interfered with Hospital operations when she "attempted to insert herself into a meeting between a unit manager and an employee" regarding a Family Medical Leave request. (GC Exh. 17 at 5.)

McGill wrote Holbrook back on February 11 at 8:11 a.m., stating that Ritacco had not violated the collective bargaining agreement's access provision as the language of the contract provides that 24-hour notice needs to be provided where it is "reasonably possible." McGill goes on to state that nurses "reach out daily, even hourly, seeking information, reporting contract violations, seeking clarification of new contract provisions, asking for union representation when they have been summoned into investigatory meetings and for general advice about their contractual rights and benefits" and that the Union representatives will "continue to provide as much notice as possible and 24 hours' notice where possible." (GC Exh. 17 at 6.) Holbrook responded to McGill's email at 10:53 a.m. stating that she understood McGill's email to express that the Union's position was that: "(1) the MNA condones each and every one of the actions taken by Ms. Ritacco over the course of the past four days and, (2) the MNA had not and will not take any action to ensure Ms. Ritacco alters her behavior in any respect." (GC Exh. 17 at 6.) McGill did not respond to Holbrook's email.

On February 13 at 1:52 p.m., Ritacco wrote an email to Holbrook telling her that she would be in the Hospital in the early afternoon the next day. (GC Exh. 16 at 5.) On February 13, at 1:59 p.m., Ritacco sent another email to Holbrook stating that she would be at the Hospital on February 15, by 9:00 a.m. Ritacco also sent an email to Holbrook on February 15, at 7:47 a.m., letting her know that she would be in the Hospital the next morning. (GC Exh. 16 at 5–7.)

On February 15, Ritacco, McGill and Carolyn Moore (Moore) who was a union representative as well as a bargaining unit member, met in the atrium before meeting with Human Resources for a prescheduled meeting set up to discuss "sign on" bonuses. (Tr. at 864.)

McGill, Ritacco, and Moore were headed to the meeting when Holbrook walked over to the group and told Ritacco that she had to leave the building immediately and that she was being banned from the building for 30 days because she had "repudiated the contract by not giving at least 24 hours' notice" to management before visiting the building. McGill was upset with Holbrook and told her she had never experienced the Hospital banning a Union representative from the building before and she called Holbrook a "vile human being." Ritacco left the Hospital while McGill and Moore stayed and attended the scheduled meeting. (Tr. at 183–184, 864–867, 2092.)

On February 15 at 1:27 p.m., Holbrook wrote an email to McGill copying Ritacco in which she reiterated each of her claims that Ritacco had violated the access provision in the parties' collective bargaining agreement and announcing that Holbrook was prohibiting Ritacco from entering the Hospital for at least 30 days. (GC Exh. 17 at 8 and 9.)

On February 18, 2022, the Union filed Charge 01–CA–290852, with the Board alleging that Respondent violated Section 8(a)(1) of the Act "by barring Marie Ritacco, who was engaged in union activity in the Employer's facility in accordance with an existing practice, from the Employer's facility." (GC Exh. 1(a).)

Ritacco did not attempt to enter the Hospital for the next 30 days. On March 16 at 11:54 a.m., she emailed Holbrook stating that she would be visiting the Hospital the next day in order to attend a meeting with La Bella and CNO Jay Prosser ("Prosser"). Holbrook wrote back that Ritacco would be permitted back into the Hospital if she committed "to adhering to the mutually agreed upon terms in Section 2.01 of the collective bargaining agreement," including "providing the contractually required notice and not interfering with the hospital's operating needs or patient care." Ritacco responded that the Union "was pleased to comply with the parties CBA, not simply Article 2.01, but all the articles consistent with its 20 years plus history and established practice with those provisions." Holbrook responded the same day writing, "Thank you Marie." (GC Exh. 17 at 13–15.)

d) Respondent Bans Wendy McGill from the Hospital

In August 2022, CHRO Holbrook resigned, and Francis Henderson (Henderson) who had taken over as director of labor relations in July 2022, became McGill's main point of contact. Although Henderson spent some time in person at the Hospital, she often worked remotely out of her home office in Dallas, Texas. In September 2022, after a Step 3 grievance meeting attended in person by Henderson, McGill, and Ritacco, Henderson told McGill that she was going to need McGill to give her 24 hours' notice in the future when she came to the Hospital to attend grievance meetings. Henderson also noted that McGill had not checked in with human resources when she had arrived for the meeting and that she would need to text Henderson when she arrived. In response McGill expressed that she was confused by Henderson's request since she always attended Step 3 grievance meetings, which were prescheduled and she had never had to give notice prior to a preplanned meeting before. McGill also testified that she had already had several such meetings with Henderson, Holbrook, and Director and Senior Counsel for Labor Relations Christopher Borruso (Borruso) and no one had ever required her to give additional notice for a prescheduled meeting before. McGill's testimony was uncontradicted. (Tr. at 869–

872; 1498.)

On October 27, 2022, Henderson sent an email to McGill in which she wrote:

> The Hospital would like to provide a reminder of some of its obligations under the collective bargaining agreement. The clear and unambiguous language in the Collective Bargaining Agreement, and which the union agreed to, states:
>
> Section 2.01 of the CBA requires 24 hours advance notice when a duly authorized representative of the MNA visits the premises of the Hospital.
> Section 2.01 of the CBA allows visitation only "to discharge the MNA's duties as collective bargaining representative."
>
> Section 2.01 requires that any such visit "not interfere with the Hospital's needs or patient care." This includes but is not limited to, engaging with employees during work time and in work areas, accessing closed areas/units of the hospital, and disrupting leadership in their duties.
>
> . . .
>
> Article XXIII provides that there shall be no "interference with the operations of the Hospital during the term of the Agreement."
>
> The hospital is committed to enforcing the clear and unambiguous language of the Agreement and expects that the Association will abide by the provisions listed therein. Any failure or willful violation by the union of the Agreement will be regarded as the union's repudiation of the contract and will be dealt with accordingly. (GC Exh. 53 at 3–4.)

In this email Henderson cites only a fragment of the sentence regarding the access provision. The complete sentence sets forth: "Where reasonably possible, the MNA shall provide 24 hours advance notice of such visit, otherwise, the MNA shall provide as much advance notice as possible under the circumstances." (GC Exh. 15 at 8.) At 10:00 a.m., McGill responded to Henderson's email stating "We are fully aware of our rights and responsibilities under the NLRA and the CBA. We are not interested in engaging in a non-productive back and forth disagreement through email with you over these issues. This disagreement is the subject in other proceedings and those proceedings will have their due course." McGill was referencing charge 01–CA–290852, which the Union had filed against Respondent on February 18, 2022, regarding Respondent's banning Ritacco from the Hospital. (GC Exh. 1(a); GC Exh. 53 at 3.)

At 10:18 a.m., Henderson referring to the language cited in her initial email, responded:

> The below is the exact contract language in the Agreement. The Hospital is confused why the union is in disagreement over the contract language cited when it is clear and unambiguous.

> Again, our expectations of your obligations is that you follow the contract language cited below." (GC Exh. 53 at 2.)

On October 28, 2022, Henderson wrote to McGill:

> Per our discussion, please send me a text each and every time you enter the facility. Just for clarity the language in Section 2.01 has two obligations that it requires of the union:
>
> 1. 'The MNA shall provide 24 hours advance notice of such a visit"
> 2. 'Upon arrival at the hospital, the visiting representative shall notify the HR office.."
>
> Also, please give me notice that you will be attending grievance meetings. I was not aware you would be here for grievances, or that you would be conducting Step 3's. I had only scheduled grievances with Marie but no information as to which ones. (GC Exh. 53 at 1.)

Henderson emailed McGill six months later on April 28, 2023, stating:

> It was brought to my attention that you were at St. Vincent hospital on Wednesday, April 26, 2023. As you are aware, Section 2.01 of the CBA requires 24 hours notice when a duly authorized representative of the MNA visits the premises of the Hospital. Moreover, it also states that "upon arrival at the Hospital, the visiting representative shall notify the HR office."
>
> Please provide information on why you failed to provide the appropriate notice prior to your arrival, and also failed to provide notice of your arrival at the hospital on this date. (GC Exh. 54.)

McGill responded on May 2, 2023: "I was at the hospital on 4/26 for a Weingarten meeting held in HR. I reported to HR upon arrival at the hospital. I accompanied and represented the nurse at the investigatory meeting conducted by the ED Director Patty Gilmore in HR." (GC Exh. 54.) To which Henderson responded on May 15: "Thank you, why were you unable to provide the 24 hour notice prior to arrival? This investigatory investigation was scheduled on Monday, April 24 with the employee." (GC Exh. 54.) It does not appear that McGill responded to this email.

Four months later, on Thursday, August 31, 2023 at 1:24 p.m., Henderson wrote an email to McGill stating:

> I received a text from you at 12:17pm central time notifying me that you would be visiting the hospital this afternoon.
>
> As you are aware, the contract states that the Association Representative "shall provide 24 hours advance notice of such visit." Please let me know the circumstances which did not allow you to provide 24 hour's notice of such visit." (GC Exh. 55.)

Henderson also sent an email to Hospital managers immediately afterwards at 12:25 p.m., setting

forth: "Wendy will be on site today. I'm sure she's taking advantage of this being a holiday weekend. Please let me know is she does anything out of the ordinary during her visit." (GC Exh. 106 at 54.)

McGill did not respond to Henderson's email. McGill went to the Hospital that day because the Hospital had announced a new rule which would not allow nurses to wear Union insignia and the grievance chair had asked McGill to provide some leaflets or guidance on how to respond to the directive. (Tr. at 879–882.)

On September 14, 2023 at 1:15 p.m., Henderson wrote McGill an email this time setting forth the complete text of the access provision from the CBA and stating:

> As you are aware, on Thursday, August 31, 2023 at 12:17 pm Central time, you texted me that you would be visiting the hospital that afternoon. Then 8 minutes later, you texted me stating "here." I have since asked for you to provide the circumstance which did not allow you to provide the 24 hour's notice required. You have failed to provide the circumstance which did not allow you to provide a response. The hospital can only presume, based on your repeated access violations, that the Association does not intend to abide by the access provisions in the CBA and provide the required notice, absent a reasonable circumstance.
>
> Other access violations include the following:
> 10/28/22- You failed to provide 24 hours' notice of your arrival as required. You also failed to notify the hospital once you arrived.
> 4/10/23- You failed to provide 24 hours' notice of your arrival as required.
> 4/26/23- You failed to provide 24 hours' notice of your arrival to the hospital. When asked why you failed to provide 24 hour's [sic] notice for an investigatory meeting that was scheduled with 48 hour's notice, you failed to respond.
> 7/26/2023- You failed to provide 24 hours' notice of your arrival as required.
> 8/14/2023- You failed to provide 24 hours' notice of your arrival as required.
>
> The Hospital has repeatedly reminded the Association of its obligations under the CBA when visiting the facility. The Hospital has also advised that in light of your repeated, willful violations of the collective bargaining agreement, the hospital has no choice but to act. Specifically, please be advised that you are prohibited from entering St. Vincent Hospital for 30 days from today and will be further prohibited from entering St. Vincent Hospital thereafter unless and until you and the MNA commit to adhering to the mutually agreed upon terms in Section 2.01 of the collective bargaining agreement." (GC Exh. 57.)

In response to this email, the Union filed an unfair labor practice charge on September 15, 2023, but McGill did not otherwise directly respond to Henderson's email. (GC Exh. 1(y); Tr. at 884.)

e) Henderson Threatens to Remove McGill from the Hospital

On October 17, 2023 at 11:51 a.m., McGill sent an email to Henderson stating: "I will be visiting the hospital on Friday, Oct. 20th between 11 and 2 for Association business." (GC Exh.

56.)

In response at 11:58 a.m. the same day, Henderson forwarded her September 14 email regarding McGill's ban to McGill writing:

> Per the notice below, you are hereby banned from the hospital until you and the Association commit to adhering to the mutually agreed upon terms in Section 2.01 of the collective bargaining agreement.
>
> You and the Association have failed to send any communication to that effect." (GC Exh. 57.)

On October 18, 2023, McGill wrote an email to Henderson in which she wrote:

> I write in response to your recent communication continuing to illegally bar a duly authorized Association representative from accessing the hospital property, denying the Association its rights to police the agreement as is legally and contractually guaranteed. There is no contractual nor legal basis for your insistence that the association make some declaration to satisfy your inappropriate demands. Regarding compliance with Article II Section 2.01, we have acted in good faith and consistently in practice for over 20 years since the language was first agreed upon.
>
> When we have been able to provide at least 24 hours advance notice we have done so, when we have been unable to give such notice, the Association has provided as much advance notice as possible.
>
> There is no contractual requirement to provide the employer with an explanation in those circumstances or an allowance for the employer to deny access in those situations.
>
> The scheduling of step 3 grievance meetings or other jointly agreed to meetings has always served as the required contractual notice. After having both clarified that the authorized Association representative attends all step 3 grievance meetings, and having met for literally scores of step 3 grievance meetings, any claim that the hospital is unaware that the Association representative will be accessing the hospital on that day is disingenuous.
>
> The Association has acted and will continue to act in good faith, in accordance with the Association's contractual and legal rights, obligations and responsibilities. The only party who has violated the Agreement and the law with respect to this language is the employer." (GC Exh. 60.)

On October 20, 2023 at 2:02 p.m., McGill texted the word "Here," to Henderson to let her know that she had arrived at the Hospital. Henderson texted back at 2:50 p.m.: "Wendy, you are still banned from the hospital until we get a guarantee that you'll follow the access provisions. If you do not leave within the next few minutes we will have you removed. Please confirm you have left." (GC Exh. 59.) After texting McGill, Henderson sent an email to

members of management with the re line "Wendy McGill":

> She is banned from the hospital. She gave me notice about 20 min ago that she was there.
>
> Please find her and have security escort her out. I already told her to leave but she is ignoring me. (GC Exh. 106 at 61.)

McGill testified that by the time she received Henderson's text, she had left the Hospital. (Tr. at 888–889; GC Exh. 59.)

On October 25, 2023, Henderson wrote to McGill:

> [T]he times that you failed to provide notice were for: 1) prescheduled investigatory meetings where an Association Representative may attend, 2) post on the union bulletin board, 3) and attend step 3 meetings where a MNA Staff Representative *may attend*.
>
> You and the Association have failed to demonstrate a reasonable circumstance which would allow you to circumvent the notice requirement in the CBA. Your presence was neither required nor needed for any of the visits cited above and you had no "contractually guaranteed" right to be at the hospital as you claim below, absent the appropriate notice as required under the CBA.
>
> You have failed to provide a guarantee that you will follow the clear and unambiguous access provisions. Moreover, on August 31, 2023, you entered the facility despite being notified by the hospital that you were prohibited from entering unless and until you and the MNA commit to adhering to the mutually agreed terms in Section 2.01 of the collective bargaining agreement. You blatantly chose to ignore the hospital's demand and entered the facility. I then contacted you to leave the facility and give me notice that you left. You have failed to respond to my directive.
>
> As such, due to your blatant disregard and repudiation of the CBA and the hospital's directive, you are prohibited from entering St. Vincent Hospital for an additional 30 days from today and will be further prohibited from entering St. Vincent Hospital thereafter unless and until you and the MNA commit to adhering to the mutually agreed upon terms in Section 2.01 of the collective bargaining agreement.
>
> Any future infractions or access to the facility by you, in violation of the CBA and the hospital's clear directive will be dealt with accordingly. (GC Exh. 60.)

After sending this email, Henderson continued to assert that McGill was banned from the Hospital including on November 8, 2023, when McGill came to a prearranged Union luncheon for nurses which the Union has traditionally held in a conference room at the Hospital a few times a year. (Tr. at 901.) When McGill texted Henderson that she had arrived at the Hospital for the event, Henderson texted McGill back: "Your access to St. Vincent has been suspended. Please leave the facility and give me notice that you have left." (GC Exh. 62.) Upon not hearing back from McGill, Henderson wrote: "we are inviting you to leave in a respectful manner. If you

continue to ignore our directive we will be escorting you out." (GC Exh. 62.) Eventually, Henderson arranged to have a member of security go up to the event and ask McGill to leave. McGill declined to leave and the security guard eventually left. (Tr. at 901–904.)

1. Analysis of Access Allegations

a) The General Counsel alleges that Respondent violated Section 8(a)(3), (5) and (1) of the Act by changing its policy regarding Union access and banning McGill access to the Hospital.[14]

i. 8(a)(5) and (1) Allegations

Absent a valid defense, an employer violates Section 8(a)(5) and (1) of the Act by making a change to a mandatory subject of bargaining without first providing the union that represents its employees with notice and an opportunity to bargain. *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141, slip op. at 1 (2024). It is well established that union access is a mandatory subject of bargaining which may not be unilaterally changed. See, e.g., *Noel Canning*, 364 NLRB No. 45, slip op. at 4 (2016); *Turtle Bay Resorts*, 355 NLRB 1272 (2010); See also *Casino San Pablo*, 361 NLRB No. 148, slip op. at 7 (2014), citing *Ernst Home Centers*, 308 NLRB 848, 849 (1992) (finding that a "unilateral change in the past practice of permitting union access is a material change about which an employer is obligated to bargain.").

It is uncontested that the parties have had the same access language in their successive collective bargaining agreements for more than 20 years. The relevant provision of the parties' collective bargaining agreement provides:

> Duly authorized representatives of the MNA may visit the premises of the Hospital at reasonable times to discharge the MNA's duties as collective bargaining representative. Where reasonably possible, the MNA shall provide 24 hours advance notice of such visit, otherwise, the MNA shall provide as much advance notice as possible under the circumstances. (GC Exh. 15 at 8.)

The General Counsel asserts that after years of interpreting the parties' access provision a certain way, Respondent changed its policy with regard to Union access without first notifying and bargaining with the Union about the change. Respondent alleges that it has not changed its access requirements but rather is just requiring that the Union abide by the language agreed upon by the parties in their contract.

The Board has held that, "[w]here past practice has established a meaning for language that is used by the parties [in their agreement], the language will be presumed to have the meaning given to it by past practice." *Pan-Adobe*, 222 NLRB 313, 325 (1976), quoting *Pekar v. Local 181, Brewery Workers*, 311 F.2d 628, 636 (6th Cir. 1962), cert. denied 373 U.S. 912 (1963).

It is well settled that the Board may interpret the terms of a collective bargaining

[14] Complaint paras. 15, 16 and 33.

agreement in order to determine whether an unfair labor practice has been committed. *Mining Specialists, Inc.,* 314 NLRB 268 fn.5 (1994). In interpreting a contract, the parties' intent underlying the contract language is paramount and is given controlling weight. Id. at 268–269. To determine the parties' intent, the Board looks to both the contract language and to the relevant extrinsic evidence, such as the parties' bargaining history and past practice. When there is no extrinsic evidence, the Board looks to the ordinary meaning of relevant contract terms as applied to the facts of the case. *In re Resko Products, Inc.,* 331 NLRB 1546, 1548 (2000).

Evidence presented at hearing established that from 2018 through 2022, Union representatives would provide some advance notice to management prior to arrival, but that the Hospital had never required Union representatives to provide 24 hours' notice for each and every visit. The General Counsel posits that this established past practice is consistent with the language of the access provision of the collective bargaining agreement as the provision provides language that 24-hour notice would be provided only when it was "reasonably possible" to do so, and that otherwise it would "provide as much notice as possible under the circumstances." Thus, up until 2022, the Respondent had given the Union wide berth in deciding when providing 24 hours' notice was "reasonably possible" and had generally accepted any amount of notice to be sufficient prior to a Union representative's arrival. Respondent presented no evidence to contradict that this had been the past practice of the parties from at least 2018 to 2022, or that Respondent had bargained with the Union about changing the meaning of the access provision when the parties negotiated their most recent collective bargaining agreement. The General Counsel alleges that Respondent changed its access policy when it began to demand that Union representatives provide 24 hours' advance notice of their visit in every instance, even in cases of prescheduled meetings, and threatened to (and did eventually) ban Union representatives from the Hospital if they did not capitulate to the new requirement.

The evidence establishes that starting in February 2022, without first notifying or bargaining with the Union, Holbrook started asserting that Ritacco had "violated" the collective bargaining agreement by failing to provide Respondent with 24 hours' notice prior to arriving at the Hospital. On February 15, 2022, Holbrook accused Ritacco of violating several aspects of the parties' access provision, including not providing 24 hours' notice ahead of her visits and banned her from the Hospital for 30 days.[15] Subsequently, in July 2022, Henderson told McGill that she was now required to provide Henderson with 24 hour notice prior to arriving at the Hospital even in the case of prescheduled meetings with management. Henderson sent emails about these alleged contract violations to McGill sporadically until September 14, 2023, when Henderson announced that she was banning McGill from the Hospital for 30 days. In her email to McGill, Henderson stated that McGill had failed to provide the Hospital with 24-hour notice prior to her arrival six different times during the period from October 28, 2022, through August 31, 2023. While Ritacco's ban involved various alleged violations of the access provision, McGill's ban

[15] In her email banning Ritacco from the Hospital, Holbrook also accused Ritacco of: failing to stop by the Human Resources office to announce her arrival on several occasions, interfering with patient care and hospital operations during her visits to the Hospital, threatening Holbrook, loitering in an employee breakroom with "no union business to conduct." (GC Exh. 17 at 8–9.) The General Counsel has alleged that Ritacco's ban violated Section 8(a)(1) in paragraph 10 of the complaint. I address this allegation infra.

was based on the fact that McGill had failed to provide Henderson with 24 hours' notice on six different occasions. (GC Exh. 57.)

In light of the evidence of longstanding past practice of the parties interpreting the contract to generally allow union representatives to provide less than 24 hours' notice prior to visiting the Hospital, I find that Respondent violated Section 8(a)(5) and (1) of the Act when it started requiring union representatives to provide at least 24 hours' notice prior to arrival for every visit and on occasions when such notice was not provided demanding that the representative provide a defense for not doing so or be banned from the hospital.

Respondent's asserted defenses lack merit. Initially, Respondent contends that the language of the collective bargaining agreement is clear that the Union must give at least 24 hours' notice prior to visiting the Hospital and that requiring the Union to adhere to the terms of the contract does not constitute a change in policy. However, the contract language taken at face value is far from clear as it specifically allows for the Union to provide less than 24 hours' notice when it is not "reasonably possible" to provide 24 hours' notice, and the term "reasonably possible" is not further defined in the contract.[16] Additionally, as set forth above, evidence presented at hearing established that the parties' past practice established that 24 hours' notice was not required or even generally expected and there is no evidence that the parties specifically bargained about the access language in the contract during the most recent contract negotiations. By suddenly requiring Union representatives to provide 24 hours' notice ahead of time for every visit or to provide a defense for not doing so, Respondent materially changed the parties' long-standing practice allowing the Union representatives wide discretion in determining how much notice was reasonably possible for any given visit.

Second, Respondent appears to put forth a waiver argument by contending that Holbrook's emails to Ritacco and McGill in February 2022, had placed the Union "on notice" that the Hospital "required some explanation" of why it was not possible to provide 24 hours' notice when such notice was not provided. (R Br. at 24.) However, Respondent provided no evidence that this change in policy was ever bargained over. Instead, Holbrook simply announced it as a *fait accompli*, under the guise that she was just enforcing the contract's access provision.[17] Contrary to Respondent's assertion that the Union acquiesced to this new requirement as they did not object to it when it was first presented by Holbrook, the Board has long held that a union is not required to offer to bargain with the employer when the unilateral

[16] It is telling that Henderson's references to the contract language in her emails to Ritacco and McGill leave out the portions of the access agreement that specifically allow for the Union to provide less than 24-hours' notice and provide instead only a segment of the provision taken out of context. See supra.

[17] Although Respondent did allege that this charge was untimely filed in its second amended answer to the second consolidated complaint, it did not address this contention at hearing or in its post hearing brief. (GC Exh. 1(mm).) Since Respondent failed to raise or develop that affirmative defense during the hearing or in its posttrial brief, I find that Respondent has waived the affirmative defense. See *Wisconsin Bell, Inc.*, 346 NLRB 62, 64 fn. 8 (2005). Moreover, as the Union filed charge 1–CA–325949 alleging that on September 14, 2023, Respondent violated Section 8(a)(5) and 8(a)(3) by unilaterally changing its policy regarding Union access on January 17, 2024, the charge was filed within six months of the allegation. (GC Exh. 1(aa)).

change is presented as a *fait accompli*, as was the case here. *In re Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001). Significantly, in the correspondence between the parties during this time-frame McGill repeatedly expressed that the Union did not agree with Respondent's position regarding Union access. (See, e.g. GC Exh. 17 at 6, GC Exh. 53 at 3; GC Exh. 1(a).) Moreover, the Board has consistently held that past acquiescence to previous unilateral changes does not operate to waive a union's right to bargain over future changes. *Owens-Brockway Plastic*, 311 NLRB 519, 526 (1993); citing *Owens-Coming Fiberglass*, 282 NLRB 609 (1987).

Third, Respondent contends that the Union is barred from raising a past practice argument because the collective bargaining agreement's zipper clause "shields" the Hospital against any such past practice claims. (R Br. at 26.)

As set forth above the parties' zipper clause sets forth:

> This Agreement contains the complete agreement of the parties, and no additions, waivers, deletions, changes or amendments shall be effective during the life of this Agreement, unless evidenced in writing, dated and signed by the parties hereto. An oral waiver or a failure to enforce any provision in a specific case shall not constitute a precedent or preclude any party from relying on or enforcing such provision in any other case." (GC Exh. 15 at 40.)

Respondent's reliance on the zipper clause fails for several reasons. First, the zipper clause does not mention, or in any way refer to the parties' access provision. It is, in fact, simply a generally worded zipper clause, which the Board has squarely held is not sufficient to demonstrate that a union has waived its statutory right to bargain over a specific subject. See *IMI South, LLC*, 364 NLRB 1373, 1375 (2016); *Ohio Power Co.*, 317 NLRB 135, 136 (1995), citing *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989).

Moreover, Respondent's argument is in direct opposition to the settled principle that the "normal function" of zipper clauses is "to maintain the status quo, not to facilitate unilateral changes." Id., citing *Murphy Oil USA*, 286 NLRB 1039, 1039 (1987). The status quo here was that the Respondent had, since at least 2001 given the Union wide discretion in providing notice to the Employer prior to visiting the facility. Significantly, that practice had continued uninterrupted under the previous agreement which contained the identical zipper clause. Those circumstances provide further evidence that the zipper clause in the current collective bargaining agreement was not intended to change the existing practice. See *Ohio Power*, supra, 317 NLRB at 136; *Aeronca, Inc.*, 253 NLRB 261, 265 (1980), enf. denied 650 F.2d 501 (4th Cir. 1981). Nor is there any evidence that Union access was "fully discussed and consciously explored during negotiation." *Ohio Power Co.*, 317 NLRB 236 (1995); see also *Viejas Band of Kumeyaay Indians*, 366 NLRB No. 113, slip op. 1 at fn. 1 (2018), citing *IMI South*, 364 NLRB at 1375.

As discussed, the zipper clause in the current agreement was unchanged from prior agreements; there is no evidence that the parties ever proposed, let alone bargained over, any changes to the specific language in the zipper clause. Nor is there any evidence that the parties ever discussed the zipper clause as it related to past practices, either in general terms or in

relation to the parties' access provision. Thus, the zipper clause in the current agreement does not support the Respondent's waiver defense.[18]

In light of all of the above, I find that Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally changed its Union access policy.

The General Counsel also alleges that Respondent violated Section 8(a)(5) and (1) when it denied Union representative McGill access to the Hospital from September 14, 2023, through November 9, 2023. Since Respondent's banning of McGill from the Hospital was directly related to Respondent's unlawful unilateral change to its access policy, I find that McGill's ban likewise violated Section 8(a)(5) and (1) of the Act. Moreover, even assuming arguendo that Respondent had a legitimate reason for banning McGill, it would still be required to negotiate with the Union prior to changing its access rules. See *Frontier Hotel & Casino*, 323 NLRB 815, 817 (1997), enfd. in pertinent part 118 F.3d 795 (D.C. Cir. 1997) (finding that when an employer accuses a union agent of misconduct, the employer is required to give the union notice and an opportunity to bargain before changing rules regarding the agent's access so that the parties can work together to arrive at a solution to the problem.)

ii. 8(a)(3) Allegations

The General Counsel also alleges that Respondent violated Section 8(a)(3) of the Act by requiring Union representatives to give twenty-four hours' notice before visiting the Hospital and by banning McGill from the Hospital.[19] (GC Br. at 97.) Section 8(a)(3) of the Act makes it an unfair labor practice "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. Section 158(a)(3). The General Counsel failed to present evidence demonstrating that Respondent discriminated against employees with regard to hire, tenure, or any other term or condition of employment when it unilaterally changed its access provision and/or banned McGill's access to the Hospital.

In light of the above, I recommend that these allegations be dismissed.

b) The General Counsel alleges that from February 15, 2022, through March 17, 2022, Respondent violated Section 8(a)(1) by denying Union representative Ritacco access to the Hospital.[20]

The test for evaluating whether an employer's statements or conduct violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain, or coerce union or protected activity. *Station Casinos, LLC,* 358 NLRB 1556, 1573 (2012). The Board considers a totality of the circumstances in assessing whether a

[18] Although Respondent does not assert a similar defense with regard to the contract's management rights' clause, I also note that the extremely general language of that clause similarly would not support a waiver argument under either the contract coverage standard or the clear and unmistakable waiver standard. *Endurance Env't Sols.,* 373 NLRB No. 141, slip op. at 21 (2024.)

[19] Comp. paras. 15 and 16; GC Br. at 97.

[20] Complaint para. 10.

statement or conduct violates the Act and intent is immaterial. *KSM Industries*, 336 NLRB 133, 133 (2001). The test is an objective one. *Sunnyside Home Care Project, Inc.*, 308 NLRB 470, 472 fn.1 (1994).

The General Counsel alleges that Holbrook banning Ritacco from the Hospital for 30 days violated Section 8(a)(1) of the Act as it had a tendency to interfere with, or restrain employees from engaging in union activity. Here, Ritacco was clearly engaging in Union activity by taking association leave in order to temporarily work full time for the Union. The announcement and banning of Ritacco from visiting the Hospital for 30 days based in part on Respondent's unilateral change to its access provision would certainly have the effect of chilling Ritacco's Union activity. Moreover, as Holbrook announced that the reason for Ritacco's ban was that she had failed to provide at least 24-hour notice prior to visiting the Hospital in front of unit member Carolyn Moore, would also have the effect of dissuading Moore and other employees from engaging in Union activity as they would see Respondent punishing Ritacco for her involvement with the Union.

Respondent contends that it banned Ritacco from the Hospital because she repeatedly failed to adhere to the access provision as laid out in the collective bargaining agreement. As set forth in detail above, I found that Respondent unlawfully implemented a unilateral change to the contract's access provision and so I find it cannot defend its ban of Ritacco due to its unlawful action.

In light of all of the above, I find that Respondent violated Section 8(a)(1) of the Act when it banned Ritacco from the Hospital for 30 days.

c) The General Counsel alleges that Respondent violated Section 8(a)(1) on October 20, 2023, when it threatened to have Union representatives removed from its facility.[21]

On October 20, 2023, after McGill had texted Henderson to let her know that she had arrived at the facility, Henderson texted McGill back writing:

> Wendy, you are still banned from the hospital until we get a guarantee that you'll follow the access provisions.
>
> If you do not leave within the next few minutes we will have you removed. Please confirm you have left. (GC Exh. 59.)

McGill testified that by the time she saw Henderson's text, she had already left the Hospital. (Tr. at 889.)

The General Counsel failed to show how the above text message which was sent solely to McGill, who is not employed by Respondent, would have had a reasonable tendency to interfere with, restrain, or coerce employees engaged in union or other protected concerted

[21] Complaint para. 13.

activity.[22] *Pacific Dry Dock Co.*, 303 NLRB 569, 571 (1991) (no violation of 8(a)(1) when no evidence that any employee had heard threat to remove representative); *Hempstead Motor Hotel*, 270 NLRB 121, 123 (1984) (same).

In light of the above, I do not find merit to this allegation and recommend that it be dismissed.

B. BONUS ISSUES

1. Shift Bonus Incentive

The General Counsel alleges that on about November 11, 2022, Respondent reduced the amount it paid its employees under its Shift Bonus Incentive program in violation of Section 8(a)(5) and (1) of the Act.[23] Respondent asserts that this allegation should be dismissed as moot, because Respondent eventually paid bargaining unit members the agreed upon amount.

a) Facts

In 2020, Respondent and the Union agreed to an incentive pay program referred to as the Shift Bonus Incentive in order to encourage employees to work in areas and on shifts where there was a critical staffing need. (Tr. at 923.) This benefit (also referred to as the "extra shift bonus") was periodically extended by mutual agreement of the parties. The bonus amounts varied and were subject to negotiation between the parties. (GC Exh. 50 at 1–14.) In late August 2022, McGill and Henderson agreed in writing to extend the shift bonus incentive until October 31, 2022, in the amount of $600 per shift which was the amount that had been in effect before. (GC Exh. 50 at 14.) On November 2, 2022, McGill and Henderson agreed to extend the bonus out again through January 1, 2023. (GC Exh. 50 at 15.)

Despite this agreement, on November 11, 2022, Henderson wrote to McGill: "the extra shift bonus is $400 per shift (12 hours) effective today. Please advise if the Union is in agreement." (GC Exh. 50 at 17.) McGill responded the next day writing: "I am confused. The parties mutually agreed to extend the same extra shift bonus terms and conditions through the end of the year. Is the hospital proposing to modify the agreement?" (GC Exh. 50 at 18.) Hearing no response, later that morning McGill sent Henderson another email in which she attached the parties' agreement to extend the shift bonus incentive through January 1, 2023, and writing: "The MNA is not agreeable to changes that would diminish the extra shift bonus in effect through January 1, 2023." (GC Exh. 50 at 19.) Hearing nothing more from Henderson, on November 15, McGill wrote another email to Henderson stating that several nurses had reached out to her and told her that they had been informed by their directors that the shift incentive bonus amount had been changed to $400. In the email McGill asserts that the change was unilateral and that the Union demands that Respondent rescind the change and maintain the terms of the extra shift

[22] I note that the General Counsel alleged in its brief that Respondent violated Section 8(a)(3) when it threatened to remove McGill from the Hospital on October 20, 2023 and November 8, 2023. (GC Exh. 106 at 61; GC Br. at 79–80.) The General Counsel, however, failed to make these allegations in its complaint.

[23] Complaint para. 26.

incentive as had been previously agreed upon. (GC Exh. 50 at 20.)

Having received no response from Henderson on November 21, 2022, Ritacco filed a grievance on behalf of two named bargaining unit members and similarly situated RNs regarding the Hospital's announced reduction in the Shift Bonus Incentive. (GC Exh. 77.) Henderson responded stating that the: "Hospital received the union's email saying they were not in agreement. We maintain the agreement that was agreed to with the Union on November 2, 2022. We consider the grievance resolved." (GC Exh. 77 at 3.) To which McGill responded: "We certainly do not consider the matter on the bonus agreement resolved, attached please find the grievance advanced to the next step in the grievance process." (GC Exh. 77 at 3.)

On November 29, Henderson emailed Respondent's Chief Executive Officer Carolyn Jackson (Jackson) writing:

> I spoke to [CNO] Jay [Prosser] about this when I was notified that the RN extra shift bonus was being reduced from $600 to $400. On November 1, we reached agreement with the MNA to extend the current shift bonus in place until 1/1/23. We cannot reduce/change the bonus unless the MNA agrees to the change and the MNA did not agree to that change.
>
> Please let me know if you need additional information or the email chain with the MNA about the extra shift bonus. (GC Exh. 78 at 2.)

Jackson's response was: "Got it, We have reduced the bonus. Copying [CNO Prosser], so we reverse back to the $600 . . . correct?" Henderson responded: "Correct. Thank you." (GC Exh. 78.) The next day Prosser wrote to Henderson:

> Given the issue with the MNA, should we proactively go back and make-up the difference on nurses who were paid 400 vs. 600 as a proactive step?
>
> Francis [Henderson]: What are your thoughts from a labor relations standpoint?
>
> John: I can pull the bonus forms and I guess we could add the $200 back to the next check as a bonus. (GC Exh. 79.)

Henderson responded:

> Jay, the hospital should pay the full amount of the bonus that we agreed with the Association. They already filed a grievance on this. If we don't do it now, we will have to if this goes to arbitration since we have a written agreement with the Association that that would be the amount.
>
> I would recommend we pay any nurses the full $600 for the extra shift, so those that were paid $400 should get the other $200. Moreover, the $600 is in effect until 1/1/23. (GC Exh. 79.)

When Ritacco and Henderson met for the grievance on December 15, Henderson represented that the Hospital had maintained the $600 shift bonus incentive to which the Union had agreed, even though the email exchange from late November shows that Henderson was fully aware that Respondent had not maintained the agreement and that the nurses who had signed up had been receiving only $400 per shift. (GC Exh. 79; Tr. at 1529.)

On December 23, Henderson denied the grievance solely on procedural grounds.

b) Analysis

An employer may not change the terms and conditions of employment of represented employees without providing their representative with prior notice and an opportunity to bargain over such changes. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962). In order to find that an employer made unilateral changes to an employee benefit in violation of the Act, it must be shown that: (1) material changes were made to the employees' terms and conditions of employment; (2) the changes involved mandatory subjects of bargaining; (3) the employer failed to notify the union of the proposed changes; and (4) the union did not have an opportunity to bargain with respect to the changes. *Garden Grove Hospital & Medical Center*, 357 NLRB 653, 653 fn. 4, 657 (2011); *San Juan Teachers Assn.*, 355 NLRB 172, 175 (2010); *Alamo Cement Co.*, 281 NLRB 737, 738 (1986). The duty to bargain does not extinguish when a collective-bargaining agreement is in effect. *See Conley v. Gibson,* 355 U.S. 41, 46 (1957). The U.S. Supreme Court has held that "[c]ollective bargaining is a continuing process. Among other things, it involves day to day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights. *Garden Grove Hospital & Medical Center*, 357 NLRB at 657.

The evidence shows that Respondent unilaterally changed the incentive bonus from the agreed upon $600 to $400 without negotiating with the Union about the change. Respondent contends that this allegation is moot because Respondent eventually paid the nurses the agreed upon amount. (R. Br. at 81.) Although it appears that Respondent eventually compensated at least some of the effected nurses, it is undisputed that Respondent violated the parties' written agreement and in so doing undermined the Union as the employees' collective bargaining representative. *Carpenters Local 1031*, 321 NLRB 30, 32 (1996).[24] In light of the above, I find that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing the bonus amount. I recommend finding merit to this allegation.

2. The Switch Shift Incentive and Winter Extra Shift Agreement

The General Counsel alleges that on about January 12, 2023, Respondent prematurely declared impasse regarding its Switch Shift Incentive and Winter Extra Shift Agreement and

[24] Citing *Bellkey Maintenance Co.*, 270 NLRB 1049, 1056 (1998), Respondent also contends that this allegation is moot because there is "no reasonable basis for suspecting such a violation will be repeated." (R Br. at 81.) As Respondent unilaterally implemented three different bonus incentives during the period from December 2022, through January 2023, it is hard to imagine how it can now claim that there is no reasonable basis to believe that it would not do so again.

implemented both programs in violation of Section 8(a)(5) and (1) of the Act.[25] The General Counsel further alleges that, in December 2022 and January 2023, Respondent bypassed the Union and dealt directly with its unit employees by soliciting unit employees to enter into Switch Shift Incentive and Winter Extra Shift Agreements in violation of Section 8(a)(5) and (1) of the Act.[26]

It is further alleged that, in March 2023, Respondent a withheld a Winter Extra Shift bonus payment owed to unit employee Melissa Huard (Huard) in violation of Section 8(a)(3), 8(a)(4), and 8(a)(1) of the Act, and additionally, that Respondents CNO, Prosser, violated Section 8(a)(1) by informing Huard that the Union was responsible for this action.[27]

a) Facts

During this time period, Respondent was interested in implementing two other new incentives to the bargaining unit members: the Switch Shift Incentive and the Winter Extra Shift Agreement. The Switch Shift Incentive offered a completion bonus for bargaining unit members if they agreed to switch from day shift to the night shift for 90 days, and also offered an additional bonus for employees agreeing to work a fourth shift. (GC Exh. 50 at 24.) I will refer to this incentive as the Switch Shift Incentive[28] to distinguish it from the Shift Bonus Incentive discussed above. The Winter Extra Shift Agreement contemplated that employees would receive a significant "completion bonus" in addition to the shift-by-shift bonus if they worked an extra shift for twelve consecutive weeks. (GC Exh. 50 at 29.)

i. Switch Shift Incentive

On November 29, 2022, a unit member sent McGill a photograph of the Switch Shift Incentive that Respondent had posted on its website. As Respondent had not notified or bargained with the Union regarding this Switch Shift Incentive, McGill immediately forwarded the photograph to Henderson via email writing:

> The attached document was forwarded to me a few moments ago. This email serves as a demand that the employer cease and desist and remove the posting. As the sole and exclusive bargaining representative for registered nurses all proposed changes of terms and conditions must be negotiated with the MNA. (GC Exh. 50 at 23.)

Henderson responded later that afternoon via email stating:

> We have not implemented the incentive program attached. This was posted in error.
>
> However, seeing that the union now has a copy of an incentive program we would like to

[25] Complaint paras. 28, 30, 31, and 32.
[26] Complaint paras. 28 and 29.
[27] Complaint paras. 11, 12, and 13.
[28] The document was entitled: "ED-ICU Day Shift RN Working Temporary Night Shift Commitment Guidelines," but for clarity I will refer to this agreement as the "Switch Shift Incentive" as that is generally how the parties referred to this agreement in emails as well as testimony. (GC Exh. 50 at 24.)

> offer, please let me know if the union is in agreement. Some nurses have expressed interest but leadership has been instructed to notify them that we can't implement without mutual agreement. (GC Exh. 50 at 22.)

Hearing no response, Henderson wrote to McGill again on December 5, asking if the Union approved the proposed incentive program and McGill responded that the Union had reviewed the proposal and would like to propose a counter. The next day, McGill forwarded the Union's counterproposal which, inter alia, removed some language regarding Respondent's discretion in offering the incentive and added language regarding the Shift Bonus Incentive. (GC Exh. 50 at 25–26.)

On December 12, Henderson responded:

> After review of the counter proposal it appears we are very far apart. The hospital already has the ability to rotate shifts among the staff to night shift in 24 hour units per 8.09. We wanted to provide an incentive to nurses for volunteering to temporarily switch shifts.
>
> Moreover, the union combines two incentive programs into this one. We already have agreement for the extra shift.
>
> Please advise if you would provide another counter or would like to meet to discuss. Otherwise, the hospital would consider we are at impasse. (GC Exh. 50 at 27.)

On December 23, at 11:02 a.m., Henderson sent McGill an email with the subject line "Shift Swap." In the email Henderson wrote: "The Hospital would like to expand the current Shift Swap incentive to all other inpatient units. Please advise if the Union is in agreement." (GC Exh. 50 at 45.) Hearing nothing back from McGill who was on vacation at the time, Henderson emailed again on December 30, writing: "The hospital has not received any communication from the union on our proposal to expand the shift swap incentive to all other inpatient units. As such, we have determined we are at impasse and will implement effective today." One minute later Henderson forwarded this email to Prosser, with a cover note instructing him: "You can implement effective today." (Tr. at 940; GC Exh. 50 at 44; GC Exh. 89.) McGill responded to Henderson's initial email later that afternoon writing: "We are not in agreement and object to any incentive plan or program that has not been properly negotiated. Further, send the proposed plan that you referenced in your email regarding shift swap incentive." McGill testified that she was not sure which plan Henderson was referring to as the "Shift Swap," which is why she asked Henderson to provide a copy of the plan in her December 30 email. (Tr. at 940–941; GC Exh. 50 at 44.)

ii. Winter Extra Shift Agreement

Around this same time, Henderson sent McGill a proposal for the Winter Extra Shift Agreement, which is at times referred to in the record as the "Winter 12 week incentive". On December 12, 2022, Henderson emailed McGill a copy of Respondent's proposed Winter Extra Shift Agreement writing: "The Hospital would like to implement the following incentive plan. Please advise if the Association is in Agreement." (GC Exh. 50 at 28–29.)

On December 16, 2022, McGill wrote Henderson back a counter proposal for the Winter Extra Shift Agreement stating that the Union was prepared to sign the counterproposal and implement it at the beginning of the next work week. (GC Exh. 50 at 31.) In response later the same day, Henderson emailed McGill Respondent's counter noting that after considering the Union's counterproposal, Respondent had increased the bonus amounts. Henderson also requested that the Union respond by the next Monday if possible. (GC Exh. 50 at 34–35.)

On Tuesday, December 20, 2022, McGill wrote to Henderson stating that she had heard that the director of the nurses in the ICU had reached out to nurses in that department, sent them the hospital's Winter Extra Shift Agreement, and told them that it would become effective next week. In the email McGill reminds Respondent that the Union has not agreed to Respondent's proposal and demands that it cease and desist any implementation of the plan. McGill also states that the parties need to meet in person to discuss the plan and that the Union was available on January 2, 3, and 4, 2023. (GC Exh. 50 at 38.)

Henderson responded at 3:20 p.m. that she would not be available to meet in person until the week of January 9, and she wrote: "Also, as you stated we have not even implemented. So if I'm understanding, the association is sending a cease and desist on something the Hospital has not even implemented. What is there to cease and desist exactly?" (GC Exh. 50 at 37.)

On December 20, 2022 at 6:20 p.m., Prosser sent an email to Henderson regarding the Winter Extra Shift Agreement stating: "I'm assuming we decided something on this. I have not seen anything." Henderson responded on December 21, 2022 at 11:14 a.m.: "It's still up for review from the union. One more pass at it and we can implement." Prosser responded at 12:13 p.m., "Okay. I think the hospital has implemented already." (GC Exh. 50 at 40–43; GC Exh. 94; Tr. at 939–940.)

On December 22, 2022, at 8:35 a.m., McGill emailed Henderson back that she was glad to hear that the plan had not been implemented and that she believed it had been as nurses from different departments had told her that managers had given them copies of the incentive plan and had "seemed to indicate that it had been agreed upon." McGill also stated that even though the Union would prefer to meet in person, it would be willing to meet over a Teams video the first week in January. (GC Exh. 50 at 37.)

Henderson responded to McGill on December 23:

> Apologies if the leaders miscommunicated. We are well aware about [sic] our duty to bargain with the union prior to implementation.
>
> We can do Teams any time next week, at the union's convenience. Please let me know what date/time works best. We would like to reach agreement on this soon to address staffing issues. (GC Exh. 50 at 54.)

iii. The Parties Meet to Discuss Switch Shift Incentive and Winter Extra Shift Agreement

The parties agreed to meet by Teams at 2:30 p.m. on January 6, 2023. Because there were so many different bonus incentives being discussed around this time, McGill asked Henderson to forward a copy of both the Switch Shift Incentive and the Winter Extra Shift Agreement in preparation for the meeting. On January 6, at 2:16 p.m., 14 minutes before the meeting was scheduled to begin, Henderson forwarded copies of the Switch Shift Incentive, the Winter Extra Shift Agreement, and a new contract labeled: "RN Extra Shift Two-Week Commitment Bonus." In her cover email Henderson wrote: "Attached please find the incentive programs we would like to discuss. You've received copies of the winter and switch before. We would also like the union to look at and consider the two week contract one as well." (GC Exh. 50 at 52–53.) At 2:30 p.m., Henderson, McGill, Ritacco, and Union co-chair Dominique Muldoon (Muldoon) met over Teams and discussed Respondent's three bonus proposals. During the discussion McGill expressed that the Union was concerned about the level of discretion the agreements provided to Respondent with regard to terminating the agreements. McGill also sought clarification about whether nurses were being paid the $600 (vs. $400) for the Shift Bonus Incentives that the parties had agreed on through January 1, 2023. McGill also expressed that the Union representatives had not had much time with the proposals that were sent prior to the meeting. The parties were not able to come to agreement on any of the three contract proposals by the end of the meeting. (Tr. at 955–959, 1636.)

On January 10 at 2:43 p.m., Henderson sent McGill a counter proposal regarding the Winter Extra Shift Agreement in which Respondent made some changes to their original proposal "based on feedback from the union." In the cover email of the counter proposal Henderson stated: "The hospital is not able to make any additional changes to the incentive plan based on your comments last Friday, as such, we believe we are at impasse. Please review and advise by today if the association is in agreement with the suggested changes which reflect the union's concerns. Otherwise, the hospital would consider we are at impasse and implement [sic] this incentive program effective tomorrow, January 11, 2023."[29] (GC Exh. 50 at 56–58; Tr. at 1636–1639.)

Later that same day at 7:57 p.m., Henderson sent McGill a separate email asking if the Union would agree to extend the parties' Shift Bonus Incentive through February 9, 2023. McGill responded the next day, January 11, 2023, at 11:03 a.m.: "The leadership is meeting late today we will respond after that meeting, and will respond as soon as we can Regarding [sic] the other proposals for winter incentive and shift swap. we [sic] will be reviewing and discussing those proposals as well and will respond." McGill wrote Henderson back the next day informing Henderson that the Union agreed to extend the Shift Bonus Incentive. McGill did not comment on the Winter Extra Shift Agreement or the Switch Shift Incentive.

iv. Respondent Declares Impasse Regarding the Switch Shift Incentive and the Winter Extra Shift Agreement

Henderson emailed McGill again on January 12, 2023 at 12:59 p.m.: "The union failed to provide any response to the [Switch Shift Incentive] and the [Winter Extra Shift Agreement] as

[29] When McGill received this email, she believed that the parties were not at impasse and that the Union could still move on some issues. (Tr. at 960.)

indicated below. As such, we have determined we are at impasse. We will implement the [Winter Extra Shift Agreement] and the [Switch Shift Incentive] effective today. McGill responded three minutes later:

> As there is a CBA in place which covers all terms of compensation for RNs covered by the CBA, the employer is legally barred from unilaterally implementing changes without the Association's agreement. We insist effective immediately the employer cease and desist implementation of the "Shift Swap Incentive" and the "Winter Market 12 Week Incentive." While we continue to be open to negotiating over various bonus incentive options, we must ensure that all such programs include mutually agreeable terms and conditions. In the event the employer does not reverse its decision, we will be forced to seek legal recourse. (GC Exh. 50 at 66–68.)

Henderson did not respond to McGill's email and the Union subsequently filed another unfair labor practice charge. (Tr. at 965–966.)

In the meantime, nurse managers had not only been distributing copies of the Winter Extra Shift Agreement which had not been agreed to by the Union, but they had already executed 22 copies of that agreement. Thirteen of these were executed in December 2022 (GC Exh. 50 at 40-43; GC Exh. 105 at 5, 8, 11, 13, 27, 28, 29, 30, and 31–34), and another nine were executed in January prior to January 12, 2023, when Henderson declared that the parties were at impasse. (GC Exh. 105 at 6, 7, 9, 10, 12, 14, 23, 25 and 16.)[30] Not only were these agreements signed by both the nurse and the nurse manager, but they all included start dates which began prior to January 12, 2023. Respondent continued to execute these agreements after January 12, 2023, as well. (GC Exh. 105 at 1–4, 15–16, 18–21, 22, 24.)

Additionally, another nurse manager had already executed at least one of the Switch Shift Incentive agreements with a unit nurse from the ED-ICU on January 10, 2023, and subsequent versions of this agreement were executed by nurse managers with other unit nurses on January 13, 16, 20, and 21, 2023. (GC Exh. 104.)

v. Prosser's March 9, 2023 Email

On March 9, 2023, RN Melissa Huard (Huard) emailed CNO Prosser writing: "I noticed that I have not received my Winter Extra Shift agreement completion incentive bonus of $6,000. It was submitted on 2/16/2023 by [RN supervisor] Eduardo. I was expecting the amount to be in that week's check ([pay period end date 2/18/23) but was told due to holiday on 02/20 and payroll having to review it due to it being completed that week, that it would be in this week's check 3/10/23." (GC Exh. 50 at 70.)

Later that day, Prosser responded to Huard's email stating: "The $6,000 bonus was submitted and verified. However the MNA has filed an unfair labor practice against the hospital

[30] The parties stipulated at the hearing that GC Exh. 105 consisted of the executed signature pages to Winter Extra Shift Agreements, which were produced by Respondent in response to the General Counsel's subpoena. (Tr. at 1810.)

that prevents us from paying the bonus. Our labor relations team is actively engaged with this situation. We know that you deserve this bonus and expect the MNA to do take [sic] the appropriate action so that we can fairly compensate our nurses for their hard work." (GC Exh. 50 at 69–70.)

b) Analysis

i. Premature Declaration of Impasse and Implementation

As noted, the General Counsel alleges that on about January 12, 2023, Respondent prematurely declared impasse regarding its Switch Shift Incentive and Winter Extra Shift Agreement and implemented both programs in violation of Section 8(a)(5) and (1) of the Act.[31] I find these allegations meritorious.

The Board has defined impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile. *Pillowtex Corp.*, 241 NLRB 40, 46 (1979), enfd. mem. 615 F.2d 917 (5th Cir. 1980). The Supreme Court has defined impasse as the "point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless[.]" *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 fn. 5 (1988) (citations and internal quotations omitted). It is the burden of the party asserting impasse to demonstrate that there was genuine impasse. *CalMat Co.*, 331 NLRB 1084, 1097 (2000); *Southwest Florida Symphony Orchestra*, 373 NLRB No. 150, slip op. at 5 (2024).

When examining whether the parties have reached impasse during bargaining, the Board considers the "bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968). However, "[i]t is not sufficient for a finding of impasse to simply show that the employer had lost patience with the Union. Impasse requires a deadlock." *Barstow Community Hospital*, 361 NLRB No. 34, slip op. at 9 (2014), enforcement denied on other grounds, 820 F.3d 440 (D.C. Cir. 2016). In order to find an impasse, "[b]oth parties must believe they are at the end of their rope." *PRC Recording Co.*, 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987); *Larsdale, Inc.*, 310 NLRB 1317, 1318 (1993); See also *NLRB v. Powell Electrical Mfg.*, 906 F.2d 1007, 1011–1012 (5th Cir. 1990). That an employer had reached its final position does not demonstrate that the union has done so, and therefore, that there was impasse. *Grinnell Fire Protection Systems Co.*, 328 NLRB 585, 586, 596-599 (1999), enfd. 236 F.3d 187 (4th Cir. 2000)("even assuming arguendo that the Respondent has demonstrated it was unwilling to compromise any further, we find that it has fallen short of demonstrating that the Union was unwilling to do so"); *The Ford Store San Leandro*, 349 NLRB 116, 121 (2007) ("[t]he fact that Respondent believed that the Union would never agree to Respondent's . . . proposals does not establish an impasse.")

I agree with the General Counsel that Respondent unlawfully declared impasse and proceeded to implement both the Switch Shift Incentive and the Winter Extra Shift Agreements

[31] Complaint paras. 28, 30, 31, and 32.

on January 12, 2023, in violation of Section 8(a)(5) and (1) of the Act.

The evidence demonstrates that the parties had been in negotiations about both incentive programs for several weeks. On January 12, 2023, Henderson declared that the parties were at impasse when the Union had communicated just the previous day that the Union leadership was meeting on Respondent's proposals and would be responding as soon as they could.[32] Moreover, McGill had just followed up with Henderson at 6:12 a.m. on the 12th letting her know that the Union would agree to a different extra shift bonus that Respondent had proposed.

Despite this progress and McGill's email letting Henderson know that the Union was in the process of discussing Respondent's latest proposals, at 12:59 p.m., Henderson unilaterally declared that the parties were at impasse and that the Hospital would implement both plans "effective today." The evidence shows that Respondent went ahead and executed agreements directly with bargaining unit members despite the fact that McGill immediately responded to Henderson by email again making it clear that the Union did not consider the parties to be at impasse and continued to be open to negotiating the agreements.[33]

Respondent's asserted defenses lack merit. With regard to the Winter Extra Shift Incentive, Respondent contends that the allegation fails because "it is simply unclear whether the Hospital implemented the Witner [sic] market bonus." (R. Br. at 82.) The record contains sufficient evidence that the plan was executed, however. First, Henderson unequivocally announced that: "we have determined we are at impasse. We will implement the Winter 12 week incentive and the Shift Swap incentive effective today." (GC Exh. 50 at 66.) Second, the record contains dozens of executed Winter Extra Shift Agreements, some of which were executed prior to Henderson's premature declaration of impasse. Third, Prosser himself admitted to Henderson that he believed that the Winter Extra Shift Agreements had already been implemented by December 21, 2022. (GC Exh. 94.) Respondent failed to proffer any evidence that the program had been rescinded or that Respondent had informed employees (or the Union) that it had been rescinded.[34]

Regarding the Switch Shift Incentive, Respondent contends that the parties were at valid impasse when the incentive was implemented. (R Br. at 83.) This argument completely ignores the fact that within three minutes of Henderson's impasse announcement, McGill emailed Henderson back stating that the Union did not agree that the parties were at impasse and that the

[32] McGill's email to Henderson on January 11, 2023 at 11:03 a.m. states: "The leadership is meeting late today we will respond after that meeting, and will respond as soon as we can Regarding [sic] the other proposals for winter incentive and shift swap. we [sic] will be reviewing and discussing those proposals as well and will respond." (GC Exh. 50 at 65.)

[33] In McGill's email she writes: "While we continue to be open to negotiating over various bonus incentives options, we must ensure that all such programs include mutually agreeable terms and conditions." (GC Exh. 50 at 66.)

[34] In fact, Huard's email to Prosser in March 2023, regarding her delayed payment indicates that Respondent was indeed actively processing the bonus payments at least through March 2023. (GC Exh. 50 at 69-70.)

Union continued to be open to negotiating the agreements. *Grinnell Fire Protection Systems Co.*, supra at 586, 596-599.

In light of the above, I find that Respondent violated Section 8(a)(5) and (1) of the Act when it prematurely declared impasse with regard to its proposed Switch Shift Incentive and Winter Extra Shift Agreements and implemented those incentives.

ii. Direct Dealing Allegations

As noted, the General Counsel alleges that, in December 2022 and January 2023, Respondent bypassed the Union and dealt directly with its unit employees by soliciting unit employees to enter into Winter Extra Shift Agreements and Shift Swap Incentives in violation of Section 8(a)(5) and (1) of the Act.[35] I find these allegations meritorious.

For the reasons set forth below, I agree with the General Counsel that Respondent violated Section 8(a)(5) and (1) by directly dealing with unit employees regarding both the Winter Extra Shift Agreement and the Switch Shift Incentive.

To establish that an employer violated Section 8(a)(5) and (1) of the Act by engaging in direct dealing, the General Counsel must show: (1) that the employer was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) such communication was made to the exclusion of the Union. *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000) citing *Southern California Gas Co.*, 316 NLRB 979 (1995).

With regard to the Winter Extra Shift Agreement, the evidence reveals that members of management had not only presented the agreements to nurses but had in fact signed off on the agreements with at least 22 nurses prior to bargaining with the Union and (prematurely) announcing impasse. See supra. These agreements were executed between nurse managers and bargaining unit employees without the Union's knowledge or acquiescence.

Regarding the Switch Shift Incentive, the evidence demonstrates that Respondent presented this contract to employees prior to notifying or bargaining with the Union by posting it on (or before) November 29, 2022. Even after McGill called it to Henderson's attention, nurse managers proceeded to execute these agreements with employees as early as January 10, 2023, which was prior to Henderson's premature declaration of impasse. As I have found that Henderson's declaration of impasse on January 12, 2023, was premature, agreements executed on January 13, 20, and 21, 2023, were also violations of the Act. (GC Exh. 104.)

As the subject of these agreements is bonus amounts to be paid to nurses when they meet certain conditions, it is clear that the agreements were for the purpose of establishing terms and conditions of employment directly with employees to the exclusion of the Union. As such it is clear that Respondent engaged in direct dealing with employees in violation of Section 8(a)(5)

and (1) of the Act when it solicited unit employees to enter into Winter Extra Shift Agreements and Shift Swap Incentives and I recommend finding merit to these allegations.

iii. Withholding of Unit employee Huard's Winter Extra Shift Bonus and CNO Prosser's Accompanying 8(a)(1) Statements

As noted, the General Counsel alleges that sometime in March 2023, Respondent withheld a bonus payment owed Huard under the winter extra shift agreement in violation of Section 8(a)(3), 8(a)(4), and 8(a)(1) of the Act.[36] It is additionally alleged that, by telling Huard that the Union was to blame for the withholding, CNO Prosser violated Section 8(a)(1) of the Act.[37] I find that the independent 8(a)(1) allegations have merit, but that the General Counsel has failed to prove that Huard's benefits were withheld in violation of Section 8(a)(3) or (4).

It is a violation of Section 8(a)(1) of the Act for an employer to tell employees that they are prohibited from providing them a benefit because the union filed an unfair labor practice charge. *Larid Printing, Inc*., 264 NLRB 369, 369 (1982) (employer unlawfully told an employee that the employer was unable to pay him differential pay for night work due to the fact that the union had filed an unfair labor practice charge.) This is precisely the situation here as Respondent told Huard that although her bonus had been submitted and verified, the Hospital was prevented from paying out the bonus because the Union had filed an unfair labor practice charge. Here, Respondent tries to have it both ways, first by unlawfully directly dealing with the bargaining unit employee without the Union's involvement (Respondent had executed the Winter Extra Incentive Agreement with Huard on December 30, 2022, before the parties had reached agreement on the contract or come to valid impasse). Second, by blaming the Union's filing of an unfair labor practice charge for Respondent's failure to pay Huard's bonus. Thus, I recommend finding that Respondent violated Section 8(a)(1) of the Act when Prosser informed Huard that the Hospital was withholding her incentive pay because the Union had filed an unfair labor practice charge.

With respect to the withholding of Huard's incentive payment, I find that the General Counsel has failed to establish a prima facie case of discriminatory treatment. The Board evaluates allegations of unlawful employment actions involving employer motivation using the analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981); see also *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395 (1983). Pursuant to *Wright Line*, General Counsel must establish that an employee's union or protected activity was a motivating factor in the employer's adverse employment action. *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6 (2016), enfd. 871 F.3d 358 (5th Cir. 2017). In order to do so, General Counsel must adduce evidence to demonstrate that the employee in question engaged in union or protected concerted activity, the employer's knowledge of that activity, and antiunion animus on the employer's part. *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6; *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014), enfd. 801 F.3d 767 (7th Cir. 2015). If the General Counsel substantiates these elements of a *prima facie* case, the burden then shifts to the employer to show that it would have taken the same action in the absence of the employee's protected conduct. *Adams & Associates, Inc.*, 363 NLRB No. 193 at p. 6, citing *Manno Electric*,

[36] Complaint para. 14.
[37] Complaint paras. 11 and 12.

321 NLRB 278, 283 fn. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997).

The Board analyzes violations of Section 8(a)(4) under the Act in much the same way as it does 8(a)(3) violations. Thus, the General Counsel must establish that the employer took the adverse action due to the alleged discriminatee's participation in protected Board activities, such as filing charges, participating in investigations, or providing testimony. The General Counsel must show that the employee engaged in those activities, the employer had knowledge of those activities, and the activity was a motivating factor in the employer's adverse action. *BS&B Safety Sys.,* LLC, 370 NLRB No. 90 (2021).

Here, the General Counsel has produced no evidence that Huard is a known Union supporter or that she was engaged in any protected Board conduct or other protected concerted activity. As such, the General Counsel has failed to establish a prima facie case of discrimination against Huard.

Accordingly, I find no merit to the General Counsel's allegations that Respondent violated Sections 8(a)(3) and (4) of the Act by withholding Huard's bonus and recommend that these allegations be dismissed.

C. INFORMATION REQUESTS

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) by failing to respond to three of the Union's information requests.[38] Respondent does not deny that the documents at issue were not produced, but asserts that it was not obligated to produce the requested documents because the Union had substantively withdrawn the first two requests and its last request was made in bad faith.

1. Facts

a) The May 18, 2022 Request

On May 18, 2022, Ritacco filed a grievance on behalf of a unit nurse and similarly situated nurses alleging that Respondent had been failing to abide by the parties' collective bargaining agreement's staffing guidelines. (Tr. at 165–166.) At the same time, Ritacco sent the following information request to Borruso related to the grievance:

a) A complete list of all RNs who were asked to work on 36N on the night of 5/16/22, including the times they were called and the response of each RN.
b) A description of any good faith efforts made to ensure that 36N was appropriately staffed on the shift cited.
c) A list of all RNs in the med/surg/tele areas in the hospital that were flexed down for the 7p-7a shift on 5/16/22.
d) Copies of staffing schedules for the months of March, April, and May 2022 for 36 North. (GC Exh. 12.)

Ritacco testified that she never received a response to this information request. (Tr. at 165–168.)

b) The May 24, 2022 Request

On May 24, 2022, Ritacco sent another email to Borruso and Holbrook labeled "Information Requests for processing of several grievances" requesting that Respondent provide the Union with the following information:

1. Please provide a list of all registered nurses, including travelers, employed on 35 North and 36 North from January 22, 2022 to present. For each such RN, please identify (1) the RN's dates of employment in the unit; (2) the RN's regularly scheduled shift and hours; and (3) whether or not the RN is in a flex position.
2. A copy of all 35 North and 36 North RN work schedules from January 22, 2022 to present.
3. A copy of the 35 North and 36 North float lists, release lists and flex lists for the above time frame (Jan 22-present).
2. (sic) From January 22, 2022 to present, please identify each instance in which an RN was released, flexed off, or floated for a shift or part of a shift on 35 North and 36 North. In doing so, please identify (1) the name of the RN released, flexed or floated; (2) whether the RN was released, flexed or floated; (3) the date and hours for which the RN was released, flexed, or floated.

Please provide this information by June 7, 2022. (GC Exh. 13.)

Ritacco testified that the Union requested this set of information from Respondent because the Union believed that there were contractual violations and wanted to investigate further. Respondent never responded to Ritacco's request and never provided the information requested. (Tr. at 169–172.)

On May 26, 2022, McGill and Borruso had a meeting in which they discussed, inter alia, outstanding information requests that the Union had requested and McGill agreed to forward Borruso any outstanding information requests that the Union was waiting for.[39] (Tr. at 909.)

On June 6, 2022, Borruso followed up with McGill by email referencing their conversation and stating: "we agreed you would provide in one email the outstanding document requests you would like the hospital to respond to. Do you know when you will be able to get those to me?" McGill responded by forwarding six information requests, which had previously been made to Respondent with the heading "Outstanding info request." Once Borruso had received the six forwarded emails from McGill, he emailed her the following message: "I received the attached six emails earlier today. Can you please confirm that these are all of the currently outstanding information requests the union would like the hospital to respond to?" McGill responded a little over an hour later writing: "Yes, these are all outstanding and yes we continue to need the hospital to provide the requested information." (GC Exh. 63.)

[39] McGill testified that despite the language of the email exchange, she was under the impression from their previous conversation that Borruso was asking for only information requests that McGill had sent to Holbrook, as opposed to all outstanding information requests. (Tr. at 911.)

It is undisputed that none of the six information requests that McGill forwarded were the May 18 or May 24 information requests set forth above. (GC Exh. 63.) Borruso testified that he did not respond to the May 18 and May 24 document requests made by Ritacco as he understood through the June 6 email exchange with McGill that the Union was no longer seeking the information in those requests as those requests were not submitted by McGill when she provided Respondent with all outstanding information requests that the Union was seeking. (Tr. at 2162–2163.)

c) The September 6, 2022 Information Request

On the second day of an arbitration hearing regarding a Union grievance regarding health insurance coverage for routine eye exams, Respondent's attorney Marc Sugerman (Sugerman) presented a Summary of Benefits and Coverage (SBC) for the relevant health plan from 2021 and 2022. (GC Exh. 49; Tr. at 738.) Sugerman contended at the arbitration hearing that the information in the SBC showed that the Union's grievance lacked merit, because neither the 2021 nor the 2022 plans covered routine eye exams. (Tr. 2262–2263.) As the SBC produced by Sugerman was at odds with the Union's theory of the grievance, the Union's attorney Jack Canzoneri, Esq. (Canzoneri) requested additional information from Respondent in an email on August 29, 2023. In that email Canzoneri asked Sugerman for, inter alia, Summary Plan Descriptions, Summary of Benefits and Coverages and Plan Documents of the health care plan from 2012 to the present in order to "allow MNA to complete its evaluation of the case on the merits." (GC Exh. 48 at 7.) Sugerman responded to Canzoneri's request on September 6, 2023, by objecting to the request stating that the plans dating back before 2022, were not relevant to the grievance. He did produce the 2021 benefit plan summaries, however. (GC Exh. 48 at 5–6) Canzoneri responded later that day, reiterating his request that Respondent furnish the Union with the information.[40] In the email, Canzoneri opined that although he believed that Respondent's objections to producing the documents requested were frivolous, he was now making the information request "separate and independent from evaluating the merits of the original arbitration," and that he was currently requesting the information as it related to the unit employees' terms and conditions of employment more generally. (GC Exh. 48 at 5.)

On September 15, 2023, Sugerman wrote Canzoneri back stating: "The Hospital objects to your request on several grounds." (GC Exh. 48 at 3.) Then Sugerman proceeded to make five different arguments for why Respondent did not need to comply: 1) MNA's shifting reasons for the information request was evidence of bad faith and MNA's attempt to harass the Hospital; 2) MNA's true motivation in seeking the information was to unlawfully modify the CBA and the current Flexible Benefits Program; 3) although Sugerman acknowledged that the information requested was presumptively relevant, he contended that the request was not being made for a proper or legitimate bargaining purpose; 4) the information was not relevant because the parties were not negotiating a collective bargaining agreement and the documents requested did not relate to the enforcement of the current CBA (this point concludes with the sentence "Please

[40] The specific language of the request for information was: "For each year from 2012 to present, for each health care plan offered by St. Vincent Hospital to MNA bargaining unit RNs in each such year, please provide Summary Plan Description (SPD), the 'Summary of Benefits and Coverages (SBC),' and the 'Plan Document' (PD)." (GC Exh. 48 at 5.)

explain why information regarding health plans dating back eleven years is related to the terms and conditions of employment to current employees"; and 5) that the "RFI imposed an undue burden on the Hospital." (GC Exh. 48 at 3–4.)

Canzoneri responded the same day via email disputing each of Respondent's arguments and requesting that Respondent provide the requested information by September 18, 2023. In his response, Canzoneri asserted that the documents were relevant because: "MNA seeks to understand the structure of health insurance coverage under the Tenet plans going back to 2012 to discern patterns of coverage; if there were changes how dramatic were they and whether they constituted a change that was comparable; learn from historical patterns and from that, MNA will consider next steps in discussion with the hospital about any concerns arising from that, and in turn, those concern [sic] could also form the basis for proposals now or in contract negotiations." (GC Exh. 48 at 2.) Canzoneri also asked Respondent in what way the request for information is burdensome as the Plan Administrator had an obligation under the Employee Retirement Income Security Act of 1974 to maintain and provide the documents requested. (GC Exh. 48 at 3.)

2. **Information Request Analysis**

As noted, the General Counsel alleges that Respondent violated Section 8(a)(5) and (1) when it failed to furnish the Union with information that the Union requested on May 18, 2022, May 24, 2022, and September 6, 2022.[41]

It is well settled that a collective bargaining representative is entitled to information from the employer that may be relevant and reasonably necessary to administering the parties' collective-bargaining agreement. The test of the union's need for such information is simply a showing of probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities. The Board uses a liberal, discovery-type standard to determine whether information is relevant, to require its production. See *Washington Star Co.*, 273 NLRB 391, 395–96 (1984) (citing *Westinghouse Electric Corp.*, 239 NLRB 106, 107 (1978)); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

With regard to the May 2022 information requests, I find that Respondent reasonably believed that the Union was no longer seeking those documents given the email exchange between McGill and Borruso in early June. Borruso's email to McGill on June 6, is extremely clear: "I received the attached six emails earlier today. Can you please confirm that these are all of the currently outstanding information requests the union would like the hospital to respond to." (GC Exh. 63 at 1.) McGill's response to this email is: "Yes, these are all outstanding and yes we continue to need the hospital to provide the requested information." (GC Exh. 63 at 1.) This response to Borruso's explicit email constitutes a clear and unmistakable waiver by the Union with regard to any outstanding requests other than the six that McGill had forwarded to Borruso. *Quality Building Contractors, Inc.*, 342 NLRB 429, 432 (2004) (When an employer asserts that a union has waived its right to information to which it is otherwise entitled under the Act, the Board applies the "clear and unmistakable waiver" standard.) In light of the above, I recommend dismissing paragraphs 23(a) and (b) of the complaint.

[41] Complaint paras. 18–23.

With regard to the September 6 information request, it is well settled that the information requested – health care plans dating back to 2012—was presumptively relevant. *Mckenzie-Willamette Regional Med Ctr. Assoc., LLC*, 361 NLRB 54, 62 (2014) (information about bargaining unit employees' health insurance plans are presumptively relevant); *Honda of Hayward*, 314 NLRB 443 (1994) (same); *Hansen Aggregates BMC, Inc.*, 353 NLRB 287, 288 (2008) (history of unit employees on the health plan also presumptively relevant). In fact, in his September 15 email Sugerman admits that the documents requested were presumptively relevant. Respondent alleges that because the documents were allegedly not relevant to the grievance being pursued, the Union requested these documents in bad faith. However, Canzoneri made clear in his correspondence with Sugerman that not only did he dispute whether the documents were relevant to the grievance, but also that the Union was requesting these presumptively relevant documents for reasons having to do with, inter alia, future contract negotiations. Moreover, production of 10 years of health care plan documents is not overly burdensome for an employer of Respondent's size.

In light of all of the above, I find that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to provide the information requested by the Union on September 6, 2023.[42]

D. CHIEF NURSING OFFICER (CNO)

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act when it notified the Union that it should refrain from contacting the CNO or any member of the administration directly with regard to all union and labor relations matters.[43]

1. Facts

Two sections of the parties' collective bargaining agreement explicitly provide for the

[42] Respondent also contends that this allegation is barred by Section 10(b) of the Act because the language of the initial charge in this case, which was filed on September 18, 2023, does not match the language in the allegation as set forth in the complaint. (R. Br. at 73.) The initial charge alleged that: "[f]rom on or about September 6, 2023, and thereafter, the Employer failed and refused to provide Summary Plan Descriptions, Summary of Benefits and Coverages, and Plan Documents from 2012-present, as the Union requested by information request on August 28, 2023, and as amended on August 29, 2023," while the allegation in the complaint alleges that "[o]n about September 6, 2023, the Union requested, in writing, that Respondent furnish the Union with the following information: For each year from 2012 to present, for each health care plan offered by St. Vincent Hospital to MNA bargaining unit RNs in each such year, please provide the Summary Plan Description (SPD), the 'Summary of Benefits and Coverages (SBC),' and the 'Plan Document' (PD)." (GC Exh. 1(ee); comp. para. 21.) It is well settled that a charge does not have to mirror the language of the complaint and that it "is sufficient if it informs the alleged violator of the general nature of the violation charged against him and enables him to preserve the evidence relating to the matter." *NLRB v. Louisiana Mfg. Co.,* 374 F.2d 696, 704–705 (8th Cir. 1967), quoting *NLRB v. Raymond Pearson, Inc.*, 243 F.2d 456, 458 (5th Cir. 1957). I find that the language in the charge was similar enough to put Respondent on notice of the allegation as set forth in the complaint. In light of the above, I find that this allegation is not barred by Section 10(b) of the Act.

[43] Complaint para. 27.

Union contacting the CNO directly. The first is in Section 2.03, regarding bulletin board postings:

> 2.03 Bulletin Boards
>
> The Hospital will provide space on each nursing unit, in a mutually agreeable location, for the posting of notices of Association meetings, of elections, and of results thereof, and the Association's clinical programs. All other notices will be submitted to Hospital Chief Nursing Officer (CNO) or designee currently with their being posted. (GC Exh. 15 at 3, internal pagination.)

The second, as set forth above in more detail, is located in the collective bargaining agreement's Grievance and Arbitration provision regarding Step 2 of the grievance process:

> Step 2: If the grievance is not adjusted satisfactorily in Step 1, it may be referred in writing to the CNO not later than five working days after the written answer of the department manager or designee has been received. A meeting shall take place within five working days after the receipt of the grievance in Step 2. The meeting shall be attended by the grievant, the MNA department/unit representative, the grievance chair or designee and the CNO and/or designee. The nurse's department manager or designee and/or the nurse's immediate supervisor may also attend the meeting. The CNO or designee shall give an answer in writing not later than five working days after the date of the meeting. (GC Exh. 15 at 66–67, internal pagination.)

Evidence produced at hearing demonstrates that Union representatives, including elected officials who are also employees, were in direct contact with Respondent's CNO prior to Henderson's email. (e.g., Tr. at 107–108, GC Exh. 5 at 13–14, 17–18, 21.) The evidence also shows that Henderson was aware of these provisions and expected the Union to abide by them.[44]

Against this backdrop, on Friday November 18, 2022, Henderson wrote an email to McGill in which she stated in part: "Finally, moving forward, the union and the union's elected officials are to refrain from contacting the CNO or any member of administration directly. I am the point of contact for all union and labor relations matters and all communications need to be directed to me. The CNO will not be communicative with the union and the union's elected officials regarding union business moving forward, unless the CBA expressly warrants it." (GC Exh. 64.)

2. Analysis

The General Counsel contends that the CBA's reference to two instances in which the Union is to contact the CNO, as well as Respondent's reliance on those provisions, operate to bar Respondent from unilaterally changing its policy to restrict Union representatives from contacting the CNO. I disagree.

[44] For example, in an email sent on September 28, 2022, Henderson asks CNO Prosser if the Union left him a copy of a bulletin posting as provided in the collective bargaining agreement. (GC Exh. 106 at 45.)

As a preliminary matter, changes in nonmandatory subjects of bargaining do not violate Section 8(a)(5). See generally *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.,* 404 U.S. 157 (1971). It is well settled that the selection of a bargaining representative is a nonmandatory subject of bargaining, because the law guarantees each party the right to choose its own representatives free of any influence from the other, with limited exceptions not at issue here.[45] *Retail Clerks Union, Local 770,* 228 NLRB 1166, 1170 (1977). As such, Respondent was privileged to change this nonmandatory term.

Nor do I find that Henderson's email runs afoul of the parties' collective bargaining agreement. Henderson's email specifically allows that the CNO will not be communicative with the Union's officials "unless the CBA expressly warrants it." In other words, Henderson's email allows for communication with the CNO under the contract provisions.

In light of all of the above, I do not find that Henderson violated Section 8(a)(5) and (1) of the Act when she restricted the Union from contacting the CNO or any other member of the administration directly except for as expressly provided for in the parties' collective bargaining agreement.[46]

E. GREIVANCE PROCESSING

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act in two respects regarding grievance processing. First, it is alleged that Respondent unilaterally changed the parties' grievance procedure in May and July of 2022 when Borruso and Henderson, respectively, informed the Union that they would be the sole designee for all steps in the grievance process.[47] Second, it is alleged that Respondent unilaterally changed the manner in which it responded to grievances since about July 2022, by denying on procedural grounds the majority of grievances filed by the Union.[48]

1. Facts

Article XXI of the collective bargaining agreement contains a provision for grievance processing that sets forth in relevant part:

> A grievance shall be reduced to writing and shall contain detail sufficient to reasonably apprise the Hospital of the nature of the grievance and the issues involved, citing each applicable section of this Agreement provided that the failure to cite a particular

[45] An exception to the general rule arises when the situation is so infected with ill-will, usually personal, or conflict of interest as to make good-faith bargaining impractical. See, e.g., *NLRB v. ILGWU*, 274 F.2d 376, 379 (3d Cir. 1960) (ex-union official added to employer committee to "put one over on the union"); *Bausch & Lomb Optical Co*., 108 NLRB 1555 (1954) (union established company in direct competition with employer); *NLRB v. Kentucky Utilities Co.*, 182 F.2d 810 (6th Cir. 1950) (union negotiator expressed great personal animosity towards employer).

[46] The General Counsel did not allege that this action violated Section 8(d) of the Act in its complaint.

[47] Complaint paras. 25(a), 25(b).

[48] Complaint para. 24.

section(s) shall not prohibit reliance thereon at a later step in the grievance/arbitration process. All grievances will be handled as follows:

Step 1: The aggrieved nurse shall first present the grievance to her/his department manager or designee within 30 calendar days of the occurrence giving rise to the grievance or from the time the grievant should have known of the facts giving rise to the grievance. The department manager or designee shall discuss the matter with the aggrieved nurse and the MNA department/unit representative and provide her/his answer not later than five working days after the time the grievance is presented to her/him. Any settlement at Step 1 shall not establish a precedent for the resolution of other or similar problems elsewhere in the Hospital.

Step 2: If the grievance is not adjusted satisfactorily in Step 1, it may be referred in writing to the CNO not later than five working days after the written answer of the department manager or designee has been received. A meeting shall take place within five working days after the receipt of the grievance in Step 2. The meeting shall be attended by the grievant, the MNA department/unit representative, the grievance chair or designee and the CNO and/or designee(s). The nurse's department manager or designee and/or the nurse's immediate supervisor may also attend the meeting. The CNO or designee shall give an answer in writing not later than five working days after the date of the meeting.

Step 3: If the grievance is not adjusted satisfactorily in Step 2, it may be referred in writing by the MNA staff representative to the Hospital's Director of Human Resources or designee, not later than five working days after the written answer of the CNO or designee has been received. The meeting at Step 3 shall take place within 10 working days after the receipt of the grievance in Step 3 and may include the Hospital's Director of Human Resources or designee, the CNO or designee, the department manager or designee, the grievant, the grievance chair or designee and the MNA Staff representative. The answer of the Hospital's Director of Human Resources or designee shall be given not later than five working days after the meeting. (GC Exh. 15 at 38.)

. . .

Time Limit for Processing

No grievance shall be considered under the foregoing procedure unless it is presented in the manner set forth herein. Extensions of the above time limits may be mutually agreed upon in writing in a particular case. Legitimate requests for extensions of time will not be unreasonably denied. A grievance must be appealed to the next step of the grievance procedure or to arbitration within the time limit provided in the procedure, or the grievance will be considered settled on the basis of the last answer given by the Hospital. If the Hospital does not provide an answer to the grievance within the above time limits, or any mutually agreed extension thereof, the grievance may be referred to the next step. (GC Exh. 15 at 39.)

. . .

ARTICLE XXV.
COMPLETENESS OF AGREEMENT

> This Agreement contains the complete agreement of the parties, and no additions, waivers, deletions, changes or amendments shall be effective during the life of this Agreement, unless evidenced in writing, dated and signed by the parties hereto. An oral waiver or a failure to enforce any provision in a specific case shall not constitute a precedent or preclude either party from relying upon or enforcing such provision in any other case. (GC Exh. 15 at 40.)

The grievance process set forth in the CBA is the same as the one in the parties' previous collective bargaining agreement. (GC Exh. 14 at 69–73.)

Ritacco was the Union grievance chair from 2001 through 2022. From 2001 up through the time of the strike, Ritacco would write up the grievance, file it, attend the grievance meetings and generally coordinate grievance processing. Ritacco's uncontradicted testimony was that at Step 1 she would write up and file the grievance with the nurse manager or the director of the nursing unit involved in the alleged infraction and then meet with the nurse manager or unit director. At Step 2 she would file and meet with the CNO and at Step 3 she would file and meet with a representative from Respondent's Human Resources office. This was initially Chief of Human Resources Jan Peters (Peters) or her assistant Patty Gilmore (Gilmore), or after Peters left, Ritacco would meet with Labor and Employment Relations Manager Kathy Nogueira (Nogueira). At times the CNO would also attend the Step 3 meeting during this time frame. After the Step 1 meeting the nurse manager would write up a response to the grievance indicating who was at the meeting, the substance of the grievance, a discussion of the grievance's merits, and the employer's response to the grievance. The same process was followed by the CNO and the Human Resources representative at Steps 2 and 3 as well. Respondent had five business days after the grievance meeting at Steps 1 and 2 to submit a written response and 10 business days to provide a written response after the Step 3 meeting. Ritacco testified that the Union was generally flexible with the response times, but that she would submit the grievance to the next step in the process if some time had passed without a response. (Tr. 106–110: GC Exh. 3.)

Evidence presented at the hearing demonstrates that grievance responses during this time frame generally addressed the merits of the grievance.[49] (GC Exh. 3–5.) After the nurses came back from the strike, Ritacco continued to file grievances the same way she had prior to the strike. Respondent's written responses to grievance meetings continued to address the merits of the grievances. (See e.g., GC Exh. 4, 5 and 6.) However, starting in February 2022, when Ritacco submitted Step 1 grievances to Respondent's directors and managers, she was informed

[49] The General Counsel introduced twenty-seven grievance responses written by members of management from 2020 through May 9, 2022. These responses address the merits of the grievance as well as the reason that the Hospital was denying the grievance. (GC Exhs. 4 and 5.) The General Counsel also introduced five settlement offers made by management dating from 2017 through 2019. These documents do not address the merits of the grievance, but rather offer non-precedent setting settlement offers. (GC Exh. 3.)

by Respondent that the Union should start sending grievances directly to Director of Labor Relations Marcelino La Bella (La Bella) and that all steps of the grievance process should now be going through Human Resources. Ritacco testified that during this time, Respondent was changing its designees and while at one point she was told that the procedure would be that La Bella would be handling Steps 1 and 2, with Holbrook handling Step 3 grievances, at another point she was told that La Bella would handle Step 1 and his assistant Marie Barral would handle Step 2 grievances. Ritacco also testified that at one point she was informed that La Bella would be handling all of the grievance steps.[50] (Tr. at 119–122, 276–277, 304, 279–283; R Exh. 9.)

On May 24, 2022, after La Bella resigned, Director and senior Counsel for Labor Relations Christopher Borruso (Borruso) emailed McGill and Ritacco informing them that "[e]ffective immediately and until further notice, [Borruso would] be the designee for all Step 1, 2 and 3 grievances under Article XXI of the collective bargaining agreement," and that all grievances and all correspondence regarding grievances should be filed directly with him. (Tr. at 119–122, 279–283; R Exh. 9; R. Exh. 10; R. Exh. 11; GC Exh. 8.)

Starting on July 25, 2022, after Borruso took over all the steps in the grievance process, his written responses after the grievance meetings only focused on procedural defects of the grievances without addressing the merits of the grievances. (Tr. at 123.) The Union submitted several examples of Borruso's responses to grievances filed after he became designee for each step of the grievance process, and his responses provide lists of ways that the grievance was procedurally deficient and therefore denied. The responses during this time frame contained almost identical alleged procedural defects. Examples of such reasons included:

- The Grievant failed to present the grievance to her department manager or designee as required at step 1.
- To date, the union has failed and refused to identify the department/unit representative for the relevant department/unit.
- The written grievance failed to provide sufficient details, including date(s) of the alleged violation(s) of the applicable sections of the Agreement as required;
- Because the Grievant failed to provide dates of any alleged violation, the Hospital

[50] Emails sent to Ritacco at this time reflect each of these changes. For example, on February 10, 2022, when Ritacco sent a Step 1 grievance to a department director of nursing, the director wrote her back telling her that she was forwarding the grievance to La Bella informing Ritacco that from that time forward all Step 1 grievances would be "handled by HR." (R Exh. 9.) On March 21, 2022, when Ritacco forwarded a Step 2 grievance to CNO Jay Prosser, Prosser wrote her back copying La Bella writing: "To my knowledge, Marc [La Bella] was/is processing all of those." (R Exh. 10.) Then on April 1, 2022, La Bella wrote to Ritacco: "After our discussions regarding the grievance procedure it has been determined that I will be the contact person for scheduling Step 1 and Step 2 grievance meetings. Please disregard my previous request for you to work with Senior HR Generalist Marie Barral on scheduling grievances and deal directly with me. If you have any questions please give me a call." (R Exh. 11.)

is unable to determine if the grievance was filed within the time required;

- The Grievant and department/unit representative failed to discuss the grievances with the Grievant' s department manager or designee within 5 days of the grievance being presented;

- The department/unit representative failed to attend the step 2 meeting;

- The grievance was not referred in writing to the Hospital's Director of Human Resources or designee within five working days after the written answer of the Hospital's CNO or designee was received.

- The union failed to meet with the Hospital within 10 days after receipt of the grievance at step 3. (GC Exh. 9 at pp. 1–13.)

On July 9, 2022, Henderson wrote an email to McGill and Ritacco setting forth: "Please be advised that effective immediately and until further notice, I will be the designee for all Step 1, 2 and 3 grievances under Article XXI of the collective bargaining agreement. All grievances and all correspondence regarding grievances should be filed directly with me. (GC Exh. 10.)

Henderson adopted Borruso's style in responding to grievances and her responses were extremely similar to Borruso's in style and content and also only contained procedural reasons for denying the grievance without any reference to the merits of the grievance. (GC Exh. 11.) Even though Respondent's written responses reflected only its procedural defenses, it is uncontested that the parties did continue to discuss the merits of the grievances when they met at each step and some of the grievances were settled on the merits despite Respondent raising procedural defenses. (Tr. at 150, 682, 1308–1312; GC Exh. 39; R Exh. 67–69.)

2. Analysis

a) Designation of Borruso and Henderson to Handle Grievances

As noted, the General Counsel contends that Respondent failed and refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act when, on May 16, 2022, Borruso notified the Union that he would be the Respondent's sole designee for all the steps of the contractual grievance procedure, and on July 9, 2022, when Henderson did the same.

i. 10(b) Affirmative Defense

Respondent contends that these allegations are barred under Section 10(b) of the Act, because they were not made within six months of the alleged violations. The General Counsel, for its part, alleges that Respondent is barred from raising timeliness as an affirmative defense because it failed to file an answer to the complaint after the complaint was amended at hearing. (GC Br. at 92.) While it is true that Respondent failed to file an answer to the complaint after it was amended at hearing, Respondent did raise the issue of timeliness in its Second Amended Answer to the Second Consolidated Complaint, in its opening statement at hearing, and in its post hearing brief. (GC Exh. 1(mm); Tr. at 94; R's Br. at 31.)

Although an affirmative defense is waived if first raised in a party's post hearing brief, it is not deemed untimely if it is either asserted in the party's answer to the complaint or litigated at hearing. *Freedom Electric Construction LLC*, 373 NLRB No. 61, slip op. at fn. 2 (2024); *EF International Language Schools, Inc.*, 363 NLRB 199 fn. 2 (2015), enfd. 673 Fed. Appx. 1 (D.C. Cir. 2017); *Approved Electric Corp.*, 356 NLRB 238 fn. 1 (2010); *Newspaper & Mail Deliverers' Union of New York (New York Post)*, 337 NLRB 608, 609 (2002). As Respondent raised a timeliness defense to paragraph 25 in its second amended answer and the General Counsel concedes that Respondent raised the timeliness defense at hearing,[51] it was therefore timely raised and I will therefore address it.

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." The Board has long held however that untimely allegations may be considered timely if they are legally and factually "closely related" to a timely filed charge. *Redd-I, Inc*., 290 NLRB 1115 (1988), as clarified by *Carney Hospital*, 350 NLRB 627 (2007). To determine if an otherwise untimely allegation is closely related to the timely charge, the Board: (1) considers whether the otherwise untimely allegations involve the same legal theory as the allegations in the timely charge; (2) considers whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge (i.e., the allegations involve similar conduct, usually during the same time period, and with a similar object); and (3) may look at whether a respondent would raise the same or similar defenses to both the otherwise untimely and timely allegations. *Redd-I, Inc*., 290 NLRB at 118. Respondent has the burden of proving untimeliness. *Midwest Terminals of Toledo*, 365 NLRB 1645, 1659–1660 (2017), enfd. 783 Fed. Appx. 1 (D.C. Cir. 2019); *Phillips 66 Co. & Wayne Michael Terrio*, 373 NLRB No. 1 (2023).

Neither of these allegations were filed within the six-month 10(b) time period. The General Counsel's allegation that Borruso violated the Act on May 16, 2022, was first alleged when it was added to the complaint on September 12, 2024, at hearing.[52] The General Counsel's allegation that Henderson violated the Act on July 9, 2022, was first alleged when it was added to a previously filed charge on March 11, 2024. (GC Exh. 1(s).)

In its post hearing brief, the General Counsel alleges that the allegation regarding Borruso was closely related to Charge 1–CA–298265, which was filed on June 27, 2022, less than six months after Borruso's May 16, 2022 email announcing that he would now be the contact for all three steps in the grievance process. (GC Br. at 91; GC Exh. 1(c).) That charge alleges that Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide the Union with information relevant and necessary to administering the parties' collective bargaining agreement. (GC Exh. 1(c).)

Applying the *Redd-I* factors, I cannot find that these two allegations are closely related. Under the first step of *Redd-I*, although both allegations allege violations of Section 8(a)(5) and

[51] (GC Br. at 91-92.)

[52] In a Motion filed on June 17, 2024, the General Counsel first notified the parties of its intent to amend the Second Consolidated Complaint at hearing. (GC Exh. 3.)

(1) of the Act, one involves a run of the mill information request allegation, while the other involves an alleged unilateral change in the parties' grievance procedure. Second, the allegations do not arise out of the same factual situation as one involves Respondent's alleged refusal to provide information and the other involves Respondent designating a single individual to represent the Hospital at each step of the grievance procedure. Third, Respondent's defenses to each of the allegations are completely separate as the Respondent's defense to the information request allegation was that the Union had essentially rescinded the request, and the second allegation's defense rests on the language of the parties' collective bargaining agreement. These allegations are simply not closely related and as such, I find that paragraph 25(a) is time-barred under Section 10(b) of the Act.

As set forth above, the Henderson allegation was added to Charge 1–CA–307704 in the second amended charge on March 11, 2024. The original Charge was filed on November 23, 2022, which is within six months of the alleged violation which took place on July 9, 2022. The Board will find the amended charge timely only if the new allegation relates back to the initially filed charge. See *WGE Federal Credit Union*, 346 NLRB 982, 983 (2006). Thus "the timely filing of a charge tolls the time limitation of Section 10(b) as to matters subsequently alleged in an amended charge which are similar to, and arise out of the same course of conduct, as those alleged in the timely filed charge. Amended charges containing such allegations, if filed outside the 6-month 10(b) period, are deemed, for 10(b) purposes, to relate back to the original charge." Id. (citing *Pankratz Forest Industries*, 269 NLRB 33, 36-37 (1984), enfd. mem. sub nom. *Kelly-Goodwin Hardwood Co. v. NLRB*, 762 F.2d 1018 (9th Cir. 1985)).

As in the previous case, the Board applies the three-prong "closely related" test set forth in *Redd-I, Inc.*,[53] in determining whether an amended charge relates back to an earlier charge for 10(b) purposes. As set forth above these factors are (1) whether the otherwise untimely allegations of the amended charge involve the same legal theory as the allegations in the timely charge; (2) whether the otherwise untimely allegations of the amended charge arise from the same factual situation or sequence of events as the allegations in the timely charge; and (3) whether a respondent would raise the same or similar defenses to both the untimely and timely charge allegations. *Redd-I*, supra.

The initial Charge here alleged that Respondent violated Section 8(a)(5) and (1) of the Act by removing notices on the Union's bulletin board that were expressly permitted under the collective bargaining agreement and a second allegation that Respondent violated Section 8(a)(3), (5) and (1) of the Act by forbidding the Union or any of its elected officials from contacting its CNO and all other Hospital Managers, except for its Director of Labor Relations, regarding any union or labor relations matters in contravention of longstanding practice. (GC Exh. 1(e)).

As the initial allegation regarding bulletin board postings is clearly not related to Henderson's sole designee allegation, I will limit my analysis to the closer of the two allegations involving Respondent's forbidding the Union from contacting the CNO or other hospital managers. With respect to the first *Redd-I* factor, both allegations allege a unilateral change in violation of Section 8(a)(5) and 8(a)(1) of the Act. Regarding the second *Redd-I* factor, the initial

[53] 290 NLRB 1115, 1118 (1998).

allegation involves Respondent limiting the Union's ability to have direct contact with its managers other than Henderson, while the Henderson allegation concerns Respondent's ability to designate a single individual as the designee for all steps of the grievance process. Both allegations involve the Respondent limiting the Union's contact to a single member of management—Henderson. As Henderson wrote in her email regarding contact with Prosser: "the union and the union's elected officials are to refrain from contacting the CNO or any member of the administration directly. I am the point of contact for all union and labor relations matters and all communications need to be directed to me."[54] (GC Exh. 64.) With regard to the third step, the Respondent's defense is that it is the Respondent's prerogative to choose which representatives it chooses to represent management, which is also part of Respondent's defense with regard to Henderson as the sole designee in the grievance process. In light of all of the above, I find that the Henderson designee allegation relates back to the initial grievance regarding Respondent unilaterally limiting Union access to members of management and therefore find that the Henderson charge was timely filed.

ii. Merits Analysis of the Henderson Designation Allegation

Employers, like unions, have a statutory right to their choice of representatives for collective bargaining and the settlement of grievances. *Local 342-50, United Food & Commercial Workers Union*, 339 NLRB 148, 150 (2003). Section 8(b)(1)(B) of the Act, makes it an unfair labor practice for a union 'to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.' Although a party may contract away its freedom to choose its representatives by specifying who they are to be in a collective bargaining agreement, such waiver of those statutory rights must be "clear and unmistakable." *Merillate Indus., Inc.,* 252 NLRB 784, 786 (1980) citing *Native Textiles*, 246 NLRB 228 (1979); *Ground Breakers, Inc.,* 280 NLRB 146, 149 (1986).

Here, the General Counsel contends that the language of the collective bargaining agreement "clearly indicates" that the parties' intent was to have a different representative of management at each step, with a gradual ascent up Respondent's chain of command. (GC Br. at 89.) That is not the language of the contract, however. The actual language of the contract, sets forth that each step of the process be handled by a specific individual[55] "or their designee." There is no language in the contract indicating any limitations on who can be named as a designee at any particular step and there is certainly nothing in the contract setting forth that the designee at each step cannot be the same individual. As such, there is no such clear and unmistakable waiver of the Employer's rights in the contract here, and the fact that Respondent has historically generally designated separate individuals for each step of the grievance process does not confer on the Union a prescriptive right to have that practice continue. *Harley Davidson Motor Co.,* 214 NLRB 433, 438–439 (1974); *Native Textiles*, 246 NLRB 228 (1979). This is especially so insofar as such an interpretation of the contract is directly contrary to the mandate of the Act itself.

[54] These actions also both took place in the second half of 2022 (July 9, 2022 and November 18, 2022).

[55] Specifically, department manager at Step 1, CNO at Step 2, and Director of Human Resources for Step 3. (GC Exh. 15 at 38.)

In light of the above, I find that the General Counsel has failed to establish that Respondent violated Section 8(a)(5) and (1) of the Act when it designated Henderson to be the Hospital's designee at Steps 1, 2, and 3 of the parties' grievance process and I recommend that the Board dismiss this allegation of the complaint.

b) Denial of Grievances on Procedural Grounds

As noted, the General Counsel alleges that Respondent unilaterally changed the manner in which it responded to grievances in violation of Section 8(a)(5) and (1) of the Act since about July 2022, by denying on procedural grounds the majority of grievances filed by the Union. The record demonstrates that Respondent previously had discussed the merits of grievances with the Union and usually included its analysis of the merits in the grievance answers it provided in writing after each step in the process. In July 2022, although Respondent continued to discuss the merits of the grievances with the Union in the Step meetings, it stopped providing its position on the merits in writing after each step and instead began providing a list of procedural defenses to each grievance without addressing the merits.

i. 10(b) Affirmative Defense

Initially, Respondent contends that this allegation is barred by Section 10(b) of the Act for two different reasons. (R. Br. at 56–57.) First, Respondent contends that since the charge was filed on January 19, 2023 (GC Exh. 1(m)), and the allegation states that the violation began in July 2022, the charge was filed more than six months after the violation. It is well settled that the 10(b) period starts to toll only once the Union has "clear and unequivocal notice" of the violation. *St. Barnabas Medical Center*, 343 NLRB 1125, 1130–1131 (2004). Here, since the allegation is that "since about July 2022, and on a continuing basis, Respondent has denied on procedural grounds the *majority* of grievances filed by the Union,"[56] the Union would not have had clear and unequivocal notice of a majority of the grievances being denied on procedural grounds when the first such denial was issued. The Union's charge was based on a pattern of responses, so at least some time would have had to have passed for the Union to be on notice of the pattern and this would certainly have taken the Union up through the July 19, 2022 tolling date.

Respondent also alleges that since the language of the initial charge alleged that "[t]he Employer has failed to bargain in good faith with the Charging Party by frustrating the operation of the parties' grievance procedure by processing grievances in a perfunctory manner," it did not align with the language of the allegation in the complaint. (R. Br. at 57.) It is well settled that a charge does not have to mirror the language of the complaint and that it "is sufficient if it informs the alleged violator of the general nature of the violation charged against him and enables him to preserve the evidence relating to the matter." *NLRB v. Louisiana Mfg. Co.,* 374 F.2d 696, 704-705 (8th Cir. 1967), quoting *NLRB v. Raymond Pearson, Inc.*, 243 F.2d 456, 458 (5th Cir. 1957). I find that the language in the charge was similar enough to put the Employer on notice of the allegation as set forth in the complaint.

In light of the above, I find that this allegation is not barred by Section 10(b) of the Act

[56] Complaint para. 24 (emphasis mine).

and will proceed with the analysis.

ii. Merits Analysis

It is undisputed that the collective bargaining agreement contains no requirement that Respondent's answer to the grievance must address the merits of the grievance or that a denial of the grievance cannot be based on procedural defects alone. In fact, regarding time limits the language of the collective bargaining agreement provides the following language which supports the opposite conclusion:

> No grievance shall be considered under the foregoing procedure unless it is presented in the manner set forth herein. Extensions of the above time limits may be mutually agreed upon in writing in a particular case. Legitimate requests for extensions of time will not be unreasonably denied. A grievance must be appealed to the next step of the procedure, or the grievance will be considered settled on the basis of the last answer given by the Hospital. (GC Exh. 15 at 72.)

This plain language in the contract allows that a grievance may be denied purely on procedural grounds (e.g., if the Union fails to move the grievance to the next step of the process in a timely manner without securing a written agreement with regard to an extension of time).

The General Counsel, however, contends that Respondent's history of providing written responses to each step of the grievance process that contained a discussion of the merits established a past practice of doing so, and that Respondent's denials solely based on procedural grounds constituted a unilateral change in violation of Section 8(a) (5) and (1) of the Act.

I cannot agree that Respondent's past practice of addressing the merits of the charge in its written response constitutes a past practice which overrides the specific language of the parties' contract. After all it is well established that where "a bargain [has] already been struck for the contract period and reduced to writing, neither party is required under the statute to bargain anew about matters the contract has settled for its duration." *C & S*, 158 NLRB 454, 457 (1966). Here the plain language of the contract allows for denial of grievances based on the Union missing deadlines, which is a procedural defense. While it is true that Respondent's responses generally listed a litany of procedural defenses, not all of which are focused on timeliness, the allegation as set forth in the complaint alleges that the issue was not with the specific reasons for denial but relies on the fact that the denials were based solely on procedural issues.[57] Simply put, the plain language of the contract clearly allows Respondent to deny grievances based on procedural deficiencies and the General Counsel failed to demonstrate that Respondent waived its right under the contract to do so.

For these reasons, I find no merit to the allegation and recommend that it be dismissed.

F. ADMINISTRATION OF ARBITRATIONS

[57] Complaint para. 24 sets forth that Respondent violated Section 8(a)(5) and (1) of the Act by denying "on procedural grounds the majority of grievances filed by the Union."

The General Counsel contends that on about September 20, 2023, Respondent violated Section 8(a)(5) and (1) and 8(d) of the Act when it failed to continue in effect all the terms and conditions of the parties' collective bargaining agreement by refusing to allow the Labor Relations Connection (LRC) and American Arbitration Association (AAA) to administer arbitrations after the selection of arbitrators.[58]

1. Facts

Since 2010, the parties' collective bargaining agreements have contained a grievance and arbitration provision, which provides that the parties will choose an arbitrator with either the American Arbitrator Association (AAA) or the Labor Relations Connection (LRC). This provision of the CBA, which has not changed since 2010, is set forth below:

> If the grievance is not adjusted in Step 3, the MNA may file a demand for arbitration under step 4 with AAA or LRC with simultaneous written notice to the Hospital's Chief Human Resources Officer not later than 30 working days after the written answer in Step 3 was received.
>
> **Step 4**: Should the MNA request arbitration in accordance with the time limits specified herein, an arbitrator shall be selected pursuant to the Voluntary Labor Arbitration Rules of the American Arbitration Association or applicable procedures of the Labor Relations Connection. The decision of the arbitrator shall be final and binding. The arbitrator shall be requested to issue a written decision within 30 days after the conclusion of the hearing. The arbitrator shall have no authority to add to, subtract from, modify, alter or disregard any of the provisions of this Agreement. Costs of the arbitrator and the American Arbitration Association or the Labor Relations Connection shall be borne equally by the Hospital and the MNA. (GC Exh. 15 at 38.)

The AAA and the LRC are organizations that provide a range of alternative dispute resolution services including helping the parties to choose an arbitrator as well as assisting with other arbitration logistics. AAA has been serving this function for the parties pursuant to their collective bargaining agreement since 2000, while LRC has been serving in that function along with AAA since 2010. AAA and LRC have similar services that they provide when parties hire them to help with arbitration services.

Specifically, with regard to the LRC's process, once the MNA files a demand for arbitration with the LRC, the LRC would provide each of the parties with a list of arbitrators. (Tr. at 704.) Each party would review the list, strike any arbitrators that they find unacceptable and rank the remaining arbitrators by preference. Each party sends their list rankings back to LRC. The LRC will review the parties' choices and pick an arbitrator that is acceptable to both of the parties.

After the arbitrator is chosen, the LRC will help with the logistics of the arbitration, by coordinating with the parties to set a time, date, and place for the arbitration and eventually collecting and distributing motions, position statements, and briefs from the parties. Generally,

[58] Complaint para. 34.

the LRC serves as a liaison between the parties and the arbitrator. (Tr at 704–710; 364–372.)

The process is generally the same for AAA as for LRC. It is uncontested that this is the way that the arbitrations submitted to AAA and LRC were processed by the parties from 2010 through September 2023. (Tr. at 704–710; 364–372.)

LRC's Labor Arbitration Rules from the relevant time period provide that:

> The parties must mutually agree to use The Labor Relations Connection to administer their grievance arbitration, fact-finding and/or interest arbitration cases. Parties may do so either during the collective bargaining process or by memorandum of agreement. The parties may, by written agreement, amend the procedures outlined in the labor arbitration rules. . .. The Labor Relations Connection functions as a liaison and facilitator between the parties and the Arbitrator. It is essential that there be no direct communication by the parties to the Arbitrator on substantive matters. Any necessary communication to the Arbitrator shall be conveyed through the Labor Relations Connection."[59] (GC Exh. 21.)

From 2000 until about 2021, 26 demands for arbitration were filed with the AAA and nine demands were filed with the LRC under the parties' collective bargaining agreements. From 2021 to about September 20, 2023, after the nurses returned to work after the strike, the Union filed 77 demands for arbitration with the LRC. During this time Respondent never objected to the LRC administering the arbitration process. In August 2023, Respondent's counsel started expressing concern to the LRC about how the company was handling some aspects of the arbitration administration and Respondent's concern that LRC failed to act in a neutral capacity. (Tr. at 712–713, 725; GC Exh. 23, 27.)

On September 20, 2023, Borruso emailed LRC founder and director Jan Teehan:

> Please be advised that the collective bargaining agreement between Saint Vincent Hospital ("Hospital") and the Massachusetts Nursing Association ("MNA") provides for the selection of arbitrators to the Voluntary Labor Arbitration Rules of the American Arbitration Association or the applicable procedures of the Labor Relations Connection. It does not provide for the application of either agency's rules or for the "administration" of any matters by either agency.
>
> Accordingly, effective as of the date and time of this email, you are instructed to cease any purported "administration" of, or any other participation of any kind in, any of the

[59] These rules were in place from around 2016 through 2022. In 2022, inconsequential and minor modifications were made to the rules as follows: "The parties must mutually agree to use The Labor Relations Connection to administer their *Grievance Arbitration, Mediation, Fact Finding and/or Interest Arbitration cases.* The parties may do so either during the collective bargaining process or by memorandum of agreement. The parties may, by written agreement, amend the procedures outlined in the Labor Arbitration rules. . . . The Labor Relations Connection functions as a liaison and facilitator between the parties and the Arbitrator. It is essential that there be no direct communication by the parties to the Arbitrator on substantive matters. Any necessary communication to the Arbitrator shall be conveyed through the Labor Relations Connection." (Emphasis added; GC Exh. 20.)

> Hospital's currently pending matters. Please provide me [sic] the arbitrator's contact information in each of the Hospital's currently pending cases at your absolute earliest convenience, but no later than the close of business tomorrow, September 21, 2023. (GC Exh. 29.)

Borruso cc'd Henderson, several attorneys for the Respondent, and several of the Union's attorneys, including Attorney Canzoneri on this email. Prior to sending this email Respondent did not notify the Union or bargain with the Union about this proposed change in practice. (Tr. at 1448, 725–726.)

That evening, Borruso forwarded a revised Notice of Hearing that he had received from LRC to Teehan and wrote: "I received the attached correspondence in connection with my email below. Please advise whether the Labor Relations Connection will comply voluntarily or whether it will insist the Hospital take action to compel it to comply." (GC Exh. 72.) After receiving no response from Teehan, Borruso wrote another email to Teehan at 6:15 p.m. on September 21, stating: "I received the attached correspondence in connection with my email below. The close of business on September 21, 2023, has come and gone. You ignored my instruction. You ignored my question. You ignored my request for information. Saint Vincent Hospital will now begin taking steps it deems appropriate to protect its interests." (GC Exh. 72.)

On September 28, 2023, Teehan sent an email to the parties writing:

> The LRC understands that there is currently a dispute between the Employer and the Union about the continued use of our services to administer arbitrations. The LRC is aware of the respective positions of the parties and the LRC will simply have to wait for resolution of this dispute between the parties to move forward with any new cases that have not been filed or docketed by the LRC.
>
> However, there are approximately 50 cases in which both the Employer and the Union have paid their respective shares of the administrative filing fees which placed those cases under the LRC's jurisdiction. The LRC believes that it is obligated to continue to administer those cases that have been docketed and for which fees have been paid by both parties. The LRC will continue to bill out those services provided in such cases in accordance with the agreed upon procedures under which the parties have operated for years. (GC Exh. 22.)

Around this time, Respondent also stopped paying bills from LRC. (Tr. at 555.)

On October 25, 2023, Respondent's attorney Cullan Jones (Jones) sent an email to AAA case administrator Patrick Kimm (Kimm) in which Jones submitted Respondent's selection choices for an upcoming arbitration that was being administered by AAA and wrote: "Please note that the Hospital only agrees to use AAA for arbitrator selection and the Hospital expressly does not agree to any of AAA's rules." (GC Exh. 103.) On August 29, 2024, in the same case, Respondent's attorney Mark Levitt who took over the case from Jones wrote to Kimm:

> As I understand the roles of the AAA, it was to provide a panel of arbitrators for the

parties to select the Arbitrator. We are not anticipating the AAA having any further role in the administration of the matter.

Therefore, I have copied Mr. Marra[60] directly and would request that he provide available dates for parties for the rescheduling of the hearing (possibly November, December or after the start of the year.)" (GC Exh. 47 at 9.)

Attorney for the Union Dennis Coyne (Coyne), Canzoneri, and McGill were cc'd on this email. Kimm responded the same day writing: "The understanding is that AAA has a full administrative role. If that is not the case, AAA will need both parties to agree that AAA cease with full administration." (GC Exh. 47 at 8-9.) Coyne responded to the correspondence string writing: "It has come to my attention that St. Vincent Hospital has notified AAA that it will only use AAA for arbitrator selection, and will not use AAA for any other purpose in this case, such as hearing scheduling, exchange of briefs, etc. Given the rules of AAA and the parties' CBA, the MNA objects to this, and asks for a ruling that St. Vincent Hospital is bound to AAA's rules governing labor arbitration, including on communications with the arbitrator." (GC Exh. 47 at 4.) It is uncontested that Respondent never notified or bargained with the Union before notifying AAA that it would no longer be using AAA for full administration of its services. (Tr. at 1448, 1473.)

2. Analysis

It is well settled that grievance arbitration provisions settle a term and condition of employment and are mandatory subjects of bargaining. *Bethlehem Steel Co*., 136 NLRB 1500 (1962); *U.S. Gypsum Co*., 94 NLRB 112 (1951); *NLRB v. Independent Stave Co*., 591 F.2d 443 (8th Cir. 1979). It follows that matters that are essential components of the grievance process and govern the specific way it is to function should also be considered mandatory. See *Electrical Workers UE v. NLRB,* 409 F.2d 150 (D.C. Cir. 1969). Accordingly, the Board has held various aspects of the grievance and arbitration process, such as the method of selecting arbitrators,[61] restrictions on legal actions to enforce arbitration awards,[62] scope of arbitration,[63] time limits for filing grievances,[64] and the form in which grievances are submitted[65] are mandatory subjects of bargaining. *C & P Telephone*, 280 NLRB 78, 81 (1986).

An employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if those practices are not required by a collective-bargaining agreement. The party asserting the existence of a past practice bears the burden of proof on the issue and must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or recur on a regular and consistent basis. *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141, slip op. at 5–6 (2024); *Wendt Corp.*, 372 NLRB No. 135, slip op. at 4, 17 (2023); *Howard Industries,*

[60] Mr. Marra was the arbitrator assigned by AAA to the case.
[61] *Independent Stave Co.*, 248 NLRB 219, 219, 228 (1980).
[62] *Star Expansion Industries*, 164 NLRB 563 (1967).
[63] *Mayes Bros.*, 145 NLRB 181 (1963).
[64] *Gerson Industries*, 217 NLRB 1018 (1978).
[65] *Southwestern Electric*, 274 NLRB 922, 922 (1985).

Inc., 365 NLRB 28, 30 (2016); *Garden Grove Hospital & Medical Center*, 357 NLRB 653, 653 fn. 4, 657 (2011).

The duty to bargain is not extinguished when a collective-bargaining agreement is in effect. See *Conley v. Gibson*, 355 U.S. 41, 46 (1957). The U.S. Supreme Court has held that "[c]ollective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights. *Garden Grove Hospital & Medical Center*, 357 NLRB at 657.

Here the contract language specifically lays out only that: "an arbitrator shall be selected pursuant to the Voluntary Labor Arbitration Rules of the American Arbitration Association or applicable procedures of the Labor Relations Connection." (GC Exh. 15 at 38.) Although this is the only language contained in the CBA, it is undisputed that the parties have been using LRC's full services since at least 2016, and have been using AAA's full services since 2000, for their arbitrations. The General Counsel contends that this consistent past practice of the parties over the more than 20-year history of their contractual relationship created an established past practice and that Respondent failed to notify or bargain with the Union about this change before implementing it.

Respondent put forth no evidence to the contrary and admits that it changed this practice without notifying or bargaining with the Union ahead of time. In fact, it is uncontested that the Union first learned that Respondent was taking this stance in letters not addressed to the Union, but rather to LRC and AAA themselves on correspondence that the Union was only copied on.

Thus, I find that the parties had a long, consistent practice of using the LRC and AAA to administer its arbitrations, which had become the parties' established past practice. This practice being one that the parties had mutually agreed on, it could not be altered during the contract term except by mutual consent. Thus, Respondent violated Section 8(a)(5) and (1) when it unilaterally announced that it would no longer use the LRC or AAA to process arbitrations without first notifying and bargaining with the Union to impasse on the matter.[66] *Garden Grove Hospital & Medical Center*, 357 NLRB at 657.

As there is no language in the parties' collective bargaining agreement regarding using LRC or AAA's administrative services, I do not find that Respondent violated Section 8(d) of the

[66] Citing *Success Village Apartments*, 348 NLRB 579, 629 (2006), Respondent here again contends that the zipper clause in the parties' collective bargaining agreement somehow allows Respondent to make this unilateral change. As set forth above, Respondent's reliance on the zipper clause fails as the clause in the parties' collective bargaining agreement is a generally worded zipper clause, which the Board has squarely held is not sufficient to demonstrate that a union has waived its statutory right to bargain over a specific subject. See *IMI South, LLC*, 364 NLRB 1373, 1375 (2016); *Ohio Power Co.*, 317 NLRB 135, 136 (1995), citing *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989) 184-188 (1988) ("Generally worded management rights clauses or 'zipper' clauses will not be construed as waivers of statutory bargaining rights"); *Success Village Apartments*, 348 NLRB 579, 629 (2006) (a "zipper clause cannot be used as a 'sword' to accomplish a change from the status quo").

Act as alleged in the complaint, however, and I recommend dismissing this allegation. [67]

G. SANCTION REQUESTS

1. The General Counsel's Request for Sanctions

The General Counsel seeks evidentiary sanctions pursuant to *Bannon Mills*, 146 NLRB 611 (1964), for Respondent's alleged failure to comply with paragraph five of the General Counsel's Subpoena Duces Tecum B-1-1LMKDLN, which requested that Respondent produce:

> For the time period August 18, 2021 to the present, documents, including but not limited to letters, emails, text messages, notes, minutes, memoranda, leaflets, presentations, memorializations or oral communications, and audio or video media, showing all communication between and among Respondent representatives regarding the following:
>
> a) Respondent's opinion of the Union;
> b) The Union's decision to strike;
> c) Employee support of the Union;
> d) Wendy McGill ("McGill")
> e) The National Labor Relations Board (the Board), including charges filed with the Board and the subject matter of those charges. (GC Exh. 66 at 5-6.)

Specifically in her post hearing brief, the General Counsel requests that I make the adverse inference that if all of the responsive documents to paragraph five of the complaint had been produced they would have shown that Respondent's conduct alleged in paragraphs 14–18 of the complaint was motivated by Respondent's anti-union animus. (GC Br. at 77.)

The General Counsel argued that Respondent's significant delay in producing documents and failure to produce a Custodian of Records who had direct non-hearsay knowledge of the specifics of Respondent's search for responsive documents failed to constitute full compliance with the subpoena. Although I share the General Counsel's frustration that the Respondent significantly delayed its production of documents responsive to paragraph five of the subpoena, I decline to make the adverse inference requested. First, the General Counsel failed to show that Respondent possessed documents responsive to paragraph five of the subpoena that were not

[67] In its post-hearing brief (pages 101–103), Respondent asserts that the trial proceeding in this case is unconstitutional for three reasons: 1) the NLRB's structure only permits the President to remove Board members for neglect of duty or malfeasance; 2) Administrative Law Judges have three layers of removal protection in violation of Article II of the Constitution; and 3) without a right to trial by jury, the NLRB's processes violate the Seventh Amendment to the Constitution. I find that this constitutional question is a matter for the federal courts to decide. Further, since ruling on the constitutional question here would entail halting (at least in part) the operation of the agency, and such a step would be in tension with my duty to faithfully administer the Act, I deny Respondent's constitutional challenge with the understanding that a federal court may address the issues at some point in the future. See *SJT Holdings, Inc.,* 372 NLRB No. 82, slip op. at 1-2 (2023); *National Association of Broadcast Employees & Technicians, Local 51 (NABET),* 370 NLRB No. 114, slip op. at 1–2 (2021).

produced. Second, the General Counsel had the opportunity to call additional witnesses to testify about the document production but chose not to do so at hearing. Third, the General Counsel failed to show how it was prejudiced by Respondent's delay in producing documents responsive to paragraph five of the subpoena. In light of all of the above, I deny the General Counsel's request for sanctions.

2. Respondent's Request for Sanctions

Respondent also requested sanctions for the General Counsel for attempting to introduce a privileged document into the record that had been inadvertently produced by Respondent in response to the General Counsel's subpoena. On November 19, 2024, the General Counsel attempted to introduce the document in question through Henderson, who was called by General Counsel as a 611(c) witness at the hearing. The document contained an email exchange between Henderson, Borruso, and Respondent's counsel that appeared to contain an attorney-client privileged communication. Respondent objected to the document immediately based on attorney-client privilege and the General Counsel withdrew the document without formally requesting that it be admitted. (Tr. at 1513–1515.) As there was an open question regarding whether the document itself was privileged or not, the General Counsel was barred from using the document in order to refresh the witness' recollection and all copies of the document were collected and returned to Respondent.

At hearing and in its post hearing brief, Respondent requested that the General Counsel be sanctioned for failing to notify Respondent when it realized that Respondent had inadvertently produced the privileged email exchange in accordance with the Massachusetts Rules of Professional Conduct. Respondent contends that the appropriate sanction would be to have all of Henderson's testimony on direct examination related to the Shift Bonus Incentive be struck from the record. (Tr. at 1561.) The General Counsel contended at hearing that because Borruso was filling two different roles with Respondent at the time of the exchange (as Director and Senior Counsel for Labor Relations) there was a grey area as to whether the communication was privileged or not. (Tr. at 1562.) The General Counsel reasoned that since the document came from Respondent and was not referenced in Respondent's privilege log, the email exchange was not clearly privileged.

As the document was almost immediately withdrawn and all copies of the document were returned to Respondent, I did not have a chance to review the document to decide if the communication contained a privileged attorney-client exchange and I make no finding with regard to whether or not the document was privileged. The General Counsel did not attempt to reintroduce the document or refer to the document throughout the rest of the hearing. It is not my place to police the canons of ethics of any state bar association, and I therefore make no finding on that issue. Nonetheless, based on Respondent's privilege concerns and the fact that the document was withdrawn by the General Counsel, I am striking the portion of Henderson's testimony regarding the document, although I note that Henderson's testimony about the document before the objection was made and the General Counsel withdrew it was minimal. Thus, Tr. at page 1512, line 21, through Tr. page 1513 line 7, are struck from the record.

CONCLUSIONS OF LAW

1. The Respondent Saint Vincent Hospital is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party Massachusetts Nurses Association (the Union) is a labor organization within the meaning of Section 2(5) of the Act representing:

> All full-time, regular part-time and per diem registered nurses who work an average of four hours or more per week, including Admissions Coordinator, Nurse IV, Patient Educator, Registered Nurse, ERCP Coordinator, Diabetic Nurse, Nurse Practice-Research, Trauma Coordinator, Dysrhythmia Specialist, Nurse Pulmonary Education Coordinator, Nurse Clinical Risk Reviewer/Data Coordinator, Pharmacy Research Coordinator, Operating Room Service Coordinator, CC Business Information Services Manager, Case Managers, Enterostomal Therapist, Clinical Nurse Specialist, Nurse Liaison, TCC, Clinical Ed Specialist II, Case Management Assistant Director, Clinical Quality Assistant Director, Emergency Mental Health Counselor and Childbirth Educator employed by the Hospital located in Worcester, Massachusetts; but excluding Office Coordinator (Orthopedics), Anesthesia Work Room Supervisor, Infection Control Coordinator, Operating Room Materials Supervisor, Nurse Clinician Radiation/Oncology, Assistant Clinical Manager, Nurse Recruiter, Health Office Coordinator, Manager of Pain Services, Nurse Manager of HEM/On/Am, Nurse Manager of Ambulatory Clinic, Cardiac Rehab Coordinator, Non-invasive Cardiology Manager, Administrative Coordinator, Nurse Manager I, Nurse Manager II, Administrative Director, Director of Risk Management, Independent Contractors, Confidential Employees, Managerial Employees, Guards and Supervisors as defined in the National Labor Relations Act.

3. The Respondent violated Section 8(a)(1) of the Act, from February 15, through March 17, 2022, by denying Union representatives access to its facility.

4. The Respondent violated Section 8(a)(1) of the Act, on March 9, 2023, by informing employees that it would withhold bonus payments that it owed them under their shift incentive contracts.

5. The Respondent violated Section 8(a)(1) of the Act, on March 9, 2023, by blaming the Union for Respondent's failure to make bonus payments owed to employees under their shift incentive contracts.

6. The Respondent violated Section 8(a)(5) and (1) of the Act, since about September 14, 2023, by requiring Union representatives to give twenty-four hours' notice before visiting its facility.

7. The Respondent violated Section 8(a)(5) and (1) of the Act, from about September 14, through November 9, 2023, by denying Union representatives access to its facility.

8. Respondent violated Section 8(a)(5) and (1) of the Act, from about September 6, 2023, by failing to provide the Union with information that was necessary for, and relevant to, the Union's performance of its duties as the exclusive bargaining representative of the Unit.

9. Respondent violated Section 8(a)(5) and (1) of the Act, on November 11, 2022, by reducing the amount it paid its employees under its shift bonus incentive.

10. Respondent violated Section 8(a)(5) and (1) of the Act, in December 2022, by implementing its winter extra shift program.

11. Respondent violated Section 8(a)(5) and (1) of the Act, in December 2022 and January 2023, by bypassing the Union and dealing directly with its Unit employees by soliciting employees to enter into, and entering into, individual incentive agreement contracts.

12. Respondent violated Section 8(a)(5) and (1) of the Act, on January 12, 2023, by prematurely declaring impasse regarding its winter extra shift program.

13. Respondent violated Section 8(a)(5) and (1) of the Act, on about January 12, 2023, by prematurely declaring impasse regarding its switch shift incentive program.

14. Respondent violated Section 8(a)(5) and (1) of the Act, on January 12, 2023, by implementing its switch shift incentive program.

15. Respondent violated Section 8(a)(5) and (1) of the Act, on September 14, 2023, by changing its policy regarding Union access to its facility.

16. Respondent violated Section 8(a)(5) and (1) of the Act, since about September 20, 2023, by unilaterally refusing to allow the Labor Relations Connection (LRC) and the American Arbitration Association (AAA) to administer arbitrations after the selection of arbitrators.

17. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

More specifically, having found that the Respondent unilaterally changed its policy with regard to Union access, reduced the amount to be paid to employees under the shift bonus incentive, implemented switch shift incentives, implemented winter extra shift agreements, and refused to allow the Labor Relations Connection (LRC) and the American Arbitration Association (AAA) to administer arbitrations after the selection of the arbitrator, Respondent

shall, on request of the Union, bargain collectively and in good faith with the Union on these and other terms and conditions of employment of unit employees and, if an understanding is reached, to embody it in a signed agreement. Respondent shall, if requested to do so by the Union, rescind the unlawful unilateral changes, reinstate the terms and conditions of employment in these areas that existed before the Respondent's unlawful unilateral changes, and make the unit employees whole for any losses attributable to its unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). To the extent that the unlawful unilateral changes implemented by the Respondent may have improved the terms and conditions of employment of unit employees, the Order set forth below shall not be construed as requiring the Respondent to rescind such improvements unless requested to do so by the Union.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice, on a form provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the Respondent shall distribute the notice electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notice is not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed its facility, 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 the facility at any time since February 15, 2022.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[68]

ORDER

The Respondent, Saint Vincent Hospital, Worcester, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

Telling its employees that its Union representatives are being banned from the Hospital.

[68]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 due under the terms of this Order.

Telling employees that it would withhold bonus payments that it owed to them under their shift incentive contracts.

Blaming the Union for its failure to make bonus payments owed to its employees under their shift incentive contracts.

Unilaterally changing the terms and conditions of employment of its unit employees by changing its policy regarding Union access to the facility and requiring Union representatives to provide at least twenty-four hours' notice before visiting the Hospital.

Unilaterally changing the terms and conditions of employment of its unit employees by denying the Union representatives access to the Hospital.

Unilaterally changing the terms and conditions of employment of its unit employees by reducing the amount it paid its employees under its shift bonus incentive program.

Bypassing the Union and dealing directly with its Unit employees by soliciting employees to enter into, and entering into, individual incentive agreement contracts.

Unilaterally changing the terms and conditions of employment of its unit employees by prematurely declaring impasse and implementing its winter extra shift program, without bargaining with the Union, its employees' exclusive collective bargaining representative.

Unilaterally changing the terms and conditions of employment of its unit employees by prematurely declaring impasse and implementing its switch shift incentive program without bargaining with the Union, its employees' exclusive collective bargaining representative.

Unilaterally changing the terms and conditions of employment of its unit employees by refusing to allow the Labor Relations Connection (LRC) and American Arbitration Association (AAA) to administer arbitrations after the selection of arbitrators.

Refusing to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

On request by the Union, rescind the changes in the terms and conditions of employment for the Respondent's unit employees as are set forth above that were unilaterally implemented on November 11, 2022, December 2022, January 2023, January 12, 2023, September 14, 2023, and September 20, 2023.

Make affected employees whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of the Respondent's unlawful unilateral changes, in the manner set forth in the remedy section of this decision.

Furnish to the Union in a timely manner the information requested by the Union on September 6, 2023.

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 amounts due under the terms of this Order.

Within 14 days after service by the Region, post at its Worcester, Massachusetts facility copies of the attached notice marked "Appendix."[69] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 15, 2022.

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

Dated, Washington, D.C. January 30, 2026

Susannah Merritt
U.S. Administrative Law Judge

[69] 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 a representative to bargain with us on your behalf;
Act together with other employees for your benefit and protection;
Choose not to engage in any of these protected activities.

WE WILL NOT tell you that your Massachusetts Nurses Association (the Union) representatives are being banned from the Hospital for failing to provide at least twenty-four hours' notice prior to their arrival.

WE WILL NOT tell you that we will withhold bonus payments owed to you under your shift incentive contracts.

WE WILL NOT blame the Union for our failure to make bonus payments owed to you under your shift incentive contracts.

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

WE WILL NOT unilaterally change your terms and conditions of employment by changing our policy regarding Union access to our facility and requiring Union representatives to provide at least twenty-four hours' notice before visiting the Hospital.

WE WILL NOT unilaterally change your terms and conditions of employment by denying your Union representatives access to the Hospital.

WE WILL NOT unilaterally change your terms and conditions of employment by reducing the amount we pay you under the shift bonus incentive program.

WE WILL NOT unilaterally change your terms and conditions of employment by directly dealing with you by soliciting you to enter into, and entering into, individual incentive agreement contracts.

WE WILL NOT unilaterally change your terms and conditions of employment by prematurely declaring impasse and implementing the winter extra shift program, without bargaining with the Union.

WE WILL NOT unilaterally change your terms and conditions of employment by prematurely declaring impasse and implementing a switch shift incentive program without bargaining with the Union.

WE WILL NOT unilaterally change your terms and conditions of employment by refusing to allow the Labor Relations Connection (LRC) and American Arbitration Association (AAA) to administer arbitrations after the selection of arbitrators.

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to furnish it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

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

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment 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 who work an average of four hours or more per week, including Admissions Coordinator, Nurse IV, Patient Educator, Registered Nurse, ERCP Coordinator, Diabetic Nurse, Nurse Practice-Research, Trauma Coordinator, Dysrhythmia Specialist, Nurse Pulmonary Education Coordinator, Nurse Clinical Risk Reviewer/Data Coordinator, Pharmacy Research Coordinator, Operating Room Service Coordinator, CC Business Information Services Manager, Case Managers, Enterostomal Therapist, Clinical Nurse Specialist, Nurse Liaison, TCC, Clinical Ed Specialist II, Case Management Assistant Director, Clinical Quality Assistant Director, Emergency Mental Health Counselor and Childbirth Educator employed by the Hospital located in Worcester, Massachusetts; but excluding Office Coordinator (Orthopedics), Anesthesia Work Room Supervisor, Infection Control Coordinator, Operating Room Materials Supervisor, Nurse Clinician Radiation/Oncology, Assistant Clinical Manager, Nurse Recruiter, Health Office Coordinator, Manager of Pain Services, Nurse Manager of HEM/On/Am, Nurse Manager of Ambulatory Clinic, Cardiac Rehab Coordinator, Non-invasive Cardiology Manager, Administrative Coordinator, Nurse Manager I, Nurse Manager II, Administrative Director, Director of Risk Management, Independent Contractors, Confidential Employees, Managerial Employees, Guards and Supervisors as defined in the National Labor Relations Act.

WE WILL, on request by the Union, rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented when we: changed our policy regarding Union access to our facility and started requiring Union representatives to provide at least twenty-four hours' notice before visiting the Hospital; denied your Union representatives access to the Hospital; reduced the amount we pay you under the shift bonus incentive program; bypassed your Union and directly dealt with you by soliciting you to enter into, and entering into, individual incentive agreement contracts; prematurely declared impasse and implemented the winter market incentive program, without bargaining with the Union first;

prematurely declared impasse and implemented the switch shift incentive, without bargaining with the Union first; and refused to allow the Labor Relations Connection (LRC) an the American Arbitration Association (AAA) to administer arbitrations after the selection of arbitrators.

WE WILL furnish to the Union in a timely manner the information requested by the Union on September 6, 2023 regarding health care Summary Plan Descriptions, Summaries of Benefits and Coverages, and Plan Documents from 2012 to present.

VHS Acquisition Subsidiary Number 7, Inc.
d/b/a St. Vincent Hospital
(Respondent)

Dated: _____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation, and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Thomas P. O'Neill Jr. Federal Building
10 Causeway Street, Suite 1002
Boston, Massachusetts

Telephone: (617) 565-6700, **Hours of Operation:** M-F 8:30 a.m. to 5:00 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-290852 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.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER.