

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

ASCENSION PROVIDENCE ROCHESTER
HOSPITAL

and

Case No. 07-CA-301250
07-CA-305265
07-CA-311975
07-CA-312887
07-CA-313950
07-CA-315264
07-CA-317896
07-CA-320281
07-CA-320715
07-CA-324581
07-CA-324585
07-CA-328405
07-CA-333553

LOCAL 40, OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION
(OPEIU), AFL-CIO

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for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

BENJAMIN W. GREEN, Administrative Law Judge. Ascension Providence Rochester Hospital (the Respondent) operates a hospital in Rochester, Michigan (the Hospital). (Tr. 46, 77-78, 406, 721) Local 40, Office and Professional Employees International Union (OPEIU), AFL-CIO (the Union) represents two units of employees employed by the Respondent at the Hospital – a registered nurse (RN) unit (RN Unit) and a radiology technologist unit (RT Unit). (Tr. 46)

The Second Amended Third Consolidated Complaint (the complaint) alleges that the Respondent violated Section 8(a)(5), (3), and (1) of the Act. The Respondent allegedly violated Section 8(a)(1) by issuing overly broad directives to employees, denying Union representatives and off-duty employees access to the Hospital's public lobby to conduct Union business, threatening to call the police if Union representatives and employees did not leave the lobby, and making other threats and promises. The Respondent allegedly violated Section 8(a)(3) by failing to immediately reinstate unfair labor practice (ULP) strikers following an unconditional request to return to work. The Respondent allegedly violated Section 8(a)(5) by unilaterally hiring and using nonunit short-term option (STO) RNs to perform RN Unit work, unilaterally discontinuing a practice of providing unit employees with Thanksgiving turkeys, failing to provide information requested by the Union, and overall bad-faith bargaining.

My recommended findings on the complaint allegations and the page where they can be found in this decision are summarized in the table below:

Comp. ¶	Act §	Page	Description of Allegation	Rec. Finding	
5	9(a)	8(a)(1)	4	Amber Matthews February 2023 Overbroad Directives Regarding Expectations	Violation
	8	8(a)(1)	9	Lindsey Schwalbach April 27, 2023 Threat and Promise at Jimmy John's	Violation
	9(b)	8(a)(1)	10	Amber Matthews June 12, 2023 Overbroad and Threatening Email Regarding Attendance	Violation
10	10	8(a)(1)	11	Brian Kirk August 21, 2023 (Lobby Day) Directive to Off-Duty Employees to Leave the Hospital Lobby and Threat to Call the Police	Violation
	11	8(a)(1)	14	Marie Dubay August 21, 2023 Overbroad Directive in Retracting the Union's Conference Room Reservation	Violation
15	12	8(a)	15	Dawn Gazzarato September 21, 2023 Overbroad Direction not to Discuss Investigatory Interviews	Violation
	13	8(a)(3)	17	Failure to Immediately Reinstate Unit employees on September 14, 2023 Following a ULP Strike	Violation
20	16	8(a)(5)	23	June 17, 2022 Information Request (G.C. Exh. 53)	Dismiss
	14	8(a)(5)	24	September 19, 2022 Information Requests (G.C. Exhs. 48-51)	Violation
25	15	8(a)(5)	30	November 17, 2022 Information Request (G.C. Exh. 52)	Violation
	17-18	8(a)(5)	33	January 11, 2023 and February 28, 2023 Information Requests (G.C. Exhs. 54-55)	Violation
	19	8(a)(5)	35	February 14, 2023 Information Request (G.C. Exh. 56)	Violation
30	22(a)	8(a)(5)	38	Unilateral Hire and Use of STO RNs	Violation ¹
	22-24	8(a)(5)	52	Unilateral Discontinuance of Practice of Providing Unit Employees with Thanksgiving Turkeys ²	Dismiss
	26-27	8(1)(5)	54	Overall Bad-Faith Bargaining	Dismiss

35 The charges in this case were filed between August 2, 2022 and January 10, 2024. The
 complaint issued on July 15, 2024 and the Respondent filed an answer thereto on July 15, 2024.
 From July 29 to August 2, 2024, in Detroit, Michigan, the hearing was held before Administrative
 40 Law Judge Melissa Olivero. Judge Olivero closed the record by Zoom on August 13, 2024. In
 September 2025, Judge Oliver retired and is thus unavailable to issue the decision in this case.
 Pursuant to Board Rule 102.36(b), by order of Deputy Chief Administrative Law Judge Arthur J.
 Amchan dated September 25, 2025, the case was assigned to me for the purpose of issuing a
 decision on the record created before Judge Olivero.

45 ¹ Although I have recommended the finding of a violation, I base that recommendation on a
 continuing violation theory and limit the recommend remedy to the period beginning April 17, 2022.

² The General Counsel contends in a posthearing brief that the Respondent hired and used STO
 RNs to perform RN Unit work without notifying and affording the Union an opportunity to bargain.
 The complaint alleges, in the alternative, that the Respondent's creation and use of the STO RN
 classification was a mid-term modification of the applicable collective-bargaining agreement. (G.C.
 Exh. 1 (ddd) ¶ 25) However, the General Counsel did not address this alternative mid-term
 modification theory in their brief and, accordingly, I do not address it in this decision.

In its answer to the complaint, the Respondent pled certain affirmative defenses, including defenses that Board members and administrative law judges are unconstitutionally insulated from removal and that the Respondent was unconstitutionally denied a jury trial. The Respondent did not argue these and other affirmative defenses in its posthearing brief and, therefore, I reject them. *Nexstar Media, Inc.*, 374 NLRB No. 1, fn. 1 (2024). In so holding, I note that the Board has rejected constitutional defenses based on removal protection of Board members and administrative law judges, and the right to a jury trial. See *Commonwealth Flats Dev. Corp. d/b/a Seaport Hotel Boston*, 373 NLRB No. 142, slip op. at fn. 1 (2024); *Nexstar Media, Inc.*, 374 NLRB No. 1, slip op. at fn. 1 (2024).

On the entire record, after considering the posthearing briefs filed by the General Counsel, the Respondent, and the Union, I render below my findings of fact³ and legal analysis.

JURISDICTION & LABOR ORGANIZATION STATUS

The Respondent admits it satisfies the commerce requirements for jurisdiction and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (G.C. Exh. 1(ddd)) The Respondent further admits that the Union is a labor organization within the meaning of Section 2(5) of the Act. (G.C. Exh. 1(ddd)) I find that this dispute affects commerce and the Board has jurisdiction pursuant to Section 10(a) of the Act.

ALLEGED UNFAIR LABOR PRACTICES

Background

The Hospital is part of a broader Ascension healthcare system (Ascension) which operates hospitals in multiple states, including hospitals in the Detroit, Michigan area. (Tr. 76-78, 401-403, 822-824) The Hospital was called Crittenton Hospital until Ascension purchased it in about 2018 and changed the name to Ascension Providence Rochester Hospital. (Tr. 318, 406) The Respondent's Detroit area hospitals are regionally grouped as Metro East and Metro West. The Hospital is in the Metro West group with Ascension Novi, Ascension Southfield, and Ascension Brighton. (Tr. 823-824) Michael Wiemann, MD is the Regional President & CEO for the Metro West Region of Ascension Michigan. (G.C. Exh. 27) The Hospital's main campus for inpatient and outpatient services is located at 1101 W. University Drive, Rochester, Michigan. The Hospital has additional facilities outside Rochester, including the Breast Center,⁴ Imaging at Barclay, and Imaging at Oxford. (Tr. 76) (G.C. Exh. 26)

As noted above, the Union represents Hospital employees in an RN Unit and RT Unit. The Union previously represented a third unit of Hospital medical lab technologists until the work of that unit was outsourced to a third-party contractor. (Tr. 52-53, 316-317) Dina Carlisle has been the Union President since December 2021 with responsibility over both units. (Tr. 324, 371, 915) Carlisle is not an employee of the Respondent. Under Carlisle, RN Cassandra Bell is the RN Unit Vice President and Nuclear Medicine Technologist Michelle Foster is the RT Unit Vice President. (Tr. 324, 915-916) Both units have a chief steward and other stewards. (Tr. 53-54, 58-59, 316, 324, 472, 659, 868) RN Danielle Drouillard was an RN Unit steward for about 2

³ The findings of fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. I did not find it necessary to resolve any factual disputes based on credibility in this decision.

⁴ The Respondent's Breast Center is also referred to in the record as the Squirrel Road facility.

5 In January 2023, 1 or 2 weeks after the alleged incident, Matthews met with Union RT Unit VP Foster to tell her about it. (Tr. 274-275, 297, 309) Matthews testified that she did not meet with Foster to negotiate over expectations which would later be conveyed to employees regarding bullying and harassment. (Tr. 298, 306)

10 A few days after speaking to Foster, Matthews consulted human resources regarding the development of managerial expectations to present to the entire Breast Center staff, including management. (Tr. 272-274, 293-294, 307-310)

15 On February 2, 2023, Matthews held a meeting with the Breast Center staff to advise them of the expectations she developed with human resources. Matthews did not advise those present that the expectations were limited to working areas or working times. (Tr. 272-278) About 13 people attended the meeting, including managers and RT Unit employees. (Tr. 290-292) (G.C. Exh. 12) Foster attended the meeting and did not object at the time to any of the expectations which were announced by Matthews. (Tr. 298-299)

20 On February 6, 2023, Matthews emailed minutes of the February 2, 2023 meeting to various managers, Union representatives, and RT Unit employees. (Tr. 263, 277, 300-301) (G.C. Exh. 12) The meeting minutes included a document which stated as follows (G.C. Exh. 12 – emphasis in the original):

A POSITIVE WORK ATTITUDE

25 **GREET YOUR COLLEAGUES. THAT IS CALLED FRIENDSHIP**
GIVE THE BEST OF YOURSELF. THAT IS CALLED SINCERITY
ORGANIZE YOUR DAY. THAT IS CALLED PREPARATION
NOW THAT YOU PREPARED, WORK. THAT IS CALLED ACTION
30 **TRUST THAT EVERYTHING WILL BE OK. THAT IS CALLED FAITH**
WORK WITH HAPPINESS. THAT IS CALLED ENTHUSIASM
GIVE THE BEST OF YOURSELF. THAT IS CALLED EXCELLENCE
HELP THOSE WITH DIFFICULTIES. THAT IS CALLED COMPASSION
DON'T GOSSIP. THAT IS CALLED INTEGRITY
35 **REALIZE THAT EVERYONE IS NOT LIKE YOU. THAT IS CALLED TOLERANCE**
TREAT EVERYONE FAIRLY. THAT IS CALLED RESPECT
TELL THE TRUTH. THAT IS CALLED HONOR
PLANT SEEDS OF LOVE AND TRUST TO REAP WHAT YOU SOW

40 The meeting minutes also included the following list of “Staff Expectations” (G.C. Exh. 12 – emphasis in the original):

- 45
- Positive behavior, professional conduct, willingness to help each other
 - Remove inappropriate comments and conversations from the workplace
 - Maintain professionalism
 - Demonstrate courteous, kind and pleasant behaviors while in the working environment
 - We have one team here and we need to be the best we can be for those we work with, techs to clerical, clerical to techs, all included.
 - Patients are our number one priority and any necessary needs to provide a positive patient experience is everyone's responsibility.
 - All of us work for Ascension. There shall not be any negative comments regarding Ascension in the workplace.

- Each of us arrive to work, punch in and out, and we need to remain positive at all times. If you are at work, it is expected that you are working.
- 5 • There shall not be any comments from staff regarding the unwillingness to train any new employees, help out with ACR, and/or what they are not going to do. Everyone is here, working for Ascension, and when working it will be based on the needs of the department.
- 10 • Amber Matthews & Theresa Sasiela are the Imaging Managers. We demonstrate respect to all associates and the expectation is for the respect to be given back in return.
- 15 • All staff members have the ability to reach out to management at any time without obtaining permission from any coworkers.
- Any questions or concerns regarding schedules or operations should be directed to management and not the Radiologists.
- 20 • ABIDE- Appreciation, Belongingness, Inclusivity, Diversity, Equity
- WorkPlace Violence- ABIDE and WPV will be monitored and must be followed at all times.
- All staff should feel comfortable reporting bad behavior without fear of retaliation from their own coworkers
- 25 • We need to continue to remove any form of lateral hostility in our working environment to create a more positive work environment for all.
- Poor behavior and inappropriate comments will no longer be tolerated (joking or not)
- Goal is to leave all negative comments, concerns, and past perceptions of others at the door.
- 30 • **This meeting (meeting minutes) serves as initial notice of expectations. If not followed, could result in corrective action.**

30 **I sincerely appreciate the incredible team that we have here at Squirrel Road. I do not want to lose any of you. We need to leave the past behind and move forward from today. Place our focus on patient care. All we have is each other here and we have to trust that our own team will support us at all times. We do not all have to be friends outside of work. We do not have to go to dinner, but what we have to do is be professional in the workplace at all times.**

Analysis

40 The General Counsel contends that the Respondent, by Mathews, violated Section 8(a)(1) of the Act by her comments on February 2, 2023 and her February 6, 2023 email.

45 The Board's current standard for evaluating the legality of alleged overbroad work rules is set forth in *Stericycle, Inc.*, 372 NLRB No. 113 (2023). In *Stericycle*, the Board reversed *Boeing Co.*, 365 NLRB No. 154 (2017) and *LA Specialty Produce Co.*, 368 NLRB No. 93 (2019), which had, in turn, reversed *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under *Lutheran Heritage*, the General Counsel was required to prove the alleged unlawful rule had a reasonable tendency to chill employees in the exercise of their Section 7 rights. In *Stericycle*, the Board returned to *Lutheran Heritage* but clarified the standard and added a second step defense. 372 NLRB slip op. at 2. *Stericycle* clarified "that the Board will interpret the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activity." *Id.* The Board noted that by incorporating the perspective of the economically dependent employee into its

analysis, the standard “is consistent with the Board’s long-established practice of construing any ambiguity in a work rule against the employer as the drafter of the rule.” *Id.* slip op. at 9. “[T]he employer’s intent in maintaining the rule is immaterial” and the General Counsel will “carry her burden, even if a contrary, noncoercive interpretation of the rule is also reasonable.” *Id.*

5 However, even if the General Counsel proves the rule is presumptively unlawful, “the employer may rebut that presumption by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule.” *Id.* The Board noted in *Stericycle* that a rule must be evaluated in its context. 372 NLRB slip op. at 20 (2023).

Under *Lutheran Heritage*, the Board has found unlawful those rules which ban negative comments regarding an employer or its staff because such a prohibition would generally be construed by employees to bar them from discussing with each other or management

15 complaints and concerns regarding their wage, hours, and other terms and conditions of employment. See *Hills and Dales General Hospital*, 360 NLRB 611, 611-612 (2014) (rules overbroad in prohibiting “negative comments” or “negativity,” and requiring employees to “represent [the employer] in the community in a positive and professional manner”); *Claremont Resort and Spa*, 344 NLRB 832, 832 (2005) (rule overbroad where “rule’s prohibition of ‘negative conversations’ about managers would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions”); *2 Sisters Food Group, Inc.*, 357 NLRB 1817 (2011) (rule overbroad in subjecting employees to discipline for the “inability or unwillingness to work harmoniously with other employees”). Similarly, the Board will find rules overbroad if they require employees to act in a

25 positive or professional manner, particularly when such provisions are considered in the context of unlawful provisions prohibiting negativity. See *Hills and Dales General Hospital*, 360 NLRB 611, 611-612 (2014); *2 Sisters Food Group, Inc.*, 357 NLRB 1817 (2011).

Given this authority and additional rationale discussed below, I find the following provisions presumptively overbroad:

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A POSITIVE WORK ATTITUDE

35 **TRUST THAT EVERYTHING WILL BE OK. THAT IS CALLED FAITH
WORK WITH HAPPINESS. THAT IS CALLED ENTHUSIASM**

- Positive behavior, professional conduct, willingness to help each other.
- Remove inappropriate comments and conversations from the workplace.
- 40 • Demonstrate courteous, kind and pleasant behaviors while in the working environment
- There shall not be any negative comments regarding Ascension in the workplace.
- Each of us arrive to work, punch in and out, and we need to remain positive at all times. If you are at work, it is expected that you are working.
- 45 • There shall not be any comments from staff regarding the unwillingness to train any new employees, help out with ACR and/or what they are not going to do.
- Amber Matthew & Theresa Sasiela are the Imaging Managers. We demonstrate respect to all associates and the expectation is for the respect to be given back in return.
- We need to continue to remove any form of lateral hostility in our working environment to create a more positive work environment for all.

- Poor behavior and inappropriate comments will no longer be tolerated (joking or not).
- Goal is to leave all negative comments, concerns, and past perceptions of others at the door.

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In so holding, I note that a directive to “trust that everything will be ok” runs contrary to the Section 7 right of employees to be critical of their work environment and proactively try to correct terms and conditions of employment they perceive as undesirable by engaging in Section 7 activity. The same is true for the directive that “[t]here shall not be any comments from staff regarding the unwillingness to train any new employees, help out with ACR, and/or what they are not going to do. Everyone is here, working for Ascension, and when working it will be based on the needs of the department.” Further, the requirement that “[a]ny questions or concerns regarding schedules or operations should be directed to management and not the Radiologists” is presumptively overbroad as employees would reasonably understand the directive to prohibit discussions among themselves regarding their terms and conditions of employment. See *Mid-Atlantic Restaurant Group LLC d/b/a Kellys Taproom*, 364 NLRB 2000, 2010 (2016) (employee discussions about work schedules are protect); *Ellison Media Co.*, 344 NLRB 1112, 1113 (2005) (rules are overbroad if they could reasonably be interpreted to prohibit discussions among employees about their terms and conditions of employment).

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The Respondent contends that the General Counsel did not meet the initial burden of proving the February 2023 directives were overbroad because they were “in direct response to reports of workplace bullying by, in part, Union Steward Nancy Anschuetz.” (R. Brf. pp. 51-52 – emphasis in the original) I disagree. The fact that the Respondent issued the directives in response to an alleged incident in which employees, including a steward, referenced the Union and the RT CBA makes it more, not less, likely that employees would understand the rules to prohibit union activity. And although the Respondent characterized the conduct of Anschuetz and other employees as bullying and harassment, the record contains no evidence that Anschuetz or any other employee was disciplined. The record also contains no non-hearsay evidence that employees engaged in misconduct which would render their facially protected activity unprotected. See *Lion Elastomers LLC*, 372 NLRB No. 183 (2023) (Board reinstates setting specific standards for determining whether employee lost protection of the Act).

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The Respondent next asserts that, even if the February 2023 directives are presumed to be overbroad, it was unable to advance more narrowly tailored rules in response to complaints of workplace bullying and harassment. Again, I disagree. The February 2023 directives were communicated in broad terms and without any indication that they would not restrict protected activity. The directives also failed to differentiate between or provide examples of legally protected activity and unprotected harassment. Thus, Matthews did not offer any explanation to the Union or employees why the Respondent believed the alleged incident involving the new employee might be considered unprotected bullying instead of a Section 7 protected conversation among employees. See *Ryder Transportation Services*, 341 NLRB 761, 761 (2044) (the Act allows employees to engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited). In my opinion, Mathews’ February 2023 directives could have been more narrowly tailored to target bullying and harassment while expressly excepting Section 7 activity from prohibition.

Based upon the foregoing, I recommend a finding that the Respondent, by Mathews, violated Section 8(a)(1) of the Act by issuing overly broad directives to employees at a February 2, 2023 meeting and by a February 6, 2023 email containing the meeting minutes.

Lindsey Schwalbach April 27, 2023 Threat and Promise at Jimmy John's – Complaint ¶ 8Facts

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In advance of a Union rally scheduled for April 29, 2023, the Union prepared rally flyers and posters. (Tr. 472-473) (G.C. Exhs. 10-11) The poster included a request to “CONTACT: Michael Badali, Ascension Rochester COO” with Badali’s work email and work phone number. (G.C. Exh. 11) The poster further stated, “[t]ell him you support a fair contract for Ascension CAREGIVERS that protects quality health care in OUR community!” (G.C. Exh. 11)

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On April 27, 2023, Union RN Unit Chief Steward Drouillard and Union election committee chair Amanda Colorito solicited local businesses to hang the rally poster in their windows and hand out rally flyers. (Tr. 475-477) One of those businesses was a Jimmy John’s near the Hospital. (Tr. 475) Drouillard and Colorito were on line at Jimmy John’s when Drouillard heard a woman behind her ask why Mike Badali’s name was on the poster. They told the woman they work at the Hospital and Badali was the COO for Asension at Metro West. The woman introduced herself as Hospital Director of Pharmacy Lindsey Schwalbach and again asked why Badali’s name was on the poster. Drouillard and Colorito said they were having a rally and hanging the posters in support of negotiations. Drouillard held up the poster to show Schwalbach and Schwalbach grabbed the poster from her. (Tr. 475-577) According to Drouillard, Schwalbach then “waved it around in front of our faces . . . and said, if you stop doing this you get the raise you wanted. If you stop doing this you get what you wanted[.]” (Tr. 477) Schwalbach kept the poster and did not return it to the employees. (Tr. 477)

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Analysis

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The General Counsel contends that the Respondent, by Schwalbach, violated Section 8(a)(1) of the Act by promising employees wage raises if they stopped engaging in union activity and impliedly threatening to deny employees wage raises if they did not stop engaging in union activity.

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The Supreme Court has observed that the “action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination.” *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944). “The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove.” *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). Thus, “when an employer engages in such ostensibly employee-friendly conduct to dissuade its employees from supporting a union or otherwise engaging in Section 7-protected activity, the Board deems it violative of Section 8(a)(1) of the Act.” *Starbucks Corp.*, 374 NLRB No. 10, slip op. at 2 (2024), citing *NP Red Rock LLC d/b/a Red Rock Casino Resort Spa*, 373 NLRB No.76, slip op. at 2-4 (2024) and *Imperial Eastman Corp.*, 139 NLRB 1255, 1259 (1962), enfd. 322 F.2d 679 (7th Cir. 1963). “The unlawful promise or grant of benefits, of course, may coexist with overtly hostile tactics such as threats and pretextual firings of known Union-supporting employees[.]” *Id.* slip op. at 3. Threatening statements violate 8(a)(1) “if they reasonably could be understood by employees to threaten retaliation for exercising Section 7 rights.” *Id.*

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I agree that Schwalbach’s comments violated 8(a)(1). In so holding, I am mindful that the purpose of activity such as picketing, holding rallies, and handbilling is often to convince an employer to give employees “what they want.” However, Schwalbach was not at the bargaining table telling the Union the Respondent would agree to wage increases if the Union called off the rally and stopped distributing flyers and posters. Indeed, the record contains no evidence that Schwalbach participated in negotiations. Rather, Schwalbach’s comments were made away

from the bargaining table and, as such, impliedly threatened that employees had to unilaterally cease such protected union activity before the Respondent would consider granting wage concessions. I am also mindful that Schwalbach did not appear to be in a position to “promise” (i.e., guarantee) wage increases. However, employees would reasonably understand her comments to convey an increased likelihood of obtaining wage raises if they first stopped engaging in union activity away from the bargaining table. *Reliance Electric Co.*, 191 NLRB 44, 46 (1971) (employer’s refusal to guarantee benefit does not cancel the employees’ anticipation of improved conditions and prevent the finding of an 8(a)(1) violation).

Based upon the foregoing, I recommend a finding that the Respondent, by Schwalbach, violated Section 8(a)(1) of the Act by promising employees wage raises if they stopped engaging in union activity and impliedly threatening to deny employees wage raises if they did not stop engaging in union activity.

Amber Matthews June 12, 2023 Overbroad and Threatening Email Regarding Attendance – Complaint ¶ 9(b)

Facts

RT Unit stenographer Heather Thibodeau was employed in the ultrasound department at the Breast Center. (Tr. 233-235) Her shift began at 7 a.m. and she reported to Manager of Imaging Services Amber Matthews. (Tr. 236, 243) Thibodeau testified that, prior to June 9, 2023, she was never disciplined for punching in between 7 a.m. and 7:03 a.m. (Tr. 236-239)

On June 9, 2023, Matthews sent Thibodeau an email which stated the following (G.C. Exh. 13):

Just a friendly reminder to be mindful of your start times. If you are scheduled 7A-3P you should be punching in at 7A.

Any punches after 7A, 7:01A or 7:03A etc., could be considered as tardy.

Again, just a reminder.

After receiving this email, Thibodeau asked about five coworkers if they, too, received an email regarding the Respondent’s arrival time punch policy. (Tr. 241) Thibodeau testified that she surveyed her coworkers regarding this matter because the entire department would usually be notified of a new policy and she felt singled out. (Tr. 241, 257)

On June 12, 2023, Mathews sent Thibodeau an email which stated the following (G.C. Exh. 14)

I came by ultrasound today but just missed you. Let's plan doing your evaluation Friday June 16th.

Also, it was brought to my attention that due to my email reminder regarding attendance and potential tardy punches you are surveying the staff within the department. This is unacceptable behavior and should cease immediately.

If you have any questions about the email reminder that was done as a courtesy please let me know.

On June 13, 2023, Heather replied, “Yes, Friday works as long as our schedule permits. I would also like representation in my meeting.” (G.C. Exh. 14)

5 Analysis

The General Counsel contends that the Respondent, by Matthews, violated Section 8(a)(1) of the Act by emailing RT Unit employee Heather Thibodeau an overly broad directive not to survey employees about the Respondent’s attendance and tardiness policy. The General
10 Counsel also contends that Matthews’ email violated Section 8(a)(1) by impliedly threatening reprisals if she did not cease such protected concerted activity. (G.C. Brf. p. 65)

I agree that Matthews’ email violated 8(a)(1). See *Ray Boats, Inc.*, 336 NLRB 779, 782 (2001) (employer statement to employee that he should stop talking about the union constituted an oral promulgation of a rule prohibiting employees from discussing the union and the words
15 “shut up about the [u]nion” constituted an implied threat of unspecified reprisals).

Matthews’ June 12, 2023 email to Thibodeau was not a facially neutral directive. “A rule that expressly prohibits employees from discussing wages is not facially neutral and would be
20 found unlawful under longstanding precedent predating *Boeing* and *Lutheran Heritage*.” *La Specialty Produce Co.*, 368 NLRB No 93, slip op. at 4 fn. 4 (2019) (emphasis in the original), citing *Triam Industries, Inc.*, 245 NLRB 1258 (1979) and *Coosa Valley Convalescent Center*, 224 NLRB 1288 (1976).” Here, the June 12, 2023 email specifically targeted employees’ Section 7
25 protected activity of discussing the attendance policy - a term and condition of employment. See *Community Counseling & Mentoring Services, Inc.*, 371 NLRB No. 39, slip op. at 12 (2021) (employee discussions regarding working conditions are protected); *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 (2007) (“It is axiomatic that discussing terms and conditions of employment with coworkers lies at the heart of protected Section 7 activity.”) Accordingly, I recommend a finding that the Respondent, by Matthews, violated Section 8(a)(1)
30 by emailing Thibodeau an express directive that her protected concerted activity (i.e., surveying employees about whether they received an email regarding the attendance and punch-in tardiness policy) was unacceptable and should cease immediately.

I also recommend a finding that the June 12, 2023 email impliedly threatened
35 reprisals if employees continued to engage in protected concerted activity. A statement need not expressly articulate the adverse consequences of engaging in Section 7 activity if those consequences are implied. See *Food Services of America, Inc.*, 360 NLRB 1012, 1012 fn. 1 (2014) (“Any employer rule that does not expressly state how violations will be dealt with implies, necessarily, a threat of unspecified consequences”). Here, Matthews’ implied that reprisals such as discipline may follow future protected
40 concerted activity of surveying staff regarding attendance and potential tardy punches by stating that “[t]his is unacceptable behavior and should cease immediately.” See, e.g., *Chelsea Homes*, 298 NLRB 813, 814 fn. 4 (1990) (implied threat where manager told employee he hoped the employee would refrain from engaging in protected activity in the future).
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Brian Kirk August 21, 2023 (Lobby Day) Directive to Off-Duty Employees to Leave the Hospital Lobby and Threat to Call the Police – Complaint ¶ 10

Facts

The Hospital has a large public lobby with a north-side glass façade which spans nearly the entire length of the building. (Tr. 68-70, 435-437, 02-504) (G.C. Exh. 16) A coffee shop and

gift shop are on the west side of the lobby with tables and chairs in front of the glass exterior across from the shops. (Tr. 419-420, 560, 565) (G.C. Exh. 17) Any member of the public can enter the Hospital lobby and go to the shops. (Tr. 68-70, 435-437)

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Both CBAs, in Article III Section 6, provide that representatives of the Union may enter the Hospital if their presence is necessary and appropriate to process step 3 grievances, attend grievance mediations, and for collective bargaining negotiations. However, pursuant to these provisions, the Union is required to obtain permission in advance from the Respondent to enter Hospital property for the particular designated activity at a mutually agreeable date and time. (G.C. Exh. 4, 6)

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Prior to August 21, 2023, Union representatives held "Lobby Days" in the Hospital lobby to make themselves available for 2 or 3 hours (usually 11 a.m. or 12 a.m. to 2 p.m.) to provide Union-related information to unit employees. In addition to providing information, the Union brought snacks and water for anyone who stopped by. The Union notified unit employees of these informational Lobby Day meetings by posting a notice of the event on the Union Facebook page and sending text blasts. (G.C. Exh. 15) (Tr. 482) Before the lobby was built, the Union held such informational meetings in Hospital conference rooms. RT Unit steward Anschuetz testified that, prior to August 21, 2023, she had never been stopped from holding a Lobby Day meeting. (Tr. 419-424, 435-437, 451-452, 459, 480-484, 494-497)

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The Union scheduled a strike vote for August 30, 2023 and a Lobby Day for August 21, 2023 to provide unit employees with information about the vote. The Union prepared materials to hand out, including buttons, flyers, and bargaining proposals. (Tr. 486, 510) (G.C. Exh. 15)

25

On August 21, 2023, Anschuetz arrived at the Hospital before 12 p.m. to set up tables on the west side of the lobby for the Lobby Day event. Anschuetz moved two tables back against the windows across from the shops so they could be seen by people at the shops but would not be in the way. (Tr. 425-426) As Anschuetz was setting up, she noticed two women dressed in suits with Hospital name badges. Anschuetz believed these women were upper management from administration on the third floor because they were formally dressed and not wearing scrubs. Anschuetz had not previously seen managers in the lobby. The two women walked past Anschuetz and then walked by again a few minutes later. (Tr. 425-426, 433-434)

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RN Unit Chief Steward Drouillard arrived in the lobby after Anschuetz and began placing additional materials on the tables. Unit RNs began to arrive and one started talking to Drouillard. Anschuetz noticed the managers walk by the table again. (Tr. 427, 485-486, 491) As Drouillard was talking to the unit nurse, a man approached and asked to speak to her privately. They walked about 10-15 feet away from the Lobby Day table, but Anschuetz could hear the conversation. (Tr. 427, 486) The man introduced himself as Head of Security Brian Kirk and asked whether they were conducting union business. Kirk told Drouillard she had to take it to her office. Drouillard said she did not have an office, but the Union was negotiating for one. Kirk said she could take it to the Local office, which is in the bylaws. Kirk said, "you can't do union business . . . on the hospital property." (Tr. 487) Drouillard asked Kirk whether he was asking them to leave. Kirk said, "yes." (Tr. 487) Drouillard asked what would happen if they did not leave. Kirk said he would call the Oakland County Sheriff to have them removed. Drouillard said she understood and agreed to leave. (Tr. 487-488)

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45

When Drouillard returned to the tables, Union RN Unit VP Bell and Union organizer Leah Derr were arriving. Drouillard told them they had to go because Kirk had asked them to leave. (Tr. 488) As Drouillard was packing to leave, she saw three managers in the gift shop - Hospital

Administrator Celia Rutherford, then Director of Nursing Janay Tull,⁵ and Director of ER Rashonda McGee. Drouillard testified that these managers were looking out the gift shop window to see what was happening at the Union tables. According to Drouillard, it was unusual to see such managers in the gift shop during working hours. (Tr. 428, 431, 488-489)

After packing to leave, Bell said she needed to sit down and rest. Therefore, the Union representatives sat down. Kirk came over and said, “they are saying you’re loitering, you need to leave now.” (Tr. 489-490) The Union representatives left. On their way out, Drouillard noticed Rutherford, Hull, and McGee standing by an elevator on the east side of the lobby watching the Union representatives leave. Drouillard also noticed an armed security guard watching them from the lobby desk. Drouillard testified that, although guards do sweeps of the lobby, it was unusual for a guard to be posted there. (Tr. 490)

Analysis

The General Counsel contends that the Respondent, by Kirk, violated Section 8(a)(1) of the Act by telling employee Union representatives they could not engage in union business on Hospital property and threatening to call the police to remove them if they did not leave.

It is well settled that hospital restrictions on union solicitation and distribution by employees on nonworking time in public spaces without disruption to hospitals or disturbance of patients are presumptively unlawful. See *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978) (affirmed finding that rule was unlawful in prohibiting solicitation and distribution in cafeteria and coffee shop absent a showing of special circumstances causing disruption to patients); *UPMC, UPMC Presbyterian Shadyside*, 366 NLRB No. 142 (2018) (employer cannot lawfully permit off-duty employees access to the cafeteria but prohibit them from solicitation in the cafeteria absent a showing that the prohibition was necessary to avoid disruption of healthcare operations or disturbance to patients).

Here, the Respondent presumptively violated 8(a)(1) by Kirk’s directive to employee Union representatives that they could not engage in any union business on Hospital property and would be removed by police if they did not leave. See *Brockton Hosp.*, 333 NLRB 1367, 1376 (2001) (hospital violated 8(a)(1) by prohibiting the distribution of union literature in the vestibule adjacent to the lobby); *St. Johns Health Center*, 357 NLRB 2078, 2096 (2011) (hospital security guard violated 8(a)(1) by threatening RNs with arrest for trespassing in violation of an invalid no solicitation policy). Further, the Respondent did not rebut the presumption of illegality by presenting evidence that the Lobby Day meeting would obstruct Hospital operations or disturb patients.

The Respondent, citing *Lehigh Portland Cement Co.*, 286 NLRB 1366, 1380 (1987) and *Amoco Production Co.*, 262 NLRB 1240 (1982), defends against these allegations on the grounds that a strike vote is an internal union matter and the Lobby Day event was only for answering employees’ questions about the upcoming strike vote. (R. Brf. p. 57) I note initially that the evidence did not indicate that the Union’s Lobby Day event was exclusively for the purpose of talking to unit employees about the strike vote and that employees could not raise other union-related issues. But regardless, the cases relied upon by the Respondent do not establish that discussions of a strike vote are not protected by the Act or are otherwise subject to prohibition as an exclusion from the law as it pertains to overbroad rules and directives which

⁵ Tull became vice president of nursing when Rutherford left the Hospital in October 2023.

unduly restrict protected activity by employees on nonworking times and nonworking areas.⁶ Rather, strike votes are protected activity and an employer violates the Act by interfering with, restraining, or coercing employees in the exercise of that activity. See *Nicholas County Health Care Center, Inc.*, 331 NLRB 970, 971 (2000) (employer violated 8(a)(1) by creating the impression that it surveilled a strike vote and interrogating an employee about her vote).

The Respondent notes that Union organizer Derr did not, as required by the Union access provisions at Article III Section 6 of the CBAs, seek permission to enter the Hospital. Presumably, Derr is not an employee of the Hospital. (G.C. Exhs. 4, 6) However, Derr's compliance or noncompliance with the contractual access provisions is irrelevant since Kirk directed all Union representatives, most of whom were off-duty employees, to leave a Hospital lobby which is normally open to them and to the public.

Based upon the foregoing, I find that the Respondent, by Kirk, violated Section 8(a)(1) of the Act by telling employees they were not allowed to engage in union business on Hospital property and threatening to call the police to remove them if they did not leave.

Marie Dubay August 21, 2023 Overbroad Directive in Retracting the Union's Conference Room Reservation – Complaint ¶ 11

Facts

Marie Dubay is employed by third-party vendor Medxcel to work in the Hospital as a Facilities Coordinator.⁷ (Tr. 206, 218, 231)

On August 18, 2023, RN Unit Chief Steward Drouillard emailed Dubay "to reserve a conference room this Wednesday 8/23/23. Any classroom or conference room would be wonderful. I would like it for the full day if possible. I am a nurse in the pre-op department." (G.C. Exh. 20) Drouillard desired to reserve the room for a Union meeting. Dubay did not know Drouillard was a Union steward or that the conference room would be used for union business. (Tr. 206-208, 221-223, 575-579) Dubay emailed Drouillard for a phone number to include in the reservation. (G.C. Exh. 20) Drouillard provided a phone number and Dubay sent Drouillard a confirmation of a conference room reservation. (G.C. Exhs. 20-21)

After Drouillard reserved the conference room, then Hospital Administrator Rutherford and then Director of Nursing Tull approached Dubay to discuss the matter. Tull told Dubay that Drouillard was not allowed to reserve a conference room. Rutherford told Dubay the meeting had to be cancelled because union business could not be conducted on the Hospital campus. (Tr. 211-212) Prior to this conversation, Dubay rarely spoke to Rutherford or Tull. (Tr. 214) The managers did not tell Dubay how they knew Drouillard reserved a conference room. (Tr. 215)

On August 21, 2023, Dubay sent Drouillard an email which stated, "[i]t has been brought to my attention this meeting will have to be cancelled. No Union Business may be conducted on campus, please contact your Labor Team if you have any questions. Thank you and I am sorry." (G.C. Exh. 20) Dubay also told Drouillard the same thing in person. (Tr. 216)

⁶ *Lehigh Portland Cement Co.*, 286 NLRB 1366 (1987) and *Amoco Production Co.*, 262 NLRB 1240 (1982) concerned the issue, not applicable here, whether a merger of an incumbent union with another union relieved an employer of its duty to bargain with the postmerger union.

⁷ The Respondent admits that Dubay is an agent of the Respondent. (G.C. Exh. 1(ccc))

Analysis

5 The General Counsel contends that the Respondent, by Dubay, violated Section 8(a)(1) of the Act by retracting the Union's reservation of a conference room upon the stated reason that no union business may be conducted on the Hospital campus.

10 The Respondent asserts the same defenses to this allegation as the Lobby Day allegation discussed above – i.e., it could prohibit employees from engaging in internal Union business regarding a strike vote on Hospital property and, under Article III Section 6, Union representatives had to obtain permission from the Respondent to be present on Hospital grounds. I again reject these defenses. Strike votes are union activity protected by Section 7 of the Act. See *Nicholas County Health Care Center, Inc.*, 331 NLRB 970, 971 (2000). Hospital employees were generally entitled to reserve conference rooms and, in fact, Dubay provided 15 Drouillard with a conference room reservation upon request. The Respondent's subsequent retraction of the reservation upon the stated reason that no union business could be conducted on campus reflects an overly broad rule which unduly restricts the right of employees to engage in Section 7 activity outside patient care areas. *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978); *UPMC, UPMC Presbyterian Shadyside*, 366 NLRB No. 142 (2018); *Brockton Hosp.*, 333 20 NLRB 1367, 1376 (2001); *St. Johns Health Center*, 357 NLRB 2078, 2096 (2011). See also *Nicholas County Health Care Center, Inc.*, 331 NLRB 970, 971 (2000). Further, the Respondent presented no evidence and does not contend that a union meeting in a conference room would have obstructed Hospital operations or disturbed patients. *Id.*

25 In so finding, I note that the broader circumstances would tend to render the Respondent's conduct coercive of employees' Section 7 activities. See *Stevens Construction Corp.*, 350 NLRB 132, 135 fn. 8 (2007) (in determining whether an employer's statement violates Section 8(a)(1), the Board will consider the totality of all relevant circumstances). Dubay communicated to Drouillard that the conference room reservation was cancelled on, as 30 discussed above, the same day off-duty employee Union representatives were removed from the Hospital lobby upon a threat to call the police. Further, the Respondent did not explain to Drouillard how management knew she made the reservation for the purpose of holding a Union meeting. This would tend to suggest to employees that the Respondent was closely monitoring their union activity in the course of rigidly enforcing an overly broad policy which prohibited them 35 from engaging in union activity in nonworking areas.

40 Based upon the foregoing, I recommend a finding that the Respondent violated Section 8(a)(1) of the Act by retracting the Union's reservation of a conference room upon the stated reason that no union business may be conducted on the Hospital campus.

Dawn Gazzarato September 21, 2023 Overbroad Direction to Employees not to Discuss Investigatory Interviews – Complaint ¶ 12

Facts

45 The Breast Center uses an internet based PACS system for copying paperwork into an imaging database. The Respondent has two PACS scanners for that purpose. Each PACS scanner requires the entry of an ID and password. All users of the particular PACS scanner use the same ID and password. (Tr. 321, 380-381, 383)

As discussed at greater length below, unit employees struck from September 11 to September 14, 2023. The Respondent did not allow unit employees to return to work until September 15, 2023. (Tr. 71-75, 78-82, 319-319, 408, 504-508) (G.C. Exh. 25, 27)

5 On September 21, 2023, HR Representative Dawn Gazzarato and Radiology Supervisor Jessick Kruttlin conducted separate interviews of four RT Unit employees, including Union RT Unit Steward Nancy Anschuetz. Union RT Unit VP Foster was present for each interview as the employee's representative. (Tr. 320-323) Gazzarato participated in each interview by Zoom. The other participants were in a room at the Hospital. (Tr. 409)

10 During these interviews, Gazzarato indicated that the password for one of the PACS scanners had been changed prior to the strike. Gazzarato asked each employee whether they changed the password or knew who did. The employees denied they changed the password or knew who did. Foster and Anschuetz testified that they did not believe unit employees had the ability to change a PACS scanner password. (Tr. 383, 411, 452-453) Foster testified that
15 Gazzarato told the employees, "this was a highly confidential investigation and that they should not speak to other associates about the contents of those meetings, and that they should follow the chain of command." (Tr. 322-333) Anschuetz further testified as follows regarding her meeting with Gazzarato (Tr. 410):

20 Before we started the meeting Dawn G. said this is a highly confidential investigation and you are not to lie. If you don't know the answer say you don't know. And then she proceeded to ask questions. At the end of asking the questions she, again, reiterated that this is a highly confidential investigation and you are not to talk to anyone, not your co-workers, no one. If you have any questions you are to follow the hospital chain of command.

25 Foster did not object to Gazzarato's direction to keep confidential what was said during the interview. (Tr. 382) Gazzarato did not indicate why the interviews were confidential and could not be discussed with anyone. (Tr. 393-394)

30 Anschuetz testified that, on September 26, 2023, she emailed Gazzarato to ask whether the investigation was over and if she (Anschuetz) was exonerated. (Tr. 411) Gazzarato emailed Anschuetz the same day that the matter was still under investigation and nothing more could be said "because it's confidential, but when our investigation is over we will let you know." (Tr. 411)

35 On September 28, 2023, according to Anschuetz, Gazzarato sent an email to Imaging Services Manager Matthews and Matthews forwarded the email to the four employees who had been interviewed. The email stated "that the investigation is closed and due to the confidential investigation and information nothing else could be said." (Tr. 412)

40 Analysis

The General Counsel contends that the Respondent, by Gazzarato, violated Section 8(a)(1) of the Act by directing employees not to discuss with anyone the PACS Scanner password investigation and the investigatory interviews of employees.

45 Over the past 10 years, the law has oscillated regarding the legality of rules prohibiting employees from discussing workplace investigations during the course of a disciplinary investigation. In *Banner Estrella Medical Center*, 362 NLRB 1108, 1109 (2015), the Board held that employees "have a Section 7 right to discuss discipline or ongoing disciplinary investigations" and "an employer may restrict those discussions only where the employer shows that it has a legitimate and substantial business justification that outweighs employees' Section 7 rights." In *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144, slip op. at 1 (2019) (*Apogee Retail*), the Board overruled *Banner Estrella Medical Center* and determined that, under

5 *Boeing Co.*, 365 NLRB No. 154 (2017), “investigative confidentiality rules are lawful . . . where by their terms the rules apply for the duration of any investigation.” In *Stericycle, Inc.*, 372 NLRB No. 113, slip op. at 10 (2023), the Board overruled *Apogee Retail* and implemented a standard whereby a presumptively unlawful rule which limits employees’ facially protected discussions of a workplace disciplinary investigation may only be maintained if the employer advances a legitimate and substantial business interest which cannot be more narrowly tailored.

10 Here, under *Stericycle*, Gazzarato’s directives to employees not to discuss with anyone the PACS scanner password change investigation and investigatory interviews were presumptively unlawful. Further, the Respondent did not advance a legitimate and substantial business interest which could not be more narrowly tailored since Gazzarato did not limit her directives to the duration of the investigation. Rather, Gazzarato told employees the subject matter was highly confidential and should not be discussed, without indicating how long such discussions were prohibited. Indeed, on September 28, 2023, Gazzarato sent an email which, according to Anschuetz’s uncontested testimony, stated that “the investigation is closed and due to the confidential investigation and information nothing else could be said.” This would indicate that the Respondent still considered the matter confidential even after the investigation had concluded and that Gazzarato’s direction not to discuss it was still in place. The Respondent’s counsel asserted in a posthearing brief that a legitimate and substantial business justification for requiring confidentiality was “to maintain a sterile investigatory environment” and “ensure testimony was not fabricated, and any evidence was preserved.” (R. Brf. p. 61) Such an assertion by Respondent’s counsel is no substitute for testimony or other evidence to that effect, but, regardless, the explanation indicates only that confidentiality was required during the investigation and does not indicate any need for confidentiality thereafter.⁸

30 Based upon the foregoing, I recommend a finding that the Respondent violated Section 8(a)(1) of the Act by directing employees not to discuss with anyone the PACS Scanner password investigation and the investigatory interviews of employees.

8(a)(3) Allegation

Failure to Immediately Reinstate Unit Employees on September 14, 2023 Following a ULP Strike – Complaint ¶ 13

Facts

40 The Respondent is party to a Non-GPO Strike Staffing Services Agreement (Staffing Agreement) with ProLink Staffing Services, LLC (ProLink). (G.C. Exh. 28) The Staffing Agreement is effective June 1, 2023 to May 31, 2026. (G.C. Exh. 28) Appendix B of the Staffing Agreement provides that ProLink would, in the event of a labor strike, provide staff for a minimum work week of “60 scheduled hours consisting of twelve-hours shifts.” (G.C. Exh. 28) If the Respondent did not provide such minimum hours, the Respondent would “be invoiced and shall pay the applicable confirmed Rate for all hours below the minimum . . .” (G.C. Exh. 28)

⁸ I note that the result would be the same under *Apogee Retail*, 368 NLRB 144, slip op. at 1 (2019). Under *Apogee Retail*, Gazzarato’s statements would violate the Act because the Respondent failed to articulate “legitimate justifications for requiring confidentiality even after an investigation is over, and if so, whether those justifications outweigh the effect of requiring post-investigation confidentiality on employees’ exercise of their rights under Section 7 of the National Labor Relations Act.” *Id.*

5 Nursing VP Tull testified that it was standard in the industry for strike-replacement contracts to guarantee replacements for a minimum of 72 hours, including 12 hours of orientation and 60 hours of work. Thus, Hull claimed the Staffing Agreement was below industry standard in that it guaranteed only 60 hours (not 72 hours). (Tr. 762-764)

The Union filed a charge in case 07-CA-324581 on August 21, 2023 and a charge in case 07-CA-324585 on August 22, 2023. (G.C. Exh. 1(w) & 1(y))

10 On August 31, 2023, Union President Carlisle emailed Respondent Regional President and CEO Wiemann the following letter (G.C. Exh. 25):

15 PEIU Local 40 provides notice that the Registered Nurse bargaining unit and the Radiology Technologists bargaining unit will conduct an unfair labor practice strike against Ascension Providence Rochester Hospital, 1101 University Drive, Rochester, MI 48307 as follows:

20 Monday, September 11, 2023 at 7 :00 am EDT through Thursday, September 14, 2023 at 6:59 am EDT.

The National Labor Relations Board actively is investigating the Hospital's illegal activity including but not limited to:

- 25 • The Hospital's illegal refusal to provide Local 40 with relevant information relating to negotiations of the successor contracts;
- The Hospital's illegal retaliation and threats against bargaining unit members;
- The Hospital's illegal banning union members from Hospital premises and threatening them with arrest;
- 30 • The Hospital's illegal creation and use of STOs;
- The Hospital's illegal bargaining from fixed positions;
- The Hospital's illegal regressive bargaining;
- The Hospital's illegal offering of unpalatable proposals not designed to obtain agreement between the parties; and
- 35 • The Hospital's overall bad faith bargaining.

40 There are 16 outstanding unfair labor practices being investigated and we expect Complaints to issue shortly, including the government's seeking of injunctive relief against the Hospital and the scheduling of multiple trials. It truly is a shame that the Hospital has placed the community in this position.

45 On August 31, 2023, Carlisle also emailed a letter to Respondent providing notice that unit employees would strike at the Breast Center, Imaging at Barclay, and Imaging at Oxford. (G.C. Exh. 26)

On September 5, 2023, Wiemann emailed Hospital staff a memorandum with the subject "Strike Notice/Contingency Planning Update," which stated as follows (G.C. Exh. 27):

As was communicated late last week, Office and Professional Employees International Union (OPEIU) Local 40 issued Ascension Providence Rochester Hospital a notice of intent to strike indicating the registered nurses (RNs) and radiology technologists it represents will conduct a three-day strike starting at 7:00 a.m. on Monday, September 11, 2023, and concluding at 6:59 a.m. on Thursday, September 14, 2023.

5 As a ministry of the Catholic Church, we affirm the right of our associates to
organize themselves through union representation and participate in a work
stoppage event. However, we are disappointed that OPEIU has made the
decision to proceed with a three-day strike, especially given the economic and
logistical hardship this will present for our associates and their families and the
10 questions and concerns this action may cause our patients and their loved ones.
Patient safety is our top priority, and Ascension Providence Rochester Hospital is
well prepared to remain open and care for our patients during this short-term
strike. We have a comprehensive contingency plan in place to ensure there is no
disruption in care or service for those we are privileged to serve.

15 Ascension Providence Rochester Hospital is following national best practice for
contingency planning that is compliant with The Joint Commission, OSHA and
the Centers for Medicare & Medicaid Services. In order to fulfill our commitment
to uninterrupted quality care for our patients, we have contracted with a staffing
agency that specializes in work stoppage events and will provide us access to a
20 full complement of highly skilled, credentialed registered nurses and radiology
technologists.

Regardless of the planned duration of the strike, we are contractually required to
commit to a minimum of four days of work for any registered nursing and
radiology technologist staff replaced, starting from the first day of a strike.
25 Ascension Providence Rochester Hospital represented registered nurses and
radiology technologists will be temporarily replaced starting the first day of the
strike on Monday, September 11, 2023, and will be able to return to their
scheduled shifts beginning the morning of Friday, September 15, 2023, as soon
as our replacement agency contractual obligation is fulfilled.

30 Ascension Providence Rochester Hospital would prefer not to have to use these
extended contracted services, particularly given the current financial challenges
the healthcare industry, including our ministry, is facing. However, we must make
every provision to ensure the health and safety of our patients, families, providers
35 and associates.

Our hospital has been bargaining in good faith with OPEIU to come to mutually
beneficial agreements on contracts that respect the human dignity and rights of
all. At the last RN contract bargaining session, our bargaining team presented a
40 final offer to OPEIU that includes an RN wage proposal with an average wage
increase of more than 19% in the first year, as well as a nearly 15% increase to
the maximum pay rate. Our current radiology technologist wage proposal also
includes an average wage increase of more than 19% in year one. These are the
largest wage increases our hospital has ever offered for the first year of an RN or
45 radiology technologist contract. Both wage proposals also include additional
wage increases for each of the remaining years of the respective contracts.
As we focus on preparations to ensure the health and safety of our patients,
families, providers and associates during OPEIU's short-term strike event,
Ascension Providence Rochester Hospital will concurrently honor upcoming
scheduled bargaining sessions on September 6, September 11 and September
18, 2023, for the RN contract, as well as September 6 and September 28, 2023,
for the radiology technologist contract.

We will continue to keep you informed as we move forward with implementing our contingency plan and preparing for this short-term strike event. Thank you for your continued support of Ascension Providence Rochester Hospital.

5

Beginning September 11, 2023, at 7 :00 a.m., the RN and RT Units struck and picketed the Hospital. Pictures of picketers show them carrying signs which reference a “ULP Strike” and “Unfair Labor Practice Strike.” (Tr. 318-319, 325-329-331) (G.C. Exh. 29-30)

10

The Respondent did not allow unit employees to return to work until September 15, 2023, at 7 a.m. (G.C. Exh. 319, 330, 408, 505) (G.C. Exh. 27)

15

Union RT Unit VP Foster and RN Unit Chief Steward Drouillard testified that the Union called the strike in support of several ULP charges which were filed against the Respondent. (Tr. 318, 330-331, 506-508)

Analysis

20

The General Counsel contends that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate employees on September 14, 2023, at 7 p.m., following the conclusion of a ULP strike. The Respondent contends that the General Counsel did not establish that the work stoppage was a ULP strike. Alternatively, even if the work stoppage was a ULP strike, the Respondent contends it had a 5-day grace period to exhaust its contractual obligation to retain replacements employed by ProLink.

25

30

“It is well settled that if a strike is caused in part by an employer’s unfair labor practice, the strike is an unfair labor practice strike.” *Reith-Riley Construction Co., Inc.*, 374 NLRB No. 13, slip op. at 6 (2024), quoting *RGC (USA) Mineral Sands, Inc.*, 332 NLRB 1633, 1633 (2001). In determining whether causation is economic and/or the alleged unlawful conduct of an employer, “the Board does not calculate the relative severity of the unfair labor practices, but instead considers only whether the strike was at least in part the direct result of the employer’s unfair labor practices.” *Id.* quoting *Boydston Electric*, 331 NLRB 1450, 1452 (2000). “The causal connection between unfair labor practices and a strike may be inferred from the record as a whole.” *Id.* citing *Child Development Counsel of Northeastern Pennsylvania*, 316 NLRB 1145, 1145 (1995), *enfd.* 77 F.3d 461 (3d Cir. 1996).

35

40

The Respondent asserts that the record contains no evidence that the employees voted to authorize the strike, in whole or in part, because of the Respondent’s alleged ULPs. Initially, I note that “a strike vote is not a dispositive factor in determining whether the strike was caused by unfair labor practices.” *Reith-Riley Construction Co., Inc.*, 374 NLRB No. 13, slip op. at 7 (2024), citing *R & H Coal Co.*, 309 NLRB 28, 28 fn. 5 (1992) and *North American Coal Corp.*, 289 NLRB 788, 791 (1988). Regardless, as the Respondent admits, Foster and Drouillard testified that the Union called the strike because ULP charges against the Respondent were pending before the Board.

45

I do not find that the General Counsel’s case is undermined because Foster and Drouillard did not describe in detail discussions between the Union and employees regarding the strike vote. The Respondent could have examined those witnesses regarding such discussions or presented other evidence regarding the same. Moreover, in addition to the testimony of Foster and Drouillard, the record contains significant evidence that the strike was caused at least in part by the Respondent’s alleged ULPs. The Union’s August 31, 2023 notice to the Respondent of the upcoming strike referenced only ULPs and did not reference any economic motives for the work stoppage. During the strike, picketing employees held signs which

referenced the Respondent's ULPs. Additionally, the strike did not coincide with a cessation of bargaining, which continued for both units until 2024. Rather, the strike vote was held on August 31, just over a week after the Union filed two additional ULP charges. Under these
 5 circumstances, considering the record as a whole, I recommend a finding that the September 2023 strike was a ULP strike. See *Reith-Riley Construction Co., Inc.*, 374 NLRB No. 13, slip op. at 9-11 (2024) (finding of ULP strike supported by evidence that picket signs referenced ULPs and the strike was called shortly after issuance of a ULP complaint).

10 The Respondent nevertheless argues that the Board grants employers a reasonable period of time, up to 5 days, to reinstate ULP strikers following their request to return to work. See *Drug Package Co.*, 228 NLRB 108, 113-114 (1977), enf. denied on other grounds 570 F.2d 1340 (8th Cir. 1978). In *Alaris Health at Castle Hill*, 367 NLRB No. 52 (2018), enfd. 811
 15 Fed.Appx. 782 (3d Cir. 2020), a health care employer had contracts with several staffing agencies to supply temporary employees on an as-needed basis. *Id.* slip op. at 2. Pursuant to Section 8(g) of the Act, the union provided the employer advanced notice that employees would engage in a strike from September 16, 2014 to September 18, 2014. *Id.* The employees struck on those dates, but were denied reinstatement by the employer for several weeks on the ground that it was contractually obligated to use agency employees for an extended period of time. *Id.*
 20 The Board noted that “[i]t is well settled that unfair labor practice strikers are entitled to immediate reinstatement after they have submitted their unconditional offer to return to work, even if their employer has hired replacements.” *Id.* Regarding the 5-day rule, the Board found as follows:

25 [W]e find that a grace period is not warranted here. As the Board explained in *Drug Package Co.*, “[t]he 5-day period is not to enable the employer to delay reinstatement or to obtain 5 days during which he is not required to pay backpay, but is in recognition of the practical difficulties he may face in reinstating the
 30 employees, when he is not in a position to know exactly when they may seek to return.” *Id.* That is not the situation in this case. Even assuming that the Respondent remained uncertain as to the duration of the strike—notwithstanding that the Union’s statutorily required 8(g) notice stated that the strike would last from September 16 through 18—the Respondent did not move to promptly
 35 reinstate the strikers following their unconditional offer to return to work on September 19. Rather, this was a situation where an employer rejects, unduly delays, or ignores an unconditional offer to return to work, such that the 5-day grace period serves no useful purpose and the employer’s obligation commences with the unconditional offer to return. See, e.g., *Ideal Dyeing & Finishing Co.*, 300
 40 NLRB 303, 321 (1990), enfd. 956 F.2d 1167 (9th Cir. 1992); *Newport News Shipbuilding*, 236 NLRB 1637, 1638 (1978), enfd. 602 F.2d 73 (4th Cir. 1979).

Id. slip op. at 3.

45 The Board, in *Alaris Health at Castle Hill* recognized that “an employer may sometimes contractually commit to retaining temporary replacements workers for a period of time” in order to continue operations during a strike and that “[s]uch a commitment may, in turn, generate an interest in delaying reinstatement of strikers in order to avoid paying both sets of workers.” *Id.* slip op. at 4. Nevertheless, “where the employer’s own unlawful conduct contributed to employees’ decision to strike, its financial interest does not permit it to delay reinstating strikers; rather, ‘since the employer is at fault for interfering with protected rights of the employees, it must bear the consequences of having violated the Act.’” *Id.* slip op. at 4, quoting *Orit Corp.*, 294 NLRB 695, 698 (1989).

I understand *Alaris Health at Castle Hill* to hold that employers are not entitled to a 5-day grace period to reinstate ULP strikers where, as here, the strike is called for a finite period and the employer rejects an unconditional offer to return to work without any showing of “practical difficulties” associated with an indeterminate date for a return to work. While I did not understand *Alaris Health at Castle Hill* to turn on such evidence, I note that here, as in *Alaris Health at Castle Hill*, 367 NLRB slip. op at 5, the evidence does not indicate whether ProLink demanded that replacements be guaranteed a minimum of 60 hours as a condition of entering into the Staffing Agreement. Although Tull testified that, within the industry, labor replacement contracts generally require a minimum guarantee for replacements of 72 hours, an industry standard does not necessarily mean there were no other options. Indeed, Tull admitted that the Staffing Agreement provided a minimum guarantee for replacements of 60 hours, which was below the industry standard. Further, we do not know whether or to what extent the Respondent explored replacement options with shorter hour guarantees upon receiving advanced notice of the duration of the strike. In such a situation, when either the striking employees or the employer can incur the limited cost (1 day) of replacements, the employer that committed the ULPs must assume the financial burden. *Id.* at 4.

Based upon the foregoing, I recommend a finding that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate strikers on September 14, 2023 pursuant to an unconditional offer to return to work.⁹

8(a)(5) Information Request Allegations

At issue in this case are Union information requests sent to the Respondent on June 17, 2022 (G.C. Exh. 53), September 19, 2022 (G.C. Exhs. 48-51), November 17, 2022 (G.C. Exh. 52), January 11, 2023 (G.C. Exh. 54), February 14, 2023 (G.C. Exh. 56), and February 28, 2023 (G.C. Exh. 55).

An employer’s statutory duty to bargain collectively includes a duty to supply a union, upon request, with information “that will enable the union to perform its duties as the bargaining representative of unit employees.” *Starbucks Corp. d/b/a Starbucks Coffee Co.*, 373 NLRB No. 83, slip op. at 2 (2024), citing *Permanente Medical Group, Inc.*, 372 NLRB No. 51, slip op. at 6 (2023), *enfd. mem.* 2024 WL 1636732 (9th Cir. 2024) and *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435– 436 (1967). Information concerning the wages, hours, and other terms and conditions of employment of unit employees is presumptively relevant. *Teachers College, Columbia University*, 365 NLRB No. 86, slip op. at 4 (2017), *enfd.* 902 F.3d 302 (D.C. Cir. 2018). Information that “does not pertain to unit employees . . . is not presumptively relevant, and its relevance must be established.” *CenturyTel of Montana, Inc.*, 373 NLRB No. 128, slip op. at 3 (2024). In *CenturyTel of Montana, Inc.*, *supra*, the Board described the burden of demonstrating the relevance of nonunit information as follows:

To demonstrate relevance of nonunit information, the General Counsel must show that either: (1) the union demonstrated the relevance of the nonunit

⁹ The Respondent has not denied that the Union made an unconditional offer to return to work, presumably because the Union’s August 31, 2023 strike notices stated that the strike would end on September 14, 2023, at 6:59 a.m. (G.C. Exh. 25-26) In a September 5, 2023 email, the Respondent acknowledged that such notice was received and advised that unit employees would only be allowed to return to work when the Respondent’s replacement agency contractual obligation was fulfilled on September 15, 2023. (G.C. Exh. 27)

information; or (2) the relevance of the information should have been apparent to the employer under the circumstances. *Disneyland Park*, 350 NLRB 1256, 1258 (2007) (citing *Allison Co.*, 330 NLRB 1363, 1367 fn. 23 (2000)); *Brazos Electric Power Cooperative, Inc.*, 241 NLRB 1016, 1018–1019 (1979), *enfd.* in relevant part 615 F.2d 1100 (5th Cir. 1980). The Union cannot simply rely on generalized conclusory explanations, hypothetical theories, or “mere suspicion.” *Disneyland Park*, 350 NLRB at 1258 fn. 5; *Sheraton Hartford Hotel*, 289 NLRB 463, 463–464 (1985). The burden of establishing relevance for nonunit information, however, is not “an exceptionally heavy one.” *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011). Rather, the Board uses a “liberal discovery-type standard.” *Acme Industrial Co.*, *supra*, 385 U.S. at 437 & fn. 6. Thus, under this standard, all that is required is a showing of a “probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.” *Id.* at 437; see also *United States Testing Co.*, 324 NLRB 854, 859 (1997), *enfd.* 160 F.3d 14 (D.C. Cir. 1998); *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994). Additionally, under longstanding Board precedent, a union is not obligated to disclose to the employer the facts supporting its claim of relevance at the time the information is requested. See, e.g., *Cannelton Industries*, 339 NLRB 996, 997 (2003); *Brazos Electric Power*, 241 NLRB at 1018–1019. “Rather, it is sufficient that the General Counsel demonstrate at the hearing that the union had, at the relevant time, a reasonable belief.” *Cannelton Industries*, 339 NLRB at 997 (citing *Knappton Maritime Corp.*, 292 NLRB 236, 238–239 (1988)).

June 17, 2022 Information Request (G.C. Exhibit 53) – Complaint ¶ 16

Facts

In June 2022, an RT Unit employee gave Union RT Unit VP Foster a letter, dated June 9, 2022, she received from SmartHealth indicating that medication “cost share will increase on July 1, 2022” and describing a SmartHealth Flexible Copay program. (Tr. 334-341) (G.C. Exh. 31) The letter described the copay program as working “with drug manufacturer’s copay assistance programs to reduce the cost of medications.” (G.C. Exh. 31)

On June 17, 2022, Foster emailed the following information request to Respondent Labor Relations Partner Kimberly Jackson (G.C. Exh. 53):

Please provide a detail of any changes made to the control group health insurance plans, including pharmacy plan and pharmacy co-pays, effective January 1, 2022 or later. This includes prospective changes determined but not yet implemented. Please provide all amended SBCs, SPDs and other documents that describe the changes. Please provide copies of all notices to participating employees identifying the changes. . . . Please provide the requested information by June 24, 2022.

On August 24, 2022, Jackson sent Foster responsive documents, including summaries of benefits and coverage for five SmartHealth plans for the period January 1, 2022 to December 31, 2022 and a SmartHealth summary plan description revised January 1, 2021. (G.C. Exh. 53)

On about August 28, 2022, during a grievance meeting regarding a matter unrelated to the Union’s June 17, 2022 information request, Jackson asked Foster whether she received the information Jackson emailed to her. Foster confirmed she received it. (Tr. 335)

Analysis

5 The General Counsel contends that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide sufficient information in response to a request for changes to health insurance plans.

10 I do not recommend the finding of a violation because it is not clear to me that the Respondent acted unreasonably and was in possession of responsive information beyond what Jackson provided. The evidence did not establish that the Respondent received specific notice from SmartHealth of a change in medication cost sharing or other documents reflecting such a change. Jackson provided summaries of benefits and coverage for 2022 and a summary plan description amended on January 1, 2021. Presumably, the Union could have compared the
15 2021 amended summary plan description to the 2022 summaries of benefits and coverage to determine if any changes were made since January 1, 2022. Thus, the Respondent did not necessarily act unreasonably in providing these documents as a response to the Union's information request and the Union did not contemporaneously assert as much or request different documents than what Jackson provided. Even at trial, neither the General Counsel nor
20 Union counsel asked Jackson whether the Respondent was in possession of other responsive materials and, if so, why she did not produce them. Accordingly, I recommend dismissal of the allegation that the Respondent failed to provide information in response to the Union's June 17, 2022 request.

25 **September 19, 2022 Information Requests (G.C. Exhs. 48-51) – Complaint ¶ 14**

Facts

30 On September 19, 2022, Union RN Unit VP Bell emailed Respondent Labor Relations Partner Jackson multiple letters, quoted below, reflecting various requests for information. (G.C. Exh. 48-51) That same day, Jackson emailed Bell a request for a minimum of a 2 week extension to provide the information based on the large amount of information requested. Bell replied with an objection to any such broad extension because the RN CBA was scheduled to expire in 8 days and the information was necessary to evaluate the Respondent's bargaining proposals and craft Union proposals. (G.C. Exh. 48-51) Bell requested that the Respondent
35 "provide what is available and identify those that might take more time so we can discuss further." (G.C. Exh. 48-51) The Respondent did not respond further or provide any of the requested information. (Tr. 514-516)

40 **September 19, 2022 – Contingent Use in the RN Unit (G.C. Exh. 48) Complaint ¶ 14(a)-(g)**

45 On September 19, 2022, Bell emailed Jackson a letter regarding "RN Unit – Information Request – Contingent Use," which stated, in part, the following (G.C. Exh. 48) (Tr. 123-130, 514-521):

OPEIU Local 40, pursuant to its rights under the collective bargaining agreement (CBA) and the National Labor Relations Act, as amended, requests that Ascension Providence Rochester Hospital (APRH or Hospital) provide the following information related to the use of Contingent RNs under the 2020-2022 CBA (as defined in Article VII, Section 2.2). Within this request, these interchangeably are referred to as Contingent, agency or contract RNs. The information requested is both to monitor compliance with the existing CBA and to

permit the Union to analyze and prepare proposals to present during the on-going negotiations for the successor CBA.

...

- 5 1. The name and address of each agency or other business that has supplied contract or agency RN personnel to the Hospital who performed RN nursing work;
2. For each such agency or other business identified above, please provide the following information:
 - 10 A. A copy of the contract(s) governing the provision of contract RNs to APRH;
 - B. The total RN hours provided by the agency/business to APRH, broken out on a monthly basis;
 - 15 C. The total overtime, other premium pay or additionally scheduled hours provided to contract RNs at APRH, broken out on a monthly basis;
 - D. All assignments of the agency RNs, on a monthly basis, broken out by unit involved;
 - E. Total payments for the above services to the agency/business, broken out by month;
 - 20 F. The hourly rate paid to the agency/business for the provision of the RN service; and
 - G. The hourly wage paid to the Contingent nurses.
3. For each agency or contractor used by APRH as identified in your answer to Request No. 1, please state whether APRH, including its affiliates, subsidiaries or parent corporations, has any ownership interest in it of any form, including but not limit to stock ownership, partnership ownership, or indirect ownership (through another corporation/company/person). For each agency or contractor for which APRH has ownership interest, please describe the ownership interest, including the percentage of ownership controlled by APRH, and whether a APRH representative serves as a director, manager or other decision-maker of the agency/contractor.

The requested information is directly relevant to Local 40's representational duties. The bargaining unit consists of RNs. The RNs provide care to the Hospital's patients. Their wages, hours and conditions of employment are governed by the CBA and the parties are in negotiations for a successor agreement. The CBA also delineates certain rights and limitations with respect to the use of agency or other non-employee RNs at the Hospital, see for example Preamble, Article I, Article VII, Article IX, Article XIII and Articles XIV. This information is needed to determine whether the Hospital is following existing restrictions, to support both grievances required to enforce the provisions and the Union's revising these CBA provisions to improve the protection of our members' rights to the work for the next contract.

Local 40 is seeking increases in the wages paid to our members. While not an apples to apples comparison, the amount both in rate and total the Hospital is prepared to pay to agencies for supplying RNs is relevant in assisting Local 40 frame our demands for the RNs, including analyzing the total the Hospital has spent for RNs in-house and through contract services. Additionally, the rate that agency RNs receive while working side by side with our RNs also will assist us in determining a fair and reasonable wage demand to communicate to you, as that rate will assist in determining the market rate. Further, the rate and total amount paid to agency RNs will assist Local 40 in making proposals on staffing levels; for example, if the Hospital spends twice as much to staff an agency RN than a bargaining unit RN,

the Hospital can replace that singular agency RN with two bargaining unit RNs, increasing staffing without increasing costs. Staffing levels, including the staffing matrix, are part of the negotiations for the successor CBA.

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Additionally, the parties have disagreed in the past as to fair compensation for RNs picking up extra hours, both the issue of what is fair to the RN and what will serve to incentivize filling open slots. The Hospital uses contract RNs to fill slots on the schedule, at times instead of offering that work to bargaining unit RNs on a premium pay basis. The amount the Hospital is willing to pay for agency RNs instead of offering premium pay assignments to bargaining unit RNs is relevant to determining a fair and reasonable rate for paying RNs to perform those services instead of or in advance of agency RNs.

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September 19, 2022 – RN Information (G.C. Exh. 49) – Complaint ¶ 14(h)-(j)

On September 19, 2022, Bell emailed Jackson a letter regarding “RN Unit – Information Request – RN Information,” which stated, in part, the following (G.C. Exh. 49):

20

OPEIU Local 40, pursuant to its rights under the collective bargaining agreement (CBA) and the National Labor Relations Act, as amended, requests that Ascension Providence Rochester Hospital (APRH) provide the following information related to the bargaining unit RNs. The information requested is both to monitor compliance with the existing CBA and to permit the Union to analyze and prepare proposals to present during the on-going negotiations for the successor CBA.

25

For each bargaining unit RN, please provide their:

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1. Name;
2. Overtime hours worked since September 1, 2021, by month;
3. Hours worked for which the RN received incentive pay since September 1, 2021, by month; and
4. Years of Similar Experience for work prior to working at APRH. (GC EX 49(5))

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September 19, 2022 – RN Unit Employee Discipline (G.C. Exh. 50) – Complaint ¶ 14(k)

On September 19, 2022, Bell emailed Jackson a letter regarding the “RN Unit – Information Request – Employee Discipline,” which stated, in part, the following (G.C. Exh. 50):

40

OPEIU Local 40, pursuant to its rights under the collective bargaining agreement (CBA) and the National Labor Relations Act, as amended, requests that Ascension Providence Rochester Hospital (APRH) provide the following information related to the bargaining unit RNs. The information requested is both to monitor compliance with the existing CBA and to permit the Union to analyze and prepare proposals to present during the on-going negotiations for the successor CBA.

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Please Provide copies of all discipline to bargaining unit employees issued on or since September 1, 2021.

September 19, 2022 – RN Unit PRN Use (G.C. Exh. 51) –
Complaint ¶ 14(l)-(o)¹⁰

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On September 19, 2022, Bell emailed Jackson a letter regarding “RN Unit – Information Request – PRN Use,” which stated, in part, the following (G.C. Exh. 51):

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OPEIU Local 40, pursuant to its rights under the collective bargaining agreement (CBA) and the National Labor Relations Act, as amended, requests that Ascension Providence Rochester Hospital (APRH) provide the following information related to the use of PRNs under the 2020-2022 CBA (as defined in Article VII, Section 2.2). The information requested is both to monitor compliance with the existing CBA and to permit the Union to analyze and prepare proposals to present during the on-going negotiations for the successor CBA.

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The information is requested for the period July 1, 2021 through the last date of the month immediate prior to your response.

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1. On a monthly basis:
 - a. The total number of RNs in an PRN assignment during that month;
 - b. The total hours worked by RNs in PRN assignments during that month;
 - c. The total wages paid to RNs in PRN assignments during that month; and
 - d. The average hourly rate paid to RNs in PRN assignments that month;
2. For each RN in an PRN assignment anytime during the period:
 - a. The APRH RN position filled by the PRN RN;
 - b. A copy of the RN position job posting that was filled by the PRN RN;
 - c. The PRN RN’s name;
 - d. The PRN RN’s contact information, including address, phone number(s) and email address(es);
 - e. The PRN RN’s date of hire;
 - f. The PRN RN’s date of termination;
 - g. The PRN RN’s years of experience as a RN working in similar experience;
 - h. The PRN RN’s rate of pay;
 - i. If any premium was paid to the PRN RN, the rate of pay and total hours of premium pay;
 - j. Any other benefit provided to the PRN RN, including but not limit health, retirement or other benefits; and
 - k. A copy of the PRN RN’s schedule(s).
3. For each PRN RN who worked at any time during the period, please provide:
 - a. A copy of any written agreement between the Hospital or other employer and the RN;
 - b. The name of the employer if other than APRH;
 - c. For each employer identified in your answer to Request No. 3(a), please state whether APRH, including its affiliates, subsidiaries or parent corporations, has any ownership interest in it of any form, including but not limited to ownership, partnership ownership, or indirect ownership (through another corporation/company/person). For each employer for which APRH has ownership interest, please describe the ownership

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¹⁰ The General Counsel withdrew complaint paragraph 14(p) at hearing. (Tr. 11-12)

interest, including the percentage of ownership controlled by APRH, and whether a APRH representative serves as a director, manager or other decision-maker of the employer.

- 5 4. For each PRN RN position open and available at the time of your response to this request, a copy of the job posting.

10 The relevance of the requested information is self-evident on the face of this request, both with respect to policing the CBA as well as for collective bargaining purposes. Nonetheless, so there is no dispute as to the relevancy of the requested information, or delay in the provision thereof, the Union states that these PRN RNs work comparable RN positions that may also be filled by bargaining unit RNs. The Hospital's right to use non-unit RNs is restricted by the existing CBA, including by but not limited to the Preamble, Article I, Article VII, Article IX, Article XIII, Articles XIV and Exhibit 1. This information is needed to determine whether the Hospital is following existing restrictions, to support both grievances required to enforce the provisions and the Union's revising these CBA provisions to improve the protection of our members' rights to the work for the next contract. In addition, the Union is entitled to the compensation information and other terms and conditions of employment with respect to PRN RNs as we negotiate with the Hospital for wage rates and other terms and conditions in general as well as premium wage rates to address the on-going staffing shortages.

25 Local 40 is seeking increases in the wages paid to our members. The amount both in rate and total the Hospital is prepared to pay to PRN RNs is relevant in assisting Local 40 frame our bargaining demands for the RNs, including analyzing the total the Hospital has spent for PRN RNs that could be spent on bargaining unit RNs. Additionally, the rate that PRN RNs receive while working side by side with our RNs also will assist us in determining a fair and reasonable wage demand to communicate to you, as that PRN wage information will assist in determining the market rate. Increasing bargaining unit RN wage rates will serve to attract more applicants for open positions, thus reducing the need for non-bargaining unit assistance and protecting the bargaining unit integrity. Further, the rate and total amount paid to PRN RNs will assist Local 40 in making proposals on staffing levels; for example, if the Hospital spends twice as much to staff a PRN RN than a bargaining unit RN, the Hospital can replace that singular PRN RN with two bargaining unit RNs, increasing staffing without increasing costs. Existing inadequate staffing levels are part of the discussions in negotiations for the successor CBA.

40 There has been disagreement in the past as to fair compensation for bargaining unit RNs picking up extra hours, both the issue of what is fair to the RN and what will serve to incentivize filling open slots. The Hospital uses PRN RNs to fill slots on the schedule, at times limiting work available to bargaining unit RNs on a premium pay basis. The amount the Hospital is willing to pay for PRN RNs instead of offering premium pay assignments to bargaining unit RNs is relevant to determining a fair and reasonable rate offered to bargaining unit RNs to perform those services instead of or in advance of using PRN RNs. This request is made without prejudice to our right to request further information. Please provide the requested information as soon as it is available and no later than September 23, 2022. Please do not wait to gather all the requested before you present it; as the information for a Request or sub-request is available, please send it then. Please provide in electronic format whenever possible.

Analysis

5 The General Counsel contends that the Respondent violated the Act by failing to provide information in response to the Union's September 19, 2022 information requests regarding the Hospital's use of contingent RNs (G.C. Exh. 48), the hours, incentive pay, and experience of unit RNs (G.C. Exh. 49), discipline of unit RNs (G.C. Exh. 50), and the use of PRNs (G.C. Exh. 51).

10 The Respondent does not contend that the information requested on September 19, 2022 was irrelevant and, indeed, information regarding the hours, pay, past experience, and discipline of unit RNs is presumptively relevant. Further, although the information regarding nonunit RNs is not presumptively relevant, the Union included in the requests an explanation of relevance and the Board has found relevant requests for information regarding the potential
15 performance of unit work by nonunit employees. See *Hospital De La Concepcion*, 371 NLRB No. 155 (2022); *Tegna, Inc. d/b/a KGW-TV*, 367 NLRB No. 71, slip op. at 4 (2019); *United Graphics*, 281 NLRB 463, 465 (1986).

20 Rather than contest relevance, the Respondent contends Jackson was overwhelmed by the number of information requests she received and her failure to respond was an unintentional oversight. The Respondent contends also that the Union did not follow up on or remind Jackson of the requests, that the Union was able to prepare and submit proposals without the information, and that the Union's motive for the large information requests was to harass the Hospital. As discussed below, I do not find these defenses compelling.

25 That the Respondent's failure to produce information may have been unintentional is not a valid defense since 8(a)(5) information request violations require no showing of malicious intent or bad faith. See *Alcoa Corp.*, 370 NLRB No. 107, slip op. at 15 (2021); *Hi-Tech Cable Corp.*, 309 NLRB 3, 9 (1992). Further, as far as I can tell, Jackson did not actually testify that she was overwhelmed or that her failure to provide information was merely an oversight. Even if she had, such an assertion would not be reasonable or credible since the Respondent did not produce *any* information. Thus, the Respondent did not provide some information in response to a large request and additional information fell through the cracks. Rather, this was a total failure to furnish information even after a charge was filed and complaint issued, which cannot
30 be characterized as reasonable or accidental. See *McLaren Macomb*, See, e.g., 369 NLRB No. 73, slip op. at 7 (2020) (defense that information "request inadvertently fell through the cracks" rejected where employer did not provide any available information).

40 The Respondent is also incorrect in asserting that the Union was obligated to follow up on or clarify the information requests where the Respondent did not raise any difficulty in production or produce any information. This is not like the June 17, 2022 information request (discussed above) for healthcare plan changes where the Respondent produced information it could reasonably believe was sufficiently responsive to the Union's request and the Union failed to identify additional information it wanted. Here, the Respondent failed to produce any
45 information and now seeks to shift the blame of doing so onto the Union by asserting, inaccurately, that the Union had a legal obligation to ask for the information more than once. See *Frontier Communications Corp.*, 370 NLRB No. 131, slip op. at 13 (2021) (employer produced enough information in response to one request "to put the ball back in the [u]nion's court" to follow up or seek clarification, but union was not required to follow up on a different information request where the employer did not provide any information at all).

Likewise, the Union was under no obligation to refrain from making bargaining proposals to the best of its ability without relevant information and did not waive its right to obtain

information by making such proposals. See *Metal Carbides Corp.*, 291 NLRB 939, 952-953 (1988) (employer violated the Act by failing to furnish information where “[u]nion in effect proceeds on a Hobson choice alternative to further delay going forward to resolve grievances as best it then can with what information it has but without waiving its statutory right to pursue eventual production of lawfully requested data”). It would be contrary to the purpose of the Act if a union’s ability to negotiate were necessarily thwarted and put on hold by an employer’s failure to furnish information relevant to such negotiations. *Id.*

Finally, the Respondent offers no explanation or evidence why the Union’s requests for admittedly relevant information was mere harassment. That an information request is long, without more, does not establish that the Union had no use for the information or that it had some antagonistic purpose for requesting the same. See *Gruma Corp.*, 347 NLRB 788 (2005) (information requests are presumed to be made in good-faith, particularly where the information sought is facially relevant, and a contention based upon the large volume of requested information, without more, “is insufficient to overcome the presumption”), citing *Honda of Hayward*, 314 NLRB 443, 449 (1988).

Based upon the foregoing, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to furnish the Union with the information it requested on September 19, 2022.

November 17, 2022 Information Request (G.C. Exhibit 52) – Complaint ¶ 15

Facts

On November 17, 2022, Union RT Unit VP Foster emailed Respondent Labor Relations Partner Jackson a request for an RT Unit seniority list and a separate request for “PRN Technologist Use.” (G.C. Exh. 52) The latter stated (G.C. Exh. 52):

Pursuant to its rights under the collective bargaining agreement (CBA), the National Labor Relations Act and pending APRRT Contract negotiations please forward the following information for the period January 2021 through the last date of the month immediately prior to your response.

1) Provide information related to the use of all non-bargaining unit staff performing bargaining unit technologist work (i.e., PRN, contingent, hourly, temp, agency) in radiology, cardiac cath lab, special diagnostic noninvasive, interventional radiology, ultrasound, cat scan, nuclear medicine and mammography.

- a) Total number of hours worked by non-bargaining unit technologists broken down by month and department.
- b) Total wages paid to non-bargaining unit technologists per month per department.
- c) Rate of hourly pay for every non-bargaining unit technologist working a bargaining unit position.

2) For each Technologist in a non-bargaining unit assignment anytime during the period:

- a) The APRRT position filled by the non-bargaining unit technologist.
- b) A copy of the APRRT position job posting that was filled by the non-bargaining unit technologist.
- c) Name of non-bargaining unit technologist employed during this time period.
- d) Non-bargaining unit technologist contact information, including address,

phone number(s) and email address(es).

- e) Hire date of non-bargaining unit technologist.
- f) Termination date of non-bargaining unit technologist.
- 5 g) The non-bargaining unit technologist years of experience as a technologist in similar experience.
- h) If any premium was paid to the non-bargaining unit technologist, the rate of pay and total hours of premium pay.
- i) Non-bargaining unit technologist name of employer if other than APRH.
- 10 j) For each employer identified in your answer to request no. 2(f), please state whether APRH, including its affiliates, subsidiaries or parent corporations, has any ownership interest in it of any form, including but not limit to stock ownership, partnership ownership, or indirect ownership (through another corporation/company/person). For each employer for which APRH has ownership interest, please describe the ownership interest, including the percentage of ownership controlled by APRH, whether a APRH representative serves as a director, manager, or other decision-maker of the employer.
- 15 k) A copy of any written agreement between the Hospital or other employer and the non-bargaining unit technologist/mid-level practitioner/RN.
- 20 3) For all unfilled APRRT bargaining unit positions, please provide a copy of the job posting.
- 4) Any additional mid-level practitioner/RN working in the capacity as a technologist in a APRRT bargaining unit position.

25 The relevance of the requested information is self-evident on the face of this request, both with respect to policing the CBA as well as for collective bargaining purposes. Nonetheless, so there is no dispute as to the relevancy of the request information, or delay in the provision thereof, the Union states that these PRN
 30 Technologists work comparable technologist positions that may also be filled by bargaining unit technologists. The Hospital's right to use non-unit technologists is restricted by the existing CBA, including but not limited to the Preamble, Article I, Article IV, Article VII, Article VIII, Article IX, Article XIII, Article XIV and Exhibit "B". This information is needed to determine whether the Hospital is following existing
 35 restrictions, to support both grievances required to enforce the provisions and the Union's revising these CBA provisions to improve the protection of our members' rights to the work for the next contract.

40 In addition, the Union is entitled to the compensation information and other terms and conditions of employment with respect to PRN Technologists as we negotiate with the Hospital for wage rates and other terms and conditions in general as well as premium wage rates to address the on-going staffing shortages.

45 Local 40 is seeking increases in the wages paid to our members. The amount both in rate and total the Hospital is prepared to pay PRN Technologists is relevant in assisting Local 40 frame our bargaining demands for the Technologists, including analyzing the total the Hospital has spent for PRN Technologists that could be spent on bargaining unit Technologists. Additionally, the rate the PRN Technologists receives while working side by side without Technologists also will assist us in determining a fair and reasonable wage demand to communicate to you, as that PRN wage information will assist in determining the market rate. Increasing bargaining unit Technologist wage rates will serve to attract more applicants for open positions, thus reducing the need for

nonbargaining unit assistance and protecting the bargaining unit integrity. Further, the rate and total amount paid to PRN Technologists will assist Local 40 in making proposals on staffing levels: for example, if the Hospital spends an exorbitant amount to staff a PRN Technologist than a bargaining unit Technologist, the Hospital can replace that singular PRN Technologist with additional bargaining unit Technologists, increasing staffing without increasing costs. Existing inadequate staffing levels are part of the discussions in negotiations for the successor CBA.

There has been disagreement in the past as to fair compensation for bargaining unit Technologists picking up extra hours, both the issue of what is fair to the Technologist and what will serve to incentivize filling open slots. The Hospital uses PRN Technologists to fill slots on the schedule, at time limiting work available to bargaining unit Technologists on a premium pay basis. The amount the Hospital is willing to pay for PRN Technologists instead of offering premium pay assignments to bargaining unit Technologists is relevant to determining a fair and reasonable rate offered to bargaining unit Technologists to perform those services instead of or in advance of using PRN Technologists.

On December 15, 2022, Jackson provided the RT seniority list. (G.C. Exh. 52)

On February 9, 2023, Foster sent the Respondent an email attaching the November 17, 2022 information request. In the email, Foster stated the following (G.C. Exh. 52):

In reviewing negotiations notes, I had sent two information requests on November 17, 2022. The first one requested seniority lists and was received on December 15. The other request involved the use of PRN employees for bargaining unit work. I have not received the second request for information. If you have a record of sending, please forward that response to me. If there is no record of response, please send the original requested information prior to the negotiations on February 21. I will attach the original request to this email.

The Respondent did not provide responsive information even after this second follow-up request for it. (

Analysis

The General Counsel contends that the Respondent violated the Act by failing to provide information in response to the Union's November 17, 2022 request for information regarding the Respondent's use of PRNs and other nonunit technologists. (G.C. Exh. 52)

The Respondent does not deny the requested information is relevant and, as noted above, the Board has found relevant requests for such information regarding the performance of unit work by nonunit employees. See *Hospital De La Concepcion*, 371 NLRB No. 155 (2022); *Tegna, Inc. d/b/a KGW-TV*, 367 NLRB No. 71, slip op. at 4 (2019); *United Graphics*, 281 NLRB 463, 465 (1986). Instead, the Respondent again contends that Jackson "was overwhelmed with requests from both units" and this one "simply fell through the cracks." (R. Brf. p. 47) However, Jackson did not testify that this is what occurred. Further, as noted above, an information request allegation does not require a showing of malicious intent or bad faith. And even if the initial failure to furnish information was a reasonable mistake, the Union sent the request again on February 9, 2023. The Respondent did not respond to the follow-up request, even after a charge was filed and complaint issued. Accordingly, the Respondent cannot successfully claim

its failure to produce information was reasonable or that, at some point, a conscious decision was not made to withhold responsive information.

5 Based upon the foregoing, I recommend a finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with information it requested on November 17, 2022.

10 **January 11, 2023 and February 28, 2023 Information Requests (G.C. Exhs. 54-55) – Complaint ¶¶ 17-18**

Facts

15 On January 11, 2022, Union RN Unit VP Bell emailed Respondent Labor Relations Partner Jackson, in part, the following request for information (G.C. Exh. 54):

20 OPEIU Local 40, pursuant to its rights under the Collective Bargaining Agreement and the National Labor Relations Act, as amended, and in order to analyze the Hospital's wage proposal and formulate a response, requests the following information:

 The wage scale for RNs employed at and by Ascension Detroit-area hospitals included but not limited to:

25 Ascension Macomb-Oakland Hospital - Madison Heights Ascension Macomb-Oakland Hospital - Warren Ascension Providence Hospital – Southfield
Ascension Providence Hospital - Novi
Ascension St John

30 The reported information should include for each hospital:

- 35 1. Any wage scale in place, including all steps within that scale;
2. The lowest hourly rate paid to a RN;
3. The highest hourly rate paid to a RN;
4. Any specialty pay rate to a RN;
5. Any signing bonus in effect for RNs; and
6. Any incentive rate offered to RNs, including the terms of eligibility for the incentive.

40 To the extent written documents exist for the above information, for example but not limited to a wage scale or an incentive plan, please provide a copy of the documents.

45 On February 9, 2023, Jackson emailed Bell the following response to the January 11, 2023 information request (G.C. Exh. 54):

 This request seeks information that is unrelated to the wages, hours, and other terms and conditions of employment for bargaining unit employees. Accordingly, the law recognizes that the information sought is not presumptively relevant. Please identify the relevance of the requested information. See, e.g. *FA. Bartlett Tree Expert Co.*, 316 NLRB 1312, 1313 (1995) ("Information that does not directly concern wages, hours, and terms and conditions of employment does not enjoy a presumption of relevance, and a specific need for it must be established . . . Further, an articulation of general relevance is insufficient.").

On February 14, 2023, Bell emailed Jackson this letter in reply (G.C. Exh. 54):

5 As has been discussed at negotiations on numerous occasions, APRH has lost
RNs to other area Ascension hospitals with higher wage rates. The wage rates
APRH pays are not sufficient to either attract new hires or retain existing staff.
APRH admits this, see for example the Hospital's February 13, 2023 Bargaining
10 Update. The wage rates other area Ascension hospitals that are poaching
current APRH RNs, and more effectively attracting new hires directly inform the
wage rates that APRH requires to remain competitive and therefore be in a
position to support our care teams and patients.

15 On February 28, 2023, Union RT Unit VP Foster emailed Jackson a request for the
following information (G.C. Exh. 55):

Pursuant to its rights under the collective bargaining agreement (CBA), the
National Labor Relations Act and pending APRRT Contract negotiations please
20 forward the following information:

The wage scale for employees in the classifications identified in the October 19,
2019 – December 31, 2022 CBA, Exhibit B, Letters of Understanding #10 IR and
Letter of Agreement RCIS (Registered Technologist, Special Procedures
25 Technologist I, Special Procedures Technologist II, CT Technologist, Registered
Nuclear Medicine Technologist, Registered Sonographer, Registered
Mammographic Technologist, Registered Cardiovascular Invasive Specialist and
Interventional Radiology Technologists)(hereafter referred to collectively as RT)
employed at and by Ascension Detroit-area hospitals included but not limited to:

30 Ascension Macomb – Oakland Hospital – Madison Heights
Ascension Macomb – Oakland Hospital – Warren
Ascension Providence Hospital - Southfield
Ascension Providence Hospital - Novi
Ascension St John

35 The reported information should include for each hospital, by classification:

1. Any wage scale in place, including all steps within that scale;
2. The lowest hourly rate paid to a RT;
- 40 3. The highest hourly rate paid to a RT;
4. Any specialty pay rate to a RT;
5. Any signing bonus in effect for RTs; and
6. Any incentive rate offered to RTs, including the terms of eligibility for the
incentive.

45 To the extent written documents exist for the above information, for example but
not limited to a wage scale or an incentive plan, please provide a copy of the
documents.

This information requested by OPEIU Local 40 is necessary and relevant for it to
negotiate appropriate wages for employees covered by the CBA. As has been
discussed with the Hospital at negotiations and on other occasions, APRH has
lost RTs to other area Ascension hospitals with higher wage rates. The wage

5 rates APRH pays are not sufficient to either attract new hires or retain existing staff. The wage rates other area Ascension hospitals that are poaching current APRH RTs, and more effectively attracting new hires directly inform the wage rates that APRH requires to remain competitive and therefore be in a better position to support our care teams and patients.

10 If you have any questions concerning this request, please contact me without delay. As this information is needed to analyze the Hospital's proposal, and to craft our proposals, we request that this information be provided as quickly as possible but in no event later than ten (10) days after receipt of this request. Please provide the information as you gather it and it is available, including by hospital and/or within a hospital, without waiting to collect it all before provision.

15 Foster testified that she requested this information because the Respondent took the position during negotiations that its wage proposal was based on the labor market in the area. (Tr. 373-375) The Respondent did not provide any responsive information. (Tr. 341-347)

20 Analysis

The General Counsel alleges that the Respondent violated the Act by failing to provide information in response to the Union's January 11, 2023 request for information regarding the wage scale of RNs at the Respondent's other Detroit-area hospitals (G.C. Exh. 54) and a February 28, 2023 request for the same information regarding RTs (G.C. Exh. 55).

25 The requested information regarding nonunit employees at other Ascension locations is not presumptively relevant and the Respondent contends the Union did not establish relevance. However, the Board has generally found relevant a union's request for wages at an employer's other nonunit locations when the union intends to use the information to bargain over wage parity. See, e.g., *Frito-Lay, Inc.*, 333 NLRB 1296 (2001); *E.I. Du Pont & Co.*, 268 NLRB 1031, 1033 (1984); *E.I. DuPont De Nemours & Co.*, 264 NLRB 48, 51 (1982). In *Frito Lay*, 333 NLRB at 1296, the Board observed that, "[c]ertainly, knowing the average wage rate of the workforces at the Respondent's other production facilities would allow the Union to bargain intelligently for wages based on parity within the Respondent's company"

35 Here, Foster testified without contradiction that she requested this information because the Respondent took the position during negotiations that its wage proposal was based on the labor market in the area. The Union did not believe this was true since other Detroit-area Ascension hospitals appeared to be offering higher wage rates sufficient to poach Hospital unit employees. Accordingly, the Union sought relevant information regarding wages paid at those Ascension hospitals to bargain over wage parity with employees at those facilities.

40 Based upon the foregoing, I recommend a finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide information requested by the Union on January 11, 2023 and February 28, 2023.

February 14, 2023 Information Request (G.C. Exhibit 56) – Complaint ¶ 19

Facts

On August 20, 2022, the Union emailed the Respondent the following information request regarding the Hospital's use of STO RNs (G.C. Exh. 56):

The information is requested for the period July 1, 2021 through the last date of the month immediate prior to your response.

1. On a monthly basis:
 - 5 a. The total number of RNs in an STO assignment during that month;
 - b. The total hours worked by RNs in STO assignments during that month;
 - 10 c. The total wages paid to RNs in STO assignments during that month; and
 - d. The average hourly rate paid to RNs in STO assignments that month;
2. For each RN in an STO assignment anytime during the period:
 - 15 a. The APRH RN position filled by the STO RN;
 - b. A copy of the RN position job posting that was filled by the STO RN;
 - c. The STO RN's name;
 - d. The STO RN's contact information, including address, phone number(s) and email address(es);
 - 20 e. The STO RN's date of hire;
 - f. The STO RN's date of termination;
 - g. The STO RN's years of experience as a RN working in an acute care setting;
 - h. The STO RN's rate of pay;
 - 25 i. If any premium was paid to the STO RN, the rate of pay and total hours of¹⁴ premium pay;
 - j. Any other benefit provided to the STO RN, including but not limit health, retirement or other benefits;
 - k. A copy of the STO RN's schedule(s).
3. For each STO RN who worked at any time during the period, please provide:
 - 30 a. A copy of any written agreement between the Hospital or other employer and the RN;
 - b. The name of the employer if other than APRH;
 - 35 c. For each employer identified in your answer to Request No. 3(a), please state whether APRH, including its affiliates, subsidiaries or parent corporations, has any ownership interest in it of any form, including but not limit to stock ownership, partnership ownership, or indirect ownership (through another
 - 40 corporation/company/person). For each employer for which APRH has ownership interest, please describe the ownership interest, including the percentage of ownership controlled by APRH, and whether a APRH representative serves as a director, manager or other
4. For each STO RN position open and available at the time of your response to this request, a copy of the job posting.

The relevance of the requested information is self-evident on the face of this request, both with respect to policing the CBA as well as for collective bargaining purposes. Nonetheless, so there is no dispute as to the relevancy of the requested information, or delay in the provision thereof, the Union states that these STO RNs work RN positions normally filled by bargaining unit RNs. The Hospital's right to use non-unit RNs is restricted

5 by the existing CBA, including by but not limited to the Preamble, Article I, Article VII, Article IX, Article XIII, Articles XIV and Exhibit 1. This information is needed to determine whether the Hospital is following existing restrictions, to support both grievances required to enforce the provisions and the Union's revising these CBA provisions to improve the protection of our members' rights to the work for the next contract.

10 In addition, the Union is entitled to the compensation information and other terms and conditions of employment with respect to STO RNs as we negotiate with the Hospital for wage rates and other terms and conditions in general as well as premium wage rates to address the on-going staffing shortages.

15 Local 40 is seeking increases in the wages paid to our members. The amount both in rate and total the Hospital is prepared to pay to STO RNs is relevant in assisting Local 40 frame our bargaining demands for the RNs, including analyzing the total the Hospital has spent for STO RNs that could be spent on bargaining unit RNs. Additionally, the rate that STO RNs receive while working side by side with our RNs also will assist us in determining a fair and reasonable wage demand to communicate to you, as that STO wage information will assist in determining the market rate. Increasing bargaining unit RN wage rates will serve to attract more applicants for open positions, thus reducing the need for non-bargaining unit assistance and protecting the bargaining unit integrity. Further, the rate and total amount paid to STO RNs will assist Local 40 in making proposals on staffing levels; for example, if the Hospital spends twice as much to staff a STO RN than a bargaining unit RN, the Hospital can replace that singular STO RN with two bargaining unit RNs, increasing staffing without increasing costs. Existing inadequate staffing levels are part of the discussions in negotiations for the successor CBA.

30 There has been disagreement in the past as to fair compensation for bargaining unit RNs picking up extra hours, both the issue of what is fair to the RN and what will serve to incentivize filling open slots. The Hospital uses STO RNs to fill slots on the schedule, at times limiting work available to bargaining unit RNs on a premium pay basis. The amount the Hospital is willing to pay for STO RNs instead of offering premium pay assignments to bargaining unit RNs is relevant to determining a fair and reasonable rate offered to bargaining unit RNs to perform those services instead of or in advance of using STO RNs.

40 On September 16, 2022, the Respondent provided information responsive to the Union's August 20, 2022 information request. (G.C. Exh. 38, 39, 56)

45 On February 14, 2023, the Union emailed the Respondent an information request regarding "RN Unit – Information Request," which stated, in part, the following (G.C. Exh. 56):

Please supplement the Hospital's September 16, 2022 response to the Union's August 20, 2022 request for information regarding STOs from the date of your answers through the present. This information is required by Local 40 to formulate its bargaining proposals and monitor compliance of the current CBA. Accordingly, we request it be provided as soon as possible but in no event not later than Friday, February 24, 2023. Please do not wait to gather all the requested information before you present it; as the information for a Request or sub-request is available, please send it then.

Analysis

5 The General Counsel contends that the Respondent violated the Act by failing to provide information in response to a February 14, 2023 Union request for STO RN use. (G.C. Exh. 56)

10 The Respondent does not contest the relevance of information regarding RN STO use and, as discussed above, the Board has found relevant requests for such information regarding the performance of unit work by nonunit employees. See *Hospital De La Concepcion*, 371 NLRB No. 155 (2022); *Tegna, Inc. d/b/a KGW-TV*, 367 NLRB No. 71, slip op. at 4 (2019); *United Graphics*, 281 NLRB 463, 465 (1986). Rather, the Respondent merely denies bad faith and contends that the Union did not identify the specific documents sought or follow up with a reminder that the information had not been provided. However, absent any indication to the contrary, it should have been clear to the Respondent that the Union wanted *all* supplemental updated information for the applicable time (i.e., all information not previously provided in response to the original August 20, 2022 request). Further, as discussed above, absent any response from the Respondent, the Union was under no obligation to remind the Respondent to provide relevant responsive information. And to the extent the Respondent denies any affirmative bad-faith effort or intent to evade its obligations under the Act, as discussed above, a showing of such bad faith is not an element of an information request violation.

25 Accordingly, I recommend a finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the information the Union requested on February 14, 2023.

8(a)(5) Unilateral Change Allegations

Unilateral Hire and Use of STO RNs – Complaint ¶¶ 22(a), 23(a), 24(a)

30 Facts

Respondent Nursing VP Tull testified that, since about May 2020, the Hospital has maintained individual contracts with nonunit PRN (per diem) RNs and STO (short-term option) RNs to fill shift vacancies not initially selected by unit RNs. (Tr. 729-731, 798) The STO RN agreements are for a specific fixed term, pay rate, and shift. (G.C. Exh. 35) (C.P. Exh. 1) STO RNs are generally paid \$75 to \$100 per hour, a rate much higher than the rate received by unit RNs under the RN CBA. (G.C. Exh. 5, 35, 38) (C.P. Exh. 1) (Tr. 106-111, 650-651, 806-807)

40 Tull testified that the Hospital increased STO RN use over time to reduce and ultimately eliminate the use of agency RNs. (Tr. 730-731) A spreadsheet the Respondent provided the Union on September 16, 2022 identified 128 STO RNs employed by the Hospital from July 1, 2021 to August 31, 2022, with their names, shifts, pay rates, and start/end dates. (Tr. 106-111) (G.C. Exh. 38) Of those STO RNs, about 69 were employed at the Hospital as of September 16, 2022. (G.C. Exh. 38) Another spreadsheet the Respondent provided the Union on September 16, 2022 contained the number of STO RNs and hours they worked in each unit each month for the same time period. (G.C. Exh. 39) (Tr. 111-113) The total STO RNs used by the Hospital increased on a monthly basis as follows (G.C. Exh. 39):

Date	7/2021	8/2021	9/2021	10/2021	11/2021	12/2021	1/2022
No.	5	7	8	16	26	26	29
Date	2/2022	3/2022	4/2022	5/2022	6/2022	7/2022	8/2022
No.	48	54	68	78	83	96	99

Since August 2022, the Respondent's use of STO RNs has declined over time. Drouillard testified that she believed no STO RNs were being used as of the hearing. (Tr. 537)

5

The Respondent's RN schedule is established 6 weeks at a time. At the start of the scheduling process, unit RNs have 10 days to bid shifts through Kronos software. The Hospital then fills vacancies with nonunit PRN RNs, STO RNs, and agency RNs. Agency RNs do not have access to Kronos and do not bid shifts in the same way as unit RNs. Typically, the Respondent still has vacancies after nonunit RNs are added to the schedule. Accordingly, the Respondent solicits unit RNs in various ways (e.g., text messages, emails, in person) to work additional shifts. (Tr. 538-539, 554, 732-736, 748-758, 776-778, 826) (R. Exh. 5-6) Unit RNs who agree to work additional shifts generally receive their standard pay rate with an overtime rate for weekly hours over 40. However, RNs can be offered a higher "critical pay" rate as an incentive to work additional shifts. (Tr. 754-755, 828-832) (G.C. Exh. 4 – Article XI Section 3)

10

15

The RN CBA includes the following provisions in Article VII – Definitions and Length-of-Service Rights (Seniority) (G.C. Exh. 4):

20

Section 2.2. When "seniority" is used in this Section, it shall mean, for either a full-time or part-time employee, bargaining unit seniority as defined in Section I of this Article. When PRN is used in this CBA it refers to those who in the previous CBAs were labeled as contingent or relief on call. When contingent is used in this CBA it refers to contracted or agency nurses.

25

Section 2.3. A layoff shall be made on the unit and shift in which there exists a need to make reductions. Such layoffs shall be made in the following order:^[11]

A. Contingent

B. PRN employee laid off

30

C. Regular employees laid off in reverse order of seniority. During the time of layoff(s), the Hospital will continue to post all positions in accordance with established procedures. Any employee subject to layoff may take an open position (as a trainee or fully qualified nurse) which the Hospital is attempting to fill, based on bargaining unit seniority.

35

...
Section 3.1. The Use of PRN Associates

1. The Hospital has the right to use and employ PRN Registered Nurses up to ninety-six (96) hours in three (3) bi-weekly pay periods. Such RNs shall be termed PRN RNs. The Hospital agrees to abide by this standard.

40

2. PRN RNs are not subject to or covered by any of the provisions of this Agreement.

3. A PRN RN has no seniority for purposes of bidding on posted positions unless she was a member of the OPEIU, Bargaining Unit within the last twelve (12) months, in which case she shall have bidding rights based on frozen seniority.

45

4. PRN RNs shall have no preference in terms of layoff(s) and recall(s) over seniority RNs.

5. A qualified regular part-time RN shall have preference to work over-code hours

¹¹ Article VII Section 2.10. of the RN CBA provides for a different order of layoff in the event of a short term layoff or a low census day. Under that section, contingent RNs are laid off first, PRN RNs are laid off fourth, and unit RNs working standard shifts for a regular straight time hourly pay rate are laid off last (sixth).

in place of the use of PRN RN(s). PRN nurses may cover for bargaining unit nurses on call, per their request, if no bargaining unit nurse wants this call.

- 5 6. It is not the intent of the Hospital to use PRN RNs in such a manner as to delete budgeted regular full or part-time positions.
- 7. Regular full or part-time RN(s) shall have preference over PRN RN(s) when being reassigned to another unit.
- 9. Present PRN employees shall be identified by name. Such PRN employee(s) shall be permitted to continue under the conditions of the present wage structure.
- 10 10. Names and wages rate(s) by total range and hours worked by PRN employees (RNs) shall be subject to verification by the Bargaining Unit Vice-President with a list given at least after each three (3) bi-weekly pay period.
- 15 11. In the event OPEIU believes the Hospital is abusing the commitment in this Section 3.1 OPEIU, may file a grievance at step 3.8. PRN RN(s) shall be oriented prior to assignment to a Nursing unit.

20 Respondent Nursing VP Tull testified that she was unaware of any difference between PRN RNs and STO RNs other than PRN RN use is specifically limited by the RN CBA and STO RNs are not referenced in the RN CBA.¹² (Tr. 798-801)

25 Union President Carlisle testified that she did not understand the RN CBA to include STO RNs within the definition of contingent nurses. (Tr. 681, 684) According to Carlisle, contingent RNs are agency nurses employed by a third party contractor to work at the Hospital for a short period of time. (Tr. 701) Regarding the Respondent's use of STO RN, Carlisle stated, "[t]his is giving the employer carte blanche to start a giant agency, pay them whatever they want to pay them and not pay the bargaining-unit members a fair wage." (Tr. 700) Carlisle
 30 did not understand the RN CBA to allow the Respondent to start an "agency instead of hiring bargaining-unit nurses as employees of their hospital." (Tr. 700-701)

Union RN Unit Chief Steward Drouillard testified that the term STO was described to her as a form of contingent worker or an "Ascension in-house agency." (Tr. 544, 582, 588)
 35 Drouillard understood that, pursuant to the RN CBA, the Respondent could use contingent RNs, which meant agency RNs. (Tr. 588) Drouillard understood an agency RN to be an RN employed by an outside agency rather than the Respondent. (Tr. 588) When asked for her understanding of "in-house agency," Drouillard testified as follows (Tr. 582-583):

40 The way that it was explained was that . . . they could leave their bargaining-unit position, sign a contract as an STO and in so doing you don't get any benefits and you can be pulled to any unit in any facility at any time. They can treat you however they want, essentially. And I don't know if -- I don't know exactly what
 45 an in-house agency is.

Drouillard admitted by 2021, when she was steward (not chief steward), she knew the Respondent was using STO RNs to fill vacant RN Unit shifts. (Tr. 542-547, 581-583)

¹² At hearing, Respondent's counsel claimed STO RNs are independent contractors and referenced as such as "contracted" nurses in the RN CBA Article VII Section 2.2 definition of "contingent." Union counsel claimed "contracted and agency nurses," as referenced in Article VII Section 2.2, are "one in the same. . . . Contracted nurses are agency nurses." (Tr. 702-703)

5 In about late-2021, Union RN Unit VP Bell found two STO RN agreements on a Hospital conference room table. (Tr. 904, 909-910, 922) (CP Exh. 1) Bell took one of the agreements and left the other. (Tr. 904-907, 923-924) Bell testified that she was “very upset” upon seeing the STO RN agreements and, on January 19, 2022, sent the Respondent an information request regarding STO RN use. (Tr. 904-907) (CP Exhs. 1-2) Bell gave a copy of the STO RN agreement to then steward Drouillard. (Tr. 544-547, 922)

10 In December 2021, Carlisle became Union President. (Tr. 649-650) However, she quickly contracted COVID and “missed months of work.” (Tr. 653) Carlisle testified that she was aware when she became President that Ascension maintained a large group of STO RNs working as floaters who called in the morning for assignments at Ascension Novi or Moross. (Tr. 651-652, 669) Carlisle learned from a friend who worked as such a STO RN that they were paid a higher wage rate than unit RNs employed at the Hospital. (Tr. 651) Carlisle testified that she would have expected Drouillard to tell her whether STOs were being used at the Hospital. (Tr. 659) And as noted above, in 2021, Drouillard knew the Hospital was using STO RNs to fill RN Unit shifts. (Tr. 542-547, 581) Nevertheless, according to Carlisle, the Union did not learn until “much later” after she became Union President in December 2021 that Ascension was using STO RNs at the Hospital. (Tr. 651-652) Carlisle testified that Bell or Drouillard told her two STO agreements were found in a Hospital conference room, but could not recall which one told her or when. (Tr. 659-660)

25 Drouillard testified that, for a brief period during the holidays at the end of 2021, the Respondent offered unit RNs a bonus rate above their hourly and overtime rates if they worked extra shifts. The bonus increased the hourly rate of day shift RNs by \$50 and night shift RNs by \$75. Drouillard testified that she accepted additional shifts because of the increased bonus rate and would not have done so if she were not being paid the bonus. (Tr. 532-533)

30 The record contains an “Agenda,” dated January 19, 2022, of an “Ascension Providence Rochester Hospital Collaboration Meeting with OPEIU” via Google Meets. (R. Exh. 2) (Tr. 766-768, 786-790) The Respondent and Union hold such labor relations meetings on a bimonthly basis and an agenda is prepared in advance of those meetings by the Respondent’s executive assistant in consultation with the Union. (Tr. 767-768, 549, 786-788) The January 19, 2022 Agenda listed attendees “Dina Carlisle, Cassandra Bell, Rebecca Coppersmith, Janay Tull, Kimberly Jackson, Kathy Bourma, CeCe Rutherford, and Jozett Hughes.”¹³ (R. Exh. 2) At the time, in January 2022, then steward Drouillard did not attend such meetings and was not provided with copies of the agendas. (Tr. 549-550) The agenda contained a list of “Union Questions,” which included a “List of names of the STO nurses.” (R. Exh. 2)

40 On January 19, 2022, RN Unit VP Bell emailed Respondent Labor Relations Partner Jackson the following information request (C.P. Exh. 2) (Tr. 897-899):

45 How many STO RNs are there at APRH? What units and shifts are they working? What are the names of the STO nurses.

On January 21, 2022, Jackson replied to Bell by email with a subject line, “Re: [EXTERNAL] STO RN.” The email stated as follows (C.P. Exh. 2):

¹³ Carlisle could not recall whether she attended the January 19, 2022 meeting. Carlisle believed she may not have attended because she was sick with Covid at the time. Carlisle looked for her notes of the meeting and found none. (Tr. 653-654)

5 The Hospital partially objects to this request to the extent that it seeks information for employees outside of the bargaining unit. In that regard, it seeks information that is unrelated to the wages, hours, and other terms and conditions of employment for bargaining unit employees. Accordingly, the law recognizes that the information sought is not presumptively relevant. Please identify the relevance of the requested information. As part of your response, please identify the relevance with particularity; a generalized assertion that it is needed for bargaining is insufficient. See F.A. Bartlett Tree Expert Co., 316 NLRB 1312, 1313 (1995) ("Information that does not directly concern wages, hours, and terms and conditions of employment does not enjoy a presumption of relevance, and a specific need for it must be established... Further, an articulation of general relevance is insufficient.").

15 On February 2, 2022, Union President Carlisle emailed the following reply to Jackson's January 21, 2022 email (C.P. Exh. 2):

20 Local 40 is responding to your response regarding the STO RN information request. The requested information is necessary for us to formulate proposals on fair compensation, staffing levels, scheduling, recruiting and retention. We request this information by February 9, 2022. Thank you.

25 On February 9, 2022, Jackson emailed Carlisle a request for a 2 week extension "regarding this information request for STO RN." (C.P. Exh. 2). Carlisle agreed to the extension. (C.P. Exh. 2)

30 On February 24, 2022, Bell sent Jackson an email which reminded her that "Local 40 has not received any information concerning STO RN." (C.P. Exh. 2)

35 On February 25, 2022, Jackson sent the Union an email which stated, "[p]lease see the attached request for information for STO RN." (C.P. Exh. 2) Jackson attached to the email a letter with the subject line, "RE: MIROC U40 STO RN RFI 2.2.2022." (G.C. Exh. 37) This letter quoted the Union's request for information regarding STO RNs, but purported to provide the following information regarding "Agency Staff" as follows (G.C. Exh. 37):

a. Please see Floor, Shift, # of Agency Staff below:

- 40 i. 5E
 - 1. am 2
 - 2. pm 1
- ii. 5S
 - 1. am
 - 2. pm 2
- 45 iii. 6S
 - 1. am 1
 - 2. pm 2
- iv. 4S
 - 1. am
 - 2. pm 1
- v. 7E
 - 1. am
 - 2. pm 2
- vi. LDRP

- 1. am 1
- 2. pm 1
- 5 vii. Float
 - 1. am 2
 - 2. pm 7
- viii. ICU/CVICU
 - 1. am 5
 - 2. pm 15
- 10 ix. SWAT
 - 1. am 1
 - 2. pm 1
- x. ED
 - 1. am 1
 - 2. pm
- 15

- b. We do not have information about the STO RN Salary.
- c. We continue to object to providing names based on relevance.

20 On March 7, 2022, Union President Carlisle sent the Respondent the following email (C.P. Exh. 3):

25 I write to follow up on your February 25, 2022 response to Local 40's February 2, 2022 information request. The Employer's use of non-unit personnel – agency, PRNs and STOs -- to perform bargaining unit work directly effects unit members working conditions since they work with our members and their work is integral to our members' work. Among other things, the Union needs information in order to formulate economic and non-economic proposals that are reasonable and competitive, to address the reality that the retention of unit members is affected by the compensation received by non-unit persons performing unit work, and, further, to evaluate the effect of Hospital decisions to devote resources to non-unit persons that is arguably detrimental of bargaining unit employees. Our initial request focused on STO RNs, and we reiterate the request for the salary paid to them, which should be defined include however they are compensated, including, but not limited to, for example, their hourly or daily rate. The identification of any benefits beyond their pay and the cost to the Hospital is also requested. Your response regarding staffing was titled "Agency Staff." To the extent this response included non-unit persons other than STO RNs, please specify other the category of the other non-unit persons utilized and provide the compensation paid, any additional benefits and the cost to the Hospital for all non-unit persons, whether agency, PRNs and STOs.

45 On April 12, 2022, Jackson emailed Carlisle a letter which contained the following information in response to the March 7, 2022 information request regarding the use of STO RNs (G.C. Exh. 36) (C.P. Exh. 3):

- a. STO RN's
 - i. The current hiring rate of STO RN's as of March 31, 2022 is \$75 on day shift 7a to 7p and \$90 on night shift 7p to 7a.
 - ii. There are no benefits provided to STO RN's beyond their pay.
- b. PRN's
 - i. The current hiring rate of PRN RNs as of March 31, 2022 is \$45.10.
 - 1. **Additional Rates** –
 - a. Afternoon Shift – \$2.00/hour;

b. Midnight Shift – \$3.00/hour

c. Weekends – \$1.75/hour

d. **On-Call** – \$4.00 per hour

5 ii. There are no benefits provided to the PRN's beyond their pay.

c. Agency

10 i. The Hospital continues to object to the request for Agency RN information to the extent that it seeks information for employees outside of the bargaining unit. In that regard, it seeks information that is unrelated to the wages, hours, and other terms and conditions of employment for bargaining unit employees. Subject to and without waiving that objection, we do not possess any information regarding the wage rates of Agency RNs because we do not employ them.

15 d. For the STO RN's information provided last time, we accidentally typed the word "Agency" in the title, but we did provide the STO RN information to you[.] This was our mistake. Please see the corrected information below.

e. Please see Floor, Shift, # of STO RN Staff below:

i. 5E

20 1. am 2
2. pm 1

ii. 5S

1. am
2. pm 2

iii. 6S

25 1. am 1
2. pm 2

iv. 4S

1. am
2. pm 1

30 v. 7E

1. am
2. pm 2

vi. LDRP

35 1. am 1
2. pm 1

vii. Float

1. am 2
2. pm 7

viii. ICU/CVICU

40 1. am 5
2. pm 15

ix. SWAT

1. am 1
2. pm 1

45 x. ED

1. am 1

Union President Carlisle testified that, as of receiving this information on April 12, 2022, she knew bargaining unit individuals were performing unit work. (Tr. 674)

In April 2022, then steward Drouillard was elected to the Union bargaining committee. (Tr. 533) Thereafter, Drouillard was aware of Union information requests submitted to the Respondent from July 2022 and February 2023. (Tr. 511-512) (G.C. Exhs. 48-56)

On August 20, 2022, the Union requested information regarding the Respondent's use of STO RNs at the Hospital. (G.C. Exh. 56) Paragraph 2(a) of that request sought for each RN in a STO assignment, "[t]he APRH RN position filled by the STO RN[.]" (G.C. Exh. 56)

On September 16, 2022, the Respondent produced information responsive to the Union's August 20, 2022 request regarding the use of STO RNs. (G.C. Exh. 56) In response to the request at paragraph 2(a), the Respondent stated (G.C. Exh. 56):

The Hospital presumes that the term "APRH RN position" used in your request for information is intended to refer to the regular full-time permanent and regular part-time permanent RN positions that are covered by the collective bargaining agreement. If this presumption is incorrect, please let us know. Based on the presumption, the Hospital states: Zero. The STO RNs are not filling bargaining unit positions. The STO positions are temporary contracted positions that are being used to temporarily supplement nursing staff at the Hospital, while the Hospital continues to recruit and fill the permanent bargaining unit positions.

On October 11, 2022, in case 07-CA-305265, the Union filed a charge alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by hiring RNs without placing them in the bargaining unit. (G.C. Exh. 1(c)) An affidavit of service of charge against employer indicates that an NLRB regional employee served a copy of the charge in case 07-CA-305265 on the Respondent on October 17, 2022. (G.C. Exh. 1(d))

Analysis

The General Counsel contends that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to notify and offer to bargain with the Union regarding the hire and use of STO RNs to perform RN Unit work. The Respondent contends that this allegation is time barred by Section 10(b) of the Act or, in not, the Respondent was authorized by the RN CBA to act unilaterally in using STO RNs to perform RN Unit work.

The Union had Actual Knowledge that STO RNs Performed RN Unit Work Outside the 10(b) Period

Section 10(b) provides "[t]hat no complaint shall issue based upon an unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." Thus, a charge must be both filed and served within the 6-month 10(b) period. See *Local 264, Laborers International Union of North America (D&G Construction Co.)*, 216 NLRB 40, 40 fn. 1, 43 (1975) (ULP occurred on October 17, 1997 and charge was timely because it was served on April 17, 1974); *Koppers Co. Inc.*, 163 NLRB 517, 517 (1967) (the 6-month 10(b) period "is determined by the date of service of the charge"). In *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), the Board summarized the law as it pertains to a 10(b) timeliness defense as follows:

The 10(b) period begins only when a party has "clear and unequivocal" notice of a violation of the Act. See, e.g., *Desks, Inc.*, 295 NLRB 1, 11 (1989). The burden of showing a complaint is time barred is on the party raising Section 10(b) as an affirmative defense. *Chinese American Planning Council*, 307 NLRB 410 (1992), review denied mem. 990 F.2d 624 (2d Cir. 1993). This burden is met by showing the filing party had actual knowledge or constructive knowledge of the alleged unfair labor practice more than 6 months prior to the filing of the charge. Such

5 knowledge may be imputed where the conduct in question was sufficiently “open and obvious” to provide clear notice. *Duke University*, 315 NLRB 1291 fn. 1 (1995), distinguishing *Southeastern Michigan Gas Co.*, 198 NLRB 1221 fn. 2 (1972), enf.d. 485 F.2d 1239 (6th Cir. 1973) (clear notice given because changes made openly). Similarly, knowledge may be imputed where the filing party would have discovered the conduct in question had it exercised reasonable or due diligence.

10 Here, the Union filed the underling ULP charge on October 11, 2022 and that charge was served on the Respondent by an NLRB employee on October 17, 2022. Thus, the 6-month 10(b) statute of limitation period for the timely filing and service of a charge began on April 17, 2022. See *Local 264, Laborers International Union of North America (D&G Construction Co.)*, 216 NLRB 40, 40 fn. 1, 43 (1975); *Koppers Co. Inc.*, 163 NLRB 517 (1967). As discussed 15 below, the record evidence established that the Union had clear and unequivocal actual knowledge of all facts arguably establishing a violation no later than April 12, 2022, prior to the start of the 10(b) period.¹⁴

20 From January 2022 to April 2022, the parties discussed and exchanged correspondence regarding the Hospital’s use of STO RNs. (C.P. Exh. 2) (G.C. Exh. 37) On February 25, 2022, the Respondent provided the number of STO RNs working on each floor and shift, but mistakenly described those RNs as “Agency Staff” rather than STO RNs. (G.C. Exh. 37) This caused some confusion and, on March 7, Carlisle responded in part as follows (G.C. Exh. 37):

25 Your response regarding staffing was titled “Agency Staff.” To the extent this response included non-unit persons other than STO RNs, please specify other the category of the other non-unit persons utilized and provide the compensation paid, any additional benefits and the cost to the Hospital for all non-unit persons, whether agency, PRNs and STOs.

30 On April 12, 2022, Jackson emailed the Union a letter which corrected the February error by stating, “[f]or the STO RN’s information provided last time, we accidentally typed the word ‘Agency’ in the title, but we did provide the STO information to you. This was our mistake. Please see the corrected information below.” (G.C. Exh. 36) At this point, if not earlier, the 35 Union had clear and unequivocal notice that STO RNs were performing unit work and that an 8(a)(5) unilateral change violation arguably occurred.

40 ¹⁴ Since I have determined that, no later than April 12, 2022 (outside the 10(b) period), the Union had actual knowledge of the Respondent’s use of STO RNs, I need not determine whether the Union had such knowledge earlier than April 12, 2022. The parties did not address in their briefs whether Drouillard, as a steward prior to April 12, 2022 (before becoming chief steward in April 2023), was an agent of the Union for purposes of imputing to the Union her knowledge of STO RN use or, if she was not then an agent, whether her knowledge as a unit employee could be imputed to the Union. 45 See *Coreslab Structures (Tulsa) Inc.*, 372 NLRB No. 31, slip op. at 2 (2022), enf.d. in relevant part 100 F.4th 1123 (10th Cir. 2024); *Nursing Center at Vineland*, 318 NLRB 337, 339 (1995). Without providing a detailed analysis, I think it unlikely that Drouillard was an agent of the Union on or before April 12, 2022. However, I think it is reasonable to infer from the circumstances that, before April 12, 2022, Drouillard likely shared with Union RN Unit VP Bell (perhaps not Carlisle who was out sick) her understanding that STO RNs were performing unit work. Nevertheless, even if such knowledge were imputed to the Union before April 12, 2022, the statute of limitations would arguably be tolled while, on January 19, 2022, the Union requested information from the Respondent to confirm the same. See *Barnard Engineering*, 295 NLRB 226 (1989).

The General Counsel asserts that Jackson's April 12, 2022 correspondence "does not constitute actual notice because it does not explain that Respondent was using STOs to perform Unit work." (G.C. Brf. p. 84) However, Union President Carlisle testified that, as of
 5 April 12, 2022, she knew nonunit STO RNs were performing unit work. (Tr. 674, 682, 684)

Nevertheless, the General Counsel relies on the Respondent's September 16, 2022 letter which stated as follows in response to a Union request for information regarding RN Unit positions filled by each STO RN (G.C. Exh. 56):
 10

The Hospital presumes that the term "APRH RN position" used in your request for information is intended to refer to the regular full-time permanent and regular part-time permanent RN positions that are covered by the collective bargaining agreement. If this presumption is incorrect, please let us know. Based on the
 15 presumption, the Hospital states: Zero. The STO RNs are not filling bargaining unit positions. The STO positions are temporary contracted positions that are being used to temporarily supplement nursing staff at the Hospital, while the Hospital continues to recruit and fill the permanent bargaining unit positions.

Presumably, the General Counsel believes this letter raised a factual ambiguity as to whether STO RNs were performing unit work and, therefore, tolled the statute of limitations. I disagree. I understand the Respondent's claim that STO RNs were not filling unit positions to be a legal argument, not a factual one. "Board precedent holds that the 10(b) period begins to run at the time the Union first has 'knowledge of the facts necessary to support a ripe unfair labor practice.'" *St. Barnabas Medical Center*, 343 NLRB 1125 (2004) (emphasis excluded),
 25 quoting *Leach Corp.*, 312 NLRB 990, 991 (1993), *enfd.* 54 F.3d 802 (D.C. Cir. 1995). The Respondent argued that STO RNs were not filling RN Unit positions because there were insufficient unit RNs to do the work. This was perhaps a questionable legal position to take. See *St. George Warehouse, Inc.*, 341 NLRB 904 (2004) (unilateral transfer of unit work unlawful where employer used temporary agency employees instead of hiring unit employees).
 30 However, the last sentence of the Respondent's response to the Union's information request is a factual admission that STO RNs performed work normally performed by unit RNs (i.e., RN Unit work). As such, the Respondent's response would not confuse or contradict the Union's knowledge of facts that support the alleged ULP.

Finally, the General Counsel seems to argue that the 10(b) period does not begin to run until the Respondent provides the Union notice of a unilateral change. That is not my understanding of the standard, which is whether the charging party had actual or constructive knowledge of facts sufficient to determine whether a unilateral change occurred. Indeed, if the
 40 10(b) period could not begin to run until an employer provided the union with notice of the change, there could never be constructive knowledge of a change based on what the union could have learned had it exercised due diligence. See, e.g., *Moeller Bros. Body Shop, Inc.*, 306 NLRB 191 (1992) (mere observation of the operation would have put the union on notice that employer was hiring employees and not making fringe fund contributions on their behalf).

Based upon the foregoing, subject to my analysis below of continuing violations, I recommend a finding that any allegation regarding the Respondent's hire and use of STO RNs before April 17, 2022 is time barred and any time barred violation cannot be remedied.
 45

Continuing Violations

Having found that the Union was aware of the Respondent's use of STO RNs to perform RN unit work outside the 10(b) period, I next address whether the unilateral change allegation is

time barred in its entirety or whether, under the “continuing violation” line of cases, the allegation is only time barred to the extent STO RN use occurred outside the 10(b) period.

5 In *Local Lodge No. 1424 v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411, 419 (1960), the Supreme Court declined to find that a respondent union engaged in a continuing violation by entering into a collective-bargaining agreement without majority support more than 6 months prior to the filing of a charge. The Supreme Court explained as follows:

10 [T]he entire foundation of the unfair labor practice charged was the [u]nion's time-barred lack of majority status when the original collective bargaining agreement was signed. In the absence of that fact enforcement of this otherwise valid union security clause was wholly benign.¹³

15 . . .
Where, as here, a collective bargaining agreement and its enforcement are both perfectly lawful on the face of things, and an unfair labor practice cannot be made out except by reliance on the fact of the agreement's original unlawful execution, an event which, because of limitations, cannot itself be made the subject of an unfair labor practice complaint, we think that permitting resort to the principle that s 10(b) is not a rule of evidence, in order to convert what is
20 otherwise legal into something illegal, would vitiate the policies underlying that section. These policies are to bar litigation over past events ‘after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,’ H.R.Rep.No. 245, 80th Cong., 1st Sess., p. 40,10¹³ and of course to stabilize existing bargaining relationships.

25 Id.

30 In subsequent cases, the Board has held that a continuing violation theory does not apply to an 8(a)(5) contract repudiation outside the 10(b) period but does apply to individual 8(a)(5) midterm modifications of particular contractual provisions (even though the charging party was aware of some violations which occurred outside the 10(b) period). See *A & L Underground*, 302 NLRB 467 (1991) (continuing violation theory does not apply to a total repudiation of the contract); *Farmingdale Iron Works, Inc.*, 249 NLRB 98 (1980) (each failure to
35 make contractually required monthly benefit payments within the 10(b) period constituted a separate and distinct violation which was not time barred). For 10(b) purposes, contract repudiation includes a refusal to apply the contract to a disputed group of employees and need not necessarily involve a refusal to apply the contract to all employees. See *St. Barnabas Medical Center*, 343 NLRB 1125, 1127 (2004); *Springfield Day Nursery d/b/a Square One*, 362
40 NLRB 261, 263 (2015).

45 Here, the Respondent's use of STO RNs within the 10(b) period seems more akin to a continuing series of midterm modifications than a one-time contract repudiation. The General Counsel does not take issue in its brief with the Respondent's failure to apply the RN CBA to STO RNs. Thus, the General Counsel has not relied on the Respondent's conduct outside the 10(b) period (i.e., contract repudiation) to render illegal otherwise lawful conduct within the 10(b) period. Further, in April 2022, the Union did not have clear knowledge of a “completed” ULP. Cf. *Square One*, 362 NLRB at 264 (employer's refusal to apply contract to substitute teachers outside the 10(b) period amounted to “a completed violation of the Act”). Thus, the Union was not in a position to know whether the Respondent intended to use STO RNs in perpetuity or to what extent. The Respondent did not notify the Union of its plan going forward. In fact, on September 16, 2022 in response to a Union information request, the Respondent advised the Union that “STO positions are temporary contracted positions that are being used to temporarily

supplement nursing staff at the Hospital, while the Hospital continues to recruit and fill the permanent bargaining unit positions.” (G.C. Exh. 56) Since the Respondent did not make an internal decision and communicate to the Union a fixed, permanent, and completed plan to staff the Hospital in a way which perhaps violated the Act, the Respondent’s conduct is more akin to an ongoing series of alleged violations than one definitive and completed violation. Accordingly, below, I analyze on the merits whether the Respondent violated the Act by hiring and using STO RNs to perform RN Unit work during the 10(b) period beginning April 17, 2022.

Merits

The Respondent does not deny that the use of STO RNs was a mandatory subject of bargaining. Rather, the Respondent contends that its unilateral use of STO RNs was authorized by the RN CBA.

This case was briefed by the parties before the Board issued its decision in *Endurance Environmental Solutions, LLC*, 373 NLRB No. 141 (2024) (*Endurance Environmental*). *Endurance Environmental* overruled the “contract coverage” standard in *MV Transportation Inc.*, 368 NLRB No. 66 (2019) (*MV Transportation*) and returned to a “clear and unmistakable” standard for evaluating a party’s claim that its unilateral action was authorized by contract. “Under that standard, the Board will not lightly infer a contractual waiver of the statutory right to bargain and will instead require such a waiver to be ‘clear and unmistakable.’” *Endurance Environmental*, 373 NLRB slip op. at 1.

In *Endurance Environmental*, the Board found retroactive application of the clear and unmistakable standard appropriate in that particular case but did “not decide whether to apply the new standard retroactively in all pending cases, leaving resolution of that question to future determination.” *Id.* slip op. at 21. In so finding, the Board noted that when “the parties negotiated the collective-bargaining agreement at issue, the governing standard was the same standard we return to today—the clear and unmistakable waiver standard.” Since, here, the RN CBA was executed after the contract coverage standard became law, I will not retroactively apply *Endurance Environmental* and will, instead, apply *MV Transportation*. However, I note that the *MV Transportation* analysis incorporates at step two the clear and unmistakable waiver standard. Thus, my analysis effectively encompasses both standards.

Under *MV Transportation*, 368 NLRB No. 66 (2019), when a party to a collective-bargaining agreement contended it was authorized by contract to take unilateral action on a mandatory subject of bargaining, the Board used a two-part “contract coverage” test to evaluate the defense. The Board explained this test as follows:

Under contract coverage, the Board will examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally. . . . In other words, under contract coverage the Board will honor the parties’ agreement, and in each case, it will be governed by the plain terms of the agreement. On the other hand, if the agreement does not cover the employer’s disputed act, and that act has materially, substantially and significantly changed a term or condition of employment constituting a mandatory subject of bargaining, the employer will have violated Section 8(a)(5) and (1) unless it demonstrates that the union clearly and unmistakably waived its right to bargain over the change or that its unilateral action was privileged for some other reason.^[1] Thus, under the contract coverage test we adopt today, the Board will first review the plain language of the parties collective-bargaining

agreement, applying ordinary principles of contract interpretation, and then, if it is determined that the disputed act does not come within the compass or scope of a contract provision that grants the employer the right to act unilaterally, the analysis is one of waiver.

Id. slip op. at 2.

“[T]he burden of proving an affirmative defense such as contract coverage is on the party asserting it.” *Metro Health, Inc. d/b/a Hospital Metropolitan Rio Piedras*, 372 NLRB No. 149, slip op. at 4, fn. 9 (2023), citing *Marydale Products Co., Inc.*, 133 NLRB 1232, 1235 fn. 8 (1961). This burden requires a preponderance of the evidence that the parties have already bargained and reached agreement over contractual language which covers and authorizes a disputed unilateral change. Id.

Here, the Respondent relies on RN CBA Article VII - Definitions and Length-of-Service (Seniority) Section 2.2, 2.3, and 2.10 as the basis of its alleged right to unilaterally hire and use STO RNs. Section 2.2 provides, in part (G.C. Exh. 4):

When PRN is used in this CBA it refers to those who in the previous CBAs were labeled as contingent or relief on call. When contingent is used in this CBA it refers to contracted or agency nurses.

Section 2.3 and 2.10 define the order of layoff of different classifications with “contingent” employees designated the first to be laid off.

Assuming for the moment that, as the Respondent argues, STO RNs are “contracted” and therefore “contingent,” Section 2 does reflect an expectation that the Respondent would employ STO RNs since they could not be laid off if they were not hired in the first place. However, the order of layoff provisions at Section 2.3 and 2.10 do not necessarily indicate that the Respondent has the right to hire and use STO RNs without bargaining over the subject. This is in marked contrast with Article VII Section 3.1 which states that “[t]he Hospital has the right to use and employ PRN Registered Nurses” up to 96 hours in three biweekly pay periods. Thus, while Section 3 would cover and authorize the Respondent to unilaterally hire and use PRN RNs, Section 2 (which deals with the layoff of contingent employees) does not, on its face, cover and authorize the Respondent to unilaterally hire and use STO RNs.

Although the plain language of the RN CBA does not establish that the Respondent had the contractual right to unilaterally hire and use STO RNs and the record is not entirely clear as to the Union’s understanding of the RN CBA, I am mindful that Union President Carlisle and RN Unit Chief Steward Drouillard appeared to indicate that they understood the Respondent to be contractually entitled to use contingent agency employees. (Tr. 588, 700-701) This at least arguably implies that the Union was reading RN CBA Article VII Section 2 as a provision which allowed the Respondent to hire and use *all* contingent nurses unilaterally (even if the Union did not believe that STO RNs were contingent as “contracted” nurses).

This leads to an analysis whether STO RNs are contingent “contracted” nurses within the meaning of RN CBA Article VII Section 2.2. The Respondent claims STO RNs are “contracted” because they sign individual contracts with the Respondent. The Respondent argues that the word “contracted” would be redundant if, as asserted at hearing by Union counsel, it was synonymous with “agency.” I do not believe the matter is so easily resolved. The Respondent has a contractual relationship with everyone who works at the Hospital, including PRN RNs who, like STO RNs, have individual contracts. And like STO RNs, PRN

RNs are only scheduled to work shifts if unit RNs do not claim all the shifts through the Kronos system. However, the current RN CBA did not identify as contingent the PRNs who were contingent under previous collective-bargaining agreements. (G.C. Exh. 4 - Art. VII Sec. 2.2.)
 5 Since PRN RNs sign individual contracts with the Respondent and were not included in the RN CBA definition of contingent “contracted” nurses, the STO RNs cannot be “contracted” nurses simply because they, like PRN RNs, sign individual contracts with the Respondent.

At hearing, Respondent’s counsel represented that STO RNs were independent
 10 contractors and, perhaps, this begins to get us to the heart of the matter. (Tr. 702) It would make some sense to group STO RNs as self-employed independent contractors with agency RNs since neither classification of worker would be “employees” of the Respondent. However, neither party briefed whether STO RNs are independent contractors and I will not go farther down that legal rabbit hole. Since the Respondent has the burden to prove its unilateral use of
 15 STO RNs was authorized by the RN CBA and I reject the Respondent’s only argument to that effect (i.e., STO RNs are “contracted” because they have individual contracts with the Respondent), I recommend a finding that the Respondent has not established a contract coverage defense at step one of the *MV Transportation* standard.¹⁵

Having refused to find that the parties, by entering into the RN CBA, agreed in advance
 20 that the contract covered and authorized the Respondent’s unilateral use of STO RNs, I turn to the second prong of the *MV Transportation* analysis – i.e., whether the Respondent proved the Union clearly and unmistakably waived the right to bargain over the Respondent’s hire and use
 25 of STO RNs. As discussed above, RN CBA Section 2 is ambiguous as to whether STO RNs are contingent “contracted” nurses and, if so, whether the Respondent can unilaterally hire and use STO RNs without bargaining. Thus, be it at step two of the *MV Transportation* standard or applying *Endurance Environmental* retroactively, I recommend a finding that the Union did not clearly and unmistakably waive its right to bargain over the hire and use of STO RNs.

Lastly, the Respondent contends that the use of STO RNs to perform unit work was
 30 lawful because it was not a material, substantial, and significant change. See *MV Transportation*, 368 NLRB No. 66 (2019); *The Rupert Co.*, 366 NLRB No. 179 (2018). Specifically, the Respondent claims RN Unit employees were not harmed by the change because STO RNs were only used for shifts that unit RNs declined. I reject this argument.
 35 First, the RN schedule is filled in a three-step process whereby (1) unit RNs initially select shifts through Kronos, (2) nonunit RNs, including STO RNs, are offered shifts the unit RNs did not select, and (3) unit RNs are solicited to fill remaining vacant shifts. If STO RNs were not offered shifts at step 2, it would likely increase the opportunity of unit RNs to select shifts at step 3,
 40 including shifts which paid an overtime rate or a critical pay rate higher than the standard contractual straight-time rate. Second, if the Respondent could not use STO RNs, it would arguably increase the Union’s leverage to negotiate higher compensation for unit RNs. Third, the Union may simply prefer that this employer, and perhaps all employers, hire union
 45 represented unit employees upon the belief that an increase in the number of union represented employees would increase their collective-bargaining power.

Based upon the foregoing, I find that, beginning April 17, 2022, the Respondent violated
 Section 8(a)(5) and (1) of the Act by hiring and using STO RNs to perform RN Unit work.

¹⁵ Perhaps the bargaining parties can work out a resolution of the contractual dispute without further intervention by the Board. However, if they cannot and exceptions to this decision are filed, the parties can provide the Board with additional briefing as to whether STO RNs are contingent “contracted” nurses and whether that turns on their status as independent contractors or employees.

**Unilateral Discontinuance of Practice of Providing Unit Employees Thanksgiving Turkeys
– Complaint ¶¶ 22(b), 23(b), 24(b)**

5

Facts

10 Annually from at least 1997 to about 2018, Crittenton Hospital provided employees with 10-12 pound turkeys for Thanksgiving. (Tr. 412) The Respondent continued this practice after purchasing the Hospital in about 2018. (Tr. 412-413, 439-441, 794, 852-856)

In November 2022, food vendor Sysco advised the Respondent that they could not provide turkeys due to the avian flu. (Tr. 764-768)

15 On November 14, 2022, in a weekly informational announcement from Josie Marinello to Hospital staff, the Respondent notified staff that turkeys would not be available that year due to a recent avian flu-outbreak. (G.C. Exh. 45) (Tr. 413) The Respondent did not notify or offer to bargain with the Union before sending this November 14, 2022 announcement. (Tr. 192)

20 The Union subsequently mentioned turkeys in contract negotiations, but did not make a formal proposal regarding the subject. (Tr. 442-447, 854)

25 On December 1, 2022, the Ascension Michigan Connection contained an article indicating that Ascension St. Mary's Hospital distributed 2,177 turkeys to staff.

On December 2, 2022, Union RT Unit steward Anschuetz sent an email to management which referenced the December 1, 2022 Connection article regarding turkeys and stated, in part, the following (G.C. Exh. 46):

30 If you didn't want to give out turkeys or just wanted to cut costs fine. But to say I'm not getting a turkey because the Avian Flu? Was the outbreak isolated to the Rochester area? Everyone wants to be appreciated. A loyal employee of 25 years.

35 Later that day, December 2, 2022, Asencion Michigan Chief Strategy Officer Jordan Jeon sent an email reply to Anschuetz which stated, in part, the following (G.C. Exh. 46):

40 Unfortunately, I, too, learned that the turkey distribution could not occur this year with the notice we received from our food vendor because of the Avian-Flu outbreak. Also, due to the logistical challenges and the timing, securing another distributor for all of our hospitals was not feasible; instead, the decision was made to provide Thanksgiving dinner for all employees working the holiday. Luckily, the Genesys leaders were able to secure enough turkeys from another vendor to continue the tradition at their location.

45

I understand this is not a satisfactory answer, but I wanted to provide you with the information I could find.

As you know, healthcare organizations are experiencing unprecedented challenges unlike we have ever experienced since the pandemic. I know these unpleasant challenges are not easy and may be too frequent to hear about in this pandemic, but I hope one day soon, we can all look back at this time and see that we made a difference in each other and many people's lives. We are so

thankful for your commitment because we value the mission that has been stewarded to us, and associates like you make it all possible.

5 Thank you for all your years of service and dedication to our patients, making a difference, and choosing courage over comfort and right over what is easy. We are committed to striving to improve our commitment to our associates. We will do better.

10 In November 2023, the Respondent again refused to provide employees with Thanksgiving turkeys and did so without notifying and offering to bargain with the Union. (Tr. 420, 783-785, 855)

Analysis

15 The General Counsel contends the Respondent, in 2023, violated Section 8(a)(5) and (1) of the Act by unilaterally failing to provide Thanksgiving turkeys to unit employees. The Respondent contends that the free turkeys were gifts and not a mandatory subject of bargaining.

20 The Board has not been entirely consistent in determining whether the failure to continue a practice of providing holiday turkeys or hams is an unlawful unilateral change in the terms and conditions of employment of employees. See *Benchmark Industries, Inc.*, 270 NLRB 22 (1984) (no violation where employer discontinued 3-year practice of providing Christmas hams and dinners, which were “token items” and “merely gifts”); *Southern States Distribution, Inc.*, 264 NLRB 1, 3 (1982) (violation where employer discontinued 6-year practice of providing \$25 Christmas bonuses and Thanksgiving turkeys); *Lima Register Co.*, 260 NLRB 1295 (1982) (violation where employer discontinued 8-year practice of providing Christmas hams); *Aeronca, Inc.*, 253 NLRB 261 (1980) (violation where employer discontinued longstanding practice of providing Christmas turkeys), enf. denied 650 F.2d 501 (4th Cir. 1981); *Atlantic International Corporation*, 246 NLRB 291, 295 fn. 4 (1979) (violation where employer discontinued previous practice for “a number of years” of giving employees turkeys or hams at Thanksgiving and Christmas). In addressing the unilateral elimination of holiday cash bonuses, legality has turned on whether the employer created an expectation among employees that the bonus is part of their wages. See *Laredo Coco Cola Bottling Company*, 241 NLRB 167, 174 (1979); *Niles-Bement-Pond Co.*, 97 NLRB 165, 166 (1951).

40 In finding that Christmas hams could not “fairly . . . be characterized as compensation or as terms and conditions of employment,” the *Benchmark Industries* Board majority noted that the “hams had been given to all employees regardless of their work performance, earnings, seniority, production, or other employment-related factors.” 270 NLRB at 22. In rejecting the dissent’s position that Christmas hams were a condition of employment because the employer gave them to employees 3 years in a row, the Board majority found reliance on the duration of the practice to be “an overly legalistic view of the employment relationship, at odds with the experience of most Americans that there may be expressions of good feeling between employer and employee which, at least at Christmas, allow for the giving of gifts with no strings attached.”

45 Id. In *Stone Container Corp.*, where the Board found lawful the discontinuance of certain holiday benefits including a Thanksgiving dinner offered for the previous 19 years, the Board held that “the length of time that certain of these gifts were given by the Respondent, without more, is insufficient to establish that they were terms and conditions of employment.” 313 NLRB 336, 337-338 (1993), citing *Harvstone Mfg. Corp.*, 272 NLRB 939, 939 fn. 1 (1984).

Following *Benchmark Industries*, the Board has relied upon that decision in differentiating between gifts not based on “employment-related factors” (not mandatory subjects of bargaining

and conditions of employment which are based on such factors (mandatory subjects of bargaining). See, e.g., *Bob's Tire Co., Inc.*, 368 NLRB No. 33, slip op. at 2 fn. 6 (2019). Since the Hospital's provision of annual Thanksgiving turkeys to unit employees was not based on employment-related factors, a change in that practice must be characterized as the mere discontinuance of a gift and not a condition of employment. *Benchmark Industries*, 270 NLRB at 22. The long length of the practice, alone, is not controlling. See *Stone Container Corp.*, 313 NLRB 336, 337-338 (1993).

Based upon the foregoing, I recommend dismissal of the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally discontinuing the practice of providing Thanksgiving turkeys to unit employees

8(a)(5) Overall Bad-Faith Bargaining – Complaint ¶¶ 26-27

Facts

As noted above, parties began bargaining for a successor RN CBA in August 2022 and for a successor RT CBA in November 2022. In attempting to establish that the Respondent engaged in overall bad-faith bargaining with no intention of reaching successor CBAs, the General Counsel relies on facts, set forth above, underlying other ULP allegations. The General Counsel also relies heavily on, as discussed below, contract proposals submitted by the Respondent to the Union during negotiations.

Proposals on Article VII of the RN CBA

On September 28, 2022, the Respondent emailed the Union a proposal with a modified RN CBA Article VII, including the following modifications to Article VII Section 3.1 (G.C. 60):

Section 3.1. The Use of PRN Associates

1. The Hospital has the right to use and employ PRN Registered Nurses up to ~~ninety-six-one hundred twenty~~(120~~96~~) hours in three (3) bi-weekly pay periods. Such RNs shall be termed PRN RNs. The Hospital agrees to abide by this standard. However, PRNs may pick up open shifts above the one hundred twenty (120) hours, so long as the open shifts have been posted and regular full-time and part-time RNs had an opportunity to sign up for the open shifts.

~~9. Present PRN employees shall be identified by name. Such PRN employee(s) shall be permitted to continue under the conditions of the present wage structure. RNs may opt to a PRN employee status if same is available.~~

~~10. Names and wages rate(s) by total range and hHours worked by PRN employees (RNs) shall be made available upon request subject to verification by the Bargaining Unit Vice-President with a list given at least after each three (3) bi-weekly pay period.~~

On June 6, 2023, the Union emailed the Respondent proposals, but stated, “[w]e remain unable to analyze the hospital's proposals on Article 7, or formulate our responses, as we still have not received the hospital's responses to our information requests re: contingent use and updated (post August 2022) STO use.” (G.C. Exh. 60)

Throughout negotiations, the parties did not modify their positions regarding RN CBA Article VII Section 3.1. (G.C. Exh. 60)

Proposals on Article XIII of the RN CBA and RT CBA

5 On August 23, 2022, the Respondent emailed proposals to the Union, including the following underlined addition to RN CBA Article XIII – Hospital Rights (G.C. Exh. 61):

10 Section 1. The Hospital retains the sole right to manage and operate the Hospital including but not limited to the sole and exclusive right to decide the number and assignment to employees; to implement professional standards of patient care; to determine and change the availability and prices of services made available by the Hospital to employees; to implement a dress code, and/or standards of infection control and hygiene; to maintain order and efficiency and to make rules of conduct for employees; to discontinue, transfer, and/or subcontract bargaining unit work or bargaining unit positions, in whole or in part; to hire, layoff, discipline, discharge, assign, transfer and promote employees and to determine the starting and quitting time and the number of hours and which days to be worked, subject only to the express restrictions governing the exercise of these rights which may be expressly provided in this Agreement. The Hospital shall have the sole and exclusive right to administer all matters not specifically and expressly covered by this Agreement, without limitation, implied or otherwise.

25 On March 6, 2023, the Union emailed proposals to the Respondent, including Article XIII without the language added by the Respondent. (G.C. Exh. 61 p. 6)

On June 7, 2023, the Respondent emailed the Union a package proposal which removed language the Respondent proposed to add to RN CBA Article XIII, but added the following language in Article XIII Section 8 (G.C. Exh. 61 pp. 56-57)

30 Section 8. The Hospital shall have the right to subcontract bargaining unit work or bargaining unit positions, on a temporary and/or permanent basis. The Hospital shall not permanently subcontract bargaining unit positions unless the subcontracting is part of an Ascension program in which RN positions are being subcontracted at other Ascension Hospitals as well.

35 On August 3, 2023, the Respondent emailed the Union a package proposal which replaced its previous proposal at Article XIII Section 8 with the following language (G.C. Exh. 61 p. 136):

40 Section 8. The Hospital shall have the right to subcontract bargaining unit work or bargaining unit positions, on a temporary and/or permanent basis.

With regard to permanent subcontracting:

45 APRH agrees to provide the Union with at least thirty (30) days' notice prior to implementation to meet and discuss alternative ideas. The subcontractor must offer current bargaining unit employees in the affected job titles the opportunity to perform the work without a reduction in pay, subject to the subcontractor's pre-employment screening requirements. Previous bargaining unit employees actively employed by the subcontractor will remain eligible to apply for and fill vacant positions in the Hospital bargaining unit, provided they are qualified to perform the work with a reasonable orientation and training period, and shall have their previous seniority reinstated upon notice to the Hospital.

Throughout the remainder of negotiations for a successor RN CBA, the Union rejected the Respondent's proposal on RN Article XIII Section 8. (G.C. Exh. 61)

5 In negotiations for a successor RT CBA, as in negotiations for the RN CBA, the Respondent proposed similar modifications to Article XIII in the same order. On January 10, 2023, the Respondent proposed to add to Article XIII, Section 1 the right to "discontinue, transfer, and/or subcontract bargaining unit work or bargaining unit positions, in whole or in part." (G.C. Exh. 63 p. 4) On May 18, 2023, the Respondent retracted that language and proposed a new RT CBA Article XIII Section 5 with language identical to the language it proposed on June 7, 2023 as RN CBA Article XIII Section 8. (G.C. Exh. 63 p. 32) On August 9, 2023, the Respondent proposed a revised RT CBA Article XIII Section 5 identical to the language it proposed on August 3, 2023 as RN CBA Article XIII Section 8. (G.C. Exh. 63 p. 139) The Union rejected all the Respondent's proposed modifications to RT CBA Article XIII. (G.C. Exh. 63)

Analysis

20 The General Counsel contends that the Respondent violated Section 8(5) and (1) of the Act by engaging in overall bad-faith bargaining with an intent to avoid reaching successor CBAs.

25 Section 8(d) of the Act defines the duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." "Good-faith bargaining 'presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract[.]'" while surface bargaining presupposes a desire to do the opposite. *St. George Warehouse, Inc.*, 349 NLRB 870, 871 (2007). "From a party's total conduct both at and away from the bargaining table, the Board determines whether the party is 'engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement.'" *Id.* at 872, quoting *Public Service Co.*, 334 NLRB 487, 487 (2001). While the Board will look at the totality of a party's conduct, "the Board is reluctant to find bad-faith bargaining exclusively on the basis of a party's misconduct away from the bargaining table." *St. George Warehouse, Inc.*, 349 NLRB 870, 871 (2007), quoting *Litton Systems*, 300 NLRB 324, 330 (1990), *enfd.* 949 f.2d 249 (8th Cir. 1991), *cert. denied* 503 U.S. 985 1992). Instead, "such conduct 'has been considered for what light it sheds on conduct at the bargaining table.'" *Id.*, quoting *Litton Systems*, *supra*.

40 The General Counsel relies heavily on the Respondent's subcontracting bargaining proposals in both units. Citing *A-1 King Size Sandwiches, Inc.*, 265 NLRB 850 (1982) and *Kitsap Tenant Support Services*, 366 NLRB No. 98 (2018), the General counsel notes that proposals can suggest bad faith where an employer seeks unfettered discretion over key terms and conditions of employment, thereby leaving the union with fewer rights and less protection than provided by law without a contract. I note initially that the Respondent, by its subcontracting proposals, did not seek to retain control over key terms and conditions of employment. By subcontracting, the Respondent would more likely forego and largely relinquish control of such terms to a third-party employer. If not, the Respondent could potentially be found a joint employer still bound by the CBAs. See *Healthbridge Management, LLC*, 365 NLRB 274 (2017). Further, particularly given the requirement in the Respondent's proposals that any subcontractor must offer unit employees in the affected job titles the opportunity to continue performing their work without a reduction in pay, the subcontractor would potentially be a successor with an obligation to bargain with the Union. See, e.g., *Adams & Associates, Inc.*,

363 NLRB 1923 (2016). Indeed, if a subcontractor were a “perfectly clear” successor, that successor would be prohibited from unilaterally setting initial terms of employment before bargaining with the Union. *Id.* However, even if a subcontractor were not a joint employer or successor of the Respondent, the Respondent’s proposed subcontracting provision would not waive employees’ right to unionize and bargain collectively.

The General Counsel, citing *University of Pittsburgh Medical Center*, 320 NLRB 122, 122-123 (1995), concedes that the Respondent’s proposals, alone, would not warrant a finding of overall bad-faith bargaining, but insists that the Respondent’s “harsh proposals” viewed in the context of other conduct warrant such a finding. (G.C. Brf. p. 113) Initially, I disagree that the Respondent’s proposals contribute to a finding of bad faith. An employer’s subcontracting decision is a mandatory subject of bargaining and an employer’s proposal of a management right to act unilaterally without bargaining on such a decision is, itself, a mandatory (not illegal or permissive) subject of bargaining. See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964); *NLRB v. American Nat. Ins. Co.*, 343 U.S. 395 (1952); *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871 (9th Cir. 1978), denying enf. of 220 NLRB 636 (1975); *Toledo Blade Co.*, 295 NLRB 626, 627 (1989). The Union might always view subcontracting as a means of union avoidance, but the Board has not adopted that view as a matter of law. *Id.* Indeed, a union might agree to an employer’s subcontracting provision in exchange for concessions such as an increase in compensation, particularly where, as here, the Respondent’s proposal includes language requiring a subcontractor to retain unit employees at a certain wage rate. See *NLRB v. Tomco Communications, Inc.*, 567 F.2d at 879 (even the Board would not complain about an employer’s insistence to impose on a management rights clause if there were significant economic benefits to compensate for the loss of a union’s representation rights during the term of the contract). The General Counsel provided no analysis of the Respondent’s proposals in their entirety to determine whether the Union and employees would have been better off without a contract. See *Atlanticare Management, LLC d/b/a Putnam Ridge Nursing Home*, 369 NLRB No. 28, slip op. at 1, 22-23 (2020) (no finding of overall bad faith where it was unclear whether the employer’s proposal, if accepted as a package, would leave employees worse off than they would be without a contract). Absent such an analysis of the Respondent’s proposals as a whole, there is no reason to believe the Respondent’s subcontracting proposals infer a bad faith intent to avoid successor CBAs. *Id.*

Similarly, I reject the General Counsel’s assertion that the Respondent’s previous subcontracting of medical lab technologist unit work is an aggravating factor which supports a finding that the Respondent was acting in bad faith to avoid reaching successor CBAs. The record contains no details of events leading to the subcontracting of medical lab technologist work. Thus, the record does not indicate that the subcontractor, much less the Respondent, violated the Act by conduct designed to avoid union organizing or collective bargaining by the subcontractor’s employees. In fact, if the Respondent subcontracted the medical lab technologist unit work in an attempt to reduce costs or rectify a staffing shortage, and was successful in that endeavor, it would be a legally legitimate reason for the Respondent to seek the right to subcontract the work of other units.

This leaves the General Counsel with an assertion that the other ULPs found herein, when considered collectively, establish that the Respondent was engaged in an overall bad-faith effort to frustrate agreement. The General Counsel takes particular issue with the Respondent’s failure to provide certain information which would have allowed the Union to bargain more effectively. In this regard, the General Counsel relies heavily on the Respondent’s failure to provide wage information which may have confirmed the Union’s belief that the Respondent was not offering wages sufficient to compete with other hospitals in the Detroit area, including other Ascension hospitals. Likewise, the General Counsel relies heavily on the Respondent’s failure

to produce information regarding the performance of unit work by nonunit employees, which would have allowed the Union to evaluate and make counterproposals regarding the Respondent's Article VII proposals to expand its use of PRNs. It is certainly possible that the Respondent did not want to disclose information which might suggest it was not proposing wages sufficiently competitive to staff the Hospital with unit employees and, instead, sought to obtain the contractual right to expand its use of nonunit workers without disclosing its prior use of the same. While such conduct might properly be characterized as a "bad-faith" attempt to avoid its bargaining obligations in pursuit of business ends, it does not suggest the Respondent was avoiding agreement altogether. Rather, the Respondent arguably used unlawful heavy handed tactics in an attempt to obtain a more favorable contract. See *Atlanticare Management LLC d/b/a Putnam Ridge Nursing Home*, 369 NLRB No. 28, slip op. 1, 23, fn. 28 (2020) (employer's unlawful refusal to furnish information, unilateral and discriminatory reduction of merit wage increases, delay in bargaining, discriminatory discharge of a union supporter, and overly broad rule prohibiting union business could have adversely impacted the union's ability to bargain effectively, but did not prove the employer was avoiding agreement altogether).

I do not find that the remainder of the violations warrant a finding of overall bad-faith bargaining. None of the ULPs occurred "at the bargaining table," but the failures to furnish information, unilateral change, and refusal to immediately reinstate returning ULP strikers were violations directly related to bargaining. Although I found that the Respondent violated 8(a)(5) by unilaterally hiring and using STO RNs to perform unit work, it is not lost on me that my analysis was a close one and the Respondent could have had a good-faith belief that the RN CBA authorized its unilateral action.¹⁶ As for the 8(a)(5) failures to furnish information, the Respondent did not simply stonewall and reject all the Union's information requests altogether. The Respondent's 8(a)(3) failure to immediately reinstate employees engaged in a ULP strike was a significant violation, but amounted only to a 1 day lockout and such a brief cessation of work was unlikely to have a dramatic impact on lengthy negotiations which continued thereafter.

Apart from the 8(a)(5) and (3) violations, the 8(a)(1) violations away from the bargaining table did not appear designed to torpedo bargaining or to have a significant and detrimental impact on the ability of the parties to reach agreement. The overbroad restriction of union activity on Hospital property perhaps made a strike vote more difficult for unit employees, but did not prevent unit employees from striking. And even if the Respondent was attempting to avoid a strike, that does not necessarily mean the Respondent was attempting to avoid a contract. During an incident at Jimmy John's, Respondent Director of Pharmacy Schwalbach implied that the Union would need to cease outside union activity, such as handing out posters and flyers, before the Respondent might concede to Union wage demands. However, the record contains no evidence that Schwalbach was involved in negotiations or had any control over the Respondent's contract proposals. The record also contains no evidence that the Respondent actually suspended negotiations or refused to make certain concessions because employees engaged in a rally or other public union activities.

Based upon the foregoing, I recommend dismissal of the allegation that the Respondent violated Section 8(a)(5) and (1) of the Act by engaging in overall bad-faith bargaining with an intent to avoid reaching successor CBAs.

¹⁶ Note that whether an employer had a "sound arguable basis" for a contractual interpretation is the standard in determining whether the employer has engaged in a midterm modification of a collective-bargaining agreement. See *Bath Iron Works Corp.*, 345 NLRB 499, 501-502 (2005). That standard does not apply, as here, where the General Counsel contends the use of RNs was a unilateral change of terms and conditions of employment.

CONCLUSIONS OF LAW

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

10 2. The Union, Local 40, Office and Professional Employees International Union (OPEIU), AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

15 3. The Respondent violated Section 8(a)(1) of the Act by:

 a) Issuing overbroad rules by telling employees they were prohibited from making negative comments about the Respondent, must maintain a positive attitude about the Respondent, and are otherwise prohibited from engaging in conduct which could encompass Section 7 activity.

 b) Issuing overbroad rules by telling employees they cannot engage in union business on Hospital property, including the hospital lobby and conference rooms where the activity does not disrupt Hospital operations or disturb patients.

 c) Issuing overbroad rules by telling employees not to discuss with anyone the Respondent's disciplinary investigation and investigatory interviews of employees by management regarding a change of the PACS scanner password.

 d) Threatening to call the police to remove employees from the Hospital's public lobby because they were engaging in union activity on Hospital property.

 e) Impliedly threatening not to give employees wage raises if they did not stop engaging in union activity.

 f) Promising employees wage raises if they stop engaging in union activity.

35 4. The Respondent violated Section 8(a)(3) and (1) of the Act by, on September 14, 2022, failing and refusing to reinstate employees who engaged in a ULP strike upon their unconditional offer to return to work.

40 5. The Respondent violated Section 8(a)(5) and (1) of the Act by:

 a) Failing to furnish the Union with information the Union requested on June 17, 2022, September 19, 2022, November 17, 2022, January 11, 2023, February 14 2023, and February 28, 2023, which was relevant and necessary to the performance of the Union's role as the exclusive collective-bargaining representatives of unit employees.

 b) Unilaterally hiring and using STO RNs to perform RN Unit work.

45 6. The Respondent did not violate the Act by:

 a) Unilaterally discontinuing an annual practice of providing unit employees with Thanksgiving turkeys.

b) Engaging in overall bad-faith bargaining with an intent to avoid reaching successor CBAs.

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

THE REMEDY

10 Having found that the Respondent, Ascension Providence Rochester Hospital, engaged in unfair labor practices, I shall order the Respondent to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

15 Having determined that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to reinstate ULP strikers on September 14, 2023 upon their unconditional offer to return to work, the Respondent will make whole the ULP strikers for any loss of earnings. Under *Thryv, Inc.*, 272 NLRB No. 22 (2022), the Respondent shall compensate any affected employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful failure to, on September 14, 2023, immediately reinstate employees who engaged in a ULP strike upon an unconditional offer to return to work.¹⁷ The make-whole award will be calculated in the manner set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *Alaris Health at Castle Hill*, 367 NLRB No. 52, slip op. at 6 (2018).

25 Regarding the Respondent's failure to immediately reinstate ULP strikers, I decline to recommend the additional remedy, sought by the General Counsel, that the Union be made whole by reimbursement for any economic assistance the Union provided to employees who participated in the ULP strike. In seeking this remedy, the General Counsel relies on *Spike Enterprise, Inc.*, 373 NLRB No. 41 (2024) and *Alwin Manufacturing Co.*, 326 NLRB 646, 647 & fn. 5 (1998). In *Spike Enterprise*, the Board listed such a strike cost reimbursement remedy among those that are appropriate "where an employer has engaged in unlawful conduct warranting a broad cease-and-desist order." 373 NLRB slip op. at 11, 13, citing *Noah's Ark Processors, LLC d/b/a WR Reserve*, 372 NLRB No. 80, slip op. at 4 (2023). In *Alwin Manufacturing*, the Board ordered such a remedy where the Respondent's conduct was "egregious" and "unusually aggravated." 326 NLRB slip op. at 657 & fn. 5. Here, in my opinion, the requested remedy of ULP strike costs is not appropriate since I have not recommended a broad cease-and-desist order and the Respondent's violations do not rise to the level of egregious and aggravated conduct.

40 Having determined that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide the Union with notice and the opportunity to bargain over the hire and use of STO RNs for the period beginning April 17, 2022, the recommended order shall direct the Respondent to notify and, upon request, bargain with the Union concerning such STO RN use. A unilateral transfer of unit work to nonunit employees clearly warrants a make-whole remedy when specific unit employees have suffered a loss such as a layoff or reduction in wages as a result of the transfer of unit work. See, e.g., *See Geiger Ready-Mix Co. of Kansas, Inc.*, 323

¹⁷ The General Counsel contends that, "[f]or reasons stated in *Thryv*," the Respondent should be responsible for harms "preceding the lockout." (G.C. Brf. p. 12) I will leave it to a compliance proceeding to determine, if necessary, the issue whether the appropriate remedy should include harms which preceded the Respondent's failure to reinstate ULP strikers on September 14, 2023.

5 NLRB No. 79 (1997); *Regal Cinemas, Inc.*, 334 NLRB 304 (2001); *Wells Fargo Armored Services Corp.*, 322 NLRB 616 (1996). It is less clear whether a make-whole remedy is appropriate when specific employees are not shown to have lost earnings or benefits, but the unit, as a whole, lost the opportunity for increased earnings because unit work was unilaterally assigned to nonunit employees. However, the Board did order such a remedy in at least one case, *Ampersand Publishing, LLC d/b/a Santa Barbara News-Press*, 362 NLRB 252, 254 (2015), incorporating 358 NLRB 1415 (2012). Accordingly, I will recommend the same. The mechanics of determining who, if anyone, should be made whole may, if necessary, be addressed in a compliance proceeding. Under *Thryv, Inc.*, 272 NLRB No. 22 (2022), the Respondent shall compensate affected employees for any direct or foreseeable pecuniary harms incurred as a result of the unlawful hire and use of STO RNs. The make-whole award will be calculated in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

20 Having determined that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to furnish the Union with requested information that is relevant and necessary to its function as the exclusive collective-bargaining representative of unit employees, the recommended order will direct the Respondent to, on request, furnish the Union with the requested information.

25 On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended¹⁸

ORDER

30 The Respondent, Ascension Providence Rochester Hospital (the Respondent), Rochester, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

35 a) Issuing overbroad rules by telling employees they are prohibited from making negative comments about the Respondent, must maintain a positive attitude about the Respondent, and are otherwise prohibited from engaging conduct which could encompass activity protected by Section 7 of the National Labor Relations Act (the Act).

40 b) Issuing overbroad rules by telling employees they cannot engage in union activity on the Respondent's property, including the hospital lobby and conference rooms where the activity does not disrupt operations or disturb patients.

45 c) Issuing overbroad rules by telling employees not to discuss with anyone the Respondent's disciplinary investigations and investigatory interviews of employees by management.

d) Threatening to call the police to remove employees from the public lobby because they were engaging in union activity on hospital property.

¹⁸ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

5 e) Threatening not to give employees wage raises if they did not stop engaging in union activity.

f) Promising employees wage raises if they stop engaging in union activity.

10 g) Failing and refusing to immediately reinstate employees who engaged in an unfair labor practice (ULP) strike upon their unconditional offer to return to work.

15 h) Unilaterally changing the terms and conditions of employment of unit employees by, on or after April 17, 2022, without providing their exclusive collective-bargaining representative, Local 40, Office and Professional Employees Internation Union (OPEIU), AFL-CIO (the Union), notice and an opportunity to bargain over the hire and using short-term option (STO) registered nurses (RNs) to perform unit work.

20 i) Failing and refusing to bargain collectively with the Union by failing and refusing to furnish the Union with requested information that is relevant and necessary to the Union's performance of its functions as the exclusive collective-bargaining representative of unit employees.

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

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

30 a) Furnish to the Union in a timely manner the information requested by the Union on June 17, 2022, September 19, 2022, November 17, 2022, January 11, 2023, February 14, 2023, and February 28, 2023, which is relevant and necessary to the Union's performance of its functions as the exclusive collective-bargaining representative of the following collective-bargaining units:

35 **RN Unit:** All regular full-time permanent and regular part-time permanent registered staff professional nurses employed by the Employer, excluding Chief Nursing Officer, Administrative Directors, Department Managers, Nursing Shift Supervisors, Nurse Manager for Psychiatric Services, Emergency Department Manager, Director, Community Health Education, Head Nurses, Patient Care Coordinators, Home Health Outreach Nurses, Nurse Managers, Instructors, Administrator Nursing Services, and all other employees as certified by the National Labor Relations Board on November 22, 1999 in Case No. 7-RC-20558.

45 **RT Unit:** All full time and regular part-time Registered Technologists, Special Procedures Technologists I and II, CT Technologists, Registered Nuclear Medicine Technologists, Registered Sonographers and Registered Mammographic Technologists employed by the Employer at its facilities located at 1101 West University Drive, Rochester Michigan ("main facility"), 2251 North Squirrel Road, #201, Auburn Hills, Michigan (Squirrel Road facility), 355 Barclay Circle Suite B, Rochester Hills, MI; 72 South Washington Street, Suite 101 Oxford, Michigan, and 1701 East South Blvd. B50, Rochester Hills, Michigan but excluding all other employees, supervisors and guards as defined by the Act.

- 5 a) Before implementing any changes in wages, hours, or other terms and conditions of employment of employees in the RN Unit and RT Unit, provide the Union with notice and an opportunity to bargain as the exclusive collective-bargaining representative of unit employees.
- 10 b) Upon request to the extent sought by the Union, rescind the unilateral change in unit employees' terms and conditions of employment by ceasing or reducing the hire and use of STO RNs to perform RN Unit work.
- 15 c) For the period beginning April 17, 2022, make unit employees whole for any loss of earnings or other benefits suffered as a result of the unlawful unilateral hire and use of nonunit STO RNs, with interest, in the manner set forth in the remedy section of this decision, plus any direct or foreseeable pecuniary harms incurred as a result of the unlawful hire and use of STO RNs.
- 20 d) Make employees who engaged in a ULP strike whole for any loss of earnings and other benefits suffered as a result of the unlawful failure to immediately reinstate them on September 14, 2023 upon their unconditional offer to return to work in the manner set forth in the remedy section of this decision, plus any direct or foreseeable pecuniary harms incurred as a result of the unlawful failure to immediately reinstate them on September 14, 2023.
- 25 e) Compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.
- 30 f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure to immediately reinstate employees who engaged in a ULP strike upon their unconditional offer to return to work, and within 3 days thereafter notify them in writing that this has been done and that the failure to immediately reinstate them will not be used against them in any way.
- 35 g) Post at its Rochester, Michigan facility, copies of the attached notice marked "Appendix."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 7, 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. In the event that, during the pendency of these proceedings, 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, copies of the notice to all current employees and former employees employed by the Respondent at any time since June 17, 2022.
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¹⁹ 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."

h) Within 21 days after service by the Region, file with the Regional Director for Region 7 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated: Washington, D.C., February 18, 2026.

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Benjamin W. Green
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT issue overbroad rules which unlawfully prohibit employees from engaging in activities protected by Section 7 of the National Labor Relations Act (the Act) by telling employees they may not make negative comments about Ascension Providence Rochester Hospital (the Hospital), must maintain a positive attitude about the Hospital, and are otherwise prohibited from engaging in conduct which could encompass activity protected by Section 7 of the Act.

WE WILL NOT issue overbroad rules which unlawfully prohibit employees from engaging in activities protected by Section 7 of the Act by telling employees they cannot engage in union activity on Hospital property, including activity on behalf of Local 40, Office and Professional Employees International Union (OPEIU), AFL-CIO (the Union) or any other union in locations such as the Hospital lobby and Hospital conference rooms where the activity does not disrupt Hospital operations or disturb patients, and **WE WILL NOT** threaten to call the police to remove employees from Hospital property because they are engaging in union activity.

WE WILL NOT issue overbroad rules by telling employees they may not engage in activities protected by Section 7 of the Act, including the discussion of disciplinary investigations and the investigatory interviews of employees by management, and **WE WILL NOT** threaten employees with reprisals for engaging in such Section 7 activity.

WE WILL NOT promise employees that they will receive wage raises if they stop engaging in union activities, including activity on behalf of the Union or any other union.

WE WILL NOT threaten to deny employees wage raises if they do not stop engaging in union activity, including activity on behalf of the Union or any other union.

WE WILL NOT fail and refuse to immediately reinstate employees who engaged in an unfair labor practice strike pursuant to their unconditional offer to return to work.

WE WILL NOT fail and refuse to bargain collectively with the Union by refusing to provide the Union with information that is relevant and necessary to the performance of its functions as the exclusive collective-bargaining representatives of employees in the following collective-bargaining units:

5 **RN Unit:** All regular full-time permanent and regular part-time permanent registered staff professional nurses employed by the Employer, excluding Chief Nursing Officer, Administrative Directors, Department Managers, Nursing Shift Supervisors, Nurse Manager for Psychiatric Services, Emergency Department Manager, Director, Community Health Education, Head Nurses, Patient Care
10 Coordinators, Home Health Outreach Nurses, Nurse Managers, Instructors, Administrator Nursing Services, and all other employees as certified by the National Labor Relations Board on November 22, 1999 in Case No. 7-RC-20558.

15 **RT Unit:** All full time and regular part-time Registered Technologists, Special Procedures Technologists I and II, CT Technologists, Registered Nuclear Medicine Technologists, Registered Sonographers and Registered
20 Mammographic Technologists employed by the Employer at its facilities located at 1101 West University Drive, Rochester Michigan ("main facility"), 2251 North Squirrel Road, #201, Auburn Hills, Michigan (Squirrel Road facility), 355 Barclay Circle Suite B, Rochester Hills, MI; 72 South Washington Street, Suite 101 Oxford, Michigan, and 1701 East South Blvd. B50, Rochester Hills, Michigan but excluding all other employees, supervisors and guards as defined by the Act.

25 **WE WILL NOT** unilaterally change the wages, hours, or other terms and conditions of employment of bargaining unit employees without providing the Union notice and an opportunity to bargain over those changes, including the unilateral hire and use of nonunit short-term option (STO) registered nurses (RNs) to perform RN Unit work.

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

35 **WE WILL** furnish to the Union in a timely manner the information it requested on June 17, 2022, September 19, 2022, November 17, 2022, January 11, 2023, February 14, 2023, and February 28, 2023, which is relevant and necessary to the Union's performance of its functions as the exclusive collective-bargaining representative of unit employees.

40 **WE WILL**, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, provide the Union with notice and an opportunity to bargain as the exclusive collective-bargaining representative of unit employees.

45 **WE WILL**, upon request to the extent sought by the Union, rescind unilateral changes to the terms and conditions of employment for unit employees by ceasing or reducing the hire and use of STO RNs to perform RN Unit work.

WE WILL make unit employees who engaged in an unfair labor practice strike whole for any loss of earnings and other benefits suffered as a result of our unlawful failure to immediately reinstate them upon their unconditional offer to return to work, less any net earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL make unit employees whole for any loss of earnings or other benefits resulting from our wrongful unilateral use of nonunit STO RNs to do RN Unit work, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of

receiving lump-sum backpay awards, and **WE WILL** file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

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WE WILL remove from our files any reference to the unlawful failure to immediately reinstate unit employees who engaged in an unfair labor practice strike upon their unconditional offer to return to work, and within 3 days thereafter notify them in writing that this has been done and that the failure to immediately reinstatement them will not be used against them in any way.

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ASCENSION PROVIDENCE ROCHESTER HOSPITAL
(Employer)

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

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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.nlr.gov

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110 Michigan St. NW, Ste 299, Grand Rapids, MI 49503-2313
(718) 330-7713, Hours: 8:15 a.m. to 4:45 p.m. ET

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The Administrative Law Judge's decision can be found at www.nlr.gov/case/07-CA-301250 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.

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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 (616) 456-2679.

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