CPL (Linwood) LLC d/b/a Linwood Care Center and its Successor 201 New Road Operations, LLC d/b/a Linwood Care Center *and* 1199 SEIU United Healthcare Workers East. Cases 04–CA–146362, 04–CA–146670, 04–CA–148705 and 04–CA–165109

October 10, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND EMANUEL

On April 5, 2016, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions[1] and a supporting brief. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

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

The Board has considered the decision[2] and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions[4] only to the extent consistent with this Decision and Order, and to adopt his recommended Order as modified and set forth in full below.[5]

1. We reverse the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to process employee Mary Jo Halpin's request for a schedule change.[6] As set forth in the judge's decision and in the record, Halpin testified that before the Union arrived on the scene, the Respondent had "a procedure by which she could request a different work schedule," and she "put [her request] in writing and g[a]ve it to" anyone in "human resources." In December 2014, Halpin submitted a written request for a different work schedule to Director of Human Resources Rose Pryzchodzki. Pryzchodzki said that she "would get back" to Halpin about her request. Halpin afterwards asked Pryzchodzki if she "heard anything about [her] being able to switch . . . days." Pryzchodzki replied that Director of Nursing Valerie Lowman told her that they could not "make any changes" because of "the negotiations with the Union." Halpin asked Pryzchodzki when she thought there would be a change. Pryzchodzki said that the next negotiations were February 2015 and that she would not know anything until at least then.

An employer negotiating with a newly certified bargaining representative is prohibited under Section 8(a)(5) from altering established terms and conditions of employment without first giving the union an opportunity to bargain about the contemplated change. See *NLRB v. Katz*, 369 U.S. 736, 743 (1962). To establish a violation under Section 8(a)(5), the General Counsel must prove that the Respondent has made a change to an existing term or condition of employment without first giving the Union a reasonable opportunity to bargain concerning it. *Motor Car*

[1] There are no exceptions to the judge's finding that Labor Management Consultants employees Jon Buress and Dan Bryan were the Respondent's agents under Sec. 2(13) of the Act.

[2] Other violations that were alleged in the complaint have been severed and resolved. *CPL (Linwood) LLC d/b/a Linwood Care Center and its successor 201 New Road Operations, LLC d/b/a Linwood Care Center*, 364 NLRB No. 154 (2016) (*Linwood I*) (soliciting employees to sign a decertification petition, soliciting grievances from employees and promising to remedy them in order to discourage employees from supporting the Union, telling employees that no changes in working conditions would be made unless they got rid of the Union or a collective-bargaining agreement was signed, coercively interrogating employees about their union sympathies, and threatening employees that continuing to support the Union would be futile).

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

We adopt the judge's findings that the Respondent, by Director of Nursing Valerie Lowman, violated Sec. 8(a)(1) by interrogating new employees about their union sympathies and by creating an impression that their union activities were under surveillance. The Respondent's exceptions to these findings are solely based on the judge's credibility resolutions, which we have adopted in full. We further adopt the judge's findings, for the reasons he stated, that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally changing the parties' agreement concerning the Union's access to its facility and by unreasonably delaying in furnishing information the Union requested about personnel files of disciplined employees. Lastly, we adopt the judge's dismissal of complaint allegations that the Respondent, by Buress and Bryan, violated Sec. 8(a)(1) by creating the impression of surveillance concerning employee support for the Union.

[4] The judge neglected to include Conclusions of Law in his decision. We shall correct this inadvertent omission.

[5] Although the complaint did not allege, and the judge did not find, that the Respondent generally failed and refused to recognize and bargain with the Union, the judge's recommended Order included language reserved for such a violation. We shall correct this error by substituting a limited bargaining order appropriate to the violations of Sec. 8(a)(5) that we have found. We shall also modify the judge's recommended Order to conform to the violations otherwise found herein and to the Board's standard remedial language, and to correct the judge's inadvertent omission of a "narrow" cease-and-desist order. Finally, we shall substitute a new notice to conform to the Order as modified.

[6] The complaint did not allege, and the General Counsel did not argue in his posthearing brief to the judge, that the Respondent unilaterally changed its procedures for dealing with requests to change employees' schedules. In the absence of relevant exceptions, we do not reach the issue of whether the judge acted properly in finding this unalleged violation sua sponte.

Dealers Association of Greater Kansas City, 225 NLRB 1110, 1112 (1976).

The General Counsel bears the burden of establishing that the Respondent altered the status quo. Here, the judge defined the status quo as a procedure under which employees were allowed to make written requests for schedule changes to the Human Resources department. Contrary to the judge, we find that the record fails to demonstrate any departure from that status quo.

To begin, it is undisputed that in December 2014, Halpin submitted a written request to Pryzchodzki to change her work schedule, as she had done prior to the Union's arrival. Thus, the Respondent maintained the status quo by allowing Halpin to submit to the Human Resources department a written request to change her schedule. That Pryzchodzki did not approve Halpin's request immediately does not establish a change in the status quo when there is no evidence that the Respondent had always approved such requests in the past.[7] Compare *Water's Edge*, 293 NLRB 465, 465 (1989) (employer violated Sec. 8(a)(5) when it adopted new procedures for changing work schedules; before the union was elected, employees were never denied the right to make a change so long as they found a replacement, but after the election, the employer sometimes rejected proposed replacements), enfd. in relevant part 14 F.3d 811 (2d Cir. 1994).

Similarly, the judge's finding that the Respondent refused to process Halpin's request is not supported by the record. As stated above, Pryzchodzki did not say that the Respondent would not change Halpin's work schedule. Pryzchodzki said that it could not change Halpin's schedule at that time because of "the negotiations with the Union." That a reasonable person would understand the Respondent was delaying the processing of her request rather than refusing to process it is shown by Halpin's follow-up question about when a change would be made. Halpin did not testify regarding how quickly the Respondent had processed prior schedule change requests.[8] Thus, there is no evidence in the record establishing that a delay in responding to her request reflects a change to the status quo. The lack of evidence as to this matter weighs against the General Counsel. Therefore, we find that there is insufficient record evidence to support the judge's unfair labor practice finding.[9]

2. We also reverse the judge's finding that the Respondent violated Section 8(a)(1) by telling Halpin that it would not process her request because it was in negotiations with the Union. According to the credited testimony by Halpin, Pryzchodzki told her that the Respondent "*can't* . . . make any changes" to Halpin's work schedule because of "the negotiations with the Union" (emphasis added). Stated differently, Pryzchodzki simply communicated to Halpin that the Respondent was obligated to negotiate with the Union regarding any changes to employees' work schedules.

This response was in conformity with the Respondent's statutory obligation to bargain with the Union over changes to employee schedules, which is a mandatory subject of bargaining.[10] See *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (where the parties are engaged in contract negotiations, an employer must refrain from implementing changes to terms and conditions of employment "unless and until an overall impasse has been reached in bargaining for the agreement as a whole"), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994); see also *Meat Cutters, Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965) (holding that "the particular hours of the day and the particular days of the week during which employees shall be required to work" are mandatory subjects of bargaining).

It was lawful for Pryzchodzki to convey to Halpin that the Respondent *was* no longer free to change employees' work schedules unilaterally. Accordingly, we dismiss the complaint allegation that Pryzchodzki's statement violated the Act.

3. The complaint alleged that the Respondent unlawfully imposed discretionary discipline and suspended and/or discharged several unit employees without prior notice to the Union and without affording the Union an opportunity to bargain. The judge correctly dismissed this allegation on the ground that then-existing precedent imposed no pre-implementation duty to bargain over

[7] Indeed, Halpin acknowledged that there may be situations where she or another employee would want a schedule change but the Respondent could not accommodate the change.

[8] For an employer's practice to become an established term and condition of employment that cannot be changed without first providing the union notice and opportunity to bargain, it must occur with sufficient regularity and frequency that employees would reasonably expect the practice to continue or recur on a regular and consistent basis. See *Sunoco, Inc.*, 349 NLRB 240, 244 (2007).

[9] Because there is insufficient evidence establishing that the Respondent changed its procedure of processing employees' requests to change their work schedules, *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997), cited by the judge, is inapposite. In that case, there was no dispute that the employer discontinued an established merit-increase program that was fixed as to timing and criteria. Thus, in *Daily News of Los Angeles*, there was a change, and the issue presented was whether the rule of *Katz* applied to that change. Here, in contrast, the record evidence does not establish a change.

[10] The record is silent on the effective date of the schedule change Halpin requested. Therefore, there is no need to determine the parties' respective rights and obligations if it had been shown that Halpin requested a schedule change that would take effect before February 2015.

discretionary discipline.[11] The judge, however, found that the Respondent violated Section 8(a)(5) by failing to promptly notify the Union of the discharges and suspensions of the unit employees *after* it discharged or suspended them.[12] The Respondent contends that the judge's finding must be reversed because the violation found was neither alleged nor fully and fairly litigated. We find merit in the Respondent's contention.

The complaint does not allege that the Respondent violated the Act by failing to provide post-implementation notice of the discipline. Nor did the General Counsel seek to amend the complaint at the hearing to include this allegation. Further, throughout the proceeding, the General Counsel exclusively focused on the Respondent's failure to provide pre-implementation notice, and he did not contend in his posthearing brief to the judge that the Respondent's failure to provide post-implementation notice was also unlawful. Under these circumstances, we find that the Respondent did not have adequate notice that the judge would make findings of violations of the Act based on an unalleged failure to provide post-implementation notice. See *Piqua Steel Co.,* 329 NLRB 704, 704 fn. 4 (1999) (finding that where complaint alleged only unlawful discharge, employer was not on notice that its failure to recall was also at issue); *WXON-TV*, 289 NLRB 615, 616–617 (1988) (finding that where complaint alleged only an unlawful failure to bargain over the decision to eliminate the production department, respondent's refusal to bargain over the effects of that decision was not at issue), enfd. 876 F.2d 105 (6th Cir. 1989). Moreover, even assuming the issue of post-implementation bargaining is closely connected to the complaint allegation of a failure to engage in pre-implementation bargaining, the parties did not litigate the former issue. *See Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). Accordingly, we reverse the judge's finding of this unalleged and unlitigated violation.[13]

4. The judge found that the Respondent's agents Buress and Bryan committed numerous violations of Section 8(a)(1). The General Counsel has excepted to the judge's failure to find that Buress and Bryan also committed other violations of Section 8(a)(1). Those violations were alleged in the complaint, but the judge, while making relevant findings of fact, did not specifically address them. We do so below, based on the judge's findings of fact, which are uncontested.[14]

(a) We find that the Respondent, by Buress, violated Section 8(a)(1) by (1) soliciting employee Harry Waugh's grievances, thereby impliedly promising him improved working conditions, (2) promising Waugh better working conditions and terms of employment if employees voted to get rid of the Union, (3) promising increased staffing and retroactive pay increases in order to discourage Waugh and other employees from supporting the Union, and (4) telling Waugh that a pay increase could not be made because of the Union. See, e.g., *Regency House of Wallingford, Inc.,* 356 NLRB 563, 563 (2011) (soliciting employees' grievances and thereby impliedly promising to remedy them violated Section 8(a)(1)); *Frank Leta Honda,* 321 NLRB 482, 489–490 (1996) (telling employees that wages were frozen because of the union or because employees supported the union violated Section 8(a)(1)); *Tyson Foods,* 311 NLRB 552, 566–567 (1993) (respondent's message that tied future wage increases and bonuses to the decertification efforts violated Section 8(a)(1)).

(b) We find that the Respondent, by Bryan, violated Section 8(a)(1) by soliciting employee Cassandra Morton's grievances and impliedly promising to remedy them in order to discourage her from supporting the Union. See, e.g., *Regency House of Wallingford, Inc.,* above. However, for the reasons discussed below, we find that the Respondent did not violate Section 8(a)(1) when Bryan, at the same meeting, told Morton that the Union was "not a good union" and that "[employees] can get another union."

Section 8(c) of the Act gives employers the right to express their views about unionization or a particular union

[11] *Alan Ritchey, Inc.*, 359 NLRB 396 (2012), held that employers have a duty to bargain before imposing discretionary discipline under certain circumstances, but that decision had been invalidated by the Supreme Court prior to the issuance of the judge's decision in this case. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). In *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016), the Board reaffirmed the rationale of the *Alan Ritchey* decision and held that discretionary discipline is a mandatory subject of bargaining, and therefore employers may not impose discretionary discipline of a serious nature without first affording the union notice and opportunity to bargain, subject to certain exceptions. However, the Board also decided to apply that holding prospectively only. Because this case was pending when *Total Security Management* issued, the holding of that decision does not apply here. Accordingly, we affirm the judge's dismissal of this complaint allegation. In affirming the judge's dismissal, we find it unnecessary to pass on the merits of the Board's decision in *Total Security Management*.

[12] In his decision, the judge inadvertently stated that the Union learned of the discharges of Dawn Apella and Anthony Barker from the Respondent's response to the Union's information request, when in fact the Union learned of the discharges of Rose Brewer and Barker through the information request. This inadvertent error does not affect our disposition of this case.

[13] Because the issue of post-implementation notice is not properly before the Board, it is unnecessary to address the merits of that issue.

[14] We find it unnecessary to pass, however, on the General Counsel's exceptions to the judge's failure to make any factual and legal findings as to complaint allegations that the Respondent, by Bryan, violated Sec. 8(a)(1) by soliciting grievances from employee Lisa Brown. Any such findings would be cumulative and would not affect the remedy.

as long as those communications do not threaten reprisals or promise benefits. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).[15] By stating that the Union was "not a good union," Bryan simply expressed his opinion about the Union. Further, he made no threats or promises to employees based on whether they chose to sign the decertification petition. See *Poly-America, Inc.*, 328 NLRB 667, 669 (1999) (finding that the respondent did not violate the Act when it informed employees that the union was "no good," had threatened to burn the plant, and would charge up to $300 in weekly or monthly fees), affd. in part and revd. in part 260 F.3d 465 (5th Cir. 2001). Bryan's statement that employees "can get another union" conveyed only the truism that employees *could* select a different union shortly after the Union's certification year expired. Thus, under Section 8(c) of the Act, Bryan's statements cannot constitute an unfair labor practice.

Nor do we believe a different result is warranted by the fact that after making these statements, Bryan solicited Morton to sign a decertification petition in violation of Section 8(a)(1).[16] It is undisputed that Bryan's statements about the Union are alleged as a separate violation from his unlawful solicitation to sign a petition against the Union. Further, Bryan's expression of views about the Union, which did not refer to decertification, cannot be linked to his request to sign the decertification petition just because they occurred in the same conversation. See *Flying Foods*, 345 NLRB 101, 105–106 (2005) (employer's lawful campaign video encouraging employees to think about their decision to sign an authorization card cannot be linked to decertification activities occurring at the same time), enfd. 471 F.3d 178 (D.C. Cir. 2006). Accordingly, we dismiss this complaint allegation.[17]

(c) We find that the Respondent, by Bryan, violated Section 8(a)(1) by promising employee Mary Jo Halpin that the Respondent would discharge a disliked supervisor, train a different supervisor Halpin complained about, increase wages, and change management in order to discourage employees from supporting the Union. See, e.g., *Bentonite Performance Minerals, LLC*, 353 NLRB 668, 668 fn. 2 (2008), reaffirmed and incorporated by reference, 355 NLRB 582 (2010) (promising employees improved benefits if they repudiated the union violated Sec. 8(a)(1)), enfd. 456 Fed. Appx. 2 (D.C. Cir. 2012).

5. The General Counsel excepts to the judge's failure to find that the Respondent violated Section 8(a)(5) and (1) by unreasonably delaying in furnishing the Union requested information concerning the amounts of wage increases of four unit employees. We find merit in this exception.

As more fully set forth in the judge's decision, in a letter to the Respondent dated February 6, 2015, union counsel Jay Jaffe requested certain information, including the "date and amount of all wage increases and/or bonuses paid since December 1, 2013" for each current employee holding a bargaining-unit position. No response to his request having been received, on March 3, 2015, Jaffe sent the Respondent a reminder about the outstanding information request. On March 12, 2015, the Respondent provided the Union the names of four employees, the dates on which they received wage increases, and the reasons for each increase. However, the Respondent did not provide the Union the amounts of the wage increases for the four employees until March 23, 2015, some 6 weeks after the Union's request.

The requested information was presumptively relevant to the Union's performance of its duties as the unit employees' bargaining representative, as it related to unit employees' terms and conditions of employment. See *Southern California Gas Co.*, 342 NLRB 613, 614 (2004). The Respondent has not rebutted this presumption. Thus, the Respondent had a statutory duty to furnish the amounts of the wage increases in a timely manner. See *Woodland Clinic*, 331 NLRB 735, 737 (2000). The duty to furnish information requires a reasonable good-faith effort to respond to the request as promptly as circumstances allow. See *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). An unreasonable delay in furnishing relevant requested information is as much a violation of Section 8(a)(5) as a refusal to furnish the information at all. *Woodland Clinic*, above at 736; *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). Absent evidence of a

[15] Section 8(c) provides that "expressing . . . any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."

[16] See *Linwood I*, 364 NLRB No. 154, slip op. at 1 fn. 1.

[17] The cases relied upon by our colleague to support her finding that Bryan's 8(c)-protected statements were unlawful are distinguishable. In *Armored Transport, Inc.*, 339 NLRB 374, 378 (2003), the statements found unlawful were direct invitations to employees to go to the Board and request a new election or to prove to the employer that the union did not represent a majority of employees. In *Wire Products Mfg. Corp.*, 326 NLRB 625, 626–627 (1998), enfd. mem. sub nom. *NLRB v. R.T. Blankenship & Associates, Inc.,* 210 F.3d 375 (7th Cir. 2000), the respondent asserted that union representation was disadvantageous, advised employees that they could engage in activities to decertify the Union on company premises, provided a sample decertification petition for that purpose, and wished the employees "Good Luck." The Board found that these statements, as a whole, reasonably communicated that employees would fare better if they decertified the union in accordance with the employer's wishes. Thus, the violation found by the Board in both cases was the unlawful encouragement of decertification, a violation already found with respect to Bryan's interaction with Morton. In neither case did the Board find additional, independent violations of the Act based on statements that, like Bryan's, merely opined that the Union "is not a good union" and expressed the truism that employees "can get another union."

justification, such a delay will constitute a violation of Section 8(a)(5) inasmuch "[a]s the Union was entitled to the information at the time it made its initial request, [and] it was Respondent's duty to furnish it as promptly as possible." *Pennco, Inc*., 212 NLRB 677, 678 (1974).[18] The Respondent has presented no evidence justifying its 6-week delay. The requested information for simply the amounts of wage increases for four employees was neither complex nor shown to be difficult to retrieve. Nor has the Respondent shown a good-faith effort to retrieve the requested information.[19] In these circumstances, the Respondent's 6-week delay was unreasonable and violated Section 8(a)(5). See, e.g., *Postal Service*, 308 NLRB 547, 551 (1992) (unreasonable to delay 4 weeks in providing information that was not shown to be complex or difficult to retrieve); *Capitol Steel & Iron Co.*, 317 NLRB 809, 813 (1995) (unreasonable to delay 2 weeks in providing the names of 17 employees who received wage increases and the amounts of those increases), enfd. 89 F.3d 692 (10th Cir. 1996).

CONCLUSIONS OF LAW

1. The Respondent, CPL (Linwood) LLC d/b/a Linwood Care Center and its successor 201 New Road Operations, LLC d/b/a Linwood Care Center, are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. 1199 SEIU United Healthcare Workers East is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) soliciting employees' grievances and impliedly promising to remedy them in order to discourage employees from supporting SEIU 1199 United Health Care Workers East (Union);

(b) promising an employee better working conditions and terms of employment if employees voted to get rid of the Union;

(c) promising increased staffing and retroactive pay increases in order to discourage employees' support for the Union;

(d) telling an employee that a pay increase could not be provided because of the Union;

(e) promising to discharge a disliked supervisor, train a supervisor, increase wages, and change management in order to discourage employees from supporting the Union;

(f) coercively interrogating employees about their union sympathies; and

(g) creating the impression among employees that their union activities were under surveillance.

4. The Respondent has violated Section 8(a)(5) and (1) of the Act by engaging in the following conduct:

(a) unilaterally changing the parties' agreement concerning the Union's access to its facility; and

(b) unreasonably delaying in furnishing the union requested information about personnel files of disciplined employees and the amounts of wage increases.

5. The aforesaid violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The Respondent, CPL (Linwood) LLC d/b/a Linwood Care Center and its successor 201 New Road Operations, LLC d/b/a Linwood Care Center, Linwood, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting grievances from employees and impliedly promising to remedy them in order to discourage employees from supporting SEIU 1199 United Health Care Workers East (Union).

(b) Promising better working conditions and terms of employment if employees voted to get rid of the Union.

(c) Promising increased staffing and retroactive pay increases in order to discourage employees' support for the Union.

(d) Promising to discharge a disliked supervisor, train a supervisor, increase wages, and change management in order to discourage employees from supporting the Union.

(e) Telling an employee that a pay increase could not be made because of the Union.

(f) Coercively interrogating employees about their union sympathies.

(g) Creating the impression that employees' union activities are under surveillance.

(h) Unilaterally changing the parties' agreement concerning the Union's access to its facility.

(i) Refusing to bargain collectively with the Union by unreasonably delaying in furnishing it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of bargaining-unit employees.

[18] In evaluating the promptness of the response, the Board will consider the complexity and extent of information sought, its availability, and the difficulty in retrieving the information. See *West Penn Power Co.*, 339 NLRB 585, 587 (2003), enfd. in relevant part 394 F.3d 233 (4th Cir. 2005).

[19] Absent such effort, the Respondent's assertion that it was unable to timely provide this straightforward information because it was preoccupied with NLRB proceedings, including the instant unfair labor practice charges against it, is entirely unavailing.

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

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

(a) Comply with the terms of the access agreement with the Union of May 2014.

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

> All full-time, regular part-time and per diem Certified Nursing Assistants (CNAs), Unit Clerks and Licensed Practical Nurses (LPNs) employed by CPL at its 210 New Road and Central Road, Linwood, New Jersey facility, but excluding all other employees, guards and supervisors as defined by the Act.

(c) Within 14 days after service by the Region, post at its facility in Linwood, New Jersey, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 21, 2015.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 4 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.

Dated, Washington, D.C. October 10, 2018

John F. Ring, Chairman

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, concurring in part and dissenting in part.

In most respects, the Board members see this case the same way. We all agree, as an earlier decision reflects, that the Respondent engaged in an aggressive, unlawful campaign to coerce employees to decertify 1199 SEIU United Healthcare Workers East (the Union).[1] We also agree that the Respondent persisted in its course of unlawful conduct, as shown in this case. As part of its continued campaign to thwart employees' choice to unionize, the Respondent committed multiple Section 8(a)(1) violations,[2] including by soliciting employee Cassandra Morton's grievances and impliedly promising to remedy them in order to discourage her from supporting the Union. Further, we agree that the Respondent, in the same post-certification year period, violated Section 8(a)(5) and (1) of the

[20] 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."

[1] The Board thus found in its earlier decision that the Respondent, following the Union's certification and shortly after the expiration of the certification year, committed numerous violations of Sec. 8(a)(1) of the Act as part of its unlawful campaign to promote decertification. See *CPL (Linwood) LLC d/b/a Linwood Care Center and its successor 201 New Road Operations, LLC d/b/a Linwood Care Center*, 364 NLRB No. 154 (2016) (*Linwood I*) (Respondent violated Sec. 8(a)(1) when it solicited employees to sign a decertification petition; solicited employee grievances and promised to remedy them if employees abandoned their support for the Union; told employees that no changes in working conditions would be made unless either employees got rid of the Union or a collective-bargaining agreement was signed; interrogated employees concerning their support for the Union; and threatened employees by suggesting that it was futile to continue supporting the Union because contract negotiations could go on a very long time).

[2] I thus join my colleagues in finding that the Respondent, as part of its unlawful decertification campaign, violated Sec. 8(a)(1) by (1) soliciting employee Harry Waugh's grievances, thereby impliedly promising him improved working conditions; (2) promising Waugh better working conditions and terms of employment if employees voted to get rid of the Union; (3) promising increased staffing and retroactive pay increases in order to discourage Waugh and other employees from supporting the Union; (4) telling Waugh that a pay increase could not be made because of the Union; (5) promising employee Mary Jo Halpin that the Respondent would discharge a disliked supervisor, train a different supervisor Halpin complained about, increase wages, and change management in order to discourage employees from supporting the Union; and (6) as noted above, soliciting Morton's grievances and impliedly promising to remedy them.

Act by (1) unilaterally changing the parties' agreement about the Union's access to the facility, thus limiting the ability of union representatives and employees to communicate while a first contract was being negotiated; and (2) delaying in providing the Union with requested relevant information.[3] But I cannot join my colleagues in dismissing the allegation regarding Respondent's unlawful conduct toward employee Morton, where the Respondent's actions seem to be part and parcel of its pervasive anti-union campaign.

In late January 2015, Dan Bryan, a consultant hired by the Respondent to spearhead its decertification campaign, and the perpetrator of numerous unlawful acts as its agent, approached employee Cassandra Morton and said that he came to "find out what was going on with" Linwood and "why everybody was either getting fired or quitting." After Morton responded with complaints about Director of Nursing Valerie Lowman's bad attitude towards the employees, Bryan told her that "1199 is not a good union" and employees "can get another union." Bryan then solicited Morton to sign a decertification petition.

The latter solicitation of decertification was indisputably unlawful: the Board so found in *Linwood I*.[4] It is similarly established that the Respondent, by Bryan, violated Section 8(a)(1) in this same conversation by soliciting employee Morton's grievances and impliedly promising to remedy them in order to discourage her support of the Union. My colleagues nevertheless carve out, and find lawful, Bryan's contemporaneous disparagement of the Union to Morton ("1199 is not a good union"), immediately followed by yet another reference to decertification of the current representative (employees "can get another union").

Those two employer statements, however must be viewed in the context in which the Respondent made them, to determine if they have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. See, e.g., *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617 (1969) ("[a]ny assessment of the precise scope of employer expression" permissible under Section 8(c) of the Act "must be made in the context of its labor relations setting"); *Hendrickson USA, LLC*, 366 NLRB No. 7, slip op. at 5 (2018).

Here, Bryan's admonitions to Morton clearly occurred within an overall context of coercion, as they were inextricably intertwined with conduct the Board found unlawful in *Linwood I* and again in this case. Promptly after probing into employee dissatisfaction and promising to redress Morton's workplace complaints, Bryan linked employees' dissatisfaction to 1199 (it "is not a good union"), urged that employees "can get another union," and directly and unlawfully solicited Morton's signature on a decertification petition. Considering Bryan's statements in context, as we must, they not only disparaged the Union but reasonably signaled to Morton the Respondent's willingness to assist her and her coworkers to "get another union" and rid themselves of 1199 representation.[5] Bryan unlawfully invited Morton to withdraw support from the Union, which Bryan sought to facilitate by unlawfully soliciting Morton to sign the decertification petition moments later.[6] Accordingly, I would find that the statements, reasonably tended to interfere with, restrain, and coerce employees in the exercise of their rights under Section 7 and thus violated Section 8(a)(1). See *Armored Transport, Inc.*, 339 NLRB 374, 378 (2003)(finding employer's letters sought to disparage the union and invited employees to get rid of it, thereby interfering in the relationship between employees and the union in violation of Section 8(a)(1)); *Wire Products Mfg. Corp.*, 326 NLRB 625, 626–627 (1998) (finding employer's letter sought to disparage the union and appealed for employees to engage in decertification activities, thereby coercing employees to decertify the union in violation of Section 8(a)(1)), enfd. mem. sub nom. *NLRB v. R.T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7th Cir. 2000).[7]

For these reasons, as to the above issue, I dissent.

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[3] I concur with my colleagues' dismissal of the allegation that the Respondent violated Sec. 8(a)(5) when it suspended and/or discharged unit employees without giving the Union notice and an opportunity to request bargaining before it decided to suspend and/or discharge them. In *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016), the Board held that employers must give the union notice and opportunity to bargain in advance of certain discipline decisions. The Board in *Total Security Management* applied this rule prospectively only, however, and it therefore does not apply to this case, which was pending at the time *Total Security Management* issued.

[4] See 364 NLRB No. 154, slip op. 1, fn. 1.

[5] By directly linking these statements to its unlawful solicitation and implied remedy of employees' grievances, the Respondent presented Morton with the archetypal "fist inside the velvet glove" long ago identified by the Supreme Court in *NLRB v. Exchange Parts Co.,* 375 U.S. 405, 409 (1964). "Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if [the Employer] is not obliged." Id. As the Court explained in *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944), "[t]he 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."

[6] As the Board stated in *Armored Transport, Inc.*, "the Respondent did not simply set forth objective information detailing the manner in which employees could reflect their interest in retaining the Union as their representative." 339 NLRB 374, 378 (2003).

[7] *Flying Foods*, 345 NLRB 101 (2005), enfd. 471 F.3d 178 (D.C. Cir. 2006), on which the majority relies, provides no principled justification for dismissing the Sec. 8(a)(1) allegation at issue here. In *Flying Foods,* the Board declined to consider the employer's campaign video in the context of an employee's unrelated decertification activities during the same month (id. at 105–106). This meaningfully contrasts with Bryan's

Dated, Washington, D.C. October 10, 2018

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT solicit your grievances and impliedly promise to remedy them in order to discourage you from supporting SEIU 1199 United Health Care Workers East (Union).

WE WILL NOT promise you better working conditions and terms of employment if you vote to get rid of the Union.

WE WILL NOT promise increased staffing and retroactive pay increases in order to discourage your support for the Union.

WE WILL NOT promise to discharge a disliked supervisor, train a supervisor, increase wages, and change management to discourage you from supporting the Union.

WE WILL NOT tell you that a pay increase could not be made because of the Union.

WE WILL NOT coercively interrogate you about your union sympathies.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT unilaterally change our agreement with the Union concerning the Union's access to our facility.

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

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

WE WILL comply with the terms of the access agreement with the Union of May 2014.

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

> All full-time, regular part-time and per diem Certified Nursing Assistants (CNAs), Unit Clerks and Licensed Practical Nurses (LPNs) employed by CPL at its 210 New Road and Central Road, Linwood, New Jersey facility, but excluding all other employees, guards and supervisors as defined by the Act.

CPL (LINWOOD) LLC D/B/A LINWOOD CARE CENTER AND ITS SUCCESSOR 201 NEW ROAD OPERATIONS, LLC D/B/A LINWOOD CARE CENTER

The Board's decision can be found at www.nlrb.gov/case/04-CA-146362 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.

statements to Morton regarding the Union and his unlawful solicitation of Morton to sign a decertification petition during the same brief conversation.

Henry R. Protas, Esq., for the General Counsel.
Louis J. Capozzi, Jr., Esq., and *Brandon S. Williams, Esq. (Capozzi Adler P.C.),* of Camp Hill, Pennsylvania, for the Respondent.
Jay Jaffe, Esq. (1199 SEIU, United Healthcare Workers East), of New York, New York for the Charging Party.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania between February 8 and 10, 2016. 1199 SEIU (the Union) filed the initial charges between February 12, 2015 and November 30, 2015. The General Counsel issued an amended consolidated complaint covering all 4 charges on February 2, 2016.

The Union has represented the Certified Nursing Assistants, Unit Clerks and Licensed Practical Nurses at Respondent's nursing facility in Linwood, New Jersey since December 13, 2013. The Union and representatives of Revera Health Systems, which owned the Linwood facility through November 30, 2015, met in collective bargaining negotiations on about 3 occasions in 2014 and 8-10 occasions in 2015. The Union and Respondent never reached agreement on a collective-bargaining agreement.

In January 2015 a decertification petition was circulated. One allegation in this case is that labor consultants, alleged to be agents of Respondent, solicited employees to sign the decertification petition. Linwood filed an RM petition (04-RM-145463) on January 30, 2015 which was dismissed by the Regional Director. The Board on February 17, 2016 declined to reverse that decision.

On December 1, 2015, Genesis Healthcare Systems took over ownership of the Linwood Care Center from Revera Health Systems. There is no dispute that Genesis, which operates the facility through its subsidiary 201 New Road Operations, LLC, is a successor employer of the bargaining unit employees.

The substantive unfair labor practice allegations in this case are as follows:

Respondent, by its human resource director, Rose Przychodzki told an employee that Respondent could not make schedule changes because employees had chosen the Union as their collective bargaining representative.

Respondent, by its alleged agents, labor consultants Jon Buress and Dan Bryan, violated Section 8(a)(1) in a variety of ways, including soliciting employee complaints and grievances, making promises that conditions would improve if employees decertified the Union and soliciting an employee to sign the decertification petition. The General Counsel also alleges that Buress and Bryan on several occasions created the impression that employees' protected activities were under surveillance.

The General Counsel also alleges that Respondent, by Valerie Lowman, then its Director of Nursing, violated Section 8(a)(1) in several respects.

In May 2014, Linwood and the Union reached an agreement on a protocol for the Union to access the Linwood facility. The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) in imposing new conditions on this agreement and then revoking it entirely.

Further, the General Counsel alleges that Respondent violated the Act in discharging and/or suspending unit employees without prior notice to the Union and without affording the Union prior notice and an opportunity to bargain over the discharges and suspensions before they were implemented. The General Counsel relies on the rationale in *Alan Ritchey,* 359 NLRB 396 (2012), a decision invalided by the Supreme Court due to the composition of the Board at the time.

Finally, the General Counsel alleges that Respondent violated Section 8(a)(5) of the Act by unreasonably delaying the furnishing of certain information requested by the Union regarding wages increases, bonuses and disciplinary measures.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party Union I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent CPL, a Delaware limited liability company, owned by Revera Health Systems, operated a skilled nursing facility in Linwood, New Jersey until November 30, 2015. In 2015, it received gross revenues in excess of $100,000 and purchased and received goods at the Linwood facility valued in excess of $5,000 directly from points outside the State of New Jersey. Respondent admits, and I find, that it was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act at all material times and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Respondent 201 New Road, a wholly-owned subsidiary of Genesis Healthcare, Inc., is a limited liability company which has operated the same facility since December 1, 2015. It is projected to receive annual gross revenues in excess of $100,000 and to purchase and receive goods at the Linwood facility valued in excess of $5,000 directly from points outside the State of New Jersey. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act at all material times. 201 New Road has continued to operate the facility in an unchanged form. 201 New Road was put on notice of CPL's potential liability in the instant cases and is a successor employer to CPL.

II. ALLEGED UNFAIR LABOR PRACTICES

Complaint Paragraph 6, alleged unfair labor practice by Rose Pryzchodzki

Prior to the Union's certification in December 2013, a unit employee seeking to have his or her schedule changed, submitted a request to the human resources department in writing. In December 2014, unit employee Mary Jo Halpin took a written request for a schedule change to Respondent's human resources director, Rose Pryzchodzki. Several days later, Pryzchodzki told Halpin that she could not change Halpin's schedule because Respondent was in negotiations with the Union. Further, she told Halpin that there could be no such changes at least until

Respondent and the Union met in contract negotiations in February 2015.[1]

Complaint paragraphs 7 and 8, alleged unfair practices by Labor Management Consultants as agent of CPL

Shortly after the expiration of the Union's certification year, Respondent CPL's parent company, Rivera Health Systems, hired Labor Management Consultants (LMC) to survey and interview unit employees at the Linwood facility. Two employees of LMC, Jon Buress and Dan Bryan, were at Linwood from January 21, to February 12, 2015. They walked the halls of the facility freely, talking to employees one-on-one and in group meetings. I infer from this record that CPL retained LMC to promote decertification of the Union.

Several unit employees testified as to their interaction with Buress and Bryan. Since none of this testimony is contradicted, it is credited in its entirety.[2]

Dan Bryan approached Mary Jo Halpin on several occasions. She agreed to meet Bryan in a storage area. Halpin asked Bryan what he was doing at the facility. He responded that Respondent had received an unfavorable employee survey and that Respondent hired LMC to find out what problems existed.

Bryan told Halpin that he had spoken to 60 employees and that virtually all complained about the Director of Nursing, Valerie Lowman. He told Halpin that Respondent would be getting rid of Lowman.[3] Halpin said she didn't have any problem with Lowman, but complained about another manager. Bryan responded that possibly Respondent could give the manager more training. Then:

> He asked me, he said as a sign of good faith, would I be willing to sign a paper saying that I didn't want the union, that way they could get rid of the people that were the problem and get on with the raises. He had said that he already had a bunch of signatures; that mine really wasn't going to matter. And I ended up, I did sign a paper.
> Q. Did he say how many signatures he had?
> A. He said he had like 60 signatures.

Tr. 33–34.

Bryan presented Halpin with a sheet of lined paper which she signed. The paper may not have had any writing on the top. If so, language was added after she signed indicating that she was an employee who no longer wanted union representation, G.C. 4.[4]

At about this time, two employees, Christine Howell and Linda Adams, were also circulating a decertification petition. Some unit employees were not aware of this.

Dan Bryan also met with unit employee Cassandra Morton. He told Morton that Respondent's corporate office had sent him to find out what the problems were at the facility. Bryan solicited Morton to sign a decertification petition. She told Bryan she was not interested. He told Morton that the 1199 SEIU was a bad union and that employees could select a different union to represent them.

Unit employee Harry Waugh was approached by Buress on the night of January 28, 2015.[5] Buress told Waugh that Revera could do things for the employees if they voted the Union out. He said that Respondent could not give employees raises until the "union thing" was taken care of. Further, Buress said that there would be no raises until Respondent and the Union agreed on a collective bargaining agreement—which could be a very long time. On the other hand, Buress told Waugh that after the Union was voted out, Respondent would grant employees retroactive raises.

Buress told Waugh that that Respondent would increase its staff once the Union was gone and he solicited complaints about Nursing Director Valerie Lowman. He showed Waugh a decertification petition and told Waugh that 60% of the employees had already signed it. Buress also told Waugh that most of the employees who had supported the Union no longer worked at the facility. He encouraged Waugh to sign a decertification petition; Waugh declined.[6]

Creating the impression of surveillance by LMC

Both Buress and Bryan told employees approximately how many employees had signed a decertification petition. The General Counsel alleges that by doing so they created the impression that employees' protected activities were under surveillance.

Complaint paragraph 9 (interrogation of new employees by Valerie Lowman; creating an impression of surveillance)

Unit employee Cassandra Morton attended a meeting with 9-10 other employees in January or February 2015. Diane Delaney, the Director of the facility, and Valerie Lowman, the Director of Nursing, conducted the meeting. Lowman told the employees that Respondent was hiring new employees to relieve its staffing problems. Lowman also told the employees at the meeting that Respondent was telling new employees about a decertification petition and was asking them if they wanted a union or not, Tr. 67–69.[7] Lowman told the employees at the meeting that 50 percent of the new hires said they wanted a Union and that 50 percent said they did not.

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[1] Rose Pryzchodzki did not directly contradict Halpin's testimony, which I credit. Pryzchodzki testified that she did not recall Halpin coming to her about a schedule change. If she had done so, Rose Pryzchodzki testified that she would have referred Halpin to the Director of Nursing, Valerie Lowman. Had she sent Halpin to Lowman, the result would not have been different. Halpin testified that Rose Pryzchodzki told her in December 2014 that her information came from Lowman.

[2] Respondent suggests that several witnesses are not credible because they were "paid" by the Union. The record shows that Respondent required unit employees who attended bargaining sessions to use personal time or vacation time to do so. The Union compensated them for lost wages if they did neither, Tr. 439–440.

[3] Lowman's employment with Respondent ended several months later. The reasons do not appear in this record.

[4] Unit employee Harry Waugh also did not recall any writing at the top of the paper he was asked to sign.

[5] Waugh's testimony is also uncontradicted and therefore credited.

[6] Like the paper given to Mary Jo Halpin, the sheet that Buress wanted Waugh to sign did not have any printed material on it.

[7] Morton's testimony on this issue is also uncontradicted and therefore credited.

Complaint paragraph 10: restricting and denying the Union access to the facility

In March 2014, the Union assigned administrative organizer Roz Waddell to the Linwood bargaining unit. In May 2014, Respondent agreed to allow the Union access to the Linwood facility to meet with unit members under the following conditions:

1. A union representative should request access in advance, at least 24 hours but preferably 48 hours to visit unit employees at the facility
2. The Union would request specific dates and times for such visits, which would be mutually agreed upon.
3. The Union representative would remain in the employee break area by the West Wing.

On March 9, 2015, Roz Waddell emailed Diane Delaney, the facility administrator/executive director. Waddell advised Delaney that she was planning to come to Linwood on the following weekdays: March 10, 11, 17, and 18 and on weekend days March 14 and 22.

Delaney responded the same day that Waddell could come during certain time periods on March 11 and 17, but not March 14 and 22 because Delaney would not be available. Instead she offered Waddell a four-hour time block on either March 28 or 29. Delaney complained about the fact that she had authorized a visit on March 6, but that Waddell did not show up or advise Delaney that she was not coming.

Waddell arrived at Linwood at 0630 on March 11 at Respondent's parking lot. Cheryl Holmes, the Assistant Administrator, told Waddell that she had to leave. On March 13, Delaney sent a letter to Union Vice-President Rhina Molina stating that union representatives were not allowed in the Linwood parking lot and advising her that union representatives would be allowed at the facility only under the following conditions that were additional to those agreed upon in March 2014:

1. One representative would be allowed at the facility at a time.
2. Union representatives were not to speak to any employees who requested that they not speak to them.
3. The Union would notify Delaney in advance if the representative was not coming as scheduled.
4. No Linwood property or materials were to be removed from the employee break area or any other part of the facility.

Delaney inferred that Roz Waddell had removed 2 memos, from her to employees, from an employee lounge. She warned that noncompliance with these conditions would cause her to revoke the Union's access to the facility.

Waddell also came to the facility on March 14 and March 17. On March 17, Lisa McConnell, Revera's regional human resources director, told Waddell that she was not allowed in the parking lot. McConnell allowed Waddell to meet with employees in the breakroom.

The next day, March 18, Waddell and organizer Diego Santelices arrived at the facility. Assistant Administrator Cheryl Holmes told them that if they did not leave, she would call the police.

In April, Respondent took the position that the Union would not be allowed access to the Linwood facility until the Union's unfair labor practice charges were resolved. Respondent and the Union discussed the access issue at collective bargaining sessions on June 2 and 3, 2015; no agreement was reached. Union organizers have not been to the Linwood facility since March 18, 2015 other than on two occasions to discuss disciplinary measures.

Complaint paragraph 11: "The Alan Ritchey issue"

Respondent discharged unit employees Dawn Apella on January 19, 2015; Rose Brewer on October 14, 2014; Anthony Barker on September 15, 2014, Laurel Bertonazzi on June 9, 2015 and Theresa Reilly on August 19, 2015. It suspended Harry Waugh on March 30, 2015 and Theresa Reilly on November 3, 2015 (after agreeing with the Union to allow Reilly to return to work after her August discharge). In none of these instances did Respondent notify the Union beforehand and offer the Union the opportunity to bargain over these disciplinary measures before they were implemented. Moreover, Respondent, at least with respect to Apella and Barker, did not promptly notify the Union of the discipline/discharge after the fact. The Union first learned of Apella and Barker's discharges months after the fact when Linwood responded to the Union's information request.

Respondent, when owned by Revera, had a progressive discipline policy, Jt. Exh. 2 pp. 8–9. That policy had a 4-step procedure leading to termination. However, Respondent retained the right to skip steps and the right to terminate on a first offense. Thus, the disciplinary measures in this case were "discretionary" within the meaning of the *Allen Ritchey* decision. Revera also had an internal grievance procedure. The Union availed itself of this process only with regard to Theresa Reilly's August 2015 termination.

Complaint paragraph 14: The Union Information Requests

On February 6, 2015, Union attorney Jay Jaffe sent a 4-page letter to Peter Tsoporis, Revera's Vice President of Labor Relations, requesting 12 categories of information by February 13. The parties met in collective bargaining negotiations on February 17 and 18. Tsoporis provided some of this information on February 19. Jaffe wrote Tsoporis on March 3, requesting the balance of the requested information by March 13. Tsoporis responded on March 12, indicating that certain information had been provided previously, but declining to provide certain information on the grounds that the Union had not demonstrated its relevance to collective bargaining. That information was contained in paragraph 9 of Jaffe's February 6 letter, which is set forth below:

A list of all bargaining unit employees who have been formally reprimanded, warned, suspended or discharged (including resignation in lieu of discharge) from December 1, 2013 through the present, as well as the following:

> (a) the complete personnel and departmental files for each such employee, including prior disciplinary action and employee evaluations;
> (b) the notice of reprimand, warning, suspension or dismissal in connection with each employee;

(c) A detailed explanation of the reason each employee was reprimanded, warned suspended or discharged;
(d) All notes, policies, statements, reports, witness statements, video, audio or electronic evidence, and any other documentation that the Company referred to or relied on in its decision to reprimand, warn, suspend or discharge each employee.

In his March 12, letter, Tsoporis, in response to paragraph 2(f) of the Union's request, provided the names of 4 employees who had received wage increases, the date of the increase, the reason for the increase, but not the amount of the increases.

On March 23, 2015, Respondent provided the amount of the wage increases for the 4 employees and a list of some, but not all employees who had been disciplined since December 1, 2013. Tsoporis did not provide items 9(a)-(d) listed above regarding any disciplined employees.

On March 27, Tsoporis advised the Union that it was cancelling collective bargaining negotiating sessions scheduled for March 30 and 31, because Respondent deemed the Union's response to its information request inadequate. He asked Jaffe for information regarding additional disciplined employees that the Union was aware of.

Jaffe provided Tsoporis the names of 3 other employees whom the Union believed had been disciplined and 4 additional employees who it believed had received wage increases on March 30. On April 2, Tsoporis provided additional information regarding employees who received wage increases and a log of employees who had been received reprimands and another of employees who had been suspended or discharged. For the first time, Tsoporis raised confidentiality concerns regarding some of the information the Union had requested regarding disciplined employees, such as their employee evaluations. Respondent received requests that their personnel files be kept confidential from about 7 employees between March 24 and 27, 2015.

By May 14, 2015, Respondent complied with all of the Union's February 6, 2015 information requests.

Analysis

Respondent, by Rose Pryzchodzki, violated Section 8(a)(1) by telling Mary Jo Halpin that her schedule could not be changed because Respondent was in negotiations with the Union.

An employer's obligation while bargaining with the certified bargaining representative of its employees for an initial contract is to maintain the status quo, *Daily News of Los Angeles,* 315 NLRB 1236 (1994). In this instance the status quo was that employees could request that their schedules be changed by submitting a written request to the human resources department. By refusing to process Halpin's request, Respondent altered the status quo and violated Section 8 (a)(5) of the Act. By telling Halpin that it would not process it, Respondent violated Section 8(a)(1).

Respondent, by its agents, labor consultants Jon Buress and Dan Bryan, violated Section 8(a)1) of the Act by 1) soliciting employees to sign a decertification petition; 2) soliciting employee grievances and promising to remedy them if employees decertified the Union; 3) telling employees that no changes in working conditions could be made unless either employees got rid of the Union or a collective bargaining agreement was signed; 4) interrogating employees concerning support for the Union.

First of all, Respondent's contention that labor consultants Jon Buress and Dan Bryan were not its agents pursuant to Section 2(13) of the Act, is wholly without merit. The Board applies common law agency principles in determining who is an agent under the Act. When applied to labor relations, agency principles must also be broadly construed in light of the legislative policies embedded in the Act. A party may be bound by the conduct of those it holds out to speak and act for it, even though there is no proof that specific acts were actually authorized, or subsequently ratified. *Atelier Condominium & Cooper Square Realty,* 361 NLRB 966, 1001 (2014). *Braun Electric Co.,* 324 NLRB 1, 2 (1997), *Dorothy Shamrock Coal Co.,* 279 NLRB 1298, 1299 (1986).[8] Statements of a supervisor or agent may be imputed to an employer even if that employer was not aware that the statements were made, *Jays Foods, Inc. v. NLRB,* 573 F.2d 438 (7th Cir. 1978).

Common law principles incorporate the principles of implied and apparent authority. Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the agent to do the act in question, *Shen Automotive Dealership Group,* 321 NLRB 586, 593 (1996). Another way the Board has stated this principle is "whether under all the circumstances the employees would reasonably believe that [a person] was reflecting company policy and speaking and acting for management," *Community Cash Stores,* 238 NLRB 265 (1978).

In the instant case, employees could not have believed that Buress and Bryan were **not** speaking and acting for management. Why else would the two labor consultants be freely walking around the Linwood facility, even after hours, asking them questions, encouraging them to sign decertification petitions and promising to remedy grievances if they would only get rid of the Union? It would have been unreasonable for employees to have believed that the two individuals were not speaking and acting on behalf of management. Strangers, with no connection to the owners of the facility, would not have any reason to engage in such activities.

Many of things said and done by Buress and Bryan violated the Act. These include soliciting employees to sign a decertification petition, *Beaird Industries, Inc.,* 311 NLRB 768 (1993); and soliciting employee grievances and explicitly promising to remedy them if employees abandon their support for the Union, *Amptech, Inc.,* 342 NLRB 1131, 1136–1137 (2004). I also find that Buress and Bryan, in asking employees to sign a decertification petition in the context a decertification campaign, conducted an unlawful interrogation, *Hercules Automotive,* 285 NLRB 944, 949 (1987). An employee responding to these consultants would necessarily have to reveal their union sympathies if they declined to sign the petition, as did Harry Waugh.[9]

[8] The language of Section 2(13) defining "agent" states that actual authorization or subsequent ratification of specific acts are not controlling in determining whether a person is an "agent."

[9] There is no evidence that Waugh was an open union supporter in January 2015.

On the other hand, I find that Buress' statement to Harry Waugh that 60 percent of employees had signed a decertification petition would not reasonably lead Waugh to conclude that employees' protected activities were under surveillance. *Grand Canyon Mining Company,* 318 NLRB 748, 752–752 (1995), cited by the General Counsel, is distinguishable. In that case the employee asked the supervisor how he knew the number of employees at a union meeting. The supervisor told him that another agent of the employer had seen 16 employees at the meeting. In the instant case, there is no evidence regarding the basis for Buress' claim. It is possible that 1) he knew the number who signed a decertification petition because he and Bryan had collected the signatures; 2) he was making the number up out of thin air; or 3) anti-Union employees had reported this number to him.

An employer's statement that contract negotiations could go on a very long time, is not *per se* a violation of the Act. However, in the context of this case, in which Respondent's consultants also promised to remedy grievances and expedite wage increases if employees abandoned the Union, such statements suggest futility in continuing to support the Union and violate Section 8(a)(1), *Airtex,* 308 NLRB 1135 fn. 2 (1992).

Respondent, by Valerie Lowman, violated the Act in interrogating new employees about their union sympathies and giving employees the impression that their Union activities were under surveillance.

Director of Nursing, Valerie Lowman, violated Section 8(a)(1) by interrogating new employees about their union sympathies in the context of a decertification drive. She also, by indicating to other employees, the results of her inquiry, gave these employees the impression that Respondent was keeping track of which employees were pro-Union and which were not. This would reasonably give employees the impression that their Union activities, in general, were under surveillance by Respondent, *Flexsteel Industries, Inc.,* 311 NLRB 257 (1993).

The Access Issue

Board law is clear that when an employer and a union have an agreement allowing the union access to its property to carry out its representational activities, or the employer has an established past practice of allowing access, the employer cannot unilaterally alter that agreement or practice, *Ernst Home Centers,* 308 NLRB 848 (1992). The employer's right to bar union representatives from its property differs in this situation from one in which there is no such agreement or practice, *Turtle Bay Resorts,* 355 NLRB 706 (2010) affirming 353 NLRB 1242, 1274–1275 (2009).

In the instant case, Respondent unilaterally changed the parties' agreement by restricting access to one representative at a time; requiring union representatives to eschew speaking to any employees who requested that they not speak to them and requiring that the Union notify facility administrator Delaney in advance if the representative was not coming. [10] In adding these conditions in March 2015, Respondent violated Section 8(a)(5) and (1) of the Act.

A closer question is whether Respondent violated the Act by barring union representatives from its parking lot. The 2014 agreement did not specifically address union access to the parking lot. However, Organizer Waddell testified that she talked to employees in the parking lot on about 10 occasions between September 2014 and March 2014. She also testified that Diane Delaney saw her there a couple of times and greeted her, Tr. 210–211. Delaney did not directly contradict Waddell by testifying that she never saw Waddell in the parking lot prior to March 2015. She testified that she observed Waddell on the sidewalk, which is public property. On those occasions, Delaney testified she would greet her. The complaint did not allege that Respondent violated the Act by barring union representatives from its parking lot. Further, I conclude that whether Respondent had a past practice of allowing union representatives in the parking lot was not fairly and fully litigated. Thus, I decline to address this issue.

Respondent violated Section 8(a)(5) and (1) in failing to promptly notify the Union of the discharge or discipline of unit employees

I decline the General Counsel's invitation to apply the rationale of the *Alan Ritchey* decision until the Board adopts that rationale; I am bound by existing precedent. Moreover, even if the Board were to reaffirm its holding in *Alan Ritchey*, it must decide whether it will apply that rationale only prospectively, as it did in the 2012 decision or retrospectively.

However, even under existing Board precedent, Respondent violated Section 8(a)(5) and (1) the Act. An employer has an obligation to bargain with the Union, upon request, concerning disciplinary matters, even if it has no obligation to notify and bargain to impasse with the Union before imposing discipline, *Fresno Bee,* 337 NLRB 1161, 1186–1187 (2002); *Ryder Distribution Resources,* 302 NLRB 76, 90 (1991).

That obligation presumes that an employer will promptly inform its employees' bargaining representative of all discipline or discharges so that the Union can decide whether or not to request bargaining. Here there is no evidence that Respondent promptly notified the Union of any discipline or discharge with the possible exception of the November suspension of Theresa Reilly. With regard to Brewer and Barker, the Union was not aware that they had been discharged for months until Linwood responded to the Union's information request.

Delay in Providing Requested Information

A delay in providing the Union requested information which is relevant to its role of collective bargaining representative of the employer's employees may, in some circumstances, constitute a violation of Section 8(a)(5) and (1) of the Act, *Postal Service,* 332 NLRB 635 (2000). However, that does not mean that every failure by an employer to respond within the time frame requested by a union constitutes a statutory violation.

In the instant case, Respondent began responding to the Union's request 13 days after it was made and 6 days after the date by which the Union asked for the information. Respondent

[10] The fourth condition that the union representatives not remove employer property or materials need not be discussed since under no circumstances would the Union have a right to do so.

continued to provide the requested information in March and early April. The company refused to comply with the request regarding the personnel files of employees of disciplined employees, first on the grounds of relevance, then on the grounds of confidentiality. By May 14, 2015, 3 months after the date by which the Union asked for the information, Respondent had satisfied the information request.

I find the Respondent did not violate the Act except in making meritless objections to the personnel files. These files were clearly relevant and Respondent's belated claims of confidentiality were likewise meritless. For one thing, Respondent made no attempt to seek an accommodation with the Union for whatever confidentiality concerns it had. I thus find that Respondent violated Section 8(a)(5) in failing to provide the disciplinary files more promptly.

REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondents, CPL Linwood. d/b/a Linwood Care Center, and 201 New Road Operations, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making unilateral changes while collective bargaining negotiations are ongoing, such as changing its procedures for requesting schedule changes;

(b) Soliciting employees to sign a decertification petition;

(c) Soliciting employee grievances and promising to remedy them if employees got rid of the Union;

(d) Telling employees that no changes to working conditions would be made unless either employees got rid of the Union or a collective-bargaining agreement was signed;

(e) Interrogating employees concerning their support for the Union;

(f) Creating the impression that employees' union or other protected activities were under surveillance;

(g) Unilaterally altering its agreement with the Union regarding the Union's access to its property;

(h) Failing to promptly notify the Union of any discipline or any discharge of any bargaining unit employee;

(i) Unreasonably delaying providing information requested by the Union for meritless reasons.

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

(a) Comply with the terms of the access agreement with the Union of May 2014;

(b) Promptly notify the Union of any disciplinary action taken against any unit employee;

(c) Maintain the status quo regarding wages, hours and other working conditions until a collective-bargaining agreement has been signed or a legal impasse has been reached;

(d) Bargain in good faith with the Union until a collective bargaining agreement has been signed or a legal impasse has been reached;

(e) Within 14 days after service by the Region, post at its Linwood, New Jersey facility copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. 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, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 21, 2015.

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

Dated, Washington, D.C., April 5, 2016.

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 make unilateral changes while collective

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

[12] 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."

bargaining negotiations are ongoing, such as changing our procedures for requesting schedule changes.

WE WILL NOT solicit employees to sign a decertification petition.

WE WILL NOT T solicit employee grievances and promise to remedy these grievances if employees get rid of the Union.

WE WILL NOT tell employees that no changes to working conditions can be made unless employees either get rid of the Union or a collective-bargaining agreement is signed.

WE WILL NOT interrogate employees, including applicants for employment, about the support or lack of support for a union.

WE WILL NOT create the impression that employees' union or other protected activities are under surveillance.

WE WILL NOT unilaterally alter any agreements we have made with the Union regarding access to our property.

WE WILL NOT fail to notify the Union promptly of any disciplinary action taken against any bargaining unit employee.

WE WILL NOT unreasonably delay providing the Union with information it has requested which is relevant to the Union's role as collective bargaining representative of our employees.

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

WE WILL comply with the terms of our access agreement with the Union of May 2014.

WE WILL promptly notify the Union of any disciplinary action taken against any unit employee.

WE WILL maintain the status quo regarding wages, hours and other working conditions until a collective bargaining agreement has been signed or a legal impasse has been reached.

WE WILL bargain in good faith with the Union, SEIU 1199 United Health Care Workers East, until a collective bargaining agreement has been signed or a legal impasse has been reached.

CPL (LINWOOD) LLC D/B/A LINWOOD CARE CENTER AND ITS SUCCESSOR 201 NEW ROAD OPERATIONS, LLC D/B/A LINWOOD CARE CENTER

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/04-CA-146362 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.