UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-74917

WASHINGTON STATE NURSES ASSOCIATION

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of the Washington State Nurses Association ("the Union") to review a June 30, 2006 Decision and Order of the National Labor Relations Board ("the Board") dismissing an unfair labor practice

complaint against Sacred Heart Medical Center ("the Medical Center"). The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) ("the Act"). The Union's petition was filed on October 10, 2006 and is timely under the Act, which places no time limitations on such filings.

The Court has jurisdiction over this proceeding pursuant to Section 10(f) of the Act (29 U.S.C. § 160 (f)), as the Union transacts business within this judicial circuit.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board had a rational basis for dismissing a complaint allegation that the Medical Center unlawfully maintained and enforced a policy that precluded employees from wearing a button—"RNs Demand Safe Staffing"—in areas of the Medical Center where patients or their families might see the button.

STATEMENT OF THE CASE

Acting on a charge filed by the Union, the Board's General Counsel issued a complaint, alleging that the Medical Center violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by unlawfully maintaining and enforcing a policy that precluded employees from wearing a button—"RNs Demand Safe Staffing"—in areas of the

Medical Center where patients or their families might see the button. (GCX 1(a), 1(c) par.5)[1]

After a hearing, an administrative law judge issued a decision and recommended order, finding that the Medical Center's conduct was unlawful. (D&O 7-10.) The Medical Center filed exceptions to the judge's decision with the Board. (D&O 1; exceptions.)

On review, the Board (Chairman Battista and Member Schaumber; Member Liebman (dissenting)) found, in disagreement with the judge, that the Medical Center did not violate the Act when it limited where employees could wear the "RNs Demand Safe Staffing" button and dismissed the complaint. (D&O 1-7.)

The Union, the charging party before the Board, initiated these proceedings with a petition to review the Board's dismissal of the unfair labor practice complaint.

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[1] "D&O" references in this brief are to the Board's Decision and Order, which includes the attached decision of the administrative law judge. "Tr" references are to the transcript of the hearing before the administrative law judge. "GCX" and "JTX" refer, respectively, to exhibits introduced by the General Counsel and those introduced jointly by the General Counsel and the Medical Center (the Respondent before the Board). References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

The facts, which are largely undisputed, are summarized directly below; the Board's conclusions and order are described immediately thereafter.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; Employees Begin Wearing a Button—"RNs Demand Safe Staffing"

The Medical Center operates an acute care medical center in Spokane, Washington. It has had a collective-bargaining relationship with the Union for at least 20 years governing a bargaining unit of its registered nurses. Over the years, nurses have worn prounion buttons. Messages on these buttons have included "**T**ogether **E**veryone **A**chieves **M**ore—WSNA," "WSNA-SHMC RN's Remember '98," and "Staffing Crisis—Nursing Shortage—Medical Errors—**R**eal Solutio**N**s WSNA." (D&O 1; Tr 29-31, 39-40, 47, 50-51, GCX 3, 4.) At no time did the Medical Center ask a nurse to remove one of these buttons. (D&O 1; Tr 58-59 (stipulation).)

In the fall of 2003, the parties began negotiations to replace their existing collective-bargaining agreement that was set to expire in January 2004, and those negotiations continued into 2004, after the old agreement's expiration. Nursing staff levels were among the subjects of bargaining. During the negotiations, some of the

approximately 1200 nurses currently in the bargaining unit began wearing a button—"RNs Demand Safe Staffing." (D&O 1; Tr 40, 46-47, 53-54, 65-66, JTX 3.)

B. The Medical Center Places Limits on Where Employees Can Wear the "RNs Demand Safe Staffing" Button

After nurses began wearing the "RNs Demand Safe Staffing" button, some of the Medical Center's nurse managers began expressing their concern to the human resources department over the impact of the button on patients and their families. (D&O 1, 2 and n.8; Tr 60-61.) On February 27, 2004, the Medical Center issued a memorandum setting forth its concerns about the "RNs Demand Safe Staffing" button, and limiting the areas of the Medical Center in which employees could wear the button. (D&O 1; JTX 2.) The memorandum stated:

> We know that staff have worn a variety of buttons over the years for different purposes, and we have no objection to most messages. This message, however, disparages [the Medical Center] by giving the impression that we do not have safe staffing. We cannot permit the wearing of these buttons, because patients and family members may fear that the Medical Center is not able to provide adequate care.
>
> It is difficult for us to understand why nurses would wear these pins at the risk of upsetting their patients, particularly since we have come to agreement with [the Union] at the bargaining table on issues related to staffing and how staff will be involved when staffing issues arise.

> To assure that patients do not become alarmed or fearful about patient care at [the Medical Center], effective immediately, it is our expectation that no staff member will wear these buttons in any area on our campus where they may encounter patients or family members.

(D&O 1; JTX 2.)

Thereafter, the Medical Center asked several nurses to remove the "RNs Demand Safe Staffing" button from their uniforms. However, it did not discipline any nurse for wearing the button. The Union ratified a new contract in May 2004. (D&O 1 and n.2; Tr 28, 37-38, 41-43, 48, 50-51, 62.)

II. THE BOARD'S DECISION AND ORDER

On the foregoing facts, the Board (Chairman Battista and Member Schaumber; Member Liebman (dissenting)), in disagreement with the administrative law judge, found that the Medical Center had established special circumstances that permitted it to preclude employees from wearing the "RNs Demand Safe Staffing" button in areas where employees might encounter patients or family members. (D&O 1-7.) Accordingly, the Board dismissed the complaint, which had alleged that the Medical Center's policy toward the button violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). (D&O 4.)

SUMMARY OF ARGUMENT

Applying settled principles to undisputed facts, the Board had a rational basis for dismissing an unfair labor practice complaint that alleged that the Medical Center unlawfully prohibited employees from wearing a button—"RNs Demand Safe Staffing"—in areas of the Medical Center where patients or their families might see the button. The Board acknowledged that the restriction on this protected union message was presumptively invalid because it extended beyond immediate patient care areas, but the Board found that the Medical Center had shown the "special circumstances" necessary to justify the restriction.

First, the Board found that the target audience would reasonably interpret the button as claiming that the Medical Center maintained unsafe staffing levels and that such message was likely to cause concern among patients and their families. In addition, the Board noted that the nurses' direct supervisors had expressed a concern over the button's impact. Those factors fully warranted the Board in finding that the Medical Center had met its burden of showing the "special circumstances" necessary to permit it to prohibit the wearing of the button in areas where employees may encounter patients or their families.

The Union suggests that additional evidence, such as patient complaints, was required before the Medical Center could meet its burden of showing "special circumstances." That suggestion is undermined by the Supreme Court's recognition in *NLRB v. Baptist Hospital*, 442 U.S. 773, 781 (1979), that a hospital need only show that the button "may adversely affect patients."

The Union's reliance on *St. Luke's Hospital*, 314 NLRB 434 (1994), and *Mt. Clemens General Hospital*, 335 NLRB 48 (2001), *enforced*, 328 F.3d 837 (6th Cir. 2003), where the Board found that the hospitals could not ban buttons in non-patient care areas, is misplaced. The buttons in both of those cases referred merely to general disputes over terms of employment. The buttons did not, as here, refer to dangerous conditions that impacted patient care. Therefore, absent any evidence that the buttons did disturb patients or their families, the employers' concerns in those cases were properly found to be speculation, insufficient to establish "special circumstances."

ARGUMENT

THE BOARD HAD A RATIONAL BASIS FOR DISMISSING A COMPLAINT ALLEGING THAT THE MEDICAL CENTER UNLAWFULLY MAINTAINED AND ENFORCED A POLICY THAT PRECLUDED EMPLOYEES FROM WEARING A BUTTON—"RNs DEMAND SAFE STAFFING"— IN AREAS OF THE MEDICAL CENTER WHERE THE BUTTON MIGHT BE SEEN BY PATIENTS OR THEIR FAMILIES

A. Introduction and Standard of Review

1. Principles relating to wearing union buttons in hospitals

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157. Employees' Section 7 rights include the right to wear union-related buttons while at work, as a form of "other concerted action," a means of communication regarding self-organization rights, or a show of support for their union or fellow union members. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802-03 & n.7 (1945). Section 8(a)(1) of the Act makes it "an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." 29 U.S.C. § 158(a)(1).

Employees' Section 7 rights, however, must be balanced against their employer's right to maintain discipline and property rights. *See, e.g., Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 492 (1978); *NLRB v. Silver Spur Casino*, 623 F.2d 571, 582 (9th Cir. 1980). Accordingly, the Board has developed presumptions to aid its balancing of the employer's and employees' interests in cases involving restrictions of Section 7 rights, adjusting the presumptions to account for the particularities of different types of workplaces or buttons. *See Raley's, Inc.*, 311 NLRB 1244, 1246 (1993); *see also Beth Israel Hosp.*, 437 U.S. at 492-95 & n.10 (explaining history of presumption); *Silver Spur*, 623 F.2d at 582.

In the healthcare setting, the Board begins its analysis of an employer's restrictions on Section 7 rights by presuming that restrictions on the wearing of union-related buttons in immediate patient-care areas are valid, but that such restrictions in non-patient-care areas are invalid unless the employer can show special circumstances justifying the restrictions. *See Casa San Miguel, Inc.*, 320 NLRB 534, 540 (1995). An employer establishes special circumstances by showing that the restriction is "necessary to avoid disruption of health-care operations or disturbance of patients." *NLRB v. Baptist Hosp.*, 442 U.S. 773, 781 (1979) (quoting *Beth Israel Hosp.*, 437 U.S. at 507). *See also id.* at 781 n.11; *NLRB v. Los Angeles*

New Hosp., 640 F.2d 1017, 1020 (9th Cir. 1981). In carrying out that burden, a hospital need only show that the union button's message "may adversely affect patients." *Baptist Hosp.*, 442 U.S. at 781.

2. This Court's standard of review

This Court recognizes that the Board has the primary responsibility of "strik[ing] the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." *NLRB v. Southern California Edison Co.*, 646 F.2d 1352, 1368 (9th Cir. 1981) (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967)). *See also Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979) (the Board's construction of the Act may not be disturbed so long as it is "reasonably defensible"). Therefore, when reviewing the Board's findings regarding a hospital's limitations on union activity, this Court recognizes that "it is the Board's function to develop presumptions and 'its conclusions on such matters are traditionally accorded considerable deference.'" *Los Angeles New Hosp.*, 640 F.2d 1017, 1020 (quoting *Baptist Hosp.*, 442 U.S. at 796 (Brennan J. concurring)).

In addition, the Court must uphold the Board's determination that the Act was not violated unless it has no rational basis. *Chamber of Commerce v. NLRB*, 574

F.2d 457, 463-64 (9th Cir. 1978) (citing *Int'l Ladies' Garment Workers v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972)). *Accord American Postal Workers Union, AFL-CIO v. NLRB*, 370 F.3d 25, 27 (D.C. Cir. 2004).[2] *But see Healthcare Employees Union v. NLRB*, 463 F.3d 909, 918 n.12 (9th Cir. 2006).[3]

As to factual matters, the Board's findings are conclusive if supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)). *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 490 (1951).

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[2] Many other Circuits also apply the rational basis standard when reviewing the Board's determination that the Act was not violated. *See Grinnell Fire Protection Sys. Co. v. NLRB*, 236 F.3d 187, 201 (4th Cir. 2000); *United Paperworkers Int'l Union v. NLRB*, 981 F.2d 861, 865 (6th Cir. 1992); *Lousiana Dock Co. v. NLRB*, 909 F.2d 281, 286 (7th Cir. 1990); *Allbritton Communications Co. v. NLR*B, 766 F.2d 812, 817 (3d Cir. 1985); *Ona Corp. v. NLRB*, 729 F.2d 713, 725 (11th Cir. 1984).

[3] The panel in *Healthcare Employees Union v. NLRB*, 463 F.3d at 918 n.12, contrary to the panel in *Chamber of Commerce v. NLRB*, 574 F.2d 457, 463 (9th Cir. 1978), rejected rational-basis review and found that "[t]he weight of authority . . . makes clear we review the Board's conclusions for 'substantial evidence in the record as a whole.'" However, a three-judge panel may not overrule Circuit precedent absent intervening Supreme Court or en banc authority. *See Dawson v. City of Seattle*, 435 F.3d 1054, 1066 (9th Cir. 2006). Thus, the panel in *Healthcare Employees Union* was without authority to overrule *Chamber of Commerce*, and therefore the panel's statement should not be held precedential in that regard. *See Ritz-Carlton Hotel Co. v. NLRB*, 123 F.3d 760, 765 (3d Cir. 1997) (reiterating Third Circuit practice that to the extent that a later panel decision is contradictory to an earlier one, the earlier holding is the precedential one).

This requirement is satisfied if "it would have been possible for a reasonable jury to reach the Board's conclusion." *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 366-67 (1998). This standard of review does not change when the Board has disagreed with the administrative law judge. *See Universal Camera*, 340 U.S. at 493-94. Although the Court will "more carefully scrutinize[]" the Board's decision when it reverses the administrative law judge's credibility resolutions, the Court gives no special weight to the judge's decision where, as here, the Board merely disagrees with the ultimate conclusions drawn by the judge from the underlying facts. *Kallmann v. NLRB*, 640 F.2d 1094, 1098 and n.7 (9th Cir. 1981) ("the Board is to be accorded special deference in drawing derivative inferences from the evidence"). *Accord NLRB v. Brooks Cameras, Inc.*, 691 F.2d 912, 915 (9th Cir. 1982) (with respect to derivative inferences, the Court's "deference is to the Board," not the judge).

B. The Board Rationally Concluded that the Medical Center Did Not Act Unlawfully When It Prohibited Employees from Wearing the "RNs Demand Safe Staffing" Button in Areas where They Could Encounter Patients or their Family Members

In February 2004, the Hospital made a single exception to its longstanding practice of allowing nurses to wear union buttons in all locations. In response to the "RNs Demand Safe Staffing" button, the Medical Center issued a memo that

restricted nurses from wearing the button in areas of the Medical Center's "campus where they may encounter patients or family members." (JTX 1.) The memo stated that the Medical Center was implementing the restriction because it was concerned that "patients and family members may fear that the [Hospital] is not able to provide adequate care," and because it sought to assure "that patients do not become alarmed or fearful about patient care at [the Medical Center]." (JTX 1.)

As the Board noted (D&O 2 n.4), the Medical Center did not challenge the judge's finding that the button presented a legitimate workplace concern without being disloyal, recklessly made, maliciously false, vulgar or obscene. *See NLRB v. Electrical Workers Local 1229 (Jefferson Standard Broadcasting Co.*), 346 U.S. 464 (1953). Accordingly, the button's message is protected by Section 7 of the Act. However, even the Medical Center's limited restriction on its wearing was presumptively invalid because it extended beyond immediate patient care areas to areas where employees might encounter patients or their families. Nonetheless, as shown below, the Board rationally found (D&O 2) that the Medical Center had "rebutted the presumption of invalidity by showing 'special circumstances' that justify the restriction."

First, the Board found (D&O 2) that the Medical Center had established that the button's message—"RNs Demand Safe Staffing"—is a message that "would inherently disturb patients." Thus, the Board found (D&O 2) that the button's express demand for safe staffing would lead "[a] reasonable person" to interpret the button's message "as a claim that the [Medical Center's] staffing levels are unsafe." The Board also concluded (D&O 2) that the button's message was "likely to cause unease and worry among patients and their families, and disturb the tranquil hospital atmosphere that is necessary for successful patient care."

Second, the Board found (D&O 2) that the Medical Center supported its limitation on where the button could be worn by pointing to the reaction of the nurses' direct supervisors. (D&O 2.) Those supervisors "expressed concern over the impact the button may have on patients." Indeed, the Medical Center's taking into account those concerns was reasonable because, as the Board explained (D&O 2), they "work on the [Medical Center] floor and are in a position to gauge patients' reaction to the button."

The reasonable inferences that could be drawn regarding the button's message and the likely reaction to that message, in conjunction with the informed concerns expressed by those supervisors, fully warranted the Board in finding (D&O 1-4) that

the Medical Center had met its burden of showing special circumstances justifying its ban of the button in areas of the Medical Center where the nurses may encounter patients or family members. As the Board noted here (D&O 2), such a ban is consistent with the Supreme Court's recognition in *Baptist Hospital* that "'in the context of health-care facilities, the importance of the employer's interest in protecting patients from disturbance cannot be gainsaid.'" *Baptist Hosp.*, 442 U.S. at 785 (quoting *Beth Israel Hosp.*, 437 U.S. at 505). As the Court further recognized in *Baptist:*

> Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family—irrespective of whether that patient and that family are labor or management oriented—need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed.

Baptist, 442 U.S. at 783 n.12 (quoting *Beth Israel*, 437 U.S. at 509 (Blackmun, J., concurring in judgment)).

C. The Union's Contentions Are Without Merit

The Union (Br 11-13) claims that the Board erred in finding that the Medical Center met its burden of showing the special circumstances necessary to preclude the nurses from wearing the "RNs Demand Safe Staffing" button in areas where they

may encounter patients or family members. The Union baldly asserts (Br 12) that the "Board found no evidence to support its conclusion that the button's message is reasonably likely to disturb patients and their families." That assertion, and, for that matter, the Union's entire brief, simply ignores the two factors the Board relied on—the button itself and the supervisors' legitimate concerns—as well as the reasonable inferences drawn from those factors, to conclude that the Medical Center met its burden.

The Board reasonably examined the button itself to determine that its message would likely disturb patients and their families. *See Pathmark Stores, Inc.,* 342 NLRB 378 (2004) (upholding grocery store's ban on union insignia with the slogan "Don't Cheat About the Meat!" despite the lack of evidence that customers declined to buy the store's meat because of the slogan). Likewise, the Board reasonably considered the concerns of the nurses' supervisors when determining the likely impact of the button. *See Baptist Hospital*, 442 U.S. at 783-84 (relying on opinions from hospital officials to hold that the hospital demonstrated special circumstances to limit solicitation); *Baylor Univ. Med. Ctr. v. NLRB*, 662 F.2d 56, 62 & n.8 (D.C. Cir. 1981) (remanding to Board its order precluding hospital from banning

solicitation in cafeteria because Board disregarded "testimony of several witnesses who testified that solicitation in the cafeteria would disrupt patients and visitors").

The Union does not argue that the Board improperly relied on the button itself or on the supervisors' concerns, or that the Board drew unreasonable inferences from this evidence. Instead, the Union argues (Br 12) that, without further evidence to prove that "disruption of patient care would necessarily result" if the nurses were allowed to wear the button in areas where they might encounter patients or their families, the Medical Center has failed to carry its burden of showing the special circumstances necessary to limit the wearing of the button.

But, as the Union itself recognizes at one point (Br 12), the Board was required to find only that the button was "reasonably likely to disturb patients and their families." This less demanding burden than the one the Union posits elsewhere (Br 12) flows from the Supreme Court's decision in *Baptist Hospital*, where, the Board noted (D&O 3) here, the Supreme Court made clear that "a hospital need not wait for the awful moment when patients or family are disturbed by a button before it may lawfully be restricted." As the Board has observed in the retail context, an employer "need not await customer complaint before it takes legitimate action to protect its business." *Nordstrom, Inc.*, 264 NLRB 698, 701 n.12 (1982).

Accordingly, the Board reasonably concluded (D&O 3) that a hospital, such as the Medical Center, may meet its burden of showing the requisite special circumstances by relying on evidence that shows that the wearing of a button "may" have an adverse affect.

Nonetheless, to support its contention that the Medical Center should have been required to present evidence demonstrating that its restriction was necessary to avoid disruption, the Union relies on two cases: *St. Luke's Hospital,* 314 NLRB 434 (1994), and *Mt. Clemens General Hospital,* 335 NLRB 48 (2001), *enforced* 328 F.3d 837 (6th Cir. 2003). Neither case compels the result the Union suggests.

In *St. Luke's Hospital,* 314 NLRB 434 (1994) (Br 12), the button—"United to Fight for Our Health Plan"—raised no concerns about patient care, but simply addressed an internal concern that nurses had regarding their benefits. The Board found (*see* D&O 3) that because the button contained an "innocuous message" unlikely to disturb patients and their families, the hospital could not ban the button in non-patient care areas. Here, by contrast, as the Board noted (D&O 3), the message—"RNs Demand Safe Staffing"— "is not innocuous," but instead raises doubt as to whether the Medical Center is providing staffing sufficient to provide safe care, a message reasonably likely to disturb patients and their families. True,

the Board found it significant in *St. Luke's Hospital* that there was no evidence of patient complaints (314 NLRB at 435), but that finding must be viewed, as the Board explained here (D&O 3), in the context of a button with an innocuous message. The case does not stand for the proposition that the absence of patient complaints, alone, prevents a hospital from lawfully restricting the wearing of a union button.

Similarly, *Mt. Clemens General Hospital,* 335 NLRB 48 (2001), *enforced* 328 F.3d 837 (6th Cir. 2003) (Br 12-13), involved a button that expressed disagreement with general working conditions—required overtime for nurses—but did not directly question the safety of patient care. In finding that the hospital did not meet its burden of showing the special circumstances necessary to restrict its wearing, the Board also relied on the absence of evidence that the wearing of the button resulted in complaints from patients or their families, or otherwise interfered with patient care or safety. 335 NLRB at 50. As in *St. Luke's Hospital*, however, the Board's reliance on the absence of patient complaints must be considered in the context of the Board's analyzing the permissibility of restrictions on a button that did not have a facially troubling message.

To the extent that the Union asserts that the message of the button in *Mt. Clemens* is akin to the message contained in the "RNs Demand Safe Staffing Button," the Board reasonably distinguished the two buttons. As the Board noted (D&O 3), the button's message in *Mt. Clemens* was "cryptic"— a line drawn through the letters "FOT." *See* 335 NLRB at 49. Therefore, patients and their families would likely have no idea that the nurses were wearing the button to support their position that the hospital should not force them to work overtime. Accordingly, as the Board further noted (D&O 3), the hospital's defense "rested on a chain of inferences: that patients would ask what 'FOT' meant, and that nurses would respond with an explanation that disturbed the patients." *See* 328 F.3d at 841 n.1. Here, by contrast, as the Board reasonably found (D&O 3), the "RNs Demand Safe Staffing" button "sends a clear message to patients: current staffing levels at the Medical Center are unsafe, and medical care is thus being compromised. No inferential leap is required in order to conclude that a reasonable patient would be disturbed by this message."

Moreover, even if patients and their families were able to understand the button's message in *Mt. Clemens*, the Board reasonably concluded (D&O 3) they would have interpreted the message as a union-management dispute that concerned

only the nurses' own terms and conditions of employment. Thus, as the Board explained here (D&O 3), "[t]he complaint [in *Mt. Clemens*] was not that 'forced overtime' would harm patients. Rather the complaint was that employees would be forced to do something that they did not wish to do." Indeed, the hospital never linked the issue of forced overtime to patient care or safety. Instead, hospital officials simply expressed concern that if patients and their families knew that nurses had some issues with the hospital over their working conditions, then patients and their families would become concerned that nurses were preoccupied with other matters and would not provide sufficient care. *See* 328 F.3d at 847. Here, by contrast, as the Board explained (D&O 3), "the message on the 'RNs Demand Safe Staffing' button relates directly to issues of patient care and hospital safety."

Still another aspect of the hospital's actions in *Mt. Clemens* contributes to that case's standing in "stark contrast" to this case. (D&O 4.) The hospital's policy in *Mt. Clemens* was overbroad because it prohibited employees from wearing the button in areas where patients and their families were not present, such as nurses' lounges. 335 NLRB at 50. Here, the complaint does not allege that the Medical Center precluded employees from wearing the button in areas of the Medical Center where it would not have been seen by patients or their families.

Therefore, contrary to the Union's claim (Br 13), the Medical Center's restriction was not overbroad, but instead constituted, as the Board found (D&O 2), an "appropriate step[] to protect the atmosphere of patient care in the facility . . . by narrowly restricting the use of this single button, and only in locations where [the button] might be seen by patients or their families." As a result, the restriction imposed by the Medical Center is akin to the restriction permissibly imposed by the hospital in *Baptist Hospital*, which included "any area of the [h]ospital which is accessible to or utilized by the public." *Baptist Hospital*, 442 U.S. at 775.

Finally, the Medical Center's showing of special circumstances is not undermined because the Medical Center allowed nurses to wear a different union button–"Staffing Crisis-Nursing Shortage-Medical Errors"–without similar limitation. As the Board found (D&O 3-4), because both buttons contained union messages protected by Section 7 of the Act, the Medical Center's tolerance of the other button actually reinforced the fact that, in this case, the Medical Center did not engage in prohibited discrimination against a message because it is a union message.

Since the Board was not confronted with an allegation that the Medical Center's tolerance of the other button showed prohibited discrimination based on the content of a protected union message, the Board was left only to confront the

argument that the Board should nonetheless second-guess management's decision as to which union button was likely to trouble the Medical Center and why. This the Board properly declined to do. (D&O 4.) "[M]anagement is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder-supervision." *NLRB v. McGahey d/b/a Columbus Marble Works*, 233 F.2d 406, 413 (5th Cir. 1956).

Accordingly, the Board was fully warranted (D&O 4) in "not second guess[ing the Medical Center's] business judgment or condemn[ing] its decision not to broaden its ban to include both buttons." Rather, once the Board found that the Medical Center had reasonably determined that the "RNs Demand Safe Staffing" button contained a message that was likely to disturb patients or their families, the Board was fully warranted in concluding (D&O 4) that "[o]n these facts, the limitations imposed by the [Medical Center] would not tend to coerce, restrain, and interfere with employees in the exercise of their [statutory] rights."

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Union's petition for review.

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