

Nos. 08-3887-ag & 08-3888-ag

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

BLOOMFIELD HEALTH CARE CENTER

Respondent

**ON APPLICATION FOR ENFORCEMENT OF
ORDERS OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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TABLE OF CONTENTS

Headings	Page(s)
Statement of subject matter and appellate jurisdiction	1
Statement of the issues presented	4
Statement of the case.....	5
I. The Board’s findings of fact.....	7
A. Background: The Union files a petition for an election	7
B. Kitson Serves as the Union’s morning election observer and later returns to the facility for her paycheck; the Center excludes her from the recreation room open to other off-duty employees, then suspends her for protesting that action; the Union wins the election	8
C. The Center files objections to the election; the Board overrules one objection without a hearing, and directs a consolidated hearing addressing the other objection and the unfair labor practice complaint allegations	11
D. The Center questions employees about their attendance at a union meeting	12
E. The Center eliminates an RA position and transfers those duties to CNAs without giving the Union notice or an opportunity to bargain about the change; the Center unilaterally changes employee work schedules	12
F. Following the Board’s certification of the Union, the Center refuses the Union’s request to bargain; the General Counsel issues a complaint alleging that the Center’s refusal violates Section 8(a)(5) and (1) of the Act.....	14
II. The Board’s conclusions and orders	15
Summary of argument.....	17

Headings-Cont'd

Page(s)

Argument.....20

- I. The Board is entitled to summary enforcement of the portion of its order which is based on its uncontested finding that the Center violated Section 8(a)(1) of the Act by interrogating employees about their attendance at a union meeting.....20
- II. Substantial evidence supports the Board’s finding that the Center violated Section 8(a)(1) of the Act by excluding off-duty employee Kitson from the facility, and violated Section 8(a)(3) and (1) of the Act by suspending Kitson because she protested her unlawful exclusion22
 - A. Applicable principles22
 - B. The Center unlawfully excluded Kitson from the facility on election day25
 - C. The Center violated Section 8(a)(3) and (1) of the Act by suspending Kitson for protesting her unlawful exclusion31
- III. The Board acted within its discretion in overruling the Center’s election objections and certifying the Union, and therefore properly found that the Center violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union upon demand.....32
 - A. Applicable principles33
 - B. The Board reasonably overruled the Center’s election objections35
 - 1. The Board did not abuse its discretion in overruling the Center’s objection alleging that employee Kitson threatened Administrator Martin on the day of the election in the presence of eligible voters35
 - 2. The Board did not abuse its discretion in overruling without a hearing the Center’s election objection regarding the Union’s distribution of a prounion letter from eight state legislators38

Headings-Cont'd

Page(s)

IV. The Board reasonably found that the Center violated Section 8(A)(5) and (1) of the Act by unilaterally eliminating a unit job, reassigning an employee, and changing employees' work schedules without notifying and bargaining with the Union.....45

 A. Applicable principles45

 B. The Center's unilateral elimination of the RA position and transfer of those duties to CNAs was a substantial and material change to employee terms and conditions of employment, and not *de minimis*48

 C. The Center's unilateral changes to Blackwood-Lindsay and Wallace's work schedules were not *de minimis*, nor were they justified by its practice of requiring other CNAs to work weekends.....52

Conclusion 56

TABLE OF AUTHORITIES

<i>675 West End Owners Corp.</i> , 345 NLRB 324 (2005), <i>enforced mem.</i> , 2008 WL 5273442 (2d Cir. 2008)	46
<i>Abbey's Transport Services, Inc. v. NLRB</i> , 837 F.2d 575 (2d Cir. 1988)	23,24,27
<i>Acme Die Casting v. NLRB</i> , 26 F.3d 162 (D.C. Cir. 1994).....	47,51,54
<i>Advertisers Manufacturing Co. v. NLRB</i> , 677 F.2d 544 (7th Cir. 1982)	45
<i>American Gardens Management Co.</i> , 338 NLRB 644 (2002).....	29
<i>Beverly California Corp. v. NLRB</i> , 227 F.3d 817 (D.C. Cir. 2000).....	29
<i>Boire v. Greyhound Corp.</i> , 376 U.S. 473 (1964)	3
<i>Bridgeport Fittings, Inc. v. NLRB</i> , 877 F.2d 180 (2d Cir. 1989)	34
<i>Carpenters Local 1031</i> , 321 NLRB 30 (1996).....	54
<i>Chipman Union, Inc.</i> , 337 NLRB 107 (1995).....	41
<i>Columbia Tanning Corp.</i> , 238 NLRB 899 (1978).....	39,40,43
<i>Corrections Corp. of America v. NLRB</i> , 234 F.3d 1321 (D.C. Cir. 2000).....	33

Cases--Cont'd	Page(s)
<i>Director, OWCP v. Greenwich Collieries,</i> 512 U.S. 267 (1994)	23
<i>Exxon Chemical Co. v. NLRB,</i> 386 F.3d 1160 (D.C. Cir. 2004).....	33
<i>Finch, Pruyn & Co.,</i> 349 NLRB 270 (2007), <i>enforced mem. on other grounds,</i> 296 Fed. Appx. 83 (D.C. Cir. 2008).....	46,50
<i>Flambeau Airmold Corp.,</i> 334 NLRB 165 (2001).....	49
<i>Freund Baking Co.,</i> 330 NLRB 17 (1999).....	3
<i>Fun Striders, Inc. v. NLRB,</i> 686 F.2d 659 (9th Cir. 1981)	29
<i>Georgia Power Co.,</i> 325 NLRB 420 (1998), <i>enforced mem.,</i> 176 F.3d 494 (11th Cir. 1999)	54
<i>Goya Foods of Florida,</i> 351 NLRB 94 (2007).....	54
<i>Greater Hartford Ass'n for Retarded Citizens d/b/a HARC, Case No.</i> 34-RC-2157 (NLRB May 9, 2006)	42
<i>Gruma Corp.,</i> 350 NLRB 336 (2007).....	46
<i>Guardsmark, LLC v. NLRB,</i> 475 F.3d 396 (D.C. Cir. 2007).....	30
<i>Huntsville Manufacturing Co.,</i> 240 NLRB 1220 (1979).....	41

Cases--Cont'd	Page(s)
<i>Ironton Publications, Inc.</i> , 321 NLRB 1048 (1996).....	51
<i>Knipe v. Skinner</i> , 999 F.2d 708 (2d Cir. 1993)	21
<i>Litton Financial Printing v. NLRB</i> , 501 U.S. 190 (1991)	45
<i>Loc. Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO v. Jewel Tea Co.</i> , 381 U.S. 676 (1965)	46
<i>Microimage Display v. NLRB</i> , 924 F.2d 245 (D.C. Cir. 1991).....	29
<i>Mike O' Connor Chevrolet-Buick-GMC Co.</i> , 209 NLRB 701 (1974), <i>enforcement denied on other grounds</i> , 512 F.2d 684 (8th Cir. 1975)	46
<i>Milchem, Inc.</i> , 170 NLRB 362 (1968).....	37
<i>Millard Processing Services, Inc. v. NLRB</i> , 2 F.3d 258 (8th Cir. 1993)	38
<i>Mimbres Memorial Hospital</i> , 342 NLRB 398 (2004), <i>enforced sub nom. NLRB v. Community Health Services</i> , 482 F.3d 683 (10th Cir. 2007).....	53
<i>Mitchellace, Inc.</i> , 321 NLRB 191 (1996).....	51
<i>NLRB v. A. J. Tower Co.</i> , 329 U.S. 324 (1946)	35
<i>NLRB v. Arthur Sarnow Candy Co., Inc.</i> , 40 F.3d 552 (2d Cir. 1994)	32,34,35

Cases--Cont'd	Page(s)
<i>NLRB v. Baptist Hospital, Inc.</i> , 442 U.S. 773 (1979)	30
<i>NLRB v. Black Bull Carting, Inc.</i> , 29 F.3d 44 (2d Cir. 1994)	34
<i>NLRB v. Future Ambulette, Inc.</i> , 903 F.2d 140 (2d Cir. 1990)	24
<i>NLRB v. G & T Terminal</i> , 267 F.3d 103 (2d Cir. 2001)	25
<i>NLRB v. HeartShare Human Services of New York, Inc.</i> , 108 F.3d 467 (2d Cir. 1997)	33, 35
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962)	45
<i>NLRB v. Lance Investigation Serv., Inc.</i> , 680 F.2d 1 (2d Cir. 1982)	43
<i>NLRB v. Link-Belt Co.</i> , 311 U.S. 584 (1941)	24
<i>NLRB v. Long Island Airport Limousine Serv. Corp.</i> , 468 F.2d 292 (2d Cir. 1972)	24
<i>NLRB v. Monroe Tube Co., Inc.</i> , 545 F.2d 1320 (2d Cir. 1976)	30,33
<i>NLRB v. Precision Indoor Comfort, Inc.</i> , 456 F.3d 636 (6th Cir. 2005)	36
<i>NLRB v. S.E. Nichols, Inc.</i> , 862 F.2d 952 (2d Cir. 1988)	23, 24

Cases--Cont'd	Page(s)
<i>NLRB v. Springfield Hospital</i> , 899 F.2d 1305 (2d Cir. 1990)	21
<i>NLRB v. Star Color Plate Service</i> , 843 F.2d 1507 (2d Cir. 1988)	21
<i>NLRB v. Transp. Mgmt.</i> , 462 U.S. 393 (1983)	23
<i>NLRB v. V & S Schuler Engineering, Inc.</i> , 309 F.3d 362 (6th Cir. 2002)	34
<i>NLRB v. Superior of Missouri, Inc.</i> , 233 F.3d 547 (8th Cir. 2000)	34
<i>NYU Medical Center v. NLRB</i> , 156 F.3d 405 (2d Cir. 1998)	22
<i>Neither Sunoco, Inc.</i> , 349 NLRB 240 (2007)	51,52
<i>Northeastern Land Services, Ltd. v. NLRB</i> ___ F.3d ___, 2009 WL 638248 (1st Cir. 2009)	3
<i>Office and Professional Employees International Union v. NLRB</i> , 981 F.2d 76 (2d Cir. 1998)	23
<i>Oneita Knitting Mills, Inc. v. NLRB</i> , 375 F.2d 385 (4th Cir. 1967)	46
<i>Pepsi-Cola Bottling Co. of Fayetteville, Inc.</i> , 330 NLRB 900 (2000), <i>enforced mem.</i> , 2001 WL 791645 (4th Cir. 2001)	53
<i>Rangaire Acquisition Corp.</i> , 309 NLRB 1043 (1992)	50
<i>Resolute Realty Management Corp.</i> , 297 NLRB 679 (1990)	21

Cases--Cont'd	Page(s)
<i>Richlands Textile, Inc.</i> , 220 NLRB 615 (1975).....	42
<i>San Antonio Portland Cement Co.</i> , 277 NLRB 338 (1985).....	50
<i>Sara Lee Bakery Group, Inc. v. NLRB</i> , 514 F.3d 422 (5th Cir. 2008).....	21
<i>Senior Care at the Fountains</i> , 341 NLRB 1004 (2004), <i>enforced mem. sub nom. NLRB v. Adlandco Dev. Corp.</i> , 131 Fed. Appx. 16 (3d Cir. 2005).....	22
<i>Service Corp., International v. NLRB</i> , 495 F.3d 681 (D.C. Cir. 2007).....	34
<i>St. Gobain Abrasives, Inc.</i> , 337 NLRB 82 (2001).....	41
<i>Snell Island SNF LLC v. NLRB</i> , (2d Cir. Nos. 08-3822-ag and 08-4336-ag).....	3
<i>Stoehmann Bakeries, Inc. v. NLRB</i> , 95 F.3d 219 (2d Cir. 1996).....	54
<i>Strand Theater of Shreveport Corp. v. NLRB</i> , 493 F.3d 515 (5th Cir. 2007).....	46
<i>Sunrise Rehabilitation Hosp.</i> , 320 NLRB 212 (1995).....	34
<i>Sunoco, Inc.</i> , 349 NLRB 240 (2007).....	51,52
<i>Torrington Extend-A-Care Employees Association v. NLRB</i> , 17 F.3d 580 (2d Cir. 1994).....	21

Cases--Cont'd	Page(s)
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951)	24
<i>Ursery Cos.</i> , 311 NLRB 399 (1993)	41, 44
<i>W-I Forest Products Co.</i> , 304 NLRB 957 (1991)	49
<i>Wright Line, a Div of Wright Line, Inc.</i> , 251 NLRB 1083 (1980), <i>enforced on other grounds</i> , 662 F.2d 899 (1 St Cir. 1981)	24

Statutes

National Labor Relations Act, as amended

(29 U.S.C. § 151 et seq.)

Section 3(b)(29 U.S.C. § 153(b)).....	3
Section 7 (29 U.S.C. § 157)	16,17,22,23,27,29
Section 8(a)(1)(29 U.S.C. § 158(a)(1)).....	2,4,5,6,12,14,15,17,18,19,20,21,22,23,28
Section 8(a)(1)(29 U.S.C. § 158(a)(1)).....	29,31,32,33,34,44,45,51,55
Section 8(a)(3)(29 U.S.C. § 158(a)(3)).....	2,4,6,12,15,17,18,22,23,29,31,32
Section 8(a)(5)(29 U.S.C. § 158(a)(5)).....	2,4,6,7,12,14,15,16,19,20,32,33,34
Section 8(a)(5)(29 U.S.C. § 158(a)(5)).....	44,45,51,55
Section 9(d)(29 U.S.C. § 159(d)).....	2,3
Section 10(a)(29 U.S.C. § 160(a))	2
Section 10(e)(29 U.S.C. § 160(e))	3,24

MISCELLANEOUS

<i>Quorum Requirements, Department of Justice, Office of Legal Counsel</i> , 2003 WL 24166831 (O.L.C., Mar. 4, 2003)	3
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**ON APPLICATION FOR ENFORCEMENT OF
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**BRIEF FOR
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**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce two Orders against Bloomfield Health Care Center (“the Center”). In the first of those orders, which issued on March 20,

2008, and is reported at 352 NLRB 252 (2008),¹ the Board found that the Center violated Section 8(a)(5), (3) and (1) of the National Labor Relations Act (29 U.S.C. §§ 151, 158(a)(5), (3) and (1)) (“the Act”), based on conduct the Center committed before, during, and in the aftermath of the New England Health Care Employees Union, District 1199, SEIU’s (“the Union”) prevailing in a Board-conducted election. (SPA 11-24.) In the second order, which issued on June 27, 2008, and is reported at 352 NLRB No. 94 (2008), the Board found that the Center violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union pursuant to its demand, which the Union based on its victory in the election. (SPA 25-27.)

The Board had subject matter jurisdiction over the unfair labor practice proceedings below under Section 10(a) of the Act (29 U.S.C. § 160(a)). Because the Board’s Order is based, in part, on findings made in an underlying representation proceeding (Board Case No. 34-RC-2172), the record in that proceeding is also before the Court pursuant to Section 9(d) of the Act (29 U.S.C. § 159(d)). *See Boire v. Greyhound Corp.*, 376 U.S. 473, 477-79 (1964). The

¹ References in this brief are to the appendices filed along with the Center’s brief. “SPA” refers to the special appendix that is bound with the Center’s brief and contains the Board’s decision and orders; “A” refers to the separately bound joint appendix, which contains the transcript and exhibits from the hearing before the administrative law judge. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

Court has jurisdiction to review the Board's actions in the representation case solely for the purpose of "enforcing, modifying or setting aside in whole or in part the [unfair labor practice] order of the Board." (29 U.S.C. § 159(d)). The Board retains authority under Section 9(c) of the Act (29 U.S.C. § 159(c)) to resume processing the representation case in a manner consistent with the Court's rulings. *See Freund Baking Co.*, 330 NLRB 17 n.3 (1999) (citing cases).

The Board filed its application for enforcement on August 7, 2008. That filing was timely because the Act imposes no time limit on proceedings for enforcement of Board orders. The Court has jurisdiction over this case pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e)), because the unfair labor practices occurred in Bloomfield, Connecticut. The Board's Order is a final order issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153(b)).²

² In 2003, the Board sought an opinion from the United States Department of Justice's Office of Legal Counsel ("the OLC") concerning the Board's authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b) of the Act. The OLC concluded that the Board has the authority to issue decisions under those circumstances. *See Quorum Requirements, Department of Justice, Office of Legal Counsel*, 2003 WL 24166831 (O.L.C., Mar. 4, 2003). The First Circuit has agreed, upholding the authority of the two-member Board to issue decisions. *Northeastern Land Services, Ltd. v. NLRB*, ___ F.3d ___, 2009 WL 638248 (1st Cir. 2009).

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of the portion of its order based on its uncontested finding that the Center violated Section 8(a)(1) of the Act by interrogating employees about attendance at a union meeting.

2. Whether substantial evidence supports the Board's finding that the Center violated Section 8(a)(1) of the Act by excluding off-duty employee Winsome Kitson from the nursing facility, and violated Section 8(a)(3) and (1) of the Act by suspending Kitson because she protested her unlawful exclusion.

3. Whether the Board acted within its discretion in overruling the Center's election objections and certifying the Union, and therefore properly found that the Center violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union upon demand.

4. Whether the Board reasonably found that the Center violated Section 8(a)(5) and (1) of the Act by unilaterally eliminating a unit job, reassigning an employee, and changing employees' work schedules without notifying and bargaining with the Union.

The issue has been briefed before this Court in *Snell Island SNF LLC v. NLRB* (2d Cir. Nos. 08-3822-ag and 08-4336-ag), which is scheduled for oral argument on April 15, 2009.

STATEMENT OF THE CASE

These proceedings began when the Union filed a petition with the Board seeking certification as the exclusive collective-bargaining representative of a unit of the Center's employees. The Union prevailed in a Board-conducted election, winning by a vote of 68 to 42. Thereafter, the Center filed objections to the election, all but two of which it eventually withdrew. (SPA 1-4; A 15-16, 39.) The Regional Director considered the Center's remaining objections and determined, as relevant here, that one of them--the Center's objection that employee Kitson interfered with employee free choice by responding to Administrator Martin's decision to exclude her from the facility on election day--warranted a hearing. The Regional Director overruled without a hearing the Center's other objection, which alleged that a letter from eight state legislators interfered with the election. (SPA 2-3.) The Board affirmed the Regional Director's determination to overrule that objection without a hearing. (SPA 8-9.)

While the Center's objections were pending, the Union filed a series of charges with the Board, contending that the Center had committed several unfair labor practices during and after the election. (SPA 19; A 173, 178, 194-95, 198-99, 202-03.) Based upon those charges, the Regional Director issued a complaint, which he later amended, alleging that the Center violated Section 8(a)(1) of the Act

by coercively interrogating employees and banning Kitson from the facility on election day; violated Section 8(a)(3) and (1) of the Act by suspending Kitson for reacting to that unlawful ban; and violated Section 8(a)(5) and (1) of the Act by eliminating an employee job classification and changing employees' work schedules, all without notifying or bargaining with the Union following its election victory. (A 181-83, 204-10.)

The Regional Director consolidated the representation and unfair labor practice issues for hearing before an administrative law judge. Based on the evidence submitted at the hearing, the judge issued a decision recommending the overruling of the Center's objections and the certification of the Union as the employees' collective-bargaining representative and finding merit to some but not all of the unfair labor practice complaint allegations. (SPA 8 n.1, 10 n.1.) After considering the exceptions filed by the General Counsel and the Center, the Board issued its March 20, 2008 decision, agreeing with the judge's decision to overrule the Center's objections and to certify the Union, and finding that the Center violated Section 8(a)(1) of the Act by interrogating employees and by attempting to deny Kitson access to the facility; violated Section 8(a)(3) and (1) of the Act by suspending Kitson; and violated Section 8(a)(5) and (1) of the Act by making unilateral changes. The Board affirmed, as modified, the judge's recommended

order. (SPA 11-24.)

Subsequently, the Union filed a charge with the Board alleging that, following the Board's certification of the Union as the employees' collective-bargaining representative, the Center had refused to bargain with the Union pursuant to its request. (SPA 25; A 924.) The General Counsel issued a complaint and filed a motion for summary judgment. The Center answered the complaint and filed an opposition to the motion for summary judgment. (SPA 25; A 925-1094.) In its June 27, 2008 decision and order, the Board granted the motion for summary judgment, and found that the Center violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the employees' duly certified collective-bargaining representative. (SPA 25-26.)

I. THE BOARD'S FINDINGS OF FACT

A. Background: the Union Files a Petition for an Election

The Center operates a 120-bed nursing home in Bloomfield, Connecticut. At the time of the organizing campaign and election, the administrator was Penni Martin and the director of nursing was Carol Mortenson. There were approximately 117 employees in the bargaining unit, which included rehabilitation aides ("RAs") and certified nursing assistants ("CNAs"). (SPA 20; A 204-12, 212-20.)

In April 2006, CNA Avril Wallace led a group of about 20 employees and presented a demand for recognition to the Center's administrator. On that same day, the Union filed a petition for an election. (SPA 20; A 727.)

B. Kitson Serves as the Union's Morning Election Observer and Later Returns to the Facility for Her Paycheck; the Center Excludes Her from the Recreation Room Open to Other Off-Duty Employees, then Suspends Her for Protesting That Action; the Union Wins the Election

On Thursday, May 18, 2006, pursuant to a stipulated election agreement, the Board conducted a secret-ballot election among the unit employees. (SPA 19; A 15.) Winsome Kitson, who had worked for the Center as a CNA since 1997, served as one of the Union's election observers during the morning voting session from 6 to 8 a.m. After the session ended, she left, as she was not scheduled to work that day. (SPA 20; A 442.)

Kitson returned to the facility at about 3 p.m. to pick up her paycheck, as was her custom on Thursdays. When she arrived, she found the Center holding the afternoon voting session in the dining room; at the same time, the Center was commemorating National Nursing Home Week by, among other activities, conducting a wheelchair race for residents in the lobby. In addition, the Center simultaneously was holding a party for employees in the recreation room, about 75 feet from the voting area and nearer to the lobby, to promote its position in the

election. There, the Center offered food to employees packaged with its message to “Give Penni [Martin] a Chance,” and to vote “no” to the Union. (SPA 20; A 231-33.)

At the afternoon voting session, the Center directed employees who were also picking up their paychecks to collect their free coffee mugs in the recreation room. (SPA 21; A 444-47, 566, 589, 671, 904-05.) Another CNA, Tameka Edwards, who was also off duty, preceded Martin into the building, picked up her paycheck, and then went to vote and attend the party. (A 445, 587-89.)

After Kitson picked up her paycheck, she was then directed to pick up her mug. As she was walking toward the recreation room to get her mug, Administrator Martin, who was in her office, noticed Kitson. Martin approached Kitson from behind in the hallway and asked her what she was doing there. (SPA 12, 21; A 447.) Kitson responded that she was picking up her paycheck and going to get a mug. Martin told her that she had to leave the facility because she was not on duty. As they were entering the recreation room, Kitson asked Martin why she was harassing her when there were other off-duty employees present in the facility. Kitson added that Martin did not know who she was messing with. (SPA 12, 21; A 448.) Although Martin said that she was going to tell other off-duty employees to leave, she did not do so; but earlier she had directed union supporters Avril

Wallace and Fay Richards to leave the facility. (SPA 20-21; A 448, 798, 835-36.)

Otherwise, the Center had no policy prohibiting off-duty employees from being in the facility. (SPA 20; A 798.)

In the recreation room, both Kitson and Martin spoke to several other employees. Some of those employees--Edwards and Millicent Mullins--were dressed in street clothes and not on duty. Martin did not ask them to leave the facility. After passing through the recreation room where about 10 employees were gathered, Kitson left the building.

Later that day, the Board tallied the ballots, and determined that the Union had won the election: of approximately 117 eligible voters, 68 cast ballots for the Union and 42 against it, with 7 challenged ballots, an insufficient number to affect the election results. (SPA 12, 21; A 448-49, 452, 566-70, 589-92, 704-05, 714-19, 906-08.) The next day, Martin informed Kitson not to report to work for her scheduled tour of duty. On May 25, Martin informed Kitson that she was suspended and could not return to duty until she completed an anger management course. (SPA 21; A 482.)

C. The Center Files Objections to the Election; the Board Overrules One Objection Without a Hearing, and Directs a Consolidated Hearing Addressing the Other Objection and the Unfair Labor Practice Complaint Allegations

Following the Union's election victory, the Center filed objections alleging, as relevant here, that employee Kitson threatened Administrator Martin on the day of the election in the presence of eligible voters (SPA 1-4, 19; A 15); and that the Union interfered with employee free choice by distributing a letter signed by eight Connecticut legislators that advocated a prounion vote.³ (SPA 19; A 15.)

The Regional Director issued a Report on Objections finding, as relevant here, that the Center's objection concerning Kitson raised substantial and material issues of fact that warranted a hearing. He also recommended overruling without a hearing the Center's objection concerning the letter from eight state legislators. (SPA 14, 19.) The Center filed exceptions to the Regional Director's report, which the Board overruled. (SPA 8-10.) Pursuant to the Regional Director's recommendation, the Board remanded the case to the Regional Director for a

³ The Center also filed another objection alleging that union representatives improperly told eligible voters that the Union would waive dues for employees who also worked at other facilities represented by the Union, thus creating an incentive for employees to vote for the Union. (SPA 19; A 15.) The Board, however, overruled that objection. (SPA 16.) Before this Court, the Center expressly abandons that objection. (Br 5 n.4.) Accordingly, the Center has waived any challenge to the Board's ruling, and the issue is not before the Court. *See* cases cited below p. 21.

consolidated hearing on the Center's election objection concerning Kitson, and the complaint allegations that the Center violated Section 8(a)(1), (3) and (5) of the Act. (SPA 19; A 40-42.)

D. The Center Questions Employees About Their Attendance at a Union Meeting

In the meantime, following its election victory, the Union posted notices about the facility, and held an employee meeting on July 20. The next day, a number of employees were gathered in the employee break room when Administrator Martin passed through. Martin openly asked the employees how the meeting had gone. One employee replied that she had not attended the meeting. Martin then asked two or three other employees directly whether they had attended the union meeting. They did not respond. (SPA 11, 22; A 465-66, 473, 750-52.)

E. The Center Eliminates an RA Position and Transfers Those Duties to CNAs Without Giving the Union Notice or an Opportunity To Bargain About the Change; the Center Unilaterally Changes Employee Work Schedules

The Center hired Carol Blackwood-Lindsay as an RA in 1997. RAs work with residents to perform certain exercises to restore the resident's range of motion; their duties are somewhat different from the CNAs' duties. CNAs also do some range of motion exercises with patients, but principally they provide personal care to residents. As an RA, Blackwood-Lindsay worked Monday through Friday,

but not on weekends, unlike CNAs, who regularly work weekend shifts. Sometime in 2004, the Center reassigned Blackwood-Lindsay to work 3 days a week as an RA and 2 days a week as a CNA. In May 2006, however, several weeks before the Union's election, the Center again reassigned her to work exclusively as an RA, on a Monday through Friday schedule with no weekend assignments. (SPA 14, 22; A 660-69.)

In early August--several months after the Union won the election, while the Center's objections were pending before the Board--the Center eliminated the RA position held by Blackwood-Lindsay and reclassified her as a CNA. The Center also transferred her RA duties to the CNAs. As a result, Blackwood-Lindsay performed on-the-job training with the CNAs to demonstrate the RA duties, which took her about 5 minutes per resident. Blackwood-Lindsay's reclassification also meant that she now had to work some weekends, which interfered with a second job that she held on weekends. Despite the Union's election victory, the Center did not notify the Union of its decision to eliminate the RA position, to transfer those duties to the CNAs, and to alter Blackwood-Lindsay's work schedule. (SPA 14-22; A 413-14, 678.)

In August--in the course of making changes to Blackwood-Lindsay's duties and schedule, and while its objections remained undecided by the Board--the

Center learned that another CNA, Avril Wallace, had not been required to perform weekend work. Although Wallace had worked only on weekdays for the past 20 years, the Center decided that she too should be required to work an alternating weekend schedule like the other CNAs. In October, the Center instituted the change without notifying or bargaining with the Union. (SPA 14, 22; A 665-69, 679-83, 686, 741.)

F. Following the Board's Certification of the Union, the Center Refuses the Union's Request To Bargain; the General Counsel Issues a Complaint Alleging that the Center's Refusal Violates Section 8(a)(5) and (1) of the Act

In its March 20, 2008 Decision and Order, the Board overruled the Center's election objections and certified the Union as the employees' collective-bargaining representative. (SPA 11-24.) Thereafter, by letters dated March 26 and April 17, 2008, the Union requested that the Center bargain with it as the exclusive collective-bargaining representative of the unit employees. Since about March 26, 2008, the Center has refused to bargain with the Union. (SPA 25-26; A 925-30.)

Thereafter, the Union filed a charge, asserting that the Center had refused to bargain with it. The General Counsel issued a complaint alleging that the Center violated the Act by its refusal to bargain, which the Center answered. The General Counsel filed a motion for summary judgment, and the Center filed a response. The Board transferred the matter to itself, and issued a notice to show cause, to

which the Center filed a response. (SPA 25; A 924-39.)

II. THE BOARD'S CONCLUSIONS AND ORDERS

On March 20, 2008, the Board (Members Liebman and Schaumber) issued its Decision, Order and Certification of Representative. The Board agreed with the administrative law judge's recommended decision to overrule the Center's election objections, and to certify the Union as the employees' collective-bargaining representative. (SPA 11-24.) The Board also found, in disagreement with the judge, that the Center violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by interrogating employees, but it agreed with the judge that the Center violated Section 8(a)(1) of the Act by attempting to deny CNA Kitson access to the facility on election day, and violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by suspending Kitson for protesting her unlawful exclusion. Finally, the Board, in disagreement with the judge, found that the Center violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally eliminating the RA position, transferring those duties to CNAs, and changing employee work schedules without notifying and bargaining with the Union. (SPA 11, 16-17, 23-24.)

In its June 27, 2008 Decision and Order, the Board (Chairman Schaumber and Member Liebman) found that the Center violated Section 8(a)(5) and (1) of the

Act (29 U.S.C. § 158(a)(5) and (1)) by refusing the bargaining requests made by the Union as the employees' duly certified collective-bargaining representative. (SPA 25-26.) In so ruling, the Board considered the pleadings filed, and found that the Center admitted its refusal to bargain, but merely sought to contest issues that were or could have been raised in the underlying representation proceeding, without offering to adduce at a hearing any newly discovered and previously unavailable evidence, or offering to show special circumstances. As a result, the Board granted the motion for summary judgment, and found that the Center violated Section 8(a)(5) and (1) of the Act as alleged. (SPA 25-26; A 949-94.)

The Board's March 20, 2008 Order requires the Center to cease and desist from the unfair labor practices found, and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (SPA 17.) Affirmatively, that Order requires the Center to offer Kitson full reinstatement and make her whole for any loss of earnings and other benefits; and to notify and, on request, bargain with the Union before implementing any changes in wages, hours and other terms and conditions of employment. The Order further requires the Center, on the Union's request, to rescind the elimination of the RA position and the transfer of those duties to CNAs; to rescind the changes to the work schedules of Blackwood-

Lindsey and Wallace; and to make them whole for any losses suffered as a result of the unlawful unilateral changes. (SPA 17.)

The Board's June 27, 2008 Order requires the Center to cease and desist from the unfair labor practices found. Affirmatively, the Order requires the Center to recognize and bargain with the Union upon request, and to embody any understanding reached in a signed agreement. (SPA 26.) Both Orders require the posting of appropriate remedial notices. (SPA 17, 26.)

SUMMARY OF ARGUMENT

The Board reasonably found that the Center committed several violations of the Act before and after the Union's election victory. First, it is uncontested that the Center violated Section 8(a)(1) of the Act by unlawfully interrogating employees. Accordingly, the Board is entitled to summary enforcement of the portions of its Order which are based on that finding.

Substantial evidence also supports the Board's finding that the Center further violated Section 8(a)(1) of the Act by attempting to exclude Kitson from the facility on election day, and violated Section 8(a)(3) and (1) of the Act by suspending her for reacting to that unlawful interference with protected activity. The Board found that Administrator Martin's attempted denial of access to a strong union supporter on election day plainly interfered with employees' Section 7

rights. Moreover, Kitson had done nothing to warrant her exclusion. Kitson did not threaten Martin, or engage in any yelling or other obstreperous conduct. Nor can the Center credibly claim that Martin dispatched Kitson because she was “lingering” in the hallway; even Martin’s testimony contradicts that characterization. Rather, as the evidence shows, and the Board reasonably inferred, Martin ordered Kitson out to keep her away from employees in the recreation room, where the Center was delivering its antiunion message. The credited evidence also shows that Martin only excluded strong supporters of the Union.

Given the foregoing facts, substantial evidence also supports the Board’s finding that the Center violated Section 8(a)(3) and (1) of the Act by suspending Kitson for protesting Martin’s unlawful action. It is undisputed that the Center knew that Kitson was a union activist; indeed, she served as a union election observer. It is also clear that the Center was hostile to such union activity; after all, it banned Kitson and other strong union supporters from its electioneering party, which was ostensibly open to all employees. In light of the powerful evidence of unlawful motive undergirding Kitson’s suspension, the Board was warranted in shifting to the Center the burden of showing that it would have taken the same action even absent her union activity. The Center did not carry this burden. It

could not credibly explain its disparate treatment of Kitson or show that she committed any infraction, much less one warranting suspension.

The Board also reasonably overruled the Center's election objection concerning Martin's election-day encounter with Kitson. Contrary to the Center's implication, the incident did not occur in front of voters waiting in line to vote, nor did Kitson yell during the encounter. The Center presented no evidence that any potential voter overheard, much less was influenced in her vote, by the encounter that took place.

The Board also did not abuse its discretion in overruling without a hearing the Center's objection that a letter from eight state legislators endorsing the Union required the Board to conduct a new election. The Center failed to meet its heavy burden of showing that the Union interfered with employee free choice by distributing the letter, which contained no threat of any kind and could not reasonably be misconstrued by employees as a Board or Federal Government endorsement of the Union. Accordingly, the Board properly certified the Union as the employees' collective-bargaining representative, and reasonably found that the Center violated Section 8(a)(5) and (1) of the Act by refusing the Union's bargaining requests.

Finally, the Board reasonably found that the Center further violated Section 8(a)(5) and (1) of the Act by making unilateral changes to mandatory subjects of bargaining. It is undisputed that the Center eliminated the RA position and imposed those duties on CNAs, and changed two employees' work schedules to include weekend work, all without giving notice to or bargaining with the Union. The Center made those unilateral changes soon after the Union's election victory-- indisputably at a time when the Center was obligated to bargain with the Union over employees' wages, hours and terms and conditions of employment. The Board acted in accord with settled precedent in rejecting the Center's claims that those unilateral changes were *de minimis*, and that it was privileged to alter the two employees' work schedules without bargaining based on practices that it had applied only to other employees.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF THE PORTION OF ITS ORDER WHICH IS BASED ON ITS UNCONTESTED FINDING THAT THE CENTER VIOLATED SECTION 8(a)(1) OF THE ACT BY INTERROGATING EMPLOYEES ABOUT THEIR ATTENDANCE AT A UNION MEETING

As shown above, during July following the election, the Center interrogated employees about whether they had attended a union meeting. (A 465-66, 473, 750-52.) The Board found (SPA 11-12) that this interrogation was unlawfully

coercive, and therefore that the Center violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by conducting the questioning. *See Resolute Realty Management Corp.*, 297 NLRB 679, 685 (1990), and cases cited therein.

In its brief to this Court, the Center acknowledges (Br. 7 n.7) that it “is not addressing that aspect of the [Board’s] Decision in [its] brief.” The Center has therefore waived its right to contest that portion of the Board’s order. *See NLRB v. Star Color Plate Service*, 843 F.2d 1507, 1510 n.3 (2d Cir. 1988) (employer’s “failure to present this claim in its original brief before this court [and not in a reply brief] provides . . . ground for . . . refusal to hear [the] claim[.]”). *Accord Knipe v. Skinner*, 999 F.2d 708, 711 (2d Cir. 1993); *Torrington Extend-A-Care Employees Ass’n v. NLRB*, 17 F.3d 580, 593 (2d Cir. 1994).

Accordingly, the Board is also entitled to summary enforcement of the portions of its order that are based on its uncontested finding that the Center’s interrogation violated Section 8(a)(1) of the Act. *See NLRB v. Springfield Hosp.*, 899 F.2d 1305, 1307 n.1 (2d Cir. 1990). *Accord Sara Lee Bakery Group, Inc. v. NLRB*, 514 F.3d 422, 429 (5th Cir. 2008) (“[c]ase law has established that when an employer does not challenge a finding of the Board, the unchallenged issue is waived on appeal, entitling the Board to summary enforcement[.]”) (citing cases).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE CENTER VIOLATED SECTION 8(a)(1) OF THE ACT BY EXCLUDING OFF-DUTY EMPLOYEE KITSON FROM THE FACILITY, AND VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY SUSPENDING KITSON BECAUSE SHE PROTESTED HER UNLAWFUL EXCLUSION

A. Applicable Principles

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees” in their union and other protected concerted activities.⁴ Proof of an unlawful effect is not required to establish a violation of Section 8(a)(1); all that is required is a finding that an employer’s conduct would reasonably tend to interfere with employee rights. *See NYU Medical Center v. NLRB*, 156 F.3d 405, 410 (2d Cir. 1998). It is settled that an employer violates Section 8(a)(1) of the Act by discriminatorily banning pro-union employee supporters from the employer’s property. *See Senior Care at the Fountains*, 341 NLRB 1004, 1005 (2004) (employer violated the Act by disparately restricting employee access to its facility), *enforced mem.*

⁴ Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) affords protection to the “exercise” of rights guaranteed employees in Section 7 of the Act (29 U.S.C. § 157)--namely, “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,” or to refrain from such activities.

sub nom., *NLRB v. Adlandco Dev. Corp.*, 131 Fed. Appx. 16 (3d Cir. 2005).

Accord NLRB v. S.E. Nichols, Inc., 862 F.2d 952, 958-59 (2d Cir. 1988).

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer to “discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” A violation of Section 8(a)(3) of the Act is also derivatively a violation of Section 8(a)(1) of the Act because such discriminatory conduct necessarily interferes with, restrains or coerces employees in the exercise of their Section 7 rights. *See Office and Professional Employees Int’l Union v. NLRB*, 981 F.2d 76, 81 n.4 (2d Cir. 1998).

The critical inquiry in such cases is whether the employer’s actions were motivated by antiunion animus. *See S.E. Nichols, Inc.*, 862 F.2d at 957; *Abbey’s Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988). Under the *Wright Line* test, if substantial evidence supports the Board’s finding that union activity was a “motivating factor” in the employer’s decision, the Board’s conclusion that the action was unlawful must be affirmed, unless the record, considered as a whole, compels acceptance of the conclusion that the same action would have been taken even in the absence of union activity. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 395, 397-403 (1983); *accord Director, OWCP v. Greenwich Collieries*,

512 U.S. 267, 278 (1994). If the Board reasonably concludes that the employer's non-discriminatory justification for its action is non-existent or pretextual, the defense fails. *S.E. Nichols, Inc.*, 862 F.2d at 957 (citing *Abbey's Transp. Servs.*, 837 F.2d at 579); *Wright Line, a Div. of Wright Line, Inc.*, 251 NLRB 1083, 1084 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981).

It is settled that the Board may infer motive from circumstantial evidence. *See NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941); *Abbey's Transp. Servs.*, 837 F.2d at 579. Among the factors supporting an inference of unlawful motivation are the employer's knowledge of the employee's union activity, the employer's disparate treatment of prounion employees as compared to others, the employer's other unfair labor practices, and the implausibility of its asserted reason for the adverse action. *See Abbey's Transp. Servs.*, 837 F.2d at 579-82; *NLRB v. Long Island Airport Limousine Serv. Corp.*, 468 F.2d 292, 295 (2d Cir. 1972); *NLRB v. Future Ambulette, Inc.*, 903 F.2d 140, 143-44 (2d Cir. 1990).

The Board's findings are entitled to affirmance if supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)). That "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951) (attribution omitted). Stated otherwise, the Board's factual

findings may only be reversed if a reviewing court is “left with the impression that no rational trier of fact could reach the conclusion drawn by the Board.” *NLRB v. G & T Terminal*, 267 F.3d 103, 114 (2d Cir. 2001) (attribution omitted). On issues of credibility, moreover, court review “is even further constricted”: credibility determinations may not be disturbed “unless incredible or flatly contradicted by undisputed documentary testimony.” *Id.*

B. The Center Unlawfully Excluded Kitson from the Facility on Election Day

It is undisputed that Administrator Martin ordered union election observer Kitson off the premises on election day. The Board found that Martin did so in order to keep Kitson away from the antiunion electioneering party that the Center was holding in the recreation room. In that room, which was situated between the main entrance to the facility and the polling place, and thus provided an ideal place for the Center’s last-minute electioneering--which it timed to coincide with the afternoon voting session--the Center offered food and souvenirs to the employees in packaging labeled with its antiunion message. As the record shows, Kitson was on her way to the recreation room to obtain one of the free coffee mugs that the Center was offering when Martin intervened and told Kitson that she had to leave. (A 447-48.) Although Kitson was not on duty at the time--she had stopped by to pick up her paycheck, as was her custom, and to vote--the Center did not have any

policy prohibiting off-duty employees from entering the facility. (SPA 20-21.)

The record makes clear, as the Board found (SPA 21), that Martin applied her *ad hoc* ban on off-duty employees visiting the premises on election day only to known union activists such as Kitson. Indeed, Martin's own testimony confirms the Board's finding. Although Martin was pressed repeatedly on the witness stand to name other off-duty employees that the Center excluded, she could name only Wallace and Richards. (A 796, 798, 836, 845, 853.) However, those employees, like Kitson, were open and strong supporters of the union campaign. (A 841-42.) Like Kitson, they participated in initiating the union campaign, distributing union literature and soliciting authorization cards. (A 714, 725-29.)

Unlike Kitson and her fellow off-duty union compatriots, whom Martin banned from the facility on election day, off-duty employees who were not prominent in the Union freely visited the facility. For example, off-duty CNA Edwards, who came to the facility with Kitson and socialized in the recreation room with other off-duty employees in Martin's presence, was not subjected to the ban. On the contrary, within minutes of banning of Kitson, Martin approached Edwards in the recreation room to compliment her on her off-duty attire. (A 590.) Martin likewise did not ban CNA Mullins, who was standing nearby, even though

she was also casually attired and obviously off duty.⁵ (A 704.)

The Board reasonably found (SPA 13) that Martin's discriminatory exclusion of Kitson and her fellow union activists from the facility on election day would tend to chill employee Section 7 rights. *See Abbey's Transportation Services, Inc. v. NLRB*, 837 F.2d 575, 582 (2d Cir. 1988) (noting that disparate treatment is persuasive evidence of violation).

In defense of its action, the Center principally challenges the Board's credibility findings. It argues (Br 45), based on Administrator Martin's discredited testimony, that she banned Kitson and other prounion activists because they were "lingering" in the hallways. Contrary to the Center's claim, Martin's own testimony contradicts her characterization--oft-repeated in the Center's brief--that Kitson lingered in the hallway that afternoon. Martin admitted (A 793) that she first spied Kitson "walking in the hallway[,] " that "when [she] saw [Kitson] in the hallway[] . . . [s]he was just walking." Martin's testimony comports with Kitson's own testimony that, upon picking up her paycheck, she was proceeding directly to

⁵ The Center does not help itself by pointing (Br 46) to Martin's innocuous treatment of Edwards and Mullins. Unlike Kitson, those employees were not prominent union supporters. They merely signed a union promotional poster, along with 74 other employees, and Mullins occasionally wore a prounion button. Also unlike Kitson, they were not members of the employee organizing committee that initiated and sustained the organizing drive, nor did they serve as union election observers. (A 434-36, 583-84, 696-97.)

the recreation room when Martin confronted her. Indeed, despite being confronted by Martin, Kitson “continued” through the corridor and into the recreation room. (A 447-48.) In view of this consistent testimony from the sole participants and witnesses to the incident, the Center utterly fails to meet its burden of showing any basis for disturbing the judge’s determination to discredit Martin’s assertion that Kitson was “lingering.” (SPA 21; A 797, 799, 836.) *See* cases cited above, p. 25.

The Center fares no better in arguing (Br 42-49) that the Board committed an “analytical” error by not considering its “affirmative defense” that the banning of Kitson was assertedly nondiscriminatory because she was lingering in the hallway. The Center’s argument is misplaced and falls short for a number of reasons.

First, the Center’s argument misperceives the issue at the heart of this Section 8(a)(1) violation. The issue here is not whether the Center intentionally discriminated against Kitson because she was a pronoun activist, but whether Martin interfered with employees’ Section 7 rights by attempting to exclude Kitson, a prominent union supporter--who had not even violated the Center’s *ad hoc* antilingering rule--from a party that was otherwise open to all employees. In the circumstances, where the Center was so plainly enforcing its ban in a discriminatory manner, the Board had no need to consider the Center’s asserted

Wright Line-like defense that it would have imposed its ban even on nonunion supporters. Martin’s patently discriminatory treatment of off-duty union supporter Kitson--which contrasted sharply with her leniency towards other off-duty employees--would have a chilling effect on employees’ Section 7 rights in any event. *See Beverly California Corp. v. NLRB*, 227 F.3d 817, 843 (D.C. Cir. 2000).⁶

The Center’s argument also falls short because it ignores that, as shown, Kitson did nothing wrong. Even assuming that the Center might lawfully ban prounion employees from “lingering” in the facility, Kitson did not linger.

Moreover, the argument misses the mark because the complaint did not allege, and

⁶ Contrary to the Center’s further contention (Br 44), the Board was not required to apply *Wright Line* “when ruling that Bloomfield unlawfully denied Ms. Kitson access to the facility.” That argument fails to recognize that, in this instance, the Board declined to find that the Center’s conduct violated Section 8(a)(3); rather, it found (SPA 12 n. 6) that the Center violated only Section 8(a)(1) of the Act. A Section 8(a)(1) violation does not, as shown, require a determination of motive, but only that the conduct tends to chill employee rights. *See* cases cited above, pp. 22-23, and *Beverly California Corp. v. NLRB*, 227 F.3d at 843. *American Gardens Management Co.*, 338 NLRB 644 (2002), cited by the Center (Br 43, 45) is not to the contrary. In that case, unlike here, the Board did not find that the employer’s conduct constituted an “independent” violation of Section 8(a)(1) of the Act. *Microimage Display v. NLRB*, 924 F.2d 245, 258 (D.C. Cir. 1991); *Fun Striders, Inc. v. NLRB*, 686 F.2d 659, 661-62 (9th Cir. 1981). Indeed, contrary to the Center’s reading of *American Gardens*, the Board there merely reiterated that, in *Wright Line*, it “set forth the causation test it would henceforth employ in all cases alleging violations of Section 8(a)(3).” *Id.* at 645 (emphasis added).

the Board did not find, that the Center imposed an unlawful ban. *Compare NLRB v. Monroe Tube Co., Inc.*, 545 F.2d 1320, 1326 (2d Cir. 1976); *Guardsmark, LLC v. NLRB*, 475 F.3d 396, 377 (D.C. Cir. 2007). Rather, the complaint alleged, and the Board agreed, that the Center's act of attempting to exclude Kitson from the facility on election day interfered with employees' rights to engage in Section 7 activity. (SPA 19; A 208.)

Citing *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773 (1979), the Center also incorrectly argues (Br 48-49) that it was entitled to exclude Kitson because of its professed need to maintain order in "patient care" areas--even though Martin approached Kitson, not in a patient care area, but rather in a hallway near the recreation room where the Center was holding an electioneering party. *Baptist Hospital*, however, does not support such a sweeping ban. Indeed, in that case, the Supreme Court upheld the Board's determination that the employer "had not justified the prohibition of union solicitation in the cafeteria, gift shop, and lobbies[,]" noting that it may reasonably be inferred that any patients in those areas would be "judged fit to withstand the activities of the public" *Id.* at 786-87. Likewise, the residents here who were participating in wheelchair races in the lobby clearly were not being shielded from the public activity of that day, which also included the election and off-duty employees' stopping by to vote and to

attend the Center's electioneering festivities. Moreover, Kitson did not do anything even potentially disruptive of that day's activities. Thus, the Center's reliance on *Baptist Hospital* is entirely misplaced.

C. The Center Violated Section 8(a)(3) and (1) of the Act by Suspending Kitson for Protesting Her Unlawful Exclusion

Based on the above, the Board had ample grounds for finding that the Center violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by suspending Kitson for protesting her unlawful exclusion from the facility. First, the General Counsel's case showing the Center's unlawful motive in suspending Kitson is practically unassailable. Thus, it is plain, and the Center does not dispute, that it knew of Kitson's prominent role in the union campaign as revealed by, among other things, her serving as an election observer. The evidence of the Center's animus is equally compelling. That is, Kitson's suspension sprang directly from her understandable reaction to the Center's unfair labor practice in ordering her from the facility without lawful reason. (*See* above pp. 9-10, 25-28.) The Board's finding of animus is also buttressed by the disparate manner in which the Center treated prominent union supporters, especially Kitson, whose conduct, unlike others, could not be reasonably characterized as lingering.

Given the overwhelming evidence of unlawful motive, the burden shifted to the Center to show that it would have suspended Kitson even absent her union

activities. The Center has never been able to make such a showing principally because it is unable to credibly explain the disparately harsh treatment that Administrator Martin accorded to prominent union activist Kitson. Indeed, as the Board noted (SPA 13), “Martin was unable to name any other employees whom she asked to leave [the facility], aside from the three known prounion employees.” Absent such evidence, the Center was hardly equipped to bear, much less carry, its *Wright Line* burden. Accordingly, the Board reasonably found (SPA 13, 21) that the Center violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by suspending Kitson for protesting her unlawful exclusion.

III. THE BOARD ACTED WITHIN ITS DISCRETION IN OVERRULING THE CENTER’S ELECTION OBJECTIONS AND CERTIFYING THE UNION, AND THEREFORE PROPERLY FOUND THAT THE CENTER VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION UPON DEMAND

In this case, the Center concedes (Br 7) that it failed to bargain with the Union following the Union’s certification and its demand for recognition and bargaining in March and April of 2008. That conduct violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)), and the Board is entitled to have these provisions of its order enforced, unless the Center can show that the Board abused its discretion in overruling the Center’s objections and certifying the Union. *See NLRB v. Arthur Sarnow Candy Co., Inc.*, 40 F.3d 552, 556 (2d Cir. 1994);

Corrections Corp. of America v. NLRB, 234 F.3d 1321, 1323 (D.C. Cir. 2000). We show below that the Board acted well within its discretion in overruling the Center's objections.

A. Applicable Principles

An employer violates Section 8(a)(5) and (1) of the Act⁷ by refusing to recognize and bargain with the duly certified representative of its employees. *See NLRB v. HeartShare Human Servs. of New York, Inc.*, 108 F.3d 467, 470 (2d Cir. 1997). Since the Center concedes (Br 7) that it has refused to bargain with the Union in order to test the validity of the Union's certification,⁸ the Court must uphold the Board's conclusion that the Center violated Section 8(a)(5) and (1) of the Act, unless, as the Center argues, the Union was improperly certified. *See id.*; *NLRB v. Arthur Sarnow Candy Co.*, 40 F.3d 552, 556 (2d Cir. 1994).

⁷ Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." A violation of Section 8(a)(5) of the Act results in a "derivative" violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). *See Exxon Chemical Co. v. NLRB*, 386 F.3d 1160, 1164 (D.C. Cir. 2004), and cases cited; *NLRB v. Monroe Tube Co.*, 545 F.2d 1320, 1329 (2d Cir. 1976).

⁸ Courts cannot directly review Board election cases. To obtain judicial review of a union's certification, an employer must refuse to bargain, prompting an unfair labor practice finding, which the Court may review. *See NLRB v. Arthur Sarnow Candy Co.*, 40 F.3d 552, 556 n.5 (2d Cir. 1994).

When an employer raises allegations of objectionable conduct by a union, the Board, with judicial approval, will set aside the election only if the misconduct “‘reasonably tended to interfere with the employees’ free and uncoerced choice in the election.’” *Service Corp., Int’l v. NLRB*, 495 F.3d 681, 684 (D.C. Cir. 2007) (citation omitted). *Accord NLRB v. Superior of Missouri, Inc.*, 233 F.3d 547, 553 (8th Cir. 2000). To meet this heavy burden, the employer is required to “‘come forward with evidence of actual prejudice resulting from the challenged circumstances,” not simply evidence demonstrating “‘merely a ‘possibility’ that the election was unfair.” *NLRB v. Black Bull Carting, Inc.*, 29 F.3d 44, 46 (2d Cir. 1994) (citation omitted).

When an employer raises allegations of objectionable conduct by an employee, the Board applies its third-party standard: it will set aside an election only if the “‘misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.’” *NRLB v. V & S Schuler Engineering, Inc.*, 309 F.3d 362, 375 (6th Cir. 2002) (citation omitted). *Accord Bridgeport Fittings, Inc. v. NLRB*, 877 F.2d 180, 186 (2d Cir. 1989) (“‘[l]ess weight’ is accorded to conduct of “‘third parties’””) (citation omitted). In assessing the evidence of allegedly objectionable conduct, the Board “‘look[s] at the objective circumstances in which the election took place,” and not “‘the subjective reactions

of the employees.” *Id.* At 185. *Accord Sunrise Rehabilitation Hosp.*, 320 NLRB 212, 212 (1995).

The Court’s role in reviewing the Board’s decision to certify a union is limited to determining whether the Board acted within the “wide degree of discretion” entrusted to it by Congress in establishing the “safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946). *Accord HeartShare Human Servs.*, 108 F.3d 467, 470 (2d Cir. 1997). Accordingly, the party objecting to the election bears the heavy burden of showing that the Board “abuse[d] its discretion in certifying the election.” *Arthur Sarnow Candy Co.*, 40 F.3d at 556 (citation omitted).

B. The Board Reasonably Overruled the Center’s Election Objections

1. The Board did not abuse its discretion in overruling the Center’s objection alleging that employee Kitson threatened Administrator Martin on the day of the election in the presence of eligible voters

The facts regarding this objection already have been set forth. Briefly, after returning to the facility on election day, Kitson started down the hall toward the recreation room to get her free coffee mug when Administrator Martin approached her from behind and asked Kitson where she was going. Kitson explained why she was there, but Martin told Kitson that she had to leave because she was not on

duty. Kitson continued toward the recreation room anyway, but Martin pressed Kitson again, telling her that she had to leave. Kitson responded by asking why Martin was harassing her when other off-duty employees were also attending the party. She added that Martin did not know who she was “messing with.” After collecting her mug, Kitson left the building. (A 448.)

The Board reasonably found (SPA 15) that Kitson’s statement that Martin didn’t know who she was “messing with” did not rise to a “threat that could have interfered with employees’ free choice [in the election], or created a general atmosphere of fear and reprisal.” *See NLRB v. Precision Indoor Comfort, Inc.*, 456 F.3d 636, 639 (6th Cir. 2005), and cases cited. That conclusion falls well within the range of the Board’s discretion. For, as the Board noted (SPA 15, 21), Kitson neither “yelled nor made any threatening gestures” during her “very minor” conversation with Martin. That factual finding is supported by the corroborative testimony of four employee witnesses who were in the recreation room and even by a management witness, Jennifer Donovan, who was Martin’s friend. Moreover, as the Board observed (SPA 15), Kitson’s statement must be viewed in the context of the Center’s unfair labor practice of unlawfully ordering her out of the facility. *See above pp. 25-27.*

The Center faults (Br 37) the judge for allegedly applying an “incorrect legal

standard” that judged Kitson’s statement according to whether Martin “felt physically threatened.” Regardless of the standard applied by the judge, however, the Board did not apply any such incorrect legal standard. Rather, the Board properly applied its longstanding, objective legal standards to the credibility-based facts that the judge found. More specifically, the Board found that, even if Kitson were deemed a union agent, her conduct was not objectionable under the standard applicable to a party--that is, her conduct did not “reasonably tend to interfere” with the employees’ free choice in the election. (SPA 15 (citation omitted).) Assuming that Kitson is not a union agent, as the Board also found (SPA 15), her conduct did not run afoul of the third-party standard--that is, her conduct was not “so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible.” (SPA 15 (citation omitted).)

Contrary to the Center’s remaining contention (Br 39-41), the rule of *Milchem, Inc.* 170 NLRB 362 (1968), does not apply here. In *Milchem*, the Board prohibited agents of parties to the election from having prolonged conversations with voters waiting in line to cast ballots. *Milchem* plainly has no relevance here since Kitson was not engaged in any conversations with voters waiting in line to cast ballots when she responded to the confrontation initiated by Martin. Nor could this “minor” hallway incident--which Martin initiated and fomented--have

affected an election that was taking place in the dining room. This case does not involve conversations with employees waiting in line to vote. Indeed, the Center does not point to any voters waiting in line, nor does it identify even a single employee witness to the incident who had not yet voted, much less a significant enough number of potential voters to have affected the outcome of this election, which the Union won by a margin of 68 to 42. *See Millard Processing Services, Inc. v. NLRB*, 2 F.3d 256, 264 (8th Cir. 1993) (court expresses confidence in an election that the union won by a margin of 114 to 84).

2. The Board did not abuse its discretion in overruling without a hearing the Center’s election objection regarding the Union’s distribution of a pronunion letter from eight state legislators

As noted above, the Center filed an objection alleging that the Union distributed a letter from eight Connecticut legislators that interfered with employee choice. The letter, which the Union distributed, encouraged a vote for the Union in the election and praised the Union’s advocacy on behalf of its members and clients. The letter also praised the employees for their services, and noted that they deserved higher wages and affordable health insurance, as well as respect for their courage and dedication; it declared “STAY STRONG AND VOTE 1199 ‘YES’!” (A 38.)

The Center argues (Br 18-27) that, in overruling this objection, the Board

improperly construed its own precedent. Citing *Columbia Tanning Corp.*, 238 NLRB 899 (1978), the Center argues (Br 20-24) that this case supports its position that the Union's distribution of the state legislators' letter interfered with employee free choice in the election. The Center's argument is meritless because *Columbia Tanning* does not support the Center's objection; it is factually distinguishable.

In *Columbia Tanning*, the Board set aside an election on the basis of a letter written in Greek and sent to Greek employees by the commissioner of labor of the State of Massachusetts on his official stationery endorsing the union as a "strong and honest union." *Id.* at 899. That letter was sent and distributed by the union during the last 24 hours before the election to 26 Greek employees in a unit of 87. Most of the employer's employees were recent immigrants. *Id.*

Citing its long-held concern that "no participant in a Board election should be permitted to suggest . . . that this Government agency [i.e., the Board] endorses a particular choice" in the election, the Board found that the commissioner's letter created enough "potential for confusion," thereby eliminating "the Board's appearance of impartiality," and interfering with employee choice. *Id.* at 899-900. In reaching that conclusion, the Board specifically noted that, as recent immigrants, the employees were unlikely to be familiar with "the complexities of state and Federal jurisdiction over labor relations." *Id.* Accordingly, they

“undoubtedly viewed a letter from the ‘Commissioner of Labor,’ bearing an insignia and formal letterhead, as an official document from a person in Government with authority over labor matters. They could not be expected to discern readily the difference between the state ‘Department of Labor’ and the Federal ‘National Labor Relations Board,’ particularly in light of the fact that both contain[ed] the word ‘Labor’ in their titles.” *Id.*

Given the very different facts recited by the Board in *Columbia Tanning*, the case does not require setting aside the election here. Unlike the letter in *Columbia Tanning*, the state legislators’ letter here was not written on government stationery, nor did the letter, as distributed, bear any letterhead or other logo suggesting an official endorsement. On the contrary, only the text of the letter was distributed in a leaflet that was headed in handwritten script with the caption “STAY STRONG AND VOTE 1199 ‘YES’!” (A 38.) Furthermore, not one of the signatory legislators here suggested that he held an office with authority over labor matters. Nor, in this case, did the Center proffer evidence showing that the majority of its employees were recent immigrants who were unfamiliar with the distinction between state and federal governments, and thus likely to confuse an endorsement by state legislators with an endorsement by the Board. *Compare id.*

The Center’s argument that *Columbia Tanning* is controlling authority, and

that the cases relied on by the Regional Director in overruling this objection were wrongly decided, is flawed for another reason. It reveals the Center's misapprehension of the holding in *Columbia Tanning*. In *Columbia Tanning*, the Board held that it will not tolerate a party's use of materials that might suggest to employees the Board's endorsement of a party to the election. That is the consistent rule of law which governs *Columbia Tanning*, as well as the cases relied upon by the Regional Director here. (SPA 3.) See, for example, *Ursery Cos.*, 311 NLRB 399 (1993), *St. Gobain Abrasives, Inc.* 337 NLRB 82 (2001), which the Regional Director relied on in overruling the Center's objection. (SPA 3.) See also *Chipman Union, Inc.* 337 NLRB 107 (1995); *Huntsville Mfg. Co.*, 240 NLRB 1220, 1223 (1979).

Huntsville is particularly instructive because it was decided within a year of *Columbia Tanning* and explains that holding. Moreover, it is relied on in *Ursery* and other cases. In *Huntsville*, the Board noted that "the thrust of [the Board's] analysis has not, with *Columbia Tanning*, departed from the concept of interference with the Board's processes. . . . Our concern is . . . with how closely a document mimics a Board publication--and under what circumstances it can be said that employees might be susceptible to such mimicry." *Accord Ursery Cos., Inc.*, 311 NLRB 399, 399 (1993) ("in general, the concern is whether and to what

extent a document imitates a Board publication and under what circumstances it can be said that the Board or the United States favors one party to the election”). In view of this clear line of authority, the Court should reject the Center’s attempt to manufacture a conflict in the Board’s caselaw.

There is no merit to the Center’s further claim (Br 28, 31, 34) that the legislative role in funding patient care makes the legislators’ pronoun letter “undeniably” or inherently coercive. As the Regional Director noted in overruling the Center’s objection (SPA 3-4), that position was rejected in *Greater Hartford Ass’n for Retarded Citizens* (hereafter “*HARC*,” not reported but appearing at A 1096-1104.) As in *HARC*, the document distributed by the Union here contains no threat of reprisal for an antiunion vote, and it was signed by less than 10% of the legislators--who have no independent control over the Center’s funding. (SPA 3; A 1104.) Furthermore, as *HARC* notes, funding to service providers by the State of Connecticut is uniform; it does not vary based on whether the provider’s employees have a collective-bargaining representative. (SPA 3; A 1104.) Indeed, the legislators’ letter in this case makes no reference to funding, so it is even more innocuous than the letter signed by the legislators in *HARC*. (A 38.)

Contrary to the Center’s argument (Br 25-26, 34), *Richlands Textile, Inc.*, 220 NLRB 615, 619 (1975), does not show that the Board will hold employers

liable for the antiunion statements of politicians while holding unions harmless for politicians' prounion statements. That case is factually distinguishable. In *Richlands*, a prominent politician wrote a letter to employees stating that if they chose the union in the upcoming election, he was "informed that the officials of this industry [i.e., the employer] will begin to close down the operation." *Id.* at 618. Although the employer knew of the politician's "informed" statement to the employees--some 300 leaflets were "floating around the plant"-- the employer said nothing to repudiate the politician's highly coercive threat of plant closure. In none of the cases relied on by the Regional Director, and certainly not in this case, were coercive statements of any kind made by the legislators. Accordingly, *Richlands* is wholly inapposite.

Finally, as to the Center's contention that it was entitled to a hearing on this objection, it proffered no evidence raising "substantial and material issues of fact" that warranted a hearing. *NLRB v. Lance Investigation Serv., Inc.*, 680 F.2d 1, 2 (2d Cir. 1982). To support its objection, the Center offered only the bare letter as it was distributed in leaflet form. That document, which speaks for itself, and was in the record, does not require a hearing to determine its content or legal significance. *See Columbia Tanning Corp.*, 238 NLRB 899 (1978), where the Board assessed the impact of such material without a hearing. *See also Ursery Cos., Inc.*, 311

NLRB 399 (1993) (same).

Contrary to the Center's contention (Br 27), *HARC* does not support its demand for a hearing in this case. The employer's objection in *HARC* was different from and broader than the Center's objection here. In *HARC*, the objection also alleged that the legislators attended union "rallies, meetings and other [u]nion sponsored-activities" sufficient to create "fear, coercion and confusion" among the employees. (A 1099.) By contrast, here the Center did not make any such allegations of other activities by the legislators that raised a material factual dispute; instead, the Center claimed only that the letter itself was inherently coercive. (A 43-44.)

In sum, the Center failed to meet its heavy burden of showing that the Board abused its discretion in overruling the Center's objections and certifying the Union as the employees' collective-bargaining representative. Therefore, it follows that the Center violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Union. Moreover, as we show immediately below, the Board reasonably found that the Center further violated the same section of the Act by unilaterally changing employees' terms and conditions of employment following the Union's election victory, the event that triggered the Center's bargaining obligation.

IV. THE BOARD REASONABLY FOUND THAT THE CENTER VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY ELIMINATING A UNIT JOB, REASSIGNING AN EMPLOYEE, AND CHANGING EMPLOYEES' WORK SCHEDULES WITHOUT NOTIFYING AND BARGAINING WITH THE UNION

A. Applicable Principles

It is well settled that an employer violates Section 8(a)(5) and (1) of the Act (29 U.S.C. 158 § (a)(5) and (1)) by making changes in employees' wages, hours and terms and conditions of employment without first notifying and bargaining with their duly designated collective-bargaining representative. *Litton Financial Printing v. NLRB*, 501 U.S. 190, 198 (1991); *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962). Unilateral action with respect to those "mandatory" bargaining subjects is proscribed, "for it is a circumvention of the duty to negotiate which frustrates the objective of Section 8(a)(5) much as does a flat refusal." *NLRB v. Katz*, 369 U.S. at 743. Furthermore, it is undisputed that "[a]n employer acts at its peril in making unilateral changes in 'wages, hours, and other terms and conditions of employment' following a union victory in an initial representation election and before the Board renders a decision on the employer's election objections." *Advertisers Mfg. Co. v. NLRB*, 677 F.2d 544, 547 (7th Cir. 1982), and cases cited therein. *See also Mike O' Connor Chevrolet-Buick-GMC Co.*, 209 NLRB 701, 703 (1974), *enforcement denied on other grounds*, 512 F.2d 684 (8th Cir. 1975).

Accord 675 West End Owners Corp., 345 NLRB 324, 339 (2005), *enforced mem.*, 2008 WL 5273442 (2d Cir. 2008). Accordingly, because the Board properly certified the Union as the employees' collective-bargaining representative (see pp. 32-44 above), the Center was required to notify and bargain with the Union before making any changes to employees' hours and terms and conditions of employment following the Union's election victory.

The employer's obligation to bargain with the certified union "extends to the elimination of bargaining unit positions . . . and to transferring a bargaining unit employee." *Gruma Corp.*, 350 NLRB 336, 344 (2007). *Accord Strand Theater of Shreveport Corp. v. NLRB*, 493 F.3d 515, 520 (5th Cir. 2007); *Oneita Knitting Mills, Inc. v. NLRB*, 375 F.2d 385, 388 (4th Cir. 1967); *Finch, Pruyn & Co.*, 349 NLRB 270 (2007), *enforced mem. on other grounds*, 296 Fed. Appx. 83 (D.C. Cir. 2008). Likewise, it is also settled that an employer may not unilaterally change employee work schedules. *See Loc. Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965) ("we think the particular hours of the day and the particular days of the week during which employees must work are subjects well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain"), and cases cited. *Accord Acme Die Casting*

v. *NLRB*, 26 F.3d 162, 168 (D.C. Cir. 1994).

Before this Court, the Center (Br 51-60) does not dispute that it made the unilateral changes without giving the Union notice and an opportunity to bargain. Specifically, in May, after the Union's election victory, the Center eliminated the RA position held by Carol Blackwood-Lindsay, converted her to a CNA, and transferred her duties to all CNAs. It is also undisputed that, following that unilateral action, the Center changed the work schedules of Blackwood-Lindsay and CNA Wallace, taking away from them the Monday to Friday work schedule that they had worked before the election, and requiring them to work on Saturdays, and alternate Saturdays and Sundays, respectively. Under settled law, the Center made those changes at a time when it was obligated to bargain with the Union over wages, hours, and other terms and conditions of employment. *See* cases cited above p. 46. Accordingly, the Center's unilateral changes were unlawful unless the Board was compelled to accept the affirmative defenses that the Center raised to those violations.

We show below that, as the Board reasonably found (A 14), the Center failed to establish its claim that its unilateral elimination of the RA classification and imposition of weekend work had only a *de minimis* impact on employees' wages, hours and terms and conditions of employment. We also show that the

Center errs in asserting (Br 58-59) that it was privileged to alter unilaterally the work schedules of Blackwood-Lindsay and Wallace to conform their schedules to the Center's practice of having other CNAs work on weekends.

B. The Center's Unilateral Elimination of the RA Position and Transfer of those Duties to CNAs Was a Substantial and Material Change to Employee Terms and Conditions of Employment, and Not *De Minimis*

As noted above, the Center admits (Br 51) that it unilaterally eliminated Blackwood-Lindsay's RA position, converted her to a CNA, and transferred the duties of her former position to all CNAs. The Center argues (Br 51-57) that it was privileged to make those changes without notifying and bargaining with the Union because they assertedly did not substantially or materially affect employees' terms and conditions of employment. In support of this argument, the Center notes (Br 52-54) that Blackwood-Lindsay had worked as a CNA in the past (although she admittedly was not so employed at the point in time when the Center's bargaining obligation was triggered), and that the changes resulted in only a slight alteration of CNA duties. The Board, however, reasonably rejected the Center's arguments. (SPA 14-15.)

The Board will find that an employer's unilateral changes have a substantial and material impact on terms and conditions of employment if those changes are "sufficiently different" from the preexisting rules that governed employees' work.

W-I Forest Products Co., 304 NLRB 957, 959 (1991). By that standard, it is clear that the changes wrought here were substantial and material. After all, the Center's unilateral changes resulted in the elimination of Blackwood-Lindsay's bargaining unit position, as well as changes in her supervision, her duties, and the types of residents with whom she worked. (A 659-64, 665-67.) They also materially altered the duties of CNAs, who, in addition to performing their regular duties of delivering "personal care" to residents, took on the more specialized and intensive rehabilitative work that RA Blackwood-Lindsay had performed with residents. (A 666, 738-40.)⁹

The law is clear that changes of the significance implemented by the Center here are substantial and material. *See, for example, Flambeau Airmold Corp.*, 334 NLRB 165, 171-72 (2001) (employer made unlawful and substantial change in terms and conditions of employment by unilaterally reassigning a helper, Sledge, to production work, thereby altering her duties but not her pay); *Rangaire Acquisition Corp.*, 309 NLRB 1043, 1043 (1992) (recognizing that even a one-time

⁹ The Center misreads the testimony of employee witnesses in arguing (Br 54) that the CNAs did not experience an increase in duties. *See, for example*, A 628-29, 631-32, 709. The employees testified there that they had not performed some of the RA's duties before, and to the extent that they had residents perform range of motion exercises before RA duties were imposed upon them, they had done so as part of having residents participate in their personal care. Indeed, CNA Wallace testified that her training with Blackwood-Lindsay required 5 minutes more per resident. (A 741.)

change in a paid 15-minute Thanksgiving break was substantial and material where the employer, as here (Br 53), claimed the “economic necessity” of eliminating the break); *San Antonio Portland Cement Co.*, 277 NLRB 338, 344-45 (1985) (employer had duty to bargain over reassignment of employees).

As the Board noted below (SPA 14), *Finch, Pruyn & Co. Inc.*, 349 NLRB 270, 277 (2007), is particularly relevant because of its factual similarity to the actions taken by the Center here. In that case, the Board found that the employer violated the Act by unilaterally eliminating a unit position (“pcc oiler”) and reassigning that position’s duties, which took about an hour per day, to the “basement oiler” position. The Board found that the elimination of that unit job involved a mandatory subject of bargaining, even if the job was eliminated for economic reasons, and even though historically the pcc-oiler’s duties had been included in the basement oiler position before they were performed by an employee who worked solely as a pcc oiler. *Id.*¹⁰

¹⁰ The Center attacks (Br 56) the Board’s reliance on *Finch, Pruyn*, arguing that it did not address whether the unilateral change there was substantial and material. However, regardless of whether the Board used that phrase, the clear implication of *Finch, Pruyn* is that the unilateral change implemented there was substantial and material. Otherwise, the Board would not have found the Section 8(a)(5) violation. In any event, cases such as *Flambeau*, cited above, expressly establish that unilateral changes such as those implemented in this case are substantial and material.

Thus, as the Board noted here (SPA 14), the fact that RA duties “can easily be assigned to other employees without necessarily increasing their hours of work does not negate the fact that a unit position has been eliminated and the duties of the position redistributed without giving the Union prior notice and an opportunity to bargain.” *See Acme Die Casting v. NLRB*, 26 F.3d 162, 168 (D.C. Cir. 1994) (violation upheld even though the unilateral change resulted in “greater number of employees working fewer hours[]”). Such a unilateral elimination of a bargaining unit position is necessarily a substantial and material change to employees’ terms and conditions of employment. Among other effects, it reduces employees’ job opportunities, and thus violates Section 8(a)(5) and (1) of the Act. *Id.*¹¹ *See also Sunoco, Inc.*, 349 NLRB 240, 246 (2007) (employer’s failure to bargain over loss of overtime job opportunities was unlawful unilateral change). It is equally clear

¹¹ The Center’s claim (Br 55-57) that *Finch, Pruyn* is distinguishable because it involved the elimination of a job and not a classification raises a distinction without a difference. In that case, as here, employees in the unit lost a job opportunity. And contrary to the Center’s implication (Br 55), it cites no cases holding that elimination of a bargaining unit position is *de minimis*. Neither *Sunoco, Inc.*, 349 NLRB 240, 246 (2007), nor *Mitchellace, Inc.*, 321 NLRB 191, 195 (1996), which are cited by the Center (Br 52, 54-55), involved elimination of a position, and in both cases, the Board found that the employer implemented the unlawful unilateral change. *Ironton Publications, Inc.*, 321 NLRB 1048 (1996), also cited by the Center (Br 55), is factually distinguishable. In that case, the Board found the changes not to be significant because they involved new technology that had never been the province of unit employees and did not involve any loss of unit work. *Id.* at 1066.

that the Center's unilateral elimination of the RA job, and its conversion of Blackwood-Lindsay to a CNA and transfer of her duties to other CNAs, also violated the Act. *See* cases cited above, pp. 47, 49-50.

C. The Center's Unilateral Changes to Blackwood-Lindsay and Wallace's Work Schedules Were Not *De Minimis*, Nor Were They Justified By Its Practice of Requiring Other CNAs To Work Weekends

As noted, as a direct consequence of the Center's unilateral decision to eliminate the RA position, it transferred Blackwood-Lindsay to a CNA position and required her to work alternate weekends. In response to Blackwood-Lindsay's protest that other CNAs had weekends off, Martin discovered that CNA Wallace also did not work weekends and had not done so during her entire 20-year tenure at the Center. As shown, the Center henceforth unilaterally required both employees to work Saturdays or alternating weekends like the other CNAs. (A 659-60, 669, 685-86, 742-43.) Obviously, that change in work schedules imposed a burden on Wallace and Blackwood-Lindsay; indeed, it threatened Blackwood-Lindsay's ability to retain a second, long-held job that already required her to work weekends. (A 682, 686, 689.) The changes also were significant inasmuch as they represented a radical departure from the schedule that Wallace had worked for more than 20 years, and that Blackwood-Lindsay had worked for 10 years. (A 659-60, 669, 689, 743.) In these circumstances, the Board had an ample basis for

finding (SPA 14-15) that the Center's changes in work schedules were substantial and material, and not *de minimis*. See, for example, *Mimbres Memorial Hospital*, 342 NLRB 398, 399 (2004) (changed schedule that included weekend work found to be a substantial and material unilateral change), *enforced sub nom. NLRB v. Community Health Services*, 482 F.3d 683 (10th Cir. 2007); *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 330 NLRB 900, 904, 912 (2000) (requiring employees to work on the weekend for the first time was a substantial and material change in working conditions), *enforced mem.*, 2001 WL 791645 (4th Cir. 2001).

Nonetheless, the Center argues (Br 57-60) that it was entitled to impose the change in Blackwood-Lindsay and Wallace's hours because it had long required other CNAs to work alternating weekends. The Center's argument is misplaced. Whatever the nature of its past practice toward CNAs generally, that practice did not control the schedules of Blackwood-Lindsay and Wallace at the time of the election. Rather, as shown, both employees were working Monday to Friday work schedules that did not include any weekend work. Accordingly, upon the Union's victory in the election, the Center was no longer free to alter unilaterally the schedules of those employees without providing notice to their collective-bargaining representative and affording it an opportunity to bargain over the change. See cases cited above, p. 44. See also *Goya Foods of Florida*, 351 NLRB

94, 97 (2007) (rejecting past practice argument as mere “reliance on an historic right to act unilaterally, and noting that right to exercise sole discretion changed once the “[u]nion became the certified representative”).¹²

Contrary to the Center’s claim (Br 57-60), its unilateral action was unlawful even though the schedule change affected only two employees in the bargaining unit. While such changes may not be significant to the employer, they are significant to the affected employees. *See Acme Die Casting v. NLRB*, 26 F.3d 162, 168 (D.C. Cir. 1994); *Georgia Power Co.*, 325 NLRB 420, 420 n.5 (1998) (“[I]f a change involves the terms and conditions of employment of unit employees, it is a mandatory subject even if only a relatively few employees are affected.”), *enforced mem.*, 176 F.3d 494 (11th Cir. 1999); *Carpenters Local 1031*, 321 NLRB 30, 32 (1996) (Board is not precluded from finding 8(a)(5) violation even if unilateral change affects only one employee).

In sum, the Board reasonably found (SPA 14-15) that the Center violated Section 8(a)(5) and (1) of the Act by taking the admittedly unilateral actions of

¹² The Center does not help itself by suggesting (Br 57-58) that its unilateral action was somehow proper because Blackwood-Lindsay individually “worked out an alternative compromise schedule”--without assistance from the Union. *See Stoehmann Bakeries, Inc. v. NLRB*, 95 F.3d 219, 223 (2d Cir. 1996) (“[a]n employer violates . . . the Act by dealing directly with union represented employees concerning mandatory subjects of bargaining”), and cases cited.

eliminating a unit job classification, transferring those duties to other employees, and changing two employees' work schedules. Because the Center took those actions after the Union won the election, the Center was required to notify and bargain with the Union before making those changes, given the Board's reasonable decision to certify the Union as the employees' collective-bargaining representative.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enter a judgment enforcing the Board's Orders in full.

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NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD)
)
Petitioner) Nos. 08-3887-ag
) 08-3888-ag
)
v.) Board Case Nos.
) 34-CA-11512
BLOOMFIELD HEALTH CARE CENTER) 34-CA-12029
)
Respondent)
)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 12,837 words of proportionally-spaced, 14-point Times New Roman type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 18th day of March 2009

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD)	
)	
Petitioner)	Nos. 08-3887-ag
)	08-3888-ag
v.)	
)	
BLOOMFIELD HEALTH CARE CENTER)	
)	Board Case Nos.
Respondent)	34-CA-11512
)	34-CA-12029

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has, on this date, sent to the Clerk of the Court by e-mail to agencycases@ca2.uscourts.gov, and by first-class mail the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of the brief by first-class mail upon the following counsel at the address listed below:

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