

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PROFESSIONAL MEDICAL TRANSPORT, INC. )	)	
and )	)	Case Nos. 28-CA-22175
)	)	28-CA-22289
INDEPENDENT CERTIFIED EMERGENCY )	)	28-CA-22338
PROFESSIONALS OF ARIZONA, LOCAL #1 )	)	28-CA-22350
)	)	28-CA-22519
_____ )	)	

**RESPONDENT PROFESSIONAL MEDICAL TRANSPORT'S**  
**BRIEF IN SUPPORT OF EXCEPTIONS**

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**TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
I. <u>STATEMENT OF THE CASE</u> .....	1
II. <u>QUESTIONS PRESENTED</u> .....	1
III. <u>FACTUAL BACKGROUND</u> .....	3
IV. <u>LEGAL ARGUMENT</u> .....	3
A. Whether the ALJ erred in finding that PMT has failed to show actual loss of majority support and that by withdrawing recognition from the Union, PMT violated Section 8(a)(5) and whether the ALJ erred in precluding PMT from presenting evidence concerning the Union’s majority status at the time of recognition.....	3
B. The ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by refusing to provide the Union with requested information in July 2008.....	17
C. The ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by direct dealing with its employees by posting an “opt out” notice for employees who did not want to provide their contact information to the Union.....	18
D. The ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by unilaterally assigning unit work to nonunit firefighters.....	22
E. The ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by refusing to provide the Union with requested information in January 2009.....	36
F. The ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by placing security cameras in the living quarters of employees at several stations.....	37
G. The ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by failing to give the Union an opportunity to bargain over the effects of the relocation of Stations 606 and 607 and in finding that affected employees are entitled to compensation due to the relocation.....	38
H. The ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by changing healthcare benefits without first allowing the Union an opportunity to bargain about the changes.....	41
I. The ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by unilaterally disallowing the Union president or his designee reasonable access to all PMT’s communication devices.....	45

J. The ALJ erred in finding that PMT violated Section 8(a)(1) by threatening to remove an employee from active duty because he engaged in Union activity....48

K. The ALJ erred in his credibility resolutions.....48

V. CONCLUSION.....50

**TABLE OF AUTHORITIES**

<b><u>FEDERAL CASES</u></b>	<b><u>PAGE</u></b>
<i>Allegheny General Hosp. v. NLRB</i> , 608 F.2d 965 (3d Cir. 1979), overruled on other grounds by, <i>St. Margaret Memorial Hosp. v. NLRB</i> , 991 F.2d 1146, 1152 (3d Cir. 1993).....	14
<i>American Automatic Sprinkler Systems, Inc. v. NLRB</i> , 163 F.3d 209 (4th Cir. 1998).....	12
<i>Armstrong v. Manzo</i> , 380 U.S. 545 (1965).....	32
<i>BendixCorp. v. FTC</i> , 450 F.2d 534 (6 <sup>th</sup> Cir. 1971).....	33
<i>Caminetti v. United States</i> , 224 U.S. 470 (1917) .....	13
<i>Cardox Division of Chemetron Corp.</i> , 699 F.2d 148 (3rd Cir. 1983) .....	31, 32
<i>Consolidated Edison of N.Y v. NLRB</i> , 305 U.S. 197 (1938) .....	40
<i>Georgetown Hotel v. NLRB</i> , 835 F.2d 1467 (D.C. Cir. 1987) .....	7
<i>International Ladies' Garment Workers' Union, AFL-CIO v. NLRB</i> , 366 U.S. 731 (1961) .....	6, 7, 11, 13, 15
<i>International Ladies' Garment Workers' Union v. NLRB</i> , 280 F.2d 616 (D.C. Cir. 1960).....	6
<i>Memorial Hospital of Roxsborough v. NLRB</i> , 545 F.2d 351 (3rd Cir. 1976) .....	32
<i>Mine Workers v. NLRB</i> , 257 F.2d 211 (D.C. Cir. 1958) .....	47
<i>Mullane v. Central Hanover Bank &amp; Trust Co.</i> , 339 U.S. 306, 313 (1950).....	33
<i>Negonsott v. Samuels</i> , 507 U.S. 99 (1993) .....	12
<i>NLRB v. J-Wood/A Tappan Division</i> , 720 F.2d 309 (3d Cir. 1983).....	16
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962).....	42
<i>NLRB v. Local 103, Intern. Ass'n of Bridge, Structural and Ornamental Iron Workers</i> (Higdon, 434 U.S. 335, 98 S.Ct. 651 (1978) .....	5
<i>NLRB v. Strong</i> , 393 U.S. 357 (1969) .....	40
<i>Nova Plumbing v NLRB</i> , 330 F.3d 531 (D.C. Cir. 2003) .....	13, 14, 15
<i>Phelps-Dodge Corp. v. NLRB</i> , 313 U.S. 177 (1941).....	40

<i>Republic Steel Corp. v. NLRB</i> , 311 U.S. 7 (1940).....	40
<i>Rodalle Press v. FTC</i> , 407 F.2d 1252, 1256 (D.C.Cir. 1968) .....	33
<i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984).....	40, 45
<i>Williams v. Taylor</i> , 529 U.S. 420 (2000).....	13
<i>Yorke v. NLRB</i> , 709 F.2d 1138 (7th Cir. 1983), <i>cert. denied</i> , 465 U.S. 1023 (1984).....	40

**NLRB CASES**

<i>A-V Corp.</i> , 209 NLRB 451 (1974) .....	42
<i>Alan Ritchey, Inc.</i> , 354 NLRB No. 79 (September 25, 2009) .....	21
<i>American Federation of Musicians Local 76 (Jimmy Wakely Show)</i> , 202 NLRB 620 (1973).....	20, 21, 39
<i>American Vitrified Products, Co.</i> , 127 NLRB 701 (1960).....	47
<i>Bath Ironworks Corp.</i> , 345 NLRB 499 (2005).....	46
<i>Bellinger Shipyards</i> , 227 NLRB 620 (1976) .....	20
<i>C&amp;C Plywood Corp.</i> , 163 NLRB 1022 (1967) .....	22
<i>Cal-Die Casting Corp.</i> , 221 NLRB 1068 (1975) .....	25
<i>Calco Roofing</i> , 268 NLRB 456 (1983).....	50
<i>Carbonex Coal Company</i> , 262 NLRB 1306 (1982).....	25
<i>Champion Int'l Group</i> , 339 NLRB 672 (2003) .....	34
<i>Citizen's Nat'l Bank of Willmar</i> , 245 NLRB 389 (1979).....	44
<i>Clarkwood Corp.</i> , 233 NLRB 1172 (1977), <i>enf'd</i> , 586 F.2d 835 (3rd Cir. 1978) .....	44
<i>Colgate Palmolive Company</i> , 323 NLRB 515 (1997).....	37
<i>Continental Oil Co.</i> , 194 NLRB 126 (1971) .....	24
<i>Cooper-Jarrett, Inc.</i> , 239 NLRB 840 (1978).....	25

<i>Courier Journal</i> , 342 NLRB No. 118 (2004).....	43, 44
<i>Dana Corp.</i> , 351 NLRB No. 28 (2007).....	8, 9, 10
<i>Depository Trust Co.</i> , 300 NLRB 700 (1990).....	18
<i>Flambeau Arnold Corp.</i> , 334 NLRB 165 (2001) .....	38, 39, 47
<i>Garment Workers, ILGWU (Bernhard-Altmann Texas Corp.)</i> 122 NLRB 1289 (1959).....	6
<i>Grand Central Aircraft Co., Inc.</i> , 103 NLRB 1114 (1953).....	49
<i>House of the Good Samaritan</i> , 268 NLRB 236 (1983).....	25
<i>J&amp;R Tile, Inc.</i> , 291 NLRB 1034, 1037 (1988) .....	15
<i>KDEN Broadcasting Company</i> , 225 NLRB 25 (1976) .....	25
<i>Kohler Co.</i> , 292 NLRB 716 (1989).....	30, 32
<i>Lamar Advertising of Hartford</i> , 343 NLRB 261 (2004) .....	33, 34
<i>Lenz &amp; Riecker</i> , 340 NLRB 1453 (2003).....	44
<i>Luther Manor Nursing Home</i> , 270 NLRB 949 (1984), <i>aff'd</i> , 772 F.2d 421 (8th Cir. 1985).....	42
<i>McLaren Health Care Corp</i> , 333 NLRB 256 (2001).....	7, 8
<i>Mercy Hospital of Buffalo</i> , 336 NLRB No. 134 (2002).....	29, 49
<i>Modern Merchandizing</i> , 284 NLRB 1377 (1987).....	22
<i>NCR Corp.</i> , 271 NLRB, 1212 (1984).....	46
<i>Park Inn Home For Adults</i> , 293 NLRB 1082 (1989).....	24
<i>Paul Mueller Co.</i> , 332 NLRB 1350 (2000).....	36
<i>Peerless Food Products</i> , 236 NLRB 161 (1998) .....	25, 41
<i>Pergament United Sales</i> , 296 NLRB 333 (1989), <i>enf'd</i> , 920 F.2d 130 (2d Cir. 1990).....	34, 35
<i>Permaneer Corporation</i> , 214 NLRB 367 (1974).....	50
<i>Permanente Medical Group, Inc</i> , 332 NLRB 1143 (2000).....	21

<i>Post-Tribune Co.</i> , 337 NLRB 1279 (2002) .....	25, 42, 43, 44
<i>R. J. E. Leasing Corp.</i> , 262 NLRB 373 (1982) .....	11
<i>Sheraton Hartford Hotel</i> , 289 NLRB 463 (1984) .....	17
<i>Sierra Bullets</i> , 340 NLRB 242 (2002) .....	34
<i>Sonoco, Inc.</i> , 349 NLRB 240 (2007) .....	38
<i>Square D Co.</i> , 204 NLRB 154 (1973) .....	20
<i>Standard Dry Wall Products</i> , 91 NLRB 544 (1950), <i>enf'd</i> , 188 F.2d 362 (3d Cir. 1951).....	48
<i>Transit Union Local 1433 (Phoenix Transit System)</i> , 335 NLRB 1263(2001).....	20, 23
<i>Transmarine Navigation Corp.</i> , 170 NLRB 389 (1968) .....	40
<i>United States Postal Service</i> , 352 NLRB No. 105 (2008).....	35
<i>United Technologies Corporation</i> , 278 NLRB 306 (1986).....	41-42
<i>United Telephone Co.</i> , 112 NLRB 779 (1955).....	47
<i>Vic Koenig Chevrolet</i> , 263 NLRB 646 (1982) .....	50
<i>Wichita Eagle &amp; Beacon Publishing Co.</i> , 206 NLRB 55 (1973) .....	20

**FEDERAL STATUTES**

29 U.S.C. § 141 .....	12
29 U.S.C. § 157 .....	10, 13
29 U.S.C. § 159(a) .....	5
29 U.S.C. § 160(b).....	12, 19-20, 23
5 U.S.C. § 554(b).....	33

**OTHER AUTHORITIES**

*Advice Ltr. From NLRB Gen. Counsel to Regional Director of Region 9, Feb. 27, 1989*, 1989 WL 241614 (Feb. 27, 1989)..... 8

*Hearings on S. 1958 before the Senate Comm. on Education and Labor, 74<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1935)*, reprinted in *1 Leg. Hist. of the National Labor Relations Act, 1935*, at 1419 (1949)..... 5

**I. STATEMENT OF THE CASE**

This case arises out of unfair labor practice charges filed against Professional Medical Transport, Inc. (“PMT” or “Respondent”) by the Independent Certified Professionals of Arizona. An administrative hearing took place on July 21 through 23 2009, in front of William G. Kocol, Administrative Law Judge (“ALJ”). Despite testimony and law to the contrary, the ALJ ignored the law and the manifest weight of evidence and found PMT liable for several unfair labor practices. As will be established below, the ALJ’s findings, conclusions, and recommendations are erroneous and inconsistent with applicable, controlling NLRB precedent and federal labor law.

**II. QUESTIONS PRESENTED**

- A.** Whether the ALJ erred in finding that PMT has failed to show actual loss of majority support, that by withdrawing recognition from the Union, PMT violated Section 8(a)(5), and whether the ALJ erred in precluding PMT from presenting evidence concerning the Union’s majority status at the time of recognition. (Exceptions 1, 2, 17, 31, 32).
- B.** Whether the ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by refusing to provide the Union with requested information in July 2008. (Exceptions 3,18, 31, 32).
- C.** Whether the ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by direct dealing with its employees by posting an “opt out” notice for employees who did not want to provide their contact information to the Union. (Exceptions 4, 5, 22, 31, 32).

- D.** Whether the ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by unilaterally assigning unit work to nonunit firefighters. (Exception 6, 7, 8, 23, 27, 31, 32).
- E.** Whether the ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by refusing to provide the Union with requested information in January 2009. (Exceptions 10, 18, 31, 32).
- F.** Whether the ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by placing security cameras in the living quarters of employees at several stations. (Exceptions 11,21, 31).
- G.** Whether the ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by failing to give the Union an opportunity to bargain over the effects of the relocation of Stations 606 and 607. (Exceptions 12, 19, 26, 31, 32).
- H.** Whether the ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by changing healthcare benefits without first allowing the Union an opportunity to bargain about the changes and whether the ALJ erred in proposing a remedy that PMT reimburse employees for any losses resulting from the change in healthcare benefits. (Exceptions 13, 20, 28, 29, 31, 32).
- I.** Whether the ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by unilaterally disallowing the Union president or his designee reasonable access to all PMT's communication devices. (Exceptions 14, 15, 24, 31).
- J.** Whether the ALJ erred in finding that PMT violated Section 8(a)(1) by threatening to remove an employee from active duty because he engaged in Union activity. (Exceptions 16, 25, 31).

K. Whether the ALJ erred in his credibility resolutions. (Exception 6).

### III. FACTUAL BACKGROUND

Respondent Professional Medical Transport, Inc. (“PMT” or “Respondent”) is an ambulance service company. (Transcript of Hearing in Case No. 28-CA-22175, et al, before William G. Kocol, Administrative Law Judge (hereinafter “TR”) at 58:21-25). Mr. Bob Ramsey is one of the owners of the company and has been since 2005. (TR at 57:23-24). Pat Cantelme is another owner. (TR at 58:1-3).

In July 2006, Respondent, through Mr. Ramsey and Mr. Cantelme, and the Independent Certified Emergency Professionals of Arizona (“Union”) entered into a “Letter of Acceptance” recognizing the Union as the bargaining agent for “any full time field paramedics, EMT’s, IEMT’s, and registered nurses” at PMT. (General Counsel’s Exhibit (hereinafter “GC Ex.”) 2). Mr. Joshua Barkley, a PMT employee and the President of the ICEP, signed on behalf of the Union. (TR at 217:10-218:1). Between September 2007 and February 2009, PMT and the Union engaged in negotiations for a collective bargaining agreement. (*See* TR at 237:17-19). It is out of these negotiations and this collective bargaining relationship that the allegations in the Third Amended Consolidated Complaint (“Complaint”) arise.

### IV. LEGAL ARGUMENT

#### A. **The ALJ erred in finding that PMT unlawfully withdrew recognition from the Union and denying PMT the opportunity to present evidence regarding majority status.**

The Complaint alleged and the ALJ found that PMT unlawfully withdrew recognition of the Union on or about February 11, 2009. Specifically, the ALJ found that the Union is entitled to a rebuttable presumption of majority support stemming from PMT’s recognition of the Union in 2006. (15 ALJD 40-42). The ALJ’s conclusion on this most critical issue is in error. As outlined in PMT’s offers of proof to the ALJ, PMT simply asked the Union for proof of majority

status before continuing negotiations in February 2009 because the Union had not, and still to this day has not, demonstrated that it has the support of a majority of bargaining unit employees. Thus, PMT has not unlawfully withdrawn recognition.

Despite PMT's voluntary recognition of the Union in July 2006, the union has never achieved majority status. There is no dispute that the Act does not require an employer to bargain with a union that does not have majority status. In fact, the Act prohibits such bargaining. The policies of the Act, and the principles of fairness that underlie the Board's rules, cannot plausibly be construed to impose liability on Respondent for any alleged unfair labor practice activity, where there has never been evidence that the Union enjoys majority support.

Here, among the background allegations, the Complaint alleges, and the Answer denies:

- Since in or about July 7, 2006, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the Unit and since then the Union has been recognized as the representative by the Respondent. This recognition has been embodied in a recognition agreement dated July 7, 2006. (GC Ex. 1(ah) at ¶ 5(b).)
- At all times since July 7, 2006, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit. (GC Ex. 1(ah) ¶ 5(c).)

It is indisputable that the Board never certified the Union as the Section 9(a) collective bargaining representative of the Unit. Instead, the Complaint rests entirely on the Respondent's unlawful voluntary recognition of a minority Union as the collective bargaining representative in July 2006. (GC Ex. 1(ah) at ¶ 5(b).) It is the General Counsel's burden to show that the voluntary recognition resulted in the Union having 9(a) status. Therefore, at the hearing, the General Counsel should have presented evidence of majority status, which PMT should have had the opportunity to rebut. Here, there was no evidence of majority status for PMT to rebut and PMT was, in fact, precluded by the ALJ's ruling from presenting its evidence of the Union's lack of majority status.

Majority status is at the heart of the Act. As Senator Wagner declared in his support of the bill which became the foundation of the Act: “[C]ollective bargaining can be really effective only when workers are sufficiently solidified in their interests to make an agreement covering all. This is possible only by means of majority rule.” *Hearings on S. 1958 before the Senate Comm. on Education and Labor, 74<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1935)*, reprinted in *1 Leg. Hist. of the National Labor Relations Act, 1935*, at 1419 (1949).

Here, it is undisputed that the Union never produced evidence of majority support. There was no card check procedure. There was no election. Nonetheless, the Region contended and the ALJ found that PMT’s voluntary unlawful recognition of the minority Union in July 2006 conferred majority status onto the Union despite no evidence of majority support. Clearly, the Act does not compel such a result and to do so would legitimize nearly every recognition of a minority union, contrary to Section 8(a)(2).

**(i) *Voluntary Recognition is valid only where there is a contemporaneous showing of majority support***

An employer is obligated under Section 8(a)(5) to bargain collectively with a union that has been “designated and selected for the purposes of collective bargaining by the majority of employees,” pursuant to Section 9(a) of the Act, 29 U.S.C. § 159(a). In the usual case it is an unfair labor practice under Section 8(a)(1) and (2) for an employer, and Section 8(b)(1)(A) for a union, to engage in collective bargaining when only a minority of employees has “designated and selected” the union as its bargaining representative. *See, NLRB v. Local 103, Intern. Ass’n of Bridge, Structural and Ornamental Iron Workers (Higdon)*, 434 U.S. 335, 344, 98 S.Ct. 651 (1978) (“There could be no clearer abridgment of § 7 of the Act, assuring employees the right ‘to bargain collectively through representatives of their own choosing’ or ‘to refrain from’ such activity than to grant exclusive bargaining status to an agency selected by a minority of its

employees, thereby impressing that agent upon the nonconsenting majority.” (internal quotations and citation omitted)).

In *International Ladies' Garment Workers' Union, AFL-CIO v. NLRB*, 366 U.S. 731 (1961), the United States Supreme Court ruled that apart from a Board-certified election, an employer and union may establish a Section 9(a) relationship through the employer's voluntary recognition based upon an actual showing that the union in fact has the support of a majority of employees. In *Garment Workers*, the employer and union signed a memorandum of understanding in which the employer recognized the union as the "exclusive bargaining representative" of its employees. The employer, without verification, accepted the union's oral assertion that it possessed union authorization cards signed by a majority of employees when in fact the union did not enjoy the support of a majority of employees. Two months after signing the memorandum of understanding the employer and union executed a collective bargaining agreement which embodied the recognition terms of the memorandum of understanding. Unlike here, when the parties executed the collective bargaining agreement the union did, in fact, enjoy majority support. The Board and the District of Columbia Circuit Court concluded that the parties unlawfully entered into a Section 9(a) majority supported bargaining relationship because the union lacked majority support when the parties signed the memorandum of understanding and, therefore, the memorandum of understanding and collective bargaining agreement were unlawful. *See, International Ladies' Garment Workers' Union v. NLRB*, 280 F.2d 616 (D.C. Cir. 1960); and *Garment Workers, ILGWU (Bernhard-Altmann Texas Corp.)*, 122 NLRB 1289 (1959).

The Supreme Court granted certiorari and focused on employee rights as guaranteed by Section 7 of the Act. The Supreme Court agreed with the District of Columbia Circuit Court,

stating: “[The employer] granted exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority.” *Garment Workers*, 366 U.S. at 737.

Accordingly, in *Garment Workers*, the Supreme Court affirmed as a general rule that an employer's voluntary recognition of a union as a Section 9(a) representative first requires that the union in fact enjoy the support of a majority of employees. Therefore, under Supreme Court law a voluntary recognition without the requisite showing of majority support is invalid.

This holding has been reaffirmed by the circuit courts. For example, in *Georgetown Hotel v. NLRB*, 835 F.2d 1467, 1470-72 (D.C. Cir. 1987), the D.C. Circuit held that "voluntary recognition has been found to have occurred when an employer agrees to recognize a union through a card check or some other procedure and then subsequently confirms the union's majority status through that procedure." The court reversed the Board's finding of a Section 9(a) relationship, stated "in this case, the Board is unable to point to any evidence in the record to suggest that verification, the critical prerequisite to recognition, ever occurred." *Id.*

Additionally, NLRB law is clear that any voluntary recognition, whether it be through contract language, card checks, conduct, or otherwise, is dependent on a recognition and request by the union on a confirmation of the union's majority status. The Board in *McLaren Health Care Corp.* 333 NLRB 256, 258 (2001) stated,

. . . voluntary recognition has been found to have occurred when an employer agrees to recognize a union through a card check or some other procedure and subsequently confirms the union's majority status through that procedure. The Board and the courts have refused to find that a binding recognition agreement exists unless both of those requirements are satisfied.

Thus, the law requires: 1.) a procedure for checking majority status and; 2.) a confirmation of majority status through that procedure. *Id.* This conclusion is consistent with the Board's General Counsel's advice on the subject, which stated:

[e]ven if the union does, in fact, represent a majority of the Employer's employees, ... there must be explicit proof presented contemporaneously with the Union's demand and the Employer's voluntary recognition. Thus, although the Employer's ambiguous statements arguably may indicate that it believed the Union had majority support, those statements are insufficient to confer 9(a) status upon the Union without actual demonstration of that majority status.

Advice Ltr. from NLRB Gen. Counsel to Regional Director of Region 9, Feb. 27, 1989, 1989 WL 241614, at \*2. (Feb. 27, 1989) (emphasis added).

At the hearing, the General Counsel presented no evidence that there has ever been a card check, petition, or election. The General Counsel submitted nothing to establish that majority status was ever confirmed or checked, despite PMT's continued denial that the Union ever has had majority support. Thus, it is clear that the voluntary recognition was invalid and the General Counsel failed to carry its burden of establishing a fundamental basis of the Complaint; namely, that the Union has majority support and therefore a Section 9(a) bargaining relationship exists.

A recent NLRB decision lends support to Respondent's contention. In *Dana Corp.*,<sup>1</sup> 351 NLRB No. 28 (2007), the NLRB modified its recognition-bar doctrine to hold that an employer's voluntary recognition of a labor organization does not bar a decertification or rival union petition that is filed within 45 days of the notice of recognition. In *Dana Corp.*, a Board majority concluded that the basic justifications for providing an insulated period do not warrant immediate imposition of an election bar following voluntary recognition. The Board reasoned

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<sup>1</sup> It is indisputable that the *Dana Corp.* requirements have not been complied with. Although the Board held that the requirements would apply prospectively only, the reasoning of the decision still supports PMT's position.

that the uncertainty surrounding voluntary recognition based on an authorization card majority (as opposed to union certification after a Board election) justified delaying the election bar for a brief period during which unit employees can decide whether they prefer a Board-conducted election. Under the Board's new policy, an employee or rival union may file a petition during a 45-day period following notice that a union has been voluntarily recognized.

The Board outlined the problems with voluntary recognition and also noted the infirmities inherent with “card checks.” The Board reasoned as follows:

While Section 9 of the Act permits the exercise of employee free choice concerning union representation through the voluntary recognition process, this does not require that Board policy in representation case proceedings must treat the majority card showings the same as the choice expressed in Board elections. On the contrary, both the Board and courts have long recognized that the freedom of choice guaranteed employees by Section 7 is better realized by a secret election than a card check. “[S]ecret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support.

*Id.* (internal quotations omitted).

The Board continued:

The current policy fails to give adequate weight to the substantial differences between Board elections and union authorization card solicitations as reliable indicators of employee free choice on union representation and fails to distinguish between the circumstances of voluntary recognition and those present in the other election-bar situations [].

*Id.* In *Dana Corp.*, the Board held that the employer and/or the union must promptly notify the Regional Office of the Board, in writing, of any grant of voluntary recognition. Upon being so apprised, the Regional Office of the Board will send an official NLRB notice to be posted in conspicuous places at the workplace throughout the 45-day period alerting employees to the recognition and using uniform language. *Id.*

*Dana Corp.* is instructive to the current situation for a number of reasons. First, the Board outlined the inherent flaws with card checks and voluntary recognition. It is indisputable here

that the Union never provided PMT with cards stating employees' desire to be represented by the Union. Accordingly, the concerns outlined in *Dana Corp.* are magnified here. Secondly, it is also indisputable that the Board was never informed of PMT's voluntary recognition of the Union, either in 2006, or in 2008, when negotiations reopened. Thus, the notice posting required under *Dana Corp.* never happened and any voluntary recognition was invalid.

Accordingly, precedent of the Supreme Court, the Board, and the District of Columbia Circuit confirm that Section 9(a) recognition requires real proof that a majority of employees, in fact, desire union representation. A mere "recognition letter" is no substitute. Here, there has been no evidence of majority support, either at the time of voluntary recognition or through today. Indeed, evidence rejected by the ALJ is to the contrary. Nevertheless, the ALJ erroneously held that voluntary recognition, without any contemporaneous showing of majority support, was sufficient to establish majority support. (*See* 15 ALJD 40-46). The ALJ compounded this error by ruling that PMT had failed to show actual loss of majority support. (*Id.*) However, it would be impossible for PMT to establish "loss of majority support" where there never has been a showing of majority support. Regardless, PMT was foreclosed from presenting evidence regarding majority support by the ALJ's pre-hearing rulings that prohibited PMT from presenting evidence regarding the Union's lack of majority support

As an alternative to hard evidence, the ALJ relied on the fiction of a voluntary recognition letter to find majority support. Thus, the ALJ's decision purports to force Section 9(a) recognition on PMT and its employees when there has never been a showing that majority of PMT employees desire Union representation. This finding denies the employees their free choice protected by Section 7 [29 U.S.C. § 157] of the Act, imposes an ineffective minority union on the employees, and is in error.

(ii) ***Any subsequent obtaining of majority status is tainted by the original unlawful recognition.***

As outlined above, PMT's original recognition of the Union was unlawful as there was no contemporaneous showing of majority status. Because the recognition was unlawful, even if the Union subsequently gained majority support, which it has not, the majority status would be tainted and the Union would still not be a valid bargaining agent.

In *International Ladies' Garment Workers' Union, AFL-CIO v. NLRB*, 366 U.S. 731, 736 (1961), the Supreme Court reasoned that even if a union subsequently gains majority support, an employer's initial unlawful grant of recognition would taint that majority. The Court reasoned:

“[W]e reject as without relevance to our decision the fact that, as of the execution date of the formal agreement on October 10, petitioner represented a majority of the employees. As the Court of Appeals indicated, the recognition of the minority union on August 30, 1957, was ‘a fait accompli depriving the majority of the employees of their guaranteed right to choose their own representative.’ 280 F.2d at page 621. It is, therefore, of no consequence that petitioner may have acquired by October 10 the necessary majority if, during the interim, it was acting unlawfully. Indeed, such acquisition of majority status itself might indicate that the recognition secured by the August 30 agreement afforded petitioner a deceptive cloak of authority with which to persuasively elicit additional employee support.

*Id.* (standing for the proposition that the initial illegal recognition tainted all that followed so that the fact that the Union gained majority status prior to the execution of a collective bargaining agreement is immaterial); *See also, R. J. E. Leasing Corp.*, 262 NLRB 373, 380 (1982)(same). Accordingly, under both NLRB law and Supreme Court precedent, it is clear that PMT's original unlawful recognition of the Union, granted without a showing of majority, taints any subsequent finding of majority status.

**(iii) *The ALJ erred in concluding that Section 10(b) of the NLRA precluded PMT from challenging majority status***

The ALJ also concluded that PMT was barred by the Act's six (6) month limitation period in Section 10(b) [29 U.S.C. § 160(b)] from challenging whether the Union enjoyed the support of a majority of employees. In other words, the ALJ concluded, once six (6) months had passed from the time of the voluntary recognition letter, PMT was barred from challenging majority status at the time of recognition. The ALJ's conclusion was in error as the Act does not compel such a result.

The National Labor Relations Board is entirely a creature of statute. As such, the Board can only exercise the authority given by Congress in the Taft-Hartley Act or Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 141, et seq. Section 10(b) states in relevant part: "[No] complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." This six(6) month limitation of Section 10(b) by its express terms only applies to the Board's own issuance of complaints. As noted by the Fourth Circuit Court of Appeals, "it is not immediately clear to us that the Board's rule applying the 10(b) time-bar to nonconstruction industry employer defenses of invalid voluntary recognition is a reasonable construction of a provision that, on its face, only applies to complaints filed by the Board." *American Automatic Sprinkler Systems, Inc. v. NLRB*, 163 F.3d 209, 219 (4<sup>th</sup> Cir. 1998). Thus, Section 10(b) cannot be applied, as it was here, to bar PMT's defense of the Union's lack of majority support.

When construing a statute, a court's task is to give effect to the will of Congress. If the will of Congress has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive. *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993). Courts should give the

words in statutes their plain meaning. *See, Williams v. Taylor*, 529 U.S. 420, 431 (2000) (“We give the words of a statute their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import.”). If the statutory language is clear and unambiguous, the court’s inquiry ends there. *See, Caminetti v. United States*, 224 U.S. 470, 485 (1917).

Here, the plain language of Section 10(b) provides that “no complaint” shall issue based on an unfair labor practice occurring more than six months prior. There is no indication in the text that this limitations period was meant to apply to anything other than complaints issued by the Board. Accordingly, to apply the 10(b) limitations period to preclude PMT from arguing that its recognition of a minority union is inappropriate and not supported by the plain language of Section 10(b).

Moreover, to apply Section 10(b) to this situation is inconsistent with *Garment Workers, supra*, in which the Supreme Court permitted inquiry into whether the union actually had majority support at the time the parties allegedly established a Section 9(a) relationship. Based on the foregoing, the ALJ's application of Section 10(b) time limits to PMT is inconsistent with the plain language of Section 10(b) and United States Supreme Court precedent. Moreover, the concept limits employees' Section 7 [29 U.S.C. § 157] rights to choose or refrain from union representation under Section 9(a). Accordingly, the ALJ’s decision to preclude PMT from challenging majority status based on Section 10(b) was erroneous and should be reversed.

**(iv) *The controlling circuit court has rejected the presumption of majority status in similar situations***

Additionally, should the ALJ’s decision regarding majority status be upheld by the Board, PMT would have a right to appeal to the D.C. Circuit. Importantly, the very presumption upon which the Region and the ALJ relied was rejected by the D.C. Circuit in *Nova Plumbing v*

*NLRB*, 330 F.3d 531 (D.C. Cir. 2003).<sup>2</sup> In *Nova Plumbing*, the D.C. Circuit Court of Appeals refused to enforce a Board order requiring a construction industry employer to bargain with a union under Section 9(a) despite the parties' clear and unambiguous contract language recognizing the union as a majority representative. The Court refused enforcement because there was no actual showing that a majority of the affected employees supported the union.

The union in *Nova Plumbing* threatened litigation if the company refused to recognize and bargain with the union. The employer initially responded by petitioning for a Board-sponsored election. The company, however, later withdrew its petition and signed a two-year agreement with the union to resolve their dispute. That agreement required Nova Plumbing to recognize the union as the majority representative of its employees. *Id.* at 535. Notwithstanding the contract's language, there was no evidence of majority support among the employees. *Id.* The employer bargained with the union briefly, but broke off negotiations, contending, in direct contradiction to the agreement it had signed, that it had a Section 8(f) relationship and that it was permitted to walk away from its bargaining obligations after the agreement expired. *Id.* The Board rejected the employer's position and held that the agreement created a Section 9(a) relationship. The employer sought judicial review of the Board's order. It argued that the Board's order was unenforceable because there was no actual majority support for the union among its employees. The D.C. Circuit Court agreed, finding that the Board had impermissibly sanctioned a Section 9(a) relationship in the absence of an actual showing of majority support. *Id.* at 536-39.

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<sup>2</sup> A federal circuit court decision which has not been overturned by the Supreme Court represents the highest law or statutory interpretation available in that circuit, and is binding on administrative agencies such as the NLRB, which do not have the same authority as these courts. *Allegheny General Hosp. v. NLRB*, 608 F.2d 965 (3d Cir. 1979), *overruled on other grounds by, St. Margaret Memorial Hosp. v. NLRB*, 991 F.2d 1146, 1152 (3d Cir. 1993).

The D.C. Circuit *rejected* the Board's rule that permits the creation of a Section 9(a) relationship based on contract language and the parties' intent.

The proposition that contract language standing alone can establish the existence of a Section 9(a) relationship runs roughshod over the principles established in *Garment Workers*, for it completely fails to account for employee rights under Sections 7 and 8(f). An agreement between an employer and union is void and unenforceable, *Garment Workers* holds, if it purports to recognize a union that actually lacks majority support as the employees' exclusive representative.

...

By focusing exclusively on employer and union intent, the Board has neglected its fundamental obligation to protect employee Section 7 rights, opening the door to even more egregious violations than the good faith mistake at issue in *Garment Workers*.

*Id.* at 536-37 (emphasis added).

In the present case, as in *Nova Plumbing*, the ALJ's decision forces a Section 9(a) bargaining relationship on employees, without a showing that a majority of these employees ever supported the Union. The decision ignored the *Nova Plumbing* court and one critical, undisputed fact: neither the Union nor the General Counsel presented any evidence to establish that a majority of PMT's bargaining unit employees ever supported the Union. To be lawful, voluntary recognition must be based on a clear showing of majority support among the unit employees. *Nova Plumbing*, 330 F.3d at 536 ("Absent a Board-conducted election, the Board required proof of 'a union's express demand for, and an employer's voluntary grant of recognition to the union as bargaining representative based on a contemporaneous showing of union support among a majority of the employees in an appropriate unit.'" (quoting *J&R Tile, Inc.*, 291 NLRB 1034, 1037 (1988)). Here, there has never been a showing of majority support. Thus, the *Nova Plumbing* rationale, which is the law of the controlling circuit court, should apply and there should be no presumption of majority support.

(v) *PMT was denied due process when it was prohibited from litigating the issue of majority status*

Finally, Respondent was denied due process when the ALJ precluded it from presenting evidence regarding majority status. At the hearing, PMT was denied the opportunity to present evidence on the Union's lack of majority support. (TR at 20:12-14). However, if PMT would have been permitted to present evidence on the lack of majority status, it would have been able to more fully support its defenses.

It is well-settled that an employer has access to very limited discovery prior to a hearing because it must proceed in an exceedingly careful manner to avoid being accused of coercive interrogation of employees. *See NLRB v. J-Wood/A Tappan Division*, 720 F.2d 309, 316 (3rd Cir. 1983). Thus, PMT has had its hands tied in terms of collecting evidence on the majority issue. Nonetheless, PMT was denied the opportunity to explore the issue of majority status at the hearing.

Were Respondent allowed to present evidence regarding the Union's lack of majority support, such evidence would have shown the following:

- In the three years since the Union was recognized as bargaining agent, the ICEP has never enjoyed nor provided PMT with any evidence of majority status.
- PMT based its recognition of the Union on the July 7, 2006 letter only. No recognition cards were ever produced to PMT by the Union. Instead, only dues authorizations from a minority of unit employees were submitted.
- The only evidence of Union support were unlawful dues authorizations, which never exceeded 1/3 of the employees in the unit. The Unit has grown from 171 in July 2006 to over 400 today with no corresponding increase in the number of dues authorizations. Mr. James Cunningham, an original Trustee of the Union submitted an affidavit to the Counsel for the General Counsel stating that the Union never had any documentation of majority support, only the dues authorizations from a minority of the employees in the unit. Mr. Cunningham further averred that the existence of a majority was never discussed among the Union.
- On February 11, 2009, when the Union president was asked whether he had majority support or if he would submit to a NLRB election or card check, he refused to answer and left negotiations.

At the hearing, PMT did submit an offer of proof on these matters. (TR at 37:15-21). The offer of proof was rejected. (Id.) Because the ALJ denied Respondent the opportunity to develop evidence supporting its case, PMT was denied due process.

**B. The ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by refusing to provide the Union with requested information in July 2008.**

The General Counsel alleged and the ALJ found that the Union made a request for information and that PMT failed to provide the information requested. According to the Complaint, the Union requested “call volume in its entirety” and “roster and contact information for Unit employees and all employees performing Unit work.” (GC Ex. 1(ah) at ¶¶ 9(a)(1-2).) However, the Complaint was inaccurate and misleading as it failed to correctly list the information originally requested by the Union. In fact, the July 25, 2008 request for information included five separate requests: a profit and loss statement for 2007; quarterly earnings reports for 2008; call volume in its entirety; collection percentages and ratios; and roster for all PMT employees, including contact information. (GC Ex. 35.) PMT responded to the request with a denial and provided the Union with an opportunity to respond with the reasons why it was entitled to the information. (GC Ex. 36). The Union did not respond.

The Union’s July 25, 2008 request included information not relevant to the bargaining, including requests for information on employees outside the bargaining unit. Thus, PMT’s refusal to provide such information was appropriate. In *Sheraton Hartford Hotel*, 289 NLRB 463, 463-64 (1984), the Board stated: “Where the information does not concern matters pertaining to the bargaining unit, the Union must show that the information is relevant. When the requested information does not pertain to matters relating to the bargaining unit, to satisfy the burden of showing relevance, the union must offer more than mere suspicion for it to be entitled to the information.” *Id.* Further, where such non-unit information is requested, the Union must

demonstrate some objective basis and not mere suspicion, to support the request's alleged relevance. *Depository Trust Co.*, 300 NLRB 700, 704 (1990). Here, much of the information requested was for non-unit employees and therefore, was not relevant. Accordingly, PMT's failure to furnish the requested information was not an unfair labor practice. PMT should not be required to edit or sift through the Union's improper request for information to attempt to discern what information it is obligated to provide.

The fact that the Complaint included only two of the five distinct categories of information requested by the Union supports PMT's contention that the requested information was irrelevant. Additionally, the NLRB's manipulating of the actual terms of the information request suggests that the information request, in the form sent to PMT, was not appropriate. For the foregoing reasons, the ALJ erred in his decision finding that PMT unlawfully refused to provide the information requested in July 2008.

**C. The ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by direct dealing with its employees by posting an "opt out" notice for employees who did not want to provide their contact information to the Union.**

The General Counsel alleged and the ALJ found that that PMT dealt directly with employees by posting an "opt out" sign up sheet for employees to sign if they did not want information about themselves provided to the Union. PMT disputes that the communication constituted "direct dealing." Regardless, these allegations are barred by the six month statute of limitations found in Section 10(b) of the Act.

**(i) The allegation is barred by 10(b)**

Joy Carpenter<sup>3</sup> testified that this "opt-out" flyer was posted at Station 1<sup>4</sup> in September or October 2007. (TR at 179: 9-16). One of the Union's witnesses, Jason Seyfert, testified in his

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<sup>3</sup> Ms. Carpenter is the Director of Human Resources for PMT. (TR at 166:22-25).

<sup>4</sup> Station 1 is the main station for PMT. It is the Station where PMT's administrative offices are located. (TR at 178:8-11).

sworn affidavit and at the hearing that he saw first saw GC Ex. 15 posted in December 2007. (TR at 442:18-443:16). Mr. Barkley testified that he could not recall when it was posted, but that unit members at Station 1 saw it posted and told him about it. (TR at 333:5-10). Thus, the uncontroverted evidence at trial was that the flyer was first posted, at the latest, by December 2007.

Events taking place around the time of the posting confirm Ms. Carpenter's testimony. Specifically, Mr. Barkley requested the phone list in an October 22, 2007 e-mail. (*See* Respondent's Exhibit (hereinafter "R Ex.") 12). The "opt out" flyer was posted in response to this request and other discussions. In addition, on November 15, 2007, Ms. Carpenter sent the requested phone list to Mr. Barkley (R Ex. 4) as a result of this process. (TR at 554:16-555:22). Accordingly, the documentary evidence confirmed that the "opt out" was posted in or around the fall of 2007.

The Union's first charge relating to the issues in this hearing was filed October 15, 2008 (See GC Ex. 1(a)). This charge does not reference the posting. Regardless, this charge was outside the 10(b) period for a posting that took place, at the latest, in December 2007. Accordingly, the allegations in Paragraph 6(c) and 8(c) are untimely and should be dismissed.

Despite the clear evidence that the allegation was time barred because no charge was filed within six months of the initial posting, the ALJ credited testimony that the flyer was posted until the end of 2008. (9 ALJD 34-35 and held, without citation to any legal authority, that the violation was continuing and the allegation thus fell within the 10(b) period. The ALJ's decision in that regard is flagrantly improper.

Section 10(b) provides that "no complaint shall be based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. §

160(b). When a union is on notice of facts that would reasonably engender suspicion of an unfair labor practice, the 10(b) period will begin to run. See *Transit Union Local 1433 (Phoenix Transit System)*, 335 NLRB 1263 fn. 2 (2001). A party will be charged with constructive knowledge of an unfair labor practice where it could have discovered the alleged misconduct through the exercise of reasonable diligence.

Here, the uncontroverted evidence was that the Union received actual notice of the posting in late 2007. Further, the posting took place at PMT's main station for all to see. Thus, the Union knew of, or should have discovered, the alleged misconduct in late 2007 and the 10(b) period began to run at that time. It is indisputable that no charge referencing this allegation was filed within the 10(b) period. Accordingly, this allegation is barred by 10(b) and the ALJ's decision finding otherwise was improper.

**(ii) *There was no harm caused by the posting***

Even assuming the allegation is not barred by 10(b), there is still no violation of the Act because the effect of the "opt-out" was non-existent. Namely, no employees chose to "opt out." (TR at 555:8-10). The Board has previously held that certain conduct, limited in impact, significance, and effect, does not rise to the level of constituting a violation, even though the same conduct, if engaged in on a more widespread basis, or under circumstances in which its impact can be anticipated to be significant, would constitute a violation. *Bellinger Shipyards*, 227 NLRB 620 (1976); *Wichita Eagle & Beacon Publishing Co.*, 206 NLRB 55 (1973); *Square D Co.*, 204 NLRB 154 (1973). The Board has referred to such cases as involving "de minimis violations." The language of the opt-out itself shows its non-coercive nature. (GC Ex. 15).

Under the teachings of cases such as *American Federation of Musicians Local 76 (Jimmy Wakely Show)*, 202 NLRB 620 (1973), an isolated *de minimis* allegation does not merit any further litigation. In *American Federation of Musicians*, the Board held that the case involved:

“One of those infinitesimally small abstract grievances [that] must give way to actual and existing legal problems if courts [and the NLRB] are to dispose of their heavy calendars.”

Accordingly, even though the employer was in “technical contravention of the statute,” the Board found that, “it ought not to expend the Board’s limited resources on matters which have little or no meaning in effectuating the policies of the Act” and declined either to find a violation or issue a remedial order. *American Federation of Musicians*, 202 NLRB at 622. The same reasoning supporting the holding in *American Federation of Musicians*, *supra*, applies with equal force here. Even if PMT was in technical violation of the Act, because not one PMT employee “opted-out,” any alleged violation of the Act was de minimis and the allegation is without merit.

**(iii) *The posting did not constitute “direct dealing.”***

Finally, the posting cannot be said to be “direct dealing” in violation of the Act. The Act does prohibit employers from dealing directly with union-represented employees regarding their terms and conditions of employment. *See The Permanente Medical Group, Inc.*, 332 NLRB 1143, 1144 (2000) (drawing the line between permissible communication and direct dealing). In other words, an employer may not circumvent or undermine a union by communicating directly with employees for the purpose of establishing or changing wages, hours, or other terms and conditions of employment. *Id.* However, an employer may communicate with its represented employees where there is no attempt to structure the communication as a bilateral mechanism for making specific proposals and responding to them. *Id.* at 1156.

Recently, in *Alan Ritchey, Inc.*, 354 NLRB No. 79 (September 25, 2009), the NLRB upheld the ALJ’s finding that the employer did not engage in direct dealing by asking employees to sign a memo, agreeing to changes in their job duties because the changes were minor and had a negligible impact on the employees’ terms and conditions of employment. The ALJ noted: “In

any case, involving an allegation of direct dealing, the inquiry must concern whether the employer's direct solicitation is likely to erode "the union's position as exclusive representative." *Id.* (citing *Modern Merchandizing*, 284 NLRB 1377, 1379 (1987) and finding that employer's request to employees regarding job duty changes did not "have the effect of eroding the position of the Union as the employees' exclusive bargaining representative" and therefore did not constitute direct dealing.) The injury suffered by the Union when it is bypassed "[is] not that flowing from a breach of contract: '[T]he real injury. . . is to the union's status as bargaining representative.'" *C&C Plywood Corp.*, 163 NLRB 1022, 1024 (1967)(internal citation omitted). Thus, the central inquiry in a direct dealing allegation is whether the employer's actions had the effect of undermining the union's role as the exclusive bargaining representative.

Here, there is no indication from the record that there was any attempt to establish or change working conditions of the employees. Here, there is no evidence that the opt-out was a "bilateral mechanism for making specific proposals and responding to them." There is similarly no evidence that the "opt out" undermined, let alone eroded, the Union's role as bargaining representative. Rather, as discussed above, the "opt-out" was simply a mechanism for letting the employees know that their information would be provided to the Union and giving them an opportunity to "opt-out" if desired. (*See* TR at 554:16-25). The act of passively posting a flyer and receiving no response cannot constitute "direct dealing" under the Act. Accordingly, the ALJ's finding that PMT engaged in direct dealing by posting the "opt out" sheet was in error.

**D. The ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by unilaterally assigning unit work to nonunit firefighters.**

The Complaint alleged, and the ALJ found, that, since in or about mid-September 2008, PMT has taken away shifts from full-time unit employees and given them to part-time employees and has reduced the number of overtime hours assigned to certain full-time unit employees. The

named “employees” in these allegations are Justin Lisonbee, Travis Murphy, Ryan Nolan, Jason Seyfert and Todd Wais, each of whom testified at the hearing. (*See* GC Ex. 1(ak)). These allegations are time-barred and are without merit.

**(i) *The allegations are barred by 10(b)***

Initially, from the face of the Complaint, it is clear that the allegations relating to this issue are time-barred under Section 10(b). Specifically, the allegations arise out of actions that took place, as alleged in the Complaint, in mid-September 2008. In fact, the Union President, Joshua Barkley, testified at the hearing that the alleged loss of overtime to unit employees began in the end of 2007. (TR at 278:5-23). Further, Mr. Barkley testified that PMT hired a large contingent of firefighters in September 2008 and that this affected bargaining unit employees’ overtime opportunities. (TR at 290:6-16). However, no charge was filed regarding this alleged unilateral change until April 30, 2009, which exceeds the 10(b) limitations period. (GC Ex. 1(s)). Accordingly, the allegations in Paragraphs 7(a)(1) and (2) and 10(a) are untimely and should be dismissed.

The ALJ failed to address PMT’s 10(b) argument. The ALJ explained, in a footnote, that because he did not address the 8(a)(3) aspect of the allegation because he found a 8(a)(5) violation, that he would not address PMT’s 10(b) argument with respect to the 8(a)(3) allegation. The ALJ did not explain why he failed to address the 10(b) argument in relation to the 8(a)(5) allegation.

As outlined above, Section 10(b) provides that “no complaint shall be based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.” 29 U.S.C. § 160(b). When a union is on notice of facts that would reasonably engender suspicion of an unfair labor practice, the 10(b) period will begin to run. *See, Transit Union Local 1433 (Phoenix Transit System)*, 335 NLRB 1263 fn. 2 (2001). Here, the Union president noticed

the alleged loss of overtime in 2007. (TR at 278:5-23). At the latest, the alleged changes took place in September 2008. (TR at 290:6-16). Yet, no charge containing this allegation was filed until April 30, 2009, which is outside the 10(b) limitations period.

This case is akin to *Continental Oil Co.*, 194 NLRB 126 (1971). In that case, the employer implemented a method of allocating overtime, which allegedly violated its collective-bargaining agreement, more than 6 months before the filing of the charge. The employer continued to follow this same method during the 10(b) period. The Board found that the employer's mere adherence to its method of allocating overtime established outside the 10(b) period could not constitute a midterm modification within the 10(b) period. The Board therefore dismissed the complaint as time-barred. *Id*; *See also, Park Inn Home For Adults*, 293 NLRB 1082 (1989) (holding that Sec. 10(b) barred a finding that an employer violated the Act by failing to make contributions to benefit funds where the charge was filed more than 6 months after the action that *initially* created the allegedly breached obligation and more than 6 months after the union learned of the employer's action).

Similarly, here, PMT's conduct during the 10(b) period was identical to its conduct during the time period six months previous to the filing of the charge. There is no allegation of any new unilateral change to PMT's method of filling unscheduled overtime during the relevant 10(b) period; namely, there is no allegation or evidence that PMT changed *anything related to overtime* in the six months prior to the April 30, 2009 charge addressing this allegation. Thus, even assuming that there was a change beginning in September 2008, there was no timely charge. Therefore, PMT has carried its burden of establishing that this allegation is time-barred under Section 10(b) and the ALJ's refusal to even rule upon the 10(b) argument was improper.

(ii) *PMT's use of part-time employees has followed an established past practice*

Additionally, assuming for the sake of argument that the charge was timely, the allegation should have been dismissed as PMT was following an established past practice. Even unilateral action does not violate the Act if it merely follows an established past practice and does not alter the status quo. *See The Post-Tribune Co.*, 337 NLRB 1279 (2002). Where an employer's action does not change existing conditions—that is, where it does not alter the status quo—the employer does not violate the Act. *See House of the Good Samaritan*, 268 NLRB 236, 237 (1983). Here, the uncontroverted evidence shows that PMT's use of firefighters as part-time employees existed well before the bargaining began with the Union. Accordingly, there has been no “change” over which bargaining was required. Again, only material, substantial and significant changes trigger a duty to bargain. *Cooper-Jarrett, Inc.*, 239 NLRB 840 (1978), *Peerless Food Products*, 236 NLRB 161 (1998). Where an employer frequently changes individual employees working schedules and assignments pre-Union, the employer may lawfully continue to make such changes unilaterally after the arrival of the Union. *KDEN Broadcasting Company*, 225 NLRB 25, 34-35 (1976); *Carbonex Coal Company*, 262 NLRB 1306, 1313 (1982). An employer need not bargain before making routine production scheduling and work assignment adjustments so long as such action did not vary from the employer's past practice. *Cal-Die Casting Corp.*, 221 NLRB 1068 Fn. 1 (1975).

The testimony from every witness who testified on the issue established that PMT used part-time employees and part-time firefighters since before the Union was even in existence. (*See*, TR at 61:10-13 (Mr. Ramsey testified that PMT has always employed part-time employees and full-time employees since the very beginning); TR at 274:22-275:2 (Mr. Barkley testified that PMT has had the practice of hiring firefighters as part-time employees since Mr. Barkley first

started working for PMT); TR at 482:21-483:1 (Ryan Nolan testified that the company has hired part-time firefighters since he was first hired); TR at 537:25-538:4 (Kellie O'Connor testified that the company hired 20-25 firefighters in September 2008, which is about the normal amount of employees it would hire in a month)).

Additionally, the way in which unscheduled overtime shifts were filled has stayed consistent since before the Union was in existence. Respondent's Exhibit 14 outlined the procedure used for filling unscheduled overtime. (*See also*, TR at 601:6-602:6). This document is available to the employees so they are aware of how overtime is filled. Kellie J. O'Connor is the PMT employee in charge of staffing. (TR at 526:2-12). She has worked in that capacity and managed the scheduling department for almost 5 years for PMT. (TR at 598:23-599:1). From Ms. O'Connor's testimony, it is clear that PMT has been consistent in the way it staffs unscheduled overtime. The process is, and has been since the before the Union came into existence, as follows: If a shift opens up, the scheduling department looks at full-time employees who are under hours first. (TR at 532:5-23). Next, the scheduling department looks to part-time employees that have minimal hours. *Id.* Then, the scheduling department goes back to full-time employees who aren't low on hours. (TR at 533:2-6). The scheduling department does not differentiate between part-time non-firefighters and part-time firefighters. (TR at 542:20-543:2).

There is no evidence in the record that anything that PMT did in terms of the process of filling unscheduled overtime shifts changed. Rather, the practice of filling shifts has been consistent, even if there have been peaks and valleys in terms of unscheduled overtime available to employees. The evidence establishes that PMT has not made any significant, substantial, or material change in regards to its use of part-time employees and firefighters. Thus, there is no violation of the Act.

The testimony was unequivocal that all PMT employees receive overtime on a regular basis. As Mr. Barkley testified, employees work an average of 56 hours per week. (TR at 270:6-20). The employees receive regular pay for the first 40 hours, and time and a half for the additional hours worked. (TR at 270:2-271:2). PMT thus has a goal to keep unscheduled overtime to a minimum. (TR at 602:15-23). Indeed, one of the Union's witnesses, Justin Lisonbee, who is a Union trustee and who the Complaint alleges lost work hours, admitted that the reason he worked less overtime after September 2008 was because the company was cutting back on overtime. (TR at 417:5-22). He could not relate his alleged loss of unscheduled overtime to any increase in hiring of firefighters. (Id). Further, PMT presented evidence that there are risks associated with workers having too many hours in a given week, including erosion of abilities and slowed response times. (TR at 79:23-80:21). This risk was confirmed at trial by Mr. Barkley himself with his testimony regarding how tired he was for the trial due to coming off a 24-hour shift. (TR at 227:19-228:9). Emergency medical services require full capacity of mental and physical alertness to save lives. The fatigue, as shown in Mr. Barkley's testimony, is the type of risk PMT is looking to avoid by limiting unscheduled overtime. PMT's limiting unscheduled overtime in an attempt to minimize costs and enhance safety is not a violation of the Act.

**(iii) *Any loss of unscheduled overtime was caused by the employees themselves***

The ALJ also erred in ignoring the uncontroverted evidence that even if there were a drop beginning in or around September 2008 in unscheduled overtime taken by the employees named in the Amended Complaint, this drop can be attributed to the employees themselves.

Todd Wais testified that he was not even asking for unscheduled overtime in 2008 until the beginning of December due to his newborn. (TR at 454:1-15). Travis Murphy left PMT in November 2008. (TR at 513:21-514:4). Accordingly, he would not have been receiving overtime

from that point on. Further, as Ms. O'Connor testified and no evidence contradicted, each of the Union members who allegedly lost overtime opportunities was attending intensive, company-sponsored, paramedic school during the timeframe that they allege lost overtime opportunities. (TR at 608:11-610:22). Namely, Todd Wais, Justin Lisonbee, Jason Seyfert and Ryan Nolan were all in medic school at that time. (*Id.*; *See also*, TR:481:3-4 (Ryan Nolan's testimony that he became paramedic in February 2009)). From August 2008 through January 2009, these individuals were required to have an additional 500 hours of training time, in addition to classroom time during this timeframe. This made it very difficult for them to even work their regularly scheduled shifts, much less overtime. Per Ms. O'Connor's testimony, "They wouldn't pick up unscheduled overtime in that timeframe. There's no time allowed. Their time is focused towards getting those hours for their class requirement." (TR at 608:11-610:22). Thus, there is a simple explanation for any drop in overtime hours starting in August or September of 2008. Namely, these individuals were not as available for overtime as they had previously been.

Finally, the ALJ erred in ignoring the uncontroverted evidence from PMT that the hiring of some former Medicare employees in September 2008 would not have led to an immediate drop in overtime for bargaining unit members. PMT admitted that there were approximately 15-25 former Medicare employees hired in September 2008. (TR at 603:2-604:21). PMT disputes that this is a "large number" of firefighters as the ALJ found. (12 ALJD 7). Regardless, these employees would not have immediately affected overtime because they were "three-manning" units for the first few months due to training. (*Id.*). This meant that they were simply added to a two-person crew and not taking away anyone's shift at that point. (*Id.*). This testimony was uncontroverted.. Simply adding an extra employee to a shift would not have disrupted any

opportunity for overtime. The allegation that several employees lost the opportunity for unscheduled overtime beginning in mid-September 2008 is without merit.

The testimony from Ms. O'Connor that established why these individuals may have seen a drop in overtime and why the hiring of firefighters would not have caused an immediate drop in overtime was uncontroverted. Nevertheless, the ALJ disregarded it. (12 ALJD 40-48). Not only did the ALJ disregard Ms. O'Connor's uncontroverted testimony, he compounded this error by erroneously stating that the testimony came from James. R. Roeder and finding that it was "unique, uncorroborated, and not credible." (12 ALJD 42). In fact, Mr. Roeder did not testify regarding the overtime issue at all. The ALJ's disregard for the uncontroverted evidence on this issue was improper. Here, there was nothing in the testimony or documentary evidence that contradicted Ms. O'Connor's testimony. Accordingly, the ALJ's decision to ignore PMT's evidence regarding the overtime issue was improper. *See, Mercy Hospital of Buffalo*, 336 NLRB No. 134 (2002) (overruling the judge based credibility finding because there was nothing in the documentary evidence which was inconsistent with witness testimony).

**(iv) *The unit alleged in the Complaint included part-timers***

Additionally, this allegation, even if true, does not constitute a violation of the Act given that the bargaining unit alleged in the Complaint includes part-time employees. (GC Ex.1(ah) at ¶ 5(a)). As the ALJ correctly observed, the Complaint alleged that work was given to part-time employees and taken away from unit employees. (TR at 89:24-90:3). Yet, the Region contradicted itself by including part-time employees in the alleged unit. (TR at 90:4-13). The General Counsel was given the opportunity to consult with the Regional Director to explain the inconsistency. (TR at 91:2-5; TR at 93:22-95:7). However, no explanation was offered at the hearing for the Region's attempt to "have its cake and eat it too" by alleging a unit that includes part-time workers while at the same time arguing that these part-time workers are taking away

bargaining unit work. It is well-settled that an employer does not violate the Act by assigning bargaining unit work to other bargaining unit employees. *See Kohler Co.*, 292 NLRB 716, 720 (1989) (“an employer violates Section 8(a)(5) and (1) of the Act by reassigning work performed by bargaining unit employees to others outside the unit without affording notice or an opportunity to bargain to the collective-bargaining representative”). Thus, if part-time employees are included in the unit, as alleged in the Complaint, there would be no violation by the assigning of work to those part-time employees. The General Counsel is estopped to claim otherwise.

The ALJ stated in his decision that his task is to identify the historical unit and then determine if the historical unit is also appropriate. (16 ALJD 3). This is a misconceived, erroneous formulation of the issue.

The issues are, by definition, defined and framed by the pleadings. Significantly, the General Counsel never claimed that the so-called historical unit was appropriate or even in issue. It is for that reason that, as the ALJ described it, “No party contends that the historical unit is inappropriate.” (16 ALJD 4). Understandably, no party addressed the issue because the historical unit, whatever its configuration, was irrelevant to the issues structured by the General Counsel’s Complaint.

Indeed, the General Counsel argued, consistent with the Complaint, that part-time employees were also to be included in the unit. Respondent denied the appropriateness of the only unit alleged by the General Counsel. This is the only unit question in the case. As the ALJ notes in his decision, “PMT denied the allegations in the complaint concerning appropriate unit and the union’s Section 9(a) status.” (2 ALJD 14-15). (Emphasis added).

Yet, the ALJ anomalously, absent any evidence, let alone probative evidence, finds the so-called “historical unit” appropriate. This curious outcome is largely accomplished by default.

The ALJ relies exclusively on the contention that no party claimed it to be an inappropriate unit, the lack of any evidentiary basis, relevant pleadings, or factual underpinnings for such a unit constituting no apparent impediment or handicap to the ALJ reaching such a result.

This is a fundamental violation of Respondent's due process rights. Respondent had no notice that any unit description, other than that pled by the General Counsel in the Complaint, would be at issue. Exacerbating the blatant due process violation is the indisputable fact that the ALJ offered the General Counsel during the hearing the opportunity to clarify her position on scope or unit definition issue by seeking guidance from the Regional Director. (TR at 91:2-5; TR at 93:22-95:7). No clarification was forthcoming from the General Counsel despite every opportunity to remove any ambiguity regarding unit description.

Respondent reasonably continued to rely on the General Counsel's Complaint as the framework for the case and the issues embodied in the case to be adjudicated. In sum, the ALJ takes a unit, which is beyond the pale of the pleadings, and blesses it as the appropriate unit. Worse, he does so because no one sought to import this extraneous and irrelevant unit into the case. Therefore, the ALJ found no reason to alter the so-called historical unit. This is a breathtaking tour de force, seriously prejudicing Respondent's rights.

The unit issue becomes the fulcrum or centerpiece for the ALJ's consideration, analysis, and determination of the 8(a)(5) alleged violations. Respondent submits that there can be no Section 8(a)(5) violation absent a legitimate finding of appropriate unit, based and rooted in probative record evidence within the issues defined in the Complaint. Indeed, the NLRB has no statutory authority to find that the Company committed an unfair labor practice under Section 8(a)(1) and Section 8(a)(5) of the Act absent an appropriate unit determination under Section 9(d) of the Act. *Cardox Division of Chemetron Corp.*, 699 F.2d 148 (3rd Cir. 1983), and

*Memorial Hospital of Roxsborough v. NLRB*, 545 F.2d 351 (3rd Cir. 1976). Also, although under Section 9(b) of the Act, the Board has broad discretion in making a unit determination, the Section's language expressly requires that the Board make a decision "in each case." That legislative command is mandatory and constitutes a non-delegable duty imposed on the Board by Congress. *See, e.g. Cardox, supra*.

As outlined above, among the alleged Section 8(a)(5) violations, the ALJ finds that Respondent violated the Act in its transfer of work to employees who are within the scope of the unit pled as appropriate by the General Counsel. This finding is erroneous. The part-time employees to whom the work in issue was transferred are not "non-unit" employees under the General Counsels' own theory of the case set forth in the Complaint. It is no violation of the Act for an employer to transfer work among its employees. *See Kohler Co.*, 292 NLRB 716, 720 (1989) ("an employer violates Section 8(a)(5) and (1) of the Act by reassigning work performed by bargaining unit employees to others outside the unit without affording notice or an opportunity to bargain to the collective-bargaining representative"). There is no controlling authority or NLRB law cited in the decision which would support such a notion. What occurred on these facts is evocative of Justice Potter Stewart's comment in *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) ("A fundamental requirement of due process is 'the opportunity to be heard' . . . It is an opportunity which must be granted at a meaningful time and in a meaningful manner.")

Respondent had no such opportunity to be heard, fashioning its submissions and testimony to the ALJ on the case noticed for hearing in the unfair labor practice Complaint. At no meaningful time was Respondent advised that the issue had now changed and that the General Counsel was seeking a mid-flight correction in her theory of the case necessitating a change in the unit description. As the record will reflect, at no time did the General Counsel seek to amend

her pleadings to mirror the so-called historical unit. Respondent was figuratively blindsided by the ALJ's unit findings in this matter.

A phantom unit, the benchmark for the ALJ, led to an order infected by the most serious error with resultant potential draconian liability. This liability is wrongfully imposed; it is a remedy figuratively in search of a violation. The Respondent is essentially accused of an intra-unit work transfer. This is a routine, every day occurrence across employers large, medium, and small, union or not, without even a taint of illegality under the Act.

These material errors flow directly from the ALJ's determination as to scope of the appropriate unit and pervade and permeate every aspect of the ALJ's decision on the Section 8(a)(5) aspects of the case. This affront to due process causes Respondent irretrievably harm.

In *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004), the NLRB itself paid deference to the due process principles controlling here.

“The fundamental elements of procedural due process are notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Congress incorporated these notions of due process in the Administrative Procedure Act. Under the Act, ‘[p]ersons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted.’ 5 U.S.C. Section 554(b). To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. *Bendix Corp. v. FTC*, 450 F.2d 534, 542 (6<sup>th</sup> Cir. 1971).” (Emphasis added). Additionally, ‘an agency may not change theories in midstream without giving respondents reasonable notice of the change.’ *Bendix Corp.*, *supra.* (quoting *Rodalle Press v. FTC*, 407 F.2d 1252, 1256 (D.C.Cir. 1968).” (Emphasis added).

Here, the General Counsel included part-time employees in the unit alleged in the Complaint. Thus, there can be no violation of the Act by Respondent's use of unit employees for unit work.

**(v) *The ALJ's decision to expand the alleged loss of overtime to all employees was improper and violates PMT's due process rights***

The ALJ compounded his error in mischaracterizing the unit by granting a vastly, overbroad draconian remedy, that is, a make whole award for “all unit employees who . . . are

determined to have lost earnings and other benefits as a result of the unlawful transfer of bargaining unit work.” (24 ALJD 38-40). However, the Complaint, upon which Respondent relied, merely named the five employees mentioned above and PMT was under the impression at the hearing that it was these five named employees who were the ones seeking redress for the alleged loss of overtime. The ALJ’s expansion of the allegation to include all unit employees was improper and denied PMT the opportunity to fully defend its case.

As above, in *Lamar Advertising of Hartford*, 343 NLRB 261, 265 (2004), the NLRB recited the standard for an agency’s satisfaction of the requirements of due process as follows: “. . . [An] administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case” and “an agency may not change theories in midstream without giving respondents reasonable notice of the change.”

In *Sierra Bullets*, 340 NLRB 242-243 (2002) the Board held that a violation based on a broader theory, when the General Counsel expressly tried the case on a narrow theory, is improper and violates due process. *See also, Champion Int’l Group*, 339 NLRB 672-673 (2003) (holding that it is fundamental that respondent cannot fully and fairly litigate a case unless it knows what the accusation is).

It is rudimentary that due process mandates that the respondent have notice of the allegations against it so that it may present an appropriate defense. Customarily, such notice is afforded through the allegations reflected in the complaint. But, in *Pergament United Sales*, 296 NLRB 333, 334 (1989), *enfd* 920 F.2d 130 (2<sup>nd</sup> Cir. 1990), the Board explained that it may find and remedy a violation even if there is no specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. The question then becomes when has a matter been “fully litigated.”

Answering this question, in *Pergament United Sales, supra*, the Board stated that the resolution of this issue depends, at least in part, on whether the respondent would have changed the conduct of its case at the hearing had the specific allegation been asserted. *See generally, United States Postal Service*, 352 NLRB No. 105 (2008) (unalleged violation not fully litigated, evidence was submitted in association with an alleged claim based on one theory of liability which the judge then relied on to find an unalleged claim based on a different theory of liability. The Board observed that had the respondent known it faced liability on this unalleged theory of liability, it might have called certain witnesses to testify, or may have changed its conduct of the case by cross-examining certain other witnesses on the issue. Under these facts, the respondent had no reason to believe that there was any such issue in the case.)

Here, PMT was not aware that any individuals besides those named in the Complaint were alleging that they lost hours due to PMT's use of part-time firefighters. Thus, at the hearing, PMT focused its defenses solely on the five individuals named in the Complaint. Further, PMT focused its efforts overall in the hearing on many other issues. Had it known that there would be the potential for hundreds of employees to be entitled to backpay, PMT would have prepared for the trial by focusing more of its efforts on this particular allegation, which is the only allegation in the Complaint with the potential for any substantial monetary liability. Because PMT was not given the opportunity to present a "class wide" defense, the ALJ's decision to expand the alleged loss of overtime to the entire bargaining unit was inappropriate and denied PMT due process.

Further, where the Board has found that a party's due process rights have been violated, the violation hinging on the judge's theory incompatible with due process, cannot be sustained. The Board routinely reverses the finding and dismisses this portion of the complaint, disdaining

the alternative of remanding. The General Counsel is not entitled to a “second bite of the apple.” See, *Paul Mueller Co.*, 332 NLRB 1350 (2000). Thus, the allegation related to the use of part-time firefighters should be dismissed. In the alternative, any compliance hearing regarding the alleged lost overtime should be limited to the five individuals named in the Complaint.

**E. The ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by refusing to provide the Union with requested information in January 2009.**

The Complaint alleged and the ALJ found that the Union made a request for information and that PMT failed to provide the information requested. The Complaint alleged that the Union sought “a current accounting of all ambulance and transportation vehicle runs in 2008, including total run numbers and patient transported runs” and “a roster of all Unit employees and all employees performing Unit work, including their names, addresses, phone numbers, and e-mail addresses.” The Union sent an additional request for information on or about January 15, 2009 requesting six separate areas of information. (GC Ex. 39). The January 15, 2009 request for information asked for the following six areas of information: (1) profit and loss statements for 2005-2008; (2) quarterly earnings report for 2008-2009; (3) collection ratios for ambulance runs for all Lifestar ambulances and transportation vehicles; (4) all accounts payable for all municipalities paid by PMT/Lifestar for any reason; (5) all accounts receivable from any municipality or ambulance service or transportation contracts not included in the profit and loss statement; (6) and an up to date accounting of all ambulance and transportation vehicle runs in 2008 and to include total run numbers and part time transported runs. *Id.* Additionally, the request sought “a ‘roster’ of ALL PMT employees, to include full and part time, to include all that you allowed to sign the ‘do not release personal information to the Union’ document that you created.” *Id.*

The information request sent by the Union was overbroad and sought irrelevant information. The Union did not demonstrate the relevance of the requested information. As stated above, an employer should not be obligated to edit an improper request and attempt to distinguish what information is relevant when the Union's request was clearly improper.

Further, Paragraph 9(b) of the Complaint again consists of an inaccurate NLRB edit of the information request. Once more, the Complaint misleads by omitting several of the irrelevant requests and revises the requests into something other than what was sent to PMT. This NLRB manipulation of the Union's actual requests supports PMT's contention that the request was overbroad and sought irrelevant information. For the foregoing reasons, the ALJ's decision finding that PMT violated the Act by refusing to provide the requested information was erroneous. An employer is permitted to rely on the information request submitted.

**F. The ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by placing security cameras in the living quarters of employees at several stations.**

The Complaint alleged and the ALJ found that in or about January 2009, Respondent unlawfully installed surveillance cameras in the living quarters of several stations. The ALJ's finding was in error.

There is Board law stating that the installation and use of hidden surveillance cameras is a mandatory subject of bargaining. *Colgate Palmolive Company*, 323 NLRB 515 (1997). However, this case is distinguishable from those cases. Here, the cameras, which have not been fully installed, were being installed in common, public areas and are open and visible. Thus, these cameras are not the type of "hidden surveillance" that the Board has found to be a mandatory subject of bargaining. The cameras were installed at the front and rear entrances of the stations in connection with an IT makeover. (R Ex. 13; TR at 400:1-16)). Thus, the cameras were not installed in "living quarters" as alleged and found. Mr. Jim Roeder testified that in

separate meetings with all Field Training Officers, it was pointed out that the cameras would have shields to ensure that they were not viewing any living areas. (TR at 590:20-591:11). Mr. Barkley and other members of the Union leadership are some of the Field Training Officers and were present at the meeting regarding the security cameras. (TR at 594:23-595:12). Accordingly, there was no violation of the Act by the unilateral installation of the security cameras.

Moreover, the cameras are not even in use. As Mr. Bob Ramsey testified, the cameras are not functional. (TR at 141:11-16). The ALJ incorrectly found that the employees or the Union were not told the cameras would not be turned on. (14 ALJD 27). In fact, the employees were told at a February 11, 2009 meeting that the cameras were not yet operational. (TR at 593: 12-18). The Union's officers and president were present at that meeting. (TR at 594:23-595:11). Thus, the Union and employees were aware that the cameras were not operational and this evidence was uncontradicted at the hearing. Accordingly, there has been no material, significant or substantial change. No employees have been affected as these entrance and exit cameras are not fully installed or functional. The Board has repeatedly declared that even a unilateral change is unlawful only if it is material, substantial, and significant. *See, e.g., Sonoco, Inc.*, 349 NLRB 240 (2007); *Flambeau Arnold Corp.*, 334 NLRB 165 (2001). Installing cameras that are not functioning is not a material, substantial or significant change. Accordingly, the ALJ erred in finding an unfair labor practice in relation to the installation of security cameras.

**G. The ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by failing to give the Union an opportunity to bargain over the effects of the relocation of Stations 606 and 607 and in finding that affected employees are entitled to compensation due to the relocation.**

The Complaint alleged and the ALJ found that PMT violated the Act by relocating stations 606 and 607. This finding was in error.

The relocations of the stations were minor changes that had no significant impact on employees. All employees from the former 606 station location went to the new 606 station location. (TR at 207:21-25). All employees from the former 607 station location went to the new 607 station location. (*Id.*) Only fourteen employees were even affected by the move. (GC Ex. 24). The 606 station employees moved to a station approximately one-half mile from the previous location. (TR at 202:1-3). The move was to a larger station with better living quarters and improved response time. (TR at 201:12-23). The 607 station employees moved to a location about three-quarters of a mile to the west and just south of the former 607 location. (TR at 204:2-20). That move took place because the former 607 had no shower, there were acts of vandalism, and there were better response times in the new location. (*Id.*) All employees were relocated with their vehicles. (TR at 205:9-12). Importantly, there is no evidence that any employees lost work time or pay due to the relocation of the stations.

As discussed above, the Board has repeatedly declared that even a unilateral change is unlawful only if it is material, substantial, and significant. *Flambeau Arnold Corp.*, 334 NLRB 165 (2001). Here, the fact that there has been no negative effect on the employees evokes the Board's holding in *American Federation of Musicians Local 76 (Jimmy Wakeley Show)*, 202 NLRB 620 (1973). There, the NLRB held that though the alleged conduct may have been in "technical contravention of the statute" the Board "ought not to expend the Board's limited resources on matters which have little or no meaning in effectuating the policies of the Act" and declined either to find a violation or to issue a remedial order. PMT respectfully submits that these same considerations discussed in the *Jimmy Wakeley Show*, *supra*, are equally applicable here. If there was a violation of the Act, it is not the type of violation for which the policies of the Act are effectuated by pursuit of such a violation.

Additionally, the ALJ erred in finding that the affected employees are entitled some monetary compensation due to the relocations. (24 ALJD 30-31). This remedy is punitive in nature and thus improper. In a series of United States Supreme Court cases, the Court has held that the Board's remedial authority is not unrestrained. It is circumscribed by Section 10(c) of the Act. Under Section 10(c), the Board's remedy must be tailored to the unfair labor practice it is intended to address. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984). Furthermore, with respect to back-pay remedies, "it remains a cardinal, albeit frequently unarticulated assumption, that a back-pay remedy must be sufficiently tailored to expunge only the actual, not merely speculative, consequences of the unfair labor practices." *Phelps-Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941)(emphasis added). A remedy is impermissible to the extent that it is punitive in nature. As the Supreme Court expressed in *Consolidated Edison of N.Y. v. NLRB*, 305 U.S. 197 (1938),

"This authority to order affirmative action does not . . . confer a punitive jurisdiction enabling the Board to inflict . . . any penalty it may choose . . . even though the Board be of the opinion that the policies of the Act might be effectuated by such an order."

*See also, NLRB v. Strong*, 393 U.S. 357, 359 (1969); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940); *Yorke v. NLRB*, 709 F.2d 1138 (7<sup>th</sup> Cir. 1983), *cert. denied* 465 U.S. 1023 (1984).

In *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), the Board fashioned a partial back pay remedy where the employer failed to bargain about the decision to terminate operations and its effects. That partial back pay remedy was designed both to make the employees whole for losses suffered as a result of the violation. *Id.* In the instant matter, the predicate for the application of the *Transmarine* remedy is absent. Specifically, no employee suffered any financial loss as a result of the relocation of work. None of the employees suffered any loss of pay, benefits, or union representation. Accordingly, an application of the *Transmarine* remedy

under these circumstances would make the affected employees more than whole, amounting to a penalty and a punitive remedy.

Actual harm to the employees affected by the relocation of Stations 606 and 607 has not been shown by the General Counsel. The employees suffered no economic harm. No operations were terminated; there was only an adjustment in the service area. Simply put, two stations moved, within a few miles of its previous location, and all employees were relocated, without economic harm and with undiminished hours. It is overreaching and punitive for PMT to be forced to pay monetary compensation to employees under these facts. Accordingly, the ALJ's proposed remedy on this issue was in error.

**H. The ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by changing healthcare benefits without first allowing the Union an opportunity to bargain about the changes.**

The Complaint alleged and the ALJ found that PMT violated the Act by changing unit employees health care benefits by increasing the employee contributions for premiums and co-pays for emergency room visits. PMT admits that it did make such a change. (GC Ex. 1(aj) at ¶ 10). However, this change does not constitute an unfair labor practice.

As evidenced by the record, PMT deducts the medical insurance premiums from the employee's paycheck each pay period. (GC Exs. 18, 20.) The 2009-2010 insurance premium did increase slightly over the previous year. (*Id.*) For example, an "employee only" medical benefit premium increased \$5.51 per pay period over the previous year. (*Id.*) Over the previous three years (2006, 2007, and 2008), PMT passed along the premium increases to its employees in the same manner. (*See* TR at 571:18-572:9).

It is well-settled that a unilateral change is unlawful only if it constitutes a "material, substantial, and a significant one" that affects the terms and conditions of employment of the bargaining unit employees. *Peerless Food Products, Inc.*, 236 NLRB 161 (1978); *United*

*Technologies Corporation*, 278 NLRB 306 (1986). Here, the benefit plan coverage remained identical to the previous year except for the premium modifications and an increase in emergency room co-pays. (GC Exs. 19, 21). Employees suffered no significant change in the benefits provided because the premium increases were slight. (GC Exs. 18, 20). Therefore, the Union's unfair labor practice allegation fails because the implemented change did not substantially alter any material term or condition of employment.

Moreover, a unilateral change must alter the status quo in order to violate the Act. *See Post-Tribune Company*, 337 NLRB 1279 (2002); *NLRB v. Katz*, 369 U.S. 736, 743 (1962). A unilateral change made pursuant to a longstanding practice is essentially a continuation of the status quo — not a violation of Section 8(a)(5). *Katz*, 369 U.S. at 746. The Board has repeatedly found unilateral changes to be lawful where employers passed on portions of employee health care premium increases pursuant to established past practices of sharing premium costs with employees. *Post-Tribune Co.*, 337 NLRB 1279, 1280-1281 (2002); *Luther Manor Nursing Home*, 270 NLRB 949, 959 (1984), *affd.* 772 F.2d 421 (8th Cir. 1985); *A-V Corp.*, 209 NLRB 451, 452 (1974).

In *Post-Tribune*, the Board held that an increase in employee paycheck deductions for increased insurance premiums followed an established past practice and failed to alter the status quo. *Id.* at 1279. The employer notified employees of the premium increase via a memorandum and the employees were passed along the same increases the insurance company passed along to the company without giving the Union notice and an opportunity to bargain. *Id.* The Board held the increase was not an unfair labor practice in violation of Section 8(a)(5) of the Act because the increase did not alter the employer's well-established status quo in allocating health care insurance premiums on the same percentage basis used previously. *Id.* at 1280. *See also*,

*Courier Journal* 342 NLRB No. 118 (2004) (no unfair labor practice where employer that had for ten years unilaterally implemented cost and benefit changes relating to the union employees' health coverage that mirrored cost and benefit changes for non-union employees without opposition from the Union did not violate the Act without first bargaining.);

The circumstances of the current case are nearly identical to the situation in *Post-Tribune*. The record demonstrates that PMT acted in 2009 as it had in 2006, 2007, and 2008. (*See* TR at 571:18-572:9.) The slight insurance premium increase is merely a "continuation of its past practice rather than an unlawful unilateral change in conditions of employment." *Post Tribune Co.*, at 1280. Further, the Union had knowledge of the premium increases prior to the cost implementation. (*See* GC Ex. 17; TR at 347:16-22). PMT notified all employees of the changes in the insurance costs through the Annual Company Compliance Meeting. (GC Ex. 17; TR 347:13-15). Five separate meetings were held by PMT between May 12, 2009 and May 16, 2009 to inform employees and to review the changes in the insurance rates. (GC Ex. 17). The insurance premium increases became effective on June 1, 2009. (GC Ex. 21). Thus, the Union representatives and its employees had notification of the insurance premium changes in advance of the implementation date through the Compliance Meeting. (TR at 347:14-15). There is no evidence in the record that the Union requested bargaining over the premium increases. In fact, it is clear that the Union failed to request bargaining over similar changes in 2006, 2007, and 2008. (TR at 571:23-572:9).

PMT followed its past practice of notifying employees prior to implementing the premium increases and informing the work force of all plan changes. (*See* GC 17; TR at 571:18-572:9.) As the ALJ pointed out in his decision, the Union never requested bargaining over the premium increases. (16 ALJD 23-25). However, without citation to authority, the ALJ excused

the Union for failing to request bargaining. (Id). NLRB law is clear that a Union's failure to timely request bargaining over subjects, where it has notice, constitutes a waiver. *Citizen's Nat'l Bank of Willmar*, 245 NLRB 389 (1979); *Lenz & Riecker*, 340 NLRB 1453 (2003)(reaffirming principle that where a Union fails to take advantage of an opportunity to bargain the Board will not find a failure to bargain violation); *See also, Clarkwood Corp*, 233 NLRB 1172 (1977), *enf'd*, 586 F.2d 835 (3rd Cir 1978)("It is well settled that when a Union is given notice of an employer's intent to change a term or condition of employment the union must act with due diligence in requesting bargaining in order to enforce the employer's bargaining obligation"). This principle is confirmed by the Board's standard remedy section of its Order, which typically provides that an employer will "on request" bargain with the Union. In fact, the ALJ, in his Order asks Respondent to post a notice stating, among other things, "WE Will, on request, bargain with the Independent Certified Emergency Professionals of Arizona, Local #1." (ALJD Appendix). As outlined above, the Union had notice of the changes and it failed to request bargaining. Accordingly, the Union waived its right to bargain over the proposed health care changes by failing to request bargaining over such changes.

This case is easily analogized to *Post Tribune* and *Courier Journal*, where no unfair labor practices were found despite the unilateral implementation of insurance premium increases and benefit changes. The slight increases in premiums was not a material, substantial or significant change and were not in violation of the Act. Additionally, the Union failed to request bargaining over the changes, thus waiving its right to bargain. For the foregoing reasons, the ALJ's decision finding that PMT violated the Act by changing healthcare benefits is incorrect and should be reversed.

Finally, the ALJ also erred in proposing a remedy that PMT reimburse employees for any losses resulting from the change in healthcare benefits. In a series of United States Supreme Court cases, that Court has held that the Board's remedial authority is not unrestrained. It is circumscribed by Section 10(c) of the Act. Under Section 10(c), the Board's remedy must be tailored to the unfair labor practice it is intended to address. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984). More generally, a remedy is impermissible to the extent that it is punitive in nature. Here, the premium increases were imposed by the health insurance company, and not by PMT. PMT passed on those increases to its employees, as it has done in the past. A remedy forcing PMT to reimburse employees for any extra expenses is beyond what the Union could have possibly obtained at bargaining and is thus punitive in nature. Accordingly, this portion of the ALJ's proposed remedy should be reversed.

**I. The ALJ erred in finding that PMT violated Section 8(a)(5) and (1) by unilaterally disallowing the Union president or his designee reasonable access to all PMT's communication devices.**

**(i) *The Union was never denied reasonable access***

The Complaint alleged and the ALJ found that PMT unilaterally modified a memorandum of understanding between the Union and PMT from 2007, so as to deny the Union president or his designee the use of PMT's electronic equipment for Union business GC Ex. 4 deals with this issue. The paragraph at issue in the memorandum of understanding, as modified, states that the "Union may have reasonable access to all communication and electronic devises [sic], to be limited to the Union President or his designee, and the receiver of such message, on an as needed basis. All messages must be in compliance with applicable laws governing the use of such devices." (*Id.*). The document is dated March 15, 2007. (*Id.*). Mr. Bob Ramsey testified that he inserted the word "reasonable" into paragraph 10 of the document because he wanted to

make it clear to Mr. Barkley that PMT would not allow open ended access to PMT's electronic devices. (TR at 96:23-97:3). Rather, the access would be "reasonable."

PMT never denied the Union "reasonable" access to PMT's electronic equipment. GC Ex. 12 is an e-mail from Mr. Ramsey to Mr. Barkley that states "if you need to and wish to access field employees in our designated proper tools please use the proper channel and submit your information and the notice to be sent out to HR and our legal staff." As Mr. Ramsey testified, Mr. Barkley sent out personal information on the emergency communication tools and he was asked to stop. (TR at 150:23-151:8). There is no evidence in the record that the Union was ever denied reasonable access.

As outlined above, the Memorandum of Understanding (GC Ex. 4) clearly gives PMT the right to define what "reasonable" access will be given to the Union President or his designee. There is no allegation that PMT denied the Union all access. The documents reflect that PMT desired to give the Union President access if he followed the proper channels. However, even if it could be argued that the Company's reading or application of the Memorandum of Understanding is incorrect, the question of whether there is a breach of contract is for the courts and not the National Labor Relations Board. Board law supports this analysis. In *Bath Ironworks Corp.*, 345 NLRB 499, 502 (2005), the Board stated: "In the instant case, [the] issue turns on the resolution of two conflicting interpretations of the respective CBA's and the Plan documents. Where an employer has a "sound arguable basis" for its interpretation of a contract and is not "motivated by union animus . . . or . . . acting in bad faith the Board would ordinarily will not find a violation." *Id.* (citing, *NCR Corp.*, 271 NLRB, 1212, 1213 (1984), among other cases).

Under these legal principles, there is no violation. PMT has a "sound arguable basis" for granting the Union President only "reasonable" (limited) access to PMT's electronic equipment.

Because the Company is merely doing what the Memorandum of Understanding gives it the right to do, there is a “sound arguable basis” for its actions and there is no violation of the Act. Further, even if PMT is incorrectly applying the terms of the Memorandum of Understanding, it has long been observed that a breach of contract is not necessarily an unfair labor practice. *See, e.g., Mine Workers v. NLRB*, 257 F.2d 211, 214-15 (D.C. Cir. 1958); *American Vitrified Products Co.*, 127 NLRB 701 (1960); *United Telephone Co.*, 112 NLRB 779, 781 (1955). PMT’s actions regarding the Memorandum of Understanding are, at worst, a breach of contract, and not an unfair labor practice.

**(ii) *The Union reneged on all previous agreements in 2007***

Additionally, as is clear from the record, the Union reneged on all previous tentative agreements in or about December 2007. (R Ex. 3; R. Ex. 5(a) through 5(k); TR at 561:18-563:14). Despite his testimony at the hearing to the contrary, Mr. Barkley swore, in his affidavit to the NLRB, that he “declared impasse” in December 2007. (TR at 374:15-375:6). Thus, the Union’s acts of reneging on all previous tentative agreements and declaring impasse relieved PMT of any alleged obligations under the March 2007 Memorandum of Understanding. Because the Union declared impasse, previous agreements with the Union would have been moot and the Memorandum of Understanding would not have been valid at the time it was allegedly breached.

**(iii) *There has been no material, significant or substantial change***

Finally, even if the Memorandum of Understanding was valid and in effect, there has been no material, significant or substantial change. As the Memorandum of Understanding itself states, only the Union President or his designee were granted the “reasonable access” to the electronic devices. This was not a term or condition of employment for all employees. The Board has repeatedly declared that even a unilateral change is unlawful only if it is material, substantial, and significant. *Flambeau Arnold Corp.*, 334 NLRB 165 (2001). Any change to access to

communication devices could only affect Mr. Barkley and/or his designee. Additionally, as outlined above, such access was to be “reasonable.” Thus, there was no material, substantial, and significant change to the PMT employees in general. Accordingly, the ALJ’s decision finding an unfair labor practice in relation to the Memorandum of Understanding was erroneous.

**J. The ALJ erred in finding that PMT violated Section 8(a)(1) by threatening to remove an employee from active duty because he engaged in Union activity.**

The Complaint alleged and the ALJ found that PMT threatened to remove Mr. Barkley from active duty for his use of the company Blackberry for Union business. The ALJ’s decision in this regard is also incorrect. There is no evidence that PMT threatened to remove Mr. Barkley from active duty because of Union business. Rather, as outlined above, as Mr. Ramsey testified, Mr. Barkley sent out personal information on the emergency communication tools and he was asked to stop. (TR at 150:23-151:8). The reason for PMT’s concern was not the nature of the message, but rather, the use of emergency communication tools for personal, non-work business. Accordingly, the ALJ’s finding on this issue was in error.

**K. The ALJ erred in his credibility resolutions.**

The ALJ credited the testimony of Justin Lisonbee, Jason Wayne Seyferth, Tod Robert Wais, and Ryan Joseph Nolan regarding the issue of lost overtime opportunities.. This credibility finding is contrary to the clear preponderance of the relevant evidence and should therefore be rejected. Respondent acknowledges that the Board does not usually reverse the credibility findings of an Administrative Law Judge, *See Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951); however, it is clear from the record that these employees, particularly those who hold a position within the union, were not credible witnesses.

Here, the majority of the employees who testified that they lost overtime opportunities holds a position within the Union. Justin Lisonbee is a trustee for the Union. (TR at 390:6-7). Jason Seyferth is also a trustee for the Union. (11 ALJD 26). Ryan Nolan is a Union employee

representative. (12 ALJD 1). Tellingly, only one employee who does not hold a position within the Union, Tod Wais, testified that he lost overtime opportunities. The testimony of these witnesses was colored by their pro-union bias. For that reason, the ALJ's finding that these were credible witnesses should be reversed. *See, Grand Central Aircraft Co., Inc.* 103 NLRB 1114, 1139 (1953)(refusing to credit testimony of witnesses with pro-union bias).

As outlined above, the testimony from Ms. O'Connor established why the individuals named in the Complaint may have seen a drop in overtime and why the hiring of firefighters would not have caused an immediate drop in overtime. This testimony was uncontroverted. Nevertheless, the ALJ disregarded it, finding that the testimony was "unique, uncorroborated, and incredible." (12 ALJD 40-48). Not only did the ALJ disregard Ms. O'Connor's uncontroverted testimony, he compounded this error by erroneously stating that the testimony came from James. R. Roeder." (12 ALJD 42). Again, Mr. Roeder did not testify regarding the overtime issue at all. The ALJ's disregard for the uncontroverted evidence on this issue was improper. Here, there was nothing in the testimony or documentary evidence that contradicted Ms. O'Connor's testimony. Accordingly, the ALJ's decision to ignore PMT's evidence regarding the overtime issue was improper. *See, Mercy Hospital of Buffalo*, 336 NLRB No. 134 (2002) (overruling the judge based credibility finding because there was nothing in the documentary evidence which was inconsistent with witness testimony). Accordingly, the ALJ's credibility findings in relation to Ms. O'Connor, erroneously referred to as Mr. Roeder, was improper.

The ALJ also erred in finding the testimony of Joy Carpenter and Kellie O'Connor to be incredible. The ALJ did not specify why he thought this testimony was incredible. As is evident from his decision and its conclusory statement finding the testimony incredible, the Judge's credibility determination was not based upon his observation of these individuals' demeanors

while on the witness stand. The Board is not bound by any credibility resolutions which are not based on the demeanor of the witnesses. *See Calco Roofing*, 268 NLRB 456 (1983). It is well established that when an administrative law judge bases his credibility resolutions on factors other than observations of witnesses' demeanor, the Board independently evaluates witness credibility. Such determinations are based on the weight of evidence, established facts, inherent probabilities and reasonable inferences drawn from the record as a whole. *Vic Koenig Chevrolet*, 263 NLRB 646 fn. 1 (1982). Even if an administrative law judge's decision related to credibility was based upon demeanor, the Board does not rubber stamp such resolutions. *Permaneer Corporation*, 214 NLRB 367, 369 (1974).

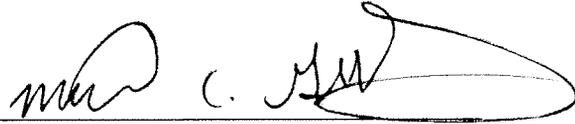
As outlined above, Ms. O'Connor testified regarding the reasons for the alleged decrease in overtime opportunities was unrelated to anything PMT did. This testimony was not contradicted by any other testimony or documentary evidence. Accordingly, the ALJ's decision to discredit Ms. O'Connor's testimony was in error.

## V. CONCLUSION

For all of the foregoing reasons, the ALJ's decision and remedy that Respondent engaged in unfair labor practices, and the remedial aspects of the Judge's Order in that regard are incorrect and should be reversed

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of December, 2009.

**SHERMAN & HOWARD L.L.C.**

Handwritten signatures of Robert J. Deeny, Thomas J. Kennedy, and Michael C. Grubbs, written in black ink above a horizontal line.

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I certify that I caused a copy of the foregoing to be electronically filed this 21<sup>st</sup> day of December, 2009.

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