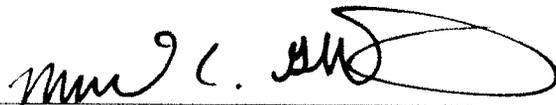


UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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
ANSWERING BRIEF

SHERMAN & HOWARD L.L.C.



Robert J. Deeny
Thomas J. Kennedy
Michael C. Grubbs
2800 N. Central Avenue, Suite 1100
Phoenix, AZ 85004
Attorneys for Professional Medical
Transport, Inc.

TABLE OF CONTENTS

	<u>PAGE</u>
I. <u>STATEMENT OF THE CASE</u>	1
II. <u>QUESTIONS PRESENTED</u>	1
III. <u>FACTUAL BACKGROUND</u>	2
IV. <u>LEGAL ARGUMENT – DISCUSSION AND ANALYSIS</u>	3
A. Intra-Unit Work – Discussion and Analysis.....	3
1. The alleged unit includes part-time employees.....	3
2. The allegations are barred by Section 10(b).....	4
3. There is no evidence of anti-union animus.....	5
B. Surveillance Cameras.....	6
C. Blackberry Device.....	9
D. Signup Sheet.....	10
1. The allegation is barred by Section 10(b).....	12
2. The posting did not constitute “interrogation”.....	13
E. Alleged “Take It or Leave It” Contract Proposal.....	15
F. Overall Conduct, Engaged in Bad Faith Bargaining.....	19
G. Alleged Promulgation of Overly Broad and Discriminatory rule.....	25
H. <i>Transmarine</i> Remedy.....	27
I. Not Ordering Interest to be Compounded on Quarterly Basis.....	31
V. <u>CONCLUSION</u>	32

TABLE OF AUTHORITIES

NLRB Cases

<i>AG Communications</i> , 350 NLRB No. 15 (2007).....	2, 28
<i>American Federation of Musicians, Local 76, AFL-CIO</i> , 202 NLRB 620 (1973).....	11, 29
<i>Atlanta Hilton & Tower</i> , 271 NLRB 1600 (1984).....	23
<i>Bellinger Shipyards, Inc.</i> , 227 NLRB 620 (1976).....	12
<i>Chicago Tribune Co.</i> , 304 NLRB 259 (1991).....	17, 19, 22
<i>Colgate Palmolive Company</i> , 323 NLRB 515 (1997).....	8, 9
<i>ConAgra, Inc. v. NLRB</i> , 117 F.3d 1435 (D.C. Cir. 1997).....	24
<i>Continental Nut Company</i> , 195 NLRB 841 (1972).....	22
<i>Continental Oil Co.</i> , 194 NLRB 126 (1971).....	5
<i>Eastex Inc.</i> , 215 NLRB 271 (1974).....	26
<i>Flambeau Arnold Corp.</i> , 334 NLRB 165 (2001).....	29
<i>Garden Ridge Management, Inc.</i> , 347 NLRB No. 13 (2006).....	22, 23
<i>Hartz Mountain Corp.</i> , 295 NLRB 418 (1989).....	24
<i>Hotel & Restaurant Employees Local 11 v. NLRB</i> , 760 F.2d 1006 (9th Cir. 1985).....	14
<i>Live Oak Skilled Care</i> , 300 NLRB 1040 (1990).....	27
<i>Logemann Bros. Co.</i> , 298 NLRB 1018 (1990).....	18
<i>Matanuska Elec. Ass'n, Inc.</i> , 337 NLRB 680 (2002).....	18
<i>National Fabco Mfg., Inc.</i> , 352 NLRB No. 37 (2008).....	31
<i>National Spinning Co., Inc.</i> , 174 NLRB 379 (1969).....	17
<i>New Horizons for the Retarded, Inc.</i> , 283 NLRB 1173 (1987).....	31
<i>Overnite Transportation Co.</i> , 307 NLRB 666 (1992).....	26
<i>Roadway Package System, Inc.</i> , 302 NLRB 961 (1991).....	9
<i>Rogers Corp.</i> , 344 NLRB 504 (2005).....	31
<i>Rossmore House and Hotel Employees and Restaurant Employees Union, Local 11</i> , 269 NLRB 1176 (1984).....	14
<i>Special Machine & Engineering, Inc.</i> , 247 NLRB 884 (1980).....	26, 27
<i>Square D Company</i> , 204 NLRB 154 (1973).....	11
<i>Stevens Graphics, Inc.</i> , 339 NLRB 457 (2003).....	26
<i>The Guard Publishing Company</i> , 351 NLRB No. 70 (2007).....	26, 27
<i>Transit Union Local 1433 (Phoenix Transit System)</i> , 335 NLRB 1263 (2001).....	13
<i>Transmarine Navigation Corp.</i> , 170 NLRB 389 (1968).....	2, 27, 28, 30, 31
<i>T-West Sales & Service, Inc., dba Desert Toyota Int'l Ass'n</i> , 346 NLRB No. 2 (2005).....	7
<i>UFCW Local 648</i> , 347 NLRB No. 83 (2006).....	7
<i>Western Summit Flexible Packaging</i> , 310 NLRB 45 (1993).....	26
<i>Wichita Eagle & Beacon Publishing Co.</i> , 206 NLRB 55 (1973).....	11
<i>Wisconsin Steel Industries, Inc.</i> , 318 NLRB 212 (1995).....	22
<i>Wright Line</i> , 251 NLRB 1083 (1980).....	5, 15

Federal Cases

<i>Consolidated Edison of N.Y v. NLRB</i> , 305 U.S. 197 (1938).....	30
<i>International Union, United Auto., Aerospace & Agr. Implement Workers of America, And Its Local No. 1712 v. NLRB</i> , 732 F.2d 573 (7th Cir. 1984).....	24
<i>International Union, United Auto., Aircraft and Agr. Implement Workers of America (UAW-CIO) v. Russell</i> , 356 U.S. 634, 78 S.Ct. 932 (U.S. 1958).....	9

<i>Lucile Salter Packard Children's Hospital at Stanford v. NLRB</i> , 97 F.3d 583 (D.C. Cir. 1996).....	27
<i>Midwest Stock Exchange, Inc. v. NLRB</i> , 635 F.2d 1255 (7th Cir. 1980)	6
<i>NLRB v. Gissel Packing Company</i> , 375 U.S. 575 (1969)	14
<i>NLRB v. Norfolk Shipbuild. & D. Corp.</i> , 195 F.2d 632 (4th Cir. 1952).....	22
<i>NLRB v. Strong</i> , 393 U.S. 357 (1969)	30
<i>Phelps-Dodge Corp. v. NLRB</i> , 313 U.S. 177 (1941).....	29,30
<i>Pleasantview Nursing Home, Inc. v. NLRB</i> , 351 F.3d 747 (6th Cir. 2003).....	23
<i>Republic Steel Corp. v. NLRB</i> , 311 U.S. 7 (1940).....	30
<i>Sure-Tan, Inc. v. NLRB</i> , 467 U.S. 883 (1984).....	29
<i>Trans Intern. Airlines, Inc. v. International Broth. of Teamsters</i> . 650 F.2d 949 (9th Cir. 1980).....	23
<i>Yorke v. NLRB</i> , 709 F.2d 1138 (7 th Cir. 1983).....	30

Other Authorities

29 U.S.C. 151, et seq., Labor-Management Relations Act, Section 8(d).....	23
<i>NLRB Representation Elections and Initial Collective Bargaining Agreements, Safeguarding Workers' Rights?</i> (2008) at p.4.....	24
<i>The Developing Labor Law</i> (Higgins) 5 th Edition, Vol. 1 at pg. 858 (ABA, Section of Labor & Employment Law)	19
<i>The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999-2004</i> , 62 Indus. & Lab. Rel. Re. 3, 16 (2008)	24

Rules

Rule 102.46(d)(2), <i>NLRB Rules and Regulations</i>	1
--	---

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”). The ALJ issued his decision on November 9, 2009.

II. QUESTIONS PRESENTED

This answering brief is limited, consistent with Rule 102.46(d)(2), NLRB Rules and Regulations, to the questions raised in the Cross-Exceptions and the Brief in Support Thereof.

Counsel for the General Counsel (“CGC”) claims, wrongly, that the ALJ erred in a number of respects. More specifically, in her cross-exceptions, CGC contends that: 1) the ALJ erred in failing to make a finding that the transfer of unit work to non-unit firefighters, though they are part time employees claimed to be in the unit in the General Counsel’s own Complaint, was a violation of Sections 8(a)(1) and (3) of the Act; 2) the ALJ erred in failing to find that a subsequent movement of surveillance cameras was in violation of Section 8(a)(5); 3) the ALJ erred in failing to make a finding that PMT violated Section 8(a)(3) by removing a blackberry device from the union president and failing to recommend remediation for the Section 8(a)(5) violation that was found; 4) the ALJ erred in failing to rule on whether PMT’s posting of a sign-up sheet for employees to choose whether PMT could provide employees’ information to the union was unlawful interrogation under Section 8(a)(1) of the Act; 5) the ALJ erred in failing to find bad faith in PMT’s act of presenting the union with a so-called “take it or leave it” contract proposal; 6) the ALJ erred in refusing to find that PMT engaged in bad faith bargaining by its overall conduct; 7) the ALJ erred in refusing to find that PMT promulgated an overly broad and discriminatory rule in violation of Section 8(a)(1); and 8) the ALJ erred in refusing to order a

Transmarine remedy and in refusing to go beyond well-defined NLRB law and order that interest be compounded on a quarterly basis.

In sum, these various exceptions amount to overreaching as a review of the facts and law convincingly establish. The ALJ's decision, though beset by errors as more extensively documented in Respondent's Exceptions, is not erroneous on the bases alleged by Counsel for the General Counsel in her cross-exceptions. CGC seeks superfluous, redundant, and unnecessary relief. CGC further magnifies, inflates, and exaggerates the significance and meaning of events, refuses to acknowledge that alleged violations of the Act have already been addressed through a remedy in the ALJ's proposed remediation section of his Decision, and seeks remedies totally disproportionate to the allegations alleged.

As more fully set forth below, the purpose of the Board's remedy is not to punish an employer for its misconduct, but to expunge the actual consequences of the unfair labor practice. *See, AG Communications*, 350 NLRB No. 15 (2007). The Board's resources are not infinite, especially in these economic challenging times. Quixotic quests for additional, unneeded remedies do little to advance and effectuate the purposes of the Act, serve its labor-management constituency, or further the Board's goal and objective of fulfilling the mission envisioned for it by Congress.

III. FACTUAL BACKGROUND

Respondent Professional Medical Transport, Inc. is an ambulance service company providing emergency and general transportation services throughout the Phoenix, Arizona metropolitan area. (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 and founder 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 alleged unfair labor practices arose.

IV. LEGAL ARGUMENT – DISCUSSION AND LEGAL ANALYSIS

- A. AN INTRA-UNIT TRANSFER OF UNIT WORK IS NO VIOLATION OF THE ACT, INCLUDING SECTION 8(a)(3), AND THE EXCEPTION CLAIMING A VIOLATION OF SECTION 8(a)(3) OF THE ACT BY THE TRANSFER OF UNIT WORK TO PART-TIMERS - CLAIMED BY THE GENERAL COUNSEL TO BE UNIT EMPLOYEES - IS MERITLESS.

(1) Part-time employees are included in the unit as alleged in the Complaint

CGC alleged that, since on 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 hours assigned to full-time unit employees.

In paragraph 5(a) of the Complaint (G.C. Exhibit 1(ah)), the Regional Director defines the unit appropriate for collective bargaining as follows: “All full time and regular part time field paramedics, EMTs, IEMTs, and all registered nurses” The ALJ himself recognized that the General Counsel placed the appropriate unit into issue. (15 ALJD 48-50). The ALJ

observes in this context: “The General Counsel argues that the record shows that a unit that includes part time employees would be an appropriate unit.” (15 ALJD 52; 16 ALJD 1-2). It is therefore anomalous for Counsel for the General Counsel to then allege, in her cross-exceptions, that the ALJ erred by failing to find that the transfer of bargaining unit work to “non-unit firefighters” was a violation of Section 8(a)(3) of the Act.

These so-called “non-unit firefighters,” the employees in question, are indeed part-time employees, expressly encompassed by the appropriate unit as alleged in the Complaint and so argued at the hearing by CGC. Indeed, Counsel for the General Counsel argues in her brief in support of cross-exceptions that the Board should find that Respondent discriminatorily reduced the hours of Unit employees by assigning such hours to part time firefighter employees in violation of Section 8(a)(1) and (3) of the Act. (General Counsel’s Brief in Support of Cross-Exceptions, pg. 8). Yet, in the same brief, CGC states that the Respondent agreed to recognize the Union as the collective bargaining representative of “all the employees of Professional Medical Transport, Inc.” (*Id.* at pg.3). It is undisputed that these part-time employees are “employees of Professional Medical Transport, Inc.” Thus, those employees are included in the recognized unit and there can be no legitimate claim or argument that PMT violated the Act in any way by its actual conduct, that is, transferring work amongst those included within the unit as defined in the Complaint, whether part time or full time. If the unit as alleged in the Complaint is improper, then the CGC has failed to establish a fundamental element of the Complaint and all charges should be dismissed. Regardless of whether part-time firefighters are included in the bargaining uni, this exception is also meritless for the reasons more fully described below.

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

Initially, from the face of the Complaint, it is clear that the allegations comprising Paragraphs 7(a) and 10(a) are time-barred under Section 10(b). The allegations arise out of

actions that took place beginning, as alleged, in mid-September 2008. However, no charge was filed regarding this allegation until April 30, 2009, which exceeds the 10(b) limitations period. (GC Ex. 1(s)).

The CGC relies on a “continuing violation” argument, without citation to any relevant case law, for the conclusion that the allegations are not time-barred. However, the evidence and case law indicates otherwise. Importantly, there is no evidence that anything PMT did in relation to filling unscheduled overtime changed within the relevant 10(b) period. *Continental Oil Co.*, 194 NLRB 126 (1971) is instructive on this issue. There, the employer first implemented a method of allocating overtime, which allegedly violated its CBA, more than 6 months before the filing of the charge. The employer followed 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 did not constitute a modification within the 10(b) period. The Board dismissed the complaint as time-barred. *Id.* Thus, the CGC’s theory of a “continuing violation” is not supported by Board law and the allegation is time barred.

(3) *There is no evidence of anti-union animus*

CGC also argues that the ALJ erred in failing to find that PMT violated section 8(a)(1) and 8(a)(3) of the Act in its distribution of unscheduled overtime. However, there can be no such violation here, as there is no evidence of anti-union animus.

When an employer is charged in a complaint with unlawful discrimination and motive is an issue, the General Counsel must make a showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. The legal principles controlling the analysis of this issue are set forth in *Wright Line*, 251 NLRB 1083 (1980) *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). Under this framework, the

General Counsel must first make a *prima facie* showing sufficient to support the inference that the protected conduct was a “motivating factor” in the employer’s decision. CGC must establish: (1) that the employees engaged in union activity; (2) that Respondent had knowledge of these activities; and (3) that Respondent’s actions were motivated by union animus. Once accomplished, the burden shifts to Respondent to demonstrate that the same action would have been taken notwithstanding the protected conduct.

Here, CGC did not establish a *prima facie* case, let alone a violation. Namely, there was no evidence at the hearing that any actions taken related to overtime were based on anti-union animus. Courts are not likely to infer lightly an unlawful purpose and will not allow the NLRB to base its case on mere suspicion. *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, (7th Cir. 1980). Here, there was no evidence proffered at the hearing regarding any anti-union animus relating to the use of overtime. Rather, at the trial it was shown that PMT has employed firefighters since prior to the Union’s very existence. (*See*, TR at 61:10-13; TR at 274:22-275:2; TR at 482:21-483:1; TR at 537:25-538:4; PMT also presented evidence that each of the Union members who alleged lost overtime opportunities were attending intensive 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*). Importantly, there was no testimony at trial that these individuals who allegedly lost overtime were singled out because of their union activities. Any slight increase in the use of these firefighters for unscheduled overtime is, at worst, an 8(a)(5) violation. Accordingly, because CGC presented no sufficient evidence of anti-union animus, there is no 8(a)(3) violation.

B. THE ALJ CORRECTLY CONCLUDED THAT THERE WAS NO VIOLATION IN A SUBSEQUENT MOVEMENT OF SURVEILLANCE CAMERAS AND ACCORDINGLY THERE WAS NO BASIS FOR REQUIRING THE REMOVAL OF THE CAMERAS;

The ALJ consigns CGC's argument on this subject to resolution in a footnote, dismissing the claim of a violation based on a relocation of the cameras. (14 ALJD 46, at fn.7). CGC's position regarding the subsequent movement of surveillance cameras is flatly inconsistent with prevailing law, for reasons more fully explained below. The ALJ also correctly notes that PMT must be accorded due process. (24 ALJD 50) This is fundamental. According to the ALJ: ". . . General Counsel has failed to provide PMT with due process on this assertion." 14 ALJD 50-52).

The NLRB is understandably required to adhere to the well-recognized precepts of due process. Indeed, in *UFCW Local 648*, 347 NLRB No. 83 (2006), the Board refused to find an unfair labor practice where there were serious due process concerns. In CGC's presentation of this case in the Complaint, and at the hearing, she failed to place the Respondent on notice that the lawfulness of his conduct on a particular date in this regard would be the basis for seeking a separate finding of a violation.

In *T-West Sales & Service, Inc., dba Desert Toyota Int'l Ass'n*, 346 NLRB No. 2 (2005), the ALJ, with NLRB approval, dismissed a claimed unfair labor practice. The ALJ observed that there was no allegation that the employer had engaged in such unlawful activity amounting to an unfair labor practice. Significantly, even after the hearing ended, the General Counsel did not move to amend the complaint to cover this allegation. The ALJ remarked in his decision that CGC had failed to address the issue of how he had satisfied his due process burden owed Respondent and stated that he, the ALJ, would not undertake that mission for him. This reasoning applies equally here. It is

undisputed that there was no allegation in the Complaint regarding the subsequent relocation of the cameras. Further, the CGC did not move to amend the Complaint at the hearing to reflect such an allegation. Accordingly, the due process deprivation is fatal to this exception.

In the alternative, PMT expands on its defense and the baselessness of the exception. This same reasoning is equally applicable and dispositive of CGC's exception with respect to the surveillance cameras herein. Putting aside the obvious due process violation, the exception is also substantively baseless.

CGC alleges that in or about January 2009, Respondent installed surveillance cameras in the living quarters of several stations. 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, are 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)). 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 Field Training Officers and were present at the meeting regarding the security cameras. (TR at 594:23-595:12). Moreover, the cameras are not even in use. As Mr. Bob Ramsey testified, the cameras are not functional. (TR at 141:11-16). The employees were told at a February 11, 2009 meeting that the cameras were not yet operational. (TR at 593 12-18). Accordingly, because the cameras

are not in use and because they were open and obvious, there was no violation of the Act by the installation of the security cameras. *See, Roadway Package System, Inc.*, 302 NLRB 961 (1991) (“It is well settled that where, as here, employees are conducting their activities openly on or near company premises, open observation of such activities by an employer is not unlawful.”)

Finally, the CGC’s contention that the ALJ should have ordered the cameras removed is without merit. Here, the ALJ correctly found that there was no need to remove the cameras because the cameras had been moved already. Further, as outlined above, the cameras are not in use. An order to remove cameras that are not in use is wasteful and unnecessary. *See, Colgate-Palmolive Co.*, 323 NLRB 515 (1997) (finding that cameras need not be removed because two of the cameras had already been moved and one camera had been deactivated). It is well-settled that any relief awarded by the Board is discretionary, not mandatory upon the finding of an unfair labor practice. “To make an award, the Board must first be convinced that the award would effectuate the policies of the Act. The remedy... is entrusted to the Board's discretion; it is not mechanically compelled by the Act.” *International Union, United Auto., Aircraft and Agr. Implement Workers of America (UAW-CIO) v. Russell*, 356 U.S. 634, 642, 78 S.Ct. 932, 937 (U.S. 1958). Here, the ALJ’s refusal to order the removal of cameras which are not in use was proper to remedy any alleged violation of the Act.

C. THE ALJ CORRECTLY DETERMINED THAT HE NEED NOT ANALYZE AN ALLEGED VIOLATION UNDER SECTION 8(a)(3) OF THE ACT WHEN HE HAD CONCLUDED THAT THE REMOVAL OF ELECTRONIC COMMUNICATIONS EQUIPMENT FROM BARKLEY AND HIS DESIGNEES WAS A VIOLATION OF SECTION 8(a)(5) OF THE ACT.

Though PMT denies any Section 8(a) (5) violation in relation to this allegation, it does not believe that any additional action is needed with respect to any alleged Section 8(a) (3) dimensions to this matter. As outlined below, PMT’s actions were consistent

with the parties' memorandum of understanding conferring on PMT the right to define what "reasonable access" will be given to the union president or his designee.

The union's renegeing on all prior tentative agreements with PMT, that the device was to be used for emergency purposes, and the fact there was no material, significant, or substantial change does not sway the General Counsel who nonetheless argues that the interests of the Act will be advanced by this superfluous action. She concedes, however, that the proposed notice crafted by the ALJ "appears to remedy the Section 8(a) (3) violation." (General Counsel's Brief In Support Of Exceptions at pg. 15).

Then, the focus of Counsel for the General Counsel's argument abruptly changes to a completely different claim, namely, that the extent and scope of the remedy for the alleged Section 8(a) (5) violation was unsatisfactory. In fact, the ALJ's decision provides that within 14 days from the date of the Order, PMT is to notify the union president in writing that he or his designee is permitted reasonable access to all PMT's communication and electronic devices. (26 ALJD 28-32). Such an Order properly remedies the alleged violation relating to the use of PMT's electronic devices.

Again, it is well-settled that any relief awarded by the Board is discretionary, not mandatory upon the finding of an unfair labor practice. Here, the ALJ's Order remedies any alleged violation. Accordingly, the CGC's exception in this regard should be rejected.

D. THE ALJ'S FAILURE TO FIND AN 8(A)(1) VIOLATION IN REGARDS TO THE "SIGN-UP SHEET" WAS NOT IN ERROR.

In his decision, the ALJ relegated this above-described argument by Counsel for the General Counsel to a footnote. (9 ALJD 9 at fn. 3). The ALJ explained that he need not resolve this allegation inasmuch as he had found a violation under Section 8(a)(5) and that the remedy provided for that violation subsumed any remedy he might provide under

Section 8(a)(1). (9 ALJD 9, fn. 3). Though PMT disagrees with the ALJ's finding that there is any violation whatsoever under the Act, any claim that there is a Section 8(a) (1) violation cannot overcome two insuperable barriers: 1) Section 10(b) of the Act; and 2) NLRB law defining interrogation, as more fully described below.

Before analyzing these twin issues, there are elements to the General Counsel's exceptions, including its arguments on this point, that amount to a hypertechnical, overly harsh interpretation of the Act, pursuing incidents even where the ALJ has already found a violation under another section of the Act, along with proposed remediation for the alleged violation. This point transcends this exception and applies across-the-board to Counsel for the General Counsel's exceptions.

At least since *American Federation of Musicians, Local 76, AFL-CIO*, 202 NLRB 620 (1973), the Board has taken the position that it ought not to expend the Board's finite resources on matters which have little or no meaning in effectuating the policies of the Act. Later, in *Square D Company*, 204 NLRB 154 (1973), the Board refused to issue a complaint, saying even if it were to assume that certain remarks made by a supervisor to an employee may have been in technical contravention of the Act, such comments were insufficient to justify either the finding of an unfair labor practice or the issuance of a remedial order.

Again, in *Wichita Eagle & Beacon Publishing Co.*, 206 NLRB 55 (1973), the Board pointedly declared: "To find, as the General Counsel urges, that this violated Section 8(a)(1) of the Act under the circumstances here would be straining at gnats to 'remedy'-what?".

Bellinger Shipyards, Inc., 227 NLRB 620 (1976), is likewise, dismissing a complaint because of the insubstantial nature of the case and the Board's resource constraints limiting its desire to charge as violations or remediate matters that may be in "technical contravention" of the statute. These cases are equally dispositive here. There is no violation of the Act because the effect of the "sign-up sheet" was non-existent, namely, no employees chose to participate. (TR at 555:8-10). Regardless, there can be no 8(a) (1) violation because the allegation is untimely and because the posting did not constitute "interrogation."

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

Joy Carpenter¹ testified that this sign-up sheet was posted at Station 1² in September or October 2007. (TR at 179: 9-16). One of the Union's primary witnesses, Jason Seyfert, testified in his 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 evidence at the hearing 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 sign-up sheet 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 posting took place around the fall of 2007.

¹ Ms. Carpenter is the Director of Human Resources for PMT. (TR at 166:22-25).

² Station 1 is the main station for PMT. It is the Station where PMT's administrative offices are located. (TR at 178:8-11).

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.

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 erroneous.

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 CGC's exception to the ALJ's finding on this allegation is without merit.

(2) *The posting did not constitute "interrogation"*

Additionally, even assuming the allegation is not time-barred, the "sign-up sheet" cannot be said to be "interrogation" in violation of the Act. An interrogation violates Section 8(a)(1) of

the Act only when “under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.” *Rossmore House and Hotel Employees and Restaurant Employees Union, Local 11*, 269 NLRB 1176, 1177 (1984), *enf’d sub nom., Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Some factors that the Board may consider in determining if there has been unlawful interrogation are “(1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation.” *Id.* at 1178 n. 20. Here, there is no evidence that PMT did anything other than passively place a flyer that allowed employees to opt-out of having their personal information provided to the Union. (TR at 54:16-25). Again, not one employee “opted out.” (TR at 555:8-10). Thus, there is no showing that any employees were “restrained” or “coerced” in the exercise of their Section 7 rights. *See Rossmore House*, 269 NLRB 1176, 1178 (1984) (finding no violation of the Act when active union supporter was asked if it was true that a union organizing committee had been formed and was asked why he wanted a union and if they charged a fee).

Moreover, the United States Supreme Court recognized in *NLRB v. Gissel Packing Company*, 375 U.S. 575 (1969), “the First Amendment permits employers to communicate with their employees concerning an ongoing Union organizing campaign ‘so long as the communications do not contain a threat of reprisal or force or promise of benefit.’ ” *Id.* at 618. This right is recognized in Section 8(c) of the Act. If Section 8(a)(1) of the Act deprived an employer of any right to ask non-coercive questions of the employees during a Union campaign, the Act would directly collide with the Constitution. Accordingly, the Act only prohibits those instances of true interrogation which tend to interfere with the employee’s right to organize. *Id.*

Here, there is no evidence that the posting interfered in any way with the employee's organizing rights.

Finally, there is no evidence of anti-union animus in regards to this sign-up sheet. As set forth above, when an employer is charged in a complaint with unlawful discrimination and motive is an issue, the General Counsel must make a showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Under *Wright Line*, 251 NLRB 1083 (1980) *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). Under this analytic framework, the General Counsel must first make a *prima facie* showing sufficient to support the inference that the protected conduct was a "motivating factor" in the employer's decision. CGC must establish: (1) that the employees engaged in union activity; (2) that Respondent had knowledge of these activities; and (3) that Respondent's actions were motivated by union animus. Once accomplished, the burden shifts to the employer to demonstrate that the same action would have been taken notwithstanding the protected conduct.

Here, CGC did not establish a *prima facie* case, let alone a violation. Namely, there was no evidence at the hearing that any the posting was based on anti-union animus. Rather, the evidence showed that the sign-up sheet was posted because PMT thought it best to let its employees know that their personal information was to be provided to the Union, and to give the employees the chance to opt-out if they did not want their personal information given to the Union. (TR at 554:16-25). There was no evidence presented at the hearing of anti-union statements or animus in regards to the sign-up sheet. Accordingly, the 8(a)(1) allegations are without merit and should be dismissed, as should the exception filed by Counsel for the General Counsel.

- E. CGC ALLEGES THAT RESPONDENT PRESENTED A CONTRACT PROPOSAL TO THE UNION AND INFORMED THE UNION THAT ITS JUNE 16, 2008 CONTRACT PROPOSAL WAS TO BE ACCEPTED OR REJECTED IN ITS ENTIRETY; THIS ACTION DOES NOT SUPPORT AN UNFAIR LABOR PRACTICE CHARGE AND THE EXCEPTION IS ABSENT MERIT.

The ALJ correctly found that PMT did not bargain in bad faith by allegedly presenting the union with a take it or leave it contract proposal. (8 ALJD 50-52). The ALJ properly viewed the bargaining across the entire spectrum of bargaining behavior by both sides. The ALJ found that if there was a “take it or leave it” approach initially conveyed, it was immediately abandoned. (8 ALJD 49-50). Therefore, at worst, PMT’s conduct was nothing more than a manifestation of a short-lived bargaining tactic, insufficient to arise to the level of an unfair labor practice, as will be detailed further below. (8 ALJD 50-52). The ALJ’s approach accurately mirrors NLRB law, which does not call for flyspecking each comment or statement made by a party during the course of negotiations. Bargaining is often characterized by posturing, bluster, banter, and even, at times, some theatre.

Seeking to attach a sinister gloss to the isolated comment attributed to PMT squarely collides with the NLRB’s traditional approach of viewing all the facts and circumstances at the bargaining table in their totality. CGC ignores the entire history of the parties’ collective bargaining that came thereafter; history understandably, reasonably, and appropriately given major consideration and weighed by the ALJ in his decision in dismissing this allegation. (8 ALJD 49-50).

Ms. Carpenter testified that PMT submitted a proposal to be accepted or rejected in its entirety at the request of Mr. Barkley. (TR at 565:17-566:1). Mr. Barkley, in GC Ex. 6, stated “I await your written counter proposal in full.” In GC Ex. 28, Mr. Barkley stated, “It is an unheard of practice to sign off on parts of contract prior to completion.” Based on these statements by Mr.

Barkley, PMT did ask that the proposal be accepted or rejected in its entirety. An employer's action taken at the demand or request of the union cannot be said to be an unfair labor practice.

Additionally, it is not an unfair labor practice to deal in complete or package contract proposals. *See, e.g., National Spinning Co., Inc.*, 174 NLRB 379, 383 (1969)(union and employer submitted complete contract proposals). However, if it were an unfair labor practice to deal in complete proposals, then the Union's request for an entire contract proposal would itself have to be an unfair labor practice. It is well-established that a Union who acts in bad faith cannot complain of bad faith by the employer. In *Chicago Tribune Co.*, 304 NLRB 259 (1991), the Board declared: "A union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude existence of a situation in which the employer's own good faith can be tested. If it cannot be tested, its absence can hardly be found." *Id.* Here, if PMT's submission of a complete contract was in bad faith, then so too was the Union's request for a complete proposal.

Regardless, as the ALJ correctly found, even though the cover letter with the contract proposal stated that the proposal was to be accepted or rejected in its entirety, the uncontroverted evidence shows that there were, indeed, negotiations back and forth based on the proposal. Ms. Carpenter testified that soon after the June 16, 2008 contract proposal, there were back-and-forth negotiations between PMT and the Union regarding the proposal. (TR at 566:2-11). The back-and-forth negotiations via e-mail continued into the following month. (TR at 570:5-8). Numerous documents in the record confirm that there was negotiation back-and-forth on the June 16, 2008 proposal. For example, GC Ex. 34 is an e-mail sent from Travis Murphy to PMT management stating that the Union was "willing to negotiate a contract with this document as a starting point." Similarly, GC ex. 32 is a June 18, 2008 e-mail from Mr. Barkley to PMT management in

which Mr. Barkley rejected the contract proposal, stating that the Union was looking forward to further negotiations based on the PMT proposal and the ICEP's proposal. GC Ex. 37 is an e-mail dialogue between Ms. Carpenter and Mr. Barkley. Ms. Carpenter states that "your response indicates that there are probably portions of our proposal you found acceptable. We assume there are portions that may be acceptable with minor changes. Please send us an email identifying those articles in each of these categories to further clarify the ICEP position." (*Id.*). Mr. Barkley responded by giving a list of the concerns that the Union had with the PMT proposal. (*See Id.*; *See also*, R Exs. 8-10). Thus, the testimony and documentary evidence confirms that, regardless of the language in the June 16, 2008 cover letter, there were indeed significant negotiations and discussions back and forth regarding the June 16, 2008 proposal. Thus, the June 16, 2008 proposal was not in reality a "take it or leave it" proposal as the CGC alleges. *See, In re Matamuska Elec. Ass'n, Inc.*, 337 NLRB 680, 682 (2002) (finding that totality of record did not establish that Respondent took a "take it, or leave it" stance in negotiations where parties changed position and reached tentative agreements, despite fact that parties dealt in "package" proposals).

Finally, at worst, the statement that the proposal was to be accepted or rejected in its entirety is best viewed as a statement made in the context of heated negotiations which is not evidence of bad faith. The Board has admonished in such circumstances that courts should be "especially careful not to throw back in a party's face remarks made in the give-and-take atmosphere of collective bargaining" or "lend too close an ear to the bluster and banter of negotiations." *See Logemann Bros. Co.*, 298 NLRB 1018, 1021 (1990). To do otherwise would "frustrate the Act's strong policy of fostering free and open communications between the parties. *Id.* PMT's statement asking that the proposal be accepted or rejected in its entirety is, at worst,

the “bluster and banter” typical of labor negotiations. Accordingly, the CGC’s exception regarding the alleged “take it or leave it” proposal is without merit.

F. THE ALJ CORRECTLY CONCLUDED THAT PMT’S CONDUCT DID NOT ENGAGE IN BAD FAITH BARGAINING.

In support of her allegation that PMT engaged in overall bad bargaining, Counsel for the General Counsel presents a very skewed depiction of the bargaining between the two sides. Union conduct at the bargaining table, at best, dubious, at worst, patently illegal, is downplayed, dismissed, or overlooked. The ALJ focused on PMT’s bargaining table conduct and the like behavior of the union, appropriately recognizing that both sides influenced the pace, progress, and outcome at the bargaining table. The ALJ was also ever mindful that the Board considers the entire course of conduct in bargaining. *Logemann Bros.*, 298 NLRB 1018, 1020 (1990); *See also*, 2 *The Developing Labor Law*, 858 (Patrick Hardin & John E. Higgins, Jr. Editors-in-Chief, 5th ed. 2006). In sharp contrast, CGC takes a tunnel-vision approach in this exception.

Exemplifying his balanced, proportionate approach, the ALJ found “. . . the union also contributed to delays, especially initially as it found its footing.” (23 ALJD 15-18). Not catalogued by the ALJ were the many false starts and incidents of bad faith bargaining engaged in by union chief negotiator Barkley, as more fully set forth below. For example, Mr. Barkley rejected all tentative agreements in their entirety, notified PMT that he was breaking off negotiations, and arbitrarily demanded that PMT implement “immediately” ten conditions, characterizing these conditions as the minimum requirements prior to restarting negotiations. (TR at 375: 4-375:13; TR AT 562:1-563:14; R.Ex.3). Such union actions are not excused under NLRB law and such union bad faith must be weighed and balanced with any alleged improper conduct by the employer at the bargaining table. *Chicago Tribune*, 304 NLRB No. 38 (1991).

In July 2006, PMT voluntarily recognized the ICEP as the bargaining agent for specified PMT employees. (TR at 223:16-17). At the beginning of the negotiations, the parties agreed on a process for negotiation, reaching a tentative agreement on an individual item, and moving on to the next item. (TR at 561:18-562:8; TR at 563:1-14; R. Ex. 3). The parties met in multiple sessions between September 2007 and November 2007 and verbally agreed upon numerous negotiation items. (*Id.*; *see also*, R. Ex. 5(a)-(k); GC Ex. 6). PMT asked Mr. Barkley to sign tentative agreements on each of the items upon which the parties had reached agreement.

However, he failed to do so (TR at 562:1- 563:14; R. Exs. 3 and 5(a)-(K)). Further, on or about December 9, 2007, Mr. Barkley, in a bad faith rejection of established collective bargaining procedures, rejected all tentative agreements in their entirety and notified PMT that he was breaking off negotiations. (TR at 375:4-376:13; TR at 562:1-563:14; R. Ex. 3). This evidence is indisputable. At that same time, Mr. Barkley illegally demanded that PMT implement the following “immediately” and that these were “the minimum requirements prior to restarting negotiations.” (R. Ex. 3).

Demand list to be implemented immediately. December 8th 2007

1. Career Firefighters (except as described in current municipal contracts) working on starwest ambulances are to be terminated from starwest as employees.
2. 18 hour cars are to be paid 1 ½ times their pay rate for any hours worked in a day past 8 hours, or change the schedule back to 24 hour Kelly schedule, (4 concurrent days off)
3. reschedule a 5 day break, without loss of income, for 18 hour cars, at least once monthly.
4. 18 hour cars are to be given a posting station with the same amenities as required by state law for 24 hour cars with opportunity to use them.
5. 2 hour exhaustion breaks when needed (paid)

6. ½ hour paid lunch and 1 hour paid dinner break for all 24 hour cars
7. No further manipulation of union intervention in discipline or re-definitions of weingarten rights.
8. Time and half for anyone working a holiday, to include Christmas and Christmas eve of 2007, new years eve and new years day.
9. No further decreases in work hours.
10. Any other changes in system management that negatively affects field employees will be considered as further degradation of relations between labor and management.

These are the minimum requirements prior to restarting negotiations. (R. Ex. 3).

Mr. Barkley demanded that PMT fire all of its firefighters and implement a number of changes “prior to restarting negotiations.” *Id.* Mr. Barkley also threatened “impasse” and demanded that PMT submit a proposed complete contract, rather than negotiating individual articles, as the parties had done previously in the negotiation process. (TR at 565:17-566:1; R. Ex. 3). Mr. Barkley broke off bargaining in December 2007. (TR at 386:21-24).

Because the union rejected all tentative agreements, PMT had to redraft the entire agreement and start over in the negotiation process. PMT then drafted a complete contract and presented it to the union on or about June 16, 2008. (GC Exs. 30-33; TR at 247:14-248:25; TR at 564:19-565:25; TR at 566:1-3). Union officials rejected the contract proposal within 24 hours. (R Ex. 8).

The Union also insisted on bargaining with a mediator. (GC Ex. 28). The parties met for multiple bargaining sessions from September 2008 through December 2008 and came to a tentative agreement on twelve bargaining subjects through the federal mediation sessions. (TR

at 300:21-25; TR at 303:3-304:5; TR at 305:10-306:18). The parties met numerous times and reached tentative agreement on a number of provisions. *Id.*

In view of the Union's own bad faith in renegeing on all tentative agreements and making unreasonable demands prior to re-opening bargaining, the Union is in no position to argue that PMT has violated Section 8(a)(5) of the Act. In *Chicago Tribune Co.*, 304 NLRB No. 38 (1991), the Board declared:

A union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude existence of a situation in which the employer's own good faith can be tested. If it cannot be tested, its absence can hardly be found.

Times Publishing Co., 72 NLRB 676, 683 (1947). Here, the Union's bad faith regressive bargaining precludes its bad faith allegations against PMT. *See Continental Nut Company*, 195 NLRB 841, 858 (1972) (union's repudiation of prior agreements precluded the existence of a situation where the employer's good faith could be tested). Similarly, in *Wisconsin Steel Industries, Inc.* 318 NLRB 212, 222 (1995) the Board held that where a party, without valid excuse, reneged on every tentative agreement, "[t]hat alone constitutes bad-faith bargaining." Here, the Union's bad faith acts of renegeing on tentative agreements and its unreasonable demands prior to restarting negotiations preclude a finding of bad faith bargaining against PMT.

Additionally, although negotiations have been difficult, there was no indication that PMT harbored any intent to avoid reaching an agreement. Here, PMT negotiated in good faith. As outlined above, PMT met with the Union both with a mediator and without. The parties reached numerous tentative agreements. The willingness of PMT to meet with the Union, manifested in numerous bargaining sessions and other communications, strongly evidences good faith. *See NLRB v. Norfolk Shipbuild. & D. Corp.*, 195 F.2d 632, 635 (4th Cir. 1952), as does the tentative agreements reached prior to PMT's good faith doubt of majority status. Similarly, in *Garden*

Ridge Management, Inc., 347 NLRB No. 13 (2006) the Board noted, in finding no violation of the Act that, as here, the parties had reached tentative agreements on many substantive contract provisions. Accordingly, the numerous tentative agreements reached between the parties belie any allegation that PMT has engaged in bad faith or surface bargaining.

Conversely, the simple fact that PMT did not agree to all of the Union's proposals is no evidence of bad faith. *Trans Intern. Airlines, Inc. v. International Broth. of Teamsters*, 650 F.2d 949, 959 (9th Cir. 1980) (holding that the fact that the employer considers exorbitant the size of the union's proposals regarding wages, benefits, and working conditions does not demonstrate a refusal to make reasonable efforts to reach an agreement); *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 758 (6th Cir. 2003) (holding that the failure to ultimately reach an agreement or a party's refusal to change a particular position does not necessitate a finding of bad faith).

In *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984), the Board held that the Company's firmness in insisting on a 1-year extension of the current contract did not constitute bad faith. The Board reasoned "We find that the totality of the Company's conduct throughout the course of bargaining establishes that the Company engaged in hard bargaining, rather than surface bargaining. To hold otherwise in such circumstances would be tantamount to requiring an employer to offer improved benefits over an expired contract or be guilty of bad-faith bargaining." *Id.*

Thus, it is clear that an employer is not compelled to surrender and submit to a union's every demand. See, Section 8(d) of the Labor-Management Relations Act., 29 U.S.C. 151, et seq. (duty to bargain does "not compel either party to agree to a proposal or require the making of a concession"). PMT's conduct here is more analogous to the situations where the Board and

Courts have found hard-bargaining, but not bad faith. Indeed, the Board and courts have found no surface bargaining where:

- The company failed to study the union's proposals concerning pensions, but came prepared to bargain in good faith on the subject. *International Union, United Auto., Aerospace & Agr. Implement Workers of America, And Its Local No. 1712 v. NLRB*, 732 F.2d 573 (7th Cir. 1984).
- The company extensively questioned each union proposal and submitted lengthy counterproposals after some delay because the prolonged questioning regarding each union proposal was designed to clarify errors or ambiguities. *Hartz Mountain Corp.*, 295 NLRB 418 (1989).
- The company held firmly to a proposal for a wage decrease. *ConAgra, Inc. v. NLRB*, 117 F.3d 1435 (D.C. Cir. 1997).

As in many negotiations for a first contract, progress has been made although no ultimate agreement has been reached. It is not unusual for a first contract to take time. In fact, studies show that between one-third and one-half of newly certified unions ultimately fail to reach a first contract. See, *NLRB Representation Elections and Initial Collective Bargaining Agreements, Safeguarding Workers' Rights?:* before the Subcommittee on Labor, Health and Human Services, Education and Related Agencies of the Committee on Appropriations United States Senate (2008), at p.4, available at http://www.nlr.gov/shared_files/Press%20Releases/2008/WBL_Senate_testimony.pdf. (Testimony of Wilma B. Liebman, Member, National Labor Relations Board, citing to Commission on the Future of Worker-Management Relations (Dunlop Commission), *Fact Finding Report 73* (May 1994), available at http://digitalcommons.ilr.cornell.edu/key_workplace/276/., which found that one-third or more of newly-certified unions fail to reach a first contract)); See also, John Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999-2004*, 62 *Indus. & Lab. Rel. Re.* 3, 16 (2008)(finding an upper-bound estimate of a 56% agreement rate within two years of certification in a first-contract situation). Thus, it is clear that the current situation is not unique.

Nor is it unique that bargaining has been ongoing for some time without an ultimate agreement being reached.

Here, the ALJ correctly found that PMT did not engage in bad faith bargaining. The record establishes that PMT negotiated in good faith prior to its good faith doubt of majority status. Accordingly, the CGC's exception on this issue is without merit.

G. THE ALJ CORRECTLY CONCLUDED THAT PMT DID NOT PROMULGATE AN OVERLY BROAD AND DISCRIMINATORY RULE IN VIOLATION OF SECTION 8(a)(1) OF THE ACT; THE EXCEPTION IS WITHOUT MERIT.

The ALJ in his decision noted the principle that a union does not have a statutory right to post materials on an employer's premises. (21 ALJD 26-27). The ALJ also recognized that any agreement to post materials typically is reflected in either a collective bargaining agreement or by past practice and that the employer may place limits on the matters posted. Furthermore, the ALJ correctly noted that Counsel for the General Counsel failed to show what the past practice has been, if any, regarding the posting of union-generated matters. Further, for reasons which shall be more fully discussed below, PMT's conduct was, in any event, consistent with the doctrinal law explained in *The Guard Publishing Company*, 351 NLRB No. 70 (2007). There, the NLRB reasoned that for there to be a violation, there must be a demonstration that the employer treated non-union solicitations differently than union solicitations. There is no such finding here or evidence to underpin such a finding.

Counsel for the General Counsel alleges that PMT threatened its employees with unspecified reprisals and promulgated an overly-broad and discriminatory rule prohibiting employees from posting anything that is "divisive, inflammatory or derogative" towards employees, management or the Company. (See GC Exs. 22, 23). As the ALJ correctly concluded, this allegation is also without merit.

It is well-settled Board law that there is no statutory right of unions or employees to post notices or otherwise use bulletin boards on an employer's premises. *Eastex Inc.*, 215 NLRB 271, 272 (1974), *enf'd.* as modified 556 F.2d 1280 (5th Cir. 1977), and *aff'd.*, 437 U.S. 556 (1978). In *Special Machine & Engineering, Inc.*, 247 NLRB 884 (1980), the Board adopted the administrative law judge's decision in which he stated:

The right to post material on an employer's bulletin boards may arise out of a collective-bargaining agreement. To the extent that the grant by an employer in a collective-bargaining agreement of the right to utilization of bulletin boards constitutes a concession, an employer may define the parameters of its concession and may insist upon the imposition of limitations, restrictions, and regulations on such rights.

The Board has also held that there is no violation of the Act by the employer simply reserving the right to monitor the contents of postings to ensure they did not contain degrading or inflammatory material. *Overnite Transportation Co.*, 307 NLRB 666, 674 (1992). Similarly, in *Western Summit Flexible Packaging*, 310 NLRB 45, 54 (1993), no violation of the Act by the employer was found for its refusal to permit the posting of an unfair labor practice charge.

Further, CGC did not and cannot show a past practice of PMT allowing the Union to post whatever it desired without PMT's scrutiny. In *In re Stevens Graphics, Inc.* 339 NLRB 457 (2003), the Board found that the General Counsel had not established that there was a past practice of permitting the Union to post *whatever* it desired without scrutiny from the employer and that there is no statutory right to place postings on an employer's bulletin boards. As in *Stevens Graphics*, here, there is no evidence in the record that PMT has a past practice of allowing the Union's unfettered access to its facilities to post whatever the Union desires.

PMT did reserve its right to prohibit postings that were divisive, inflammatory, or derogative, as is its right under the Act. *PMT* is entitled to such a reservation. As in *Special*

Machine, Overnite Transportation, and Western Summit, PMT merely “defined the parameters” of its concession in allowing certain postings. Such an action does not violate the Act.

Additionally, there has been no discrimination against the Union. As the Board has held, “discrimination means the unequal treatment of equals. Thus, in order to be unlawful, discrimination must be along Section 7 lines. In other words, unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status.” *The Guard Publishing Company*, 351 NLRB No. 70 (2007). *See also, e.g., Lucile Salter Packard Children's Hospital at Stanford v. NLRB*, 97 F.3d 583, 587 (D.C. Cir. 1996) (charging party must demonstrate that “the employer treated nonunion solicitations differently than union solicitations”). Here, the postings are monitored on a non-discriminatory basis. There is no evidence in the record that PMT allowed non-union organizations or individuals to post “divisive, derogatory, or inflammatory statements.” In fact, there is nothing in the record that establishes that PMT treated Union postings differently from other postings. Accordingly, there is no evidence that the prohibition on these types of postings is driven by anti-unionism. Accordingly, the ALJ correctly concluded that PMT did not violate the Act by prohibiting postings in this manner.

H. THE ALJ’S DECISION CORRECTLY CONCLUDED THAT A *TRANSMARINE* REMEDY WAS INAPPROPRIATE ON THESE FACTS.

Counsel for the General Counsel essentially argues that the *Transmarine* remedy should be applied woodenly and mechanically, insensitive to the totality of the facts. The ALJ’s formulation of a remedy was far more nuanced and consonant with NLRB law. The ALJ had no difficulty easily distinguishing *Live Oak Skilled Care*, 300 NLRB 1040, 1042 (1990), a fulcrum of the CGC’s argument in this regard. The ALJ discerned that unlike in *Transmarine*, and cases following in its wake, there was no loss of employment

here. Refusing the *Transmarine* remedy, the ALJ aptly found its imposition on these facts “disproportionate.” (24 ALJD 27). *See too, AG Communication Systems*, 350 NLRB No. 15 (2007) (unwarranted to impose *Transmarine* remedy where, as here, employees suffered no detriment).

Consideration of the *Transmarine* remedy stemmed from the alleged unlawful failure to provide the union with an opportunity to bargain concerning the effects of the relocation of stations 606 and 607. PMT underscores that its discussion of the remedy imposed by the ALJ with respect to *Transmarine* and in the following argument with respect to the appropriate calculation of interest is without prejudice to its firmly held position that no financial remedy at all is appropriate on these facts. The underlying reasons why any financial remedy is unjustified and inappropriate on these facts are more fully set forth below.

The Complaint alleged and the ALJ found that PMT violated the Act by relocating stations 606 and 607. This finding itself was in error and any application of the *Transmarine* remedy is inappropriate.

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 (7th 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. Certainly, imposition of a

Transmarine remedy constitutes overreaching and is punitive in nature. Accordingly, CGC's exception in this regard is meritless.

- I. THE ALJ ACTED APPROPRIATELY IN ORDERING INTEREST TO BE AWARDED ACCORDING TO THE TEACHINGS OF *NEW HORIZONS FOR THE RETARDED, INC.*, 283 NLRB 1173 (1987).

The CGC's exception on this point does not require extended discussion. Indeed, in the recent case of *National Fabco Mfg., Inc.*, 352 NLRB No. 37 (2008), the Board rejected the very argument which Counsel for the General Counsel makes here. The Board very succinctly declared: "Having duly considered the matter we are not prepared at this time to deviate from our current practice of assessing simple interest." *See, e.g. National Fabco Mfg., Inc.* at footnote 4 (2008)(citing *Rogers Corp.*, 344 NLRB 504 (2005)).

Additionally, a mere two days before the filing of Counsel for the General Counsel's brief, Richard A. Siegal, Associate General Counsel for the Office of the General Counsel, Division of Operations – Management, declared that the Board's interest rate remains 4% for the second quarter, fiscal year 2010. (See *Memorandum O.M.* 10-28). In Mr. Siegal's memorandum, he declares that the rate used to calculate interest on back pay and other monetary remedies provided for in Board orders is to be based upon the "short term federal rate," consistent with *New Horizons for the Retarded, supra*,

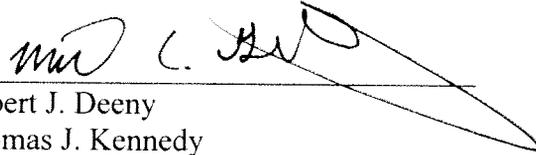
Thus, both the General Counsel's own policy and NLRB precedent stand as an insurmountable barrier for Counsel for the General Counsel's effort to reach beyond well-established precedent. Accordingly, the CGC's exception on this issue must be dismissed.

V. **CONCLUSION**

For the foregoing reasons, the Cross-Exceptions should be dismissed in their entirety.

RESPECTFULLY SUBMITTED this 14th day of January, 2010.

SHERMAN & HOWARD L.L.C.

A handwritten signature in black ink, appearing to read "Michael C. Grubbs", is written over a horizontal line. The signature is stylized and extends to the right of the line.

Robert J. Deeny
Thomas J. Kennedy
Michael C. Grubbs
2800 N. Central Avenue, Suite 1100
Phoenix, AZ 85004
Attorneys for Professional Medical
Transport, Inc.

I certify that I caused a copy of the foregoing to be electronically filed this 14th day of January, 2010:

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, NW, room 11602
Washington, DC 20570-0001

COPIES of the foregoing were sent via Electronic Mail this 14th day of January, 2010, to:

Cornele A. Overstreet
Regional Director, Region 28
NATIONAL LABOR RELATIONS BOARD
2600 N. Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
cornele.overstreet@nlrb.gov

Sandra L. Lyons
Counsel for the General Counsel, Region 28
NATIONAL LABOR RELATIONS BOARD
2600 N. Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
Sandra.Lyons@nlrb.gov

Joshua S. Barkley
Tony Lopez
INDEPENDENT CERTIFIED EMERGENCY
Professionals of Arizona, Local #1
11417 E. Decatur Street
Mesa, AZ 85207
coachjbar@yahoo.com

Independent Certified Emergency
Professionals, Local No. 1
1143 East Palo Verde Drive
Phoenix, AZ 85013
tlo9530@yahoo.com

By 