

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Judges**

USC UNIVERSITY HOSPITAL

and

**Cases 21-CA-39656
21-CA-39693
21-CA-39798
21-CA-39799
21-CA-39808
21-CA-39870**

**NATIONAL UNION OF HEALTHCARE
WORKERS**

**BRIEF OF COUNSEL FOR THE ACTING GENERAL COUNSEL
To The Honorable Gregory Z. Meyerson, Administrative Law Judge**

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I. INTRODUCTION

Respondent USC University Hospital (herein Respondent or the Hospital) is a renowned private teaching hospital that provides acute care services in Los Angeles. Prior to April 2009, the Hospital was owned and operated by the Tenet Healthcare Corporation (herein Tenet). In 2004, the Board certified the Service Employees International Union, United Healthcare Workers-West (herein SEIU), as the representative of the employees in the Service, Maintenance and Technical Unit. This relationship was embodied in a collective-bargaining agreement, effective from January 1, 2007, to March 31, 2011, between the SEIU and several other Tenet-owned hospitals, including the Hospital at USC.

In approximately January of 2009, in anticipation of the sale of the Hospital, Tenet and the SEIU executed a modified version of the above-described collective-bargaining agreement which included only those provisions of the agreement that related to the Hospital and the Hospital's operations and deleted all references to Tenet. This modified version of the collective bargaining agreement was also effective until March 31, 2011.

In April 2009, Respondent purchased the Hospital from Tenet and at that time agreed to recognize the SEIU as the collective bargaining representative of the Service, Maintenance and Technical Unit and agreed to adopt the terms of the modified collective-bargaining agreement between Tenet and SEIU insofar as such terms were not unique to Tenet.

A week or so prior to an election scheduled in May 2010, the SEIU disclaimed interest in the Service, Maintenance and Technical Unit and in June 2010, the National Union of Healthcare Workers (herein the Union or the NUHW) was certified as the new collective-bargaining representative of employees in this same Service, Maintenance, and Technical Unit. Respondent and the NUHW began bargaining for a new collective bargaining agreement beginning in August

of 2010 and to date, nearly 17 months later, the parties have not yet reached a collective-bargaining agreement.

Respondent has, since shortly after the inception of the collective-bargaining relationship with the Union, repeatedly disregarded its obligation to bargain with the chosen representative of its employees by committing unilateral changes to the existing terms and conditions of employment of its employees. These unilateral changes have resulted in employees suffering financial loss, discipline and other adverse consequences.

In addition to Respondent's unlawful commission of unilateral changes, Respondent targeted its employee Juan Michael Torres, a known and active supporter of the Union, by arbitrarily disciplining him on multiple occasions because of his activities on behalf of the Union. And finally Respondent interfered with employees' Section 7 rights by instructing them not to wear insignia in support of the Union.

The pulmonary function technicians (herein PFTs) are a specialized group of respiratory therapists employed by Respondent to work in a specific laboratory performing pulmonary function tests. For several years, the PFTs were required to be on-call a certain number of evenings and weekends per month in the event that they were needed to perform blood gas studies on patients prior to the performance of emergency procedures in the operating room. For many years, if the PFTs were called in to perform those blood gas studies in the operating room, their supervisor, Susan Farr, paid them their premium pay in addition to an extra shift bonus, if the employees ended up working beyond their regular full-time hours in a given 2-week pay period.

In approximately October 2010, and without first providing the NUHW with advance notice or an opportunity to bargain, Respondent stopped paying the PFTs this extra shift bonus, claiming that the extra shift bonus had been paid in error.

The Union immediately disputed this unilateral change and demanded that Respondent bargain over the change. At one point, in discussions regarding the elimination of the extra shift bonus, the Union and the PFTs suggested to Respondent that the extra shift bonus be voluntary instead of mandatory and that the PFTs be given first priority to sign up for any extra shifts to perform the blood gas studies in the operating room. Respondent thereafter in February 2011, and without providing the Union with notice or an opportunity to bargain, completely eliminated the PFTs on-call schedule in the operating room thereby denying the PFTs the opportunity to earn the supplemental income they came to rely on by working the additional evening and weekend shifts on the on-call schedule.

The echo technicians work in the cardiology department and take ultrasound images of patients' hearts. Since 2008, the echo technicians have worked a 12-hour-day, 3-day-a-week schedule. In November 2010, without providing the NUHW with notice or an opportunity to bargain, Respondent announced that effective January 2, 2011, it would be changing the echo technicians' schedule to an 8-hour-day/ 5-day-a-week schedule. The Union immediately stated its objection to this schedule change and demanded that Respondent bargain over this change. Nevertheless Respondent implemented this schedule change as it had planned on January 2, 2011.

In the past, Respondent has, depending on the department head at the time, allowed a 7-minute grace period for employees clocking in and out in the Respiratory, EVS and Laboratory Departments. Starting in the beginning of 2011, and again without giving the NUHW prior

notice or an opportunity to bargain, Respondent eliminated the 7-minute grace period and beginning in February 2011 began disciplining employees in these three departments for being 7 minutes or less late to work.

Since at least April of 2009 Respondent allowed employees to wear union insignia in immediate patient care areas. Beginning in May 2011, following its pattern of not giving the NUHW notice or an opportunity to bargain, Respondent told employees that they were not permitted to wear Union insignia protesting an employee's discharge anywhere in the hospital and instructed employees to remove Union insignia.

Michael Torres is a well-known and active supporter of the NUHW. Between March 18 and April 7, 2011, Respondent issued Torres three written warnings and one 24-work-hour suspension in retaliation for Torres' actions on behalf of and support for the NUHW.

By engaging in all of these acts, Respondent has committed multiple unfair labor practices in violation of Section 8(a)(1)(3) and (5) of the Act. Given the nature and impact of these violations, a 6 month extension of the certification year, and a notice reading are warranted.

II. STATEMENT OF THE ISSUES

- Did Respondent violate Section 8(a)(1) and (5) of the Act by: unilaterally eliminating the extra shift bonus and on-call schedule for the pulmonary function technicians; unilaterally eliminating the 7-minute grace period of employees in the respiratory, laboratory and environmental services department and disciplining employees for tardies falling within the 7-minute grace period; unilaterally changing the schedule of the echo technicians; and unilaterally changing its policy with respect to the wearing of Union insignia?
- Did Respondent violate Section 8(a)(3) of the Act by disciplining its employee Juan Michael Torres because of his support for the Union?
- Did Respondent violate Section 8(a)(1) of the Act by instructing employees to remove Union insignia?
- In light of the nature and impact of Respondent's actions, should the Board, in addition to the traditional remedies, order a 6 month extension of the Union's certification year and require a reading of the notice at Respondent's facility?

III. STATEMENT OF THE FACTS

A. *Background*¹

Respondent is an acute care hospital with a facility located at 1500 San Pablo Street in Los Angeles, California. Since June 17, 2010, the date that the Union was certified by the Board, Respondent has had a collective-bargaining relationship with the NUHW, who represents a unit of service, maintenance and technical employees (herein the Unit) employed at the

¹ Respondent admitted the relevant portions of the complaint establishing the background and collective-bargaining history between the parties. In order to clarify the complaint, at the opening of the hearing the General Counsel withdrew and/or amended paragraphs 5(a); 5(b); 7(b); 8(a); 8(c); and 8(e). (Tr. 10-14).

Hospital² (GCx -1(al); GCx-1(an)).³ Prior to April 1, 2009, the Hospital was owned by Tenet. In June 2004, during the time that Tenet operated the Hospital, the Board certified the SEIU to represent the Unit. Thereafter in approximately 2007, the SEIU and Tenet, on behalf of several Tenet-owned hospitals, including the facility at USC, executed a collective-bargaining agreement effective by its terms from January 1, 2007, to March 31, 2011. (GCx-1(al); GCx-1(an); GCx-3).

In approximately January of 2009, in the anticipation of the sale of the Hospital, Tenet and the SEIU executed a modified version of the above-described collective-bargaining agreement which included only those provisions of the agreement that related to the Hospital and deleted all references to Tenet. This modified agreement was not negotiated between the parties but was merely cut and pasted from the old contract for convenience sake. This modified version of the collective-bargaining agreement expired on March 31, 2011. (GCx-3; Tr. 44-46). This modified agreement (herein Agreement or CBA) contains the terms and conditions of employment currently in effect between Respondent and the Union. (Tr. 43-46; GCx-4).

In April 2009, Respondent purchased the Hospital from Tenet and at that time agreed to recognize the SEIU as the collective-bargaining representative of the Unit and agreed to adopt the terms of the Agreement between Tenet and SEIU insofar as such terms were not unique to Tenet. (GCx-1(al); GCx-3). A week or so prior to an election scheduled in May 2010, the SEIU, the incumbent union, disclaimed interest in the Unit and following an election in June 2010, the

² This unit includes all full-time, regular part-time and per diem service, maintenance, technical and skilled maintenance employees employed by Respondent at its facility located at 1500 San Pablo Street, Los Angeles, California, and excludes all other employees, managers, supervisors, confidential employees, guards, physicians, residents, central business office employees (whether facility-based or not) who are solely engaged in qualifying or collection activities, employees of outside registries and other agencies supplying labor to the Employer and already-represented employees. (GCx-1(al); GCx-3).

³ Throughout the remainder of this brief, all citations to the transcript will be referred to as "Tr." followed by the appropriate page number. General Counsel's exhibits will be referred to as "GCx" and Respondent's exhibits will be referred to as "Rx" followed by the appropriate exhibit number.

Union was certified as the new collective-bargaining representative of employees in the Unit. (GCx-1(al); Tr. 727-728). Respondent and the NUHW began bargaining for a new collective-bargaining agreement beginning in August of 2010 and to date, nearly 17 months later, the parties have not yet reached a collective-bargaining agreement. (Tr. 44-46; 274-275).

Pursuant to the Agreement, one authorized field representative for the Union is permitted to enter the Hospital “at reasonable times for the purposes of observing whether the Agreement is being adhered to and/or to check on complaints of bargaining unit employees.” (GCx-4 p. 6). Union Organizer Antonio Orea (herein Orea) was the designated field representative from the time the Union was certified until the beginning of November 2010. (Tr. 477-478). Union Organizer Sophia Mendoza (herein Mendoza) took over as the designated field representative at the beginning of November 2010 and currently holds that position. (Tr. 271-273). Mendoza testified that as the field representative, she is the primary contact with management personnel at the Hospital for grievances and any issues that might come up with respect to employees. (Tr. 274).

B. Respondent eliminates the extra shift bonus and the on-call schedule.

The respiratory therapists, pulmonary function technicians, and the OR (operating room) blood gas technician employed at the Hospital are all part of the Unit. (Tr. 50-51; 330-331; 444-445). The Respiratory Therapy Department and Pulmonary Diagnostic Services Department is overseen by Director of Respiratory Therapy and Pulmonary Diagnostic Services, George Sarkissian (herein Sarkissian). (Tr. 330; 332; 498-499). Although Sarkissian oversees both of these departments, each of the departments is directly supervised by separate managers. The Respiratory Therapy Department is directly managed by Department Manager of Respiratory

Services Tracy O'Connel (herein O'Connel) and the Pulmonary Diagnostic Services Department is directly managed by Susan Farr (herein Farr),⁴ (Tr. 334; 526).

There are 4 pulmonary function therapists⁵ employed at the Hospital and 1 OR blood gas technician. Basil Nasir (herein Nasir)⁶ is the only OR blood gas technician employed at the Hospital. The pulmonary function therapists and the OR blood gas technician are all part of the Pulmonary Diagnostic Services Department. (Tr. 329-330; 334; 441-443).

Although employees in the Pulmonary Diagnostic Services Department are licensed respiratory therapists, the work they perform and the hours that they work are separate from the work performed by and the schedules of the employees in the Respiratory Therapy Department. While the Respiratory Therapy Department operates 24 hours a day, 365 days a year, the Pulmonary Diagnostic Services Department is only open Monday through Friday from approximately 7:00 a.m. to 7:30 p.m. (Tr. 330-331). The respiratory therapists care for patients throughout the hospital, providing respiratory therapy services for patients as needed. (Tr. 57). The Pulmonary Diagnostic Services employees however are a specially trained group of respiratory therapists that unlike the other respiratory therapists, are stationed in the pulmonary lab and the operating room and perform specialized diagnostic tests. (Tr. 328-330). The Respiratory Therapy Department is also much larger than the Pulmonary Diagnostic Services Department, in that it employs approximately 93 respiratory therapists. (Tr. 526).

The pulmonary function technicians perform a variety of tests to help evaluate a patient's lung function, tests that doctors then use to diagnose diseases. They also do other types of tests to monitor long term patients or cystic fibrosis patients including conducting arterial blood gas

⁴ Respondent did not produce Farr to testify at the hearing. (Tr. 890-895).

⁵ These therapists include: Darren May; Roxanna Medrano; Ruben Duran, and Chris Bogg (who recently replaced therapist Lisa Rogers). (Tr. 285; 330-331).

⁶ Nasir is a shop steward for the Union. He has held this position since 2009.

tests, pulmonary function tests and exercise studies. (Tr. 328). The pulmonary function lab is located on the second floor of the Hospital. For every surgery that is performed at the Hospital, certain blood work and blood tests need to be performed, accordingly the OR blood gas technician obtains blood tests and runs blood samples for patients receiving procedures in the operating room and reports those results to the anesthesiologists as the surgery is ongoing. The OR blood gas technician also monitors and maintains the blood gas machines used to determine if there is a need for respiratory therapy and interprets those results for the doctors. The OR blood gas lab is located in the operating rooms on the fourth floor of the Hospital. (Tr. 332-333; 442-443).

OR blood gas technician Nasir is the only employee at the Hospital *permanently* assigned to work in the operating room and perform the blood gas studies on a regular basis. Nasir performs these duties on Mondays, Tuesdays, and Wednesdays from 7:00 a.m. to 7:30 p.m. (Tr. 332-333; 443). The other pulmonary function technicians have also been specially trained to perform the duties that Nasir performs in the OR and can fill in for Nasir when he is not working. (Tr. 328-329).

Because there is often a need for emergency surgeries and procedures to be performed in the operating room around the clock, since at least 2004 or 2005, the Hospital had utilized an on-call schedule to cover the needs of the blood gas lab. (Tr. 335-337; 446-448; GCx-48). The pulmonary function technicians and OR blood gas technician were placed on the on-call schedule by Pulmonary Diagnostic Services Manager Farr in order to cover the blood gas lab's needs in the OR in the evenings and on the weekends, when the pulmonary function technicians were not regularly assigned to work. (Id). Farr would post monthly schedules 2 weeks in advance of the month that needed coverage and the pulmonary function technicians and OR

blood gas technician would typically be assigned to be on-call one evening per week and one weekend per month. Weekend coverage was from 7 p.m. on Friday through 7 a.m. on Monday. (Id). Placement on this on-call schedule was mandatory. (Tr.339).

Pursuant to the Agreement and past practice, the pulmonary diagnostic services employees were paid a rate of \$5.75 per hour for simply being placed on the on-call schedule, regardless of whether or not they were called into work. (Tr. 446; GCx-4 pp. 56-57). When pulmonary diagnostic services employees on the on-call schedule were needed to assist with a procedure in the operating room and were called into work for an evening or weekend shift, they would be paid a rate of time-and-a-half their base hourly rate for the hours they were required to work. (Tr. 340; GCx-4 pp. 56-57).

Pursuant to the Agreement, pulmonary diagnostic services employees are entitled to an extra shift bonus of \$125 when they have worked all the hours posted in their posted schedule and then work an additional 12-hour shift on top of his/her regular full time hours. Any additional hours worked beyond the additional 12-hour extra shift would be pro-rated at a rate of approximately \$10.42 per hour (\$125.00 divided by 12 hours). (GCx-4 p. 52; Tr. 285; 334-335). Although the contract reads that employees are entitled to this extra shift bonus when they *sign up* to work an extra shift, Farr had had a long time past practice since at least 2004 or 2005 of paying the extra shift bonus to the pulmonary diagnostic employees when they were called into the Hospital from the mandatory on-call OR blood gas lab schedule in order to work an evening or weekend shift. (GCx-4 p. 52; Tr. 340; 448). Pulmonary Function Technician Darren May (herein May) and OR Blood Gas Technician Nasir were paid the extra shift bonus in this manner by Farr on a regular basis. The extra shift bonuses were coded on employees' paystubs as

“Differential 2.” (Tr. 340-344; 448; GCx-49).⁷ May testified that up until February 2011, all the extra shift bonus pay he received on his paychecks was from getting called back to work on the OR on-call schedule. He didn’t receive extra shift bonuses in any other manner. (Tr. 361).

Chief Human Resources Officer Matthew McElrath (herein McElrath) testified that Respondent’s timekeeping and payroll system, called “Kronos” underwent a major upgrade in August 2010. McElrath was highly involved in the upgrade of the Kronos system. (Tr. 817-818). Managers were trained on using the new Kronos system for a few weeks during approximately the fall of 2010 and the upgrade went live on or around October 1, 2010. (Tr. 819-821). After the new software was implemented Farr discovered she was having a hard time programming her old timekeeping system into the new Kronos system. This triggered an investigation into why the program wasn’t working as it should have been and eventually revealed Farr wasn’t coding the extra shift bonuses correctly and the new system wouldn’t allow her to pay the extra shift bonuses for call-back hours worked on the Blood Gas lab on-call schedule as she had in the past. (Tr. 506; 509-510).

Upon discovering this Human Resources Manager Eva Herberger (herein Herberger) notified McElrath that Farr had been improperly paying the extra shift bonus to pulmonary diagnostic services employees for the callback hours worked on the OR blood gas lab on-call schedule. McElrath recommended to Herberger that the problem be fixed. (Tr. 780-782). The problem was also brought to the attention of Director of Respiratory Therapy and Pulmonary

⁷ May previously worked in payroll at the Hospital’s sister Norris facility and is well versed with the timekeeping system, termed Kronos, that the Hospital uses. (Tr. 372-373). May was clearly able to translate the information contained in his paystub both during his direct and cross examinations. (Tr. 343-344; 358-363). May testified that when the Kronos system was set up, it was set up in shifts of 10 hours, despite the fact that employees typically work 12 hour shifts. The “30” indicated on the paystubs in GC-49 means a total of 3 extra shifts, and the “20” means a total of 2 extra shifts. The extra shift amount is then multiplied at the extra shift bonus rate of \$125. (Tr. 343-344; GCx-49).

Diagnostic Services Sarkissian around the time that the new software was implemented. (Tr. 506; 509-510).

On October 1, 2010, May received his paycheck for the payroll period of September 12-25, 2010, and noticed that the extra shift bonus for call back hours worked on the blood gas lab OR on-call schedule was not indicated on this paystub. (Tr. 344-346; GCx-50).⁸ Immediately after noticing this problem on his paycheck, May went to speak with Farr. Farr initially told May that she had probably made a mistake and that she would correct the problem. Farr followed up with May a few days later, on approximately October 5, 2010, and told him that she had been making a mistake by paying the pulmonary diagnostic services employees the extra shift bonus on the hours employees were called back into work from the mandatory blood gas lab on-call schedule. (Tr. 346).

May told Farr that the pulmonary diagnostic services employees had always been paid the extra shift bonus in that manner and that he was going to raise the matter with the Union. (Tr. 346-347). Later that day, May faxed his paystub to and informed Union Organizer and then designated field representative Orea of the problem. Orea's conversation with May was the first notice that the Union received of the elimination of the extra shift bonus. (346-347; 479-480). In early October 2010, May informed Nasir that Farr didn't include the extra shift bonus on his paycheck. After hearing this Nasir followed up with Farr and Farr informed Nasir that the pulmonary diagnostic services employees wouldn't be receiving the extra shift bonus as they had in the past because there had been a mistake and she had coded it wrong. (Tr. 449-451).

⁸ May testified that because he had worked 88 hours that pay period, he should have received an extra shift bonus of \$125.00 (for the 12 hours he worked beyond his normal 72 hours that pay period) in addition to an extra 4 hours of an extra shift bonus at a pro-rated basis. In total May testified that he should have received about \$160 or \$170 in extra shift bonuses on the paycheck that he received on October 1, 2010. (Tr. 344-346).

On October 12, 2010, Orea sent a letter to Human Resources Manager Herberger regarding the elimination of the extra shift bonus for call back hours worked and other issues.

This letter read in relevant part:

It has come to my attention that [the Hospital] has implemented the following changes without notifying the Union... You are now refusing to pay the extra shift bonus to the PFT Department which has been paid for many years... all the above changes are unilateral changes. The Union was never notified about these changes. *The Union demands that you cease and desist from implementing these changes immediately until the Union has had a chance to meet with you to negotiate over these changes* [emphasis added]. Please call me to set up a time to meet. We are prepared to meet on any day and time that works for you. (Tr. 479-480; GCx-54).

On October 22, 2010, Orea met with Respondent's Counsel, Linda Deacon, (herein Deacon) to discuss the elimination of the extra shift bonus and other issues. During this meeting Orea raised the issue of the elimination of the extra shift bonus as an example of the things that Respondent was doing that were creating turmoil and as an example of one of the unilateral changes implemented by Respondent. Deacon told Orea that the way the extra shift bonus had been paid for call back hours worked on the OR blood gas lab on call schedule was a mistake. Orea told Deacon that the parties needed to come together and find a resolution of this matter. Deacon said she would look into the matter further. Orea did not agree to the elimination of the extra shift bonus during this meeting nor was this matter resolved in any way. (Tr. 489-490).⁹

Shortly after Union Organizer Mendoza took over for Orea as field representative in early November 2010, she learned about the change to the payment of the extra shift bonus during a conference call with employees in the Pulmonary Diagnostic Services Department. Prior to this conference call, Respondent never notified her of this change. (Tr. 285). On November 11, 2010, the Union filed a grievance over the elimination of the extra shift bonus. (Tr. 286; 451; GCx-28).

⁹ Deacon did not testify to refute any of the statements made during this meeting.

A grievance meeting was held over the grievance on December 9, 2010. In attendance at this meeting were: Mendoza; Nasir; Pulmonary Function Technician Lisa Rogers; and Human Resources Manager Herberger. The Union and the employees conveyed to Herberger that the way that the extra shift bonus had been paid was a past practice and that the Union had not been notified prior to Respondent unilaterally changing the way in which it was paid. The Union and the employees then proposed that in order for the pulmonary diagnostic services employees to qualify for the extra shift bonus, the OR blood gas lab on-call schedule of the pulmonary diagnostic services employees should be made voluntary instead of mandatory, giving the pulmonary diagnostic services employees the first right to sign up for open slots, and if all slots weren't filled by the pulmonary diagnostic services employees, then the respiratory department would be allowed to fill the open slots. Herberger was receptive to the Union and the employees' proposal analogizing it to the way priority was given to certain employees in other departments of the Hospital. Herberger stated that she would discuss the proposal with Sarkissian and Farr and get back to the Union. (Tr. 454-455; 288-289). The Union did not agree to the elimination of the pulmonary diagnostic services on-call schedule during this meeting but simply suggested a manner in which to resolve the issue of the extra shift bonus. (Tr. 289).

At the beginning of January 2011, Herberger called Mendoza and stated that Respondent was agreeing to the Union's proposal to eliminate to the pulmonary diagnostic services blood gas lab on-call schedule in the OR. Mendoza clarified to Herberger that that had not been the Union's proposal, but stated she had to get off the phone as she was about to walk into another meeting. (Tr. 288-289). Mendoza saw Herberger during a bargaining session a couple of days later on approximately January 4, 2011, and reiterated that the elimination of the blood gas lab on-call schedule had not been the Union's proposal. Mendoza asked if she and the other

pulmonary diagnostic services employees could meet with Herberger to discuss their proposal. They scheduled to meet on approximately January 5, 2011. (Tr. 290).

On approximately January 5, 2011, Mendoza, Pulmonary Function Technician May and OR Blood Gas Technician Nasir met with Pulmonary Diagnostic Services Manager Farr and Herberger. Mendoza and the employees reiterated that they had originally proposed that if management was going to refuse to pay the extra shift bonuses to employees for hours worked from the on-call schedule, then the Union and the employees wanted Respondent to make the on-call schedule voluntary instead of mandatory, allowing the pulmonary employees the first right to voluntarily sign up on the on-call list, then employees would still get the extra-shift bonus if they signed up for a shift and their hours qualified them for the bonus. (Tr. 290; 347-349; 456). Herberger replied that Respondent did not agree to their proposal and that what they were going to do instead was eliminate the OR on-call schedule for pulmonary. Mendoza responded that the elimination of the OR on-call schedule was yet another unilateral change and the Union wanted to negotiate over it. Herberger told Mendoza and the employees that the lead respiratory therapists and the clinical coordinators in the respiratory department would be taking over the work in the OR Blood Gas Lab. (Tr. 290-292; 347-349).

On January 12, 2011, Herberger sent a letter to Mendoza denying the Union's grievance over the elimination of the extra-shift bonus. (Tr. 292; GCx-31). On January 24, 2011, Mendoza sent a letter to Herberger, summarizing in great detail the proposal that the Union and the employees set forth above during the December 9, 2010 meeting and clearly explaining that Respondent had disregarded the Union's original proposal and instead only "picked and chose" those aspects of the proposal that it wanted. In this letter, Mendoza also demanded that

Respondent cease and desist from the implementation of the change to the OR on-call schedule. (Tr. 294; GCx-32).

As of the beginning of February 2011, despite the Union's efforts to resolve this matter with Respondent, the OR on-call schedule was completely eliminated and Respondent began assigning employees in the Respiratory Department to handle the OR Blood Gas Lab work previously handled by the Pulmonary Diagnostic Services Staff via the on-call schedule. (Tr. 351; 456). On February 7, 2011, the Union filed a grievance over the elimination of the on-call schedule. (Tr. 292; 458; GCx-30). On February 16, 2011, Herberger sent a letter to Mendoza denying the Union's grievance over the elimination of the on-call schedule. (Tr. 295; GC-x 33).

May estimated that he has lost approximately between \$1,000 to \$2,000 per month as a result of the elimination of the on-call schedule (including the \$5.75 hourly rate he was paid for simply being paid to be placed on the on-call list in addition to the hours he was paid when he was called back and paid at a rate of time-and-a-half his regular salary). Since the mandatory OR on-call schedule has been eliminated he no longer has the opportunity to work evening and weekend shifts. (Tr.351-352). May testified that he has also suffered financially as a result of the elimination of the extra shift bonus. He used to pick up between 2-4 extra shifts per month thus earning up to about \$500 per month. (Tr. 353). Nasir estimated that he has lost approximately \$1000 per month as a result of the elimination of both the on-call schedule and the extra shift bonus. (Tr. 459).¹⁰

In approximately January 2011, Respondent began posting voluntary extra shifts for the pulmonary function lab. However these extra shifts only covered day shifts from Monday through Friday and didn't give employees in the pulmonary services department the same

¹⁰ Respondent's own Custodian of the Records was unable to clearly explain the payroll records entered into the record as exhibits Rx 38-42 and was unable to reconcile the differences between the employees' paystubs and their own payroll records. (Tr. 808-816).

amount of opportunities to earn extra money as they did via the evening and weekend shifts included in the OR on-call schedule. (Tr. 363; 467-468). Also although there are also extra shift opportunities in the Respiratory Department, the pulmonary function technicians do not have the opportunity to sign up for these shifts as there are only between 10 shifts available for the nearly 100 respiratory and pulmonary diagnostic services employees. The pulmonary diagnostic services employees have to compete for the extra shifts among the dozens of respiratory therapists and will be bumped if a respiratory services employee has more seniority than them. (Tr. 468-470).

May also testified that the OR Blood Gas Lab has suffered since the elimination of the on-call schedule. The equipment in the lab no longer gets the proper maintenance and the quality control of the lab is no longer in place as it was when the specially trained Pulmonary Diagnostic Services employees were solely responsible for the lab. (Tr. 351-352). The respiratory therapists now have to balance the OR Blood Gas Lab among their other regular duties and thus don't have the same time, attention or training to spend on the OR Blood Gas Lab as did the pulmonary diagnostic services staff. (Tr. 352; 364).¹¹

C. Respondent changes the schedule of the echo technicians.¹²

Article 11(F)(7) of the Agreement provides the following:

Should the Employer determine that it is necessary to change/revise a schedule(s) for more than sixty (60) days and start &/or end time(s) by more than sixty (60) minutes, and

¹¹ May also testified that the pulmonary diagnostic services staff used to cover the OR blood gas lab during the day shifts on Thursdays and Fridays when Nasir was not regularly assigned to work but since, the above changes took place, Respondent has assigned the Thursday and Friday day shifts to the Respiratory Department as well. (Tr. 352-353).

¹² Respondent denies the agency status of Tasneem Naqvi (herein Naqvi) and Leslie Saxon as to this allegation despite the fact that the signatures of these two individuals appear on the memorandum announcing the schedule change at issue as to this allegation. (GCx-27). Moreover, Naqvi has clinical oversight over the department involved in this allegation and oversees the running of services by the echo technicians. (Tr. 620-621). Naqvi also played a crucial role behind the decision to change the schedules of the echo technicians. (Tr. 594-600; 621-633; 636-640).

if the change affects more than three (3) current employee(s) in positions covered by the CBA, the Employer agrees to notify the union in writing no less than 30 days prior to the implementation date. If the union requests, the Employer will meet with the union steward and or union representative to make a reasonable attempt to review/revise the schedule so as to have the least impact on the fewest number of full-time and part-time staff possible. Once the new schedule is established, bidding will be accomplished by seniority within each classification. None of the foregoing shall affect the Employer's ability to make any changes or exercise any rights provided for in Article 21- Management Rights. (GCx-4, p. 32).¹³

Echo technicians employed at the Hospital are responsible for taking ultrasound images of patients' hearts in order to look for any abnormalities in the valves and fluids of the heart. There are 4 full-time and 4 per diem echo technicians employed at the Hospital. The echo technicians treat the most acute patients that are often not able to be treated in the county or community hospitals. The echo technicians work in the Cardiology Department and are supervised by Cardiology Supervisor Rafael Llarena (herein Llarena) and Director of Echocardiography Services and Noninvasive Cardiology Susana Perese (herein Perese). (Tr. 226-228; 592-593; 634). As the Executive Administrator for Surgical Services and Cardiovascular Specialities, Tarek Salaway (herein Salaway) has oversight of this department. (Tr. 592).

Gigi Youseff (herein Youseff) is a lead echo technician who has worked for the Hospital since 2003. (Tr. 226). When Yousseff first started working for the Hospital, the echo technicians worked a schedule of 8-hours-a-day/ 5-days-a-week. In approximately 2008, the echo technician staff and their then supervisor Susan Farr mutually decided that the 8/5 schedule

¹³ Respondent produced Cory Cordova (herein Cordova), former field representative for the SEIU at the Hospital up until May 2010, to testify as to this specific provision of the Agreement. (Tr. 721). Cordova testified that under the SEIU, if there was going to be a schedule change, then the SEIU would get a call, an email, a letter, or employees would get notice of the change and if there was a problem with the change, the Union would bring it up with the Hospital. (Tr. 724-725). Cordova testified that if the conversation with the Hospital did not result in a resolution, the Union did not have the power to block the schedule change. (Tr. 725). Cordova did testify however that the Union could file grievances over the lack of notice of the change as well as over the change itself. (Tr. 729). Cordova also testified as to the ongoing rivalry between the SEIU and the Union and the fact that the Union broke out from some of the leadership in the SEIU and that there are lawsuits surrounding this issue. (Tr. 727-728).

was problematic because it didn't provide adequate coverage of all the areas of the hospital,¹⁴ including inpatient and outpatient services, intensive care, and the operating room, that needed to be covered. Accordingly the echo technicians decided together with their supervisor that they should be working a 12-hour-a-day/3-day-a-week schedule. (Tr. 228-229; 251-252). As of 2008, the echo technicians began working this new 12/3 schedule. (Tr. 229). Echo technician Barry Martin (herein Martin) began working for the Hospital in 2008. From the start of his employment he worked the 12/3 schedule. (Tr. 251-252). Martin is a member of the Union's bargaining committee. (Tr. 252).

In early November 2010, Perese, Salaway and Llarena held a meeting for all of the echo technicians. During this meeting Perese stated that she had tried to think of a way to improve patient care¹⁵ and that it had been decided that by going to a 5/8 schedule it would benefit patient care. (Tr. 254).¹⁶ The echo technicians in attendance at the meeting were shocked by the announcement. After they had recovered they expressed their concerns about moving to the 5/8 schedule and said that they felt that the 12/3 schedule better handled the patients and the volume of work. (Id). Martin asked if they could vote on the matter but Perese said that they could not vote on the issue, that it was a management decision and that they were already going forward with the decision. The employees were told that the new schedule would be implemented on a 3-month basis and that after 3 months they would evaluate it and see how it was working. (Tr. 254-255). Originally during the meeting, Salaway, Perese and Llarena had stated a desire to go

¹⁴ Youseff testified that the 5/8 schedule was often problematic because a surgery would begin at 1:00 p.m. and the echo technician would be scheduled to leave at 3:00 p.m. in the middle of the surgery. The 12/3 coverage however allowed one echo technician to be scheduled to be assigned to one specific area of the Hospital needing coverage for an entire 12-hour period. (Tr. 229).

¹⁵ Respondent's witnesses testified at great length about the need for the schedule change in order to benefit patient care. Specifically, Respondent's witnesses stated that echo technicians were needed at the Hospital on more of a regular schedule so that their schedules matched more closely with those of the doctors, nurses and other technicians with whom they worked on a regular basis. Thus allowing more continuity of service and better communication between the echo technicians and the other staff they worked with. (Tr. 594-600; 621-633; 636-640).

¹⁶ Salaway's calendar entry shows that this meeting took place on November 3, 2010. (Rx-45).

forward with the schedule change beginning December 6, 2010. However during the course of the meeting it was decided that they would go forward with the schedule change in January 2011 instead. (Tr. 608-609).

Youseff was not able to attend this meeting because she was not working the day the meeting took place. Accordingly Salaway and Llarena called Youseff to inform her of the schedule change. Salaway told her that they had decided to change the echo technician shift back to the 5/8 schedule in order to improve patient care. (Tr. 230-231). They didn't go into the details as to why there was a need for such a change. Youseff told Salaway and Llarena that she was unhappy with the decision and asked that they involve her in the decision as the lead echo technician. (Tr. 231).

Soon after the employees were notified of management's decision to change their work schedule, they spoke with Union Organizer Mendoza at the Hospital about the change in approximately the beginning of November. (Tr. 233; 256-257; 296-297). This was the first notice that the Union received about the schedule change for the echo technicians. (Tr. 297; 485).¹⁷ Mendoza instructed the employees to have a step one grievance meeting with their director to talk about why the Hospital was making the change and to see whether the Hospital had other ideas on how to minimize the impact of the change. (Tr. 296-297). Following

¹⁷ Although Herberger testified that she notified the previous Union field representative Orea about the change to the echo technician's schedule during a meeting on October 22, 2010, and produced photocopies of undated post-it notes stating as such, (Tr. 847-855; Rx 67), Orea denied that he ever received such notice from Herberger. On cross-examination, Orea testified clearly about each of the topics discussed during the October 22 meeting with Herberger and none of those topics included the change of schedule for the echo technicians. (Tr. 487). On rebuttal, General Counsel attempted to offer Orea's notes from the October 22 meeting which were recorded on his I-pad as GCx-58, but that exhibit was rejected. (Tr. 907-911). Herberger also testified that she spoke with Mendoza about the echo tech schedule change in early November 2010. (Tr. 857). Herberger could not remember very much however about this alleged conversation with Mendoza. She didn't recall if the conversation was face-to-face or over the phone; she didn't recall where the conversation took place; and she didn't take any notes of her conversation with Mendoza. (Tr. 887). Mendoza denied ever having any such meeting or conversation with Herberger. (Tr. 897).

Mendoza's instruction, the employees did have a few meetings with management on this issue. (Tr. 235).¹⁸

On November 29, 2011, Mendoza had a meeting with Human Resources Manager Herberger to discuss various issues including the schedule change for the echo technicians. During this meeting, Mendoza informed Herberger that the Director of the echo technicians wanted to change their schedule. Mendoza told Herberger that the Union wanted to meet and negotiate over that issue. Herberger responded that she had heard a little about the issue and began talking about a schedule change for the vascular technicians that was occurring around that same time. Mendoza clarified with Herberger that it was the echo technicians that she was talking about. Herberger responded that she hadn't heard anything about the echo technicians. (Tr. 297-298).

On November 29, 2010, Herberger followed up on the conversation she and Mendoza had and sent an email to Mendoza clarifying her confusion between the echo technicians and the vascular technicians, notifying her about the changes the Hospital wished to make to the schedules of the vascular technicians and stated that a 30-day notice of the change would be given to the vascular technicians. In that email, Herberger also stated: "Originally I thought they were 12-hour employees...but they are not. It is the echo technicians who are 12-hour employees." (GCx-34). On November 30, 2010, Mendoza sent a reply email to Herberger summarizing some of the topics discussed during their November 29, 2010 meeting and

¹⁸ Article 13(Q) "Modification of Practices" of the Agreement provides that: "There shall be no individual bargaining with employees over wages, hours and working conditions. Where the Agreement explicitly allows employee agreement, it shall not be coercive. If requested, by either party, the parties agree to discuss modifications or improvements to terms and conditions of current practices." (GCx-4, p. 51).

acknowledging Respondent's desire to change the schedule of the vascular technicians. (GCx-35).¹⁹

In approximately mid-December 2010, Respondent distributed a memorandum to the echo technician staff that announced the schedule change of the echo technicians would be in effect as of January 2, 2011. Although the memorandum was dated as of November 13, 2010, employees didn't receive it until nearly a month later. This memorandum made no mention of whether or not the new schedule was being implemented on a trial basis. (GCx-27; Tr. 231-232; 255). The Union was not given a copy of this memorandum. (Tr. 299).

On December 22, 2010, Mendoza sent an email to Director of Noninvasive Cardiovascular Diagnostic Services, Perese. In this email, Mendoza stated that the Union was aware of the announcement of the unilateral change to the echo technicians' schedule. Mendoza demanded that Respondent cease and desist from implementing this change until all parties had completed good faith negotiations. (GCx-36). The Union did not receive a response to this email. (Tr. 300-301).

On January 4, 2011, after the schedule change for the echo technicians had already been implemented, during collective-bargaining negotiations, a side-bar discussion was held in order to discuss the schedule change. Present at the meeting were Respondent Counsels Lester Aponte and Deacon, Herberger, echo technician Barry Martin, and Mendoza. (Tr. 302). During this sidebar, Mendoza stated that she had repeatedly asked for a meeting to talk about the change in the echo technicians' schedule and she hadn't heard back from them and now the change had already been implemented. She also raised the fact that employees had initially been told that the change would be only on a 3 month trial basis, yet the memorandum the employees had

¹⁹ Mendoza testified that the Union didn't grieve or pursue the changes to the vascular technicians' schedules because the Union received proper written notification of the schedule change and the vascular technicians were scared to make any issue of the schedule change. (Tr. 897).

received said nothing about a trial basis. Mendoza stated that the Union wanted to understand why the Hospital was making the change so that the Hospital's needs could be addressed without having such an impact on the echo technicians. Mendoza also mentioned the cease-and-desist letter she had sent to Perese on December 22, 2010. (Tr. 257-259; 302-303; GCx-36). Deacon then stated that she didn't understand the issue and that she wanted to talk further with Perese before getting back to the Union. At the close of the side-bar meeting, Respondent's representatives told Mendoza and Martin that they would get back to the Union after they had spoken to Perese. (Tr. 303). Mendoza did not agree to the schedule change during this meeting. (Id).

On January 5, 2011, Mendoza sent a letter to Herberger following up on several issues that still needed to be addressed by Respondent, including the issue of the schedule change of the echo technicians. (GCx-37). On January 18, 2011, Mendoza sent another letter to Herberger following up on several unresolved issues. Among the issues she included in the letter was the issue of the schedule change for the echo technicians. Mendoza stated in this letter that the Union was still waiting for a response to set a date to meet around the changes in the schedule for the echo technicians. (GCx-38). Mendoza never received a response from Respondent to either of these letters. (Tr. 304-305).²⁰

Since the schedule change, patient care has been impacted. Previously under the 12/3 schedule, there were 3 echo technicians available all day long every day. With the new 5/8 schedule, and the staggered 8-hour shifts that are worked, there are only 2 echo technicians in the morning and 2 echo technicians in the afternoon/evening. There is only overlap of the echo technicians for a couple hours in the afternoon and with the various departments that need to be

²⁰ Although Herberger's notes from the January 4, 2011 meeting may suggest otherwise, (See Rx-68), Mendoza's letters clearly show that the Union was waiting for Respondent to get back to the Union to further discuss the echo technician schedule change.

covered throughout the day, the modified schedule runs thin on patient care. (Tr. 235-236; 260). Another problem is that under the 12/3 schedule there was never a need to use registry services because there was always another echo technician who was off that day and could come in and cover if another technician is unavailable. Now because all the echo technicians work every day, the registry service needs to be used and the registry employees do not provide the same quality of service causing the need to repeat certain tests that were done improperly by the registry employees. (Tr. 236-237).

D. Respondent eliminates the 7-minute grace period and begins disciplining employees who are 7 minutes or less late to work.²¹

Employees at the Hospital are issued a badge that they use to swipe in and out at arrival, break times, and departure times using the Kronos timekeeping system. (Tr. 58; 159). The Hospital has a payroll policy whereby employees who arrive at work and swipe in 8 minutes or later beyond their start time will have their pay docked by at least 15 minutes. Employees who arrive at work and swipe in between 1 and 7 minutes beyond their start time will not have their pay docked; instead and for payroll purposes, the Kronos system will round that employee's time of arrival back to the employee's actual start time. For example if an employee's normal start time is 6:00 a.m., and that employee arrives to work at 6:07 a.m., the Kronos timekeeping system will round back his start time as 6:00 a.m. (Tr. 59; 124-125; 160; 206-207).

Since at least 2009, employees in the Laboratory, Respiratory and EVS Departments have had the understanding that in addition to not being docked pay for being 7 minutes or less

²¹ The General Counsel amended the complaint at hearing to limit this allegation only to the Laboratory, Respiratory and EVS Departments. The allegation was also amended to allege that Respondent began disciplining employees in these departments beginning in approximately February 2011, instead of March 2011. (Tr. 14-25; GCx-2).

late to work, tardies of 7 minutes or less wouldn't count against employees for disciplinary purposes. (Tr. 145-148; 166-170; 171-173; 207-208; 211).²²

Respondent maintains an attendance and punctuality policy at the Hospital which defines tardiness as:

Any time an employee arrives late at workstation, which includes returning from rest periods and meal periods and/or is not dressed appropriately and ready to work at the beginning of the assigned shift. Shift times have no grace period for dressing or clocking i.e., if shift starts at 7:00 a.m. employee must be ready to report to work at that time. Tardiness is based on arrival and/or departure as scheduled for shift start and end times. It is not associated with time reporting or payroll clock in times. (Tr. 98; Rx-1).

The above-described policy was revised after Respondent took over operations of the Hospital, on January 26, 2010, in order to expand on the definition of tardiness and specifically added the sentence "tardiness is based on arrival and/or departure as scheduled for shift start and end times. It is not associated with time reporting or payroll clock in times." (Tr. 764-766). The previous attendance and punctuality policy which had been revised most recently on March 31, 2006, did not contain this sentence. (Rx-63). In making this change, Respondent was seeking to clarify the difference between the rounding rules with respect to payroll and the rules with respect to how time is paid. (Tr. 766). Employee confusion over this aspect of the policy prompted Respondent to add this sentence to the policy. (Tr. 827-828). McElrath testified that the newly revised terms were posted on the intranet but were not highlighted to call them to the employees' attention. McElrath also testified that he didn't hold, and no hospital-wide meetings were held with regard to this change to the policy. (Tr. 828-830).²³

²² Human Resources Manager Herberger testified that Tenet and the SEIU went to "hot button" arbitration over the issue of the existence of the 7-minute grace period in 2006 and that Tenet prevailed on that issue. (Tr. 841-845). Respondent however failed to produce the arbitrator's decision on this issue. Respiratory employee Torres remembered the SEIU's pursuit of that particular grievance but stated that the arbitration was never resolved. (Tr. 103).

²³ Although McElrath testified that Respondent's policies are posted on the intranet, McElrath conceded that not all employees have access to a computer to view these policies. (Tr. 831).

Field representative Sophia Mendoza first learned that the 7-minute grace period was no longer being honored in approximately April and/or May 2011, when she got a text message from Laboratory employee Tracy Mills (herein Mills) and a phone call about the issue from EVS employee Melissa Lynch (herein Lynch). (Tr. 316-317; GCx-52). Prior to hearing about this matter from Mills and Lynch, the Respondent had never notified the Union of any changes it was making to the tardiness policy. Upon learning that certain employees were being disciplined under this newly implemented policy, Mendoza filed grievances on behalf of several employees including Lynch and EVS employee David Johnson as well as on behalf of Mills and Laboratory employees Cruzberto Sandoval, Edgardo Nured, Akenna Scotland. (Tr. 317).

On April 20, 2011, Mendoza sent a letter to Herberger listing a number of unilateral changes that had been implemented at the hospital. Among these was the enforcement of the 7-minute grace period in the laboratory. Mendoza demanded in this letter that Respondent cease and desist from implementing these changes and revert to the status quo until the parties completed negotiations over the issues. (Tr. 383-385; GCx-52).

Between May and June 2011, there was a series of correspondence between Mendoza, Herberger and Human Resources Generalist Sue Whitfield (herein Whitfield) on the topic of the 7-minute grace period. (GCx-43; GCx-44; GCx-45; GCx-46; GCx-47). In this correspondence Whitfield and Herberger made clear that they were not willing to meet further with the Union on the topic of the 7-minute grace period and discipline issued in connection with the grace period. Their reasons for this position was that they opined that the Union could not simultaneously pursue an unfair labor practice charge and a grievance over the same issue and they maintained that a unilateral change had not occurred (GCx-45 and GCx-47).

Alex Sylla (herein Sylla) is an HR Generalist. In this capacity he has access to personnel files maintained in the HR Office. (Tr. 692). In preparation for the hearing, Respondent assigned Sylla to search personnel files looking for employees who have been written up for tardiness within the 7-minute or less timeframe from April 2009 to the present date. Sylla searched only the 600-700 bargaining unit employees and used a database to get a wide list of employee write-ups for tardiness and then went through each write-up to determine if those employees were written up for tardies within the 7-minute grace period. In doing this, of the 600-700 employees he searched, he came up with a total of only 14 incidents in which employees were issued disciplinary notices for tardies of 7-minutes or less. (Tr. 694-696; 697-702; 704-705; 711; Jx-1; Rx-25 through 35; Rx-60-62).

Of these disciplines, only one of the employees of the group of 14 that Sylla produced, worked in a department at issue in the Complaint. The verbal warning issued to respiratory therapist Margaret Knight on April 15, 2010, as will be discussed further below, was the only discipline derived from Sylla's search which included an employee in one of the three departments at issue in the case. The other employees who received this discipline worked in the operating room, pharmacy, nursing, centralized scheduling, or other departments.²⁴ The Respondent didn't produce any write-ups including tardies of 7-minutes or less in the EVS or Laboratory Departments. (Jx-1; Rx-25 through 35; Rx-60-62).

(1) Respiratory Department

As discussed above, the Respiratory Department is run by Director of Respiratory Sarkissian and Manager of Respiratory O'Connel. Both O'Connel and Sarkissian assumed these positions in approximately September 2010. (Tr. 57; 498-499; 526). Shortly after they began

²⁴ A few of the departments listed on these disciplinary documents listed only codes under the department heading section of the disciplinary records and there was no testimony on the record or in the stipulation entered into between the parties in Jx-1 to clarify which department the disciplines came from.

working in the Respiratory Department, Sarkissian and O'Connel held a staff meeting for the department to introduce themselves. During this meeting, one of the day shift respiratory therapist raised the issue of the 7-minute grace period and asked whether employees would still be afforded a grace period for clocking in. Sarkissian said yes, that he wasn't going to be nitpicky and that he wanted everyone to be on time at 6:00 to take report, but that he would not write anyone up within the 7-minute grace period. (Tr.62-64; 136; 145-148).²⁵ Since this meeting Respiratory Therapist Noemi Aguirre (herein Aguirre) has not been written up for being tardy 7 minutes or less, despite the fact that she has been tardy 7 minutes or less on various occasions after this meeting occurred. (Tr. 149; GCx-17, pp. 2449-2453).²⁶ She has been disciplined, however, for being late *more* than 7 minutes on two occasions. (Tr. 149-151; 154; GCx-16; Rx-8).²⁷

The documentary evidence shows that within the Respiratory Department, over the years employees may have been occasionally and inconsistently disciplined for being tardy 7 minutes or less both before and after Respondent took over the Hospital. For example Noemi Aguirre was disciplined twice in 2006 for tardies of 7 minutes or less. (GCx-13 and GCx-14). She was also disciplined only once in April 2010 for tardies of 7 minutes or less,²⁸ despite the fact that

²⁵ On both direct and cross examination Sarkissian did not specifically deny that he hadn't made the above comments. He did recall the meeting and admits saying that he told employees that there could be "mistakes" and "accidents" with respect to tardiness. (Tr. 503-505; 515-516).

²⁶ Although the writing is very small, these pages of Aguirre's time punch records show that Aguirre was late to work 7 minutes or less on numerous occasions and these occasions were not counted against her. See for example the following dates listed on these pages: 11/2/10; 11/10/10; 11/21/10; 12/8/10; 12/15/10; 12/18/10; 12/23/10 (GCx-17 p. 2449); 1/11/11; 1/12/11; 2/3/11; 2/18/11; 3/3/11; (GCx-17, p.2450). This list does not include all tardies of 7 minutes or less that is included in this exhibit but is merely a sampling of the numerous times this employee was tardy 7 minutes or less.

²⁷ Under Respondent's disciplinary policy with respect to tardiness, employees will receive: a "verbal correction" after the 8th occurrence of tardiness in a consecutive 12-month period; a "written warning" for a 9th occurrence in a consecutive 12-month period; a "24-work-hour suspension without pay after the 10th occurrence in a consecutive 12-month period; a "final warning" after the 11th occurrence in a consecutive 12-month period; and discharge after the 12th occurrence in a consecutive 12-month period. (See Rx-1, page 4 of 4).

²⁸ Respondent failed to produce any record evidence that Aguirre had been disciplined for tardies of 7 minutes or less between 2006 and 2010.

she had been tardy 7 minutes or less on multiple occasions between 2009 and 2010.²⁹ (GCx-15; GCx-17, p. 2436-2437, 2439-2441).³⁰ As stated above, since April 2010, Aguirre has not been written up for tardies of 7 minutes or less. (Tr. 149). Moreover Respondent failed to produce record evidence that any respiratory employees had been disciplined for tardies of 7-minutes or less between 2006 and 2010. Nor has Respondent produced any evidence showing that other employees, aside from Juan Michael Torres as will be discussed further below, in the Respiratory Department have been written up for tardies of 7 minutes or less since April 2010, including the time period following the fall 2010 staff meeting with Sarkissian and O'Connel discussed above.³¹

Similarly respiratory therapist Juan Michael Torres (herein Torres) was written up for tardies of 7 minutes or less on February 10, 2006. (Rx-2) but Respondent failed to produce any evidence that he received additional write ups for tardies of 7 minutes or less until April 16, 2010 (Rx-4) despite the fact that Torres was tardy multiple times between 2009 and 2010 (GCx-12).³²

Torres is a highly involved member of the Union as will be discussed in further detail below. (Tr. 48; 51-53). Shortly after the above described department meeting during the fall of 2010, whereby Sarkissian and O'Connel were introduced to the staff, Torres met with O'Connel in her office. During this meeting, Torres introduced himself as a chief steward at the Hospital

²⁹ None of Aguirre's tardies of 7 minutes or less cited here were included on her April 2010 disciplinary notice. (Id).

³⁰ See for example dates: 4/20/09; 4/13/09; 5/2/09; 6/5/09; 6/9/09; 9/25/09; 9/27/09; 9/30/09; 12/17/09; 1/2/10; and 2/25/10.

³¹ See also: Rx-4 (discipline issued to Michael Torres on April 16, 2010); Rx-17 (undated discipline issued to Allen Ravago including tardy dates between March and April, 2010); Rx-16 (discipline issued to Alex Correa on April 15, 2010); Rx-18 (discipline issued to Richard Rea on March 6, 2006); Rx-19 (discipline issued to Richard Rea on May 11, 2006); Rx-21 (discipline issued to Richard Rea on June 2, 2006); Rx-22 (discipline issued to Richard Rea on August 28, 2006); and Rx-23 (discipline issued to Richard Rea on April 18, 2010).

³² See for example GCx-12 pp: 2486 (5/14/09); 2487 (6/11/09, 6/13/09, 7/2/09); 2488 (8/5/09, 8/19/09, 8/28/09); 2489 (9/16/09, 9/25/09, 10/23/09, 12/04/09); 2490 (12/18/09, 2/3/10, 2/4/10, 2/13/10, 2/17/10); 2491 (3/4/10, 3/5/10). This list does not include all tardies of 7 minutes or less that is included in this exhibit but is merely a sampling of the numerous times this employee was tardy 7 minutes or less. None of the tardies of 7 minutes or less listed here were included on Torres' disciplinary notice he received in February 2006.

and told her that it was his role to act as a liaison between employees and management. (Tr. 64-66). The purpose of the meeting was to discuss Torres' attendance issues. (Tr. 65). O'Connel presented Torres with a list of times that he had been tardy. (Tr. 66; GCx-5 pp. 0616-0617). Torres disputed many of the occurrences listed on those pages. (Tr. 67). One of Torres' points of contention over the occurrences listed was the fact that some of his tardies were 7 minutes or less. Torres pointed out to O'Connel that his understanding from the above-described staff meeting with Sarkissian was that the tardies of 7 minutes or less should not be counted against him. O'Connel stated that the Hospital did have a grace period although it is considered late, but that they wouldn't be ding his pay for those occurrences (Tr. 67-68).

On February 4, 2011, O'Connel asked Torres to meet with her again. On this occasion, O'Connel issued Torres a Step 1 Verbal Notification. (Tr. 68; GCx-5). The same handwritten pages were attached to the discipline as Torres had been shown at his prior meeting with O'Connel. During this meeting, O'Connel clarified her position to Torres with respect to the 7-minute grace period. O'Connel told Torres that even though the Hospital policy didn't allow for a grace period, that within the Respiratory Department, they would continue to honor the grace period and that tardies of 7 minutes or less wouldn't count towards discipline. (Tr. 69).

The documents Respondent produced to General Counsel pursuant to her subpoena support the position iterated by O'Connel during her meeting with Torres on February 4, 2011, that the Respiratory Department would continue to honor the grace period. At the bottom of the first page of GCx-5 p. 0613, in the box listed "Dates Tardy," it reads "Total= 19 See Attached." Attached to the actual disciplinary document are handwritten pages (pp. 0616-0617) showing the dates and times that Torres allegedly was tardy. If the corrected tardy times are subtracted, it leaves a total of 35 incidents in which Torres was tardy between June 25, 2010 through January

6, 2011. Page 0615 of GCx-5, however only lists a total of 19 tardies, and completely eliminates those occasions in which Torres was tardy 7 minutes or less. The bottom of this page reads: "These were tardies in excess of 7 minutes. The total tardies per hospital policy during this time=35." Thus Torres was disciplined on February 4, 2011, only for tardies in excess of 7 minutes and not for any tardies falling within the 7-minute grace period.

On March 18, 2011, O'Connel issued Torres a Step 2 Written Warning. On this occasion, O'Connel asked Torres to come and meet with her in her office. The Step 2 warning issued to Torres included a date on which Torres was 7 minutes late to work. Torres reiterated that if the department had a grace period policy, he shouldn't be counted as late. O'Connel responded that it was still considered late and that was why she was including it in his discipline. (Tr. 70-72; GCx-6).

(2) *EVS Department*

Lynch works in the EVS (Environmental Services) Department. She has worked in this position since 2008. Her current supervisor is Inez Avila. (Tr. 156-157). EVS workers are represented by the Union. Lynch is a shop steward for the Union which is an elected position. (Tr. 158-159). Between May and November of 2008 Lynch received 3 disciplinary notices for tardiness. The discipline Lynch received on November 11, 2008, (GCx-19) included incidents in which Lynch was tardy 7 minutes or less. (Tr. 161-163; GCx-18-20).³³

After receiving the above-mentioned disciplines in 2008, Lynch didn't receive any other discipline for tardiness although she continued to punch in late on occasion and in particular punched in late 7 minutes or less on multiple occasions. (Tr. 164; GCx-21).³⁴ On April 21,

³³ It can't be told by looking at GCx-18 and GCx-20 how late Lynch was on the dates listed in the notice.

³⁴ See for example GCx-21: p.2409 (4/14/09, 4/27/09); p.2410 (4/30/09, 5/19/09); p.2411 (6/23/09, 7/14/09); p. 2412 (8/3/09, 8/13/09); p. 2413 (9/5/09, 10/6/09); p. 2414 (10/22/09); p. 2415 (11/26/09, 12/13/09); p. 2416 (12/28/09, 1/21/10); p. 2417 (2/1/10, 2/26/10); p. 2418 (3/12/10, 4/6/10); p. 2419 (4/28/10); p. 2420 (5/19/10,

2011, Lynch was called into Human Resources Manager Herberger's office along with the then Acting Manager of EVS Kevin Kaldjian (herein Kaldjian).³⁵ (Tr. 167). Kaldjian told Lynch that he was going to have to give her a write up for being tardy. Lynch was then handed a first step verbal correction for tardiness. Two of the tardies listed on her discipline were for times when she arrived to work 7 minutes or less late (GCx-21 pp. 2425-2426 (2/14/11 and 4/11/11;GCx-22).

Lynch asked, don't we have a 7-minute grace period? She said that was her understanding because the Respondent didn't dock employees' pay until after the 8th minute. (Tr. 168-169). Lynch asked to see the relevant policy and asked that all employees be permitted to see the policy. (Tr. 169). Kaldjian and Herberger told Lynch that they were going to be implementing this policy now. Lynch responded that they hadn't been implementing the policy. And they responded that this was a new policy. (Tr. 169-170). On May 11, 2011, Lynch was issued a second-step written warning for tardiness by Kaldjian. (R.44; Tr. 741-742).

After the meeting described above, Lynch contacted Mendoza and the Union filed a grievance over her discipline. The grievance was not resolved however, and Respondent did nothing with respect to Lynch's grievance. (Tr. 170; GCx-43; GCx-44; GCx-45; GCx-46; GCx-47). Sometime soon after the meeting described above, employees began asking Lynch about attendance and tardiness issues. (Tr. 171). Kaldjian similarly testified that after the warnings issued to Lynch, there was confusion, and employees began to approach him with questions about the 7-minute grace period. (Tr. 742).

6/22/10); p. 2421 (7/29/10, 8/9/10); p. 2422 (8/30/10); p. 2423 (9/20/10, 10/18/10); p. 2424 (10/3/10, 12/4/10, 1/3/11); p. 2425 (1/18/11, 2/14/11, 2/15/11). This list does not include all tardies of 7 minutes or less that is included in this exhibit but is merely a sampling of the numerous times this employee was tardy 7 minutes or less.

³⁵ Kaldjian was hired by Respondent in 2009 as an administrative operations manager. Beginning in December 2009 he acted as the Manager of the EVS Department for approximately 6-7 months. (Tr. 735-736).

Around this same time, and in light of the employee confusion over the grace period issue, Kaldjian held a departmental meeting for the EVS Staff. (Tr. 171; 742). During this meeting, Lynch questioned Kaldjian about the 7-minute grace period and he told her that they were implementing this *new* policy. Lynch asked whether the new policy was in the employee handbook, so employees could read over the policy and get familiar with it. (Tr. 172-173). Kaldjian stated that Respondent would be checking the Kronos system and would be implementing a new policy whereby employees could not even be 1 minute late. (Tr. 173). Lynch responded that sometimes several employees end up crowding around the Kronos clock waiting to clock in right at clock in time and that someone was bound to end up being a minute or so late. Lynch asked whether employees would be dinged for that. Kaldjian responded that this was simply the new policy that was going to be implemented. (Id).

(3) *Laboratory Department*

Laboratory employee Mills has worked at the Hospital since April of 2007. Up until July or August 2011, Mills was supervised by Phlebotomy Supervisor Liz Sanchez (herein Sanchez). Her current supervisor is Phlebotomy Supervisor Deedee Frank. (Tr. 203). On Mills' first day of hire in 2007, Sanchez brought Mills over to the Kronos machine. She told her that this was where Mills needed to clock in and out and explained the grace period to her. Sanchez said that as long as Mills wasn't later than 7 minutes the Kronos clock would clock her in as being on time, and it wouldn't dock her pay. Sanchez also said that if Mills was going to be 7 to 10 minutes late that she didn't have to call but if she was going to be later than 10 minutes she needed to call and let Sanchez know what was going on. (Tr. 207).

Sanchez told Mills as long as her tardiness wasn't excessive (like 30 minutes or an hour) there would be no discipline. (Tr. 207-208). After Respondent bought the Hospital from Tenet,

and Respondent began operating the Hospital, Mills asked Sanchez if there were going to be any inner department changes because of the new ownership. Sanchez responded no, that everything was going to be the same. (Tr. 208-209). During her 4 years working at the Hospital, Mills never received discipline for tardiness, despite the multiple times she had been tardy (See GCx-24),³⁶ until April 19, 2011. (Tr. 209-210).

On April 19, 2011, Mills received a Step 1 Verbal Correction for being tardy 8 times between March 28, 2011, and April 18, 2011. Four of the tardies listed were for being late one minute and 2 of the tardies were for being late 6 minutes after the hour. (Tr. 210; GCx-25). That day Sanchez asked Mills to accompany her to her office. Sanchez told Mills that she was being written up for being tardy. Sanchez then proceeded to go down the list of dates and times that Mills had been tardy. Mills was shocked at seeing the warning because several of the times listed on the warning fell within the 7-minute grace period. Mills told Sanchez, I thought we had a 7-minute grace period. Sanchez responded that no, this was a new policy that they were implementing now. (Tr. 211). Following this meeting, Mills notified Field Representative Mendoza and the Union filed a grievance over Mills' write up. (Tr. 211; GCx-26).

On May 11, 2011, Mendoza attended a Step 2 grievance meeting over Mills' grievance. Present at this meeting in addition to Mendoza and Mills were Human Resources Generalist Whitfield and Director of the Laboratory Department Jana Lavender (herein Lavender). (Tr. 317-318). During this meeting, Mills and Mendoza discussed their understanding of the past practice that employees had never been written up or disciplined for being late within the 7-minute grace period. Mendoza also stated that no one had ever been informed that there had

³⁶ See for example GCx-24 pp.: 2389 (4/4/09, 5/2/09, 5/22/09); 2390 (6/3/09, 6/29/09, 7/12/09); 2391 (8/10/09, 9/6/09, 10/18/09, 11/2/09); 2392 (1/23/09, 12/16/09, 1/11/10); 2393 (2/6/10, 3/1/10, 3/24/10); 2394 (6/9/10, 7/25/10, 8/25/10); 2395 (9/6/10); 2396 (9/18/10, 10/16/10); 2397 (11/3/10, 12/6/10, 1/8/11); 2398 (1/22/11, 2/9/11, 3/16/11). This list does not include all tardies of 7 minutes or less that is included in this exhibit but is merely a sampling of the numerous times this employee was tardy 7 minutes or less.

been a change to the policy. During the meeting Whitfield turned to Mills and asked her whether she knew that there was no longer a 7-minute grace period. Mills said that she didn't. Whitfield asked Mills whether she knew now and Mills responded that she did now. Whitfield stated that Respondent's policy of not having a 7-minute grace period had been in effect since the Respondent purchased the facility. Mills asked if the policy had been in effect for 2 years, why it had taken her 2 years to get a write up. Lavender just shrugged. Mills' grievance was not resolved. (Tr. 213-215; 318; GCx-43; GCx-44; GCx-45; GCx-46; GCx-47).

Mills testified that when a new policy is implemented in the Laboratory Department, the policy will be photocopied and the pertinent area of the policy highlighted, and it would be taped up in the dispatch area. (Tr. 216). Mills stated that nothing about the tardiness policy was ever posted in the Laboratory Department. (Tr. 217). Mills testified that aside from herself, after she received her discipline, just about every other employee she spoke to in the Laboratory Department, also received discipline for tardiness. (Tr. 217-218).

E. Respondent disciplines Union leader Juan Michael Torres.

Respiratory therapist Torres has worked for the Hospital since 1992. He is currently employed in the respiratory therapy department and is supervised by Department Manager of Respiratory Services O'Connel and Director of that department, Sarkissian. He works the night shift from 6:00 pm. to 6:30 a.m. Prior to Sarkissian and O'Connel who took over the department in September 2010, Torres was supervised by Victor Perez. (Tr. 48-49; 56-58). Torres is one of the interim vice presidents for the Union. He was also elected as a chief shop steward at the Hospital, and is an elected contract bargaining team member³⁷ for the Union. He has held these various titles for the Union since approximately 2010. (Tr. 51-52). Torres was also a chief

³⁷ Torres testified that there are 25-30 members of the bargaining committee besides himself.

steward for the SEIU, an elected contract team member, and an elected executive vice president of SEIU, during the time that the SEIU was at the Hospital. (Tr. 54-55).

As a chief steward, Torres' primary responsibilities at the Hospital are to help out with contract interpretation and help represent members in step 1 and step 2 grievance meetings. Step 1 and Step 2 are meetings held pursuant to the grievance procedure in the Agreement and involve meeting with a manager or director to discuss issues involving contract interpretation, or employee discipline. (Tr. 53). Torres also is responsible for training other stewards, communicating between the membership and the Union as to future events and committee actions, and basically exchanging information between the Union and the membership. (Tr. 52). As a member of the bargaining committee, Torres is responsible for attending most of the negotiation sessions with Respondent and reporting back to the membership the status of the negotiations. (Tr. 55). Torres has attended the majority of the negotiation sessions since they began in August 2010. (Tr. 55-56).

During Torres' meeting with O'Connel which took place in approximately October 2010, shortly after O'Connel and Sarkissian took over the Respiratory Department, described above. Torres made sure to introduce himself as a chief steward at the Hospital and told O'Connel that it was his role at the Hospital to operate as a liaison between management and the employees. (Tr. 66). It was during this meeting that O'Connel showed Torres the handwritten notes of the times he had arrived late to work. (Tr. 66-67; GCx-5, pp. 0615-0616). In addition to raising the issue of the 7-minute grace period with O'Connel during this meeting, Torres also raised several other issues about this handwritten list with O'Connel. Torres told O'Connel that there were a lot of occurrences included in the list that shouldn't have been included, specifically those incidents that occurred before O'Connel started working at the Hospital. (Tr. 67).

On February 4, 2011, Torres met with O'Connel again, as discussed above. It was during this meeting that O'Connel issued Torres his first-step verbal correction for tardiness. (Tr. 68; GCx-5). Torres continued to challenge O'Connel about the grace period during this meeting and it was at this point that O'Connel clarified her position on the grace period to Torres, as discussed above. (Tr. 68-69). Also on February 4, 2011, O'Connel issued Torres a first step verbal correction for absences.³⁸ (GCx-8).³⁹ During the discussion over this warning, Torres pointed out that he might have been on a medical leave of absence during some of the days in question. (Tr. 77-78).

As discussed above, on March 18, 2011, Torres was issued his second step warning for tardiness, which included one incident on January 6, 2011, in which his tardiness should have fallen within the 7-minute grace period. Torres again challenged O'Connel on the grace period issue and on certain other occurrences of tardiness listed on his warning. In particular Torres pointed out that he had seen other departments "group" tardies on consecutive days together and that accordingly some of consecutive days he arrived tardy should have been grouped to count as only one occurrence. (Tr. 70-73; GCx-6).

During this meeting, O'Connel also issued Torres a second-step written warning for attendance. Torres explained that he had provided O'Connel with a doctor's note for March 16,

³⁸ Respondent's time and attendance policy defines an occurrence as "an unscheduled and/or unauthorized absence from work. The policy also states: "Scheduled and authorized absences are those covered either by State and/or Federal regulations, and/or university policies. The times when a staff employee is normally scheduled to work, but is required or approved to be away from work are as follows: jury duty; military leave; paid accrued sick leave up to a maximum of 96 hours annually; bereavement leave; paid accrued vacation leave; family medical leave; California family rights act; medical leave; voting; paid holidays." (Rx-1). Human Resources Generalist Dora Castaneda (herein Castaneda) testified that NUHW members are entitled to FMLA; pregnancy disability leave, California Family Rights Act, general leave, and Union leave. She testified that they don't qualify for sick leave. (Tr. 655-656).

³⁹ Under Respondent's disciplinary policy with respect to attendance, employees will receive: a "verbal notification/correction" after the 6th unscheduled absence in a consecutive 12-month period; a "written warning" for a 7th unscheduled absence in a consecutive 12-month period; a "24-work-hour suspension without pay after the 8th unscheduled absence in a consecutive 12-month period; a "final warning" after the 9th unscheduled absence in a consecutive 12-month period; and discharge after the 10th unscheduled absence in a consecutive 12-month period. (See Rx-1, p. 3 of 4).

2011. (Rx-5).⁴⁰ Torres told O'Connel that that day was a day in which he was medically excused from work. O'Connel responded that regardless of whether he provided a doctor's note or not, she was still going to count it against him. (Tr. 78-79; GCx-9).

On April 7, 2011, O'Connel called Torres into her office and informed him that she was going to have to issue him a 24-hour work suspension without pay for tardiness. Torres pointed out to O'Connel that he hadn't been one hour late to work on March 25, 2011. Again this discipline included the January 6, 2011 incident in which Torres was 7 minutes late to work. Torres pointed out to O'Connel that that particular occurrence shouldn't have been included in the discipline and that accordingly he didn't believe that he should be suspended. (Tr. 74-75; GCx-7).⁴¹

After April 2011, Torres received additional discipline from Respondent. On September 2, 2011, he received a step one verbal warning for attendance from O'Connel. On this occasion, Torres disputed certain days that were included on the disciplinary notice with O'Connel. Torres disputed that an absence occurring on August 27, 2010 should be included on the discipline as the disciplinary period should count back only 12 months. O'Connel responded to Torres: "oh you are good you are really good." Torres also reiterated that his absence on March 16, 2011 shouldn't have counted against him since he was on medical leave at that time. Torres explained that he wasn't trying to beat the system but that he was just pointing out what was in front of him and stated that he is allowed to dispute it if he thinks it is incorrect. O'Connel became red and frustrated and told Torres if he didn't agree he could write down a comment. Torres asked

⁴⁰ Torres doctor's note is dated March 16, 2011, and provides that Torres was under his doctor's care on March 16, 2011, and able to return to work on March 18, 2011. (Rx-5). Castaneda testified that the Respondent does sometimes approve retroactive leave requests. (Tr. 684).

⁴¹ Attached to GCx-7 is a third page which reads: Date and time error correction for punctuality standard form for Michael Torres. 1. 3/25/11 was 7:00 p.m. and should be 6:00 p.m.; 2. 3/25/11 should be 3/31/11 at 7:00 p.m. due to Union negotiations. Correction submitted to human resources. Please see attached documents. Torres testified that he never saw this third page until he was shown a copy by general counsel a few days before the hearing. (Tr. 75; GCx-7 p. 0573)

O'Connel why she was issuing him discipline when it didn't warrant it. He told her he felt like she was wasting her time and resources writing him up when it wasn't in accordance with the Hospital's policy. (Tr, 82-84; GCx-11).

On September 14, 2011, O'Connel issued Torres a final warning for tardiness. Included on this warning were two incidents in which Torres was tardy 7 minutes or less, including the January 6, 2011 incident discussed above. In the comment section of that warning Torres wrote: "Manager continues to accelerate progressive discipline. Do not agree with write up. NLRB complaint filed over harassment of me." (Tr. 80-82; GCx-10).

Curiously, despite Respondent's attendance policy of requiring a verbal notification/correction after the 8th incident of tardiness in a consecutive 12-month period (See Rx-1, pp. 3-4), the disciplinary notices issued to Torres for tardiness that he received on February 4, March 18 and April 7, 2011, state that an employee will receive a verbal correction/notification after *6 rather than 8 occurrences of tardiness*. The disciplinary notices issued to other employees that were entered into the record however comply with Respondent's time and attendance policy of requiring 8 occurrences before a verbal correction/notification can be issued for tardiness. (See for example GCx-5-7; Compare with GCx-13-16, GCx-18-20).

Respondent produced documentary evidence that another respiratory therapist, Margaret Knight (herein Knight) received discipline similar to the discipline issued to Torres for tardiness. (Jx-1; Rx-35-37). Respondent however provided no testimony regarding these disciplines issued to Knight. (Jx-1). Rx-35 is a verbal correction issued to Knight on April 15, 2010 and includes three incidents in which Knight was tardy 7 minutes or less. (Rx-35). Rx-36 is another verbal correction issued to Knight on May 26, 2011, and includes only tardies of over 7 minutes. (Rx-

36). Rx-37 appears to be a step 2 written notification issued to Knight on September 12, 2011 for tardiness, and again involves only tardies of over 7 minutes. (Rx-37).

F. ***Respondent instructs employees to remove Union insignia.***

William Hooper was an employee in the EVS Department and was a long time Union leader, shop steward, and part of the Union's bargaining committee. Respondent terminated Hooper during the spring of 2011, and the Union felt that Hooper's termination was in retaliation for his Union activity. As part of the Union's efforts to support Hooper, Union Organizer Mendoza began a sticker campaign. (Tr. 305-306). Mendoza prepared about 300 black and white stickers reading "Respect our Work. Stop Union Busting! We Support William Hooper." (Tr. 305-306; GCx-23). Mendoza distributed about 200 stickers to two of the Union stewards at the Hospital. (Tr. 306-307; GC-39). Afterward she saw about 20 employees wearing the stickers during the nightshift and about 50-100 employees wearing the stickers during the day shift. (Id). Mendoza saw employees wearing the stickers on their uniforms, either on the front or the back, throughout the Hospital, including patient care areas. (Tr. 308).

Around this time, EVS employee Lynch had placed one of the Hooper stickers on the small bag she wears around her neck while at work. (Tr. 174). After the EVS staff meeting discussed above, in which the 7-minute grace period was discussed, Acting EVS Manager Kaldjian asked to speak with Lynch. Kaldjian told Melissa that Respondent did not want employees wearing stickers within the facility and that she had to take the sticker off. Lynch asked Kaldjian why he wanted her to remove the sticker and he responded that Respondent did not want employees wearing stickers at work. Lynch told Kaldjian that this was on her work bag. Kaldjian responded that he didn't care, that she could not wear a sticker at work.⁴²

⁴² Kaldjian testified that he told Lynch that she could wear Union stickers as long as they say "I support NUHW" or "I love NUHW." He testified that he explained that he was only asking Lynch to remove that particular sticker

Shortly after the commencement of the sticker campaign, Mendoza began getting reports from employees that directors and managers were instructing the employees to remove their stickers. These employees included Melissa Lynch, Herbert Palacios, and Josie Marquez, among others. (Tr. 308-309). Upon hearing this, on May 11, 2011, Mendoza sent an email to Human Resources Manager Herberger and other representatives in the Human Resources Department, as well as those directors and managers who Mendoza had heard were telling employees not to wear the stickers at the Hospital. (Tr. 308-309).

Mendoza's email stated that it had come to the attention of the Union that management had been telling employees that they are not allowed to wear stickers in support of their Union. Mendoza advised Respondent that its actions were interfering with employees' Section 7 rights and demanded that Respondent cease and desist from engaging in this unlawful activity. (GCx-40). Unbeknownst to Mendoza, on May 9, 2011, Human Resources Manager Herberger had sent her a letter via fax and regular mail. Mendoza did not receive Herberger's letter until after she had sent her email. (Tr. 426).⁴³ Herberger's letter stated that Respondent felt that although employees are permitted to wear Union insignia at work, it felt that the Hooper stickers were designed to provoke controversy and risked interfering with health care operations. Herberger advised Mendoza that employees wearing the stickers in immediate patient care areas would be instructed to remove them and would be subject to discipline if they refused to do so. (GCx-41). After receiving Mendoza's letter, Herberger sent Mendoza another letter essentially reiterating what she had stated in her May 9 letter. (GCx-42).

because of its inflammatory nature. (Tr. 737-738). On rebuttal Lynch reconfirmed her prior testimony and denied that Kaldjian spoke to her about the alleged inflammatory comment on the sticker. Tr. 904-905.

⁴³ Mendoza testified that Herberger had sent the letter to the incorrect fax number. In fact recently, Herberger contacted Mendoza to clarify the Union's fax number. (Tr. 900-901; GCx-56; GCx-57).

The Union has held other similar sticker campaigns at the Hospital. Between January and June 2010, the Union held sticker days and several employees wore stickers reading “NUHW is my union” and “I support NUHW.” After two employees were suspended in approximately May 2010, the Union issued stickers to employees reading “I support Michael and Julio.” More recently in approximately February 2011, the Union took part along with the California Nurses Association, another union at the Hospital, in a sticker campaign and issued stickers to its members stating “Safe Patient Care, Not Cheeseburgers.” Mendoza saw about one hundred Union members wearing these stickers at the Hospital around this time. (Tr. 312-314; GCx-51). Respondent never communicated any issues with the above-described sticker campaigns with the Union. (Tr. 314).⁴⁴ Up until this point, Respondent never notified the Union at any time after the Union was certified about a change in policy on wearing Union insignia. (Tr. 314; 435).

Respondent has a dress code/hygiene policy in place. (Tr. 784; Rx-11). With respect to the wearing of non-Hospital emblems that policy states:

Clothing, patches, display buttons, etc. with non-hospital emblems, pictures, words, etc., not relating to the Hospitals or USC are not allowed. Only hospital issued and approved logo wear will be allowed to be worn and only with prior management approval. Employees are permitted to wear official school, professional or hospital awarded pins. (Rx-11).

Although the Hospital’s policy doesn’t specifically permit the wearing of Union insignia and in fact prohibits the wearing of all non-Hospital insignia, Respondent’s witnesses testified that employees are permitted to wear NUHW or other union buttons and lanyards (such as buttons that read I support NUHW). Respondent sees employees wearing this type of insignia all the time. (Tr. 737-738; 788-789; GCx-41; GCx-42).

⁴⁴ Although Chief Human Resources Officer McElrath denied ever seeing the Michael and Julio sticker, he was not asked about and did not deny seeing employees wearing the “cheeseburger sticker.” Tr. 789.

IV. ARGUMENT

A. Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally eliminating the extra shift bonus and blood gas lab on-call schedule of the pulmonary function technicians.⁴⁵

An employer violates Section 8(a)(5) and (1) of the Act if it makes a unilateral change in wages, hours, or other terms and conditions of employment without first giving the union notice and an opportunity to bargain. See *NLRB v. Katz*, 369 U.S. 736, 743 (1962). An employer's unilateral change certainly constitutes an 8(a)(5) violation when numerous bargaining unit employees are affected, and can even constitute an 8(a)(5) violation when only one employee is affected by the change. See, e.g., *Carpenters, Local 1301*, 321 NLRB 30, 32 (1996); *Kentucky Fried Chicken*, 341 NLRB 69, 83 (2004).⁴⁶

It is well settled that wages are a mandatory subject of bargaining. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 348 (1958). Even though the unilateral action may have been initiated through a mistake, an employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even if these practices are not required by a collective-bargaining agreement. *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). As such, these past practices cannot be changed without offering the unit employees' collective bargaining representative notice and an opportunity to bargain. *Id.* See also *Granite City Steele Co.*, 167 NLRB 310, 315 (1967); *Queen Mary Rest. Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977); *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); *B & D Plastics*, 302 NLRB 245 fn. 2 (1991);

⁴⁵ At the hearing, Respondent attempted to show that the General Counsel had not properly worded the complaint with respect to the payment of the extra shift bonus for call back hours worked on the blood gas lab on-call schedule. Tr. 354-358. General Counsel maintains that the terms on-call and call-back can be used interchangeably. Moreover Respondent was not prejudiced as to General Counsel's wording of the complaint, as the record evidence makes clear that Respondent was well aware of the factual issues that it needed to defend against. Moreover in order to clarify matters, the General Counsel did make a motion to conform the pleadings to the proof in the case and later made a motion to amend the complaint. Both of these motions were rejected. (Tr. 495-496; 918-922).

⁴⁶ In *Kentucky Fried Chicken*, the Board affirmed an ALJ's finding that the respondent employer had committed a unilateral change under Section 8(a)(5) of the Act by changing the job duties of one single employee.

DMI Distrib. of Delaware, 334 NLRB 409, 411 (2001). Even when such a unilateral change is purported to be the correction of a short-term payroll or other error, the employer has a duty to bargain with the union about such changes. See, e.g., *Mid-Wilshire Health Care Center*; 337 NLRB 72 (2001).

In *Prime Healthcare Servs.-Garden Grove LLC*, 357 NLRB No. 63 (2011), the employer, due to clerical errors, allowed certain reserve sick leave benefits to accrue for employees for approximately 9 months, despite the fact that the employer had intended to cancel such benefits. The employer then realized the mistake and issued a memorandum notifying its employees of the mistake and the fact that the reserve sick leave benefits would no longer accrue. The employer did not however inform the Union of this change either before or after the memorandum was issued. Instead the Union learned of the change from the employees. The Board found that under these circumstances, the employer had failed to notify the union and allow an opportunity to bargain and had acted unilaterally in violation of Section 8(a)(1) and (5) of the Act. *Id.*, slip op. at 3.

Similarly, in *JPH Mgmt., Inc.*, 337 NLRB 72 (2001) the employer, during collective-bargaining negotiations with the bargaining representative of its employees, mistakenly gave its employees a wage increase for five weeks and subsequently informed its employees that the wage increases were being rescinded. Thereafter and without notifying or bargaining with the union, the employer rescinded the wage increase. The Board in *JPH Mgmt., Inc.* found that, despite its alleged mistake, the employer's unilateral rescission of the wage increase warranted a cease and desist order because wages are always considered mandatory subjects of bargaining and that during contract negotiations, an employer may not make changes to represented employees' terms and conditions of employment without bargaining to impasse. *Id.* at 73, citing

to *NLRB v. Katz*, supra; *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

The Board has generally held that employer practices which occur over a long period of time supply the longevity needed to establish a past practice. In *Granite City Steel Co.*, 167 NLRB at 315, the Board found a past practice when the employer allowed six succeeding union business representatives access to the blast furnace plant for 15 years for the purpose of resolving grievances. In *Sunoco, Inc.*, the Board found a past practice when for 3 years the employer offered unit employees at certain facilities the chance to deliver jet fuel. *Sunoco, Inc.*, 349 NLRB at 244. Moreover, a past practice must occur regularly and with such frequency that employees could reasonably expect the “practice to continue or reoccur on a regular and consistent basis.” *Id.*

Here, the Respondent’s alleged “mistake” of paying the pulmonary diagnostic services employees the extra-shift bonus for call back hours worked on the OR blood gas lab on-call schedule occurred long enough to establish a past practice. This practice had occurred since approximately 2004 or 2005, and continued when Respondent purchased the Hospital on April 1, 2009. The change applied to an entire department of employees, albeit a small department.⁴⁷ Even though the change applied to only a select number of employees in the unit, it still constituted a unilateral change in that Respondent was not privileged to change the way the extra shift bonuses were paid without first notifying and bargaining with the Union.

No record evidence was presented by Respondent that the Union was ever notified or given an opportunity to bargain prior to Respondent’s elimination of the extra-shift bonus for call-back hours worked on the OR blood-gas lab on call schedule. Instead the record evidence

⁴⁷ As discussed at detail above, the pulmonary diagnostic services department is its own department as the employees work separate hours, perform separate functions and are supervised by separate management than the Respiratory Department.

reveals that the Kronos upgrade implemented in approximately August or September 2010 revealed an error in the way that Farr⁴⁸ was paying the extra shift bonus, and adjusted that error. On October 1, 2010, pulmonary function technician Darren May noticed that the extra shift bonus was missing from his paycheck and immediately informed Farr. A few days later Farr began informing employees in her department of the error and the fact that she would no longer be paying the extra shift bonus for call-back hours worked on the blood gas lab on-call schedule.

The employees then notified their Union representative, Orea, of the unilateral change, *after* the change had been implemented. This was the first that Orea had heard of the change and he immediately thereafter sent a cease and desist letter to Respondent and demanded that Respondent bargain over the change. Although Orea met with Respondent's counsel on October 22, 2010, no evidence was presented that the matter of the extra shift bonus was bargained over or resolved during that meeting.⁴⁹ Even assuming arguendo that Respondent had properly notified the Union of its intention to eliminate the extra shift bonus for call back hours worked. That notification would have been a *fait accompli*. As demonstrated by Respondent's record evidence at the hearing, the Hospital had already changed the way it paid the extra shift bonus and it was not possible to continue paying the bonus as it had in the past. *S&I Transportation*, 311 NLRB1388, 1388 at n.19 (1993) (finding *fait accompli* where employer's testimony at hearing revealed employer's fixed position to implement changes).

As for the elimination of the blood gas lab on-call schedule, this change came as a result of the Union's proposal in effort to resolve the issue of the extra shift bonus, during the meeting

⁴⁸ An adverse inference should be drawn from Respondent's failure to produce Deacon as a witness to testify about these allegations. *International Automated Machines*, 285 NLRB 1122, 1123 (1987)(failure to call witness reasonably assumed to be favorably disposed to party, warrants adverse inference on factual questions of which the witness would have knowledge).

⁴⁹ An adverse inference should also be drawn from Respondent's failure to produce Deacon as a witness to testify about this meeting. *International Automated Machines*, supra at 1123.

in December 2010. The Union proposed that the blood gas lab on-call schedule be switched from mandatory to voluntary, with the pulmonary diagnostic services employees having the first opportunity to sign up for the on-call schedule.⁵⁰ The Hospital seized on that proposal and took only the portions it wanted, namely eliminating completely the mandatory blood gas lab on-call schedule, and not allowing the pulmonary diagnostic services employees in question the first right to sign up.

Because this change in the on call schedule came as part of a proposed settlement on the initial unilateral change (the extra shift bonus pay), and the parties never agreed on this resolution, the elimination of the blood gas lab on-call schedule was yet another unilateral change committed by Respondent.⁵¹ Although Respondent and the Union met again in January 2011 to discuss the elimination of the OR blood gas lab on-call schedule, before the on-call schedule was actually implemented, Respondent simply announced the elimination of the on-call schedule as a *fait accompli* and allowed no room to bargain over that issue. *S&I Transportation*, supra. Afterward and before the on-call schedule was eliminated, Mendoza sent a detailed letter to Herberger re-explaining the Union's proposal with respect to the extra-shift bonus and demanding that Respondent cease and desist from making any changes to the OR blood gas lab on-call schedule.

As discussed above, the elimination of both the extra shift bonus and the on-call schedule has greatly affected the wages of the employees in the pulmonary diagnostic services department. Both Nasir and May testified that they have lost out on between one to two

⁵⁰ Although Herberger's account of the proposal offered during the December meeting differs from that of Mendoza, May and Nasir, Mendoza, May and Nasir's testimony should be credited over that of Herberger as their testimony was clear, consistent and they corroborated one another. Moreover Mendoza's lengthy letter to Herberger detailing the Union's proposal corroborates the account of Mendoza, May and Nasir.

⁵¹ The Union's disagreement with these unilateral changes is also evidenced by the fact that the Union filed grievances both over the extra shift bonus and on-call issues. Respondent denied both those grievances.

thousand dollars of monthly income as a result of this change.⁵² Accordingly because Respondent failed to provide the Union with notice and an opportunity to bargain over these changes, and because these changes materially affect the terms and conditions of employees in the pulmonary diagnostic services employees, namely their wages, Respondent violated Section 8(a)(1) and (5) of the Act.

B. Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing the work schedules of the echo technicians.

As discussed above, an employer violates Section 8(a) (5) when it makes a unilateral change in unit employees' terms and conditions of employment without first giving the union notice and an opportunity to bargain over the change. See *NLRB v. Katz*, supra. It is well established that changes in employee work shifts involve mandatory subjects of bargaining. *Meat Cutters Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965) ("the particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain"); *United Cerebral Palsy of New York City*, 347 NLRB 603, 607 (2006).

Here, Respondent did not give the Union direct notice of the proposed change to the echo technician's schedules. The Union first learned of the Respondent's planned schedule change for the echo technician employees from the employees themselves, sometime after Respondent announced it to employees in November 2010.⁵³

⁵² Any efforts by Respondent to discredit the monetary damages suffered by the employees as a result of these changes, either through testimonial or documentary evidence, should be discredited. Respondent's own custodian of the records failed to competently explain its payroll records for its employees in the pulmonary diagnostic services department while General Counsel's witnesses testified clearly and competently about how the unilateral changes have affected them financially.

⁵³ Despite Respondent's testimony to the contrary, Orea's account that he was never provided notice of the schedule change should be credited as he testified clearly and competently that he was never notified of the change to the echo technician's schedule in October 2010. Even if Respondent's account is credited to find the Union was

The Union's first response upon hearing of the proposed schedule change was timely and reasonable. It urged the affected employees to have a discussion with the Respondent to convince the Respondent to maintain the status quo. After that effort by the echo technician employees was rebuffed,⁵⁴ Mendoza met with Herberger in person and informed her that the Union wanted to meet and discuss the schedule change for the echo technicians.⁵⁵ The Union thereafter saw Respondent's written notice of the change - given to employees, but not the Union, on or around early to mid December 2010.⁵⁶ The Union made a demand on December 22, 2010, prior to Respondent's implementation of the scheduling change - that Respondent refrain from effectuating the change and bargain with the Union before changing the employees' schedules. Nevertheless, the Respondent ignored the Union's demand and unilaterally implemented its planned change to eight-hour shifts.

After the change had been implemented, the Union continued to try to bargain over the change with Respondent to no avail. The Union met with the Respondent in effort to negotiate

notified of the change in October 2010, the notification given to the Union was merely a *fait accompli* and thus ineffective. Board law does not require a union to request bargaining, as a condition precedent for a Section 8(a)(5) violation, where the request would be futile, or where the employer has presented the union with a *fait accompli*. *National Car Rental*, 252 NLRB 159, 163 (1980), *enfd. in rel. part 672 F.2d 1182 (3d Cir. 1982)*. Thus, if the notice is not sufficiently in advance of the decision, or if the evidence reveals that the employer had no intention of changing its mind, then the notice is not timely and is ineffective. See *Intersystems Design Corp.*, 278 NLRB 759, 759 (1986).

⁵⁴ Any communications Respondent had with the echo technicians themselves surrounding the issue of the schedule change does not constitute bargaining under the Act or the Agreement between the parties. The parties have a provision of the Agreement which prohibits Respondent from directly dealing with employees. (See GCx-4 Article 13(Q), p. 51). Moreover the Board has long held that the obligation to bargain collectively requires, "recognition that the statutory representative is the one with whom [the employer] must deal in conducting bargaining negotiations, and that it can no longer bargain directly with the employees." *General Electric Co.*, 150 NLRB 192, 194 (1964), *enfd. 418 F.2d 736 (2nd Cir. 1969)*, *cert. denied 397 U.S. 965 (1970)*.

⁵⁵ Any efforts by Respondent to attempt to show that Mendoza was confused between the vascular technicians and the echo technicians are unpersuasive. Mendoza testified clearly as to her conversation with Herberger on November 29 and the follow up e-mails confirm this account.

⁵⁶ Although Respondent's deny the agency status of Leslie Saxon and Tasneem Naqvi, the fact that these individuals signed the memorandum issued to employees in December 2010 is sufficient to establish their agency status. In *Albertson's, Inc.*, 344 NLRB 1172 (2005), the Board explained the test for determining agency status: "whether the alleged agent's position and duties, and the context in which the conduct occurs, establish that 'employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management.'" *Albertson's, Inc.*, *supra* at 1172 (quoting *Pan-Ostion Co.*, 336 NLRB 305, 306 (2001)). Here the fact that Saxon and Naqvi signed the memorandum would lead employees to reasonably believe that these individuals were conveying company policy and speaking for management.

over the matter and sent multiple correspondences to Respondent seeking to meet again to discuss the change, but all of these efforts were refuted and Respondent continued forward with the schedule change as it had planned and without regard for the Union.

Respondent claims that it abided by the terms of the collective bargaining agreement in implementing the schedule change. (See GCx-4, Article 11(F)(7), p. 32). However Respondent failed to abide by this provision of the contract. This specific provision requires that the notice be given to the Union *in writing*. It is undisputed that Respondent did not provide written notice to the Union of the schedule change.

Former field representative for the SEIU Cory Cordova's testimony⁵⁷ with regard to the past practices of this provision is unpersuasive. Cordova's testimony establishes at best the notion that the SEIU might have waived its rights with regard to this provision of the contract in the past. A newly certified Union cannot be held to the predecessor union's failure to enforce this provision of the contract. In fact, the Board has specifically recognized the principle that acquiescence to unilateral employer actions by a predecessor union is not imputed to a newly-certified incumbent union. *University of Pittsburgh Medical Center*, 325 NLRB 443, 443 (1998) (waiver by predecessor union found inapplicable to incumbent union); *Eugene Iovine, Inc.*, 328 NLRB 294, 296-97 (1999) (predecessor union acquiescence to employer reduction of employee hours not imputed to newly certified union).

The fact that the Union did not challenge the change to the vascular technician schedule that occurred around the same time as the schedule change for the echo technicians, does nothing to discredit the position the Union took with respect to the echo technicians. First and foremost, the Union received proper written notice of the schedule change for the vascular technicians.

⁵⁷ Cordova's testimony should not be credited as he was a biased witness. Cordova worked for the predecessor union which has an ongoing and heated rivalry with the Union, which has resulted in the SEIU taking legal action against the Union.

Secondly, the Union did not push the matter on behalf of the vascular technicians as the vascular technicians were afraid to challenge the schedule change. Further, even assuming arguendo that the NUHW acquiesced to the unilateral change in the vascular lab tech schedule, that does not constitute a waiver of its right to bargain over subsequent schedule changes. See, *Owens-Corning Fiberglas*, 282 NLRB 609 (1987). (“A union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.”)

Finally, whether or not the schedule change for the echo technicians was medically necessary or necessary for improved patient care, as Respondent took great strides to demonstrate, is immaterial. Recently, in *Virginia Mason Hospital*, 357 NLRB No. 53 (2011), the Board overruled an administrative law judge's decision that a hospital had not violated Section 8(a)(1) and (5) of the Act by unilaterally implementing a flu-prevention policy for its union represented registered nurses. In making this finding, the judge had relied on the Board's decision in *Peerless Publications*, 283 NLRB 334 (1987). In *Peerless Publications* the Board carved out an exception to the presumption that certain terms and conditions of employment are mandatory subjects of bargaining. The Board held that to overcome that presumption “the subject matter sought to be addressed by the employer must go to the protection of the core purposes of the enterprise.” The Board also held that the change sought by the employer must be narrowly tailored to meet the employer's needs and appropriately limited in its applicability. *Id.* at 335.

In overruling the administrative law judge, the Board in *Virginia Mason Hospital*, reaffirmed prior findings that *Peerless Publications* “was decided within the unique context of the newspaper industry and is of limited applicability outside of the narrow factual situation presented in that case.” *Virginia Mason Hospital* supra, slip. op. at 5 citing to *King Scoopers*,

Inc., 340 NLRB 628 (2003). Between *Peerless Publications* and *King Scoopers*, the Board has repeatedly declined to find that an employer's actions met the *Peerless Publications* standard. *Virginia Mason Hospital* supra, slip op. at 5. "Unless carefully limited, the "core purposes" exception would swallow the rule that decisions affecting employment conditions are subject to mandatory bargaining, in contrast to core entrepreneurial decisions." *Id.*, slip op. at 5 citing to *Edgar P. Benjamin Healthcare*, 322 NLRB 750, 752 (1996). Finally the Board found in *Virginia Mason Hospital*, that "The Act does not establish a narrower duty to bargain for healthcare employees." *Virginia Mason Hospital* supra, slip op. at 7.

The facts of the instant case would not stand up to the *Peerless Publications* test. Whether or not the schedule change for the echo technicians was necessary for improved patient care, though potentially compelling, is not enough to defeat Respondent's duty to bargain under the Act. As stated above the *Peerless Publications* test is factually specific and extremely difficult to meet and certainly if the Board didn't find requiring patient care professionals to take proper safety precautions to avoid spreading influenza amongst patients and patient care professionals alike in the hospital setting, it certainly wouldn't find that a simple schedule change would hold water against the *Peerless Publications* test.

For the foregoing reasons, Respondent violated Section 8(a)(1) and (5) of the Act by changing the schedules of the echo technicians.

C. Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally eliminating the 7-minute grace period and by subsequently disciplining employees for being tardy 7 minutes or less.

Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees over unilateral changes to terms and conditions of employment. *NLRB v. Katz*, supra. It is well-settled that work rules that can be

grounds for discipline are mandatory subjects of bargaining, and an employer may not make or change them without notifying a union and giving it an opportunity to bargain. *King Scoopers, Inc.*, supra at 628. It is immaterial that a new or changed rule is intended to accomplish a worthwhile result; rather, if the change affects employee terms and conditions of employment, it is a legitimate concern to the union as collective-bargaining representative. *Bridgestone Firestone, Inc.*, 337 NLRB 133, 134 (2001).

For purposes of analyzing whether bargaining is mandatory, work rules generally should not be severed from their ensuing penalties, and an employer must bargain over the substance of the rule as well as the penalty. *Peerless Publications*, supra at 334-335. Discipline imposed as a result of the implementation of an unlawfully promulgated rule itself violates Section 8(a)(5). See *Tocco, Inc.*, 323 NLRB 480, 489 (1997) (discharge of employees under employer's unilaterally changed drug use policy is itself violation of 8(a)(5)). An 8(a)(5) violation will be found where an employer either had no prior rule prohibiting late arrivals or modified any purported informal "rule" by adding a disciplinary element. See *Scepter Ingot., Castings*, 331 NLRB 1509, 1516 (2000), enfd. 280 F.3d 1053 (D.C. Cir. 2002) (Section 8(a)(5) violation where employer, without bargaining with the union, formalized rule prohibiting employees from putting steel in furnaces by adding discipline to the rule, contrary to its past practice).

While Respondent asserts that it had both a policy and a prior practice of disciplining employees who were 7 minutes or less late to work,⁵⁸ the record evidence speaks otherwise. Generally speaking, Respondent failed to produce any documents proving that employees had been consistently disciplined for tardies under the 7 minute or less timeframe. Of the several

⁵⁸ As discussed above, General Counsel disputes that there was ever an arbitration over the 7-minute grace period issue in 2006 and Respondent presented no documentary evidence on the record proving that such arbitration ever took place. However even if there were an arbitration over this issue, that arbitration would be irrelevant as it occurred outside the timeframe delineated in the complaint on this issue.

hundreds of employees who could have been subject to discipline, Human Resources Generalist Sylla produced only 14 documents showing that employees had been disciplined for tardies of 7 minutes or less. Moreover of those 14 documents, only one of those documents was derived from one of the departments at issue in the complaint, the Respiratory Department. The remaining disciplinary documents of employees not included in the complaint that Sylla produced are thus irrelevant.

Moreover, although Respondent may have at times, enforced its alleged policy of disciplining employees for being tardy 7 minutes or less, the record evidence shows that employees in the EVS, Respiratory and Laboratory Departments went for months or even years without being disciplined when they arrived to work late 7 minutes or less. For instance, within the EVS Department, EVS employee Lynch was disciplined in 2008 for being tardy 7 minutes or less but didn't receive another disciplinary notice for being late 7 minutes or less until April 2011, despite the fact that she was tardy 7 minutes or less on multiple occasions between 2008 and 2011. In the Laboratory Department, Laboratory employee Mills didn't receive any discipline for tardiness of 7 minutes or less from the date of her employ in 2007, until receiving her disciplinary notice in April of 2011, despite the fact that she was tardy 7 minutes or less several times between 2007 and 2011.

In the Respiratory Department, Respiratory therapist Aguirre received 2 disciplinary notices for being tardy 7 minutes or less in 2006 and then received no additional disciplinary notices for tardies of 7 minutes or less until April 2010, despite the fact that she had been tardy 7 minutes or less on various occasions between 2006 and 2010. Also since April 2010, Aguirre has received no additional disciplinary notices for being tardy 7 minutes or less despite the fact that she was tardy 7 minutes or less on multiple occasions after April 2010.

Respiratory therapist Torres also received a write up for tardiness of 7 minutes or less in 2006 but then received no additional disciplinary notices for tardies of 7 minutes or less until April 2010, despite the fact that he had been 7 minutes or less late to work between 2006 and 2010. After Sarkissian and O'Connel began working in the Respiratory Department in September 2010, O'Connel further confirmed Respondent's enforcement of not disciplining employees for tardies of 7 minutes or less when she issued a disciplinary notice to Torres for tardiness in February 2011, but did not include in that disciplinary notice, occasions in which Torres had been tardy 7 minutes or less. Following that February meeting, Torres was issued discipline which included tardies of 7 minutes or less in March 2011.

The documentary evidence described above fails to establish that Respondent had a policy or practice of disciplining employees who were tardy 7 minutes or less. Because employees went for months and even years of clocking in 7 minutes or less and never received an adverse consequence, a reasonable employee would believe that Respondent applied a 7-minute grace period. This documentary evidence of Respondent's own inaction grouped with Respondent's rather confusing payroll policy of not docking employee pay for tardies of 7 minutes or less, makes it easy to understand why employees in these three departments understood that Respondent applied a 7-minute grace period.

Although Respondent may have promulgated a rule in the past that employees who were late less than 7 minutes were subject to discipline, the past practice in the Laboratory, EVS and Respiratory Departments was not to discipline employees for violating the rule. The credible evidence establishes that the past practice in these three departments conformed to the pay policy of not deducting the pay of employees unless they were late more than 7 minutes.

An employer who has a long-established rule but doesn't discipline employees for violating it, violates § 8(a)(5) when it begins disciplining employees for violating the rule without first notifying the union of the change and affording it an opportunity to bargain. Like any substantial and material unilateral change of a term and condition of employment, when an employer adds discipline to a rule "on the books" for many years the Employer has to give the union advance notice of the proposed change and an opportunity to bargain. *Scepter Ingot., Castings*, supra.

Beyond the documentary evidence discussed above, which clearly establishes Respondent's practice of applying the 7 minute grace period, Respondent's own statements to employees also establish the existence of the grace period. Within the Respiratory Department, shortly after Sarkissian and O'Connel took over the department in September 2010, they held a meeting to introduce themselves and during the course of this meeting, Sarkissian told employees that the 7 minute grace period would continue to be honored.⁵⁹ Also during the February 2011, meeting between Torres and O'Connel in which O'Connel issued Torres a disciplinary notice for tardiness (which excluded his tardies of 7 minutes or less) she informed him that the 7 minute grace period would continue to be honored.⁶⁰

Within the EVS Department, during the April 2011 meeting in which Lynch was issued her disciplinary notice including tardies of 7 minutes or less, when Lynch questioned Interim EVS Manager Kaldjian about the grace period he informed her that Respondent was instituting a *new* policy of disciplining employees for tardies of 7 minutes or less. Following that April 2011

⁵⁹ Where Sarkissian's testimony differs from that of Torres and Aguirre, Torres and Aguirre should be credited. Torres and Aguirre corroborated one another with regard to this meeting. Moreover Sarkissian's testimony was vague in that he didn't deny making this statement during the meeting and did admit that he stated during this meeting that mistakes with regard to tardiness would be permitted.

⁶⁰ Where O'Connel's testimony differs from that of Torres, Torres should be credited. He testified clearly and consistently both on direct and cross.

meeting, during an EVS Departmental meeting, Kaldjian again stated to employees that Respondent was implementing a *new* policy with respect to the 7 minute grace period.⁶¹ Within the Laboratory Department, when Mills was issued her disciplinary notice for tardies of 7 minutes or less, she questioned her supervisors about the grace period and was told that Respondent was implementing a *new* policy by no longer applying the grace period.

Respondent's own witnesses testified as to employee confusion surrounding the 7-minute grace period issue. Chief Human Resources Officer McElrath testified to the confusion about the 7 minute issue that led to the Respondent's revision of the attendance policy in January 2010, a revised policy which by Respondent's own testimony and the record evidence was not made clearly known, to employees. Additionally Kaldjian testified as to the employee confusion regarding the grace period which led him to hold the departmental meeting discussed above in which he clarified the 7 minute or less policy. The fact that employees became confused about the 7-minute grace period issue once Respondent began disciplining employees for tardies of 7 minutes or less lends further credence to the notion that Respondent had allowed a 7-minute grace period up until approximately February or March of 2011.

All of the above clearly shows that Respondent had a past practice of allowing a 7 minute grace period. Despite this past practice however, between March and April 2011, Respondent began issuing discipline to employees for tardies of 7 minutes or less. Respondent began issuing this discipline without giving the Union prior notice or an opportunity to bargain over the rule change. Respondent did not deny that it never gave the Union notice prior to disciplining employees for tardies of 7 minutes or less. Moreover, the Union made its objection clearly

⁶¹ Where Kaldjian's testimony differs from that of Lynch's, Lynch should be credited. She testified clearly and consistently both on direct, cross and on rebuttal. Moreover the documentary evidence corroborates Lynch's version of the events.

known to Respondent by both sending Respondent a cease and desist letter and filing grievances over the disciplines issued to employees.

In light of the above, Respondent violated Section 8(a)(1) and (5) by unilaterally implementing a new rule in which employees could be disciplined for tardies of 7 minutes or less and by disciplining employees Lynch, Mills and Torres under this policy.

D. Respondent violated Section 8(a)(1) and (3) of the Act by disciplining Juan Michael Torres⁶²

To establish an §8(a)(3) violation, the General Counsel must show: (1) the existence of protected activity; (2) the employer's knowledge that the employee engaged in such activity; (3) the alleged discriminatee suffered an adverse employment action; (4) and a motivational link, or nexus, between the employee's protected activity and the adverse employment action. *American Gardens Management Co.*, 338 NLRB 644, 645 (2002).

General Counsel must then establish that an employee's protected activity is a motivating factor for the adverse employment action taken against that employee. Where it is shown that an employer's opposition to union activity is a motivating factor in the employer's decision to take adverse action against an employee, the employer will be found to have violated the act unless it is able to demonstrate that the adverse action would have taken place even in the absence of protected concerted or Union activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert denied*, 455 U.S. 989 (1982). With regard to the employer's burden, it is not enough for an employer to show that it had a legitimate reason for taking the action—it must demonstrate that it would have, not just *could* have, taken the same action even absent the employee's union activity. *Hicks Oil & Hicksgas, Inc.*, 293 NLRB 84, 85 (1989).

⁶² The fact that Respondent introduces several other documents showing Torres' tardies and absences from work is irrelevant as these incidents occur outside the scope of the complaint and are not at issue here.

As discussed at detail above the first prong of the four-pronged test articulated under *American Gardens Management Co.*, supra is clearly met. Torres is a well-known Union supporter and is extremely involved in the Union. He is currently one of the interim vice presidents of the Union, an elected shop steward and one of the 25-35 elected contract bargaining team members at the Hospital. He has attended the majority of the negotiation sessions between Respondent and the Union. In his roles on behalf of the Union, Torres acts as a liaison between management and employees on contract interpretation, disciplinary and other matters.

The second prong or knowledge prong of this test is also met. Torres' activities on behalf of the Union are open and well known to Respondent as he participates in bargaining sessions and otherwise acts as a liaison between management and employees. Moreover during Torres' first face-to-face meeting with O'Connel, he was careful to inform her of his role with the Union and the fact that he acted as a liaison between management and employees. The third prong of the test is met as well as Torres suffered adverse employment actions when he was disciplined twice on March 18, 2011 for unexcused absences and for tardiness and received an unpaid 24-work hour suspension for tardiness on April 7, 2011.

The fourth prong of the test is established by the fact that Torres was treated disparately by Respondent, and that his discipline occurred close in time to O'Connel's employment in the Respiratory Department. The question of motivation is one of fact to be decided based on all the evidence in the record. Since direct evidence of motivation is seldom available, it is well-settled that unlawful motivation may be inferred from circumstantial evidence as well as direct evidence. The Board considers the timing of the adverse action in relation to the employee's protected concerted activity or Board activity to be critical in identifying employer motivation. Indeed, "timing alone may suggest anti-union animus as a motivating factor." *Masland*

Industries, 311 NLRB 184, 197 (1993). quoting from *NLRB v. Rain-Ware, Inc.*, 732 F. 2d 1349, 1354 (7th Cir. 1984); *World Fashion, Inc.*, 320 NLRB 922 (1996). When adverse action is taken against employees on the heels of their union or other protected concerted activity, the Board finds that the General Counsel has made out a prima facie case of unlawful motivation. *Limpert Brothers*, 276 NLRB 364 (1985).

From the very first time that Torres met with O'Connell he made known to her his role in the Union and immediately challenged her, based on both contractual and past practice arguments, on the incidents of tardiness and absences for which O'Connell desired to write Torres up. As evidenced above, O'Connell became increasingly frustrated with Torres and his write ups continued to accelerate through September 2011. As discussed above, although Torres is a long-time employee of the Hospital with many years experience as a respiratory therapist, O'Connell embarked upon an anti-Torres campaign as soon as she took over the department in September 2010. O'Connell immediately began meeting with Torres, to critique his behavior and/or discipline him, soon after she began working in the Respiratory Departments and continued to ply Torres with discipline in the months that followed.

The motivational link between Torres' March 18 and April 7, 2011 disciplines and his protected concerted activities also lies in the disparate manner in which Respondent administered these disciplines. Although many other employees in the Respiratory Department were late less than 7 minutes, Torres was singled out for discipline. First with respect to Torres' discipline for tardiness on March 18, 2011, the January 6, 2011, incident includes a tardy in which Torres was late to work 7 minutes or less. As a result and as discussed above, this disciplinary notice violates Section 8(a)(5) of the Act. It also violates Section 8(a)(3) of the Act. The record evidence shows that although Respondent maintains that it enforced the tardiness policy within

the 7-minute timeframe, Torres was the only employee within the Respiratory Department that was disciplined for being tardy for 7 minutes or less after Sarkissian and O'Connel began working for the Respiratory Department. Thus Torres was the only employee within this department against whom this policy was enforced.

As discussed above, although respiratory therapist Aguirre received discipline which included a tardy of 7 minutes or less in April 2010, she didn't receive any additional disciplines including tardies for 7 minutes or less after this date or after Sarkissian and O'Connel took over the department, despite the fact that she had been tardy 7 minutes or less on various occasions after April 2010. Even respiratory therapists Margaret Knight, Alex Correa, Allen Ravago and Richard Rea who received disciplines similar to those received by Torres, did not receive any disciplines including tardies of 7 minutes or less after April 2010. Respondent had ample opportunity on the record to show that the newly implemented policy of disciplining employees for tardies of 7 minutes or less, was instituted in a fair and even-handed manner, but instead the record evidence reflects that this policy was only enforced against Torres.

If the discipline or discharge is inconsistent with an employer's usual procedure, the discipline or discharge is also found to be discriminatory. *Keystone Lamp Manufacturing Corp.*, 284 NLRB 626 (1987); *Pottsville Bleaching and Dyeing Company*, 283 NLRB 359 (1987). Similarly, where an employee is treated disparately, and punished more harshly than others who engaged in comparable conduct, the discipline violates Section 8(a)(3) of the Act. *Sonoma Mission Inn And Spa*, 322 NLRB 898 (1997). When an employer fails to discipline other employees engaged in comparable conduct, and reserves discipline exclusively for the union leader, the Board does not hesitate to find that the discipline or discharge is unlawful. *Sonoma*

Mission Inn, supra. Similarly, when an employer enforces a rule more strictly against a union leader, the discipline is unlawful. *Teksid Aluminum Foundry*, 311 NLRB 711 (1993).

Taking the above into account, Torres should have never received a written warning on March 18, 2011, because once the January 6 incident of tardiness is discounted, that leaves him only with 7 occurrences. Similarly, Torres should have never received a 24-work-hour suspension on April 7 because this same January 6 incident should have never been included in his disciplinary notice.

Respondent also chose to use a separate disciplinary notice for Torres than it did for other employees. With respect to the tardiness disciplines issued to Torres above, Respondent issued him a form which required only 6 incidents of tardiness over a 12 month period as opposed to the standard 8 incidents as required in Respondent's time and attendance policy. (Rx-1). Respondent did not explain on the record why this separate form was used specifically for Torres and not for other employees.

As for Torres' disciplines for attendance, Respondent issued him a written warning for attendance on March 18, 2011, which included an absence on March 16, 2011 for which Torres had submitted a doctor's note. As discussed above, Torres submitted a doctor's note for his absence from work on March 16 and 17. Respondent however discriminatorily disregarded this doctor's note and counted the March 16 absence against him. Had this March 16 absence not been counted against him, Torres would not have been eligible to receive a written warning on March 18.

Based on the above, and Respondent's timing of the discipline issued to Torres along with Respondent's disparate treatment of Torres, Respondent violated Section 8(a)(3) of the Act in issuing discipline to him on March 18 and April 7.

E. Respondent violated Section 8(a)(1) of the Act by instructing employees to remove their Union insignia.

In *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-803 (1945) the Supreme Court held that employees had a right to wear union buttons at work, and that “prohibitions against the wearing of insignia must fall as interferences with union organization.” However, hospitals “are not factories or mines or assembly plants” but are places where ailments are treated, and where patients need a “restful, uncluttered, relaxing and helpful atmosphere.” *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 509 (1978) (concurring opinion).

Whether a rule regarding union buttons and insignia in the hospital setting is valid depends upon whether the rule is being applied to a patient care or non-patient care area of the facility. Accordingly, the Board has held that a hospital may prohibit the wearing of union insignia in “immediate patient care areas” and that a rule banning buttons in patient care areas is presumptively valid. *London Memorial Hospital*, 238 NLRB 704, 708 (1978). However, a rule prohibiting the wearing of union insignia in non-patient care areas is presumptively invalid, absent a showing by the employer of “special circumstances” – that banning the wearing of insignia was “necessary to avoid disruption of health care operations or disturbance of patients.” *NLRB v. Baptist Hospital*, 442 U.S. 773, 781 (1979).

The record evidence shows that Respondent attempted to apply a rule regarding the wearing of Union insignia to all areas of the Employer’s facility when Interim EVS Manager Kaldjian told EVS employee Lynch after a departmental meeting that Lynch was not allowed to wear the Hooper Sticker “anywhere in the facility.” Such a broad prohibition of union insignia, indiscriminate whether the stickers were worn in patient or non-patient care areas, is presumptively invalid.

As it will be further set forth below, Respondent provided no evidence on the record that the Hooper Stickers disrupted health care operations or disturbed patients. Thus, by telling Lynch that she was not allowed to wear the Hooper Sticker “anywhere in the facility,” the Employer, through Kaldjian, violated Section 8(a)(1) of the Act.⁶³

The record evidence also reflects that Respondent conveyed to the Union via two letters sent by Herberger, that employees are only prohibited from wearing the stickers in immediate patient care areas. Moreover, Respondent presented testimonial and documentary evidence that employees are not prohibited from wearing union stickers generally, but that the prohibition applied only to the stickers that were made in response to Hooper’s termination because of their “inflammatory” content.

Based on the evidence, Respondent’s rule prohibiting the wearing of the Hooper sticker in immediate patient care areas may have been presumptively valid. Such a determination, however, does not end the inquiry. The presumption of validity can be overcome.

In *Mt. Clemens General Hospital*, 335 NLRB 48 (2001) the Board affirmed the judge’s conclusion that the employer had violated Section 8(a)(1) by instructing employees to remove buttons worn throughout the hospital that were designed to protest forced overtime. (The buttons contained the letters “FOT” with a line through them.) The Employer defended its prohibition by claiming that patients might ask questions about the FOT button that would then instigate discussions between nurses and patients regarding the hospital’s overtime policies.

In finding the employer’s action unlawful, the Board affirmed the judge’s conclusion that, in these circumstances, the presumption of validity regarding application of the rule to

⁶³ Where Kaldjian’s testimony differs from that of Lynch’s with respect to the sticker issue, Lynch should be credited. Lynch testified competently and consistently both on direct, cross and rebuttal as to this issue and maintained throughout that Kaldjian had conveyed to her that she couldn’t wear any Union stickers anywhere at the facility.

patient care areas had been overcome. There was no evidence that any patient or family member had complained; there was no evidence that the FOT button had caused any patient-nurse dialog regarding its meaning; there was no disruption of patient care associated with nurses wearing this button; and the employer had previously allowed employees to wear union buttons that could be considered just as “controversial” as this one was.

Similarly, in *St. Luke’s Hospital*, 314 NLRB 434, 435 (1994) the Board considered the fact that employees were wearing pins and stickers “in an effort to encourage their co-workers to support the Union’s bargaining position” and rejected the employer’s argument that it could ban the wearing of buttons that read, “United to Fight for our Health Plan” throughout the hospital because of the possibility that patients might be upset if they thought the Employer and its employees were “at odds” with one another. In noting that the record did not support such a conclusion, the Board stated that “there is no evidence that any patient complained of, or even noticed, the stickers and buttons at issue in this case.” *Id.* at 435.

The facts of the instant case call for the same reasoning to be applied as was in *Mt. Clemens* and *St. Luke’s Hospital*. Consequently, the presumed validity of the Employer’s rule banning the Hooper Sticker in immediate patient care areas has been overcome.

Respondent has provided no record evidence that any patient or family member has complained; no evidence that the stickers have led to conversations between patients and EVS or any other employees regarding its meaning; and no evidence that patient care was in any way disrupted. Moreover, although employees have in the past worn stickers in immediate patient care areas which could be considered just as controversial as the Hooper Sticker, it is admitted by the Respondent that it has never before prohibited employees from wearing Union stickers in patient care areas.

Respondent's only proffered basis for banning the Hooper Sticker is its conclusory assertion that the sticker is "inflammatory." Respondent through its witnesses, offered no clear explanation as to why the sticker is inflammatory. The Board would not likely find that the "Stop Union Busting!" language that is printed on the sticker to be inflammatory. The evidence and the Board's holding in *St. Luke's Hospital* make it clear in fact that the Hooper Sticker is not inflammatory. The only message conveyed to anyone unfamiliar with the issue is that there was a labor-management dispute taking place. Moreover, if language such as "United to *Fight* for our Health Plan" [emphasis added], 314 NLRB at 434 and other similar language is not found to be improper by the Board, see also *Vestal Nursing Home*, 328 NLRB 87, 97 (1999) (unlawful employer prohibition of sticker reading "Dare to Struggle, Dare to Win"); *London Memorial Hospital*, 238 NLRB at 706-708 (unlawful employer prohibition of button reading "I'm Working With Teamsters 743 to Protect Our Jobs – How About You?"), surely language which simply states "Stop Union Busting!" does not surpass the threshold for inflammatory language.

Because the presumption of validity of Respondent's prohibition of the Hooper Sticker in patient care areas has been overcome, the Respondent's prohibition on wearing the Hooper Sticker, both via Kaldjian's and Herberger's actions violated Section 8(a)(1) of the Act.

F. Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing its policy on the wearing of Union insignia.

The requirement that employees not wear the Hooper Stickers represented a significant change in past practice. Admittedly, and despite its dress code policy which prohibited the wearing of all insignia not related to the Hospital, Respondent had never before prohibited employees from wearing union insignia anywhere in the Respondent's facility, including patient care areas. Moreover, when employees wore union stickers during the Union's certification campaign, stickers which contained language similar to the Hooper Stickers, i.e. the "I support

Michael and Julio” and “Safe patient care not cheeseburgers” stickers, Respondent did not prohibit employees from wearing these stickers in any part of the Employer’s facility. Beginning in May 2011, the Employer began telling employees that they were not allowed to wear the Hooper Stickers in immediate patient care areas. Acting EVS Manager Kaldjian informed EVS employee Lynch that she was not permitted to wear *any* Union sticker *anywhere in the Hospital*.

It is well settled that a dress code is a mandatory subject of bargaining, and that unilaterally imposing a new dress code or revising an existing one requires that the union which represents the unit employees be given notice of the change and an opportunity to bargain concerning the change. A failure to do so violates the Act. *Transportation Enterprises, Inc.*, 240 NLRB 551, 560 (1979). In *Holladay Park Hospital*, 262 NLRB 278, 279-280 (1982) the Board found that the employer violated Section 8(a)(5) of the Act by changing its past practice by prohibiting its nurses from wearing union insignia without notifying or bargaining with the union before unilaterally instituting that change in past practice.

Here, similarly, the Employer admittedly never before objected to its employees wearing Union insignia. Its prohibition of the Hooper Stickers constituted a change in past practice⁶⁴ and was clearly done without notification to the Union or offering to bargain with it concerning that change before it was unilaterally instituted by the Employer. In this regard employees began informing Mendoza that they had been asked to remove their stickers *before* Respondent addressed this issue with the Union. Therefore, Respondent’s prohibition of the Hooper stickers was a unilateral change and violated Section 8(a)(1) and (5) of the Act.

⁶⁴ It is worth noting that the relationship between the Union and the Respondent in the instant case is complicated by the fact that it involves a successor employer, a defeated incumbent union, and the lack of a contract between the Union and the Respondent. Nevertheless, it is well settled that despite the lack of a contract between an employer and the representative union, the employer must abide the then existing terms and conditions of employment until such time as it reaches an agreement with the new union or a lawful impasse occurs. See *NLRB v. Katz*, supra; *R.E.C. Corp.*, 296 NLRB 1293 (1989). Respondent has provided no evidence that it has ever prohibited employees from wearing union insignia in the Respondent’s facility, patient care areas or otherwise. Thus, it is reasonable to conclude that such a prohibition is a significant change in past practice.

G. The Board should order a 6-month extension of the certification year.

Given the negative impact of the Respondents' unilateral changes on the parties' first-contract bargaining, the Board should order a 6-month extension of the certification year as a special remedy.

The certification year provides a newly-certified union with "a reasonable period in which it can be given a fair chance to succeed." *Center-O-Cast*, 100 NLRB 1507, 1508 (1952)(quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944)). It is well established that where an employer's unfair labor practices delay good-faith bargaining during that period, the Board may extend the certification year. *Mar-Jac Poultry Co.*, 136 NLRB 785, 786-87 (1962). An employer's failure to bargain in good faith after certification takes "from the union . . . the period when unions are generally at their greatest strength – the one-year period immediately following union certification." *Id.* at 787. Therefore, when unlawful conduct has disrupted the bargaining relationship, parties need a reasonable period of time to resume their relationship. *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1007 n.5, 1045-46 (1996), *enfd.* 140 F.3d 169 (2d Cir. 1998).

The length of an extension is not merely an arithmetic calculation. *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004), *enfd. mem.* 156 Fed. Appx. 331 (D.C. Cir. 2005). In considering whether to extend the certification year, and for how long, the Board considers "the nature of the violations; the number, extent, and dates of the collective bargaining sessions; the impact of the unfair labor practices on the bargaining process; and the conduct of the union during negotiations."⁶⁵ Where an employer's unfair labor practices disrupt the bargaining relationship, a minimum six-month extension of the certification year is necessary.⁶⁶

⁶⁵ *American Medical Response*, 346 NLRB 1004, 1005 (2006) (extending certification year 3 months when limited record did not show reason for initial 10-month delay in bargaining following certification); *Northwest Graphics*,

A six-month extension of the certification year is justified here. The record evidence reveals Respondent's unilateral changes, adversely impacted the bargaining process. First, the Respondent's announcement of its intention to cancel some contractual benefits diverted the Union's energy and attention to discussing the propriety of the unilateral changes rather than on engaging in substantive negotiations for a new contract. Second, the Respondent's unilateral changes has placed the Union in a disadvantaged bargaining position. Finally, the significant unilateral changes to employees' terms and conditions of employment threaten to undermine the Union's effectiveness in the eyes of employees and, eventually, its level of support.

Thus, the Respondent has negatively altered the Union's legitimate level of bargaining leverage for over half of the certification year so far.⁶⁷ In these circumstances, a six-month extension of the certification year is necessary for the Union to have a reasonable period of effective bargaining once the legitimate bargaining leverage is restored.

H. Respondent's egregious actions warrant the special remedy of a notice reading.

For the same reasons as stated above, Respondent's actions also warrant the special remedy of a notice reading. The Board has broad discretion in determining the appropriate remedies to dissipate the effects of unlawful conduct. *WestPac Electric*, 321 NLRB 1322, 1322 (1996); see also *Maramount Corp.*, 317 NLRB 1035, 1037 (1995) (the Board has broad discretion to fashion a "just remedy"). In recent years the Board has affirmed Administrative

342 NLRB at 1289-90 (extending certification year 12 months); *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 617 (1996) (extending year 6 months after employer refused to supply information requested).

⁶⁶ See *Beverly Health and Rehabilitation Services*, 325 NLRB 897, 902-903 (1998), *enfd.* 187 F.3d 769 (8th Cir. 1999) (granting 6 month extension despite 9 months of good faith bargaining during the certification year); *Dominguez Valley Hospital*, 287 NLRB 149, 151 (1987), *enfd.* 907 F.2d 905 (9th Cir. 1990) (same).

⁶⁷ The impact of the Respondent's violations on the bargaining process distinguishes this case from *Spurlino Materials*, 353 NLRB No. 125, slip op. at p. 4 (2009). In *Spurlino*, the Board found that an eight-month *Mar-Jac* extension was not necessary because there was "no showing that [the] unilateral changes and other unfair labor practices had any impact on the parties' ongoing contract negotiations."

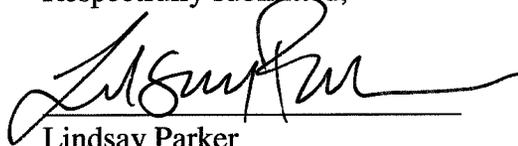
Law Judges' orders that notices be read to employees, in addition to the regular posting requirements. See e.g. *Excel Case Ready*, 334 NLRB 4 (2001); *Federated Logistics and Operations*, 340 NLRB 255 (2003), *enfd.* 400 F.3d 920 (D.C. Cir. 2005). Ordering a notice reading during work time "will ensure that the important information set forth in the notice is disseminated to all employees including those who do not consult the [r]espondent's bulletin boards." *Excel Case Ready*, 334 NLRB at 5. By imposing such a remedy, the Board can assure that all employees will know that the employer will respect their statutory rights. *Federated Logistics*, *supra* at 258 & n.11. Moreover the Fifth Circuit has observed, the "reading requirement is an effective but moderate way to let in a warming wind of information and, more important, reassurance." *Id.* citing to *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969).

Here the evidence shows that the Respondent, rather than maintaining the status quo of its employees, began implementing unilateral changes to employees' terms and conditions of employment including changing employee schedules, changing the way in which employees are paid, and changing employee work rules within the months following the certification of the Union and following the commencement of negotiations. Respondent's egregious actions robbed employees of their statutory rights under the Act and worked to erode employee support for the Union. A reading will also allow all employees to more fully internalize all of the notice, as opposed to hurriedly scanning the posting under the scrutiny of others. Accordingly Respondent's pervasive unfair labor practices, warrants a public notice reading.

V. CONCLUSION

Based on the above, the record evidence and applicable Board law establish that Respondent violated Section 8(a)(1) and (5) of the Act by by: unilaterally eliminating the extra shift bonus and on-call schedule for the pulmonary function technicians; unilaterally changing the schedule of the echo technicians; unilaterally eliminating the 7-minute grace period of employees in the respiratory, laboratory and environmental services department and disciplining employees for tardies falling within the 7-minute grace period; and unilaterally changing its policy with respect to the wearing of Union insignia. Further Respondent violated Section 8(a)(1) and (3) of the Act by disciplining its employee Juan Michael Torres because of his support for the Union and violated Section 8(a)(1) of the Act by instructing employees to remove Union insignia. Finally, Respondent's egregious actions to call for the special remedy of a notice reading to employees and a six month extension of the Union's certification year.

Respectfully submitted,



Lindsay Parker
Jean Libby
Counsel for the Acting General Counsel
National Labor Relations Board

Dated at Los Angeles, California, this 25th day of January, 2012.

VI. REMEDY

Based on the violations in this case, Counsel for the Acting General Counsel submits that the appropriate remedy is the following:

A. USC University Hospital, and its officers, agents, successors, and assigns be ordered to:

1. Cease and desist from:

(a) unilaterally changing the terms and conditions of our employees in the following bargaining unit represented by the **National Union of Healthcare Workers (the Union)**, by: changing the way we pay the extra shift bonuses for the pulmonary function technicians; eliminating the blood gas on-call schedule; changing the schedule of the echo tech employees from a 3-day-a-week, 12-hour-a-day schedule to a 5-day-a-week, 8-hour-a-day schedule; eliminating the 7-minute grace period for clocking in or clocking out; and changing the practice of allowing you to wear Union insignia at work without giving prior notice to the Union and affording the Union an opportunity to bargain about these changes.

Included: All full-time, regular part-time and per diem service, maintenance, technical and skilled maintenance employees employed by the Employer at its facility located at 1500 San Pablo Street, Los Angeles, California;

Excluded: All other employees, managers, supervisors, confidential employees, guards, physicians, residents, central business office employees (whether facility-based or not) who are solely engaged in qualifying or collection activities, employees of outside registries and other agencies supplying labor to the Employer and already-represented employees.

(b) in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7

of the Act.

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

(a) bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of employees in the above unit concerning terms and conditions of employment, and if an understanding is reached, embody it in a signed agreement.

(b) before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the above units.

(c) immediately restore our pay of the extra shift bonuses to the pulmonary function technicians as it existed on September 1, 2010, when call-back hours were included and make whole the affected pulmonary function technicians for any extra shift bonus money lost as a result of our unilateral elimination of this benefit, plus interest.⁶⁸

(d) immediately restore the mandatory Blood Gas Lab On-Call Schedule as it existed on January 1, 2011, and pay employees for the on-call schedule hours and any extra shift bonuses they would have earned, plus interest. reinstate tuition reimbursement for continuing education as a result of our unilateral elimination of this schedule, plus interest.

(e) immediately reinstate the 3-day-a-week, 12-hour-a-day schedule of the echo techs as it existed on November 1, 2010.

⁶⁸ Interest for this, and the other make-whole remedies involved in this case, should be ordered consistent with the Board's recent decision in *Jackson Hospital Corp.*, 356 NLRB No. 8 (2010).

(f) immediately reinstate our prior practice of permitting a 7-minute grace period in the EVS, Respiratory and Laboratory Departments, when clocking in for the start of your shift, as it existed on December 1, 2010.

(g) immediately reinstate our prior practice of allowing employees to wear union insignia while in immediate patient care areas as it existed on April 1, 2011.

(h) remove from our files all references to the verbal corrections issued to Traci Mills and Melissa Lynch, and the written warning issued to Michael Torres, and any other disciplines issued to affected employees as a result of our unlawful unilateral change to the 7-minute grace period policy and notify them in writing that this has been done and that the warnings will not be used against them in any way.

(i) remove from our files all references to the written warnings and suspension issued to Michael Torres as and notify him in writing that this has been done and that the written warnings and suspension that resulted from our unlawful conduct will not be used against him in any way.

(j) make Michael Torres whole for any loss of earnings and other benefits that he may have suffered as a result of the suspension we issued to him on April 7, 2011.

(k) post, consistent with the Board's recent decision in *J&R Flooring, Inc.*, 356 NLRB No. 9 (2010), the appropriate Notice.⁶⁹

(l) notify the Regional Director for Region 21, in writing, within 20 days from the date of the Administrative Law Judge's Order, what steps have been taken to comply with that Order.

⁶⁹ A proposed Notice is attached.

Attachment (Proposed Notice to Employees)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT unilaterally change the terms and conditions of employment of our employees in the following bargaining unit represented by the **National Union of Healthcare Workers (the Union)**, without giving prior notice to the Union and affording the Union an opportunity to bargain about these changes, by: changing the way we pay the extra shift bonuses for the pulmonary function technicians; eliminating the blood gas on-call schedule; changing the schedule of the echo tech employees from a 3-day-a-week, 12-hour-a-day schedule to a 5-day-a-week, 8-hour-a-day schedule; eliminating the 7-minute grace period for clocking in; and changing the practice of allowing you to wear Union insignia at work without giving prior notice to the Union and affording the Union an opportunity to bargain about these changes.

Included: All full-time, regular part-time and per diem service, maintenance, technical and skilled maintenance employees employed by the Employer at its facility located at 1500 San Pablo Street, Los Angeles, California;

Excluded: All other employees, managers, supervisors, confidential employees, guards, physicians, residents, central business office employees (whether facility-based or not) who are solely engaged in qualifying or collection activities, employees of outside registries and other agencies supplying labor to the Employer and already-represented employees.

WE WILL NOT instruct you to remove Union insignia in immediate patient care areas.

WE WILL NOT discipline you because of your union membership or support.

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

- WE WILL** bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of employees in the above unit concerning terms and conditions of employment, and if an understanding is reached, embody it in a signed agreement.
- WE WILL** before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the above unit.
- WE WILL** restore our pay of the extra shift bonuses to the pulmonary function technicians as it existed on September 1, 2010, when call-back hours were included and make whole the affected pulmonary function technicians for any extra shift bonus money lost as a result of our unilateral elimination of this benefit, plus interest.
- WE WILL** restore the mandatory Blood Gas Lab On-Call Schedule as it existed on January 1, 2011, and pay employees for the on-call schedule hours and any extra shift bonuses they would have earned, plus interest.
- WE WILL** reinstate the 3-day-a-week, 12-hour-a-day schedule of the echo techs as it existed on November 1, 2010.
- WE WILL** reinstate our prior practice of permitting a 7-minute grace period in the EVS, Respiratory and Laboratory Departments, when clocking in for the start of your shift, as it existed on December 1, 2010.
- WE WILL** reinstate our prior practice of allowing employees to wear union insignia while in immediate patient care areas as it existed on April 1, 2011.
- WE WILL** remove from our files all references to the verbal correction issued to Traci Mills and Melissa Lynch, and the written warning issued to Michael Torres, and any other discipline issued to affected employees, as a result of our unlawful unilateral change to the 7-minute grace period policy and WE WILL notify them in writing that this has been done and that the warning will not be used against them in any way.
- WE WILL** remove from our files all references to the written warnings and suspension issued to Michael Torres as and WE WILL notify him in writing that this has been done and that the written warnings and suspension that resulted from our unlawful conduct will not be used against him in any way.

WE WILL

make Michael Torres whole for any loss of earnings and other benefits that he may have suffered as a result of the suspension we issued to him on April 7, 2011.

USC UNIVERSITY HOSPITAL

(Employer)

Dated: _____

By: _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

Telephone:

Hours of Operation:

STATEMENT OF SERVICE

I hereby certify that a copy of **Brief of Counsel for the Acting General Counsel to the Administrative Law Judge in USC University Hospital, Cases 21-CA-39656 et. al.**, was submitted for E-filing to the Division of Judges of the National Labor Relations Board on January 25, 2012.

The following parties were served with a copy of said document by electronic mail on January 25, 2012.

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Respectfully submitted,



Lindsay Parker
Jean Libby
Counsel for the Acting General Counsel
National Labor Relations Board

Dated at Los Angeles, California, this 25th day of January, 2012.