UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

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In the Matter of:

SPRAIN BROOK MANOR NURING HOME, LLC,	Case Nos. 2-CA-040231
	2-CA-040385
Respondent,	2-CA-072458
	Case Nos. 2-CA-40231
-and-	2-CA-40385
	2-CA-72458
1199 SEIU UNITED HEALTHCARE WORKERS EAST,	
Charging Party.	

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EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Please take notice that pursuant to the National Labor Relations Board Rules and Regulations, Section 102.69, Sprain Brook Manor Nursing Home, LLC (hereinafter referred to as "Employer"), by its attorneys Kaufman Dolowich Voluck & Gonzo LLP, respectfully submits the following exceptions to Administrative Law Judge Mindy E. Landow's Decision dated November 8, 2012 (attached hereto as **Exhibit "A"**) in the above-referenced matter:

1. The Administrative Law Judge ("ALJ") erred in finding Respondent unlawfully threatened employees with unspecified reprisals for seeking assistance from the Union and by threatening employees that if they sought Union representation they would not receive payments owed to them in connection with the compliance settlement in Sprain Brook Manor LLC, 351 NLRB 1190 (2007) in violation of Section 8(a)(1) of the National Labor Relations Act (the "Act"), prejudicing Respondent for the reasons set forth in this document and in Respondent's Brief in Support of Exceptions to the Administrative Law Judge's Decision (the "Brief").

2. The ALJ erred in finding Respondent discharged Catherine Alonso ("Alonso") in violation of Section 8(a)(1), (a)(3) and (a)(4) of the Act, prejudicing Respondent for the reasons set forth in this document and in Respondent's Brief.

3. The ALJ erred in finding Respondent suspended and thereafter discharged Karen Bartko ("Bartko") in violation of Section 8(a)(1) and (a)(3) of the Act, prejudicing Respondent for the reasons set forth in this document and in Respondent's Brief.

4. The ALJ erred in finding Respondent implemented certain changes to terms and

conditions of bargaining unit employees without affording the Union notice or any opportunity to bargain, including: (i) discontinuing its practice of providing a free hot lunch to employees, (ii) discontinuing its practice of providing on site check-cashing privileges to employees, (iii) discontinuing its practice of providing free on-site physicals and PPD (tuberculosis) examinations to employees, and (iv) discontinuing "medical expenses" pay outs to employees who were not enrolled in the health plan offered by Respondent, in violation of Section 8(a)(5) of the Act, prejudicing Respondent for the reasons set forth in this document and in Respondent's Brief.

5. The ALJ erred in finding Respondent unlawfully threatened employees with reprisals if they engaged in union activity in violation of Section 8(a)(1) of the Act, because such finding was based on a series of incorrect premises, rendering the finding incorrect itself, because such finding is contrary to Board law and based upon the ALJ's palpably incorrect evidentiary rulings (ALJD p. 12, lines 37-46, p. 13 lines 1-50, p. 14 lines 1-42).

6. The ALJ erred in not finding Alonso to be a credible witness, because such finding is without any evidentiary basis and contrary to the clear preponderance of the record evidence and for such other reasons as are set forth in Respondent's Brief. (including, but not limited to, ALJD p. 13, lines 11-13).

7. The ALJ erred in not finding Clarissa Nogueira ("Nogueira") to be a credible witness, because such finding is without any evidentiary basis and contrary to the clear preponderance of the record evidence and for such other reasons as are set forth in Respondent's Brief. (including, but not limited to, ALJD p. 13, line 31).

8. The ALJ erred in finding that Respondent failed to show any persuasive reason to disregard Alonso's testimony, because such finding was based on a series of incorrect premises, rendering the finding incorrect itself, because such finding is without any evidentiary basis and contrary to the clear preponderance of the record evidence and for such other reasons as are set forth in Respondent's Brief. (ALJD p. 13, lines 4-50).

9. The ALJ erred in finding Respondent unlawfully threatened employees with unspecified resprisals in violation of Section 8(a)(1) of the Act, because such finding was based on a series of incorrect premises, rendering the finding itself incorrect, because such finding is without any evidentiary basis and contrary to the clear preponderance of the record evidence and for such other reasons as are set forth in Respondent's Brief. (ALJD p. 14, lines 1-12).

10. The ALJ erred in finding Respondent unlawfully threatened employees with resprisals with regard to backpay payments and/or seeking union representation in violation of Section 8(a)(1) of the Act, because such finding was based on a series of incorrect premises, rendering the finding itself incorrect, because such finding is without any evidentiary basis and contrary to the clear preponderance of the record evidence and for such other reasons as are set forth in Respondent's Brief. (ALJD p. 14, lines 31-42).

11. The ALJ erred in finding Respondent possessed historic animus toward the Union and toward both Alonso and Bartko in violation of Section 8(a)(3) and/or (a)(4) of the Act, because such finding was based on a series of incorrect premises, rendering the finding itself incorrect, because such finding is contrary to Board law and based upon the ALJ's palpably incorrect evidentiary rulings. (ALJD, p. 16, lines 9-46).

12. The ALJ erred in finding Respondent possessed animus toward the Union and toward both Alonso and Bartko as part of the underlying record in violation of Section 8(a)(3) and/or (a)(4) of the Act, because such finding was based on a series of incorrect premises, rendering the finding itself incorrect, because such finding is contrary to Board law and based upon the ALJ's palpably incorrect evidentiary rulings. (ALJD, p. 16, lines 48-52; p. 17, lines 1-14).

13. The ALJ erred in finding that General Counsel met their *Wright Line* burden with regard to Bartko and Alonso, because such finding was based on a series of incorrect premises, rendering the finding itself incorrect, because such finding is contrary to Board law and based upon the ALJ's palpably incorrect evidentiary rulings. (ALJD p. 16, lines 9-52; p. 17, lines 1-14).

14. The ALJ erred in finding that Alonso's prior poor work performance record failed to justify her termination under the *Wright Line* test, because such finding was based on a series of incorrect premises, rendering the finding itself incorrect, because such finding is contrary to Board law and based upon the ALJ's palpably incorrect evidentiary rulings. (ALJD p. 17, lines 18-49).

15. The ALJ erred in finding Alonso was terminated and did not voluntarily resign, because such finding was based on a series of incorrect premises, rendering the finding itself incorrect, because such finding is contrary to Board law and based upon the ALJ's palpably incorrect evidentiary rulings (ALJD p. 18, lines 1-11).

16. The ALJ erred in finding Respondent failed to adduce sufficient evident to rebut General Counsel's prima facie case and/or to meet its burden of proof under *Wright Line* with regard to Alonso, because such finding was based on a series of incorrect premises, rendering the finding itself incorrect, because such finding is contrary to Board law and based upon the ALJ's palpably incorrect evidentiary rulings (ALJD p. 17, lines 18-49; p. 18, lines 1-38).

17. The ALJ erred in finding Respondent's agents statements constituted union animus in violation of Section 8(a)(3) of the Act, because such finding was based on a series of incorrect premises, rendering the finding itself incorrect, because such finding is contrary to Board law and based upon the ALJ's palpably incorrect evidentiary rulings (ALJD p. 19, lines 1-24).

18. The ALJ erred in finding Respondent unlawfully terminated Bartko in violation of Section 8(a)(3) of the Act, because such finding was based on a series of incorrect premises, rendering the finding itself incorrect, because such finding is contrary to Board law and based upon the ALJ's palpably incorrect evidentiary rulings (ALJD p. 20, lines 15-48; p. 21, lines 1-28).

19. The ALJ erred in finding Respondent failed to adduce sufficient evident to rebut General Counsel's prima facie case and/or to meet its burden of proof under *Wright Line* with regard to Bartko, because such finding was based on a series of incorrect premises, rendering the finding itself incorrect, because such finding is contrary to Board law and based upon the ALJ's palpably incorrect evidentiary rulings (ALJD p. 20, lines 1-48; p. 21, lines 1-28).

20. The ALJ erred in finding Respondent unlawfully discontinued free hot lunches for employees in violation of Section 8(a)(1) and (a)(5) of the Act, because such finding is based upon the ALJ's palpably incorrect evidentiary rulings, his improperly accepting as credible the testimony of General Counsel's witnesses, improperly rejecting the credible testimony of Respondent, because such finding is unsupported, if not contradicted, by the record evidence, is contrary to Board law, and for such other reasons as set forth in Respondent's Brief. (ALJD p. 22, lines 17-50; p. 23, lines 1-8).

21. The ALJ erred in finding Respondent unlawfully discontinued check-cashing privileges to employees in violation of Section 8(a)(1) and (a)(5) of the Act, because such finding is based upon the ALJ's palpably incorrect evidentiary rulings, his improperly accepting as credible the testimony of General Counsel's witnesses, improperly rejecting the credible testimony of Respondent, because such finding is unsupported, if not contradicted, by the record evidence, is contrary to Board law, and for such other reasons as set forth in Respondent's Brief. (ALJD p. 23, lines 12-40; p. 24, lines 1-4).

22. The ALJ erred in finding Respondent unlawfully discontinued free on-site physicals and tuberculosis tests for employees in violation of Section 8(a)(1) and (a)(5) of the Act, because such finding is based upon the ALJ's palpably incorrect evidentiary rulings, his improperly accepting as credible the testimony of General Counsel's witnesses, improperly rejecting the credible testimony of Respondent, because such finding is unsupported, if not contradicted, by the record evidence, is contrary to Board law, and for such other reasons as set forth in Respondent's Brief. (ALJD p. 24, lines 8-45).

23. The ALJ erred in finding Respondent unlawfully discontinued "medical expense" payouts to employees in violation of Section 8(a)(1) of the Act, because such finding is based upon the ALJ's palpably incorrect evidentiary rulings, his improperly accepting as credible the testimony of General Counsel's witnesses, improperly rejecting the credible testimony of Respondent, because such finding is unsupported, if not contradicted, by the record evidence, is contrary to Board law, and for such other reasons as set forth in Respondent's Brief. (ALJD p. 24, lines 49-52; p. 25, lines 1-33).

24. The ALJ erred in not finding Mushell to be a credible witness, because such finding is without any evidentiary basis and contrary to the clear preponderance of the record evidence and for such other reasons as are set forth in Respondent's Brief. (including, but not limited to, ALJD p. 24, lines 16-22).

25. The ALJ erred in concluding Respondent unlawfully threatened employees with unspecified reprisals for seeking assistance from the Union and by threatening employees that if they sought Union representation they would not receive payments owed to them in connection with the compliance settlement in Sprain Brook Manor LLC, 351 NLRB 1190 (2007) in violation of Section 8(a)(1) of the Act, because such finding was based on a series of incorrect premises, rendering the finding itself incorrect, because such finding is contrary to Board law and based upon the ALJ's palpably incorrect evidentiary rulings (ALJD p. 26, lines 8-11).

26. The ALJ erred in concluding Respondent discharged Catherine Alonso ("Alonso") in violation of Section 8(a)(1), (a)(3) and (a)(4) of the Act, because such finding was based on a series of incorrect premises, rendering the finding itself incorrect, because such finding is contrary to Board law and based upon the ALJ's palpably incorrect evidentiary rulings

(ALJD p. 26, lines 13-14).

27. The ALJ erred in concluding Respondent suspended and thereafter discharged Karen Bartko ("Bartko") in violation of Section 8(a)(1) and (a)(3) of the Act, because such finding was based on a series of incorrect premises, rendering the finding itself incorrect, because such finding is contrary to Board law and based upon the ALJ's palpably incorrect evidentiary rulings (ALJD p. 26, lines 16-17).

28. The ALJ erred in concluding Respondent implemented certain changes to terms and conditions of bargaining unit employees without affording the Union notice or any opportunity to bargain, including: (i) discontinuing its practice of providing a free hot lunch to employees, (ii) discontinuing its practice of providing on site check-cashing privileges to employees, (iii) discontinuing its practice of providing free on-site physicals and PPD (tuberculosis) examinations to employees, and (iv) discontinuing "medical expenses" pay outs to employees who were not enrolled in the health plan offered by Respondent, in violation of Section 8(a)(5) of the Act, because such finding was based on a series of incorrect premises, rendering the finding itself incorrect, because such finding is contrary to Board law and based upon the ALJ's palpably incorrect evidentiary rulings (ALJD p. 26, lines 20-33).

29. The ALJ erred in concluding Respondent committed unfair labor practices affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act, because such finding was based on a series of incorrect premises, rendering the finding itself incorrect, because such finding is contrary to Board law and based upon the ALJ's palpably incorrect evidentiary rulings (ALJD p. 26, 34-35).

30. The ALJ completely erred in fashioning the "Remedy" portion of her Decision for the reasons cited herein (ALJD p. 26, lines 39-52; p. 27, lines 1-9).

31. The ALJ erred in ordering Respondent to cease and desist from threatening employees with unspecified reprisals for seeking assistance from the Union or any other labor organization for the reasons cited herein as well as in Respondent's Brief (ALJD p. 27, lines 18-19).

32. The ALJ erred in ordering Respondent to cease and desist from threatening employees that if they seek union representation they will not receive payments owed to them in connection with the compliance settlement in *Sprain Brook Manor*, 351 NLRB 1190 (2007) for the reasons cited herein as well as in Respondent's Brief (ALJD p. 27, lines 19-21).

33. The ALJ erred in ordering Respondent to cease and desist from suspending, discharging or otherwise discriminating against any employee for supporting the Union or any other labor organization or for participating in prior charges before the NLRB for the reasons cited herein as well as in Respondent's Brief (ALJD p. 27, lines 25-27).

34. The ALJ erred in ordering Respondent to cease and desist from unilaterally changing the wages, hours or other terms and conditions of employment for members of the bargaining unit without first providing notice to and, upon request, bargaining with the Union for the reasons cited herein as well as in Respondent's Brief (ALJD p. 27, lines 29-31).

35. The ALJ erred in requiring Respondent to take any of the affirmative action set forth in the Decision for the reasons set forth in this document and Respondent's Brief. (ALJD, p. 27, lines 38-47; p. 28, lines 1-34).

36. The ALJ erred in the above-mentioned exceptions because his findings of fact are not supported by the record evidence taken as a whole, and are contrary to Board/Court precedent.

Dated: Woodbury, New York
December 21, 2012

Respectfully submitted,
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ND: 4836-6730-5490, v. 1

EXHIBIT A

JD(NY)–35–12
Scarsdale, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

SPRAIN BROOK MANOR NURSING HOME, LLC

and

Case Nos. 2-CA-40231
2-CA-40385
2-CA-72458

1199 SEIU UNITED HEALTHCARE WORKERS EAST

Susannah Z. Ringel, Esq. and *Moriah H. Berger, Esq.*
for the Acting General Counsel
Jeffery Meyer, Esq. (Kaufman, Dolowich, Voluck & Gonzo, LLP), for the Respondent
William Massey, Esq. (Gladstein, Reif & McGinnis),
for the Charging Party

DECISION

Statement of the Case

Mindy E. Landow, Administrative Law Judge. The charges and amended charges in this matter were filed by New York's Health and Human Services Union 1199/SEIU (the Union) on various dates between December 1, 2010 and April 15, 2011. On December 23, 2011, the Regional Director, Region 2 issued a Complaint and Notice of Hearing, supplemented by an Amended Consolidated Complaint and an Amendment to Amended Consolidated Complaint, issued on March 26 and April 10, 2012, respectively (collectively, the complaint). As amended, the complaint alleges that Sprain Brook Manor Nursing Home, LLC., (the Employer or Respondent) violated Sections 8(a)(1), (3), (4) and (5) of the Act by: threatening employees with unspecified reprisals for seeking assistance from the Union; threatening employees that if they sought Union representation they would not receive payments owed to them in connection with a compliance settlement in *Sprain Brook Manor*, 351 NLRB 1190 (2007); discharging Catherine Alonso; suspending and then discharging Karen Bartko and by implementing certain changes to terms and conditions of bargaining unit employees without affording the Union prior notice and the opportunity to bargain over the changes.[1] Respondent filed answers to the complaint and amendments thereto denying the material allegations contained therein. A hearing was held before me in New York, New York on May 7 and 8, 2012.

[1] These are: discontinuing the practice of providing on-site check cashing services to employees; discontinuing its practice of providing a free hot lunch to employees; discontinuing its practice of providing free on-site physical exams and tuberculosis (PPD) tests to employees and discontinuing payments to those employees who chose not to enroll in the Employer's health plan to compensate them for medical expenses.

On the entire record, including my observation of the demeanor of the witnesses, [2] and after considering the briefs filed by the Acting General Counsel (hereafter referred to as the General Counsel) and Respondent,[3] I make the following

Findings of Fact

I. Jurisdiction

Based upon the record and the stipulations of the parties, I find that Respondent, a corporation, operates and maintains a nursing home in Scarsdale, New York, where annually, in the course and conduct of its business operations, it derives gross revenues in excess of $100,000 and purchases and receives goods and products valued in excess of $50,000. The record establishes that the Respondent is an employer engaged in commerce within the meaning of Section 2 (2), (6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

In June 2006, after a Board-conducted election, the Union was certified as the exclusive collective-bargaining representative of a unit of the following employees:

> All full-time and regular part-time and per diem non-professional employees including licensed practical nurses, certified nurses' aides, geriatric techs/activity aides, housekeeping employees, laundry employees/assistants, dietary aides, and cooks employed by the Employer at its facility located at 77 Jackson Avenue, Scarsdale, NY, but excluding all other employees, including office clerical employees, managers and guards, professional employees and supervisors as defined by the Act.

Subsequently, the Employer tested the Union's certification and on September 29, 2006, the Board granted the General Counsel's motion for summary judgment and ordered Respondent, upon request, to bargain with the Union as the exclusive representative of bargaining unit employees and, if an understanding is reached, embody the terms and conditions of employment of such employees in a signed agreement. On December 6, 2006, the Board granted the General Counsel's motion for summary judgment and ordered the Employer to provide certain information to the Union.

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[2] In reaching my findings regarding the credibility of witnesses, I have considered their demeanor, the content of the testimony, whether or not it was corroborated or refuted by other reliable evidence, the inherent probability of the testimony and the record as a whole. In certain instances, I credited some, but not all, of what the witness said. I note, in this regard, that "[N]othing is more common in all kinds of judicial decisions than to believe some and not all" of the witness' testimony. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950) rev'd. on other grounds 340 U.S. 474 (1951); J. *Shaw Associates, LLC*, 349 NLRB 939, 939-940 (2007).

[3] The General Counsel filed a motion to strike portions of Respondent's post hearing brief, asserting that it made representations of fact which are unsupported by the record. Although I deny the motion, as discussed below, I have rejected certain assertions contained in Respondent's brief which the record fails to substantiate.

Thereafter, in *Sprain Brook Manor Nursing Home, LLC*, 351 NLRB 1190 (2007)(*Sprain Brook* 2007), the Board found that the Respondent had committed certain unfair labor practices including unlawfully interrogating employees, surveilling employees, calling the police on the Union and its supporters, telling employees that it was futile to support the Union, and unilaterally increasing wages. In addition, it was found that Respondent had unlawfully discharged two employees, including Alonso, and had reduced the overtime hours of three employees including Bartko and Union delegate Clarissa Nogueira.

Before the Board order issued, United States District Judge Gerard E. Lynch ordered Respondent to reinstate Alonso pursuant to proceedings brought under Section 10(j) of the Act.[4] Subsequent to the Board order in *Sprain Brook 2007,* Respondent entered into a backpay stipulation which provided for installment payments to the five employees who had suffered adverse employment consequences including Alonso, Bartko and Nogueira. This backpay stipulation was executed on behalf of Respondent by the then-and current-owner of the facility, Robert Klein.[5] Beginning on January 4, 2010, Alonso received an initial monthly payment, including interest of $7,767.20, with declining balances thereafter. The last payment, due December 5, 2011 was for a total amount of $1,602.75. This payment significantly exceeded those due to the other employees.[6]

B. Bargaining History and Union Activity

As was the case during the period of time when the earlier cases were being processed, Respondent employs an administrator to handle its operations. Based upon stipulations entered into during the hearing, the record establishes that during the period from September 2010 to September 2011, Michael Reingold held that position. In June 2011, Shlomo Mushell began working as a consultant to the facility and in September of that year he assumed the position of administrator, a position he continues to hold.[7]

The parties have yet to reach agreement on an initial contract. The most recent face-to-face negotiations were held in June 2010. The Union was represented in negotiations by its vice-president, Greg Speller and contract administrator Adrian Trumpler. Several employees, including Alonso, Bartko and Nogueira, attended negotiations as well. Respondent was represented by various officials including its counsel Jeffrey Meyer and, on occasion, Reingold.

Since its certification, the Union has engaged in certain tactics in an attempt to keep employees engaged and apprised of what is going on. Among these are so-called "shift change visibilities" which consist of meetings between Union staff and employees held during the period from approximately 2:00 to 4:00 p.m., when the morning shift employees are leaving and the afternoon shift employees are arriving at work. These were held at the entrance to the facility parking lot. Both Alonso and Bartko attended such meetings, which were held in plain view and visible to anyone looking out from the facility or its windows.

In addition, the Union sponsored an informational picket at the facility on November 23, 2010, from 2:00 to 4:00 p.m. In addition to Union representatives Speller and Trumpler, a

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[4] *Mattina v. Sprain Brook*, Case No. 06 Civ. 4262 (S.D.N.Y.) Orders issued July 5 and October 12, 2006.

[5] Klein, who was subpoenaed to appear by Counsel for the General Counsel, failed to do so.

[6] The backpay stipulation also provides that Respondent shall submit checks for the monies owed to Region 2, and that it shall make appropriate withholdings from the wage payments for each discriminatee.

[7] Moshell was the sole representative of the Respondent called to testify in this proceeding.

number of employees attended this event including Alonso, Bartko and Nogueira. Although Bartko was on vacation at the time, she returned early to attend the event. The picketers marched in an oval, carried signs and chanted various slogans. According to witness testimony, a manager named Eric took photographs of the event on his cell phone from a spot near the kitchen entrance and owner Klein observed the event from approximately 25 yards away.

The evidence further establishes that Bartko served as a Union delegate until the time of her discharge.

C. The Discharge of Catherine Alonso and Alleged Violations of Section 8(a)(1)

Alonso has worked for the Employer for 22 years, initially as a nursing assistant and then in the housekeeping department. During this time she has had a variety of assignments in the facility. For the year or so prior to her 2010 discharge, Alonso was assigned to clean the ground floor which included the lobby of the facility, various hallways, the resident dining room, six bathrooms, and the facility offices. This is also where the administrator's office is located.

On November 9, 2010, at about 11:00 a.m., Reingold summoned Alonso to his office for a meeting. Reingold initially asked Alonso when she was going to retire. When Alonso replied that she had no intention of doing so, Reingold told her she was being let go, specifically because the men's room was dirty and there was urine on the toilet seat. As Alonso testified, Reingold had a paper in his hand and he wanted her to sign it. Reingold told her that if she did so, she would receive five weeks of pay, unemployment and the money coming to her. Alonso asked if she could leave the room to get Nogueira and her reading glasses, and Reingold responded that if she left the room she would really have trouble and would get nothing. Alonso signed the paper without reading it. At the hearing she asserted that she had not read the document prior to signing it.[8]

The document which Alonso admitted signing, dated November 9, 2010, states as follows:

> I Catherine Alonso am resigning my position at Sprain Brook Manor. I understand that I will receive 4 weeks compensation as a reward for my years of service. I will also be paid for this week ending November 12th. I will receive any time owed to me up to the 12th of November 2010 with regards to vacation or sick time that I have accrued.

After she signed the paper, Reingold told Alonso to return on Friday and he would give her the money that she was owed.

On cross-examination, Respondent sought to adduce evidence from Alonso that when Reingold referred to "money that was coming to [her]," he was referring to her accrued vacation and sick time rather than payments due to her pursuant to the backpay stipulation. Her testimony in this regard is as follows:

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[8] Alonso's testimony is as follows:
Q: [by counsel for Respondent] Ms. Alonso, if you could take a look at that document please? Once you've reviewed it please let me know.
A: Oh. I never saw this, never
Q: Is that your signature on it?
A: That's my signature.

Q:[by counsel for Respondent] He said that to you? Isn't it possible that he could have meant the vacation and sick time that you had accrued that was coming to you?
A: I don't know if that's what it meant.
Q: You don't know?
A: No
Q: So you don't know what he meant by saying you had money coming to you?
A: Oh yes. He said – yes, I knew that. That I had the money coming to me from the old case.
Q: Well, how'd you know it was from the old case?
A: It had to be. That was the only money I had coming to me.
Q: You didn't have accrued vacation or sick time?
A: Yeah, I guess I did. I don't get that either.
Q: And that would have come to you as well, right?
A: Yeah.
Q: Right. Once your employment ended on November 9, 2010, did you receive any checks?
A: Yes, I received. . .
Q: And do you recall what those checks were for?
A: For the money that I had from the old case.
Q: It came directly from Sprain Brook to you?
A: Yes.
Q: Okay. Are you sure?
A: I'm – yeah, I'm sure.
Q: How'd you get the other checks from the previous case?
A: What other check?
Q: From the previous case.
A: From the Labor Board. I think it was from the Labor Board.
Q: Those would come directly from the Labor Board?
A: Yeah.
Q: But you're saying now that a check coming directly from Sprain Brook was for the same case?
A: I don't know. I'm not sure now.

No records were produced by the Employer to establish that Alonso had, in fact, received payments for severance pay or any accrued or vacation time or to contradict the express terms of the compliance settlement.

After meeting with Reingold and learning of her discharge, Alonso sought out Nogueira who was working in the laundry room. Alonso told her she had just been fired and that Reingold told her he had found a dirty toilet. As Nogueira testified, she asked why Alonso had not come to get her, and Alonso replied that Reingold had told her that if she left the room she would be sorry. She said that she had signed a paper. When Nogueira asked what paper, Alonso could not respond. She said she had wanted to leave the room to get Nogueira and her glasses, but that Reingold would not let her.

Nogueira returned to Reingold's office with Alonso, and asked him why he was firing her. Reingold stated that he had found the toilet dirty and it was done and over with. Nogueira stated that Reingold could not fire Alonso due to a dirty toilet and asked why he had not called for a Union representative, and that Alonso deserved that. Reingold replied that the employees did not deserve union representation and that if Nogueira wanted to make this an issue, she would have to schedule an appointment and bring in a Union representative. At this point, Reingold was appearing very annoyed, and Alonso said that Nogueira should not get herself into trouble

and they should leave, which they did.

On Friday, Alonso returned to Reingold's office, as instructed, along with another discharged employee, Pat Miller. The record does not contain any evidence regarding the reasons for the discharge of this second employee.[9] Alonso's testimony of what occurred at this second meeting is unclear and her responses to certain questions from Counsel for the General Counsel indicate that she has conflated certain events from the first meeting with this one. In any event, although Alonso initially testified that she signed a paper on this occasion as well, there is no evidence of a second signed document in the record.

D. Alonso's work record

On cross-examination, Respondent sought to adduce evidence regarding Alonso's work history. Her memory of these events was at times vague and incomplete although she did identify her signature on one written warning. Alonso also admitted receiving a prior warning for not properly cleaning, but could not recall when that occurred or who had issued the warning. Alonso also acknowledged that she had been told on a few other occasions that she was going to be written up for not properly performing her duties. There was one occasion when she was assigned to clean the refrigerator and did not fully complete the task in the time allotted along with her other assigned duties. Alonso acknowledged being suspended for one day, but could not recall why. She asserted that housekeeping director Michael Sanfratello never spoke with her about properly distributing supplies and did not recall receiving an in-service training for this matter. Alonso also stated that she did not recall refusing to sign any disciplinary action form which was presented to her.

The contents of Alonso's personnel file, contains the following disciplinary notices:[10]

- September 21, 2009 – 1st Warning for unsatisfactory work
  Upon inspection, Room 410 was found to be dusty on the lamp and the night tables. There was also debris on the floor, indicating the room had not been swept properly.[11]

- October 19, 2009 – 2nd warning for unsatisfactory work
  Cathy Alonso was assigned to work on first floor. One of primary responsibilities of this assignment is cleaning lobby coffee tables and end tables. Prospective resident's family noticed dust and decided not to admit their family member as a resident.[12]

- October 26, 2009 – warning for unsatisfactory work

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[9] On cross-examination, Alonso was asked about the reasons for Miller's termination. She replied that she did not know the reasons for the discharge and that, although she has spoken with Miller since that time, the two have not discussed the issue. Respondent failed to offer any evidence as to why Miller was discharged.

[10] Although administrator Moshell testified that these notices were maintained in Alonso's file he had no personal knowledge of the underlying incidents and could not specifically identify either the signatures on the notices or the identity of the individuals whose signatures appear there.

[11] Although Alonso did not sign this notice, it is signed by Nogueira in the space for "union representative's signature."

[12] This notice was signed by both Alonso and Nogueira.

Cathy Alonso was assigned to work on the first floor. One of the primary responsibilities of this assignment is to clean visitors (sic) bathrooms. Upon checking the bathroom at 3 pm, the bathroom had no toilet paper or paper towels.[13]

- October 28, 2009 – warning
  Cathy Alonso was distributing supplies throughout the facility. Upon checking, she did not put the right amount on each floor.[14]

- November 21, 2009 – 3 day suspension:
  On Saturday, November 21, 2009, at approximately 9:45 a.m., Cathy Alonso was asked by Michael Sanfratello, Director of Maintenance and Housekeeping, to clean the refrigerator in the pantry closet in addition to her other scheduled tasks and duties. Upon inspection at 1:30 p.m. it was noted that the assigned tasks had not been performed. Also, debris was found in the corridors and the resident's bathroom in Room 310 was dirty. The Director began to search for Ms. Alonso to address these issues and found her sitting down in the residents' day room on an unscheduled break. She had failed to carry out her assigned tasks and duties.[15]

For the following year, Alonso had no further discipline. There is a notice of termination, apparently prepared by Reingold relating to the events of November 9, 2010, which states as follows:

- I went to the mens (sic) room in the locker room, the toilet had blue cleaner in it, so it had been freshly cleaned. But the toilet seat has dried urine all over it, the floor was dirty.

This disciplinary notice further states that the employee resigned. It was not signed by Alonso or witnessed by any other individual.

E. The Discharge of Karen Bartko

1. Bartko was accused of improperly taking juice from Respondent's facility

On February 22, 2011, Reingold approached Nogueira while she was working in the laundry room and asked her, regarding Bartko, "is she one of [your] people?" Initially, Nogueira did not answer because she was confused as to what Reingold meant. He inquired again, and Nogueira replied in the affirmative, assuming that Reingold was referring to her status as a Union delegate. Reingold told Nogueira that Bartko had been seen leaving the facility with two containers of cranberry juice and had come back without them. Nogueira informed Reingold that Bartko goes outside for her break and he replied that that was impossible as Bartko had returned in a matter of seconds. Nogueira stated that she would go speak with Bartko regarding the matter. Reingold stated that he wished to see both of them in his office.

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[13] Neither Alonso nor Nogueira signed this warning.

[14] Alonso did not sign this warning. Although it appears there is a witness, the record does not indicate who this might be.

[15] This notice was not signed by either Alonso or by any Union representative.

Nogueira went to where Bartko was working and asked her about the incident. She confirmed that she had gone outside with cranberry juice and that she had been on her lunch break. Nogueira told Bartko that Reingold wanted to see them in his office.

As both Bartko and Nogueira testified, Bartko does not avail herself of the lunch that is offered to employees; nor does she eat in the facility. She brings her lunch and obtains either milk or juice from the kitchen and goes out to her car to eat. On the day in question, a kitchen employee gave her two 4 oz. containers of juice, although she generally gets only one. She also was late going on her break and returned to the facility quickly for that reason.

Before going to Reingold's office, Bartko, along with Nogueira, went outside and Bartko retrieved from a garbage container a small plastic bag containing a banana peel and two empty juice containers. When the two women went into Reingold's office, Bartko showed him the plastic bag and stated that she had been outside on her break. Reingold replied that employees were not provided with juice. Bartko stated that she was given juice because she brings her own lunch. Reingold asked who had given the juice to her, and Bartko replied that it was a kitchen employee. Reingold stated that he would check the surveillance camera and that both Bartko and the employee who had provided her with the juice would be written up.

Nogueira protested that employees would be written up over mere ounces of cranberry juice. Reingold replied that he had made clear that nobody is supposed to obtain anything from the kitchen. Bartko stated that she had always gotten either milk or juice because she brought her own lunch. Reingold's reply was to the effect that, if he felt like having a steak, would it be OK for him to do so? Nogueira replied that he was comparing a steak to 4 ozs. of cranberry juice. Bartko responded that employees provided with water, which also cost something to the facility, but she was cut off as she made this argument. Bartko also offered to replace the juice, but Reingold rejected this offer, stating that the juice had to be Kosher.

Reingold then summoned Cameron Wharton, Respondent's director of dietary services into the meeting. Reingold asked him why his employees were giving out juice and stated that no one was supposed to be getting anything from the kitchen. Initially Wharton was silent. Wharton then confirmed that Bartko did not take the lunches that were provided to employees and that the kitchen staff provided her with juice or milk. Reingold reiterated that employees were not supposed to be getting anything from the kitchen. There was also a discussion of the Employer's lunch policy and Nogueira stated that any changes should be discussed with the Union. [16]

Although Reingold had threatened Bartko with discipline, no action was taken at this meeting, and Reingold stated that he would consider what to do next.

According to Nogueira, other employees including the receptionist, nurses and secretaries have received drinks from the facility's kitchen without adverse consequences.

2. Bartko's discharge

The main entrance to Respondent's facility has two main doors separated by a vestibule. On March 4, 2011, Bartko was on her way out of the facility as Reingold was entering. Bartko

[16] As will be discussed below, in December 2010, Respondent had distributed a memorandum to its employees advising them that they would no longer be receiving hot lunches but would be provided with a sandwich and salad.

neglected to hold the door for Reingold and the two passed each other in the vestibule. Reingold asked whether Bartko held doors for people. She did not respond. According to both Nogueira and Bartko, the doors each have a bar which prevents slamming or sudden closing.

Reingold apparently took offense at Bartko's actions and came to Nogueira, who was working in the laundry room, and accused Bartko of slamming the door in his face. Nogueira replied that this was not possible as the doors have bars on the top which cause them to close slowly. Reingold appeared annoyed and stated that he would not be subjected to that and wanted both Nogueira and Bartko in his office. Nogueira went outside to find Bartko, as she surmised that the employee was on her break. While outside the facility, Nogueira heard knocking on the window and saw Reingold gesticulating for them to come inside. Reingold then proceeded to the front door and, according to Nogueira, was yelling that he wanted Trumpler. Nogueira asked whether Trumpler was coming and Reingold stated that he had not answered the phone, so he left a message. He then instructed the two employees to report to his office. Reingold stated that he was going to write Bartko up and send her home for the day, and that he would pay her for the day if he had to, but she should leave the facility. According to both Bartko and Nogueira, Reingold was yelling at them. Bartko asked what she had done. She was asked whether she held doors for people. Bartko replied that while she would hold the door for others she would not do so for Reingold. Bartko argued that she was being "set up." When Reingold told her she was being sent home, Bartko replied that he was the one who should go home.

Reingold summoned a nearby office employee, identified in the record as "Gwen," to be a witness to the meeting, and Reingold proceeded to record Bartko's remarks. Reingold told Bartko to keep talking, and that she was burying herself.

When Reingold told Bartko that she was being sent home, Nogueira replied that Bartko speaks up for herself, her coworkers and the residents and that was something that is not liked. Bartko stated that Reingold was just hurting the residents as there were only three CNAs on duty that day, and now there would be only two.

Because Reingold did not otherwise specify how long Bartko would be suspended for, Nogueira assumed that it was for that day. While walking Bartko to the parking lot, Nogueira advised Bartko to go home, and return on her next regularly scheduled work day.

The events in question took place on a Friday. Bartko was next scheduled to return to work on Sunday, March 6, which she did. She worked her full shift without incident. After she returned home for the evening, at about 5:00 p.m., the secretary to the Director of Nursing called her and told her that, according to instructions from Reingold, she was not to return to work until further notice.

Subsequently, Union vice-president Speller called Reingold seeking to discuss Bartko's employment status. His call was returned by Respondent counsel Meyer. According to Speller, the Union thought she had been suspended and wanted to get her back to work. Meyer initially told Speller that the Employer was willing to take Bartko back but subsequently advised him that he had spoken with someone else and the decision was that she would not be returned to work.

On cross-examination, Bartko denied telling Reingold that she did not have to answer to him or that he could not tell her what to do. She also denied telling Reingold that he did not have the authority to send her home. She also specifically denied slamming the door on him. In addition, according to Bartko, Trumpler never contacted her to instruct her not to report to work on the Sunday following the incident. Bartko also stated that she did not recall seeing Reingold

carrying packages as they were passing each other in the vestibule.

F. The Alleged Unilateral Changes

1. The December 14, 2010 memorandum to employees

Respondent's employees historically received a hot lunch on a daily basis. This was a practice which had been in effect for decades and had existed long prior to the Union's certification. The lunch served to employees consisted of the food that was prepared for and served to residents and typically consisted of such items as chicken, mashed potato and broccoli or meatballs and spaghetti.

On December 14, 2010, Reingold send a memorandum to employees notifying them that: "[a]s of January 1st hot lunch will no longer be provided. In the meantime we will be offering a sandwich and a salad, this will be available in the staff dining room."

According to Nogueira, sandwiches and salad were served to employees in lieu of a hot lunch for a period of approximately six months, at which time the Employer resumed its original practice of serving hot lunch to employees.[17]

Respondent argues that it maintained a practice of offering hot lunches to its employees only when excess food remained after residents were fed. There is no testimonial or other evidence in support of this contention. To the contrary, according to Nogueira, this was not the case and there was always sufficient food for the workforce.

In the same memorandum, employees were advised that the Employer was "notified by the check cashing company that they will no longer offer on site check cashing." As recounted by employee witnesses, an outside firm would come to the facility on a weekly basis during working hours and employees would be able to cash their checks for a fee. This practice had been in effect for about a year prior to its termination. Administrator Moshell testified that the check cashing company had no contractual relationship with Sprain Brook and decided of its own volition to cease providing such services as it was not profitable. However, as noted above, these events occurred before Moshell began his employment at the facility and he did not otherwise state the basis for his knowledge of these events.

As Speller and Nogueira testified, no prior notice of either of the above-noted changes was ever provided to the Union.

2. Medical Services

Respondent's employees are required to have annual physical examinations and tuberculosis (PPD) tests. In the past, these services were offered to employees on-site, free of charge. On a certain date announced to employees, a weekend RN supervisor referred to in the record as "Jackie," set up a station in the resident dining room. There she would meet with employees, take their blood pressure and temperature, perform the PPD test and otherwise check their general health. Forms would be completed for employees to submit certifying that they had been examined and given the requisite test.

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[17] As noted above, Alonso was discharged prior to this change and Bartko was unaffected by it as she brought her own lunch on a daily basis.

On February 18, 2011, employees received a memorandum from Reingold, stating as follows:

> All employees are required to submit their annual PPD & Physical Exam on or before MARCH 25, 2011 completed by your Physician. If you had your PE done within the last three (3) months, you may not obtain a new PE but a copy should be submitted to the Nursing Department.
> All employees should have their PPD done except for those with a history of positive (+) PPD, in which case an x-ray must be submitted and attached to your Physical Exam.
> All Physical Exam results will be submitted to the DNS for the Medical Director to review and sign.
> No employee will be allowed to come to work without his/her annual PE after MARCH 25, 2011.
> Employee Screen / PE form is available at the nursing department.
> For any questions please direct it to the DNS or any RN supervisor.
> For your strict compliance.

The testimony of witnesses called by the General Counsel establishes that there was no prior notice of this change afforded to the Union, and Respondent has adduced no evidence to the contrary.

In support of its contention that the foregoing does not represent a unilateral change, Respondent relies upon the testimony of the General Counsel's witnesses that, since the memorandum was distributed in February 2011 they did not take steps to affirmatively investigate whether such services would continue to be available to them at the facility.

Respondent further relies upon Moshell's testimony as follows:

> Q: [by Respondent's counsel] Mr. Moshell, with regard to employee PPDs and physical exams, are you aware or do you have knowledge of those exams currently being offered by Sprain Brook at no cost to its employees?
> A: Yes, we give by our physicians – our staff.
> Judge Landow: I'm sorry? I couldn't hear you.
> A: We give it by our staff.
> Judge Landow: Staff?
> A: They are, yeah.
> Q: [by counsel for Respondent] And to date do you know if any employees have taken up that offer with the company?
> A: Yes.
> Q: Okay. And do you recall the staff members, whether they be RNs or doctors or who performs these services on behalf of Sprain Brook?
> A: Yes.
> Q: And who are they?
> A: Our physicians, our RNs, anybody who requests somebody for a physical.
> Q: And that has been the practice at Sprain Brook since you have taken over as the administrator?
> A: Correct.
> Q: And prior to – to the extent you know, prior to – well, even during the tenure of consulting for the company, is it your understanding that Sprain Brook offered PPDs and physicals at no [cost] to employees in 2011 as well?
> A: Yes.
> Q: And do you know if employees, in 2011, took up that offer?

A: Yes, they have.

3. Medical "pay outs"

For a period of five or six years continuing until late-2011, Respondent had offered its employees the option of receiving a monthly payment in lieu of participating in its health plan. The amounts of the payments were tied to and increased according to the cost to the Respondent of the health insurance those employees were opting not to receive. Nogueira, who availed herself of this option, testified that she received a monthly sum. Her payroll record shows that the final monthly pay out she received amounted to approximately $350.

On November 21, 2011, Respondent issued the following memorandum to employees:

> Due to recent changes in health care legislation, Sprain Brook Manor Nursing Home is unable to continue offering a "medical expenses" payout as has been done in the past. However you are afforded the opportunity to enroll in our current health plan as administered by Oxford Health Plans. Please see Israel in the business office for enrollment options and forms.

There is no record evidence as to what changes in "health care legislation" would have necessitated such a change.

In its defense to these allegation of the complaint, Respondent argues that the Respondent sought to negotiate such changes with the Union but was unable to do so because here have been no face to face negotiations between the parties since June 2011. Respondent further relies upon the fact that Speller admitted that the Respondent had contacted him, via letter, about health insurance premiums and the subcontracting of the laundry department.[18]

There is, however, no evidence that Respondent provided the Union with any notice or an opportunity to bargain over the specific issue of the elimination of medical pay outs for its unit employees.

III. Analysis and Conclusions

A. The Alleged Violations of Section 8(a)(1)

The complaint alleges that Respondent, by Reingold, threatened employees with unspecified reprisals for seeking assistance from the Union and further threatened employees that if they sought Union representation they would not receive payments owed to them in connection with the compliance specification in *Sprain Brook Manor*, 351 NLRB 1190 (2007) (*Sprain Brook 2007*). Both of these complaint allegations stem from the meeting between Reingold and Alonso held on November 9, 2010.

Section 8(a)(1) makes it unlawful for an employer to "interfere with, restrain, or coerce employees in the exercise" of their Section 7 rights. For the purposes of Section 8(a)(1),the motive for the employer's actions is irrelevant; if the action, or sequence of actions, reasonably

[18] Apparently, the parties agreed that the one remaining employee in that department, Nogueira, be transferred into the housekeeping department with no change to her working hours or rate of compensation. There is no evidence of any agreement with regard to the issue of health insurance premiums.

tends to interfere with the free exercise of rights under the Act, it is unlawful. See *Naomi Knitting Plant*, 328 NLRB 1279, 1280 (1999).

In defending against these allegations of the complaint as well as those relating to Alonso's discharge, Respondent seeks to discredit her testimony. In support of these contentions, Respondent argues that Alonso is not credible due to her "outright denials regarding conversations with Reingold," her "inability to recall basic facts concerning paychecks and compensation sources" and the fact that Alonso allegedly denied the existence of her "resignation letter" while admitting her signature was on that document.

As an initial matter, I must state that Alonso was a witness who demonstrated significant deficits in her recall of certain events; in particular, the specific details regarding her prior history of discipline. In this regard, however, it should be noted that prior to her discharge on November 9, 2010, Alonso had received no discipline for more than one year. At the time she was called to testify in this matter, well over two years had elapsed since any prior discipline had issued. Although Alonso denied receiving or reviewing certain disciplinary notices, she candidly admitted that her superiors had brought to her attention certain underlying issues with her performance, as she recalled them. She also acknowledged her signature as it appeared on certain documents, described above. As for Alonso's inability to recall the specifics of her backpay compensation by Respondent, I note that the backpay stipulation signed by Klein specifically states that checks are to be submitted by Respondent to the NLRB. Thus, any confusion over the source of Alonso's backpay may well be attributable to the fact that while Alonso received checks drawn on Respondent's account, they were provided to her through the auspices of the NLRB.

In any event, notwithstanding my observations about Alonso's inability to recall certain events, I find her description of her interaction with Reingold on November 9, 2010, to be detailed, consistent and credible. It is inherently likely that the events of this encounter would stand out in Alonso's recollection, while other less significant events may have faded. Moreover, Alonso's recollection of this meeting largely comports with the account she told Nogueira shortly thereafter. As she is a current employee, I find there is good reason to credit Nogueira. See *Advocate South Suburban Hospital*, 346 NLRB 209 fn. 1 (2006), quoting *Flexsteel Industries*, 316 NLRB 745 (195), aff'd mem. *NLRB v. Flexsteel Industries*, 83 F.3d 419 (5th Cir. 1996)(current employees are likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests); see also *American Wire Products, Inc.*, 313 NLRB 989, 993(1994)(current employee providing testimony adverse to his employer is at risk of reprisal and thus likely to be testifying truthfully). Moreover, as noted above, Alonso's account of events regarding her interaction with Reingold is unrebutted. As has been noted, while it is possible for the Board to dismiss or disregard uncontroverted testimony, it may not do so without a detailed explanation. See *Missouri Portland Cement Co. v. NLRB*, 965 F.2d. 217, 222 (7th Cir. 1992).

Aside from the fact that Alonso's testimony regarding her interactions with Reingold is unrebutted, and corroborated in large measure by Nogueira, I found both of these witnesses to demonstrate an impressive and candid demeanor while on the witness stand. Contrary to any suggestion by Respondent, I did not find Alonso's failure of memory to be a product of dissembling or an attempt to evade questioning; rather, she frankly acknowledged facts which would be adverse to her interests in this proceeding and conceded her failure to recollect certain matters. In sum, I find that Respondent has failed to show any persuasive reason to disregard Alonso's uncontested version of events.

Thus I credit Alonso's testimony that Reingold told her that if she left the room to seek Union representation she would have "trouble." As the Board has found, a threat need not be specific in order to be found violative of Section 8(a)(1) of the Act. *SKJ Jonesville Division, L.P.*, 340 NLRB 101 (2003)(and cases cited therein). In a variety of contexts the Board has concluded that raising the specter of "trouble" in conjunction with or stemming from union activity is conduct which reasonably falls within the prohibitions of Section 8(a)(1). See, e.g., *U. S. Steel Corp.*, 279 NLRB 16 fn. 1 (1986); *Perth Amboy Hospital*, 279 NLRB 52 fn. 2 (1986); *Parkview Hospital, Inc.*, 343 NLRB 76, 81 (2004)(threatening an employee with "trouble" for engaging in union activity held to be a threat of unspecified reprisals). Here, in agreement with the General Counsel, I find that Reingold's admonition to Alonso that if she left their meeting to seek union representation she would have "trouble" is a threat of unspecified reprisal which violates Section 8(a)(1) of the Act.

The General Counsel has further alleged that Reingold threatened Alonso that if she sought Union representation she would not receive payments owed to her in connection with a prior Board order and backpay stipulation in violation of Section 8(a)(1). Alonso testified that Reingold sought to induce her to sign a paper by promising her that, if she did so, she would receive the "money coming to her" as well as other benefits such as severance pay and accrued vacation and sick leave payments. When Alonso asked for permission to leave the office to retrieve her eyeglasses and consult with a union representative, Reingold told her that if she left the room not only would she have trouble, but that she would get nothing. As noted above, Respondent argues that Alonso's account is not worthy of credit, a contention I have rejected. Respondent also contends, without any direct evidentiary support, that to the extent Alonso is credited, Reingold was referring to other payments, e.g. severance, vacation and/or pay that had been promised to Alonso in the meeting with Reingold and not to any sums of money owed to her by virtue of her prior unlawful discharge. At most, Respondent has shown that Alonso demonstrated some uncertainty in her testimony, as set forth above, about what Reingold was referring to. However, the evidence is also clear that at this point in time, Alonso was continuing to receive backpay payments pursuant to the compliance stipulation.

As has been noted above, the test of whether a statement is violative of Section 8(a)(1) of the Act is an objective, not subjective, one. Under all the circumstances I conclude that it was reasonable for Alonso to conclude, as she testified, that when Reingold told her that if she left the room to seek out Nogueira she would have "trouble" and "get nothing," that he was threatening to withhold her backpay. Apart from any other promise which may have been made by Reingold to induce Alonso to resign, her backpay was the only specific sum which Respondent clearly owed to her at the time. Thus, under the circumstances it would be reasonable for Alonso to conclude, absent any other clarification, that when Reingold separately referenced the money "coming to her" it was her backpay to which he was referring. Accordingly, I find that by threatening Alonso that if she sought Union representation she would have trouble and get nothing Respondent threatened to withhold Alonso's backpay and violated Section 8(a)(1) of the Act. See *The Baytown Sun*, 255 NLRB 154, 161 (1981).

B. The Discharges of Catherine Alonso and Karen Bartko

Section 8(a)(3) of the Act provides, in pertinent part, that it is "an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Section 8(a)(4) provides that it is an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."

The General Counsel has alleged that Alonso was discharged in retaliation for her continuing Union support and because of her prior participation in Board proceedings against the Respondent. It has also been alleged that Bartko was discharged due to her support for and activities in support of the Union. Respondent contends that it accepted the Alonso's voluntary resignation or, in the alternative, lawfully discharged her due to her continued and documented poor performance. Respondent further contends that Bartko was discharged due to her disrespectful and insubordinate conduct which included, as Respondent argues in its brief: "(i) slamming the door in her supervisor's face; (ii) her insubordinate and hostile attitude during the meeting with Reingold; and (iii) reporting to work that weekend in direct contravention of Reingold's instructions." Thus, the issue of the Employer's motivation is at stake in each instance.

1. The *Wright Line* Factors

Allegations of discrimination which turn on Employer motivation under either Section 8(a)(3) or (4) of the Act are analyzed under the framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See also *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 395 (1983); *American Gardens Mgmt.Co.*, 338 NLRB 644, 645 (2002) (*Wright Line* analysis applies to claims of discriminatory discharge under both Section 8(a)(3) and 8(a)(4)).

To establish a violation of Section 8(a)(3) and (4) under *Wright Line*, General Counsel must first show, by a preponderance of the evidence, that the employee engaged in protected concerted activity, the employer was aware of that activity, and the activity was a substantial or motivating reason for the employer's action. *Wright Line*, supra; *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Proof of an employer's motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Ronin Shipbuilding*, 330 NLRB 464 (2000); *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004); enfd. mem. 179 LRRM (BNA) 2954 (6th Cir. 2006); *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). The Board has long held that where adverse action occurs shortly after an employee has engaged in protected activity an inference of unlawful motive is raised. See *McClendon Electrical Services*, 340 NLRB 613, fn. 6 (2003) (citing *La Gloria Oil*, 337 NLRB 1120 (2002), enfd. mem. 71 Fed Appx. 441 (5th Cir. 2003) (Table)).

As part of its initial showing, the General Counsel may offer proof that the employer's reasons for the personnel decision were pretextual. *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003); see also *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D. C. Cir. 1995); *Real Foods Co.*, 350 NLRB 309, 312 fn. 17 (2007)(unlawful motivation demonstrated not only by direct, but by circumstantial evidence such as timing, disparate or inconsistent treatment, expressed hostility, departure from past practice and shifting or pretextual reasons being offered for the action). In addition, proof of an employer's animus may be based upon other circumstantial evidence, such as the employer's contemporaneous commission of other unfair labor practices. *Amptech, Inc.*, 342 NLRB 1131, 1135 (2004). Moreover, should the evidence show that the employer's proffered defense is pretextual in nature, the Board has found that the second prong of the *Wright Line* analysis is unnecessary. See e.g. *Relco Locomotives, Inc.*, 358 NLRB No. 32, slip op. at 1, fn. 4 (2012); *Austal USA, LLC.*, 356 NLRB No. 65,slip op. at 2 (2010).

Once the General Counsel establishes its prima facie case, the burden of persuasion then shifts to the employer to "demonstrate that the same action would have taken place even in the absence of the protected conduct." *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004); *Wright Line*, supra. To meet its *Wright Line*

burden, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996). See also *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996).

2. Application of the *Wright Line* Standards

As was outlined in *Sprain Brook Manor* (2007), supra, both Alonso and Bartko were initial supporters of the Union who suffered adverse employment consequences as a result of their protected activities. Alonso was unlawfully discharged, and Bartko had her overtime hours reduced. They were both owed backpay compensation as a result of these discriminatory actions until December 2011.

Continuing into 2010, these employees continued their Union activities, by participating in shift change visibilities and picketing (both of which were not only conducted in plain sight but actively observed by management) and through their participation in collective-bargaining negotiations. In addition, Bartko served as a Union delegate for her fellow employees up until her discharge. Thus, the record is apparent that both Alonso and Bartko engaged in Union activities and that Respondent was aware of that fact.

I additionally find that the General Counsel has adduced evidence of animus toward the Union generally and toward the specific activities of these two employees in particular. As an initial matter, I take administrative notice of and consider Judge Rosas' findings in *Sprain Brook Manor* (2007) to be background evidence of animus. In arguing that such a finding is not appropriate, Respondent argues that the prior incidents involving the employees that serve as the basis for the current claim of discrimination occurred during a remote period, i.e. 2005 -2007 or 5 to 7 years ago. This assertion, of course, overlooks the fact that Respondent was obliged to provide backpay payouts to five of its employees, including the two named discriminates here, up to and including the year 2011 and that the Union engaged in open activities at the site during 2010.

In *Opelika Welding*, 305 NLRB 561, 566 (1991), the Board upheld the administrative law judge's reliance on findings in a prior case. There, the judge noted that in the prior proceeding the employer displayed animus against the same type of union activity that was involved in the subsequent case. Thus, the judge concluded that the prior findings could be relied upon as evidence of the employer's continuing antiunion animus. Here, as there, the employees in question are engaged in the same sort of organizational activity, for the same labor organization, that caused the Employer to retaliate against them initially. Moreover, although it appears from the record that certain managers have left and others taken their place, Robert Klein has been an owner of Respondent throughout the years of the Union's organizational drive, certification and the litigation of the earlier unfair labor practice allegations. He has remained in this position during all times relevant to the instant matter. I therefore find it appropriate to impute animus based upon the evidence adduced in prior proceedings involving the Respondent here. See *Southern Maryland Hospital*, 295 NLRB 1209 fn. 1 (1989); *Kenworth Trucks of Philadelphia*, 236 NLRB 1299 fn. 2 (1978)(and cased cited therein).

Furthermore, in addition to any legal presumptions or prior determinations regarding the Employer's animus toward its employees' Union activities, there is independent evidence of such in the instant record. I draw this conclusion from various comments made by Reingold, some of which have been found to constitute independent violations of Section 8(a)(1), as described above. Thus, when Alonso was confronted with a demand that she sign what

amounted to a letter of resignation, and requested permission to leave the room to consult with the Union, she was told that if she left she would have trouble and not receive what was coming to her. When Nogueira protested Alonso's discharge for a dirty toilet and asked Reingold why he had not called for Union representation, Reingold stated that his employees did not deserve Union representation. These comments are direct and contemporaneous evidence of Respondent's animus toward its employees' Union activities. Additionally, as will be discussed below, I find further evidence of animus in the circumstances attending the discharges of both Alonso and Bartko and the pretextual nature of the Respondent's proffered defenses.

Based upon the foregoing, I conclude that the General Counsel has established the requisite elements of a prima facie case under *Wright Line*, with respect to both Alonso and Bartko. Accordingly, it falls to the Respondent to establish, by a preponderance of the evidence, that it would have discharged either or both of these employees notwithstanding their Union or other protected activities.

a. Alonso

Respondent argues that Alonso was an unsatisfactory employee with a history of work performance problems. In this regard, Respondent relies upon a series of written warnings maintained in Alonso's personnel file, which document performance deficiencies for the period from September through November 2009, to justify the discharge of this long-term employee and active Union supporter. Such evidence is unavailing for several reasons. As an initial matter, as General Counsel notes, after November 2009, there is no further documentation or evidence of any subsequent performance problem for one year or until Alonso was summoned to Reingold's office purportedly for failing to adequately clean a toilet. In this regard, I note that Alonso was cross-examined extensively regarding her work assignments and her testimony that she performed them assiduously is not only credible based upon her demeanor but generally unrebutted, with the limited exception of the two-month period noted above.

Further, the record fails to demonstrate that Reingold was aware of any prior problem with Alonso's performance. As was stipulated by the parties, Reingold became the administrator at Sprain Brook Manor in September 2010, or approximately 10 months after the final 2009 disciplinary notice was issued to Alonso. There is no evidence that Reingold reviewed Alonso's personnel file prior to calling her to their meeting or based his discipline on her work history. In this regard, Reingold made no reference to any prior infraction or problem with Alonso's work performance either during the initial meeting between the two, the meeting subsequently held with Nogueira or, most tellingly, in the disciplinary notice he prepared to document Alonso's termination from service. Moreover, there is simply no evidence to support Respondent's assertion, as set forth in its post-hearing brief, that Reingold or any other management official conducted an audit of the rooms to which Alonso had been assigned in early November 2010. There is similarly no evidence of deficiencies in her work performance discovered as a result of any such audit. To the contrary, the record evidence supports the conclusion that the sole allegation leveled against Alonso on the day of her discharge and seized upon by Respondent was Alonso's failure to adequately clean one toilet. The record fails to disclose any evidence that Reingold was at the time, aware of any other problem with Alonso's work performance. Thus, I find that Respondent's exhumation of Alonso's prior disciplinary notices and its newly-found reliance upon Alonso's limited history of performance deficits is a post-hoc justification for her discharge which supports the conclusion that it is pretextual (and, accordingly, some evidence of animus).[19]

[19] There is similarly no evidence to support Respondent's contention that other employees were

Continued

As for Respondent's suggestion that Alonso voluntarily resigned, I find that the evidence shows that Reingold induced Alonso to sign a paper, which she stated she could not read, through a combination of empty promises[20] and threats. The Board has recognized that coerced "resignations" are properly viewed as discharges. See e.g. *Federal Screw Works*, 310 NLRB 1331 (1993)(Board adopts finding that employees who were "hustled" into signing resignation agreements were in fact discharged). Moreover, Respondent has repeatedly confused the record, at times characterizing Alonso's separation from service as a resignation and at others a termination.[21] Based upon the evidence as a whole I conclude that Alonso did not wish her employment to end and that the termination of her employment is properly viewed as a discharge.

While there was no immediate precipitating event of Union activity which appears to have prompted Reingold to take action against Alonso, the Board has recognized that the elements of *Wright Line* do not require that there be a direct link or nexus between protected conduct and adverse employment action. See *USC University Hospital*, 358 NLRB no. 132, slip op. at 1 fn. 2 (2012)(citing *Mesker Door, Inc.*, 357 NLRB No 59, slip op. at 2 fn. 5 (2011)). Moreover, the Board has recognized that an employer may watch and wait for an infraction to occur and utilize that as pretext to discipline an employee based upon animus toward prior protected conduct. See *United Parcel Service*, 340 NLRB 776, 777 fn. 10 (2003) and cases cited therein. Further, as noted above, at the time Alonso was discharged, she was still receiving installment payments from Respondent as a result of her prior Board case, and testimony in that matter. Those payments also substantially exceeded those owed to the other employees involved.

Finally, I note that Alonso was an employee of long tenure who was assigned to clean some of the most publicly accessible areas in the facility (e.g. the lobby and dining room) as well as the offices and rest rooms of the facility's administrator and other staff. There her work would have been subject to constant evaluation, and had there been any continuing insufficiency it is more likely than not it would have been noted. Thus, Respondent's argument that she was a sub-standard employee is belied by its actions in issuing her work assignments to these heavily-monitored areas of the facility where she received no discipline for a period of one year prior to her discharge.

Based upon the foregoing, I conclude that Respondent has failed to adduce sufficient evidence to rebut the General Counsel's prima facie case and to meet its burden of proof to show, through a preponderance of the reliable, credible evidence that it would have discharged Alonso notwithstanding her Union and other concerted, protected activities. Accordingly, I conclude that Respondent discharged her in violation of Section 8(a)(1), (3) and (4) of the Act.

b. Bartko

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terminated for similar performance problems. The record is silent as to the reason for Miller's discharge, and there was no evidence presented by Respondent to show that other employees were treated in a fashion similar to Alonso.

[20] There is no evidence to show that Respondent met its promise to provide Alonso with severance, accrued vacation and sick pay or to agree to a claim for unemployment benefits. This clearly is evidence within the control of Respondent and under the circumstances here, where Respondent has raised these factors to challenge Alonso's credibility, I conclude that the failure to adduce it supports an inference that Reingold's representations were false.

[21] By way of example, in his opening statement, Respondent's counsel referred to Alonso's, "termination, resignation, however you want to phrase it . . ."

Preliminarily, I note that there are several factual assertions made by the Respondent in its post-hearing brief which have no support in the record. For example, the record fails to establish that Bartko allowed the door to "slam" onto Reingold. To the contrary, both Bartko and Nogueira testified that the doors to the facility have a bar which slows down the rate at which they close precisely to prevent such an occurrence.[22] There is also no evidence that Reingold was carrying a number of packages at the time, or that Bartko observed that he was so encumbered. Similarly, the record fails to establish that Reingold or any other agent of Respondent advised Union official Trumpler or any other Union official or agent that Bartko should not report to work after March 4, 2011. Against this backdrop, I evaluate Respondent's proffered defense to Bartko's termination.

On February 22, 2011, Reingold went to find Nogueira and asked whether Bartko was one of "her people." Of course, this was a gratuitous comment as administrator Reingold must have been well aware that Bartko, as a CNA, was a bargaining unit member. And, as noted above, Bartko was also a Union delegate. Reingold most certainly would have been aware of this as well. Accordingly, I conclude that Reingold's query was a sardonic reference to Bartko's Union activities and support. As has been described above, Bartko had been previously accused of improperly taking juice and, with Nogueira's assistance, had successfully refuted that claim and received no discipline. At this time, Reingold made some comments about the change in the facility's lunch policy and Nogueira reminded him that any such changes must be discussed with the Union. As both Nogueira and Bartko recounted, Reingold demonstrated his displeasure with these employees during this meeting. In sum, I conclude that the foregoing events on whole evince animus toward the Union and its efforts to advocate on behalf of bargaining unit employees.

Against the background of a prior successful intervention on the part of the Union, ten days later, Reingold apparently took offense at the fact that Bartko neglected to hold the door for him as he was entering, and she leaving the facility. He summoned Nogueira and Bartko to his office where his account of events was disputed, as Nogueira pointed out that the door was unable to slam, as he asserted. She also asked some questions about what Reingold had observed at the time and encountered his considerable annoyance. As both Bartko and Nogueira testified, Reingold was yelling at them throughout this encounter.

As has been set forth above, it is undisputed that Bartko reacted to Reingold in an intemperate manner.[23] In response to Reingold's questioning she responded that she would hold the door for others, but not for him. He then called a subordinate into the office as a witness and took notes of their encounter, telling Bartko that she was going to "bury" herself.[24] As Respondent acknowledges in its post-hearing brief, Reingold, "sent her home for the day."[25] Bartko impertinently asserted that Reingold was the one who should be sent home.

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[22] This is, of course, inherently probable given the nature of population residing at the facility.

[23] The General Counsel argues that Bartko's conduct should be examined under the principles of *Atlantic Steel Co.*, 245 NLRB 814 (1979) and its progeny, but fails to identify what, if any, protected conduct Bartko was engaged in contemporaneous with her "outburst." I conclude, on whole, that the General Counsel's reliance on *Atlantic Steel* for these purposes is inapposite.

[24] Although the contents of Bartko's personnel file were subpoenaed by the General Counsel, these notes were not produced. In fact, there were no documents produced in response to the subpoena. The General Counsel makes note that no disciplinary notices were produced although clearly encompassed by the subpoena.

[25] Respondent's Brief, page 5

Although Respondent also asserts that Bartko was told not to report back to work until further notice, there is no evidence to support this specific contention. Rather, the testimony of both Bartko and Nogueira is to the effect that Bartko was merely told to leave the facility. The conversation of the two employees as Bartko was being escorted to her car, demonstrates that the length of Bartko's suspension had not been made clear to either of them at that time. This testimony is generally corroborated by Union vice-president Speller, who stated that when he initially spoke with Respondent's counsel, he was advised that Bartko would be allowed to return to work, a decision which was only subsequently reversed.

Thus, absent instructions to the contrary, Bartko returned to work on her next regularly scheduled day,[26] was allowed entry into the facility and worked her full shift without incident. It was only after her shift was completed that she was informed that she should not return to the facility until further notice.

I support of its contention that Bartko was lawfully discharged, Respondent relies upon *Continental Can Co.*, 148 NLRB 640 (1964 and *Cotwool Manufacturing Corp.*, 115 NLRB 1018 (1956). Aside from the fact that both these decisions issued prior to the explication of the *Wright Line* standards, they are inapposite in any event. For example, in *Continental Can Co.*, supra at 641, the trial examiner, affirmed by the Board, concluded that the evidence showed that the employee in question demonstrated an "attitude of indifference to his work, insubordination and insolence toward his superiors." "Thus, he frequently reported late to his work station, he spent too much time away from his work station, he was inattentive while at work and he did not cooperate with his supervisors and fellow employees." The employee was the subject of "a never ending cycle of complaints" and would be "reprimanded on an average of twice per week." The employee's response to these reprimands "tended to be insolent and insubordinate" resulting in "many angry arguments" where he and his supervisor "addressed profanities at one another." Respondent cannot credulously be attempting to compare Bartko's previously spotless employment record to the one at issue there.[27] Respondent further relies upon *Davie Roofing*, 341 NLRB 222 (2004). There the Board, reversing the administrative law judge, found that two employees were lawfully discharged after they committed safety violations and insubordinately refused to comply with their employer's instructions that they acknowledge these violations in writing. What is noteworthy about Respondent's reliance upon this case is its acknowledgement and tacit admission that here, as there, the Respondent has failed to adduce evidence of comparable situations of similar instances of insubordination for which employees have been discharged.

Notwithstanding the foregoing, as has been well noted, under the Act, an employer may discharge an employee for good reason, bad reason or no reason at all so long as it is not for union or concerted protected activities. See e.g. *Ryder System, Inc.*, 302 NLRB 608 (1991). However, what is at issue here is not whether the Bartko's remarks justified Respondent in discharging her, but whether Respondent has shown that they would have caused her discharge in the absence of her protected activities.

While it is the case that, in her meeting with Reingold, Bartko was rude, and perhaps more, the evidence fails to meet Respondent's burden of proof to establish that Reingold made a determination to discharge her based upon that behavior. Rather, the record demonstrates that he intended to, and did, suspend her for the balance of the work day. Moreover, there is no evidence to suggest that Bartko received and, consequently, defied any instruction not to

[26] Had she not, Bartko might well have been accused of job abandonment.

[27] As the record establishes, Bartko has no prior history of discipline in her personnel file.

subsequently report to work, as Respondent contends. Further, the timing of Reingold's accusations against Bartko, coming shortly after a successful Union intervention on her behalf, in conjunction with his apparent overreaction to what appears, at best, to have been a minor slight (neglecting to hold the door for him) suggests that he bore animus toward Bartko for more than her conduct on that particular day.

Further, the sum of the evidence shows that Bartko's outburst was provoked by two false accusations of misconduct occurring within the space of two weeks as well as by Reingold's hostile and intimidating manner toward her on March 4. The Board has "long recognized that an employer cannot provoke an employee to the point where he commits an indiscretion and then rely on that conduct to terminate his employment." *Key Food*, 336 NLRB 111, 113 (2001)(employee touched supervisor on the shoulder following supervisor's abusive tirade). See also *Opelika Welding*, supra at 568 (and cases cited therein). In addition, a distinction may be drawn between spontaneous and premeditated statements by employees. Id. Here, Bartko's outburst was clearly provoked by Reingold's overstated reaction to and false report of her conduct; an exaggeration of events which I have concluded stemmed, at least in part, from his animus toward Bartko's protected conduct.

Moreover, the construct of Respondent's proffered defense to Bartko's discharge is based upon assertions not supported by the record. In particular, the evidence fails to show that Bartko slammed the door on Reingold or that she defied instructions not to report to work, as Respondent has alleged. I conclude therefore that Respondent's proffered reasons for Bartko's discharge are exaggerated and to a large extent simply false. Because Respondent's defense is pretextual in significant measure, it is inadequate to meet Respondent's burden of proof to rebut the General Counsel's prima facie case, and precludes a finding that Bartko's discharge took place for non discriminatory reasons or that she would have been discharged had it not been for her Union and protected, concerted activity. Accordingly, I find that Respondent discharged Bartko in violation of Section 8(a)(3) of the Act.

C. The Unilateral Changes

1. Applicable Legal Principles

Under the Act, before an employer may effect a material and substantial change in its employees' wages, hours and other terms and conditions of employment, it must notify the employees' collective-bargaining representative and afford the representative an opportunity to bargain about the change. *NLRB v. Katz*, 369 U.S. 736 (1962); *Daily News of Los Angeles*, 315 NLRB 1236, 1237-1238 (1994) enfd. 73 f.3D 406 (D.C. Cir. 1996). The notice given to the union must be sufficient to allow a meaningful chance to bargain before the change is implemented. *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993); *Intersystems Design Corp.*, 278 NLRB 759 (1986). While parties are negotiating for a collective-bargaining agreement, as is the case here, the obligation to refrain from unilateral changes extends beyond the duty to provide notice and an opportunity to bargain but also encompasses a duty to refrain from implementation at all unless and until agreement or an overall impasse is reached. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) enfd. sub nom. *Master Window Cleaning v. NLRB*, 15 F.3d 1087 (9th Cir 1994). Moreover, a union must be provided with meaningful notice and an opportunity to bargain. When a union learns of changes after they have already been implemented, the Board recognizes that subsequent bargaining demands are futile. A union's failure to request bargaining under such circumstances does not constitute a waiver of any statutory right to bargain over such changes. See *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023-1024 (2001) and cases cited therein.

The Board has also found that providing notice to employees regarding a change in working conditions does not constitute notice to the union:

> One of the purposes of initial notice to a bargaining representative of a proposed change in terms and conditions of employment is to allow the representative to consult with unit employees to decide whether to acquiesce in the change, oppose it or propose modifications. A union's role in that process is totally undermined when it learns of the change incidentally upon notification to all employees.

Roll and Hold Warehouse & Distribution Corp., 325 NLRB 41-42 (1997).

It is within this context that I evaluate the allegations regarding the alleged unilateral changes implemented by Respondent.

2. Discontinuance of hot lunches for employees

The General Counsel has alleged that by discontinuing its long-standing practice of providing hot lunches to its employees for a period of approximately 6 months, Respondent has violated the Act. It is further contended that the substitution of a sandwich and salad during this period was a sufficiently material change in terms and conditions of employment to warrant bargaining over the issue. Respondent argues that it did not effect any such change but has merely continued its practice of offering hot lunches to employees when there is excess food available after the facility's residents have been fed.

In *Ford Motor Co. v. NLRB*, 441 U.S. 448, 449 (1979), the Court upheld the Board's finding that in-plant food services are a mandatory subject of bargaining and held as follows:

> The availability of food during working hours and the conditions under which it is to be consumed are matters of deep concern to workers, and one need not strain to consider them to be among those "conditions" of employment that should be subject to the mutual duty to bargain. By the same token, where an employer has chosen, apparently in his own interest, to make available a system of in-plant feeding facilities for his employees, the prices at which food is offered and other aspects of service may reasonably be considered among those subjects about which the management and union must bargain. The terms and conditions under which food is available on the job are plainly germane to the "working environment". . . (footnotes omitted).

Here, Respondent's argument that no change occurred because employees historically were provided with hot lunch only on a conditional basis, i.e., if sufficient food remained after the residents were fed, is unsupported by any evidence and rebutted not only by Nogueira's credible testimony but by the express terms of the memorandum distributed to employees: "[a]s of January 1st hot lunch *will no longer be provided*. In the meantime we will be offering a sandwich and a salad, this will be available in the staff dining room" (emphasis supplied).

Moreover, this change was substantial and material. The Board has, under a variety of circumstances, found that unilateral changes to the type and manner of food and drink provided to employees are unlawful. See e.g. *Mercy Hospital of Buffalo*, supra (employer closed cafeteria from 2:00 to 4:00 p.m. and substituted vending machines offering similar meal choices); *Beverly Enterprises,* 310 NLRB 222, 239 (1993)(elimination of free coffee unlawful); *Central Mack Sales*, 273 NLRB 1268 (1994)(same).

Here, the credible witness testimony establishes that Respondent had been providing its employees with free, on-site hot lunches for many years. Then, Reingold announced that they would be receiving sandwiches and salads. There is simply no evidence to support Respondent's contention that the established and continued practice was to offer hot lunches to employees on a conditional basis, i.e. when they were not consumed by the residents of the facility. The record also establishes that no notice or meaningful opportunity to bargain over this change was provided to the Union. Accordingly, Respondent has violated its duty to bargain in violation of Section 8(a)(1) and (5) of the Act.[28]

3. Cessation of check-cashing privileges

The Respondent's practice of providing employees with check-cashing services during working hours is a mandatory subject of bargaining because it relates to wages, hours and terms and conditions of employment. The practice involved the manner in which employees received their pay, and their ability to cash their paychecks during working time provided an economic benefit to these employees arising out their employment. I further find that this change was material and significant because it required employees to cash their paychecks during their own time. *AT&T Corp.*, 325 NLRB 150, 153 (1997); See also *Sheraton Hotel Waterbury*, 312 NLRB 304, 307 (1993); *Sands Motel*, 280 NLRB 132, 143 (1986)(Board adopts finding that check-cashing privilege is a mandatory subject of bargaining); *Somerville Mills*, 308 NLRB 425 (1992)(Board adopts finding that the hour at which employees receive their paycheck is a mandatory subject of bargaining.)

Respondent contends that it had no bargaining obligation over this issue because it had no contractual relationship with the check cashing vendor, and that the company of its own accord ceased providing such services as they were found not to be profitable.[29] Assuming this to be the case, such circumstances do not relieve Respondent of its obligation to bargain with the Union over this change. As an initial matter, the issue of using working time to cash one's paycheck is one that is eminently suitable for collective bargaining. *AT&T Corp.*, supra at 153.

Moreover, as the General Counsel notes, employees commonly receive any number of significant employment services and benefits (health insurance, for example), through third-party vendors. Such benefits are mandatory subjects of bargaining notwithstanding alterations in the contractual relationship between the employer and the vendor. By way of another example, in *Ford Motor Co.*, supra at 503, discussed above, the Court noted that even though the in-plant vending machine prices were set by the outside vendor, "an employer can always effect prices by initiating or altering a subsidy to a third-party supplier. . .and will typically have the right to change suppliers at some point in the future. . . the employer holds future, if not present, leverage over in-plant food services and prices." Such an analysis obtains here, as well.

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[28] As the General Counsel notes, the fact that Respondent has since reinstituted the hot lunch program does not remedy the violation because such a restoration, absent more, does not meet the requirements of *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

[29] Although Moshell testified that this was the case, he was not employed at the facility at the time and failed to demonstrate any personal knowledge of the nature of the relationship between the facility and the check-cashing company. He also conceded that he did not know whether Respondent had provided any instructions to the vendor. Thus, his testimony on this issue is hearsay which is unsupported by any documentary or corroborating evidence. For purposes of my analysis, I will assume that that Moshell's testimony on this issue is an accurate reflection of the relationship between the Respondent and the check cashing vendor; however, I wish to emphasize that do not find that Respondent has adduced sufficient probative evidence to support its contentions.

Thus, the time, place and manner in which employees cash their paychecks is a mandatory subject of bargaining. Here there was no notice or opportunity afforded to the Union for bargaining over such changes. Accordingly, I find that Respondent has violated the Act as alleged in the complaint.

4. Discontinuance of free on-site physical examinations and tuberculosis tests.

The credible testimony of the employees here establishes that after February 18, 2011, Respondent unilaterally discontinued its practice of providing free annual physical examinations and tuberculosis (PPD) tests to its employees. After this date, a well-established practice whereby a weekend nurse supervisor would provide such services to employees during working hours was discontinued. Neither of the employees who were working for Respondent at the time (Bartko and Nogueira) received these services thereafter.

Respondent relies upon Moshell's assertion that certain employees have, since that time, received such services, upon request. Moshell's vague and conclusory testimony, as set forth above, is unsubstantiated by any salient detail: thus he failed to offer particulars about who might be providing such services, when they may have been provided, the number of employees who have availed themselves of these services or where or when they were offered. Similarly, Moshell failed to show that Respondent has notified its employees that on site physical examinations and PPD testing remains available to them, something Respondent easily could have done at any relevant time.

Moreover, Respondent's position here is rebutted by plain and unambiguous language of the memorandum distributed to employees, which states in pertinent part: "All employees are required to submit their annual PPD & Physical Exam on or before MARCH 25, 2011 *completed by your physician*" (emphasis supplied). Thus, employees are clearly directed that these matters are to be undertaken with their own health care providers, and that, necessarily, they are to bear the burden of the cost of these examinations, which are required for continued employment. As a general matter, employees' health benefits are a mandatory subject of bargaining about which an employer has an obligation to bargain in good faith. *E.I. DuPont De Nemours, Louisville Works*, 355 NLRB No. 176 (2010) enf. denied 682 F.3d 65 (D.C. Cir. 2012); *United Hosp. Med. Ctr.*, 317 NLRB 1279, 1281 (1995). Moreover, there can be no dispute that the cost to employees of physical examinations, needed to maintain continued employment, "is an aspect of the relationship between [an employer] and its employees." *Ford Motor Co.*, supra at 501 (1979). In *Keeler Die Cast*, 327 NLRB 585, 589 (1999), the Board adopted the administrative law judge's finding that the unilateral discontinuance of employer-subsidized annual influenza vaccinations was a violation of Section 8(a)(5). Here, there is no evidence to support Respondent's contention that the services previously offered to employees are still provided. Rather, the credible evidence in conjunction with the admissions contained in Respondent's own memorandum to employees shows that it is not. The evidence further establishes that there was no notice provided to or an opportunity to bargain afforded to the Union prior to the implementation of this change. As this health benefit to employees is a mandatory subject of bargaining, Respondent's unilateral change violated Section 8(a)(1) and (5) of the Act.

5. The discontinuance of "medical expense" payouts to employees

The record shows that for several years prior to November 2011, employees who declined health insurance coverage under the Employer's health insurance plan received a monthly sum which was keyed to the cost of insurance premiums for those who did participate in the plan. Recently, certain employees received somewhere in the vicinity of $300 per month.

Several years of such monthly payments clearly constitute a term and condition of employment and a past practice which would require the Respondent to bargain over any change.

Although the memorandum announcing the elimination of medical pay outs refers to changes in health care legislation, these were not explored on the record.[30] However, even if Respondent had shown that the discontinuance of medical pay outs had, in fact, been necessitated by statutory changes, it would still be required to bargain with the Union over this change in employment terms, unless it could show that bargaining over the subject would be illegal. See e.g. *National Fuel Gas Distribution Corp.*, 308 NLRB 841, 845 (1992)(employer violated Section 8(a)(5) by unilaterally eliminating thrift plan where new tax law could make it very expensive. . ."the appropriate mechanism for consideration of that potential consequence is collective bargaining, not unilateral repudiation of a contract terms"); see also *The Swanson Group, Inc.*, 312 NLRB 184, 185 (1993)(employer must bargain about prior contract terms claimed to be illegal. . ."If the Respondent believes the clauses are illegal, it can negotiate a new agreement.")

Respondent requests that I infer, from the fact that the parties apparently amicably resolved the issue of the subcontracting of the laundry department, that it bargained in good faith with the Union. However, the subcontracting of the laundry department is a separate issue entirely. Here, there is no evidence to support Respondent's apparent contention that it provided prior notice of or an opportunity to bargain over the elimination of the health insurance pay out with the Union. [31] I conclude that Respondent's failure to do so is a violation of the Act.

In sum, inasmuch as the Union had no notice of any of the foregoing alleged unilateral changes until after their implementation (and only then, from bargaining unit members), there can be no basis for any credible argument that the Respondent provided timely notice to the Union or afforded it a meaningful opportunity to bargain over these alterations in substantial and material terms and conditions of employment. Nor does the fact that the parties have not met for face-to-face negotiations since June 2010 excuse Respondent's obligation to bargain over these mandatory subjects. Accordingly, by unilaterally discontinuing hot lunches for its employees, on site check cashing privileges, on site and free physical examinations and PPD tests and medical expense pay outs to bargaining unit employees, Respondent has failed and refused to bargain with the Union in violation of Section 8(a)(1) and (5) of the Act.

Conclusions of Law

1. Respondent, Sprain Brook Manor, LLC. is an employer engaged in commerce within the meaning of the Act.

2. The Union, New York's Health and Human Services Union 1199/SEIU, is a labor organization within the meaning of the Act and the exclusive collective-bargaining representative of the following unit of employees:

All full-time and regular part-time and per diem non-professional employees

[30] Although the General Counsel subpoenaed documents relating to this matter, none were produced.

[31] There is no evidence regarding what Respondent's proposals regarding health insurance premiums was to the Union and this vague description, as framed by counsel's questioning, is unhelpful. Clearly, if Respondent had made a proposal, particularly a written proposal, to the Union regarding any of the specific matters at issue in this proceeding, it could have provided evidence of such.

including licensed practical nurses, certified nurses' aides, geriatric techs/activity aides, housekeeping employees, laundry employees/assistants, dietary aides, and cooks employed by the Employer at its facility located at 77 Jackson Avenue, Scarsdale, NY, but excluding all other employees, including office clerical employees, managers and guards, professional employees and supervisors as defined by the Act.

3. By threatening employees with unspecified reprisals for seeking assistance from the Union and by threatening employees that if they sought Union representation they would not receive payments owed to them in connection with the compliance settlement in *Sprain Brook Manor LLC*, 351 NLRB 1190 (2007), Respondent violated Section 8(a)(1) of the Act.

4. By discharging Catherine Alonso, Respondent violated Section 8(a)(1),(3) and (4) of the Act.

5. By suspending and thereafter discharging Karen Bartko, Respondent violated Section 8(a)(1) and (3) of the Act.

6. By implementing the following changes to terms and conditions of bargaining unit employees without affording the Union notice or an opportunity to bargain, Respondent violated Section 8(a)(5) of the Act:

a. Discontinuing its practice of providing a free hot lunch to employees

b. Discontinuing its practice of providing on site check-cashing privileges to employees

c. Discontinuing its practice of providing free on-site physicals and PPD (tuberculosis) examinations to employees

d. Discontinuing "medical expenses" pay outs to employees who were not enrolled in the health plan offered by Respondent.

7. By the foregoing acts, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having discriminatorily discharged Catherine Alonso and suspended and then discharged Karen Bartko, Respondent must offer them reinstatement to their former jobs, without prejudice to their seniority or other rights and privileges previously enjoyed and make them whole for any loss of earnings and other benefits they may have sustained by reason of Respondent's unlawful conduct. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp., v. NLRB*, 747 F.3d 1137 (D.C. Cir. 2011). Respondent shall also be directed to expunge from the employment records of Alonso and Bartko any reference to their unlawful discipline and notify each of them in writing that this has been done and that their discipline will not be used against them in any way. Respondent should also be ordered to

rescind, upon request of the Union, any of the unilateral changes found to be unlawful herein and restore the status quo ante and provide the Union with notice and an opportunity to bargain before making changes in terms and conditions of employment of bargaining unit employees. Respondent should also be ordered to make employees whole for any losses they may have incurred as a result of the unlawful unilateral changes to their terms and conditions of employment. *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[32]

ORDER

The Respondent, Sprain Brook Manor, LLC., Scarsdale, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with unspecified reprisals for seeking assistance from New York's Health and Human Services Union 1199/SEIU or any other labor organization.

(b) Threatening employees that if they seek union representation they will not receive payments owed to them in connection with the compliance settlement in *Sprain Brook Manor*, 351 NLRB 1190 (2007).

(c) Suspending, discharging or otherwise discriminating against any employee for supporting New York's Health and Human Services Union 1199/SEIU or any other labor organization or for participating in prior charges before the National Labor Relations Board.

(d) Unilaterally changing the wages, hours or other terms and conditions of employment for members of the bargaining unit without first providing notice to and, upon request, bargaining with the Union.

(e) 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) Within 14 days from the date of the Board's Order, offer Catherine Alonso and Karen Bartko full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Catherine Alonso and Karen Bartko whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any

[32] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

WE WILL before implementing any changes in terms and conditions of employment of unit employees, notify and, upon request, bargain with the Union as the exclusive collective bargaining representative of these employees.

WE WILL, upon request by the Union, rescind any of the unlawful unilateral changes to your terms and conditions of employment.

WE WILL make our bargaining unit employees whole for any losses they may have incurred by virtue of our unlawful unilateral changes to their terms and conditions of employment.

SPRAIN BROOK MANOR NURSING HOME, LLC

(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. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies 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. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614

New York, New York 10278-0104

Hours: 8:45 a.m. to 5:15 p.m.

212-264-0300.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0346.