UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROSEWOOD CARE, LLC D/B/A ROSEWOOD REHABILITATION AND NURSING, Respondent, *and* 1199 SEIU UNITED HEALTHCARE WORKERS EAST, Charging Party.	Cases: 03-CA-297817 03-CA-303582

ROSEWOOD CARE, LLC'S
MOTION FOR RECONSIDERATION

Rosewood Care, LLC d/b/a Rosewood Rehabilitation and Nursing (Rosewood), pursuant to 29 C.F.R. § 102.48(c), moves for reconsideration of the Board's decision dated March 4, 2026, reported at 374 NLRB No. 53 (Decision) (copy attached).

Reconsideration is warranted because the law has changed in the two years since the parties filed briefing in response to the Administrative Law Judge (ALJ) decision (Jan. 11, 2024) (Initial Decision). Rosewood filed its exceptions and accompanying briefing on February 5, 2024; and the General Counsel and the 1199 SEIU United Healthcare Workers East (Union) filed their answering briefs on February 16 and 22, 2024, respectively. The Board then affirmed the ALJ decision more than two years later (March 2026), relying entirely on the parties' two-year-old briefing. During that two-year stretch, however, federal courts shattered multiple bases of the ALJ decision and the arguments of the General Counsel and Union. Because this matter

should be decided under current law, the Board should reconsider its Decision and fix its errors.

The Board's Decision errs in at least three respects: (1) By ordering Rosewood to pay compensatory and consequential damages, the Board exceeded its authority under the National Labor Relations Act (NLRA); (2) by imposing legal damages on Rosewood without a trial by jury, the Board denied Rosewood its rights under the Seventh Amendment; and (3) by restricting Rosewood's private rights outside of an Article III court, the Board violated the Constitution's separation of powers. Rosewood reserves its right on judicial review to raise arguments under the Administrative Procedure Act (APA)—including arguments that the Board lacked substantial evidence to support its conclusions and that the Board's conclusions are arbitrary and capricious.

PROCEDURAL BACKGROUND

Below, the ALJ concluded that Rosewood had committed multiple unfair labor practices (ULPs) under sections 8(a)(1), (3), and (5) of the NLRA. Initial Decision, 374 NLRB No. 53, at 16–17.[1] To remedy these violations, the ALJ ordered Rosewood to cease and desist from certain actions. *Id.* In addition, the ALJ ordered Rosewood to, among other things, "[m]ake whole" its terminated employee by compensating him "for any … direct or foreseeable pecuniary harms incurred as a result of the unlawful discharge, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings." *Id.* at 17. In

[1] The Board's March 4, 2026, Decision adopted the ALJ's Initial Decision as modified. The citations to the Initial Decision here come from the Initial Decision attached to the Board's final decision.

imposing this remedy, the ALJ noted that its decision was "[i]n accordance with" the Board's decision in *Thryv, Inc.*, 372 NLRB No. 22, 2022 WL 17974951 (N.L.R.B. 2022), *vacated in part Thryv, Inc. v. NLRB*, 102 F.4th 727 (5th Cir. 2024). *Id.*

The Board affirmed the ALJ's remedies, including the *Thryv* remedy. Decision at 1 n.2. But the Board noted that it was "open to reconsideration of [*Thryv*] in a future proceeding." *Id.* Because the Board lacked a "three-member majority to overrule [*Thryv*] at this time," however, it ultimately "agree[d] to apply" the decision here. *Id.*

DISCUSSION

The Board's decision errs in at least three ways: (1) by ordering Rosewood pay compensatory and consequential damages, the Board exceeded its authority under the NLRA; (2) by imposing legal damages on Rosewood without a trial by jury, the Board denied Rosewood its rights under the Seventh Amendment; and (3) by restricting Rosewood's private rights outside of an Article III court, the Board violated the Constitution's separation of powers. Rosewood explains each error in turn.

I. THE BOARD EXCEEDED ITS AUTHORITY UNDER THE NLRA BY ORDERING ROSEWOOD TO PAY COMPENSATORY AND CONSEQUENTIAL DAMAGES

By awarding damages under *Thryv*, the Board exceeded its authority under the NLRA.

The NLRA limits the types of remedies the Board may apply. It authorizes the Board to "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of" the Act. 29 U.S.C. § 160(c). For long, this text was never thought to empower the Board to award legal damages. *See*

UAW-CIO v. Russell, 356 U.S. 634, 643, 645 (1958); *see id.* at 642 (Awarding relief for medical expenses would "supersed[e] common-law actions" to "recover damages caused by … tortious conduct."). Nor was it thought to delegate the power to impose punitive awards. *NLRB v. CNN Am., Inc.*, 865 F.3d 740 (D.C. Cir. 2017).

Yet that all changed in December 2022 through the Board's decision in *Thryv*. Headlong against decades of judicial and Board precedent, and over a strong two-member dissent, the Board in *Thryv* declared that "make-whole" relief now included consequential damages. *See Thryv*, 2022 WL 17974951, at *6 ("revisit[ing] and clarify[ing]" its "existing practice of ordering relief"). But that decision was wrong, as three circuit courts confirmed—*after* the ALJ issued his Initial Decision, and *after* Rosewood and the parties here briefed exceptions to that Initial Decision.

The first to do so was the Third Circuit, in December 2024 (10 months after the exception briefing here was completed). The unanimous panel's holding was straightforward. "The NLRA," it wrote, "limits the Board's remedial authority to equitable, not legal, relief." *NLRB v. Starbucks Corp.* (*Starbucks I*), 125 F.4th 78, 95 (3d Cir. 2024). But *Thryv* relief, it reasoned, is compensatory and thus a type of legal relief not permitted under the NLRA. *Id.* at 96–97. As the court concluded, "Simply put, the Board's current order [awarding *Thryv* remedies] exceeds its authority under the NLRA." *Id.* at 97. Ten months later, a unanimous panel of the Fifth Circuit held the same. *Hiran Mgmt., Inc. v. NLRB*, 157 F.4th 719, 728 (5th Cir. 2025) ("We agree with the Third Circuit's analysis, which concluded that the *Thryv* remedy goes beyond the text of the NLRA."). And then the Sixth Circuit—exactly five days after *Hiran*

came down—echoed both the Third and the Fifth. *NLRB v. Starbucks Corp.* (*Starbucks II*), 159 F.4th 455, 470 (6th Cir. 2025) (siding "with the Third and Fifth Circuits' assessment of the issue").

The Ninth Circuit, in a split opinion, issued an aberrant ruling, concluding that the NLRA allowed the new remedy. *See Int'l Union of Operating Eng'rs, Stationary Eng'rs, Loc. 39 v. NLRB*, 127 F.4th 58 (9th Cir. 2025), *petition for reh'g en banc denied* 155 F.4th 1023 (9th Cir. 2025) (amended decision), *sub nom. Macy's Inc. v. NLRB*, *petition for cert. filed* (U.S. Nov. 26, 2025) (No. 25-627). But as the dissenting opinions explained, the court's ruling was unprecedented and unfounded. *See* 127 F.4th at 89 (Bumatay, J., dissenting in part) ("[T]he Board has no authority to order this type of monetary relief. Until two years ago, the Board had never claimed the authority to award consequential damages, like the ones ordered against Macy's."); 155 F.4th at 1072 (Nelson, J., dissenting from the denial of rehearing en banc) ("The panel majority erred in affirming the NLRB's unprecedented award of consequential *Thryv* damages, which are unauthorized by statute and forbidden by the Seventh Amendment.").

Nonetheless, the Board here "appli[ied] *Thryv*" to uphold the ALJ's award of consequential damages against Rosewood. Decision at 2. Doing so, it ordered Rosewood to "[m]ake [its former employee] whole … for any … direct or foreseeable pecuniary harms suffered as a result of the unlawful termination …." *Id.*

Whatever *Thryv* might call them, the Board imposed consequential damages—a type of legal relief. As a result, imposing those damages is *ultra vires* under three

circuits' cases. The Board should heed the emergent circuit-court majority, rescind the *Thryv* award, and harmonize its opinion with the clear text of the NLRA.

II. The Board Denied Rosewood Its Seventh Amendment Rights by Imposing Legal Damages Without a Trial by Jury

If the NLRA authorizes the Board to award *Thryv* damages, imposing them here without the presence of a jury violated Rosewood's Seventh Amendment rights.

A. *Jarkesy* requires a jury trial for common-law claims

After the ALJ's Initial Decision (January 2024) and after the parties filed their exception briefing (February 2024), the U.S. Supreme Court in June 2024 issued *SEC v. Jarkesy*, which represented a "massive sea change" in Seventh Amendment jurisprudence. 603 U.S. 109, 201 (2024) (Sotomayor, J., dissenting). In *Jarkesy*, the Supreme Court "invert[ed] prior teachings on how courts should balance government needs with individual rights." Bryan T. Camp, *The Impact of* SEC v. Jarkesy *on Civil Tax Fraud Penalties*, 27 Fla. Tax Rev. 478, 515 (2024). That inversion sparked a "reconsideration" of the place that civil jury rights occupy in our constitutional system. Philip Hamburger, *The Value of Jury Rights*, 93 Geo. Wash. L. Rev. 1283, 1285 (2025). In light of *Jarkesy*, the Board should grant Rosewood's motion and align its decision with the Seventh Amendment by rescinding the *Thryv* award.

B. Rosewood was entitled to a jury trial under the Seventh Amendment

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. CONST. amend. VII. Juries are thus required for all civil actions (over $20), including statutory actions that are

analogous to suits at common law. *Tull v. United States*, 481 U.S. 412, 417 (1987). To determine whether an action is so analogous, courts (1) "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity," and (2) "determine whether [the remedy sought] is legal or equitable in nature." *Id.* at 417–18 (citations omitted). The remedy factor is the more important. *Id.* at 421 (citation omitted). Indeed, it is "all but dispositive." *Jarkesy*, 603 U.S. at 123. For that reason, that factor is discussed first.

1. *Thryv* damages are a legal remedy

Under *Jarkesy*, legal remedies may not be awarded outside of a jury trial. *Id.* at 122–24. *Thryv* damages are a legal remedy.

To begin with, *Thryv* damages are monetary damages. *See Starbucks II*, 159 F.4th at 474. Monetary damages are legal (i.e., not equitable) when they "are designed to punish or deter the wrongdoer rather than solely to restore the status quo." *Ibid.* (citation modified). *Thryv* damages do more than restore the status quo. They are "at least partly designed to punish or deter employers acting unlawfully. That is the very definition of legal relief." *Id.* at 480. Indeed, "money damages," according to *Jarkesy*, "are the prototypical common law remedy." *Jarkesy*, 603 U.S. at 123. Because the Board imposed *Thryv* damages against Rosewood, it imposed a legal remedy. And because it imposed a legal remedy, this action was sufficiently analogous to a suit at common law to entitle Rosewood to a jury trial under the Seventh Amendment.

2. The ULP claims here are analogous to common-law tort claims

The other factor only further supports Rosewood's right to a jury trial. To reiterate, this factor asks whether the relevant claims are analogous to a type of "18th-century action[ ] brought in the courts of England prior to the merger of the courts of law and equity." *Tull*, 481 U.S. at 417–18. At issue here are ULP claims, and ULP claims are analogous to common-law tort claims.

Establishing an analogous common-law action does not require the identification of a "precise[ ]" analog in 18th-century English common law. *Id.* at 421 (rejecting the necessity of an "'abstruse historical' search"). The comparison is rather to *categories* of actions that were brought at common law (tort, contract, debt, etc.). *See Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 711 (1999). For example, a 42 U.S.C. § 1983 cause of action against a state official for a violation of a constitutional or statutory right is a suit at common law because it "sound[s] in tort and s[eeks] legal relief." *Ibid.*; *see also Curtis v. Loether*, 415 U.S. 189, 195 (1974).

ULP claims sound in tort too. *See Monterey*, 526 U.S. at 711. With respect to ULPs, the NLRA "merely defines a new legal duty, and authorizes the [NLRB] to compensate a [charging party] for the injury caused by the defendant's wrongful breach." *Curtis*, 415 U.S. at 195; *see also United States v. ERR, LLC*, 35 F.4th 405, 412 (5th Cir. 2022). This is the essence of a tort claim. *See* 3 William Blackstone, *Commentaries on the Laws of England* *115–19 (1768); *Monterey*, 526 U.S. at 727 (Scalia, J., concurring in part) ("[T]orts are remedies for invasions of certain rights.").

More specifically, the NLRA prohibits employers from engaging in "unfair labor practice[s]" and empowers the NLRB to adjudicate whether an employer has

violated that prohibition. 29 U.S.C. §§ 158, 160(a)–(c). Effectively, the NLRA prohibits common-law wrongful discharge. And a claim for wrongful discharge is "'a tort so widely accepted in American jurisdictions today'" courts "'are confident that it has become part of our evolving common law.'" *Tamosaitis v. URS Inc.*, 781 F.3d 468, 486 (9th Cir. 2015); *see, e.g.*, Kerry R. Lewis, Note, *A Reexamination of the Constitutional Right to a Jury Trial Under Title VII of the Civil Rights Act of 1964*, 26 Tulsa L.J. 571, 589–90 (1991) (describing English common law claims for, among other things, breach of contract for wrongful discharge); *see also* 1 William Blackstone, *Commentaries on the Laws of England* *75 (1768) ("[N]o master can put away his servant, or servant leave his master, after being so retained, either before or at the end of his term …."); Stuart M. Speiser, et al., 11 *American Law of Torts* § 34:83 (2024) (describing tort of wrongful termination, i.e., when an (1) "employee was discharged by his or her employer" and (2) "the employer breached a contract or committed a tort in connection with the employee's termination"); *see id.* § 34:85 (observing pedigree back to English common law).

Because a ULP claim is analogous to an 18th-century common-law tort claim, the Seventh Amendment requires a jury trial here.

* * *

In sum, Rosewood was entitled to a jury under the Seventh Amendment because (1) ULP claims sound in common-law tort and (2) the Board imposed a legal remedy against Rosewood in the form of *Thryv* damages. As a result, the Board's in-house adjudication violated Rosewood's Seventh Amendment right to a jury trial. For

this reason, the NLRB should rescind the *Thryv* award to align its Decision with the Seventh Amendment.

III. THE BOARD VIOLATED THE SEPARATION OF POWERS BY RESTRICTING ROSEWOOD'S PRIVATE RIGHTS

The Board should reconsider its Decision for a third reason. The Decision restricts Rosewood's private rights, and the Constitution assigns the adjudication of private rights to the judiciary alone—not to agencies.

"The judicial Power of the United States" is vested solely in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. "Under the basic concept of separation of powers that flows from the scheme of a tripartite government adopted in the Constitution, 'the judicial Power of the United States' cannot be shared with the other branches." *Jarkesy*, 603 U.S. at 127 (citation modified) (citations omitted).

The structural principles secured by the separation of powers are "essential to the preservation of liberty." *The Federalist No. 51*, at 348 (Madison) (J. Cooke ed., 1961). To better secure individual liberty, this framework "protect[s] each branch of government from incursion by the others." *Bond v. United States*, 564 U.S. 211, 222 (2011). Article III "protects liberty" through "its role in implementing the separation of powers" and "by specifying the defining characteristics of Article III judges." *Stern v. Marshall*, 564 U.S. 462, 483 (2011). These characteristics—life tenure (with good behavior) and fixed salaries—were adopted to ensure independent judgment free of influences from Congress and from the Crown, who had "'made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their

salaries.'" *Id.* at 484 (quoting THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776)).

Critically, Article III cannot serve its purposes "if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III," which is why the Supreme Court has "long recognized that … Congress may not 'withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.'" *Stern*, 564 U.S. at 484 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855)). Indeed, "Congress cannot vest any portion of the judicial power of the United States, except in courts ordained and established by itself." *Martin v. Hunter's Lessee*, 14 U.S. 304, 330–31 (1816).

The judicial power includes the power to adjudicate private rights, which are distinct from public rights. Public rights, true to their name, "are those belonging to the public as a whole." *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 171 (2015) (Thomas, J., dissenting). Private rights, by contrast, are those of individuals, and they include such things as liberty and property interests. Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 569–70 (2007). Administering (not to mention protecting) these different rights involves different considerations. *Id.* at 572 (explaining that "[t]he administration of core private rights was thought to involve different political considerations than the administration of public rights").

In our system of separated powers, the duty "to adjudicate upon, and protect, the rights and interests of individual citizens" is "the peculiar province of the judicial department." Nelson, 107 Colum. L. Rev. at 569 (quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 369 (Boston, Little, Brown & Co. 1868)). That is why "American constitutions were widely understood to require an opportunity for 'judicial' proceedings when the government proposed to act upon core private rights." *Id.* at 570. In this way, the Constitution's separation of powers "reflect[s]" the differences in the administration of private and public rights. *Id.* at 572. Thus, to remove the administration of private rights from the judiciary does more than simply weaken the protection of private rights: it outright violates the Constitution. Therefore, as *Jarkesy* crisply put it, "matters concerning private rights may not be removed from Article III courts." *Jarkesy*, 603 U.S. at 111 (citations omitted).

Yet that is just what happened here. Both by enjoining Rosewood and imposing *Thryv* damages on it, the Board's Decision restricted Rosewood's private rights. More specifically, it restricted Rosewood's liberty and "provid[ed] for" the "forfeiture or transfer to another" of Rosewood's property. Nelson, 107 Colum. L. Rev. at 569–70 (quoting *Newland v. Marsh*, 19 Ill. 376, 382 (1857)). What is more, this matter was not heard by an independent Article III judge; it was heard by Executive Branch officers—an NLRB-employed ALJ and, on appeal, the Board itself. Therefore, in adjudicating Rosewood's private rights, the Board violated the constitutional separation

of powers. For this reason, the Board should reconsider its Decision and dismiss the complaint against Rosewood.

CONCLUSION

The Board's decision is triply flawed—it is *ultra vires* under the NLRA, and it violates Rosewood's constitutional rights twice over. For all three of those reasons, the Board should grant Rosewood's motion and reconsider its Decision.

Dated: March 31, 2026.

Respectfully submitted,

/s/ Oliver J. Dunford

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CERTIFICATE OF SERVICE

I do hereby certify that on March 31, 2026, a true and correct copy of the foregoing was E-Filed with the NLRB and served via email upon:

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ATTACHMENT TO ROSEWOOD CARE, LLC'S MOTION FOR RECONSIDERATION

374 NLRB No. 53 (Decision)

Rosewood Care, LLC d/b/a/ Rosewood Rehabilitation and Nursing *and* 1199 SEIU United Healthcare Workers East. Cases 03–CA–297817 and 03–CA–303582

March 4, 2026

DECISION AND ORDER

BY MEMBERS PROUTY, MURPHY, AND MAYER

On January 11, 2024, Administrative Law Judge Andrew S. Gollin issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Rosewood Care, LLC, d/b/a Rosewood Rehabilitation and Nursing, Rensselaer, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to call the police on representatives of the Union and threatening to have representatives of the Union arrested if they do not cease distributing union-related surveys and meeting with unit employees in areas near the Respondent's facility, and requesting and attempting to cause police officers to arrest such representatives for engaging in protected concerted activities.

(b) Banning, attempting to deny, or otherwise restricting union representatives from accessing the Respondent's facility in accordance with the parties' collective-bargaining agreement and/or established past practice.

(c) Threatening union representatives with arrest or initiation of criminal trespass charges or issuing a trespass notice to union representatives forbidding them from entering the Respondent's property because they engaged in protected activities.

(d) Discharging or otherwise discriminating against employees because they engage in protected concerted activities.

(e) Changing the terms and conditions of employment of its unit employees without first notifying the Union and giving it an opportunity to bargain.

(f) Unilaterally restricting or denying union representatives' access to unit employees without first notifying the Union and giving it an opportunity to bargain.

(g) Failing and refusing to bargain with the Union by refusing to process all pending grievances.

(h) Failing and refusing to timely process grievances filed by the Union in accordance with the parties'

[1] The judge drew an adverse inference from the Respondent's failure to call its part owner, Israel Frankel, as a witness, and the Respondent excepts. In adopting the judge's findings, we find it unnecessary to pass on the Respondent's exception because the adverse inference has no material impact on the violations of Sec. 8(a)(1) that were found by the judge and adopted by the Board here. Member Prouty would deny the Respondent's exception and affirm the judge's adverse inference. In Member Prouty's view the adverse inference was within the judge's discretion to draw, for the reasons stated by the judge.

The Respondent also argues on exception that the judge's recommended Order requires the Respondent "to grant almost unfettered access to the Union to its residential nursing facility." We disagree. Contrary to the Respondent's argument, the recommended Order merely requires the Respondent to grant that access to which it agreed in the parties' collective-bargaining agreement and/or by its past practice. Further, the Order does not require Frankel to take action in his individual capacity; to the extent that Frankel is implicated in the Order, it is solely in his official capacity as a part owner of the Respondent.

In the absence of exceptions, we adopt the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) when it discharged employee Nicholas Parker because he engaged in protected concerted activities.

[2] The judge recommended a notice mailing remedy. However, the judge failed to set forth any rationale for this remedy. We find that the Board's traditional remedies are sufficient to effectuate the purposes of the Act in this matter. Member Prouty would adopt the judge's notice-mailing remedy, to which the Respondent did not except, as an appropriate remedy to ensure that employees are made aware of the Respondent's violations of the Act.

Having adopted the judge's finding that the Respondent violated 8(a)(1) by, among other things, issuing union representatives a trespass notice forbidding them from entering the Respondent's property and threatening them with initiation of criminal trespass charges for a retaliatory purpose, we order the Respondent to immediately withdraw any trespass notices and any criminal trespass charges against the Union or individual union representatives, to the extent not already done, and notify the Union of the withdrawal.

We shall order the Respondent to rescind the unilateral changes found, which the judge inadvertently omitted from the recommended Order. We shall also modify the recommended Order to conform to the Board's standard remedial language and the violations found. We shall substitute a new notice to conform to the Order as modified.

In accordance with the Board's decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), enf. denied on other grounds 102 F.4th 727 (5th Cir. 2024), the judge ordered the Respondent to compensate employee Parker for any direct or foreseeable pecuniary harms incurred as a result of his unlawful discharge. As stated in *Performance Plumbing, LLC,* 374 NLRB No. 48, slip op. at 2 fn. 2 (2026), and *Lodi Volunteer Ambulance Rescue Squad, Inc.*, 374 NLRB No. 26, slip op. at 3 fn. 3 (2026), Members Murphy and Mayer find no need at this time to express an opinion whether the novel remedies announced by the Board majority in *Thryv* are permissible under the Act. They would be open to reconsideration of that precedent in a future proceeding, but in the absence of a three-member majority to overrule it at this time, they agree to apply *Thryv*.

collective-bargaining agreement unless certain agents cease to act as bargaining representatives.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) To the extent not already done, immediately withdraw any and all trespass notices and any initiation of criminal trespass charges against the Union and/or any individual union representatives and inform the Union in writing that this has been done.

(b) Within 14 days from the date of this Order, offer Nicolas Parker full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(c) Make Nicolas Parker whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful termination, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Compensate Nicolas Parker for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(e) File with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Nicolas Parker's corresponding W-2 form(s) reflecting the backpay award.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Nicolas Parker, and within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel record and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Rescind the changes in the terms and conditions of employment for its unit employees that were unilaterally implemented on March 10, 18, and 23, April 4, May 19, June 9, 14, 20, 22, and 29, July 7, 8, 9, 11, 13,19, and 27, and September 27, 2022.

(i) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify, and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time, regular part-time and per diem non-professional employees, including all licensed practical nurses, activities aides, certified nurse aides, rehabilitation/physical therapy aides, dietary aides, dishwashers, housekeeping employees, laundry employees, maintenance employees, and unit secretaries employed by the Respondent at its Rensselaer, New York facility; but excluding all business office clerical employees, guards, receptionists, the dining room supervisor, chefs, and all other supervisors and professional employees as defined in the Act, and all other employees.

(j) On the Union's request, process grievances filed by the Union, including the grievances scheduled for discussion on July 13, 2022, and any filed thereafter, and timely process all grievances in accordance with the provisions of the collective-bargaining agreement.

(k) Within 14 days after service by the Region, post at its Rensselaer, New York facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 10, 2022.

(l) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn certification

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. March 4, 2026

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David M. Prouty, Member

_____
James R. Murphy, Member

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Scott A. Mayer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten to call the police on representatives of the Union or threaten to have representatives of the Union arrested if they do not cease distributing union-related surveys and meeting with unit employees near our facility, or request and attempt to cause police officers to arrest union representatives for engaging in protected concerted activities.

WE WILL NOT ban, attempt to deny, or otherwise restrict union representatives from accessing our facility in accordance with the collective-bargaining agreement and/or established past practice.

WE WILL NOT threaten union representatives with arrest or initiation of criminal trespass charges or issue a trespass notice to union representatives forbidding them from entering our property because they engaged in protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities.

WE WILL NOT change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT unilaterally restrict or deny union representatives' access to unit employees without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT fail and refuse to bargain with the Union by refusing to process all pending grievances.

WE WILL NOT fail and refuse to timely process grievances filed by the Union in accordance with the collective-bargaining agreement unless certain agents cease to act as bargaining representatives.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, to the extent not already done, immediately withdraw any and all trespass notices and any initiation of criminal trespass charges against the Union and/or any individual union representatives and inform the Union in writing that this has been done.

WE WILL, within 14 days from the date of the Board's Order, offer Nicolas Parker reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make Nicolas Parker whole for any loss of earnings and other benefits resulting from the unlawful termination, less any net interim earnings, plus interest, and WE WILL also make him whole for any other direct or foreseeable pecuniary harms suffered as a result of the unlawful termination, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Nicolas Parker for the adverse tax consequences, if any, of receiving a lump-sum backpay award and WE WILL file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

WE WILL file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Nicolas Parker's corresponding W-2 form(s) reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's order, remove from our files any reference to the unlawful

discharge of Nicolas Parker, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL rescind the changes in the terms and conditions of employment for our unit employees that were unilaterally implemented on March 10, 18, and 23, April 4, May 19, June 9, 14, 20, 22, and 29, July 7, 8, 9, 11, 13,19, and 27, and September 27, 2022.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All full-time, regular part-time and per diem non-professional employees, including all licensed practical nurses, activities aides, certified nurse aides, rehabilitation/physical therapy aides, dietary aides, dishwashers, housekeeping employees, laundry employees, maintenance employees, and unit secretaries employed by the Respondent at its Rensselaer, New York facility, but excluding all business office clerical employees, guards, receptionists, the dining room supervisor, chefs, and all other supervisors and professional employees as defined in the Act, and all other employees.

WE WILL, on the Union's request, process grievances filed by the Union, including the grievances scheduled for discussion on July 13, 2022, and any filed thereafter, and WE WILL timely process grievances in accordance with the provisions of the collective-bargaining agreement.

ROSEWOOD CARE, LLC D/B/A ROSEWOOD REHABILITATION AND NURSING (EMPLOYER)

The Board's decision can be found at https://www.nlrb.gov/case/03-CA-297817 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940

Alicia P. Stanley and *Sarah Crowley, Esqs.,* for the General Counsel.
Joshua B. Crabtree., Esq., for the Respondent.
Kimberly A. Lehmann, Esq., for the Union.

DECISION

STATEMENT OF THE CASES[1]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. This hearing was held on October 16–17, 2023, in Albany, New York. 1199 SEIU United Healthcare Workers East (Union) filed the underlying charges against Rosewood Care, LLC d/b/a Rosewood Rehabilitation and Nursing ("Respondent') alleging violations of Sections 8(a)(1), (3), and (5) of the National Labor Relations Act (Act). Based on those charges, the General Counsel, through the Regional Director for Region 3, issued an Order consolidating cases, consolidated complaint, and notice of hearing (complaint) against Respondent on June 6, 2023.[2] On June 16, 2023, the Respondent filed its Answer denying the alleged violations and raising various affirmative defenses.

Case 03–CA–297817 alleges unilateral changes to the Union's access to Respondent's facility. For years, representatives met with employees at various locations inside the facility. During the pandemic, the State of New York banned all visitation. The representatives began meeting with employees outside, on the sidewalk or in the parking lot. In March 2022, after the restrictions were lifted, Respondent began requiring that representatives meet with employees in the basementbreakroom. Between May and July, Respondent threatened to call and called the police to have the representatives removed if they attempted to meet employees other than in the breakroom. Between July and August, Respondent banned two of the representatives from the property for allegedly threatening and harassing conduct, and it threatened to have them arrested and charged with criminal trespass if they returned. This ban precluded the representatives from attending grievance meetings and contract negotiations, in person. After the Union filed the charges, Respondent ceased processing all pending grievances. The Complaint alleges this conduct violated Section 8(a)(1) and (5) of the Act.

Case 03–CA–303582 alleges the discriminatory discharge of

[1] Abbreviations used in this decision are as follows: "Tr." for the Transcript, "Jt. Exh." for Joint Exhibits, "GC Exh." for the General Counsel's exhibits and "R. Exh." for Respondent's Exhibits. Although I have included several citations to the record to highlight specific testimony or exhibits, my findings and conclusions are not limited to those portions but rather based on my review and consideration of the entire record.

[2] The complaint originally included allegations from Case 03–CA–294111. Prior to the hearing, Respondent and the Union entered into a non-Board settlement to resolve those allegations. Pursuant to the settlement, the Union requested withdrawal of the charge in Case 03–CA–294111. On October 16, 2023, the Regional Director for Region 3 approved the Union's request and severed that Case from the Complaint. (Jt. Exh. 22.) The settlement resulted in the withdrawal of Complaint paragraphs 1(a), (b), and (c), 5(b), 6(a), (b), and (c), 7(a), (b), (c), and (d), and 13(a)-(g). (Tr. 7).

Nicholas Parker. In March 2022, Parker went on a medical leave following a nonwork injury. He remained off work through July. On July 11, the Union notified Respondent that Parker had been elected a Union delegate/steward at Respondent's facility. About three hours later, Parker was discharged. Respondent contends it was because he failed to timely request an extension of his leave. The complaint alleges the discharge violated Section 8(a)(3) and (1) of the Act.

At the hearing, all parties were afforded the right to call and examine witnesses, present any relevant evidence, and argue their respective legal positions. Each filed post-hearing briefs, which I have carefully considered. On the entire record, including my observation of the demeanor of the witnesses. I make the following Findings of Fact and Conclusions of Law. [3]

FINDINGS OF FACT

A. Jurisdiction and Labor Organization Status

Respondent is a limited liability company that operates an 80-bed skilled nursing and rehabilitation facility in Troy, New York (Respondent's facility). Annually, in conducting its business operations, Respondent derives gross revenues in excess of $100,000 and purchases and receives goods valued in excess of $5000 directly from points outside the State of New York. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It further admits, and I find, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

B. Collective-Bargaining Relationship and Agreement

For many years, Respondent has recognized the Union as the exclusive bargaining representative of the following unit of employees (Unit):

> All full-time, regular part-time and per-diem non-professional employees, including all licensed practical nurses, activities aides, certified nurse aides, rehabilitation/physical therapy aides, dietary aides, dishwashers, housekeeping employees, laundry employees, maintenance employees, and unit secretaries employed by the Respondent at its Rensselaer, New York[4] facility; but excluding all business office clerical employees, guards, receptionists, the dining room supervisor, chefs, and all other supervisors and professional employees as defined in the Act, and all other employees.

This recognition has been embodied in successive collective-bargaining agreements. The most recent of which was dated December 1, 2014, to November 30, 2018. The parties later agreed to extend that agreement to November 30, 2022 (CBA). (Jt. Exhs. 1 and 2.)

The preamble to the CBA states it is between the Employer and the Union. The "Employer" is identified as Rosewood Gardens Nursing Home located at 284 Troy Road, Troy, New York 12144.

Article 3 is entitled "Union Activity, Visitations and Bulletin Boards." Section 1 states:

> A representative of the Union shall have reasonable access to the Employer for the purpose of conferring with the Employer, delegates of the Union and/or Employees, and for the purpose of administering this Agreement. Where the Union representative finds it necessary to enter a department of the Employer for this purpose, he/she shall first advise the administrator or his/her designee in person, as the Employer shall state.… Such visits shall not interfere with the operation of the Employer.

(Jt. Exh. 1, pg. 2.)[5]

Articles 15 and 16 contain the grievance and arbitration procedures. They set forth the steps and periods for filing, processing and appealing grievances and submitting them to arbitration.

Article 20 addresses medical leaves of absence. Section 1 states that all leaves shall be granted in compliance with the Family Medical Leave Act, as amended (FMLA), but such compliance shall not diminish any additional rights afforded by the language of the CBA. Section 3 states that at the conclusion of an FMLA leave, the employee shall be entitled to 9 months of extended unpaid leave for that specific injury or illness, upon written request, and the employee shall be entitled to return to his/her same job classification at the end of said leave. (Jt. Exh. 1, pg. 20.)

C. Alleged Unfair Labor Practices

1. Background

a. Respondent's Operations

Israel Frankel is Respondent's Principal/Owner. Terry Houser is the Human Resources Director. Ashley Cokgoren was the Administrator from February to May 2022. (Tr. 238.) Each of these individuals is an admitted supervisor and agent of Respondent within the meaning of Section 2(11) and 2(13) of the

[3] The Findings of Fact are a compilation of the stipulated facts, credible testimony, and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as in conflict with credited evidence or because it was incredible and unworthy of belief. In assessing credibility, I relied upon witness demeanor, the context of their testimony, the quality of their recollections, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. In judicial decisions, it is common to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 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)). Where critical, specific credibility findings are set forth below.

[4] The CBA identifies the facility as located in Troy, New York, and in Rensselaer, New York. (Jt. Exh. 1, pgs. 1 and 37.) There is no dispute it is referring to the same, single facility.

[5] Article 3, Sec. 3 requires the Union to provide the Employer with a listing of its representatives, including delegates (i.e., stewards). (Jt. Exh. 1, pg. 2.)

Act.

Respondent's facility is located at the top of a hill, off Route 4. (Jt. Exhs. 24 and 25.) There is a long, winding driveway that starts at the bottom of the hill off Route 4 and goes up and to the right to a surface parking lot. A canopy-covered sidewalk connects the parking lot to entrance to the facility.

Inside the entrance to the facility there is a lobby with a receptionist's desk. The lobby has a seating area with a television for residents and their guests. The facility consists of two floors and a basement. The basement has the employee breakroom. This is referred to by various names, including employee dining room, basement breakroom, or breakroom.

The entire facility, including the break room, is monitored by surveillance cameras. Frankel and Houser have access to the surveillance video.

There are three shifts (day, evening, and night). The change-over period between the day and evening shifts is around 2:45 to 3:15 p.m. The change-over period between the evening and night shifts is around 10:45 to 11:15 p.m.

b. History Regarding Visits to Respondent's Facility

Maureen Tomlinson is the Union's Vice President for the Capitol (Albany) Region. She oversees the Region's Union representatives (also referred to as "organizers"), negotiates contracts, attends labor-management meetings, and processes grievances. Tomlinson has held this position since 2017. Prior to that, she was a union representative, and for periods between 2008 and 2015, she represented the Unit employees working at Respondent's facility. (Tr. 116.) When Tomlinson visited the facility, she notified Houser and then checked in at the receptionist's desk upon arrival. She typically would meet with Unit employees in the chapel if it was available. If not, she would ask the receptionist what other spaces were available, and then use one of the available spaces. If she came during shift change, Tomlinson would talk with employees outside, either on the sidewalk or in the parking lot. (Tr. 116–117; 146–147.)

Tanya Grant and Melissa Tambasco were the union representatives assigned to Respondent's facility between 2013 and 2021. Grant was there between 2013 and 2015, and Tambasco were there between 2015 and 2021. (Tr. 208–210.) They typically visited the facility about once a month. (Tr. 191.) They would call or email in advance to let Houser know they would be coming. They would check in at the receptionist's desk and find out what space(s) was available to use to meet with Unit employees. They usually used the chapel or the private dining room. (Tr. 192; 210–211.)

In 2018, Respondent renovated the facility, and the chapel and private dining room were eliminated and repurposed. Thereafter, when the union representatives met with employees indoors, they would meet in an open office, the conference room, and "once and a while" in the basement break room. Outside they would meet with employees on the sidewalk, the parking lot, or on the side of the building where employees went to smoke. (Tr. 96–97, 191–192; 199.)[6]

In 2020, the State of New York responded to the COVID-19 pandemic by restricting all outside visitors from entering nursing and rehabilitation care facilities. Those restrictions remained in effect until late 2021.[7] While the restrictions were in effect, the union representatives would meet with employees outside the facility, on the covered sidewalk, in the parking lot, or in the area where employees went to smoke.[8] When the restrictions were lifted, the union representatives continued to meet with employees outside, and they would meet with them inside, in an office, the lobby, and "once in a while" in the employee breakroom. (Tr. 96).[9]

The Union hired Channel Kelly to be a union representative. In 2021, the Union notified Respondent that Kelly was assigned to represent the Unit employees at its facility. (Tr. 209.) Kelly visited Respondent's facility about twice a month. Because of the COVID restrictions, Kelly would meet with Unit employees outside, in the parking lot or on the sidewalk. (Tr. 43.) When the restrictions were lifted, Kelly continued to meet with them there. She also began to meet with them inside the facility, initially in the lobby. (Tr. 43.) The record does not establish when or how often Kelly went inside the facility after the restrictions were lifted. (Tr. 43–44.)

2. March 10 and 19 and April 4 Interactions

On March 10, 2022,[10] Kelly went to Respondent's facility to meet with Unit employees and to submit two grievances. While Kelly was in the lobby, newly hired Administrator Ashley Cokgoren introduced herself to Kelly and asked why she was there.[11] Kelly stated she was meeting with employees in the lobby like she normally does. Cokgoren walked away and returned several

[6] I credit Union Delegate Beverly Miller and former employee Denise Hinton that union representatives seldom met with employees in the basement breakroom. (Tr. 96; 191–192.) They credibly testified employees avoided the breakroom because they could not get cellular service down there. (Tr. 96.). They also disfavored meeting with union representatives in the breakroom because of the surveillance cameras. (Tr. 45; 79; 123.)

[7] None of the witnesses could confidently recall when exactly in late 2021 the COVID-19 visitation restrictions were lifted. The Centers for Medicare and Medicaid Services issued new guidance in late November 2021 lifting most of the restrictions as a result of the high vaccination rates among nursing home residents and the low number of positive cases among residents and staff. Paula Span, *Families Cheer, Some Doctors Worry as Nursing Homes Open Doors Wide to Visitors*, N.Y. TIMES, Nov. 27, 2021.

[8] Houser testified she did not know that Union representatives meet with employees outside the facility, on the sidewalk or in the parking lot, during the COVID-19 restrictions. (Tr. 212–213.) I do not credit this testimony. In general, I found Houser to be an unreliable witness. She had a guarded and defensive demeanor, and her testimony was often vague and largely uncorroborated. The COVID restrictions were in place for over a year, and Houser worked onsite on a daily basis. Both she and Frankel had access to the surveillance cameras covering both the inside and outside of the facility. (Tr. 243–244.) While she may not have been present or aware of every visit, I find it implausible that she was unaware that Union representatives were meeting with employees outside.

[9] It is unclear how often the representatives met with employees in the lobby, or how long those meetings typically lasted. It also is unclear whether others (i.e., residents, visitors, etc.) were present at the time.

[10] All dates refer to 2022, unless otherwise stated.

[11] Cokgoren, who no longer worked for Respondent at the time of the hearing, did not testify.

minutes later. She told Kelly she had spoken to Houser who stated that Kelly could not meet with members in the lobby, and she had to meet with them in the basement breakroom. Kelly complied and went to the breakroom. She remained there for about 15 minutes, but no members came to meet with her. She then went outside into the parking lot. No one from management said anything to her at that time about being in the parking lot. (Tr. 22–23.)

On March 19, Kelly returned to Respondent's facility to meet with Unit employees. Cokgoren approached her in the lobby and stated Respondent had not been notified she would be visiting that day. She then told Kelly she could not be in the lobby. Kelly told Cokgoren she would be outside in the parking lot. Cokgoren told her she did not want her out in the parking lot. Kelly then called her supervisor, Maureen Tomlinson, and put her on speakerphone for Cokgoren to hear. Cokgoren told Tomlinson she did not receive notification that Kelly was coming that day. Tomlinson responded that Kelly would just be outside and that it should not be a bother. Kelly stated she would be in her car and would meet with members as they were coming or going from work. Cokgoren told Tomlinson that Respondent did not want her out there.[12] She told Kelly to go to "the bottom of the hill" where the driveway ends, off Route 4. Kelly then went and remained there. (Tr. 24–25.)

Tomlinson later raised concerns with Cokgoren that it was unsafe for Respondent to require Kelly to be at the bottom of the hill, with incoming and outgoing traffic. On March 23, Cokgoren emailed Tomlinson that she would never ask someone to be where it was unsafe, but she wanted a relationship with the Union that included "appropriate communication and advanced notice of visits." (Jt. Exh. 3.) The following day, Tomlinson emailed Cokgoren that the CBA "does not state that we need to give notice far in advance." But to better the working relationship between Respondent and the Union, Tomlinson agreed that Kelly would email when she planned to visit the facility, and if Respondent does not respond, the Union will take that as acceptance. (Jt. Exh. 3.) Tomlinson commented on how the parties' relationship had worsened over the past year and a half, and she suggested they arrange a meeting to try to resolve the "lack of communication" and "continual contract violations." (Jt. Exh. 3.) The record does not reflect whether Cokgoren or Houser responded, but there was no meeting to discuss these issues.

On April 4, Tomlinson emailed Cokgoren that she would be at the facility that day for a short time and would be outside. That same day, Israel Frankel emailed Tomlinson that she was welcome to come and speak with Unit employees as long as she meets with them in the basement breakroom and not outside on the facility grounds. (Jt. Exh. 4.)

In early to mid-April, Tomlinson had a telephone conversation with Frankel. In that conversation, Frankel asked why Kelly was at the facility so much. Tomlinson said it was because she was a newer representative, and she was there to introduce herself and establish a relationship with the Unit employees. Frankel stated Kelly needed to call in advance and needed to go to the basement breakroom. Tomlinson objected to this, stating the Union was not restricted to the breakroom. She explained to Frankel that most Unit employees did not utilize the breakroom, and they had told her it was because there were surveillance cameras in there. (Tr. 122–123.)

3. May 19 Interactions

On May 19, Kelly and fellow Union representatives Ruthie Young, Denise Hilton, Lori Massara, and Robert Holland went to Respondent's facility. The purpose was for them to hand out snacks and drinks to employees in celebration of Nurses' Appreciation Week. It also was to distribute surveys to union members to solicit their views and concerns for the upcoming contract negotiations. Kelly notified Houser in advance of the Union's visit.

Throughout their visit, the Union representatives remained outside. While Kelly was standing by herself, Houser and Cokgoren came out and told her she and the others needed to meet with members in the basement breakroom. Kelly waved Young over to join the conversation. Young was aware of the issues Kelly was having regarding access. Young told Houser that the CBA does not require representatives to be at a specific location when they make visits to the facility. There was a "back and forth" between Houser and Young. Houser threatened to call the police and later did. When the police arrived, Young and Kelly showed the officers the language in the CBA giving them the right to be there, and there was no requirement for them to be in the breakroom. Houser called Frankel and had him on speakerphone while the officer was there. Frankel told the police that he wanted the Union representatives off the property. The police then asked Kelly, Young, and the other representatives to leave. (Tr. 28–29.)

As they were getting ready to leave, Kelly gave one of the employees the remaining snacks and drinks to take inside and to give to the other employees. Houser told the employee to give the snacks and drinks back to the Union representatives. Young heard this and it angered her. She told Houser she was going to call her supervisor (Tomlinson), have her switch and assign her to Respondent's facility, and that she was going to be Houser's "worst nightmare." (Tr. 74).[13] The police were present when she said this, but they said nothing. The Union representatives then left.

4. June 9 Interactions and June 14, 20 and 22 Communications

Kelly later notified Respondent that she planned to next visit the facility on June 9. On June 9, at 12:20 p.m., Houser emailed Kelly, stating, "You may visit in the [basement breakroom] with your members as long as they are on their break, as resident care

[12] Kelly testified Cokgoren stated flatly she did not want her on the property. I do not credit Kelly's testimony. Cokgoren statements prior and after this conversation consistently were that Respondent wanted representatives to meet with members in the basement breakroom, not in the lobby or out in the parking lot. It was not until July that Respondent barred Kelly and Tomlinson from the property altogether.

[13] Houser testified Young screamed, swore, and caused spit to land on her during this exchange. (Tr. 216–217.) Young denied this, stating she been doing her job too long for her to let someone get her that mad. (Tr. 86.) I do not credit Houser. Respondent offered no corroboration. Additionally, while it is more likely than not that Young used profanity toward Houser as she spoke because of how upset she was, I do not credit Young screamed or otherwise acted aggressively toward Houser. If that had happened, I believe the police would have intervened, or at least taken steps to deescalate the situation, which did not happen.

is our first priority. You may not congregate in the facility parking lot or any other un-designated area." (Jt. Exh. 8.)

On the afternoon of June 9, Kelly, Tomlinson, and two other Union representatives went to Respondent's facility to continue distributing surveys to members for the upcoming contract negotiations. They were outside into the parking lot. Houser came out and told them they could not be out there, and that they needed to go to the basement breakroom. Tomlinson stated they had the right to be there. Houser then threatened to call the police. Tomlinson told her to go ahead and call the police because they were not going to go to the basement. Shortly thereafter, the police arrived at the facility and spoke separately to those present. Houser had Frankel on speakerphone and they both were talking to the police officers. Frankel told the officers he wanted the union representatives arrested. The police stated they were not going to do that, but they told Kelly, Tomlinson, and the others that they needed to leave the property, which they did. (Tr. 125–127.)

On June 14, Kelly emailed Houser that she planned to visit Respondent's facility that day to meet with members and address a grievance. That same day, Houser responded with an email identical to her June 9 email, stating that Kelly was welcome to come and visit with her members in the basement breakroom but not in the parking lot or any other un-designated area. (Jt. Exh. 10.)

On June 20, Respondent's attorney, James Allen, emailed Tomlinson, writing in pertinent part:

> In recent weeks, there has been an issue regarding union representatives' visits to the facility. Several times, the representative has visited the facility and parked in the parking lot instead of following the parties' well-established past practice of entering the facility and setting up in the [basement breakroom].
>
> There are a few unique issues that make these latest parking lot audiences problematic. First, the facility does not own the parking lot property. The property owner does not wish outside entities to loiter in the parking area and conduct business. This is inclusive of all outside entities, not simply union representatives.
>
> The second, as stated above, the parties established an efficient past practice implementing the express terms of the parties' Agreement whereby the representative sets up in the [basement breakroom]. This practice allows easy and immediate access to all employees during their non-working hours.
>
> My client would respectfully request that all union representatives follow the procedures detailed in the parties' collective-bargaining agreement and long-established past practice for providing reasonable access to union members. As expressly provided for in the parties' agreement, if the union requires access beyond the past practice of representatives setting up in the [basement breakroom], it may request such additional access by making an in-person request of the administrator.
>
> Rosewood will continue to allow reasonable access under the established terms and protocols. Rosewood will deny future access under terms not in compliance with the parties' Agreement and past practice.
>
> …

(Jt. Exh. 9). [14]

The parties were scheduled to meet on June 14 to discuss pending grievances.[15] Frankel cancelled that meeting because of a family emergency. On June 22, he sent Tomlinson and Kelly an email providing July 11 or 13 as possible reschedule dates. The email Frankel sent was essentially a "reply all" to Houser's June 14 email to Kelly about her visiting the facility that day. (Jt. Exh. 10.) The parties eventually agreed to reschedule the meeting for July 13.

Kelly notified Houser she planned to visit the facility on June 29 to meet with members. On June 29, Houser responded with an email identical to her June 9 and 14 responses. (Jt. Exh. 11.)

5. July 7 Interactions and July 8 and 11 Communications

The Union scheduled to hold internal elections for delegates to represent the Unit employees at Respondent's facility. Kelly planned to visit the facility on July 7 to distribute and collect ballots. This was her first delegate election. She notified Frankel and Houser that she planned on visiting that day, but she did not specify when or why.

On July 7, Kelly and Tomlinson went to Respondent's facility, and they went to the basement breakroom. They remained at the facility until around 3:30 p.m., and then they left. (Tr. 32–33; 128.)

Kelly returned that evening at around 10:15 p.m. to distribute ballots to the evening and night shifts. She remained in the parking lot because most employees would not be in the breakroom during the evening. She spoke to employees as they were entering or exiting the facility. At one point, Kelly thought she saw a Unit employee who was leaving get into their car, and she went over and knocked on the person's window. The individual rolled down their window, and Kelly introduced herself. The person identified herself as the night supervisor. That was the end of the

[14] Houser testified Israel Frankel owns the parking lot, but she did not know the details of that ownership interest. (Tr. 241.) Respondent failed to call Frankel as a witness, and his absence went unexplained. Where a respondent fails, as part of its defense, to present key actors as witnesses, the Board will draw an adverse inference. *Tracy Toyota*, 372 NLRB No. 101, slip op. at 19 (2023) (cases cited therein). See also *Sparks Restaurant*, 366 NLRB No. 97, slip op. at 9–10 (2018), enfd. 805 Fed. Appx. 2, 4 (D.C. Cir. 2019). I find an adverse inference is warranted not only because Frankel was a key decisionmaker and actor regarding Respondent's alleged violative conduct at issue, but because as the alleged owner he had first-hand knowledge regarding the nature and scope of his ownership interest and the contractual relationship, if any, between he and Respondent, particularly Respondent's right to exclude individuals from the parking lot. Without Frankel, there also was no opportunity to examine whether there was common ownership or control between Respondent and the owner of the lot.

[15] By the time of this meeting, the Union had several pending grievances, including over the discharges of Unit employees Meiling Cole and Ikeara Leroy, and the suspension of Unit employee Deshona Russell. (GC Exhs. 3, 5 and 6.) The parties were scheduled to meet on May 10, but that meeting was cancelled by the Union because the employees were not available. The meeting was later rescheduled. (Tr. 235.)

conversation. Kelly returned to where she had been, and the night supervisor went back inside.[16]

Tomlinson then arrived at the facility to assist Kelly at around 11 p.m. Shortly thereafter, a police car pulled into the parking lot. The police officers spoke to Tomlinson and Kelly and told them they could not be in the parking lot, and that they needed to go to the bottom of the hill. Tomlinson and Kelly then moved to the bottom of the hill, as instructed. (Tr. 129.)[17]

While Tomlinson and Kelly were at the bottom of the hill, the new Administrator, Brandon Rose, and the Director of Nursing came down and told them they needed to leave. Rose stated that if they did not leave, she would call the police.[18] After that, Tomlinson and Kelly packed up to leave. As they did, the police arrived again. The police asked what was going on, and Tomlinson told them they were leaving. (Tr. 34–35; 131–132.)

6. July 8 and 11 Correspondence from Allen Barring Tomlinson and Kelly

On July 8, Respondent's attorney Allen sent Union President George Gresham a letter, copying Tomlinson and Kelly. The letter stated in pertinent part:

> …
>
> Last evening, July 7, 2022, the combative and aggressive behavior of Tomlinson and Kelly crossed the line and became personally threatening and harassing to several employees at Rosewood Gardens. Rosewood Gardens demands an immediate cessation of any threatening and harassing behavior or conduct on its premises by any union representative. Failure by union representatives to cease and desist threatening and harassing anyone on the property … will result in swift action … The company shall vigorously pursue every legal avenue available to ensure the safety of its residents, employees, and authorized visitors.
>
> Rosewood must act to protect its staff and proactively remove any liability the company may incur for failing to act and remove known dangers from potential violators of the state's laws designed to protect citizens from harm and threats of harm. Rosewood is putting the union, Tomlinson, and Kelly on formal notice that Tomlinson and Kelly are hereby immediately banned from entering upon the property of the facility. Rosewood will pursue any and all legal avenues available to it to secure the safety of its residents, employees, authorized visitors, and its property.
>
> The conduct of Tomlinson and Kelly has exposed the union to civil and potentially criminal claims from individual employees. Their conduct has resulted in several employees filing individual claims with the local police, fearing for their personal safety. Tomlinson and Kelly staked out employees at night in a dark parking lot, attempted to chase and flag down vehicles as employees left their shift interrogated employees about matters those employees made clear they did not wish to discuss, and pounded on car windows when the employees chose to close them to avoid the interrogation. These are not the actions of professional union representatives and certainly not the behavior rosewood has come to expect from Local 1199.
>
> We welcome an appointment from your office of alternative representatives to visit the facility and conduct themselves in the professional manner and decorum that the business relationship between Rosewood and Local 1199 has been accustomed. Rosewood will continue to allow reasonable access under the established terms and protocols in compliance with the parties' agreements and past practice and will continue to engage the union in the professional and productive manner the party's history has established and demonstrated.
>
> …
>
> I thank you for your prompt attention to this matter. My client looks forward to moving forward in a positive and productive manner with Local 1199.

(Jt. Exh. 13.)[19]

On July 11, Allen emailed Gresham that one matter he failed to address was the conduct of Union business at Respondent's facility. He noted there was a grievance meeting scheduled for July 13, and the Union would need to designate substitute representatives for that meeting in light of the ban on Tomlinson and Kelly from Respondent's facility. Allen further stated that "Due to their conduct, Rosewood will not communicate with the current representatives, even by phone or computer teleconference." (Jt. Exh. 16.)

7. Discharge of Nicholas Parker

Nicholas Parker worked for Respondent as a per diem certified nursing assistant beginning in April 2018 until his termination. He was a member of the Unit.

On around March 19, 2022, Parker broke his foot playing football on a day off from work. On March 21, Parker went to Respondent's facility, on crutches, and spoke with Houser. In addition to being the Human Resources Director, Houser also is the

[16] Houser was not present for this interaction but testified the night supervisor (Love) later reported she was in her car taking her break when Kelly came over and knocked on her window. Love was very upset about it and called upper management. (Tr. 225.) Respondent did not call Love and her absence went unexplained. The record does not reflect whether she continued to be employed by Respondent at the time of the hearing.

[17] The record does not reflect specifically where Tomlinson and Kelly were standing "at the bottom of the hill" or who owned that property. (Tr. 35–36.) Houser testified she did not know if Frankel owned the property at the end of the driveway. (Tr. 241–242.)

[18] Rose was not called to testify at the hearing. Rose resigned shortly after, and allegedly because, of this interaction. (Tr. 226.) Houser was not present for this interaction, but she testified the following day Rose told her that Tomlinson yelled at her and stated, "we've gotten rid of every fucking administrator, you're next." (Tr. 225–226.) Tomlinson denied making this statement. (Tr. 157.) I credit her denial. Tomlinson struck me as a level-headed professional not prone toward making idle threats. Plus, there is no evidence the Union had any involvement in seeking the removal or replacement of any prior Administrator.

[19] Respondent presented no first-hand testimony or documentary evidence to substantiate any of the claims contained in Allen's letter, particularly about employees raising concerns or filing claims with the police about the Union representatives. The record reflects Kelly knocked only on the night supervisor's car window, believing she was a Unit employee and wanting to give her a ballot.

Benefits Administrator. (Tr. 207.) Parker informed her he would need a leave of absence and did not have a return date. He asked what his options were considering he would have no income while on leave. Houser informed him there was no light duty available, which Parker already knew. She told them he was eligible for short-term disability through a third-party benefit administrator. Houser provided Parker with a packet with the paperwork for him to apply for short-term disability and for FMLA leave. Parker applied and received short-term disability benefits, but he never completed the paperwork for FMLA leave. Houser, nonetheless, designated him as on FMLA leave, allegedly in order to protect his job. (Tr. 248; 253.) But she never told him she had done so. (Tr. 258.)

Parker's next doctor's appointment was on around May 17. The doctor told him he was not yet cleared to return to work. Later that day, Parker texted Houser informing her his foot was still broken in three places and he had to go back to see the orthopedist on June 7 to get more X-rays and to see if he can start therapy to regain functionality. (Jt. Exh. 6.) On June 7, Parker had his appointment and again was not cleared to return to work. The following day, Parker emailed Houser that he had his doctor's appointment on June 7, and remained off work until further notice. He stated his next appointment was on July 7. He included a copy of the medical certification form completed by his doctor. (Jt. Exh. 7.) Parker received no response to his e-mail.

The 12-week FMLA leave Houser placed Parker on expired on around June 18. (Tr. 230–231.) Houser did not inform Parker of that fact or that he needed to request an extension of his leave, per the CBA. She testified the information was available to Parker online, and he could access and complete the necessary paperwork, and it was not her responsibility to "mommy cuddle" him through the FMLA and extended leave process.

Parker next met with his doctor about his foot on July 7. On July 8, Parker emailed Houser that while he was hoping to return to work his doctor said he was not yet able to, and he needed to remain off work until August 1.[20] He concluded his e-mail, " I'm sorry about all this Terry, and I'm still hoping I even have a job at this point at Rosewood." (Jt. Exh. 15.)

Parker ran to be a Union delegate and was elected. On July 11, at 10:25 AM, Kelly emailed Houser to inform her that Parker was one of the newly elected delegates for Respondent's facility. (Jt. Exh. 14.) That same day, at 1:35 p.m., in a reply to Parker's June 8 e-mail, Houser emailed him stating "Per your union contract you are no longer employed. Thank you." (Jt. Exh. 15.)[21] Parker received no other documentation or explanation. He contacted the Union and spoke with Kelly. She informed him the Union would file a grievance over his termination, which it did on July 12. (Jt. Exh. 17.)

Houser testified that Parker was discharged "due to the fact that he did not request in writing according to the CBA, an extension of his—his leave." (Tr. 229.)[22]

8. Banning Tomlinson and Kelly and Threatening Criminal Trespass Charges and Arrest

On July 13, Tomlinson and Kelly went to Respondent's facility for a scheduled grievance meeting. There were at least three pending grievances at the time. (Tr. 38.) Upon entering the facility, Frankel stopped them and told them he did not want them on the property. He said they were not going hear the grievance, and they needed to leave. Tomlinson and Kelly then left. (Tr. 133.)

Later that day, Tomlinson emailed Frankel stating the Union has the right and duty to access Respondent's facility for the purpose of representing its members. It was against the law for Respondent to change the terms of the parties' CBA regarding access and refuse to hold grievance meetings and otherwise interfere with employees' Section 7 rights. She concluded the email stating that she and Kelly would be visiting the facility the following day and expected to meet with members without unlawful interference from Respondent. (Jt. Exh. 18.)

Later that same day, Respondent's attorney Allen emailed Tomlinson in response, stating that while the Act entitles the Union to reasonable access to Respondent's facility for the purposes of conducting appropriate union business and representational activities, it does not create a right for any particular individual to be permitted access when that individual has engaged in the sort of unlawful conduct Tomlinson and Kelly engaged in the prior week. He went on to state Respondent was working with the proper authorities to formally exclude Tomlinson and Kelly from the property since they refuse to heed Respondent's declaration that they are not permitted on the grounds. He emphasized that Respondent was not refusing to allow the Union access to the facility, nor was it refusing to abide by the CBA regarding grievance handling. But it would need to be through other Union representatives. Allen concluded by stating "If either you or Ms. Kelly enter onto the property tomorrow, or any time, Rosewood will report to the authorities that you are trespassing, and you will be removed. Rosewood will pursue all legal avenues available to ensure the safety of its residents, employees, staff, and visitors including but not limited to exclusion of any individuals conducting themselves unlawfully as you and Ms. Kelly have." (Jt. Exh. 19.)

On July 27, Houser emailed Tomlinson and Kelly each a Trespass Notice stating, "An entry by you upon or near [Respondent's facility] shall be deemed a trespass and we will institute criminal proceedings against you pursuant to the New York Penal Law § 140.05 Trespass, and you will be subject to arrest in the event you are found to have entered the property." (Jt. Exh.

[20] Parker's June 8 email to Houser states he was attaching a note from his doctor's appointment. The exhibit introduced into evidence did not contain an attachment.

[21] I do not credit Houser's testimony that the decision to discharge Parker was made prior to receiving the Union's July 11 email. (Tr. 233.) There is no evidence supporting that testimony, and she later appeared to contradict herself, or at least create confusion, when, during cross examination, she confirmed Parker was terminated after the email announcing he had been elected as a delegate. (Tr. 260.)

[22] This is consistent with Respondent's later position in September when there was an election over a decertification petition. In email correspondence, Respondent's attorney James Allen stated his client would challenge Parker's eligibility to vote because he was no longer employed and had abandoned his job. Specifically, Allen stated that Parker "[w]as on FMLA and upon the expiration of the leave period [he] failed to contact or follow the procedures necessary to request a leave extension." (Jt. Exh. 26.)

20.)

9. Grievance Handling and Bargaining and Denial of Access

Although Respondent and the Union had been discussing possible dates to meet on several of the outstanding grievances, the parties never met. At the hearing, Houser testified that once the Union began filing the underlying charges, Frankel concluded those charges trumped the grievances, and Respondent has not held further meetings to discuss or otherwise process the grievances. (Tr. 236–237.) Respondent ceased processing all grievances as of July 2022, even though the CBA remained in effect until November. (Tr. 137–138.)

The parties scheduled to begin negotiations over a successor agreement in September. The negotiations were scheduled to take place in person, at Respondent's facility. The Union's attorney, Kimberly Lehmann, indicated the Union wanted Tomlinson and Kelly to participate as part of its bargaining committee. On September 27, Allen emailed Lehmann informing her that Frankel refused to allow Tomlinson or Kelly onto the property in light of the Trespass Notice. Allen noted that if either of them entered upon the property, Frankel would have them arrested. (Jt. Exh. 21.)

The parties later met to begin negotiations. Kelly and Tomlinson participated through videoconferencing while the other members of the Union's bargaining committee (Young) were permitted to participate in person. Tomlinson testified this has made bargaining more challenging because they cannot be there to speak with Unit employees to discuss issues. (Tr. 134–135.)

I. LEGAL DISCUSSION

A. Section 8(a)(1)

Paragraph 6 of the complaint alleges Respondent violated Section 8(a)(1) of the Act: (1) on about May 19, June 9, and July 7, when its agents threatened to call and called the police because Union representatives were distributing surveys to Unit employees in the parking lot; (2) on about July 7, when its agent called the police on Union representatives engaging in union activity in an area where Respondent had no legitimate property interest; (3) on about July 8 and 13, when its attorney, in writing, banned two Union Representatives (Tomlinson and Kelly) from entering upon the property of Respondent's facility and threatened to initiate criminal trespass charges against the two for a retaliatory purpose; (4) on about July 27, when its agent, in writing, issued a trespass notice to Tomlinson and Kelly forbidding them from entering Respondent's property and threatening them with arrest and criminal prosecution, for a retaliatory purpose; and (5) on about September 27, when its attorney, in writing, threatened to arrest and initiate criminal trespass charges against Tomlinson and Kelly, for a retaliatory purpose.

Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Section 7 of the Act states "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." It is protected Section 7 activity for a non-employee union representative to communicate with unit employees on an employer's premises pursuant to a contractual access/visitation clause or established past practice. *Turtle Bay Resorts*, 355 NLRB 706 (2010), enfd. 452 Fed.Appx. 433 (5th Cir. 2011), adopting and incorporating in full 353 NLRB 1242 (2009). An employer violates Section 8(a)(1) when it denies, limits or otherwise interferes with the union's right to access the employer's property, including by evicting or threatening to evict, calling or threatening to call the police, pursing or threatening to pursue criminal charges, an/or banning or threatening to ban the union representatives, in response to their representational activities. See *North Memorial Health Care*, 364 NLRB 770, 793 (2016), enfd. in relevant part 860 F3d 639 (8th Cir. 2017); *Turtle Bay Resorts*, 353 NLRB 1242, 1242 fn. 6, 1274–1275 (2009), incorporated by reference 355 NLRB 706 (2010); *Frontier Hotel & Casino*, 309 NLRB 761, 766 (1992), enfd. sub nom. 71 F.3d 1434 (9th Cir. 1995); and *Roadway Package System*, 302 NLRB 961 (1991). The caveat being the union must abide by the contractual language and it may not depart "dramatically" and "unreasonably" from the established past practice. See *Fred Meyer Stores, Inc*., 368 NLRB No. 6 (2019).[23]

There is no dispute Respondent engaged in the underlying conduct. The issues are whether the Union representatives had the right to access Respondent's property beyond the employee breakroom, and whether they were abiding by that right when the alleged violations occurred. Based upon my review, the answer to both is yes.

Article 3, Section 1 of the CBA grants Union representatives "reasonable access to the Employer for the purpose of conferring with the Employer, delegates of the Union and/or Employees, and for the purpose of administering this Agreement." The preamble to the CBA defines "the Employer" by its physical address of "284 Troy Road, Troy, New York 12144." The CBA does not define or limit where the representatives may, or must (not) go. The only limitations are that: (1) "if the representative finds it necessary to *enter a department* of the Employer . . . he/she shall first advise the administrator or his/her designee in person, as the Employer shall state;" and (2) the visit "shall not interfere with the operation of the Employer." Under this language, I conclude the Union had the contractual right to reasonable access the physical address for one or more of the stated purposes, subject

[23] In *Fred Meyer*, the contract afforded the union the right to access the employer's property for representational purposes. Representatives were permitted to talk briefly with employees on the sales floor as long as it did not unreasonably interrupt their work. Lengthy conversations and discussions were to take place in the breakroom. Although the provision at issue did not set a ceiling (or floor) on the number of representatives who could visit a store at one time, the Board held the substance of the provision included the past practice over the course of years, which established that visitations would be limited to one or two representatives at a time. On the particular day at issue, the union sent eight representatives to the store who fanned out onto the sales floor and did so for the purpose of soliciting employees' signatures on petition—a process that was not considered brief and, therefore, necessitated that it be done in the breakroom. The representatives refused to abide and were directed to leave the premises. The Board concluded the union's conduct was a dramatic and unreasonable departure from its past practice and, therefore, lost the protection of the Act.

the above limitations.

This interpretation of the CBA is consistent with the parties' past practice. When Tomlinson was the Union representative for periods between 2008 to 2015, she regularly would meet with Unit employees at various locations inside the facility, but she occasionally met with them on the sidewalk and in the parking lot. Union Delegate Beverly Miller confirmed this practice continued until the COVID-19 restrictions went into effect. Once that happened, *all* interactions between the Union representatives and the Unit employees occurred outside on the sidewalk, in the parking lot, or the area where employees would smoke. In late 2021, when the restrictions were limited, the Union representatives continued meeting with employees outside as well as inside the facility.

The union representatives acted consistent with the CBA and the past practice when they visited the facility on each of the dates at issue. The union representatives notified Respondent in advance of their planned visit. If they went inside, they would either check or they would go to the basement breakroom (where they had been instructed to go). The evidence does not establish that the union representatives' presence or activities on any of the dates at issue interfered with Respondent's operations. They interacted with the Unit members briefly, before or after work, or while they were outside smoking. On May 19, Houser confronted Kelly and Young and directed them to meet with Unit members in the basement breakroom, not the parking lot or sidewalk. Young told Houser she would request to be reassigned to Respondent's facility, and that she would be Houser's "worst nightmare." This was the only evidence of a "threat" being made.

Respondent argues the confrontations the Union representatives had with Houser were disruptive and witnessed by residents, visitors, and other staff members, which is why it contacted the police and initiated criminal trespass actions against Kelly and Tomlinson. The evidence regarding the alleged disruptions is limited to Houser's impressions or uncorroborated hearsay. Furthermore, any confrontations or disruptions that occurred were in direct response to Respondent denying the Union representatives their right to access based on the CBA and past practice.

The Union representatives did not depart "dramatically" and "unreasonably" from their established past practice when visiting Respondent's facility on the dates at issue. The Union typically sent 1 or 2 representatives when visiting the property, but on two of the occasions (May 19 and June 9) it sent multiple representatives who were present in the parking lot. The Union previously sent multiple representatives to the parking lot. Young testified that during the pandemic the Union sent multiple representatives who set up tables in the parking lot to meet with Unit employees. There also was an instance where Union representatives drove an RV into the parking lot to meet with members. In *Fred Meyer*, the Board found the union representatives lost protection both because of their number and the extended period of time they interacted with employees while they were working. Here, the Union representatives interacted with the Unit employees outside of their working hours.

An employer violates Section 8(a)(1) when it responds to employees' protected union activity at or near its facility by threatening to call the police. *Winkle Bus Co., Inc*., 347 NLRB 1203, 1218–1219 (2006); *Roadway Package System*, 302 NLRB 961 (1991).

Based on the totality of the evidence, I conclude Respondent violated Section 8(a)(1) when it evicted and threatened to call and called the police on the union representatives exercising their contractual right to confer with the Unit employees.

As stated, the General Counsel contends Respondent violated Section 8(a)(1) on the evening of July 7 when its agents called the police on Kelly and Tomlinson while they were at the bottom of the hill, because Respondent had no legitimate property interest to remove them from that location. An employer who denies nonemployee union representatives access to private property for purposes related to the exercise of statutory rights bears a threshold burden of establishing that, at the time it denied access, it had a property interest entitling it to exclude individuals from the property. See *Swardson Painting Co*., 340 NLRB 179 (2003)(citing to *Indio Grocery Outlet*, 323 NLRB 1138, 1141–1142 (1997), enfd. 187 F.3d 1080 (9th Cir. 1999), cert. denied 529 U.S. 1098 (2000)). If the employer fails to meet this threshold burden, there is no actual conflict between private property rights and statutory rights, and its actions therefore will be found to violate Section 8(a)(1). Id. Kelly and Tomlinson were engaged in protected activity when they attempted to speak to Unit employees and hand them ballots as they entered and existed the driveway, and Respondent presented no evidence establishing it had a legitimate property interest in having them removed . I, therefore, find Respondent violated Section 8(a)(1) when it called the police to have them removed from that location.

Thereafter, Allen sent the July 8 letter banning Kelly and Tomlinson, citing their "combative and aggressive behavior" that "crossed the line" and "became personally threatening and harassing to several employees" There is no evidence in the record substantiating these claims. The same is true about Allen's claims in the July 13 letter threatening to initiate criminal trespass charges against them if they entered the property. Thereafter, Houser sent them each a criminal trespass notice forbidding them from entering the property under threat of arrest or criminal prosecution. Two months later, without any intervening event, Allen reiterated the ban and threat to prosecute when the Union requested to have Kelly and Tomlinson participate in contract negotiations. All of this was in response to the union representatives attempting to exercise their right to access the facility and the outside area to represent their members, and without any real evidence of any sort of disruption to Respondent's operations. I, therefore, conclude this conduct also violates Section 8(a)(1). See *Turtle Bay Resorts*, 353 NLRB at 1273.

B. Section 8(a)(3)

Paragraph 7 of the Complaint alleges Respondent violated Sections 8(a)3) and (1) of the Act on July 11 when it discharged Nicholas Parker because he engaged in protected, concerted and union activity. The General Counsel contends Respondent discharged Parker because he was selected to be a union delegate. Respondent denies this and contends it discharged Parker because even though Houser put him on FMLA leave following his injury as a courtesy to protect his job, that leave expired on June 18, 2022, and Parker failed to request an extension in accordance

with Article 20 of the CBA.

Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment[,] to encourage or discourage membership in any labor organization."[24] When assessing the lawfulness of an adverse action that turns on employer motivation, the Board applies the analytical 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), approved by *NLRB v. Transportation Management Corp*., 462 U.S. 393, 395 (1983). Under *Wright Line*, the General Counsel must initially show that: (1) the employee engaged in union or other protected activity, (2) the employer had knowledge of the activity, and (3) the employer demonstrated animus against union or other protected activity. Animus can be established through direct evidence or inferred from circumstantial evidence on the record as a whole. *Intertape Polymer Corp*, 372 NLRB No. 133, slip op. 6–7 (2023). Circumstantial evidence of discriminatory motive may include, among other factors, the timing of the action in relation to the union or protected conduct; contemporaneous unfair labor practices; shifting, false, or exaggerated reasons, offered for the action; failure to conduct a meaningful investigation; departures from past practices; and disparate treatment of the employee. Id.

If the General Counsel meets this prima facie burden, the burden of proof shifts to the employer to demonstrate it would have acted the same had protected conduct not occurred. *Wright Line*, 251 NLRB at 1089.The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade, by a preponderance of the evidence, that the action would have taken place absent the protected activity. *Northeast Center for Rehabilitation*, 372 NLRB No. 35, slip op. at 1–2 fn. 5 (2022), and cases cited there.

The employer's burden cannot be satisfied by proffered reasons that are found to be pretextual, i.e., false reasons or reasons not in fact relied upon. Indeed, where the reason advanced by an employer for the adverse action either did not exist or was not actually relied on, the inference of unlawful motivation remains intact, and is in fact reinforced by the pretextual reason proffered by the employer. *Intertape Polymer Corp*, supra slip op. at 7.

In applying the *Wright Line* framework, I conclude the General Counsel has met her burden. Houser discharged Parker on July 11, a few hours after learning he had been elected Union delegate. The Board has held that an employer's adverse action within a few hours of learning of the employees' protected union activity is enough to establish that animus was the motivating factor. See e.g., *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 861 (2014); *Gaetano & Associates, Inc*., 344 NLRB 531, 532 (2005); and *Atlantic Marine, Inc*., 193 NLRB 1003 (1971).

In addition to the timing, there is, as discussed above and below, Respondent's contemporaneous unfair labor practices. In the week prior to Parker's discharge, Houser and Rose denied Kelly and Tomlinson access and called the police to have them removed, and then Allen banned them and threatened them with arrest and criminal prosecution, all for exercising their contractual and established right to access Respondent's property to confer with employees and administer the CBA by processing grievances.[25]

Animus is further established based on Respondent's reason(s) for discharging Parker. Houser testified she decided to discharge Parker because he failed to request extended leave once his FMLA leave had expired. I find this to be pretext for two reasons. First, Parker was unaware he had been placed on FMLA leave and, therefore, did not know he needed to request an extension. Houser acknowledges she never informed Parker she had placed him on FMLA leave, but claims she was not required to do so. This is incorrect. The FMLA regulations state it is the employer's responsibility to designate leave as FMLA-qualifying (whether unpaid or paid through substitution of paid leave), and to give notice of this designation to the employee. The notice must: (1) be provided in writing within 5 business days of the employer having enough information to determine whether the leave is FMLA-qualifying; (2) be provided for each FMLA-qualifying reason per applicable 12-month period; (3) include the employer's designation determination, and any substitution of paid leave and/or fitness for duty requirements; and (4) provide the amount of leave that is designated and counted against the employee's FMLA entitlement, if known. 29 U.S.C. §825.300(d). None of that was done here.

Second, when Parker failed to request an extension at the expiration of his FMLA on June 18, he was not discharged. He also was not discharged on around July 8, when he failed to request leave after he told Houser his doctor said he could not return to work for another month. It was only after, and immediately after, Houser learned that Parker had been elected Union delegate, that she discharged him -- 23 days later. As the Union points out in its brief, Respondent provided Parker leeway up until learning of his Union activity, and then it strictly enforced the CBA against him.

Accordingly, I find the General Counsel has established by a preponderance of the evidence that Parker's discharge was discriminatorily motivated, and that Respondent's stated reason for his discharge is pretext. I, therefore, find Respondent violated Section 8(a)(3) and (1).

C. Section 8(a)(5)

1. Unilateral Changes Regarding Union's Access

Paragraphs 9 and 10 of the Complaint allege Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally changed the Union's right to access Unit employees at Respondent's facility. Section 8(a)(5) make it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of its employees over the mandatory subjects of wages, hours and other terms and conditions of employment.[26] An employer may not unilaterally change represented employees' terms and conditions of employment without providing their

[24] An 8(a)(3) violation is a derivative violation of Sec. 8(a)(1).

[25] Respondent argues Houser harbored no anti-Union animus, and she, in fact, testified she wanted more Union delegates because they made her job easier. (Tr. 231–232.) I reject this argument. The record is replete with evidence of Houser's hostility toward the Union and its representatives, particularly at around this time.

[26] An 8(a)(5) violation is a derivative violation of Sec. 8(a)(1).

union prior notice and an opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736, 747 (1962). The Board has recognized that union's access to represented employees at the employer's premises is a mandatory subject of bargaining. See *Turtle Bay Resorts*, 353 NLRB at 1274. See also *McGraw-Hill Broadcasting Co.*, 355 NLRB 1283, 1294 (2010); *Regency Heritage Nursing & Rehab. Center*, 353 NLRB 1027, 1034 (2009). To trigger the duty to bargain, the change must be material, substantial, and significant. *Frontier Hotel & Casino*, 323 NLRB 815, 818 (1997), enfd. in pertinent part 118 F.3d 795 (D.C. Cir. 1997). Where an employer unilaterally changes the union's access for representational purposes, that change is material in nature. *Turtle Bay Resorts*, 355 NLRB 1272, 1272-1273 (2010); *Frontier Hotel & Casino*, 323 NLRB at 817-818; *Ernst Home Centers, Inc.*, 308 NLRB 848, 848-849 (1992). Cf *Peerless Food Products*, 236 NLRB 161 (1978).

It is a violation of Section 8(a)(5) and (1) for an employer to unilaterally and materially change the union's right to access, without providing prior notice and an opportunity to bargain. See *Turtle Bay Resorts*, 353 NLRB at 1272–1273; *Ernst Home Ctrs., Inc*, 308 NLRB at 849. Even when an employer accuses a union agent of misconduct while exercising their right to access, the employer is required to give notice and an opportunity to bargain before changing provisions or practices regarding the access to allow the parties the opportunity to work together to arrive at a solution to the problem. *North Memorial Health Care*, 364 NLRB at 793. See also *Meadowlands View Hotel,* 368 NLRB No. 116, slip op. at 17 (2019), quoting *Frontier Hotel & Casino*, 323 NLRB at 817.

It is a further violation for the employer to seek enforcement of its unilateral change by calling the police or seeking the arrest and criminal prosecution of those who continue to access the property in accordance with the terms of the parties' agreement or past practice. See *Hilton Anchorage*, 370 NLRB No. 83, slip op. at 27 (2021), enfd. 2022 WL 3010171 (9th Cir. 2022); and *Toms Ford, Inc.*, 253 NLRB 888, 893 (1990).

The General Counsel alleges that beginning on about March 10, Respondent unilaterally and materially changed the established past practice regarding the Union's access when it restricted the Union's representatives to the basement breakroom, without providing the Union prior notice or an opportunity to bargain over the change and its effects. The General Counsel further alleges that on about March 10 and 18, April 4, May 19, June 9, 14, 20, and 29, and July 7, Respondent violated Section 8(a)(5) and (1) when its agents, orally or in writing, unilaterally restricted the Union representatives' access to Unit employees by limiting them to the basement breakroom, and on about June 9, July 7, 8, 11, 13, and 19, when its agents, orally or in writing, unilaterally denied the Union representatives' access to Unit employees by barring them from accessing the facility, all without providing prior notice and an opportunity to bargain over the change and its effects. On May 19, June 9, and July 7, Respondent involved the police to remove the representatives for exercising their right to access. On each of the dates in question, there is no dispute the Union representatives were attempting to confer with the Unit employees (e.g., general discussions, distributing surveys for upcoming contract negotiations, handing out ballots for internal elections, etc.) or to administer the CBA (i.e., filing, processing, or meeting on grievances).

Respondent denies it unlawfully restricted or denied the Union's access to the Unit employees on its property. It permitted representatives to meet with employees in the basement breakroom. The police were called only when the representatives refused to leave the parking lot, where Respondent contends they had no right to be. It banned Tomlinson and Kelly and threatened to have them arrested and criminally prosecuted for trespass, because they engaged in threatening and harassing conduct toward management and employees. And while those two were banned from the property, the Union was allowed to send other representatives to meet with employees and administer the contract, including processing grievances, and that Tomlinson and Kelly were permitted to participate in meetings remotely through videoconferencing.

As discussed, the CBA gives the Union reasonable access to Respondent's facility—defined by its physical address – for the stated purposes, subject to the specific requirements and limitations contained therein. The General Counsel argues the CBA does not define where representatives could meet with Unit employees; thus, the parties' past practice controls. For conduct to constitute a past practice, it must occur with such regularity and frequency over an extended period of time that employees could reasonably expect it to continue on a regular and consistent basis. See *Tecnocap LLC*, 372 NLRB No. 136, slip op. at 12. (2023); *Garden Grove Hospital & Medical Center*, 357 NLRB 653 (2011). For over a decade, the Union representatives have met with Unit employees at Respondent's facility, at least monthly. Inside the facility representatives met with employees in the chapel, the private dining room, the conference room, offices, and occasionally in the basement breakroom. Outside the facility they met with employees on the covered sidewalk, in the parking lot (including in cars), and on the side of the building where employees smoked.

The Union's practice changed slightly in 2018, when the chapel and private dining room were eliminated, and those locations were no longer available. The practice changed again between 2020 and late 2021, when the COVID-19 restrictions prevented the representatives from entering the facility, and they were forced to meet with employees outside the facility. Contrary to Respondent's claims, I conclude it was well aware of this practice and raised no objections, until March 2022.[27]

In mid-March, after Cokgoren told Kelly that she could not

[27] Respondent argues the Union has no right to access the parking lot because Frankel, not Respondent, owns the parking lot, and any past practice that may have developed was without Frankel's knowledge or consent. Respondent further argues that requiring Frankel to now permit the Union access to the parking lot would be an unconstitutional taking. Respondent relies on *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021), which concerned a California regulation requiring agricultural employers to permit union organizers to enter their property for up to three hours per day, 120 days a year, to meet with employees. In that case, the organizers, without a contractual relationship, and without giving notice, marched through the employer's property, yelling through bullhorns. The Supreme Court held the regulation was an unconstitutional "pre se physical taking." Respondent argues that like the employer in *Cedar Point*, it seeks to exclude Union representatives. Though, unlike

meet with employees in the lobby and later told her she could not meet with them in the parking lot, Tomlinson emailed Cokgoren requesting to meet and discuss Respondent's "continual contract violations." In early to mid-April, Tomlinson spoke with Frankel, and he informed her Respondent wanted Kelly to meet with employees in the basement breakroom.[28] Tomlinson objected, explaining that employees seldom went to the basement for their breaks and were not comfortable speaking with representatives down there because of the surveillance cameras. Despite these objections, and Tomlinson's prior request for the sides to meet, Respondent continued to unilaterally restrict the representatives to the breakroom, without bargaining over the change and its effects.

Based on the foregoing, I conclude the Union had an established past practice of meeting with employees at various locations, both inside and outside Respondent's facility, and Respondent unilaterally and materially changed that practice, without providing the Union prior notice and an opportunity to bargain, in violation of Section 8(a)(5) and (1).[29] For the same reasons, Respondent violated Section 8(a)(5) and (1) when it unilaterally restricted and denied the Union agents access on the dates cited. See *Turtle Bay Resorts*, 353 NLRB at 1273–1275; *Frontier Hotel & Casino*, 309 NLRB at 766. Respondent further violated Section 8(a)(5) and (1) when it involved the police and initiated criminal trespass charges against the Union representatives as a means of effectuating its unlawful unilateral changes.

2. Repudiation of the Agreement by Refusing to Process Pending Grievances

Paragraph 11 of the Complaint alleges that between July 11 and November 30, Respondent failed to continue in effect all the terms and conditions of the parties' CBA when it repudiated the grievance and arbitration procedure while the CBA remained in effect, without the Union's consent. The Board has held an employer's refusal to process or arbitrate contractual grievances violates Section 8(a)(5) and (1) if the conduct amounts to a unilateral modification or wholesale repudiation of the agreement. *Velan Valve Corp*., 316 NLRB 1273, 1274 (1995). The refusal to process or arbitrate all or a particular class of grievances—as opposed to a single grievance or a narrow class of grievances—amounts to a wholesale repudiation of the agreement. Id. *Indiana & Michigan Electric Co*., 284 NLRB 53 (1987). The record establishes Respondent ceased processing all pending grievances beginning on around July 13.

Respondent defends it never made a clear statement indicating it intended to refuse to process pending grievances. Rather, following the July 7 incident involving Rose, Tomlinson and Kelly, Respondent was willing to proceed with processing the grievances so long as Tomlinson and Kelly were not the Union's onsite representatives when the parties met over those grievances.

Houser's testimony undercuts Respondent's argument. She stated Frankel decided to stop processing the grievances once the Union began filing the unfair labor practice charges, because he believed those charges trumped the grievances. The Board has held the "pendency of unfair labor practice charges against an employer does not relieve it of its duty to bargain with the union filing those charges and that a refusal to bargain because of pending charges constitutes bad-faith bargaining on its part." *Zenith Radio Corp*., 187 NLRB 785 (1973). In certain limited circumstances, the pendency of charges may be a defense to a refusal to bargain about those grievances *involving the same allegations* made in the charges. *Airport Aviation Services*, 292 NLRB 823, 830 (1989). Here, however, Respondent ceased processing *all* grievances, regardless of whether there was a corresponding charge. For example, it stopped processing pending grievances over the discharges of two Unit employees (Cole and Leroy) and the suspension of another (Russell). None of those pending grievances were the subject of any charge.

Accordingly, I conclude Respondent violated Section 8(a)(5) and (1) when it repudiated the grievance and arbitration procedures, without the Union's consent, by failing and refusing to process the pending grievances.

3. Failure and Refusal to Bargain and Process Grievances with Tomlinson and Kelly as Union's Representatives

Paragraph 12 of the Complaint alleges that since July 11, Respondent has failed and refused to bargain with the Union as the Unit employees' exclusive collective-bargaining representative unless Tomlinson and Kelly ceased to act as the bargaining agents. Respondent denies this allegation and contends it was willing to meet on grievances and bargain with the Union, just not with Tomlinson and Kelly because of their previous harassing and threatening conduct.

The Board has long recognized that "each party to a

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that employer, Respondent merely seeks to exclude two specific representatives, not an entire union, which is asserting a property interest to a lesser extent than the employer in *Cedar Point*. Respondent misses the mark with these arguments because, unlike the employer in *Cedar Point*, Tomlinson and Kelly had a right to access the property of Respondent's facility, and they were acting in accordance with that right when they were banned and threatened with arrest and criminal prosecution.

Furthermore, the evidence regarding Frankel's "ownership" is limited to Houser's conclusory testimony. Property interest issues are highly nuanced. As previously noted, there is no evidence about the nature or scope of Frankel's property interest, the contractual relationship, if any, that exists between Frankel and Respondent regarding use of the lot, and Respondent's right to use and exclude. This evidence is critical to determining who, if anyone, had the authority to lawfully exclude the Union representatives from the lot.

[28] The General Counsel and the Union argue the CBA does not require advance notice when Union representatives planned to visit, and Respondent made an unlawful unilateral change when it began requiring advance notice. Based upon my review, I conclude the practice has been that representatives called or emailed prior to visiting the facility. This, however, appears to be a moot issue because in her March 24 email to Cokgoren, Tomlinson agreed that moving forward, in an effort to improve the relationship, representatives would call or email when they planned on visiting. Since then, the Union has consistently provided this notice.

[29] My conclusion should not be read as the Union representatives have the unfettered right to decide where they will meet with Unit employees at Respondent's facility. The established practice has been for the representatives to check in when they enter the facility and find out what space(s) are available to use. Just as Respondent cannot unilaterally determine where the representatives meet with employees, neither can the Union.

collective-bargaining relationship has both the right to select its representative for bargaining and negotiations and the duty to deal with the chosen representative of the other party." *Fitzsimmons Mfg. Co*., 251 NLRB 375, 379 (1980), enfd. sub nom. 670 F.2d 663 (6th Cir. 1982). A party's right to select its representative, however, is not absolute, and the other party is relieved of its duty to deal with a particular representative when it establishes the representative's presence would render bargaining (including grievance handling) impossible or futile. Id. The test is whether there is "persuasive evidence that the presence of the particular individual would create ill will and make good-faith bargaining impossible." *KDEN Broadcasting Co*., 225 NLRB 25, 35 (1976). The inquiry is fact-intensive, and, because it is a defense, the employer bears the burden of persuasion. *J&J Snack Foods Handhelds Corp*., 363 NLRB 213, 223 (2015).

General misconduct is not enough to justify barring a union representative. See e.g., *Casino San Pablo,* 361 NLRB 1350, 1355 (2014) (employer unlawfully banned representative indefinitely for briefly delaying departure from facility after a labor-management meeting); *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005) (employer could not lawfully refuse to deal with a representative even after she attempted to physically force her way into a meeting between an employee and a manager); *Victoria Packing Corp*., 332 NLRB 559, 559-600 (2000) (employer acted unlawfully by refusing further access to a representative who yelled "I'm going to get you and your . . . company" at the company's owner after being told that he could not talk to employees during worktime); *Long Island Jewish Medi. Ctr.*, 296 NLRB 51, 70–72 (1989) (employer acted unlawfully in banning a representative from its facility after the representative cursed at managers and lightly shoved one of them). The outcome may be different where the misconduct is egregious. See, e.g., *Pan American Grain Co., Inc*., 343 NLRB 205 (2004) (employer lawfully refused to deal with representative who left voicemail message impliedly threatening HR director with physical violence); *Sahara Datsun*, 278 NLRB 1044, 1046–1047 (1986) (employer lawfully refused to deal with representative who contacted the employer's bank with unsupported allegations of financial impropriety by employer's managers), enfd. 811 F.2d 1317 (9th Cir. 1987); *Fitzsimons Mfg. Co*., 251 NLRB at 379–380 (employer could lawfully exclude representative who engaged in unprovoked physical attack on company's personnel director).

Respondent contends Kelly and Tomlinson were banned primarily because they interfered with its operations on several occasions. Specifically, it argues: (1) Kelly terrified an employee late at night by knocking on her car window in a dark parking lot; (2) Tomlinson yelled at Rose in a threatening manner late at night; (3) Tomlinson and Kelly each repeatedly visited areas that they were not allowed after being asked not to; (4) Tomlinson and Kelly each was involved in multiple arguments that escalated to the level of police involvement; and (5) Kelly was disrespectful to employees, patients, and visitors on multiple occasions. In addition to operational interference, these actions harmed the residents because it interfered with their ability to enjoy their time at the facility peacefully. Most of these claims are vague and unfounded. Respondent relies upon Houser's uncorroborated testimony about what others allegedly reported to her, which I do not credit. The interactions involving Houser that provoked a reaction from Kelly or Tomlinson, such as June 9, where when she denied access to areas where, under the CBA or established past practice, representatives had a right to be to confer with Unit employees or administer the CBA. With the exception of June 9, each time one of Respondent's agents told Kelly and/or Tomlinson they could not remain on the property, they relented and went where Respondent asked them to go, including leaving the property. On June 9, when Tomlinson and Kelly asserted their right to remain, Respondent called the police. Each time the police responded, they simply asked Tomlinson and Kelly to leave, which Tomlinson and Kelly did.

Additionally, each of the instances Respondent relies upon to establish Kelly or Tomlinson engaged in harassing or disruptive behavior were when they were attempting to interact with Unit employees. There is no evidence of any confrontations or issues related to grievance handling or contract negotiations. On July 13, when Kelly and Tomlinson went to Respondent's facility to meet on the pending grievances, Frankel refused to meet and told them to leave. Kelly and Tomlinson complied without incident.

In short, Respondent has failed to meet its burden of establishing Kelly's or Tomlinson's presence would create ill will and preclude good-faith grievance processing or contract negotiations. The alleged misconduct also falls well short of the sort that would entitle Respondent to unilaterally ban Tomlinson and Kelly from performing their representational duties, in person, or that would entitle Respondent to threaten them with arrest or criminal prosecution if they appeared on site.

Based on the foregoing, I conclude Respondent violated Section 8(a)(5) and (1).

CONCLUSIONS OF LAW

1. Rosewood Care, LLC d/b/a Rosewood Rehabilitation and Nursing ("Respondent") has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

2. 1199 SEIU United Healthcare Workers East (Union) has been a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has recognized the Union as the exclusive collective-bargaining representative of the following bargaining unit (Unit):

> All full-time, regular part-time and per-diem non-professional employees, including all licensed practical nurses, activities aides, certified nurse aides, rehabilitation/physical therapy aides, dietary aides, dishwashers, housekeeping employees, laundry employees, maintenance employees, and unit secretaries employed by the Respondent at its Rensselaer, New York facility; but excluding all business office clerical employees, guards, receptionists, the dining room supervisor, chefs, and all other supervisors and professional employees as defined in the Act, and all other employees.

4. Respondent violated Section 8(a)(1) of the Act when: (1) its agents threatened to call and called the police because Union representatives were distributing surveys to Unit employees in the parking lot; (1) its agent(s) called the police on Union representatives engaging in union activity in an area where Respondent had no legitimate property interest; (3) its attorney, in

writing, banned two Union Representatives from entering upon the property of Respondent's facility and threatened to initial criminal trespass charges against the two for a retaliatory purpose; (4) its agent, in writing, issued a trespass notice to Union representatives forbidding them from entering Respondent's property and threatening them with arrest and criminal proceedings for a retaliatory purpose; and (5) its attorney, in writing, threatened to arrest and initiate criminal trespass charges against union representatives for a retaliatory purpose.

5. Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Nicholas Parker because he engaged in protected, concerted and union activities.

6. Respondent violated Section 8(a)(5) and (1) of the Act when it: (1) unilaterally changed the established past practice by limiting where the Union's representatives could meet Unit employees to the basement breakroom, without providing prior notice or an opportunity to bargain over the change and its effects; (2) unilaterally restricted or denied the union representatives' access to Unit employees by barring them from accessing the facility in accordance with the parties' collective-bargaining agreement and/or established past practice, without providing prior notice and an opportunity to bargain over the change and its effects; (3) involved the police in having the Union representatives removed for attempting to access Unit employees in accordance with the parties collective-bargaining agreement and/or established past practice; (4) repudiating the parties' collective-bargaining agreement by failing or refusing to process all pending grievances, without the Union's consent; and (5) failing and refusing to bargain, including processing grievances, with the Union unless certain agents ceased to act as bargaining representatives

7. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. The Act has not been violated in any other way.

REMEDY

Having found Respondent engaged in certain unfair labor practices, I shall order it to cease and desist and to take certain affirmative action, as further set forth in the Order below, designed to effectuate the Act.

Having found Respondent unlawfully discharged Nicholas Parker, Respondent is ordered to offer him reinstatement and make him whole for any loss of earnings and other benefits suffered as a result of his discharge. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Thryv, Inc*., 372 NLRB No. 22 (2022), Respondent shall also compensate Parker for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful discharge, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Further, Respondent is ordered to compensate Parker for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s). *AdvoServ of New Jersey, Inc*., 363 NLRB 1324 (2016). In accordance with *Cascades Containerboard Packaging--Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), Respondent is ordered to file with the Regional Director for Region 3 copies of Parker's corresponding W-2 form(s) reflecting the backpay awards. Respondent is also ordered to remove from its files any references to Parker's unlawful discharge and to notify him in within three days, in writing, that this has been done and that the unlawful discharge will not be used against him in any way.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended.[30]

ORDER

Respondent Rosewood Care, LL d/b/a Rosewood Rehabilitation and Nursing, its officers, agents, successors and assigns, shall:

1. Cease and desist from

(a) Threatening to call or calling the police on union representatives engaging in protected, concerted and/or union activities toward Unit employees, such as distributing surveys for upcoming contract negotiations or ballots for internal Union elections;

(b) Calling the police on union representatives engaging in protected activities in an area where Respondent had no legitimate property interest;

(c) Banning, threatening to arrest, or otherwise restricting Union representatives from entering upon the property of Respondent's facility in accordance with the parties' collective-bargaining agreement and/or established past practice;

(d) Threatening to arrest or initiate criminal trespass charges, or initiating criminal trespass charges, against union representatives because they engaged in protected activities;

(e) Discharging or otherwise discriminating against employees due to their protected concerted activities and/or union sympathies;

(f) Unilaterally changing established past practice by limiting where the Union's representatives could meet with Unit employees, without providing prior notice or an opportunity to bargain over the change and its effects;

(g) Unilaterally restricting or denying the Union representatives' access to Unit employees, without providing prior notice and an opportunity to bargain over the change and its effects;

(h) Involving the police in having the Union representatives removed for attempting to access Unit employees in accordance with the parties' collective-bargaining agreement and/or established past practice;

(i) Repudiating the parties' collective-bargaining agreement

[30] 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.

by failing or refusing to process all pending grievances, without the Union's consent;

(j) Failing or refusing to bargain, including processing grievances, with the Union unless certain agents ceased to act as bargaining representatives; and

(k) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed 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 after the issuance of the Board's Order, reinstate Nicholas Parker to his former positions or, if that position no longer exists, to a substantially equivalent position, without prejudice to seniority or any other rights and privileges previously enjoyed;

(b) Make whole Parker for any loss of earnings and other benefits, and for any direct or foreseeable pecuniary harms suffered as a result of the discrimination against him, in the manner set forth in the Remedy section of this decision;

(c) Compensate Parker for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s);

(d) File with the Regional Director for Region 3, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of the backpay recipient's corresponding W-2 form(s) reflecting the backpay award;

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Parker, and within 3 days thereafter, notify Parker in writing that this has been done and that the discharge will not be used against him in any way;

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stores in electronic form, necessary to analyze the amount of backpay due under the terms of the Board's Order.

(g) Within 14 days after service, duplicate and mail, at its own expense and after being signed by Respondent's authorized representative, copies of the attached notice marked "Appendix."[31] to the last known addresses of all employees who were employed by Respondent at any time since March 10, 2022. In addition to the mailing of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if Respondent customarily communicates by such means;

(h) Respondent shall post copies of the attached notice marked "Appendix."[32] Copies of the notice, on forms provided by the Region Director for Region 3, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material;

(i) Within 21 days after service by the Region, file with the Regional Director for Region 3 a sworn a certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C., January 11, 2024

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL NOT fail or refuse to bargain with 1199 SEIU United Healthcare Workers East (Union) as the exclusive collective-bargaining representative of the following bargaining unit ("Unit"):

All full-time, regular part-time and per-diem non-professional employees, including all licensed practical nurses, activities aides, certified nurse aides, rehabilitation/physical therapy aides, dietary aides, dishwashers, housekeeping employees, laundry employees, maintenance employees, and unit

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[32] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notice must also be posted by such electronic means within 14 days after service by the Region. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]."

secretaries employed by the Respondent at its Rensselaer, New York facility; but excluding all business office clerical employees, guards, receptionists, the dining room supervisor, chefs, and all other supervisors and professional employees as defined in the Act, and all other employees.

WE WILL NOT unilaterally change established past practice by limiting where the Union's representatives could meet with Unit employees, without providing prior notice and an opportunity to bargain over the change and its effects.

WE WILL NOT unilaterally restrict or deny the union representatives' access to Unit employees in accordance with the parties' collective-bargaining agreement and/or established past practice, without providing prior notice and an opportunity to bargain over the change and its effects;

WE WILL NOT involve the police in having the union representatives removed for attempting to access Unit employees in accordance with the parties' collective-bargaining agreement and/or established past practice;

WE WILL NOT repudiate the parties' collective-bargaining agreement by failing or refusing to process all pending grievances, without the Union's consent;

WE WILL NOT fail or refuse to bargain with the Union, including processing grievances, unless certain agents ceased to act as bargaining representatives; and

WE WILL NOT threaten to call or call the police on union representatives engaging in protected activities toward Unit employees, such as distributing surveys for upcoming contract negotiations or ballots for internal union elections;

WE WILL NOT call the police on union representatives engaging in protected activities in an area where Respondent had no legitimate property interest;

WE WILL NOT ban or otherwise restrict union representatives from entering upon the property of Respondent's facility in accordance with the parties' collective-bargaining agreement and/or established past practice;

WE WILL NOT threaten to arrest or initiate criminal trespass charges, or initiate criminal trespass charges, against union representatives because they engaged in protected activities.

WE WILL NOT discharge or otherwise discriminate against employees due to their protected concerted activities and/or union sympathies.

WE WILL reinstate Nicholas Parker to his former positions or, if that position no longer exists, to a substantially equivalent position, without prejudice to seniority or any other rights and privileges he previously enjoyed.

WE WILL make Parker whole for any loss of earnings and other benefits, and for any direct or foreseeable pecuniary harms suffered as a result of his discriminatory discharge; and compensate him for the adverse tax consequences, if any, of receiving lump-sum backpay award.

WE WILL remove from our files any references Parker's discriminatory discharge, and we will notify him in writing that this has been done and that the discriminatory discharge will not be used against him in any way.

ROSEWOOD CARE, LLC D/B/A ROSEWOOD REHABILITATION AND NURSING

The Administrative Law Judge's decision can be found at www.nlrb.gov/https:/case/ 03-CA-297817 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.