New York Presbyterian Hudson Valley Hospital *and* New York State Nurses Association. Case 02–CA–258244

December 5, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS RING AND PROUTY

On August 11, 2021, Administrative Law Judge Jeffrey P. Gardner issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

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,[2] and conclusions and to adopt the recommended Order, as modified and set forth in full below.[3]

On February 25, 2020,[4] registered nurse (RN) Rosamaria Tyo left an operating room (OR) during a surgery that she and another RN were assigned to document and engaged in concerted activity with a group of coworkers and union representatives. The issue in this case is whether the Respondent's termination of Tyo following that conduct was unlawful. For the reasons stated by the judge, as well as those set forth below, we find that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating Tyo.

I. BACKGROUND

In December 2018, the Board certified the New York State Nurses Association (the Union) as the exclusive collective bargaining representative of a unit of RNs at the Respondent's 128-bed hospital in Cortlandt Manor, New York. At the time of the events herein, the Union and the Respondent were engaged in bargaining for an initial contract. The parties' bargaining resulted in at least one memorandum of understanding (MOU) pursuant to which the Respondent provided a ground-floor office for union representatives to use, and the Union agreed to provide 24 hours' notice before coming on-site, go through security procedures when entering the facility, and not conduct business in patient areas. RN Tyo's coworkers selected her to be a member of the Union's negotiating team and between April or May 2019 and February 2020, she participated in negotiations. In October and November 2019, she and a few coworkers met with a nursing director and with Chief Nursing Officer Ophelia Byers about staffing shortages, mandatory overtime, and the Respondent's failure to pay the RNs' annual merit wage increases for the first time in 19 to 20 years.

The Respondent has five active ORs in which surgeons perform a variety of procedures, including ophthalmological, orthopedic, robotic, and neurological surgeries. At least one surgeon, an anesthesiologist, and a certified surgical technician ("scrub nurse" or "scrub tech") are present during any given OR procedure. Also present is a "circulating" nurse, who helps prepare the OR, documents the procedure by entering information into the Respondent's electronic medical record system,[5] calls for or retrieves supplies if needed during the surgery, and is expected to help in an emergency. At the end of a procedure, the circulating nurse remains with the patient and

[1] Members Kaplan and Wilcox did not participate in the consideration of this case.

[2] The Respondent has excepted expressly and impliedly to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Because of the Covid-19 pandemic, the hearing in this case was conducted virtually via Zoom. The Respondent excepts broadly to the conduct of the video hearing and contends specifically that the judge demonstrated bias by allowing one of the General Counsel's witnesses, union representative Carol Lynn Esposito, to testify with a union flag hanging on a wall behind her, while instructing the Respondent's witness, Vice President of Human Resources Sedrick J. O'Connor, to turn off the Respondent's Zoom virtual background. In *William Beaumont Hospital*, 370 NLRB No. 9, slip op. at 1–2 (2020), the Board upheld administrative law judges' authority to schedule and conduct video hearings in the "compelling circumstances" of the pandemic, under appropriate safeguards "informed but not controlled by those listed in Section 102.35(c)(2) of the Board's Rules [& Regulations]." On careful examination of the judge's decision and the entire record, we find that the judge acted within his discretion in conducting the hearing and that the Respondent's contention of bias lacks merit. Virtual backgrounds obscure a Zoom participant's actual physical background. The record demonstrates that the judge was concerned about the integrity of the hearing, and that he attempted to ensure that each witness testified without interruption or influence by observing them in their surroundings.

[3] We shall modify the judge's recommended Order in accordance with our decisions in *Cascades Containerboard Packaging – Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021) and *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022), and we shall also modify the judge's recommended Order to conform to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

[4] All further dates are in 2020 unless otherwise stated.

[5] The information entered includes the names of the surgeons and nurses participating in the surgery, the times they enter and exit the OR, the time of the first incision, etc.

hands the patient off to recovery room personnel. OR Clinical Nurse Coordinator Nancy Kelly schedules the procedures daily for each operating room, noting the type of service and the names of the surgeons, scrub techs, circulating nurses, and floating nurses, if any, who relieve the scrub tech and circulating nurse during breaks and lunch periods. Nurses and other medical professionals carry the Respondent's messaging device called a "mobile heartbeat."

Until her termination on March 13, 2020, RN Tyo was a 17-year employee of the Respondent, who had been assigned to the OR since 2015. Tyo was one of several RNs who acted as "preceptors" or trainers to new OR nurses, teaching these "orientees" tasks such as prepping the OR with supplies and equipment for each procedure and electronically documenting the procedure. Tyo and another preceptor, Andrew Askew, credibly testified that the preceptors' practice was to gradually relinquish documenting and other duties to orientees as the latter gained more experience and confidence. RN Kevin Lazaro was one such orientee. The Respondent hired Lazaro in May 2019, and he began training to become a certified OR nurse. By November 2019, he had completed a prerequisite OR course called Peri-Op 101, which includes 26 instruction and training modules and an extensive test. During this period, Lazaro also trained as a circulating nurse in the OR where he partnered with different preceptors, including RNs Tyo and Askew. Lazaro observed hundreds of surgeries and learned how to document them. During his orientation, Lazaro was assigned as the secondary circulating nurse on more than 20 spinal procedures, including three cervical laminectomies with microdiscectomies and one lumbar fusion surgery.[6] By fall 2019, Lazaro was assigned as the primary circulating nurse to document various surgeries. On a number of occasions in December 2019 and January 2020, Lazaro relieved circulating nurses during their 15-minute morning breaks and 30-minute lunchbreaks.

II. THE EVENTS OF FEBRUARY 25, 2020 AND THEREAFTER

The Respondent regularly schedules "town hall" meetings from 12 to 1 p.m. at which administrators and employees discuss updates on a variety of work-related topics. Union agents and unit employees learned that Chief Nursing Officer Byers planned to conduct a town hall on February 25 and they formulated a plan to meet with her when the town hall ended to apprise her of bargaining issues, invite her to attend negotiations, and present her with cards signed by RNs urging the Respondent to pay them annual increases.

On February 25, Kelly assigned Tyo to precept RN Lazaro in a complex surgery known as a cervical laminectomy posterior with microdiscectomy bilateral procedure. The schedule shows that Tyo and Lazaro were assigned to relieve each other for their 15-minute morning breaks, and that a floating nurse, Nicky Perkins, was assigned to relieve the two of them during their 30-minute lunchbreak.[7] At 9:30 a.m., the scrub tech, Lazaro, and Tyo entered the OR for the procedure and, at about 10 a.m, the surgeon and anesthesiologist entered. At 11 a.m., Perkins offered to relieve Lazaro and Tyo for lunch, but they declined because documenting the first part of the procedure was crucial. Tyo and Lazaro combined their break and lunch, a common practice, and left the OR from 11:45 a.m. to 12:30 p.m., and Perkins documented the procedure during their absence. When they returned, Lazaro resumed documenting with Tyo as preceptor. About 12:49 p.m., Tyo received word that the group of union agents and employees were on-site and ready to engage Byers in the conference room. Tyo told Lazaro that she had a meeting with Byers; asked whether he was comfortable documenting the surgery on his own for a while (he indicated that he was); and reminded him that he could reach her on the hospital's "mobile heartbeat" phone or on her personal cell phone and that floating nurse Perkins was also available to assist him if needed.

Tyo left the OR and walked to the ground floor conference room where the town hall had concluded. Tyo, six colleagues, and three outside union representatives approached Byers and explained their purpose. Byers chided the group, saying they were "disrespectful" and their behavior was "unacceptable" because they should have made an appointment with her. When union agents responded that they were engaged in protected activity and had a legal right to be there, Byers became visibly angry and singled out Tyo by name as someone who should know better because she had been to Byers' office. Byers refused to take the cards that the group offered her, asked for their individual names, and left the conference room. Meanwhile, Byers' assistant contacted security. Vice President of Human Resources Sedrick O'Connor was also notified.[8] By the time O'Connor

[6] A fusion procedure entails the permanent placement of hardware in the patient's body.

[7] Perkins was a "traveling nurse." Traveling nurses typically work with the hospital under 13-week employment contracts. Perkins' first name is also spelled "Nikki" and "Niki" in the record.

[8] O'Connor testified that, in the past, when he was alerted that union representatives were on-site but did not confine themselves to the designated union office, he would print a copy of the parties' MOU, give it to the union representatives, and remind them of its key terms. Before leaving his office on February 25 to go to the conference room, he attempted to print a copy of the MOU to give to the union representatives, but his printer would not work.

arrived at the conference room, the group had dispersed, Tyo had returned to the OR, and security guards had escorted union representatives to the Union's office and out of the building. Byers explained what happened to O'Connor. Less than 2 hours after the incident, O'Connor initiated an email thread with Respondent's Director of Site Security Steve Carroll and the Vice President of Security and Emergency Management Diego Rodriguez, requesting a report and security video footage. The subject line of the email thread was "NYSNA just ambushed Ophelia in a meeting."

Tyo returned to the OR at 1:16 p.m.—less than half an hour after originally departing—and resumed precepting during the remainder of the procedure which ended approximately an hour later. Less than 1 week later, on March 2, Kelly scheduled Lazaro as the primary circulating nurse on another laminectomy with microdiscectomy surgery. With Kelly's knowledge, Lazaro's preceptor, Marissa Cedieux,[9] spent most of the procedure outside the OR at the OR reception desk. The Respondent did not register any concern, issue any discipline, or launch any investigation of Cedieux's conduct.

On March 5, Director of Surgical Services Bruce Provencher and Human Resources Representative Christine Lampersberger conducted a disciplinary meeting with Tyo and her union representative during which they revealed that she was being investigated for abandoning a patient on February 25.[10] Tyo acknowledged leaving the OR to engage in union activity and explained the circumstances, including her instructions to Lazaro and her confidence in his skills. On March 13, the Respondent terminated Tyo for "patient abandonment" and, on March 20, sent a letter to the Office of Professional Discipline of the New York State Education Department's Office of the Professions reporting her February 25 conduct. Tyo invoked the Respondent's discipline review procedure, and she and union representatives presented evidence about precepting practices and Lazaro's experience, guidance on the definition of patient abandonment, and letters from surgeons who had worked with Tyo advocating for her reinstatement. One such letter was written by Saran Rosner, MD, a surgeon who performed the cervical laminectomy posterior with microdiscectomy bilateral procedure on February 25. The Respondent upheld its decision to terminate her.

[9] This preceptor's last name also appears as "Padalla" in the record.

[10] The Office of Professional Discipline of the New York State Education Department's Office of the Professions defines patient abandonment as when "[a] nurse, who has accepted a patient care assignment and is responsible for patient care, abandons or neglects a patient needing immediate professional care without making reasonable arrangements for the continuation of such care."

Lampersberger's name also appears in the record as "Lampers-Berger."

III. THE JUDGE'S DECISION AND THE PARTIES' POSITIONS

The judge applied the Board's *Wright Line* analysis and found that the Respondent terminated Tyo because of her union activity.[11] The judge considered Tyo's extensive union activity and the Respondent's knowledge of that activity based on her participation in bargaining and her October and November 2019 meetings with Byers in which she discussed staffing shortages, mandatory overtime, and the Respondent's failure to pay the RNs annual merit wage increases. In assessing whether the Respondent demonstrated animus toward Tyo, the judge considered the fact that Byers called Tyo out by name when the group approached her on February 25 and that the Respondent immediately sought to determine the identities of the participants with a view toward determining what actions to take against them. The judge also found that the Respondent's defense that Tyo engaged in egregious behavior by leaving Lazaro alone to document the February 25 surgery was pretextual based on the Respondent's own OR assignment records and the fact that the other medical professionals in the OR during the surgical procedure, including the surgeons, did not find Tyo's conduct troublesome enough to report it or request that it be investigated. As a result, the judge found that, under *Wright Line*, the General Counsel met her initial burden of demonstrating that animus towards Tyo's protected union activity motivated the Respondent's decision to terminate her and that the Respondent failed to meet its rebuttal burden because it did not demonstrate that it would have terminated Tyo absent her union activity.

In addition to challenging the judge's credibility resolutions, the Respondent excepts to the judge's failure to apply the Board's recent decisions in *General Motors LLC,* 369 NLRB No. 127 (2020), and *Tschiggfrie Properties, Ltd*., 368 NLRB No. 120 (2019), and argues that he substituted his judgment for that of its medical professionals.[12] The General Counsel and the Union argue that

[11] See *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

[12] Chairman McFerran and Member Prouty were not members of the Board when *General Motors* was decided, and express no opinion on whether it was correctly decided. Chairman McFerran adheres to her views expressed in *Tschiggfrie* that the "clarifications" that decision purported to make to the General Counsel's initial *Wright Line* burden were unnecessary, as the relevant "clarifying" concepts were already embedded in the *Wright Line* framework and reflected in the Board's body of *Wright Line* cases. Member Prouty was not a member of the

the judge properly assessed the evidence and found the violation.

IV. ANALYSIS

We agree with the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) by discharging Tyo.[13] First, we adopt the judge's findings that the General Counsel met her initial *Wright Line* burden to prove that Tyo's union activity was a motivating factor in her discharge, including the judge's findings that Tyo engaged in protected union activity, the Respondent knew of Tyo's protected union activity, and the Respondent demonstrated animus in several respects.[14]

Prior to February 25, Tyo engaged in union activity as a member of the Union's bargaining team and met with Byers concerning staffing issues, mandatory overtime, and the Respondent's post-certification failure to pay RNs' annual merit wage increases for the first time in two decades. In addition, by approaching Byers after the town hall had concluded, the union group did not disrupt the town hall and at no point did the group physically or verbally accost her. Nevertheless, Byers expressed disdain for the union group's actions, calling them "disrespectful" and "unacceptable," and, even after the group responded that they were just engaging in protected union activity, Byers singled out Tyo by saying she "knows better than this." Very soon after this, the Respondent initiated its investigation of Tyo and then terminated her. In these circumstances, we agree with the judge that the General Counsel met her initial burden of demonstrating that animus towards Tyo's protected activity was a motivating factor in her termination. Thus, contrary to the Respondent's and our dissenting colleague's assertions, the record and the judge's analysis support finding that a causal relationship exists between Tyo's protected activity and the Respondent's termination of her.[15]

Our dissenting colleague asserts that Byers' statements were protected by Section 8(c) of the Act and therefore cannot be evidence of animus. We disagree. Section 8(c) protects "views, argument, or opinion." It expressly excludes statements containing any "threat of reprisal or force or promise of benefit." Byers' angry statements directed to her subordinate, Tyo, that her and the group's activity was "disrespectful," "unacceptable," and that Tyo specifically should "know[] better," did not express a "view, argument, or opinion" for purpose of Section 8(c); rather, she publicly admonished Tyo and other employees for their union activity and conveyed the clear message that the protected activity they engaged in was not permissible. Her remarks pointedly condemned Tyo and the other employees' protected activity and explicitly told them it was "unacceptable." Conduct that is "unacceptable" is—by definition—conduct that will not be tolerated. Byers' use of that term alone—even putting aside the increased impact of combining it with the other pejorative characterizations Byers made—thus reflected animus toward the activity and contained a clear threat of adverse consequences for engaging in it. See, e.g., *Winston-Salem Journal*, 341 NLRB 124, 126 (2004) (finding that a respondent threatened an employee with discipline when it called the employee's conduct "unacceptable"). Moreover, the Board has long recognized that even a respondent's use of euphemistic terms that are less threatening than "unacceptable," such as "troublemaker" and "attitude," can still be indicative of animus. See *Citizens Service Investment Corp.*, 342 NLRB 316, 328 (2004), and cases cited therein ("bad attitude" and "troublemaker" were "simply another way of indicating that [the employee] was terminated because he engaged in protected concerted activity"). Indeed, the Board has found that a respondent violated Section 8(a)(1) when its manager told an employee who represented a coworker in a union matter that he was "disrespectful" to managers and should not speak that way again. *Orchids Paper Products Co.*, 367 NLRB No. 33, slip op. at 3 and 25 (2018). Although Byers' statements are not alleged as independent violations here, *Orchids Paper* demonstrates that castigating employees engaged in protective activity for being "disrespectful" can fall outside the protection of Section 8(c). Here, then, we have no difficulty in finding that Byers' use of the terms "disrespectful" and

Board when *Tschiggfrie* was decided and expresses no views on whether it was correctly decided.

[13] We need not pass on the Respondent's argument that the judge should have applied *General Motors* because doing so would not change the result. The test set forth in *General Motors* is the *Wright Line* test, which the judge applied. See *General Motors*, supra, 369 NLRB No. 127, slip op. at 1.

[14] We note that, with regard to the General Counsel's initial *Wright Line* burden, our dissenting colleague only disagrees with the finding related to animus, as he otherwise acknowledges that Tyo engaged in union activity and that the Respondent knew as much. Separately, he asserts that Tyo's actions in leaving the OR were indefensible and thus unprotected. We address both of these arguments in more detail below.

[15] In *Tschiggfrie*, the Board clarified that the General Counsel does not necessarily satisfy her initial *Wright Line* burden by simply producing *any* evidence of the employer's animus or hostility toward union or other protected activity. Instead, the Board held that the evidence, as here, must be sufficient to establish that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee. See 368 NLRB No.120, slip op. at 1. Here, in view of Byers' vocalized disdain for the union group's protected activity and her further insistence on ominously criticizing Tyo even after being reminded of the protected nature of the group's activity, there is more than sufficient evidence to sustain the finding that the General Counsel satisfied her initial burden of demonstrating that the union activity precipitated the Respondent's investigation and termination of Tyo.

"unacceptable," as well as her statement that Tyo specifically should "know[] better," in reference to union activity that Byers was correctly informed was protected, falls outside the protection of Section 8(c).[16]

We also note that, in these circumstances, our dissenting colleague's assertion that Byers merely expressed opposition to the "way" that Tyo and the rest of the group engaged in union activity but not to "the fact" that they were engaged in union activity is a speculative distinction without a difference. It is immaterial that Byers might not have retaliated against employees for a less confrontational form of protected activity. The Board has long rejected efforts to police the "reasonableness" of employees' choices of how to engage in protected activity. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16 (1962) (the "reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not"); *Trompler, Inc.*, 335 NLRB 478, 480 & fn. 26 (2001) ("In our view, if employees are protesting working conditions, whether caused by a supervisor or by higher management action, those employees can protest by any legitimate means, including striking. The fact that some lesser means of protest could have been used is immaterial. We would not second-guess the employees' choice of means of protest."), enfd. 338 F.3d 747 (7th Cir. 2003); *Plastilite Corp.*, 153 NLRB 180, 183 (1965) ("[T]he Act allows employees to engage in any concerted activity which *they*"—not their employers—"decide is appropriate for their mutual aid and protection . . ." (emphasis added)). Tyo and her fellow employees' choice of protected activity is protected from retaliatory discipline by the Respondent.[17]

Second, having found that the General Counsel satisfied her initial burden, we agree with the judge's conclusion that the Respondent did not meet its *Wright Line* rebuttal burden, as it failed to prove it would have discharged Tyo even absent her union activity. The Respondent argues, and our dissenting colleague agrees, that it lawfully discharged Tyo because she engaged in "outrageous" conduct, consisting of patient abandonment, by leaving Lazaro in the OR without her for 28 minutes. The Respondent relatedly argues that the judge substituted his business judgment for the Respondent's as to whether Tyo's conduct warranted discharge. These arguments are meritless. The question addressed by the judge, and now by the Board, is whether the Respondent's asserted reason for the discharge—"patient abandonment"—was its actual reason. The judge found that it was merely a pretext, and we agree. See, e.g., *Toll Mfg. Co.*, 341 NLRB 832, 834 (2004) (finding an unlawful discharge under *Wright Line* where "the reasons the Respondent gave for discharging" its employee "were not in fact relied on, but were pretexts for taking action against a leading union adherent").

The judge's rejection of this defense was based in part on his credibility resolutions, including his discrediting of Kelly's testimony regarding Lazaro's level of experience. We note that the judge explicitly relied on both witness demeanor and other factors, including inherent inconsistencies and contradictions, and we find no basis to overrule his credibility determinations. See *Standard Drywall Products*, supra; *Lizdale Knitting Mills, Inc.*, 211 NLRB 966, 967–968 (1974). The judge found that Kelly's testimony was internally inconsistent because Kelly denied knowing that Lazaro had worked on a surgery as complex as the February 25 procedure, while admitting that he had worked on a "posterior cervical fusion" surgery that was even more complex. Even if Kelly's testimony was that a fusion surgery is just "more complex" when measured on an overall scale of surgical complexity ranging from less to more complex and is not necessarily more complex than the February 25 procedure, Kelly's testimony still confirmed that Lazaro had experience working on complex procedures.

In any event, the judge reasonably found that Kelly's testimony that Lazaro was not sufficiently experienced to cover for Tyo was undermined by Kelly's admission that she was unaware of traveling RN Perkins' experience, despite having personally assigned Perkins to cover the procedure during Tyo's and Lazaro's 30-minute lunchbreak (which was actually 45 minutes, when combined

[16] *United Site Services of California, Inc.*, 369 NLRB No. 137, slip op. at 14 fn. 68 (2020), cited by our dissenting colleague, is inapposite. In that case, the Board found that the non-union philosophy policy set forth in the employer's handbook (i.e., to "do everything in its legal power to prevent any outside, third party, who is potentially adversarial, such as a union from intervening or interrupting the one-on-one communications or operational freedoms") was a lawful expression of an anti-union view protected by Sec. 8(c) and not evidence of animus. Although definitively anti-union, the handbook statement generally warned of lawful opposition to union activity, but, unlike the circumstances of this case, was not part of and did not express targeted disapproval and the "unacceptability" of employees engaged in protected activity.

Neither Chairman McFerran nor Member Prouty were members of the Board when *United Site Services* was decided, and they express no view on whether the analysis of Sec. 8(c) in that case was correct.

[17] Our dissenting colleague also asserts that the quick succession of events—the protected activity followed soon after by the investigation and termination of Tyo—"alone" is insufficient to establish that the Respondent's adverse action had an unlawful motive. It is clear from the preceding paragraphs that timing is obviously not "alone" in the analysis. The substance of Byers' statements and the context in which she made them are sufficient to find anti-union animus causally connected to the termination that followed. And, in any event, our dissenting colleague admits that timing is relevant in a case where there is "disparate treatment." As we explain below, this is one of those cases.

with their break). Put simply, if Kelly was comfortable assigning Perkins to provide solo nursing coverage for 45 minutes—despite admitting that she had no idea whether Perkins had ever before participated in the particular type of procedure—then it is implausible that Lazaro's solo coverage for 28 minutes raised a genuine concern, particularly when Kelly knew that Lazaro did have experience with complex procedures. In addition, Kelly also scheduled Tyo and Lazaro to relieve each other for their 15-minute breaks during the procedure, which is further evidence that solo coverage by Lazaro was unremarkable.

We also observe that on March 2, the Respondent—while it was investigating Tyo allegedly for "patient abandonment" because she left Lazaro 6 days earlier—assigned Lazaro to be the primary circulating nurse on a spinal surgery of similar complexity as the February 25 procedure and during that March 2 surgery, Lazaro's preceptor, Cedieux, was absent from the OR for most of the procedure—yet Cedieux was not punished for her absence. According to Kelly, Cedieux called Lazaro at 15-minute intervals and Kelly acquiesced in Cedieux's assessment of Lazaro's competence and confidence. Our dissenting colleague's acknowledgement that Cedieux had also left Lazaro alone in the operating room underscores that Tyo's temporary absence from the OR was not an aberration. It demonstrates that preceptors' assessments of orientees' competence and confidence in deciding whether to leave orientees alone to document surgical procedures was an expected and respected norm. Nor, as our colleague claims, was Tyo's conduct more egregious than Cedieux's conduct because "Tyo left [Lazaro] on his own and went to a different floor of the Hospital from the OR, whereas Cedieux was just outside the OR and could have been available immediately in case of emergency." The location of either Cedieux or Tyo is largely immaterial; both assessed Lazaro's competence and comfort and neither remained in the OR. If absence from the OR constitutes patient abandonment, both committed the same infraction. The critical difference is that only one of them—Tyo—engaged in protected union activity during her absence from the OR, and she was the only one that the Respondent punished. The Respondent expressed no concern at all with Cedieux's absence. This further demonstrates that the Respondent's purported outrage over Tyo's much shorter period of absence from the OR was not genuine.

It is significant, in turn, that the surgeons who had worked with Tyo in the OR—who would seem to be neutral and competent judges of her conduct—did not share the Respondent's view that she had endangered the patient. They provided written testimonials to the hospital administration objecting to the Respondent's termination of Tyo. Notably, the testimonials include one from Saran Rosner, the chief surgeon during the February 25 procedure itself. Rosner's letter expresses her firsthand, expert view that Tyo has "always" demonstrated the highest professional standards. The surgeons' actions strongly suggest that Tyo's behavior neither violated hospital norms nor risked placing a patient in danger. They surely had no interest in defending outrageous misconduct by a nurse—to the contrary. Not surprisingly, then, on November 16, 2021, the Office of Professional Discipline of the New York State Education Department's Office of the Professions issued a letter finding no basis to support disciplining Tyo.[18] There is no evidence here, meanwhile, that the Respondent took action against the doctors and nurses in the OR who apparently failed to report Tyo's absence from the OR, which would seem to be a serious omission on their part—if, indeed, the Respondent genuinely viewed Tyo's absence as outrageous.

Accordingly, in view of the evidence here—namely, (1) the Respondent's assigning Perkins to provide solo nursing coverage for 45 minutes during the February 25 procedure despite not knowing if Perkins had any experience with that particular procedure; (2) the Respondent's assigning of Lazaro to provide solo nursing coverage during Tyo's 15-minute breaks from the February 25 procedure; (3) the Respondent's failure to punish Cedieux for being absent from the OR for a far longer period of time during a surgery of similar complexity as the February 25 procedure; (4) the unanimous conclusion of Tyo's colleagues, including the lead surgeon who performed the February 25 procedure with her, and the Office of Professional Discipline that Tyo's conduct did not warrant discipline; and (5) the Respondent's failure to punish any of Tyo's medical colleagues for not reporting her alleged misconduct—we are convinced, like the judge, that the Respondent would not have taken any adverse action against Tyo had it learned that she had left the OR for 28 minutes to do anything other than to engage in union activity.

[18] We construe the General Counsel's Motion to Supplement the Record with this letter as a request for the Board to take administrative notice of it, and we construe the Respondent's response thereto as its opposition to the Board's taking notice. Having considered the request and opposition, we find no basis for not admitting the letter into evidence. Accordingly, as we have done for other similar records that have issued after the close of a hearing before a judge but before our rendering of a decision, see, e.g., *Iron Griddle Restaurant*, 327 NLRB 1234, 1234 (1999) (state court opinion affirming state administrative agency's determination); *Drummond Coal Co.*, 277 NLRB 1618, 1618 fn. 1 (1986) (arbitral award), we take administrative notice of the letter. We would reach the same ultimate conclusion here, however, regardless of the letter.

The Respondent's reliance on *Ryder Distribution Resources, Inc.*, 311 NLRB 814 (1993), in support of its argument that the judge impermissibly substituted his business judgment for the Respondent's is misplaced. In *Ryder*, the Board reversed the judge's finding that the employer unlawfully subcontracted the driving for one of its biggest accounts and terminated employee drivers who serviced that account because they attempted to organize. 311 NLRB at 814. The Board found that "[a]lthough the judge questioned the economic efficacy of the [employer]'s decision to contract . . . and found it wanting, 'the crucial factor is not whether the business reasons cited by [the employer] were good or bad, but whether they were honestly invoked and were, in fact, the cause of the change.'" Id. at 816 (citations omitted). Here, for the reasons detailed above, we are convinced that the judge correctly concluded that the Respondent's ostensible reason for Tyo's discharge, "patient abandonment," was *not* "honestly invoked," but rather was a pretext. Accordingly, we find that the judge did not substitute his judgment for that of the Respondent.

Finally, our dissenting colleague contends not just that the Respondent's motive here was lawful, but that its motive was immaterial because Tyo engaged in "indefensible" conduct and so lost the protection of the Act. But Tyo's conduct here was not "indefensible," as measured by the standards of the Board's case law. A health care employee loses the Act's protections when she fails to take precautions to prevent the reasonably foreseeable possibility of imminent injury to a patient. *Bethany Medical Center*, 328 NLRB 1094, 1094 (1999). Tyo—who, as noted above, was the "circulating nurse" primarily tasked with documenting the procedure, not the surgeon, anesthesiologist, or scrub nurse—took those precautions and so did not lose the Act's protection.[19]

Specifically, Tyo took precautions consistent with her role as a preceptor training an orientee: She told Lazaro she was stepping out of the OR; she confirmed that he was comfortable documenting the surgery on his own; she instructed him to contact her on the Respondent's "mobile heartbeat" messaging device or on her personal cell phone should the need arise and reminded him that Perkins was also available; and she was gone for no longer than Lazaro had previously been scheduled to relieve other preceptors during their lunchbreak.

In addition to having taken these precautions, and contrary to the dissent's description of events, Tyo clearly did not leave a patient during an operation without adequate care. To the contrary, the patient remained in the hands of the same doctors and nurses who handled the procedure without Tyo's documentation during her breaks. That the patient was left with capable coverage during Tyo's absence is strong evidence, in addition to the precautions that she took, that her absence did not create a reasonably foreseeable possibility of injury to the patient. See *NLRB v. Special Touch Home Care Servs.*, 708 F.3d 447, 459 (2d Cir. 2013) (explaining that in cases that "involve[] situations where 'there were other persons to provide cover' for the [absent] employee[]" the Act's protections are not forfeited (quoting *Bethany Medical Center*, 328 NLRB at 1095 fn. 9)).

Moreover, the medical professionals who remained in the OR when Tyo was absent. including lead surgeon Rosner, apparently thought Tyo's absence was so unremarkable that they did not report it. Indeed, surgeon Rosner, in her letter urging Tyo's reinstatement, noted that Tyo "always" demonstrated the highest of professional standards and called Tyo's commitment to patient care "unwavering." Consistent with that, and as noted above, the state Office of Professional Discipline found no basis to discipline Tyo. Our dissenting colleague's shock at Tyo's conduct and our decision is fundamentally at odds with the view of the medical professionals closest to the event and with the judgment of the state administrative body that investigates alleged nursing misconduct.[20]

This evidence—namely, the reasonable precautions that Tyo took; that the patient remained in the capable hands of other medical professional during Tyo's absence; the fact that other professionals in the OR did not report Tyo's absence; and the New York agency's conclusion that Tyo did *not* abandon a patient—persuade us that Tyo did not create a reasonably foreseeable possibility of injury to the patient and so did not lose the Act's protection.

In sum, we agree with the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) by discharging Tyo.[21]

[19] Contrary to the claim of the dissent, we do not "trivialize Tyo's role" by explaining that she was the "circulating nurse" during the February 25 operation. Rather, we accurately describe her role.

[20] There is simply no basis for the dissent's assertion that Chief Surgeon Rosner *"overlook[ed]* Tyo's misconduct" (emphasis added). To the contrary, in her letter urging Tyo's reinstatement, Rosner glowingly reviewed Tyo's operating room conduct, including its positive effect on patient safety.

[21] Our dissenting colleague asserts that Sec. 10(c) of the Act precludes an award of reinstatement and backpay to Tyo because Sec. 10(c) states that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him [or her] of any back pay, if such individual was suspended or discharged for cause." But in finding that Tyo was discharged for cause, our colleague relies on his dissenting view that Tyo's termination was lawful. We have found that the Respondent's asserted reasons for the discharge were a pretext, and thus, that the discharge was not for cause. In any event, we note that, even in

ORDER

The National Labor Relations Board orders that the Respondent, New York Presbyterian Hudson Valley Hospital, Cortlandt Manor, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because of their support for and activities on behalf of the Union.

(b) 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 from the date of this Order, offer Rosamaria Tyo full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Rosamaria Tyo whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(c) Compensate Rosamaria Tyo for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 2, 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.

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

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Rosamaria Tyo and, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her 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 stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its Cortlandt Manor, New York facility copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 2, 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 to employees 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 13, 2020.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

dual-motive *Wright Line* cases, the Sec. 10(c) "'for cause' proviso was not meant to apply to cases in which both legitimate and illegitimate causes contributed to the discharge." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 fn. 6 (1983) (approving *Wright Line* standard). "The proviso . . . thus has little to do with the situation in which the Board has soundly concluded that the employer had an anti-union animus and that such feelings played a role in a worker's discharge." Id. Thus, a discharge in violation of the Act, an unfair labor practice, is not "for cause," as the Supreme Court has explained. See *Washington Aluminum Co. v. NLRB*, 370 U.S. 9, 14 (1962) (Sec. 10(c) "cannot mean that an employer is at liberty to punish a man by discharging him for engaging in concerted activities which [Sec.] 7 of the Act protects."). See also *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 217 (1964); *East End Bus Lines, Inc.*, 366 NLRB No. 180, slip op. at 15 fn. 61 (2018), and cases cited therein.

[22] 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 facility involved in these proceedings is 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 facility reopens and a substantial complement of employees has 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]." 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."

Dated, Washington, D.C. December 5, 2022

Lauren McFerran, Chairman

David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER RING, dissenting

In the middle of a complex spinal surgery, Operating Room (OR) Nurse Rosamaria Tyo left her assignment in the OR for nearly half an hour to participate in a union-related action. She did so without her supervisor's knowledge and without securing alternative coverage, despite the Hospital having established protocols for a nurse handing off a patient to another nurse in the OR. She left her responsibilities during the surgery to an individual who was still in training to become an OR nurse and whose training in the OR Tyo was charged with overseeing. Tyo saw nothing wrong with her conduct. After conducting an appropriate investigation, the Respondent discharged Tyo for patient abandonment. My colleagues find that by doing so, the Respondent violated the National Labor Relations Act, and they order Tyo reinstated with backpay. I disagree strongly with this finding and these remedies. Tyo's conduct was indefensible and therefore unprotected by the Act. Even assuming she retained the Act's protection, the General Counsel failed to prove that animus against Tyo's union activities motivated her discharge. Moreover, because Tyo was discharged for cause, the remedies my colleagues order contravene Section 10(c) of the Act.

The majority's decision sets an alarming precedent. Employees absolutely should be protected when they engage in union-related activity. But there are limits. A nurse leaving a patient in the middle of a spinal surgery must be one. I respectfully dissent.

FACTS

The Respondent runs a 128-bed hospital with five active operating rooms. Its registered nurses are represented by the New York State Nurses Association (Union). At the time of the incident at issue here, the Respondent and the Union were in negotiations for an initial collective-bargaining agreement. Tyo was a member of the Union's bargaining committee. Although the parties had not yet reached agreement on an initial contract, they had entered into a memorandum of agreement (MOA) regarding the Union's access to the Hospital. Under the MOA, the Union was granted office space in the Hospital. The MOA further provided, however, that the Union was not to conduct union business in the Hospital outside the designated office.

Tyo was an OR circulating nurse and had been for nearly 5 years. Her duties in the OR included documenting all events in the course of a surgery in the electronic medical record (EMR), retrieving additional supplies as needed, and assisting the surgeon or surgeons in case of emergency. As an experienced circulating nurse, Tyo also served as a "preceptor"—a training nurse—to "orientees," i.e., RNs in training to become circulating nurses. Tyo's duties in the OR therefore included overseeing the work of an orientee if one was assigned to the same surgery as Tyo. Tyo's immediate supervisor was OR Clinical Nurse Coordinator Nancy Kelly.

OR nurses may leave the OR for a few minutes—for example, to use the bathroom—without securing coverage, but during longer absences, such as a 15-minute shift break, another nurse—typically a designated "floater" nurse—must cover for them. This is not just a matter of one nurse walking into the OR and the other walking out. Before leaving the OR, the departing nurse must hand off the patient by briefing the floater nurse on the patient's status. Under certain circumstances, and with Kelly's knowledge, a circulating nurse serving as a preceptor may leave an orientee with sufficient relevant experience to handle circulating-nurse duties on his or her own while the preceptor goes on break. There is also evidence that with Kelly's knowledge, one preceptor—RN Marissa Cedieux—entrusted circulating-nurse duties to an orientee while she visited with colleagues at the OR reception desk, steps away from the operating room. Apart from the incident involving Tyo described below, however, there is no record evidence of a preceptor leaving an orientee unsupervised in the OR without Kelly's knowledge or that of any other supervisor or manager and visiting an area of the Hospital several minutes' distant from the OR.

On February 25, 2020, Tyo was assigned to a complex spinal surgery—specifically, a cervical laminectomy posterior with microdiscectomy bilateral procedure. This type of surgery is rarely performed at the Hospital and had last been performed in 2018. It is a procedure that may pose a risk of quadriplegia and during which the patient may require neural monitoring to prevent grave harm. Also assigned to this surgery was RN Kevin Lazaro. Lazaro was hired by the Respondent in May 2019 with no previous operating-room experience. As of February 25, 2020, he was an orientee in training to become

an OR circulating nurse. Thus, Tyo would be serving as Lazaro's preceptor during the surgery.

Tyo and Lazaro entered the OR at 9:30 a.m. The surgery proper began at 11:25 a.m. At 11:45 a.m., Tyo and Lazaro were relieved for a 45-minute break—combining their 15-minute shift break and their 30-minute lunchbreak—by floater nurse Nicky Perkins. Before leaving the OR, Tyo and Lazaro handed the patient off to Perkins by reviewing with her pertinent information about the patient's status. Tyo and Lazaro returned from lunch at approximately 12:30 p.m. Perkins handed the patient off to them and left the operating room at 12:45 p.m.

At the same time, Chief Nursing Officer Ophelia Byers was leading a "town hall" meeting in the Hospital's conference room, which is on the ground floor of the Hospital and a 3-to-4-minute walk from the OR suite one floor above. Unbeknownst to Byers, the Union and several RNs, Tyo among them, were planning to confront Byers in the conference room at the end of that meeting at 1 p.m. and pressure her to attend collective-bargaining sessions and to accept signed cards from unit nurses seeking a merit wage increase. Shortly after 12:45 p.m., Tyo received word that a group of union agents and unit employees had assembled for that purpose outside the conference room.

At 12:49 p.m., Tyo left the OR and walked down to the conference room. She did so without securing alternative coverage by floater nurse Perkins and without the knowledge or approval of Clinical Nurse Coordinator Kelly or any of the Respondent's other management personnel. Tyo had with her the "mobile heartbeat," through which the OR could have contacted her in case of emergency. The "mobile heartbeat" operates through a cellular phone, such as an iPhone, and is therefore only as reliable as cellular coverage within the Hospital allows it to be. During the ensuing confrontation in the conference room, Byers stated that the employees were being "disrespectful," called the situation "unacceptable," and told Tyo that she should know better. After security was called, the unit employees dispersed and the union representatives, who were in breach of the MOA by conducting union business outside their designated office space, were escorted out of the building. Tyo returned to the OR at 1:16 p.m.

The Respondent investigated the incident, including by reviewing security camera footage. That footage showed that seven employees were in the group that confronted Byers, five of whom were off duty at the time, and one of whom was on an approved break. The seventh employee was Tyo, who was neither off duty nor on an approved break. The investigation further revealed that Tyo had not notified Kelly of her departure from the OR and had not obtained coverage from a qualified nurse, such as Perkins, and that her absence was not documented in the EMR. On March 13, the Respondent discharged Tyo for patient abandonment.

DISCUSSION[1]

Tyo's Conduct Was Indefensible and Therefore Unprotected.

Section 7 of the Act generally protects employees engaged in union or other protected concerted activity, but it does not protect employees when they engage in conduct that is unlawful, violent, in breach of contract, or otherwise indefensible. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962). When employees engage in union activity without taking reasonable precautions to eliminate a "reasonably foreseeable possibility of danger," they lose the protection of the Act. *General Chemical Corp.*, 290 NLRB 76, 83 (1988) (finding that employees at a plant where hazardous chemicals were manufactured lost the Act's protection by walking off the job without being properly relieved); see *NLRB v. Special Touch Home Care Services, Inc.*, 708 F.3d 447, 462 (2d Cir. 2013) (finding that home health aides who participated in an unannounced strike lost the Act's protection because by "abandon[ing] their assigned posts," they "expos[ed] the people they were hired to care for and protect to foreseeable and imminent danger"). In determining whether a healthcare employee loses the protection of the Act through indefensible conduct, the question "is not whether [her] action resulted in actual injury but whether [she] failed to prevent such imminent damage as foreseeably would result from [her] sudden cessa-

[1] The Respondent filed charges against Tyo with the Office of Professional Discipline of the New York State Education Department's Office of the Professions, alleging patient abandonment. That office issued a letter concluding its investigation and declining to discipline Tyo. The General Counsel filed a Motion to Supplement the Record with this letter. My colleagues do not rule on the General Counsel's motion. Instead, they construe it as a request for the Board to take administrative notice of the letter, which they grant as such. Contrary to my colleagues, I would treat the motion as what it is—a motion to reopen the record—and deny it. First, the letter is not relevant because there is no indication of what standard the Office of Professional Discipline applied in reaching its determination not to discipline Tyo. I have no idea whether the standard it applied mirrors Board law. Second, to constitute newly discovered evidence admissible on a motion to reopen the record, the letter must have been "capable of being presented at the original hearing." *Rush University Medical Center*, 362 NLRB 218, 218 fn. 2 (2015). It was not: the letter had not issued yet as of the time of the hearing. Lastly, the evidence sought to be admitted must "require a different result." Board's Rules and Regulations Sec. 102.48(c)(1). My colleagues and I agree that this letter does not require a different result. With or without it, my colleagues would still find the discharge unlawful, and I would still find it lawful. Accordingly, I would deny the General Counsel's motion.

tion of work." *Bethany Medical Center*, 328 NLRB 1094, 1094 (1999).

Tyo walked out of an operating room in the middle of a complex spinal surgery. She did so without securing coverage by the floater nurse and without informing Kelly, let alone obtaining her permission. She then went to a location within the Hospital several minutes distant from the OR, despite the fact that her duties as circulating nurse included assisting the surgeon in case of emergency, and she remained there until she returned to the OR nearly half an hour later. That Tyo had a cell phone through which the OR could have contacted her is immaterial: Tyo was 3 or 4 minutes away from the OR, and a great deal can go terribly wrong in an operating room in 3 or 4 minutes. This is presumably why the Respondent requires its OR nurses to be in the OR when assigned to a surgery as opposed to available by phone, a business and medical judgment I am not prepared to second-guess. Moreover, the fact that no actual injury occurred is also immaterial. "Actual harm to patients is not the issue. The appropriate inquiry is focused on the *risk* of harm, not its realization." *NLRB v. Special Touch Home Care Services*, 708 F.3d at 460; see also *General Chemical Corp.*, 290 NLRB at 83 ("Although no actual damage took place, that is not the test. There was a reasonably foreseeable possibility of danger . . . .").

The majority points out that Lazaro occasionally had been permitted to cover for circulating nurses during their breaks, that Cedieux left Lazaro to handle circulating-nurse duties for an extended period of time during another procedure, and that Lazaro remained in the OR during Tyo's absence. However, Lazaro was still in training, he had never been assigned to this specific type of surgery before—a complex surgery rarely performed at the Hospital[2]—and Tyo was not authorized or qualified to determine whether Lazaro could be left to handle circulating-nurse duties without oversight during this surgery. Tyo left him on his own and went to a different floor of the Hospital from the OR, whereas Cedieux was just outside the OR and could have been available immediately in case of emergency. Moreover, Kelly knew where Cedieux was but did not know where Tyo was. Under these circumstances, I would find that Tyo's conduct created a reasonably foreseeable possibility of danger, losing her the protection of the Act. Indeed, the fact that Tyo's absence from the OR was not recorded in the EMR reflects a consciousness that something improper had occurred. Notably, when a federal court of appeals wished to illustrate indefensible, and therefore unprotected, concerted activity in a healthcare setting, the example the court came up with was a "nurse's walking out of an operating room in the middle of an operation." *East Chicago Rehabilitation Center, Inc. v. NLRB*, 710 F.2d 397, 405 (7th Cir. 1983). I agree.[3]

Tyo's Discharge Was Lawful under Wright Line.

Even if walking out of an operating room in the middle of surgery was not so indefensible as to sacrifice the Act's protection—a position I frankly find ludicrous—the General Counsel did not sustain her burden under *Wright Line*[4] to prove that Tyo's discharge violated Section 8(a)(3) of the Act. While it is clear that Tyo engaged in union activity and that the Respondent knew as much, I disagree with my colleagues' finding that the General Counsel proved that animus toward that activity was a motivating factor in the Respondent's decision to discharge her. Accordingly, I would reverse the judge's decision and dismiss the complaint on this additional ground as well.

The majority affirms the judge's finding that Tyo's discharge violated Section 8(a)(3) "for the reasons stated by the judge, *as well as* those set forth" in the majority's opinion (emphasis added). However, my colleagues *subtract* from the judge's reasons for finding that the General Counsel sustained her initial burden of proof under *Wright Line*. Specifically, the majority relies on just two grounds to find that the General Counsel established antiunion animus (in addition to protected activity and employer knowledge): Byers' response when she was confronted in the conference room after the town hall meeting, and timing. Neither ground sustains the General Counsel's *Wright Line* burden.

Turning first to what Byers said, she did not make any threats, and nothing she said was alleged to have violated

[2] The judge found that in her testimony, Kelly admitted that Lazaro had previously been assigned to a surgery "even more complicated" than the February 25, 2020 cervical spinal surgery. Contrary to my colleagues, I agree with the Respondent that the judge misinterpreted Kelly's testimony. Lazaro had previously been assigned to spinal-fusion procedures. The judge asked Kelly to characterize a spinal-fusion procedure "on the scale of simple to complex," and Kelly answered, "that would be more complex." In other words, Kelly testified that a spinal fusion is toward the "more complex" end of "the scale of simple to complex"—not that it is more complex than the surgery Lazaro was assigned to, with Tyo as his preceptor, on February 25.

[3] That the chief surgeon was willing to overlook Tyo's misconduct, as my colleagues observe, does not affect the determination under applicable Board precedent that her conduct was indefensible. The majority also attempts to trivialize Tyo's role by emphasizing that she was the circulating nurse, not the "surgeon, anesthesiologist, or scrub nurse." Tyo's duties included assisting the surgeon in case of emergency. By leaving the OR and going to a location several minutes distant from the OR, Tyo rendered herself incapable of fulfilling this duty. No emergency happened, thankfully, but this was no trivial act.

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

the Act. Byers described the group that confronted her as "disrespectful," called the situation "unacceptable," and stated that Tyo should know better. These were statements of opinion, which are protected by Section 8(c) of the Act.

Moreover, these statements expressed Byers' anger at being ambushed, but they did not express opposition to the Union. Put differently, she expressed displeasure toward the *way* employees and their union representatives—who were in breach of the MOA on union access to the Hospital—had chosen to engage in union activity, not toward the *fact* that it was union activity they were engaged in. Thus, even if statements of opinion can be relied on as evidence of antiunion animus—as the Board once held,[5] in opposition to the courts of appeals[6]—Byers did not express antiunion animus. See *Central Plumbing Specialties, Inc.*, 337 NLRB 973, 974 & fn. 9 (2002) (finding it unnecessary to reach whether no statement protected by Section 8(c) may be used as evidence of antiunion animus because the statement at issue did not express antiunion animus). However, extant precedent holds that Section 8(c) means what it says—i.e. "[t]he expressing of any views, argument, or opinion . . . shall not constitute *or be evidence of* an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit" (emphasis added)—and therefore *no* such expression can be used as evidence of antiunion animus to support an unfair labor practice finding. See *United Site Services of California, Inc.*, 369 NLRB No. 137, slip op. at 14 fn. 68 (2020). Accordingly, Byers' statements cannot be relied on to prove animus in support of a finding that Tyo's discharge was an unfair labor practice, and my colleagues' finding to the contrary directly contravenes both Section 8(c) of the Act and extant Board and court precedent.[7]

The majority also relies on timing as evidence of antiunion animus, i.e., the fact that the Respondent investigated Tyo's departure from the OR and then discharged her "very soon after" Byers expressed displeasure when she was confronted by union representatives and prounion employees in the conference room. But the Respondent also investigated the OR incident and discharged Tyo very soon after she walked out of the OR in the middle of an operation, without securing coverage, unbeknownst to Kelly, and leaving orientee Lazaro on his own, none of which was, in and of itself, protected by the Act. Where a discharge decision is made close in time *both* to protected activity and unprotected misconduct, timing alone is insufficient to establish unlawful motive. See *General Motors, LLC*, 369 NLRB No. 127, slip op. at 10 fn. 23 (2020) (holding that timing "would not necessarily be probative of unlawful motivation in cases where the Sec[tion] 7 activity and the abusive conduct occur during the same event, unless surrounding circumstances like disparate treatment make it probative"); see also *Syracuse Scenery & Stage Lighting Co.*, 342 NLRB 672, 675 (2004); *Frierson Building Supply Co.*, 328 NLRB 1023, 1024 (1999) ("[C]oincidence, at best, raises a suspicion. However, 'mere suspicion cannot substitute for proof' of unlawful motivation" (quoting *Lasell Junior College*, 230 NLRB 1076 fn. 1 (1977).).

Accordingly, because the basis of the majority's finding that the General Counsel met her initial burden of proof under *Wright Line* is plainly insufficient, not to mention contrary to precedent and to the Act itself, the finding is unsustainable. And because the General Counsel did not meet her burden of proof, the burden never shifted to the Respondent to demonstrate that it would have discharged Tyo in any event even in the ab-

[5] See, e.g., *Overnite Transportation Co.*, 335 NLRB 372, 375 fn. 15 (2001); *Mediplex of Stamford*, 334 NLRB 903, 903 (2001); *Affiliated Foods, Inc.*, 328 NLRB 1107, 1107 (1999); *Lampi LLC*, 327 NLRB 222, 222 (1998); *Gencorp*, 294 NLRB 717, 717 fn. 1 (1989).

[6] See *Sasol North America Inc. v. NLRB*, 275 F.3d 1106, 1112 (D.C. Cir. 2002); *Medeco Security Locks, Inc. v. NLRB*, 142 F.3d 733, 744 (4th Cir. 1998); *BE & K Construction Co. v. NLRB*, 133 F.3d 1372, 1375–1377 (11th Cir. 1997) (per curiam); *Holo-Krome Co. v. NLRB*, 907 F.2d 1343, 1345–1347 (2d Cir. 1990).

[7] In their zeal to dispute my 8(c) finding, the majority all but finds Byers' statements violated Sec. 8(a)(1). But the General Counsel did not so allege, and for good reason: the statements were not threats, and the cases the majority cites in support of their contrary view are either distinguishable or inapposite. Contrary to the majority, the Board in *Winston-Salem Journal*, 341 NLRB 124 (2004), did not find that the respondent "threatened an employee with discipline when it called the employee's conduct 'unacceptable.'" It found a threat of discipline when the respondent said the employee's conduct was "unacceptable" *and "would not be tolerated" and, if the employee repeated it, he* "*would be sent home*." Id. at 126 (emphasis added). Similarly, in *Orchids Paper Products Co.*, 367 NLRB No. 33 (2018), the employer violated Sec. 8(a)(1) when a manager told union officer Gunn that he did not like the way Gunn treated management during a *Weingarten* interview at which Gunn was acting as the employee's representative *and warned him not to talk that way to management again*. Id., slip op. at 25. Thus, in *Winston-Salem Journal* and *Orchid Paper Products*, the employer threatened discipline, either expressly or impliedly. Byers did not. In *Citizens Service Investment Corp.*, 342 NLRB 316 (2004), also cited by my colleagues, the Board observed that absent an alternative explanation for the characterization, discharging an employee for being a "troublemaker" or having a "bad attitude" is often a euphemistic way of saying that the employee was discharged for his or her union activities or prounion sentiments. Id. at 328. But Tyo was not discharged for being a "troublemaker" or having a "bad attitude." She was discharged for patient abandonment. Besides, Byers did not say that Tyo was a troublemaker or had a bad attitude. She said that what the group, which included Tyo, *did* was disrespectful and unacceptable. That was her opinion, expressing it was protected by Sec. 8(c), and therefore it cannot be used as evidence that Tyo's discharge was an unfair labor practice.

sence of her union activity. Thus, I need not reach the second step of the *Wright Line* analysis.

Nevertheless, to the extent my colleagues rest their finding that the Respondent did not sustain its *Wright Line* defense burden on evidence that during another surgery, in their words, "of similar complexity as the February 25 procedure," Lazaro's preceptor was absent from the OR for most of the procedure, that finding fails as well, for two reasons. First, the majority's belief that this surgery was "of similar complexity as the February 25 procedure" rests on the judge's misinterpretation of Kelly's testimony, discussed above.[8] Second, Lazaro's preceptor during this surgery, Marissa Cedieux, was at the OR reception desk, steps away from the OR where Lazaro was working and therefore able to return to the OR in a matter of seconds in case of emergency, whereas Tyo was in the conference room on another floor. Moreover, Kelly knew where Cedieux was, but Tyo left the OR without informing her supervisor. Thus, my colleagues compare apples to oranges here and fail to establish that Tyo and Cedieux were treated disparately.

Reinstatement and Backpay in These Circumstances Are Contrary to the Act.

Because Tyo was discharged for cause, the Board lacks the authority to award her reinstatement or backpay. Section 10(c) of the Act states, in relevant part, that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him [her] of any back pay, if such individual was suspended or discharged for cause." As I have stated previously, "[t]he Supreme Court has observed that '[t]he legislative history of [Section 10(c)] indicates that it was designed to preclude the Board from reinstating an individual who had been discharged because of misconduct.' *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 217 (1964)." *East End Bus Lines*, 366 NLRB No. 180, slip op. at 20 (2018) (then-Chairman Ring, dissenting in part). Accordingly, I must also dissent from the remedies my colleagues order here.[9]

CONCLUSION

Today, a Board majority finds that an OR nurse was unlawfully discharged, and orders her reinstated with backpay, after she walked out of an operating room in the middle of an operation, without securing alternative coverage, without giving her supervisor required notice, leaving a trainee whose work she was assigned to oversee to work on his own, and went to another location in the Hospital, creating the risk that she would be unable to return to the OR in time to assist the surgeons in case of emergency. Once in a while the Board issues a decision that shocks the conscience. This one shocks mine. I respectfully dissent.

Dated, Washington, D.C. December 5, 2022

John F. Ring, Member

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 discharge or otherwise discriminate against any of you for supporting the Union or any other labor organization or for engaging in union or other protected concerted activity.

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, within 14 days from the date of this Order, offer Rosamaria Tyo full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Rosamaria Tyo whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest, and WE WILL also make such employee whole for reasonable search-

[8] Supra fn. 2.

[9] The majority states that Sec. 10(c) does not apply in mixed-motive *Wright Line* cases where the respondent's animus against protected activity has been shown. Here, however, the General Counsel failed to meet her burden to prove animus, and therefore Sec. 10(c) applies and precludes reinstatement and backpay.

for-work and interim employment expenses, plus interest.

WE WILL compensate Rosamaria Tyo for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 2, 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 years.

WE WILL file with the Regional Director for Region 2, 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 Rosamaria Tyo's corresponding W-2 form(s) reflecting the backpay award.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Rosamaria Tyo, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

NEW YORK PRESBYTERIAN HUDSON VALLEY HOSPITAL

The Board's decision can be found at www.nlrb.gov/case/10-CA-258244 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.

Jamie Rucker, Esq. and *Tanya Khan, Esq.,* for the General Counsel.
James S. Frank, Esq., Corey Argust, Esq., Donald Krueger, Esq. and *Eduardo Quiroga, Esq.,* for Respondent.
Joseph Vitale, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JEFFREY P. GARDNER, Administrative Law Judge. The charge in Case 02–CA–258244 was filed on March 17, 2020. The case was initially consolidated with other pending charges and included in a Second Consolidated Complaint issued on May 26, 2020. Thereafter, those previously pending charges were withdrawn leaving only the allegations in this charge to be litigated.[1]

The remaining allegations of the complaint before me allege that on or about March 13, 2020, Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully terminating employee Rosamaria Tyo's employment in retaliation for her protected union and concerted activity. Respondent maintains it lawfully terminated Tyo on March 13, 2020, because she violated its policies and her professional responsibilities as a nurse.

Beginning October 13, 2020, and ending October 21, 2020, pursuant to the Board's decision in *William Beaumont Hospital*, 370 *NLRB* No. 9 (Aug. 13, 2020), I conducted a trial via Zoom Government, during which all parties were afforded the opportunity to present their evidence.[2] On November 25, 2020, the General Counsel and Respondent each filed timely briefs, with the Charging Party ("the Union") joining in the General Counsel's submission.

Upon consideration of the entire record[3] and the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

Based on the pleadings herein, and its representations at hearing, Respondent admitted and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[4] In addition, I find that the Union is a Labor Organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

Respondent is a 128-bed community hospital engaged in the

[1] The substantive allegations relating to those prior charges were withdrawn by Order of the Regional Director approving those withdrawals and further confirmed at the hearing.

[2] McLean Johnson, a Board attorney, served as Courtroom Deputy to assist with the Zoom technology during the trial, and is recused from otherwise participating in the case.

[3] Respondent filed a Motion to Correct the Record on November 24, 2020 and submitted a proposed errata sheet to the court reporting agency with 64 proposed corrections. The court reporting agency performed a transcript audit, which concurred with nearly all of Respondent's proposed corrections. On December 2, 2020, the General Counsel filed a Limited Opposition to Respondent's Motion, opposing only 3 of Respondent's proposed corrections and adding 1 additional proposed correction of its own. Respondent's Motion is granted with respect to the 61 unopposed corrections, which are hereby incorporated into the record. As to the disputed proposed corrections, based on my review of the parties' positions, the court reporting agency's audit, the context in which the proposed corrections appear and my recollection of the testimony, I agree with the General Counsel's proposed corrections on (i) page 45, line 13 and (ii) page 463, line 11; I agree with Respondent's proposed correction on page 634, line 20; and I accept the General Counsel's additional proposed correction on page 633, line 11. Those corrections are also hereby incorporated into the record.

[4] Respondent previously stipulated that it is engaged in commerce within the meaning of the Act in the parties' October 2018 Stipulated Election Agreement, wherein it was also stipulated that the Union is a Labor Organization.

business of providing health care services for the northern Westchester County and southern Putnam County region of the state of New York at its facility located at 1980 Crompond Road, Cortlandt Manor, New York, the only facility involved herein. The Charging Party Union has represented a unit comprised of registered nurses ("RNs") at this facility since it was certified by the Board in December 2018. Rosamaria Tyo is a registered nurse who until March 13, 2020, was employed by Respondent and was a member of the unit.

Tyo testified at the hearing regarding her employment with Respondent, and the events leading up to her discharge. Also testifying at the hearing for the General Counsel were Union consultant Carol Lynn Esposito, RNs Andrew Askew, Kevin Lazaro and Donna L. Shores, and Union representative Theodric Figurasin. Respondent offered the testimony of Clinical Nurse Coordinator Nancy Kelly and Vice President of Human Resources Sedrick J. O'Connor.

Tyo's Employment and Experience

Prior to her termination, Rosamaria Tyo had been a registered nurse with over fifteen years of experience working for Respondent, including the last four and a half years as an operating room nurse ("OR nurse"). She previously worked in both the emergency room and the telemetry unit. She had a history of positive performance reviews throughout her tenure with Respondent. At the time of her termination her immediate supervisor was Nancy Kelly.

As an operating room nurse, Tyo's duties were to facilitate surgical procedures, working with a surgical team, which typically consisted of an anesthesiologist, one or more surgeons, a physician assistant, a scrub technician and one or more nurses, including a circulating nurse, in the room. A float nurse was also typically available outside of the operating room to assist or relieve the OR nurses, if needed.

One of the jobs of the circulating nurse is to document the surgical procedure in the emergency medical record ("EMR"). This documentation includes all pertinent events beginning before the procedure, continuing during the surgery through to the delivery of the patient to the recovery room. One nurse is always assigned as primary circulating nurse for the procedure and is responsible for the EMR documentation.

Tyo was active with the Union, and her active support was known to Respondent. She served on the Union's contract bargaining committee, and she also had a history of raising issues with management regarding its overtime and compensation policies, which were the subjects of disputes in bargaining.[5]

Respondent's Operating Room Practices

Respondent's facility has six operating rooms, of which five were actively used for surgical procedures. Respondent has a rigorous training program for nurses assigned to its operating rooms. Nurses who are new to working in an operating room, including experienced RNs without operating room experience, must complete a course called Peri-Op 101, which includes instruction and observation, and culminates in a test which the RN must pass in order to be certified.

Even after successful completion of the Peri-Op 101, including certification, new operating room nurses continue working with a preceptor. A preceptor is not a supervisor, but more of a mentor for nurses who are either new to the position, to the hospital, or to the particular department. The preceptor helps facilitate the education of the orientee and helps an orientee develop experience as an operating room nurse. There is no specific training provided to be a preceptor, and nurses on orientation may or may not be assigned to one specific preceptor.

Preceptors often work alongside orientees, but will leave orientees alone in certain circumstances, including in the operating room during surgeries. Indeed, preceptors and orientees routinely cover each other for breaks, and sometimes orientees are assigned to work alone for the entirety of a procedure. This is particularly true of orientees who have progressed through their orientation.

Where a preceptor and orientee are working together, either can be assigned as the circulating nurse for the procedure. Absent specific instructions about particular concerns management may have about an orientee, it is left to the discretion of the preceptor how much independence to give their orientees, based on the preceptor's observation of the orientee's skills and abilities. Once the preceptor has a certain level of confidence in a nurse's abilities, the role of preceptor gradually transitions from an instructor role to one primarily serving as an observer.

During surgeries, nurses routinely leave the operating room for short periods—to retrieve surgical items, or to use the bathroom, e.g.—with no formal coverage needed, and no documentation of that brief absence required. However, for longer absences—shift breaks or lunch periods, e.g.—a nurse must secure coverage for that period of absence, and the recording nurse should properly document that exchange. In addition, operating room nurses are equipped with a "mobile heartbeat" cellphone, which serves as a constant line of instant communication with other hospital staff should an emergency arise at any point during a surgery requiring their immediate attention.

Kevin Lazaro's Nursing Experience

Kevin Lazaro had already been a registered nurse for approximately three years before being hired to work at Respondent's facility in May 2019. He had previously worked in a hospital setting, but did not have prior operating room experience at the time of his hire. As such, Lazaro was required to begin his tenure with Respondent going through the Peri-Op 101 process.

Lazaro successfully completed his Peri-Op 101 course in the Fall of 2019, and passed his certification test in November 2019. Prior to his passing the test, Lazaro had observed and/or participated in multiple operating room surgeries of varying degrees of difficulty. After November 2019, Lazaro continued participating in surgeries with increasing levels of individual responsibility. By January 31, 2020, he was judged by the hospital's Director of Surgical Services to be meeting all expectations.

At the time of the events leading up to and underlying this case, Tyo had been serving as a preceptor for Lazaro for an

[5] Tyo also had earlier engaged in additional concerted activity when she lodged a complaint with the New York Department of Labor (and/or Governor's office). No direct evidence was introduced to demonstrate Respondent was aware of these efforts.

extended period. She had developed confidence in Lazaro's abilities and believed based on her observations that he had reached the point where he required little guidance. Lazaro's assignments, which included significant autonomy and solo responsibility including during complicated procedures, reflected a similar belief on the part of hospital management.

By February 25, 2020, Lazaro had been scheduled to be alone in the operating room for the entirety of multiple procedures and had been scheduled on numerous other occasions to cover lunch and/or breaks alone during procedures. Specifically, he had worked by himself for the entirety of procedures on at least three prior occasions, January 7, 8 and 21, 2020. And on the very day of the events at issue, February 25, 2020, Lazaro was scheduled to be by himself in the operating room while his preceptor, Tyo, went on break.

Nancy Kelly testified that she was concerned about Lazaro never having specifically worked on a posterior cervical laminectomy with microdiscectomy previously. However, she acknowledged that Lazaro had previously worked on a posterior cervical fusion surgery which was at least as complicated if not more complicated than the February 25, 2020 procedure he and Tyo were assigned to.

Kelly testified that to her knowledge Float Nurse Nicky Perkins, whom she assigned to cover for Tyo and Lazaro for their lunch break that day during the surgery, had not recently participated in any orthopedic or neurology surgeries. Indeed, Kelly acknowledged that she did not know whether Perkins, a "traveler nurse," had ever worked on that specific surgery at all. A traveler nurse is a contracted nurse employed by Respondent for a set period of time, typically thirteen weeks. This was Perkins' first tour of duty with Respondent, and Kelly acknowledged she was unaware whether Perkins had worked on this type of surgery in the past, or what surgical experience she may have had.

Nevertheless, Perkins was assigned, alone, to lunch coverage for ORs 5 and 6 that day, and she took over for Tyo and Lazaro during the lunch break in OR 5 for at least 45 minutes. Despite no specific knowledge of Perkins's surgical experience, Kelly testified that she was comfortable in general with Perkins being alone.

February 25, 2020 Incident and Aftermath

On February 25, 2020, Tyo and Lazaro were assigned to work together on an early morning surgery followed by a second surgery - a posterior cervical laminectomy with microdiscectomy. Lazaro was assigned to serve as primary circulating nurse for the day. Lazaro and Tyo were assigned to relieve each other for their 15-minute morning breaks, although a third nurse was assigned as an additional option to relieve them for that break. In addition, Perkins, working as the Float Nurse, was assigned to relieve Tyo and Lazaro for their scheduled 30-minute lunch break that day.

Tyo had experience in this specific procedure but Lazaro did not. Kelly testified that she was comfortable enough with Tyo's experience in this procedure to allow Tyo to precept Lazaro and further believed it would be valuable experience for Lazaro to participate in this type of procedure, which was not done with any regular frequency at the facility. In posterior cervical laminectomies, surgeons occasionally use hardware to stabilize the patient's spine and use neural monitoring as a precaution for the patient and surgeon so that the patient is not harmed. Nurses can assist the surgeons with these devices, though the surgeons are primarily responsible for this.

The surgery began at 9:30 a.m. in OR 5, with both Tyo and Lazaro working together with a team that in addition to nurses included an anesthesiologist, two surgeons, and a very experienced scrub tech.[6] Perkins first arrived to the OR to offer relief to Lazaro and Tyo at 11:00 a.m. that day. However, because the most critical time for the nurses to be present is at the beginning of the surgery, Tyo and Lazaro declined to leave for lunch at that time. Perkins nevertheless remained in the OR at that time because she had not recently seen an orthopedic surgery or neurosurgery case and was interested in observing.

At 11:45 a.m., Tyo and Lazaro took their scheduled lunch break. Before leaving, they "handed off" responsibility to Perkins, with Tyo describing the patient and details of the case to Perkins. This type of handoff, or transfer of responsibility is standard and required to ensure seamless nurse coverage for the surgical patient. At approximately 12:30 p.m., Tyo and Lazaro returned from lunch, and Perkins transferred responsibility back to them. Perkins left OR 5 at 12:45 p.m. and told Lazaro she would be available to assist if needed. The handoffs to and from Perkins for Tyo's and Lazaro's lunch break were both recorded in the EMR.

Meanwhile, at approximately the same time that day, Chief Nursing Officer Ophelia Byers was scheduled to conduct a "Town Hall Meeting" in the ground floor conference room of the facility. The conference room is approximately a 1–2 minute walk from the location of the operating rooms. The meeting was scheduled to take place from noon to 1 p.m., and nurses were invited to attend.

At 12:49 p.m., Tyo left the operating room to go to the first floor conference room. Before leaving, she asked Lazaro if he was comfortable being in the room without her and Lazaro said he was. Tyo told Lazaro that she could be reached by personal phone or the mobile heartbeat, and reminded him that Perkins was nearby as well if necessary. Because Lazaro had worked in the operating room with multiple other similar surgeries during his tenure with Respondent, Tyo felt comfortable leaving Lazaro alone at this point in the surgery, which was at a point where there was little for the nurses to do. Nothing arose requiring Lazaro to reach out for Tyo or Perkins during Tyo's absence.

Tyo was absent from the operating room for 28 minutes, including the short walks to and from the ground floor conference room. When she arrived just outside the conference room, she joined with six other hospital employees, along with three Union representatives, including Union representative Theodric Figurasin, and waited briefly for Byers's scheduled meeting to finish up. Once the meeting concluded, the assembled group entered the conference room just after 1 p.m.

The group approached Byers, and sought to persuade Byers to attend the collective bargaining negotiations that had been

[6] Kelly testified that an experienced scrub tech is a factor she considers in determining the appropriateness of nurse assignments.

ongoing between Respondent and the Union. They tried to hand Byers signed cards from employees regarding merit wage increases for nurses, which had been among the subjects of dispute between the parties. Byers reacted angrily, chastising the employees for being disrespectful and describing their action of confronting her without advance notice as unacceptable. She told the group that this was not the way to get in touch with her, and singled out Tyo by saying "Rosa knows better than this." Byers left the room abruptly, refusing to accept the cards offered by the group.

Almost immediately after the employees' arrival to the conference room, Byers's executive assistant, Nancy Cito,[7] contacted security which responded quickly. O'Connor was also contacted, and immediately headed toward the conference room. On his way there, he encountered Byers and Cito, who apparently told him about the unscheduled portion of the meeting. By the time he reached the conference room, the employees—including Tyo—had mostly disbursed, and security was questioning the Union representatives—including Figurasin—about their presence at the facility before being removed.

Tyo arrived back at the operating room at 1:16 p.m. Lazaro was assigned to be the primary individual responsible for documenting the procedure in the EMR, which he had done previously. Lazaro's notes did not document Tyo's departure from the OR for this period. There is general agreement that Tyo's absence for that duration should have been documented. However, no evidence was presented that Lazaro or Tyo were disciplined for that omission.

The Events following Tyo's Concerted Activity

Immediately after the unscheduled meeting between the employees and Byers, Respondent launched an investigation seeking to identify everyone who participated in the meeting. The investigation was directed from the highest levels of management to get to the bottom of what it labeled an "ambush" of Byers. The emails circulating among management officials carried the subject line "NYSNA just ambushed Ophelia in a meeting."

Video and photographic images were reviewed to identify the participants of the meeting, including Tyo. And once Tyo was identified, the investigation continued with a further investigation of Tyo's specific participation, including her specific arrival to and departure from the meeting, travel to and from the meeting, whereabouts and work assignments for the day. By contrast, no investigation had initially been prompted by her actual departure or absence from the operating room and surgery itself, though it was known to multiple individuals in the operating room, including the surgeons themselves. Dr. Saran Rosner, the lead surgeon for the procedure at issue later advocated on Tyo's behalf, describing her as one of the top operating room nurses at the facility, having "always demonstrated the highest of professional standards."

Following Respondent's investigation of Tyo's absence, Tyo was terminated on March 13, 2020, allegedly for "patient abandonment." The New York State Board of Nursing, part of the New York State Education Department, the body which investigates allegations of patient abandonment, describes abandonment as occurring, in pertinent part, when: "[a] nurse, who has accepted a patient care assignment and is responseible for patient care, abandons or neglects a patient needing immediate professional care without making reasonable arrangements for the continuation of such care." (GC Exh. 3).

[7] Neither Byers nor Cito testified at the hearing. Tyo and Figurasin consistently described Byers's reaction as angry and indignant in the face of the employees having confronted her together unannounced that day.

III. CREDIBILITY DETERMINATIONS

My factual findings set forth above are based on my observations of witnesses' testimonial demeanor.[8] I found employee Rosamaria Tyo to be extremely credible. She testified consistently on direct and cross examination. Her recollection of the events was detailed and specific, and on the limited occasions when she did not immediately recall an answer, she readily acknowledged as much.

I also found nurse Lazaro to be very credible. No longer employed by Respondent, he had little to no stake in the outcome of the litigation, and he appeared earnest in trying to accurately convey what he recalled of the events. He admitted to have been unaware that the events of February 25, 2020 were out of the ordinary at the time, and his testimony struck me as all the more straightforward as a result, including when he acknowledged that he probably ought to have recorded Tyo's absence.

I found RNs Andrew Askew and Donna L. Shores all have been credible witnesses in their limited testimony.[9] In particular, Askew's over ten years of experience and non-involvement with this particular matter made him uniquely suited to explain the role of preceptor, and he appeared very candid and convincing in describing how the preceptor uses their judgment in deciding how much independence to afford a preceptee. This included leaving them alone in an operating room on occasion, which he admitted doing, an admission I find unlikely to have been made if it weren't both true and not particularly unusual.

I also found Union representative Theodric Figurasin to be very credible. I found him to be straightforward in answering questions. He appeared unrehearsed, and was clear and unevasive in his testimony. He was clear about what he knew and what he did not know about this particular facility and the events he witnessed.

By contrast, I did not find Clinical Nurse Coordinator Nancy Kelly to be particularly credible. While her testimony demonstrated her overall knowledge about the workings of the hospi-

[8] Where credibility resolution is not based on observations of witnesses' testimonial demeanor, the choice between conflicting testimonies rests on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Taylor Motors, Inc.*, 366 NLRB No. 69 slip op. 1 at fn. 3 (2018); *Lignotock Corp.*, 298 NLRB 209, 209 fn. 1 (1990).

[9] While I also found the General Counsel's proferred expert, Carol Lynn Esposito, to have testified credibly, I do not rely significantly on her testimony. While her experience and knowledge of the subject matter of nurse ethics is considerable, she did not have first-hand knowledge of the events at issue here, and to the extent she offered an opinion as to what may or may not constitute patient abandonment, I find that expert testimony is not needed to assess whether Ms. Tyo's conduct meets that definition.

tal, her attempt to support the narrative that Lazaro was not sufficiently experienced in a particular procedure was directly undermined by her own admission that she had no knowledge of the surgical experience, if any, of another nurse (Perkins) whom Kelly herself assigned to cover that same procedure.

Moreover, in her testimony, Kelly alternately: (1) denied being aware that Lazaro had previously worked on a surgery as complicated as the 2/25/2020 laminectomy; and (2) admitted that a posterior cervical fusion—a surgery Lazaro previously had worked on—would be even more complicated than the 2/25/2020 procedure. I find this inconsistency on such a crucial point to severely undermine her credibility.

Likewise, I did not find Vice President of Human Resources Sedrick J. O'Connor to be credible. He was inconsistent in his testimony about hospital communications, wavering between trying to depict Tyo as being inaccessible due to spotty phone service at the hospital, while simultaneously maintaining the hospital's communications system were not actually compromised at all.

ANALYSIS

Respondent violated 8(a)(3) and 8(a)(1) of the Act on March 13, 2020, when it discharged Tyo, and Respondent has not met its Wrightline burden.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board set forth its causation test for cases alleging violations of the Act turning on employer motivation. First, the General Counsel must make an initial prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. *Wright Line*, 251 NLRB 1083 (1980), 10 enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). See *Coastal Sunbelt Produce, Inc. & Mayra L. Sagastume*, 362 NLRB No. 126, slip op. at 1 (2015).

Establishing unlawful motivation requires proof that: "(1) the employee engaged in protected activity; (2) the employer was aware of the activity; and (3) the animus toward the activity was a substantial or motivating reason for the employer's action." *Consolidated Bus Transit, Inc*., 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009).

If the General Counsel makes that showing, the burden shifts to the employer to "demonstrate that the same action would have taken place even in the absence of the protected conduct." *Septix Waste, Inc.,* 346 NLRB 494, 496 (2006). An employer "cannot simply present a legitimate reason for its action, but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." W.F. Bolin Co., 311 NLRB 1118, 1119 (1993).

Here, notwithstanding Respondent's argument that Tyo's conduct was so egregious as to remove the protections of Section 7 of the Act, I find that Tyo was clearly engaged in protected activity when she joined with fellow employees to confront Chief Nursing Officer Ophelia Byers with their collective concerns over management's treatment of merit increases, and to invite Byers to attend bargaining sessions. As such, I find that the General Counsel proved the first element of its prima facie case.

Respondent was also clearly aware of Tyo's protected activity. Indeed, Byers made it known that she knew specifically that Tyo was among the employees present, as she singled her out by name, chastising Tyo for "know[ing] better" than to be participating.[10] In addition, immediately following this incident, Respondent embarked on an investigation to identify everyone who participated in the unscheduled meeting with Byers, and was unquestionably aware of Tyo's participation. Therefore, there can be no doubt that the General Counsel also proved the second element of its prima facie case.

As to the third element of the General Counsel's prima facie case, it is longstanding Board law that animus need not be proven by direct evidence; it can be inferred from the record as a whole. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). I find the combination of timing and pretext demonstrate that Respondent's actions were in retaliation for Tyo's being a part of the contentious meeting with Byers, protected concerted activity protected by the Act.

Here, there is actually direct evidence of Respondent's animus toward Tyo's protected activities in the form of Byers's unrebutted statements to the gathered employees that their conduct was "disrespectful" and "unacceptable" behavior. Her chastisement of Tyo further demonstrated her animus toward what Tyo and others were doing.

I also find it noteworthy that, while already known to Byers, Respondent's confirmation of Tyo's participation in the Byers meeting was information Respondent intentionally and immediately sought to find out. Respondent specifically compiled a list of those participants in order to determine what action to take in response to their "ambush" of Byers. The familiar yet infamous phrase "taking names" comes to mind, along with the well-known implication that retaliation would follow.

In addition, I find the timing of Respondent's decision to investigate Tyo, which it used shortly after as justification for terminating her is further evidence of animus in this case. And I find Respondent's pretextual claim, discussed below, to bolster this specific finding of animus. Taking all these together, I find more than sufficient evidence to demonstrate Respondent's animus. See *BS&B Safety Systems, LLC*, 370 NLRB No. 90 (2021), where the Board found that the General Counsel met its burden of proving Respondent's animus "rely[ing] only on the timing of the discharge and evidence of pretext as found by the judge."

Accordingly, having met all three elements, protected activity, knowledge, and animus motivating Tyo's discharge, I find that General Counsel has met its prima facie burden that the discharge was unlawful.

I further find that Respondent has not met its burden to demonstrate that the same action would have taken place notwithstanding the protected conduct. Indeed, I specifically find that Tyo would not have been discharged were it not for her

[10] It is also undisputed that Tyo was a known Union adherent prior to this incident, as she was a member of the Union's contract bargaining committee, and had attended multiple bargaining sessions with Respondent representatives present.

having engaged in protected concerted activity. Significantly, no investigation was prompted by Tyo's departure from the operating room itself, and there is no reason to believe any such investigation would have been conducted in the absence of her protected activity. The only reason any investigation took place was as a result of Tyo's protected activity.

In this regard, I find it very telling that the surgeon involved in the operation Tyo was alleged to have abandoned, Dr. Rosner, did not share the hospital administration's claimed view that Tyo had engaged in "egregious conduct" as argued by Respondent. To the contrary, Rosner viewed Tyo as one of the top operating room nurses at the facility, singling out Tyo's adherence to the highest of professional standards.

Moreover, Respondent's claim that Tyo had engaged in patient abandonment on the basis of the facts of this case is utterly uncompelling. Respondent's primary argument is that Tyo's act of leaving Lazaro in the operating room without her for 28 minutes during a surgery was so outrageous that they had no choice but to terminate her. Yet, Lazaro had been alone during surgeries for that duration and longer on multiple previous occasions, at the assignment of management, including at least one surgery that was as complicated or more than the surgery in question.

Again, although there were two surgeons and multiple other individuals in the operating room during the surgery, no one present thought enough of this allegedly outrageous act to so much as report it, let alone launch an investigation of it, as one might expect where outrageous conduct has taken place. To the contrary, one of the surgeons, despite being aware of Tyo's conduct, objected in writing to Tyo's termination.

In short, I am not persuaded that Respondent would have discharged Tyo, a 17-year employee at the hospital, with a positive employment record, who was respected and relied on to serve as preceptor to mentor new nurses til the day she was terminated, had she not engaged in concerted activity days before her discharge. That timing, given the totality of the circumstances in this case, cannot be ignored.

Where an employer's proffered reasons are pretextual - either false or not actually relied on - the employer fails by definition to meet its burden of showing it would have taken the same action for those reasons absent the protected activity. See *Boothwyn Fire Co. No. 1*, 363 NLRB No. 191, slip op. at 7 (2016); *Pro-Spec Painting, Inc.,* 339 NLRB 946, 949 (2003); and *Hays Corp.*, 334 NLRB 48, 49 (2001). I find Respondent's claim that Tyo committed patient abandonment to be disingenuous considering the totality of the circumstances here, and therefore, find this defense to be pretext for its unlawful termination in retaliation for Tyo's protected activity.

Therefore, I find that Respondent has not met its burden under *Wright Line*, and that it cannot prove it would have taken the same action against Tyo even in the absence of her protected activity. Indeed, I find that it would not have discharged Tyo but for the fact that she engaged in that activity.

In sum, I find that Tyo's concerted activity was a substantial and motivating reason for her discharge, and as such, I find the General Counsel has met its initial prima facie burden. With the burden shifted to Respondent to demonstrate that it would have taken the same action even in the absence of the protected conduct, I find that Respondent has failed to meet its burden, for a series of reasons.

Accordingly, I find that Respondent violated Section 8(a)(3) or (1) of the Act when it terminated Tyo on March 13, 2020, and therefore, recommend that Tyo be made whole for the unlawful actions taken by Respondent.

CONCLUSIONS OF LAW

1. On or about March 13, 2020, Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully terminating Rosamaria Tyo's employment in retaliation for her protected union and concerted activity.

2. The above violation is an unfair labor practice within the meaning of the Act.

REMEDY

As I have concluded that the Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Respondent, having discriminatorily discharged Rosamaria Tyo, must rescind its unlawful discipline, offer Tyo reinstatement and make her whole for any loss of earnings and other benefits resulting from that discrimination.

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). The Respondent shall also file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Don Chavas, LLC d/b/a Tortillas Don Chavas and Mariela Soto and Anahi Figueroa,* 361 NLRB No. 10 (2014).

In addition to the backpay-allocation report, Respondent shall file with the Regional Director for Region 2 a copy of Tyo's corresponding W-2 form(s) reflecting the backpay award. *Cascades Containerboard Packaging*, 370 NLRB No. 76 (2021). In addition, Respondent is ordered to reimburse Tyo for all search-for-work-related expenses regardless of whether she received interim earnings in excess of these expenses overall or in any given quarter. *King Soopers, Inc.*, 364 NLRB No. 93 (2016).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, New York Presbyterian Hudson Valley Hospital, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any em-

[11] 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.

ployee because they support the Union and engage in concerted activities, or to discourage other employees from engaging in these activities;

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Within 14 days from the date of the Board's Order, offer Rosamaria Tyo full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Rosamaria Tyo whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision, plus reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings.

(c) Compensate Rosamaria Tyo for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 2, 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.

(d) File with the Regional Director for Region 2 a copy of Rosamaria Tyo's corresponding W-2 form(s) reflecting the backpay award.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Rosamaria Tyo and, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her 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 stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its location in Cortlandt Manor, New York, the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondents customarily communicate with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have 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 13, 2020.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 11, 2021

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 do anything to prevent you from exercising these rights.

WE WILL NOT discharge or otherwise discriminate against any employee for engaging in activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Rosamaria Tyo full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

[12] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. 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."

WE WILL make Rosamaria Tyo whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, plus reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings.

WE WILL compensate Rosamaria Tyo for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 2, 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 years, along with a copy of Rosamaria Tyo's corresponding W-2 form(s) reflecting the backpay award.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Rosamaria Tyo, and WE WILL within 3 days thereafter, notify her in writing that this has been done.

NEW YORK PRESBYTERIAN HUDSON VALLEY HOSPITAL

The Board's decision can be found at www.nlrb.gov/case/10-CA-258244 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.