UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

DYCORA TRANSITIONAL HEALTH – FRESNO, LLC
Employer

and **Case 32–CA–215700**

SERVICE EMPLOYEES INTERNATIONAL UNION
LOCAL 2015

DYCORA TRANSITIONAL HEALTH – FRESNO, LLC
Employer

and **Case 32–RD–213130**

ROSALINDA LORONA,
Petitioner

and

HEALTHCARE SERVICES GROUP, INC.
Involved Party

Amy L. Berbower, Esq., for the General Counsel.

Christopher M. Foster, Esq. and Michael Giambona, Esq.
(McDermott, Will & Emery LLP), for the Respondent/Employer.[1]

Manuel A. Boigues, Esq. (Weinberg, Roger & Rosenfeld)
For the Charging Party/Union.

[1] Also appearing for the Respondent/Employer on brief is Ronald J. Holland, Esq., of the same firm. Giambona appeared at trial, but not on brief.

DECISION AND RECOMMENDED ORDER ON OBJECTIONS TO THE ELECTION

I. Statement of the Case

ARIEL L. SOTOLONGO, Administrative Law Judge. At issue in this case is whether Dycora Transitional Health—Fresno, LLC (Respondent or Employer) violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes in the working conditions of bargaining unit employees without notifying or bargaining with their representative, Service Employees International Union, Local 2015 (Union or Local 2015). Also, at issue is whether the Employer engaged in objectionable preelection conduct, including the above-described alleged unfair labor practices, during the critical period preceding a decertification election conducted on May 31, 2018.

Procedural History

Based on a charge filed by the Union on February 28, 2018 in Case 32–CA–215700, the Regional Director for Region 32 of the Board issued a complaint on May 25, 2018, alleging that Respondent had violated Section 8(a)(5) and (1) of the Act by unilaterally implementing changes in the work schedules and meal policies of bargaining unit employees in December or January 2019, as will be described in more detail below. Thereafter, on June 8, 2018, Respondent filed a timely answer to the complaint, in essence denying all the substantive allegations of the complaint and raising additional affirmative defenses. Additionally, on January 17, 2018, a decertification petition was filed in Case 32–RD–213130 by Rosalinda Lorona (Lorona or Petitioner) regarding bargaining unit employees of the Employer's Fresno, California facility (the Fresno facility). Pursuant to that petition, an election was conducted in the Fresno facility on May 31, 2018, in which the majority of employees voted in favor of decertifying the Union as collective-bargaining representative of the unit employees in that facility. On June 7, 2018, the Union filed timely objections to the conduct of the election in Case 32–RD–213130, and on July 17, 2018, the Regional Director issued a Decision on Objections and Order Consolidating Cases for Hearing, consolidating for hearing the above-referenced unfair labor practice case with certain of the aforementioned objections to the election filed by the Union.[2] I presided over this case in Fresno, California, on August 28 through 30, 2018.

Because some of conduct alleged in the objections in Case 32–RD–213130 is also covered by the unfair labor practices alleged in the complaint in Case 32–CA–215700, I will first address the allegations of the complaint.[3]

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[2] The Regional Director's order also consolidated Case 32–RD–213115, which involved objections to an election conducted in the Employer's Clovis, California facility, with the above-referenced cases for hearing. Prior to the start of the hearing in this matter, however, the Union disclaimed interest in representing the employees of the Clovis facility, and accordingly the General Counsel at the start of the hearing moved to sever Case 32–RD–213115 from the instant proceedings. I granted the motion to sever and remanded that case to the Regional Director for disposal as she deemed appropriate (Tr. 8–9).

[3] Thus, the Union's Objection No. 8 tracks the allegations of pars. 7(a) and (b) of the complaint, as the Regional Director noted in fn. 4 of her July 17, 2018 decision on objections.

II. The Unfair Labor Practice Allegations of the Complaint

A. Jurisdiction and Labor Organization Status

Respondent admits, and I find, that at all material times it has been a California limited liability corporation with an office and place of business in Fresno, California, where it is engaged in providing rehabilitation and skilled nursing care to individuals. Respondent further admits, and I find, that in conducting its business operations during the 12-month period ending February 28, 2018, it received gross revenues in excess of $100,000 and purchased and received goods valued in excess of $5000 from suppliers located outside the State of California. Accordingly, I find that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent also admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

B. Findings of Fact

1. Respondent's operations and other background facts

As briefly summarized above, Respondent owns and operates several nursing home and rehabilitation facilities in California's Central Valley, including the facility in Fresno which is the focus of the instant proceedings. Respondent acquired the Fresno facility in December 2016 from its predecessor, Beverly Healthcare-California, Inc. d/b/a Golden Living Center-Fresno (Golden Living), which was a party to a collective-bargaining agreement with the Union that was set to expire on December 31, 2016 (Jt. Exh. 1). Upon acquiring the Fresno facility from Golden Living, Respondent recognized the Union as the collective-bargaining representative of the employees in the following unit at the Fresno facility:

> All full-time and regular part-time certified nursing aides, nursing assistants, restorative nursing aides, cooks, dietary aides, activity assistants, and receptionists employed by Respondent; excluding registered nurses, licensed vocational nurses, social service assistants, central supply clerks, office clerical employees, confidential employees, professional employees, guards, and supervisors as defined in the Act.

Respondent and the Union entered into a 1-year agreement extending the terms of the agreement between the Union and Golden Living, effective by its terms from January 1, 2017 through December 31, 2017 (Jt. Exh. 2).

Respondent's chief executive officer (CEO) is Julianne Williams.[4] Ken Evans is the Fresno facility administrator, and Raymond Gonzalez is the director of dining services in that

[4] Although not alleged in the complaint, or admitted in the answer, as a Sec. 2(11) supervisor, there can be little doubt in light of her testimony, and the nature of her position, that Williams is indeed a Sec. 2(11) supervisor and Sec. 2(13) agent of Respondent. Although not relevant with regards to the allegations of the complaint, which does not allege conduct on her part, Williams' status as a Sec. 2(11) supervisor is a factor in the objections case, as discussed in that part of the decision.

facility, and both are admitted as Section 2(11) supervisors.[5] In his capacity, Gonzalez oversees the dietary department, also known as the kitchen, which provides for the dietary and nutritional needs of the facility's residents. Undisputed testimony established that the facility typically has about 200–210 residents at any given time, and are approximately 22 employees in the dietary department, and about 190 employees in the bargaining unit altogether.

The allegations of the complaint, as discussed below, concern events that occurred at the Fresno facility, and more precisely in dietary department, in late December 2017 and January 2018.

2. The Events of December 2017 and January 2018

The complaint alleges that Respondent announced certain changes in the employees' working conditions in late December 2017 and implemented one such change at the time, and implemented the other in January 2018, without notifying or bargaining with the Union. These facts are not truly in dispute. What appears to be in dispute is the length of time the changes were in place, how many employees were affected, and—from a legal standpoint-- whether in light of these facts Respondent had a duty to bargain with the Union.

Victor Gonzales (Gonzales), currently a prep cook but formerly a dietary aide in the dietary department (also known as the kitchen), which is part of the above-described bargaining unit, testified that his regular work schedule was from 5:30 a.m. to 2 p.m., as reflected on a posted schedule introduced as General Counsel Exhibit 2.[6] This schedule, according to Gonzales, had been in place since he had started working for Respondent about a year and a half earlier. On December 28, 2017, he attended a meeting called by Raymond Gonzalez (Gonzalez), the director of dining services, where Gonzalez announced that a new schedule would be implemented effective on January 9, 2018. The new schedule, which was distributed to those present and also posted that day, changed the prior schedule by requiring everyone in the dietary department to start and end work 15 minutes earlier each day (GC Exh. 4). There were other employees present at that meeting, although Gonzales did not recall how many, and they had to sign an attendance roster indicating that they had been present and had been notified of the new schedule to begin on January 9 (GC Exh. 3).[7] According to Gonzales, Gonzalez explained that the reason for the schedule change was because the residents were being fed late on account of everyone starting late and finishing late. (Tr.24–25; 30–38.)

On the same date, December 28, 2017, according to Gonzales, another (dietary department) employee meeting was held by Gonzalez, although it isn't clear at what time it was held or how long after the first meeting regarding the change in schedule, as described above. At this (second) meeting, Gonzalez announced a change in the practice of allowing dietary department employees (and a few others, as discussed below) to eat "leftover" food after the residents had been fed. As with the first meeting, those employees who were present signed an "In-Service Meeting" memo prepared by Gonzalez which summarized what had been discussed

[5] The complaint alleges Gonzalez as "Dietary Department Supervisor," which is admitted by Respondent, but Gonzalez testified that his title is Director of Dining Services" (Tr. 286).

[6] Gonzales is schedule # 2 in that list (GC Exh. 2).

[7] Gonzalez prepared the summary of the "In-Service" meeting, the term used by Respondent for these types of employee meetings, which also contains the signatures of those present (GC Exh. 4).

at the meeting (GC Exh. 5).[8] Gonzales testified that it had been his understanding that the practice had been to allow dietary department employees to have "left-over" foods after the resident had all been provided with their meals, although he was not exactly sure how long such practice had been in place. He also testified than in addition to dietary department employees, CNAs (certified nursing aides) who worked double shifts were allowed to eat left-over food if they brought in a "slip," although he did not elaborate as to who provided the "slip."[9] Gonzales also testified, however, that some employees were abusing the system by preparing their own meals or snacks from the supplies in the kitchen rather than waiting for "left-overs" after residents had been fed—and that he complained to Gonzalez about this (Tr. 45–48; 50–56; 93–97).

Finally, Gonzales testified than on January 9, 2018, the day the new schedule was to go into effect, he arrived at 5:15 a.m., 15 minutes earlier than in the past. He found out very shortly after arriving from the cook, however, that the new schedule had been rescinded and was no longer in effect. Gonzalez confirmed this when he arrived at work that morning, and the "old" schedules were once again posted. He also testified that the new food policy was also rescinded at some later point, but could not recall when (Tr. 39–41; 43).[10]

Raymond Gonzalez, the head of the dietary department (director of dining services), in essence corroborated the above-described testimony by Gonzales, but also provided additional information regarding Respondent's past practices and the ensuing changes discussed in the December 28 meetings, as well as his reasons for announcing the changes. He became the director of dining services in November 2017 and had previously been the sous chef. Regarding the change of schedule, he announced on December 28, 2017, he testified that he instituted the change because the residents were not being fed on time. He confirmed Gonzales' testimony

[8] The In-Service meeting summary report, in relevant part, contains handwriting that states as follows: "Subjects Covered: Foods purchased by and for the (building . . .?) are to be consumed by residents only. Staff, including dining services, are not allowed to eat any foods, snacks, juices, etc. Dining Services staff are not allowed to eat "left-over" foods or trays. Staff are not allowed to make any grill cheeses, burritos, or any other items. Employees who make foods are required to taste the foods made. A taste is considered 1 tablespoon. Staff who work double shifts are not allowed to have a meal." It appears that at least three employees signed the memo a month later, on January 30, 2018, as reflected in the second column of employee signatures in that document (Tr. 322; GC Exh. 5).

[9] Gonzales acknowledged that his understanding of this practice regarding left-over meals was through "word of mouth," and not from anything in writing. Gonzales also explained that the unwritten rule was that staff had to wait 30 minutes after the residents had been fed before they could help themselves to a left-over meal, because sometimes a resident would ask for "seconds" after an initial serving. He acknowledged, however, that this "rule" is something he learned from other workers, such as the cook, and not from any official source. (Tr. 49; 96–97)

[10] Gonzales admitted the 15-minute earlier arrival on January 9 did not really affect him in any significant or perceivable way (Tr. 41).

that he rescinded the schedule change on the day it went into effect, January 9, 2018, personally informing employees when he arrived at work at 7:30 a.m., and phoning others who were not present.[11]

Regarding the food consumption policy, Gonzalez testified that prior dietary department heads had different policies and practices regarding the consumption of "left-over" food by the staff. For example, the first director when he started working at the facility, Oralia "Lala" Mares, allowed no food consumption at all. Her successor, Funzell Thompson, allowed the staff to consume up to 5 percent of the food, although Gonzalez could not explain how that was measured. His immediate predecessor, Daniel Mullins, never discussed the issue one way or another.[12] Gonzalez admitted, however, that it had become the "practice" to allow the staff to eat left-over food. He confirmed Gonzales' testimony that some employees had been abusing the system by helping themselves to food supplies to make themselves meals, before residents were fed, which resulted in shortages. As a result, he announced at the December 28, 2017 In-Service meeting that he would no longer allow the consumption of the facility's food by the staff, effective immediately. According to Gonzalez, this new policy was rescinded about 1-1/2 to 2 months later, and employees were allowed to resume eating left-overs. (Tr. 289–291; 293–296; 298; 323–325; 334–335; GC Exhs. 3; 5)[13]

Union Representative Pauline Grant Clarke (Grant), who was the representative assigned to the Fresno facility, testified that she first learned of the schedule change from the cook, Rodney Downes (Downes), who texted her a photo of the posted new schedule on January 7 (GC Exh. 6). The following day, on January 8, 2018 Grant sent Respondent's Administrator, Ken Evans, 2 letters demanding that Respondent "cease and desist" from implementing the schedule change. Curiously, Grant on January 19, 2018 filed a grievance demanding that Respondent discontinue its change of schedule, and followed it up on February 9, 2018 by a second step grievance, although she was aware that the change had been rescinded on January 9, 2018, as Downes had informed her.[14] Grant also testified she first learned of the change in the food consumption practice on or about February 12, 2018, while she was visiting the facility to meet with Evans regarding the grievance about the schedule change. While waiting in the break room,

[11] Gonzalez testified that 8 out of 15 scheduled employees had come in 15 minutes early that day (Tr. 290–291), which happens to be the exact number of employees who were scheduled to arrive before he arrived at 7:30 a.m. that morning, as reflected in the new schedule (GC Exh. 4). It is notable that about 46 pp. of time and attendance records, covering the period from December 9, 2017 to February 9, 2018, were introduced in the record as joint exhibit (Jt Exh.) 4, records that were presumably subpoenaed by the General Counsel for the apparent purpose of showing how many employees were affected by the newly implemented schedule on January 9. Yet, not a single mention of this record is made by the General Counsel (or any other party) on brief, perhaps because it did not yield the type of favorable information hoped for. In sum, the record indicates that no more than 8 employees were affected on one shift before the new schedule was rescinded.

[12] He did not provide a timeline of the dates when his predecessors were in office, however.

[13] This policy was rescinded on February 16, 2018, as communicated to the Union (Grant) by Administrator Evans on that date via email (Jt. Exh. 5)

[14] Grant testified that Downes informed her the next day (presumably, January 10), that the new schedule had been "rolled back." She also testified, however, that Respondent never informed her that in fact it had rescinded the change, and hence the pursuit of the grievance. A series of email communications between the parties reveals Evans at first being reportedly unaware of what change of schedule Grant was referring to, and finally later, in mid-February, informing her that the change had been in fact rescinded immediately on the day it was to go into effect (Jt. Exh.3).

she noticed employees with lunch bags, and asked them why they were bringing their own food. They informed her that they could no longer eat meals "from the kitchen," and Grant said she would talk to Evans about that. During their meeting, Evans told Grant he was unaware of either the change in the schedule or the change regarding meals. In their subsequent communications via emails, Evans informed Grant that the schedule change had in fact been rescinded on January 9, and that the food consumption policy was rescinded on February 16, as previously noted (Tr. 125–129; 131–134; 136–137; 139–140; Jt. Exh. 3).

In sum, the salient facts regarding the changes announced and made by Respondent involving the revised schedules of the dietary department employees and the consumption of food made by and at the facility are not in dispute. In this regard, I find that I need not make any credibility resolutions regarding the testimony of the General Counsel's and Respondent's witnesses as to these events, because not only do they not contradict each other, but they rather corroborate and augment each other's testimony. Accordingly, I find that the following are the salient and relevant facts established in the record regarding these allegations:

- On December 28, 2017, Director of Dining Services Raymond Gonzalez informed dietary department employees during a meeting that effective January 9, 2018 their schedules would be changed by starting (and ending) 15 minutes earlier. They were handed a copy of the new schedule, which was also posted in their department;
- On the same date (December 28, 2017), Gonzalez also announced during a meeting of dietary department employees that effective immediately employees would no longer be allowed to eat food purchased and prepared by the facility, including "left-over" food after residents were served their meals, nor would they be allowed to prepare foods for their own consumption from supplies purchased by the facility. Prior to this announcement, the practice had been, for an undetermined period of time, to permit employees to consume "left-over" food prepared for residents after the residents had been fed;
- On January 9, 2018, a total of 8 employees arrived 15 minutes earlier pursuant to the new schedule. Gonzalez informed all dietary department employees that same morning, some in person and some by telephone, that the new schedule was rescinded and discontinued. The posted new schedules were removed, and the "old" schedules were re-posted again;[15]
- The policy of not allowing employees to consume left-over food after residents had been fed, as described above, was discontinued on or about February 16, 2018, at which time employees were allowed to resume consuming left-over food.
- Respondent did not notify or bargain with the Union prior to implementing the above-described changes regarding the new schedule for dietary department employees and the food consumption practice or policy.

[15] The Union learned on January 10, 2018, from one of the bargaining unit members, that the new schedule had been rescinded the day before.

C. Discussion and Analysis

Paragraphs 7 and 8 of the complaint allege that Respondent violated Section 8(a) (1) & (5) of the Act by failing to notify and bargain with the Union to impasse before implementing the changes regarding the new schedule for dietary department employees and the food consumption practice or policy.

It is by now axiomatic that Section 8(a)(5) of the Act requires an employer to provide its employees' representative with notice and an opportunity to bargain before instituting changes in any matter that that constitutes a mandatory subject of bargaining, such as wages, hours and other terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). A unilateral change in a mandatory subject of bargaining is unlawful only, however, if it is a "material, substantial, and significant change." *Berkshire Nursing Home*, 345 NLRB 220 (2005); *Toledo Blade*, 343 NLRB 385 (2004); *Flambeau Airmold Corp.*, 334 NLRB 165 (2001), quoting *Alamo Cement Co.*, 281 NLRB 737, 738 (1986), modified on other grounds 337 NLRB 1025 (2002). The General Counsel argues that both the schedule change and the meal consumption policy change meet the above criteria, because these changes not only involved mandatory subjects of bargaining but were also material and substantial. Respondent argues that the above-described changes were permissible under the collective-bargaining agreement's "Management Rights" clause, which provides, inter alia, that the Employer has "the sole and exclusive" right to "direct, control, and schedule its operations and workforce."[16] Additionally, it argues that both changes were de minimis in that both were rescinded in short order and did not have a significant or material impact, and that both were consistent with Respondent's past practices and thus permissible under the Board's ruling in *Raytheon Network Centric Systems,* 365 NLRB No. 161 (2017), and other cases.

The General Counsel establishes a prima facie violation of Section 8(a)(5) when he shows that the employer made a material and substantial change in a term of employment without negotiating with the union. The burden is then on the employer to show that the unilateral change was in some way privileged. *McClatchy Newspapers, Inc.*, 339 NLRB 1214 (2003), and cases cited therein. First, with regard to the change of schedule that was announced on December 28, 2017 and implemented—albeit for a very short period of time—on January 9, 2018, there can be no question that this type of change is one that would normally trigger an obligation to bargain. A change of schedule by definition involves a "term and condition of employment" and one could significantly affect employees' daily lives or routines. The

[16] The full clause, in relevant part, provides as follows:
The Employer retains the exclusive right to manage the business, to direct, control, and schedule its operations and workforce, and to make and all decisions affecting the business, whether or not specifically mentioned herein, and whether or not heretofore exercised except as specifically limited by the express terms of this Agreement. Such prerogatives shall include, but are not limited to, the sole and exclusive rights to:
. . . . select and determine the number of its employees, including the number assigned to any particular work or work unit; to increase or decrease that number; direct and schedule the workforce . . . ; determine the work duties of employees; promulgate post and enforce rules and regulations governing the conduct and acts of employees during work hours; . . . ; determine job qualifications, work shifts, work pace, work performance levels, standards of performance, and methods … and in all respect carryout, in addition, the ordinary and customary functions of management, all without hindrance or interference by the Union except as specifically abridged, altered or modified by the express terms of this agreement. (Jt. Exh. 1, art.icle 3, p. 3–4)

existential problem in this instance, however, is that the change was in place for a period of an only an hour or two and was then rescinded. At most, it affected eight employees who showed up early by 15 minutes on January 9, and it is not even clear that all eight indeed showed up early that day.[17] This new schedule was then quickly rescinded by Respondent, and the employees in the dietary department were personally notified by their supervisor, Gonzalez, that very morning, that the schedule was no longer in effect—and that the old schedule was now back in place. Thus, at most, eight employees in a unit of about 190 employees were affected on one single, isolated and discreet instance of very short duration. In these circumstances, I am persuaded that this change was de minimis, and not a material and substantial change, and that the General Counsel has thus not met its burden of proof in establishing a prima facie case of a violation.

The General Counsel, citing *Pepsi Cola Bottling Co.*, 330 NLRB 900 (2002), and *Hedison Mfg. Co.*, 260 NLRB 590 (1982), argues that shift changes of 15 and 5 minutes, respectively, were found to be a material, substantial and significant change. Unlike in the instant case, however, those changes affected a whole unit of employees, and most importantly, were in place until the Board found a violation and ordered the employers to cease and desist from such conduct—a year or two after the changes were made. Clearly, in determining whether a change is material and substantial, and thus unlawful, *context* matters. Quite simply, a shift change of 15 minutes (or even 5 minutes), that affects an entire unit and remains in place for a year or two—and only rescinded after legal proceedings—is not the same as a 15-minute shift change that affected only eight employees and was in place for only a couple of hours and then rescinded after a request from the Union. If this type of scenario does not define de minimis, I struggle to imagine what scenario does.[18] Accordingly, I conclude that under these particular circumstances, the unilateral change briefly implemented and then rescinded (at the Union's request) by Respondent was not a "material and substantial" change—and thus not unlawful.

[17] Indeed, the General Counsel's only employee witness, Gonzales, admitted that this "slight maneuver in time" on this instance "didn't really affect me at all."

[18] The General Counsel's arguments create the impression that while it accepts the theoretical concept of *de minimis* in the abstract (because the Board and the courts have so dictated), it doesn't truly accept that there is actually such a thing as *de minimis* in practice, because it apparently believes that a change is a change and any unilateral change is a per se violation, regardless of the circumstances. For example, the General Counsel's cites of *ABC Automotive Products Corp.*, 307 NLRB 248 (1992), for the proposition that merely announcing a unilateral change is a violation, regardless of whether it is implemented or not, and of *JPH Management*, 337 NLRB 72 (2001), for the proposition that rescinding a unilateral change, without bargaining with the union, is itself a *separate* violation. Both cases are inapposite. In *ABC Automotive* the announcement of the unilateral change occurred in the context of a strike were the employer also committed numerous other unfair practices, and the announcement of the unilateral change was communicated to all the strikers, who were informed their benefits would significantly change when the returned from the strike. The announced unilateral change was not "implemented" because the strikers did not return to work, and thus the announced change was never rescinded. The damage, however, had been done, as the Board reasoned. Here, the "damage" was undone almost immediately after implementation—at the Union's request, who had demanded that Respondent "cease and desist" from carrying out the change. In *JPH Management*, the initial change—a wage increase—was never alleged or found unlawful, but rather its rescission was the change that was found to be a violation. Moreover, the General Counsel's apparent reliance on that case for the proposition that an employer may never cure its own initial wrongdoing, even at the request of the union, without first bargaining with the union, is illogical and suggests a rigid "damned if you do, damned if you don't" doctrine that discourages parties from settling and remedying their own disputes—contrary to well-established Board doctrine.

Secondly, even assuming that the unilateral change described above was material and substantial, it appears that the Union, by entering into a collective-bargaining agreement containing the above-described management-rights clause, waived its right to bargain over this particular issue. Waiver of a statutory right, of course, must be clear and unmistakable, and will not be lightly inferred. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *TCI of New York*, 301 NLRB 822, 825 (1998); *Georgia Power Co.*, 325 NLRB 420 (1998). The contractual language in this case, under which the Employer retains, inter alia, the "exclusive right to….direct and schedule the workforce," including" the sole right to…determine …work shifts….," appears to be specific enough to constitute a waiver fitting the above-cited criteria. In that regard, I note that the contractual language above is very similar to that in *Baptist Hospital of East Tennessee*, 351 NLRB 71 (2007), where the Board found that the contractual waiver existed. While it is true that the language in that case was even more specific, stating that the employer had the right, inter alia, "to determine and change starting times, quitting times and shifts," I conclude that the contractual language herein is specific enough to grant Respondent the authority to change the starting times of shifts without first bargaining with the Union. Nonetheless, as the General Counsel correctly points out, a contractual waiver of statutory rights does not survive the expiration of the contract. See, e.g., *Paul Mueller Co.,* 332 NLRB 312, 313 (2000); Ryder/Ate, Inc., 331 NLRB 889 fn. 1 (2000); *Ironton Publications*, 321 NLRB 1048, 1048 (1996). In the present case, however, we have an anomaly in that the decision and announcement of the shift change was made by Gonzalez on December 28, 2017, prior to the expiration of the contract on December 31, 2017, but the actual shift change was not implemented until January 9, 2018, after the contract had expired. I have found no authority that addresses this specific situation, and the parties cite none. On balance, I am persuaded that the date that ultimately should govern and determine the existence of a waiver in this instance should be the date when the Employer made—and announced—its decision, December 28, 2017, at which time it was acting pursuant to its contractual authority.

Accordingly, and for the above reasons, I conclude that Respondent's failure to bargain with the Union regarding the shift change for dietary department employees did not violate the Act.

With regard to the other allegation of the complaint, involving the change in the policy or practice of allowing employees to consume "left-over" food, the above-discussed rationale is not applicable, for two reasons. First, unlike the schedule change, which was rescinded almost immediately, the policy regarding food consumption was not rescinded until February 16, 2018, about 6–7 weeks after it was announced—and implemented—on December 28, 2017. Secondly, there is no specific language in the contract that would arguably allow Respondent to unilaterally change or terminate a well-established practice of allowing employees to consume left-over food, arguably a "benefit" or "perk" that employees had been provided with and had become accustomed to. To be sure, this was not a contractually-mandated "benefit." As correctly pointed out by the General Counsel, however, a particular working condition or benefit need not be expressly embodied in a collective-bargaining agreement in order for such condition or benefit to become a "term or condition of employment." Regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment that cannot be changed without offering the employees' representative the opportunity to bargain, absent a clear

and unequivocal waiver of this right. *Garden Grove Hospital & Medical Center*, 357 NLRB 653, 657 (2011); *Sunoco, Inc.*, 349 NLRB 240, 244 (2007).[19] In that regard, the Board has long held that discontinuing providing employees with such "perks" as free meals, *hot* meals, snacks, food samples, free beer or soft drinks, and even coffee have been unlawful unilateral changes by employers. See, e.g., *Sprain Brook Mannor Nursing Home, LLC*, 361 NLRB 607 (2014), adopting a prior nullified decision at 359 NLRB 929 (2013) (discontinuing hot lunches, substituted with sandwiches and salads); *Beverly Enterprises*, 310 NLRB 222, 239 (1993) (discontinuing free coffee); *Poletti's Restaurant*, 261 NLRB 313, 320 fn. 16 (1982) (free desserts); *Southern Florida Hotel & Motel Ass'n*, 245 NLRB 561, 569 (1979) (free beer, soft drinks and snacks).

In the instant cast, it is clear that employees—at least those in the dietary department as well as CNAs who worked double shifts—had become accustomed to being provided with meals from left-over food after residents had been fed, and that this had become a condition of employment because of this practice. Moreover, unlike the change in the start time for the shift, which was rescinded almost immediately and thus had little impact, the discontinuation of this meal allowance lasted 6–7 weeks until February 16, 2018. In these circumstances, such a change cannot be deemed to be de minimis, as I found the shift change to be. I thus conclude that the General Counsel met his prima facie burden to show that Respondent implemented a unilateral change in a term or condition of employment without bargaining with the Union. Respondent then bears the burden to establish that the change was in some way privileged. *McClatchy Newspapers*, supra. Respondent argues that the managements-rights clause in the contract, which it apparently interprets in the broadest possible manner, permits it to change or modify the food consumption policy or practice at will. I disagree. As previously discussed, a waiver of a statutory right must be clear and unmistakable, which in this instance would mean contractual language specific enough to unequivocally permit Respondent to make changes in the food consumption policy. Unlike its contractually-referenced control regarding shifts, which was clear and specific, there is nothing that specifically or even indirectly refers to other terms and conditions of employment, I this instance, food-consumption policy. Accordingly, I conclude that there is no contractual waiver in this instance by the Union of its statutory right to be bargained with prior to a change in this practice.

Respondent additionally argues, relying on *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), that the change in the food consumption policy was consistent with its past practice and thus not unlawful, citing Gonzalez' testimony that his predecessors had different policies regarding allowing employees to consume left-over food. Examining Gonzalez' testimony, however, I note there is no evidence that Respondent had a history of allowing and then denying employees' consumption of left-over food. Rather, Gonzalez' testimony suggests that the first director he worked under, Mares, did not allow such consumption, and that this policy become more lax with subsequent directors, with the arc

[19] In that regard, although it is not entirely clear exactly how long the practice of allowing employees to consume left-over food had been in place, the record shows that it had been in place as long as dietary aide Gonzales had worked there (a year and a half), according to his credible testimony, and according to Union Representative Grant the practice ad been in place since 2013, when she first started visiting the facility, which was at the time operated by a different employer. Moreover, as previously noted, Director of Dining Services Gonzalez conceded that it was the "practice" to allow employees to consume left-over food.

increasingly tending toward allowing employees more food privileges over time—a trend that Gonzalez then reversed. Accordingly, I conclude that Respondent did not establish that it had an established past practice of allowing and then denying employees the right to consume left-over food, and that *Raytheon* is thus not applicable in this instance. In view of the above, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its food consumption policy or practice without giving the Union notice or the opportunity to bargain.

In sum, and for the reasons discussed above, I find that Respondent did not violate the Act by unilaterally changing the shift of dietary department employees, as alleged in paragraph 7(a) and (b) of the complaint, but did violate Section 8(a)(5) and (1) of the Act by discontinuing its practice of allowing employees to consume left-over food, as alleged in paragraph 7(c) of the complaint.

III. The Objections in Case 32–RD–213130

As briefly discussed above, pursuant to a decertification petition filed in Case 32–RD–213130, an election was held among the bargaining unit employees at the Employer's Fresno facility on May 31, 2018. The initial tally of ballots prepared at the conclusion of the election showed that of the approximately 183 eligible voters, 32 votes were cast for and 57 votes cast against the Union, with 28 challenged ballots, a number sufficient to affect the results of the election. Thereafter, the Regional Director issued a supplemental decision directing that the challenged ballots be opened and counted, which was done on June 27, 2018. The revised tally of ballots showed that 42 votes were cast for and 74 votes were cast against the Union, with one sustained challenged ballot. Based on objections to the conduct of the election filed by the Union on June 6, 2018, the Regional Director on July 17, 2018 issued a Decision on Objections directing that a hearing be conducted regarding Union Objections 4 through 11.[20] As also briefly mentioned previously, Objection 8 tracked the unfair labor practices discussed above.

Below, I will discuss the evidence proffered in support of these objections, and my recommendations pursuant to my findings and conclusions. Before doing that, however, I believe it helpful to first discuss the analytical framework used by the Board to determine the validity of objections.

A. *The Analytical Framework Regarding Objections*

Under well-established Board doctrine, for conduct to be objectionable, it must normally occur during the critical period, which begins on the date the petition is filed, and runs through the date of the election, during which "laboratory conditions" must be maintained. *Ideal Electric Mfg. Co*, 134 NLRB 1275 (1961); *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962). Generally, conduct that occurs prior to the critical period is not considered objectionable. *Ideal Electric; Data Technology Corp.*, 281 NLRB 1005, 1007 (1986). There are exceptions to this doctrine, however, such as when the prepetition conduct is truly egregious or is likely to have a "significant impact" on the election, *Servomation of Columbus*, 219 NLRB 504, 506 (1975) (violence or threats thereof); *Royal Packaging Corp.*, 284 NLRB 317 (1987) (promises of benefits in violation of the *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973) doctrine); or when

[20] The Union later withdrew Objection 7, leaving Objections 4 through 6, and 8 through 11 for determination.

such conduct "adds meaning and dimension to related post petition conduct," *Dresser Industries*, 242 NLRB 74 (1979).

Additionally, the Board analyzes objectionable conduct which is also an unfair labor practice differently that objectionable conduct which is not. In *Intertape Polymer Corp.*, 363 NLRB No. 187 (2016), the Board reiterated its longstanding rule that a violation of Section 8(a)(1) during the critical period is, a fortiori, conduct that interferes with the results of the election unless it is so de minimis that it is "virtually impossible to conclude that [the violation] could have affected the results of the election." See, also, *Pacific Coast Sightseeing Tours & Charters, Inc.,* 365 NLRB No. 131, slip op. at 10 (2017)*; Super Thrift Market, Inc.*, 233 NLRB 409, 409 (1977); *Dal-Tex Optical Co.*, supra, at 1786. In determining whether the unlawful conduct is de minimis, the Board considers a number of factors, including the number of incidents, their severity, the extent of dissemination, and the size of the unit. *Super Thrift Market*, supra, at 409.

On the other hand, the criteria used by the Board to evaluate alleged objectionable conduct that is not also an unfair labor practice differs somewhat from the criteria discussed above in *Intertape Polymer* and other cited cases. Thus, when the alleged objectionable conduct is not also an unfair labor practice, the proper standard to apply is whether the alleged misconduct, taken as a whole, warrants a new election because it has "the tendency to interfere with employees' freedom of choice" and "could well have affected the outcome of the election." *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995); *Metaldyne Corp.*, 339 NLRB 352 (2003). In making this determination the Board examines several factors: (1) the number of incidents; (2) the severity of the incidents and whether they are likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists on the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and, 9) the degree to which the misconduct can be attributed to the party. *Taylor Wharton Division*, 336 NLRB 157 (2001); Cedars-*Sinai Medical Center*, 342 NLRB 596, 597 (2004).

With the above framework in mind, I will proceed to discuss the Union's objections that were set for hearing by the Regional Director.[21]

B. Objections 4 Through 6 and 8 Through 11

Objection 4:

Dycora promised or implied benefits to eligible voters if the Union lost the election.

In support of this objection, the Union proffered evidence regarding several separate incidents, which will be discussed below. First, the Union alleges that during a conversation between dietary aide Victor Gonzales and dietician Elizabeth Olivares, Olivares made some

[21] The Union's objections, as well as the Regional Director's Decision on Objections, are part of the formal exhibits (GC Exhs. 1(m); 1(v)). As mentioned previously, although the Regional Director set Objection . 7, among the others, for hearing, the Union later withdrew this objection.

promises of benefits if the Union was no longer around.[22] In support of this allegation, Gonzales testified that Olivares, whose job as dietician is to prepare diets for the residents, told him that if the Union wasn't around they could do more "fun things," or more "fun stuff," like getting gift cards—presumably from the employer (Tr. 63–66; 103). There are two fundamental problems with Gonzales' testimony in this regard, however. First, the testimony was very vague in that he did not testify as to exactly *when* this conversation took place, and thus there is no evidence it occurred during the critical period. Moreover, the testimony was rambling and confusing, to say the least.[23] Thus, I cannot give this testimony much weight. A more fundamental—and existential—problem with this testimony, however, is that the Union proffered no evidence whatsoever showing that Olivares was a Section 2(11) supervisor or Section 2(13) agent of the Employer. As the proponent of the objection, it is the Union's burden to show that Olivares was a supervisor or at least an agent of the Employer, and that the Employer was thus responsible for this conduct. In the absence of such evidence, whatever Olivares allegedly said is simply of no consequence. Accordingly, I find that this specific objection lacks merit and recommend that it be overruled.

Next, the Union alleges that a flyer posted on the bulletin board where the Employer typically posted messages for employees, which read as follows:

> **Know the Facts**
> 104 employees in this center are not paying dues—do you know if you are one of them according to the records? Come see us and we'll tell you.
> How much are Union dues?
> A minimum of $15.50 a month and a maximum of $45 a month
> How much will you get if a 2% increase is agreed in bargaining?
> Employees making $13.00 an hour working full-
> time (2080 hours) means $540 more a year
> Annual Union Dues for a Full-Time employee= $540[24]

Regarding this flyer, Gonzales testified that he saw it posted on the bulletin board in the break room some time before the election, although he was not sure if it was hours, days, or weeks before the election (Tr. 79–83).

No additional evidence or testimony was elicited regarding this flyer. The Union argues that this flyer is objectionable conduct because it implies that employees would receive a 2 percent wage increase if there was no Union, since there is no evidence that a 2-percent wage increase had been discussed or agreed to in collective-bargaining negotiations. The Union additionally argues that since it had filed a grievance to obtain retroactive pay for some of its members, this flyer also implied that the Employer was promising to resolve such grievance, which the Union alleges was actually not resolved until July 2018, after the election. These

[22] Gonzales did not know the dietician's last name, but (Director of Dining Services) Raymond Gonzalez later testified it was Olivares (Tr. 300).

[23] Thus, a reading of his testimony in transcript pp. 64–65 shows Gonzales' tendency to ramble and be confusing—and not be clear about was exactly said, or by whom.

[24] The above is the exact wording on the flyer, but not an exact reproduction of the spacing or appearance of the flyer. A photo of the flyer was introduced into evidence (U Exh. 1(a)), as well as a photo of the bulletin board where it was placed (U Exh. 1(b)).

arguments are unpersuasive. I see no implicit, let alone an explicit, promise of a 2 percent (or any other amount) wage increase in the above message, which simply states that "*if* a 2% wage increase is agreed to in *bargaining*" (emphasis supplied) it would be the equivalent of what some employees pay in Union dues—the accuracy of which the Union does not dispute.[25] I likewise find no merit in the Union's argument that this message somehow represented a promise to resolve the Union's grievance in the employees' favor, which was not about a 2-percent wage increase. Indeed, I fail to see why the Union would object to the Employer accepting the merit of a grievance and agreeing to resolve it in its favor—which presumably, is exactly what the purpose of the grievance was in the first place.[26] Accordingly, I find no merit in this particular objection and recommend that it be overruled.

In support of Objection 4, the Union proffered evidence about three separate incidents which it alleges constitute promises of benefits by the Employer. First, it cites the testimony of employee Maria Hernandez, who testified she attended a meeting held at the facility on the same week of the election, where the Employer's CEO, Julianne Williams, spoke to assembled employees. According to Hernandez, Williams first stated said that they should give the company (or her) "a chance" by voting no in the election. Hernandez added that during the meeting, which was not mandatory and was attended primarily by registered nurses, LVNs and CNAs, one of the CNAs asked sick hours would be lost (if the Union was voted out), and Williams answered "no."[27] Another employee asked, similarly, if (accrued) vacation hours would be lost, and again Williams answered "no." Hernandez asked Williams about retroactive ("retro") pay for CNAs—which as discussed below, was the subject of ongoing negotiations and a grievance filed by the Union.[28] Williams demurred, saying that she did not know and could not respond to that. The following day, Hernandez testified, Assistant Administrator Phylicia Smith approached her and informed her that those CNAs that did not get their "retro" pay would do so. Finally, Hernandez testified that on the same day she was approached by Smith, the Employer distributed and posted a letter signed by Williams stating, inter alia, "you will not be denied your back pay raises given in 2017" (Tr. 194–198; 200–205; 212–213; U Exh. 6).[29]

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[25] Indeed, this "cost of dues" message is a tried and true one that employers have now been using during representation campaigns for some 40 years, and to my knowledge identical or similar messages have yet to be found objectionable by the Board (not surprisingly, the Union proffered no authority in support of its contention).

[26] Since it does not make sense for the Union to object to the Employer agreeing to settle the grievance in the Union's favor, what the Union truly objects to, it would appear, is that the Employer made the announcement first. The Union cites no authority for the proposition that such announcement amounts to a "promise" of a benefit.

[27] Hernandez clarified that the CNA had said to Williams, as she was asking the question, that there were "rumors" that accrued sick leave would be lost—in the context of the Union losing the election—and asked if that was the case, and Williams answered no. (Tr. 197–198.)

[28] Hernandez testified she asked about the "retro-pay" because she had attended the bargaining sessions between the Employer and Union where this topic had been discussed (Tr. 212).

[29] William's letter to employees, dated May 29, 2018, in pertinent part, reads as follows:

> . . , I respectfully ask for your "NO" vote.
>
> Why should you vote NO? As I explained, there are many untruths about what would happen if the union were to be voted out. First, you will not be denied your back pay for raises given in 2017. Although we do not agree with the union's interpretation, we have agreed to pay the additional increases. Second, we will not terminate your employment, replace you, or take away vacation, holidays, or other benefits should you choose to deal directly with Dycora. We intend to honor your service just we said we would when we assumed operations from Golden Living in December 2016. Telling you any different is a scare tactic … If you have any questions, please ask your assistant Administrator Phylicia Smith or Vice President of Operations Kristine Williams….

With regard to the above-described evidence, I note that Williams, in response to employee concerns fueled by rumors that they would lose their jobs, vacation or sick leave, or other benefits should the Union lose the election, simply denied that this would be the case. She did not promise any new or additional benefits, but only gave assurances that the status quo would be maintained. Thus, I do not view these statements as "promises" of rewards should the employees vote the Union out, contrary to the assertion of the Union, who proffered no authority that statements of this precise nature are unlawful or objectionable. Indeed, to rule otherwise would create an insidiously unfair and unbalanced situation where employers are forced to remain mute in the face of false, even vicious, rumors about doom if the union is rejected, be those rumors accidental or maliciously created.[30] Accordingly, I find no merit in this aspect of the objection and recommend that it be dismissed.

The second aspect of the allegation is that Williams, by informing employees in her May 29 letter that the Employer had agreed to pay the "retro pay" sought by the Union in its grievance, was in fact "promising" a benefit if employees voted the Union out. I likewise find this allegation unpersuasive. In that regard, I note that human resources (HR) consultant Keri Oviedo testified, credibly, that in April 2018, during (grievance) settlement discussions between the Union and the Employer, the parties had come to an agreement, in principle, to resolve the "retro pay" grievance.[31] Oviedo testified that she was present during the meeting in April where this "meeting of the minds" occurred, which left the "nuts and bolts" still to be worked out—such as exactly which employees were eligible, and what amounts they would receive. These negotiations regarding the actual language of the agreement continued during May and June, with attorneys exchanging drafts, Oviedo testified, with the final agreement being finalized in July (Tr. 349–350; 357–359; 366–369; R Exh. 5). In finding Oviedo's testimony credible, I note that no witness contradicted, or even addressed, her testimony, and that no other evidence was introduced to negate it.[32] Accordingly, by announcing that employees would be receiving the "retro pay" requested by the Union in its grievance(s), the Employer was not making a "promise" of an additional benefit in return for their rejecting the Union, but rather announcing that it had agreed to pay employees wages that were due pursuant to the collective-bargaining agreement with the Union. As briefly discussed above, the Union got what it was seeking in its grievance(s)—retroactive pay for the employees—and it should not now be heard to complain

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Please vote "NO" to union representation. (U Exh. 6.).

[30] It would thus be reasonable to assume that if an employer, faced with questions from employees about (false) rumors that they would lose all their benefits or pay should their union be decertified, simply stayed mute or said "we cannot address that," this response would certainly lead a typical, reasonable employee to assume the worse—that they were indeed about to lose those benefits. Needless to say, this would leave employers defenseless and might encourage and reward the malicious creation and spreading of false rumors.

[31] These grievances are reflected in the record in Union Exhibits 3(b) & (c).

[32] The Union argues that no "agreement" could have been reached in April because in May it filed a request to move the grievance to arbitration (U Exh. 4), a move that Oviedo testified surprised her (Tr. 368). I find this argument inapposite and unpersuasive. One of the oldest principles in the legal profession is that no lawsuit, complaint, grievance, charge or claim should ever be withdrawn until the ink is dry on a settlement, lest the moving party be left time-barred by a statute of limitations or other such rule if a settlement in principle subsequently falls apart. The Union's practice of advancing the case to arbitration by its May 22, 2018 letter can be reasonably explained by the need to preserve that cause of action, as well as by the time-honored practice of keeping the proverbial "fire under the feet" of the Employer to finalize their agreement. In sum, in no way does it contradict Oviedo's credible testimony that an agreement in principle to resolve the grievance(s) had been reached in April.

that the Employer—rather than the Union—got to announce such outcome first. Indeed, this could arguably serve as a classic example of being "hoisted by your own petard." Accordingly, I find this particular allegation has no merit, and recommend that it be dismissed.

The Union next asserts that what occurred during an encounter between its organizer, Ignacio Cortez, and dining services director Raymond Gonzalez, constituted an objectionable promise that employees would receive better pay without the Union. Cortez, an organizer assigned by the Union to help rally support for the Union during the preelection period in May, testified that around May 25 he was meeting with 3 employees, Guadalupe Gutierrez, Bette Torres and Julie Vasquez, in the break room. Gutierrez asked Cortez why the Employer was paying them (its employees) so little. At that point Gonzalez, who was sitting at a nearby table, interjected and said "if you wouldn't be union, I could get you more money." Cortez asked Gonzalez why he was saying that, and Gonzalez replied that with the (collective bargaining) contract he could not pay them more. According to Cortez, there were no other employees (besides the three he was speaking to) in the break room at the time. Gonzalez testified that although he had several conversations with Cortez in the break room during this period, he never told Cortez—or any employees present at the time—that employees could make more money or could benefit without the Union (Tr. 238–244; 246–247; 309–311). No other witness testified about this alleged incident.

Based on the above scenario, I conclude that I need not make a credibility resolution between the 2 witnesses who contradicted each other, because even if I credited Cortez' version, the alleged conduct would not be objectionable.[33] Thus, applying the factors discussed by the Board in *Cambridge Tool*, supra, I note that the following: (1) there was only one incident of this nature; (2) there is no evidence whatsoever of dissemination; (3) only 3 employees were present during the incident, in a unit comprised of approximately 183 employees; (4) the results of the election were not close, with the Union losing by a margin of 32 votes out of 116 votes cast; (5) the alleged statement by Gonzalez wasn't of a "severe nature" likely to cause fear among the employees; and (6) there is no evidence that the conduct persisted in the mind of employees—in this case, only the three who were present. Considering the above, I conclude that it is exceedingly unlikely that this conduct would have interfered with the employees' freedom of choice or that it could have affected the outcome of the election. Accordingly, I find no merit in this part of the objection and recommend that it be overruled.

Finally, the Union alleges that during the same employee meeting where Williams spoke, (and testified about by Hernandez) as described above, Williams promised that employee wages

[33] Should the Board decide that a credibility resolution is required, I make the following observations: It is reasonable to infer that to the extent that any bias by either witness exists, Cortez has one in favor of the Union and that Gonzalez has one in favor of the Employer, so any possible bias as a factor is mutually neutralized. There was nothing in the demeanor of either witness that would lead me to believe that one was being truthful but not the other, nor any inconsistencies or contradictions in their testimony that would lead me to find one less reliable than the other. Nonetheless, I note that according to Cortez' testimony the event was witnessed by three employees who were speaking with him at the time, yet they did not testify and thus did not corroborate his testimony, which tends to lessen its credibility. In any event, even assuming both witnesses were equally credible, the Union bears the burden of proof in this situation, which it has failed to carry because I cannot credit its witness (Cortez) over the Employer's (Gonzalez). Accordingly, I would have to conclude that Gonzalez' testimony would carry the day, and that the facts do not support the Union's version of this event.

would be raised if the Union was voted out. This allegation is different from the above-described ones in one distinctive way: the testimony came from a witness called by the employer, Rosalinda Lorona, who is the Petitioner in Case 32–RD–213130. Lorona's testimony is difficult to summarize, because it was scattered and often seemingly contradictory. Initially, in answering a general question as to whether the Employer made any threats or promises during the preelection period, Lorona specifically testified that no threats or promises had been made. She was then asked if she attended a meeting in the days prior to the election, and she testified that she was present at a meeting where Williams spoke. The following are excerpts of the salient parts of her testimony:

> THE WITNESS: She just introduced herself as Julianne.
>
> JUDGE SOTOLONGO: All right. Okay. Tell us what she said.
> THE WITNESS: Yeah. She had just told us that if the Union was no longer part of our facility, that that don't mean that we're going to all automatically get raises or any kind of anything until it's all settled -- it was basically like she'll go back and try to catch us up to our pay… (Tr. 395.)[34]

Her testimony later continued as follows:

> THE WITNESS: Okay. Well, an employee did ask a question.
> JUDGE SOTOLONGO: Okay.
> THE WITNESS: Are we going to get raises?
> JUDGE SOTOLONGO: Okay.
> THE WITNESS: And –
> JUDGE SOTOLONGO: So she said that in response and –
> THE WITNESS: -- she said, yes, that they will be coming but not all at once. They're going to have to look at, you know, the service. Like I've been there for eight years and I should be brought to my pay where I should be at compared to other facilities that are not union. And but she said, like, that's not going to happen overnight. It's going to take some time, but eventually everybody will start getting, you know, raises as we're supposed to. You know, with our evaluations as most companies do.
> JUDGE SOTOLONGO: And is that what she said? She said that eventually we will give you raises? Was that in connection to -- well, go ahead. Tell us what else she said.
> THE WITNESS: She was just clarifying any kind of questions or concerns that we had. It wasn't in great detail. I mean, we didn't stay on that subject long because we did have other subjects to talk about, about the facilities and, you know, our ins and outs of what needs to be done on a daily basis.
> JUDGE SOTOLONGO: Okay. Go ahead.
> MR. FOSTER: If I can ask?
> Q. BY MR. FOSTER: So just what—did she specifically say that promise -- that raises were coming? What specifically --

[34] The copied portions of the transcript are not sequential; there are parts that are skipped because they reflect the witness injecting unnecessary background information, or explaining her motivations or inner thoughts, or reflect objections and arguments related to those objections, which add little, if anything, to the substance of the testimony. Additionally, some of the omitted portions also deal with my often futile (and sometimes clumsy) attempts to instruct the witness to stay on course and simply repeat what was said rather than summarize or inject her motivations or other unnecessary information.

A. No.
Q. — did she say?
A. She didn't promise. That's one thing she told us. I can't promise you, but, you know, look at with any business. You know, if you do a good job, your yearly evaluation, you know, if you deserve that raise you get it or however that

She further testifies as follows:

THE WITNESS: She said they would have to look into it and bring us up, you know, the ones who need to be brought up, be brought up, but not everybody can because they can't afford that. Obviously, that's too many of us. So that's what she told us.
JUDGE SOTOLONGO: You also mentioned before there was something said about evaluations. What did she say about that?
THE WITNESS: Yeah, well, before we used to get yearly evaluations and little raises with those. Well, we haven't had those in a very long time. So they had asked is that going to happen again? And once again she said, they have to look into it and that would probably be happening.
JUDGE SOTOLONGO: That would probably be happening? Okay.
THE WITNESS: Well, take out probably, but I mean, she's saying that was most likely will be happening because, I mean, we deserve our raises so.
JUDGE SOTOLONGO: Okay. And so her exact words was this would likely be happening?
THE WITNESS: Yes.
JUDGE SOTOLONGO: Or did she say we had to take a look at this in --
THE WITNESS: Yeah, she did say they had to look at their finances. I mean, not everybody can get raises because that would be a lot of raises at once. (Tr. 406–408.)

Williams testified that she was the CEO of the Employer, since it assumed operation of the Fresno facility in December 2016. She visited the facility on May 29, 2017 and spoke to a nonmandatory gathering of employees on the second-floor dining room of the facility. She testified that at the meeting she addressed concerns raised by the employees, who asked her if they would be fired, or if their sick leave or vacation hours would be cut or eliminated should the Union be voted out. She told them these rumors were not true, that the Employer had no intention of doing such things or of hurting employees in any way. She stressed that she could make no promises and stated that there would be no retaliation of any type regardless of how employees voted in the election. She told them to look at how everything had been kept the same when the operations of Golden Living, the predecessor employer, had been taken over by Dycora. In response to a question by an employee, and consistent with Hernandez's testimony, as described earlier, Williams also informed employees that the Employer would pay them the retroactive wages that had been the subject of negotiations with the Union, as the Employer had agreed to do. Williams further testified that an employee asked if they would be getting raises, and she stressed that she could not address that issue or make any promises, but did say that employees could ask staff in their nonunion facilities about their wages and benefits, again stating that she could not promise any raises. Williams specifically denied that she ever said that she would "look into" or "consider" providing them a (wage) raise, or stating that raises would be provided to employees gradually over time, or saying that raises would be considered depending on the outcome of the election (Tr. 435–445).[35]

[35] Williams also testified that she said that the Employer did provide annual (wage) raises, but also said that she could not promise that the same thing would happen with them (Tr. 462).

Clearly, there is a direct conflict between Lorona's testimony and that of Williams regarding what Williams said about future wage increases in the event that the Union was no longer the employees' representative. In assessing credibility, I must look to a number of factors, including but not necessarily limited to, inherent interests and demeanor of witnesses, corroboration of testimony and consistency with admitted or established facts, inherent probabilities, and reasonable inferences that may be drawn from a record as a whole. *Hill & Dales General Hospital*, 360 NLRB 611, 615 (2014); *Daikishi Corp.*, 335 NLRB 622, 633 (2001), enfd. 56 FedAppx. 516 (D.C. Cir. 2003). Moreover, in making credibility resolutions, it is well established that the trier if fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2 Cir. 1950). In this instance, I conclude that Lorona's testimony is not as credible or reliable as that of Williams. In so concluding, I note the following: first, Lorona appeared to contradict herself at times, repeatedly asserting on the one hand that Williams made no promises yet testifying that she said that employees would indeed receive wage increases over time, depending on their evaluations and other factors. In listening to and reviewing Lorona's testimony, I formed the impression she had trouble distinguishing between what she actually heard Williams say and what she interpreted her as saying, and what Lorona "read into" Williams' words appear to have impacted her recollection months after the events. Williams provided a far more straightforward and detailed account of what she said during the meeting in question, far more certain in her description of what actually took place. Indeed, it appears that Williams had, prior to the meeting, been well-counseled on what she could and could not say during the pre-election period, and that she was careful in choosing her words in answering the employees' questions. Moreover, and just as importantly, I note that Hernandez, a Union witness who testified about what Williams had said during this meeting, did not corroborate or confirm Lorona's version of events—indeed, no other employee did, despite the fact approximately 50 employees were present. In these circumstances, I find that Williams, as she testified, did not say or imply that employees would be receiving future wage raises if the Union was voted out.

Accordingly, and for these reasons, I conclude that this aspect of objection 4 also has no merit, and I recommend that objection 4 be overruled.

Objection 5:

Dycora and its agents solicited grievances and made an implied promise to remedy them.

In support of this objection, the Union proffers the testimony of Lorona, who testified that during the meeting in May described above, Williams stated that employees could "ask her any questions," and that she had "an open door policy, which you know, at any moment any of us could go into her office or give her a phone call, and she will answer anything to her best knowledge" (Tr. 397–398). Additionally, the Union argues that in her May 29 letter, Williams again informed employees that they could ask other managers any questions (U Exh. 6). These facts are not in dispute, since Williams did not deny telling employees they could come to her for any questions—and the May 29 letter, which extends the same invitation, speaks for itself.

The Union argues that telling employees they are free to come in to see or call Williams (or other managers) if they had any questions about the election represents a solicitation of grievances and an implied promise to remedy such grievances. I disagree. The Union has proffered no authority for the proposition that telling employees they are free to ask questions—or words to that effect—represents a solicitation of grievances, let alone an implied promise to remedy them. Indeed, from a linguistic or legal standpoint, I find it hard to imagine that any employee could reasonably interpret such words as a solicitation, since it only invites employees to ask questions, not list or recount their grievances. Simply put, those words do not represent a solicitation, let alone an implied promise of a resolution. Accordingly, I find no merit to this objection, and recommend that it be overruled.

Objection 6:

Dycora and its agents questioned and polled employees regarding their support for the Union during the critical period.

In support of this objection, the Union proffered the testimony of Gonzales, who testified that sometime during the month before the election, a barbeque (BBQ) was held at the facility.[36] During the BBQ, "secretaries" were going around giving away "Vote No" buttons, and one of them pinned one of these buttons on Gonzales (Tr. 68–70; 75–77)). Additionally, Gonzales testified that some individuals wearing antiunion buttons offered him candy. Gonzales did not know the names or positions of these "secretaries" or other individuals offering candy, and his description of them is extremely vague, to say the least. Based on this testimony, the Union argues that the Employer had its "agents" were polling employees. The Union proffered not a scintilla of authority (or reliable evidence) to support the proposition that these unknown individuals were "agents" of the Employer, although it is clearly its burden to do so.[37] For all the record shows, these individuals could have been bargaining unit employees expressing their viewpoint about the Union, which they clearly had the right to do. Accordingly, I recommend that this part of the objection be overruled.

Additionally, the Union cites the testimony of Hernandez, who testified that the assistant administrator approached her with a box of candy and offered her one. Hernandez took one candy, saying thank you. At that point, the assistant administrator told her to look at what it said in the back (of the wrapper, presumably), which said "vote no" (Tr. 205–206). This testimony was not contradicted by anyone, including the Assistant Administrator. Contrary to the Union's argument, I do not view this incident as representing a "polling" of employees. Unlike cases where the Board has found that employers offering employees antiunion buttons to wear represents a type of polling or interrogation, I view this offer of candy as a request to vote no, which the Employer is entitled to do. Unlike a button, which by displaying or not displaying an employee is compelled to reveal his/her views, a candy is consumed and presumably disappears

[36] I note that Gonzales also testified that the Employer had a practice of holding BBQs throughout the year on different occasions, and that other witnesses testified that it always held one during the Memorial Day weekend.

[37] The Union appears to imply that because Raymond Gonzalez, the head of the dietary department, was the cook at the BBQ, this fact somehow transformed this entire event into an antiunion event and anyone who distributed "vote no" buttons was transformed into an "agent" of the Employer. Again, the Union proffers no authority for this stretch of an argument, which I reject.

from view, ultimately revealing nothing about an employee's sentiments.[38] Moreover, even if this conduct could be viewed as a type of polling or interrogation, the Union proffers no argument, or supporting evidence, as to how this isolated incident would be objectionable under the multipronged *Cambridge Tool* criteria, as discussed above. Accordingly, I recommend that this portion of the objection be overruled.

In light of the above, I find no merit to Objection 6 in its entirety and recommend that it be overruled.

Objection 8:

Dycora and its agents changed terms and conditions of employment of eligible voters during the critical period.

This objection tracks the allegations of paragraphs 7(a) and (b) of the complaint, which alleged that the Employer violated Section 8(a)(5) and (1) of the Act by unilaterally making changes to the schedule of dietary department employees and by discontinuing the practice of allowing employees to eat left-over food after the facility's residents had been fed. The facts regarding these allegations were previously discussed in Section II of this decision dealing with these unfair labor practice allegations and need not be repeated here.

As previously discussed at the beginning of this section, an unfair labor practice committed during the critical period is considered objectionable conduct that interferes with the results of the election unless it is so de minimis that it is virtually impossible to conclude that such conduct could have affected the results of the election, *Intertape Polymer*, supra. With regard to the allegation that the Employer unilaterally changed the schedule of dietary department employees, I concluded that this conduct did *not* violate the Act, and recommended that it be dismissed, so the *Intertape Polymer* rationale is not applicable. More importantly, even assuming such conduct violated the Act, it would still not be objectionable conduct because it did not occur or take place during the critical period. As previously discussed, conduct outside of the critical period is not objectionable except in exceptional circumstances not applicable here. In this instance, the change in the schedule of dietary department employees was announced on December 28, 2017, implemented on January 9, 2018, and rescinded within 2 hours on that same date. The critical period began 8 days later, on January 17, 2018—the date the petition was filed in Case 32–RD–213130. Accordingly, the alleged conduct took place, and was rescinded and ceased, before the critical period had begun. Such conduct is therefore not objectionable, and I recommend that this part of the objection be dismissed.

Regarding the allegation concerning the Employer's food consumption policy, I found such conduct to be in violation of Section 8(a)(5) and (1) of the Act, as previously discussed. For the following reasons, however, I find that this conduct is likewise not objectionable. First, I note that this policy was announced and implemented on December 28, 2017, almost 3 weeks before the critical period commenced on January 17, 2018. Nonetheless, it can be argued that this unfair labor practice continued (i.e., that it was a "continuing violation") past the beginning

[38] Indeed, it could be argued that a union supporter's ultimate "revenge" would be to gleefully consume all the candy with the antiunion message, and then proceed to vote for the Union.

of the critical period, since it was in place until February 16, 2018, at which time the policy was rescinded. Even if this conduct was still "in place" and thus occurring during the early part of the critical period, however, I would still conclude that it was so de minimis that it is virtually impossible to conclude that it could have affected the results of the election. In so concluding, I note that this conduct, which as noted began before the critical period commenced, came to an end on February 16, 2018, almost 4 months before the election was conducted on May 31, 2018. Moreover, it affected a small portion of the bargaining unit—the dietary department, which consisted of 22 employees in a bargaining unit consisting of approximately 183 employees.[39] Additionally, I would note that there is no evidence that there was dissemination of this conduct among bargaining unit employees, much less that it lingered in their minds—and absolutely no evidence, or reason the infer, that it caused "fear" in bargaining unit employees. Indeed, I would note that no one even bothered to report this change to the Union. The Union first learned of this change in mid-February 2018, when Union Agent Pauline Grant visited the facility to meet with Administrator Evans (regarding the shift change that had already been rescinded) and noticed employees had brought their own food. She then asked an employee what was going on and learned that the food consumption policy had been changed. Grant then brought it to Evans' attention and the policy was rescinded shortly thereafter, on February 16, 2018. This scenario strongly suggests that very few employees were affected, that most were apparently not aware of the meal policy to begin with, and that no one was particularly concerned enough to bring it to the Union's attention—certainly not an indication that this was an issue that lingered in employees' minds or that caused fear.[40] Combine those facts with the event's remoteness in time (almost 4 months before the election, as indicated), and the margin of the Union's defeat in the ballot count, and it is virtually impossible to conclude that this conduct could have affected the results of the election. Simply put, the Board has never suggested, let alone ruled, that voters could be so fragile so as to be impacted by events so remote in time and so limited in scope. In these circumstances, I conclude that the change in the meal consumption policy, first announced implemented about 3 weeks before the commencement of the critical period, and rescinded almost 4 months prior to the election, was not objectionable conduct.

Accordingly, and for the above reasons, I conclude that objection 8 lacks merit, and recommend that it be overruled.

Objection 9:

> Dycora discriminatorily applied an unlawful solicitation rule during the critical period by allowing Petitioner's supporters and or managers to engage in solicitation while on working time and in-patient care areas, allowing them to wear anti-union button/stickers, while maintaining that (sic) a non-solicitation policy that prohibited eligible voters from wearing pro-union stickers.

[39] A few CNAs may have been affected as well, but in accordance to the practice, those were only allowed to consume left-over food in special circumstances, such as when they had back-to-back shifts, and only if they had a "slip" allowing them to get a meal. No evidence was proffered as to how often this occurred, or how many CNAs may have been involved.

[40] Indeed, this change in policy was announced only to dietary department employees by Gonzalez, who had them signed the memo acknowledging the new policy. I note that only 18 employees signed the memo (GC Exh. 5).

In support of this objection, the Union proffers the testimony of employees Gonzales and Hernandez, and Union Organizer Cortez, who testified that they observed numerous employees and in some cases managers of the Employer wearing or distributing anti-Union buttons. The Union then cites the Employer's handbook, which states that "Solicitation and or/distribution of literature by one employee to another employee is prohibited while either person is on working time or in immediate patient care areas" (R. Exh. 4, p. 33). Regarding this allegation, I first note that there is nothing unlawful in this rule—and indeed the General Counsel did not allege the existence of any rule contained in the employee handbook, including this one, as unlawful. Hence, the Union's objection might be valid if there was evidence that this rule was *discriminatorily* applied or enforced, such as by permitting employees who did not support the Union to violate this rule while enforcing it against those employees who were Union supporters. The existential problem here is, however, that there is not even an iota of evidence supporting such discriminatory enforcement or application of the rule(s) in question.[41] To the contrary, as admitted by Union witness Cortez (Tr. 275–276), many employees openly wore prounion buttons, attire and other paraphernalia, as well as anti-Union buttons, during the preelection period. Simply put, there is no evidence that the Employer in any way interfered with employees' right to express their pro or antiunion views by wearing or distributing items that reflected their views.

Accordingly, I conclude that this objection lacks merit and recommend that it be overruled.

Objection 10:

Dycora and its agents provided unlawful aid and assistance to the Petitioner and/or supporters of the Petitioner, including by allowing them to use the Employer's bulletin board to solicit and distribute literature but prohibiting the Union from doing the same.

In support of this objection, The Union again cites the testimony of Cortez, who testified that he observed antiunion literature posted in the Employer's bulletin board by a receptionist named Cassie Mendoza. The Union then cites an employee handbook rule, which states as follows: "Bulletin boards are used by management to communicate information about wage and hour laws, equal employment opportunity, health and safety, company policies, business announcements and all other official communications that affect this center or your job . . . To avoid confusion, employees may not tape, post, tack or affix in any other way literature, printed or written materials, photographs or personal notices on company bulletin boards, on the walls or else on company property" (U. Exh. 4, p. 33). Based on the above, the Union argues that since the Union is allowed to post materials only on its bulletin board, and not allowed to post its materials elsewhere, and the employer was permitting antiunion employees to post materials in the Employer's bulletin board, this "interfered with laboratory condition," and is thus—presumably—objectionable. There are multiple flaws with both the facts proffered in support of this objection as well as the premise that the above conduct, even if true, is objectionable conduct that warrants overturning the results of the election. First, I note that Cortez, as a Union organizer, was the least qualified witness in terms of establishing what the Employer's history,

[41] As discussed below, there is indeed no evidence that the Employer's employee handbook was actually distributed to employees or that they were aware of its existence.

practices and policies were, having been present only for a short period of time at the facility prior to the election.[42] He admitted that he never tried posting prounion literature in places or bulletin boards *other* that the union bulletin board, where he posted various flyers (Tr. 257).[43] Thus, his testimony that the Union (or its supporters) were not in fact permitted to post literature elsewhere simply is unpersuasive—and given little weight. Moreover, other than the single incident where he saw Mendoza, the receptionist, posting anti-Union literature in the Employer's bulletin board, there is no evidence that this was common practice or occurring repeatedly.[44] I note, in that regard, that Cortez did not testify how long the literature posted by Mendoza in the Employer's bulletin board remained there, so it's unknown whether it was taken down 20 minutes later or remained there for weeks. Accordingly, I conclude that the factual underpinnings of the Union's allegation are extremely weak—and that is being generous. From the analytical framework standpoint, the case is just as weak. Thus, although the Union alleges that the Employer's alleged conduct interfered with the "laboratory conditions," required during the critical period, the Union fails to explain exactly how—since it failed to apply the multi-pronged criteria set forth in *Cambridge Tool* showing that the alleged conduct, taken as a whole, warrants a new election because it has "the tendency to interfere with employees' freedom of choice" and "could well have affected the outcome of the election" *Cambridge Tool & Mfg. Co.*, supra; *Metaldyne Corp.*, supra.[45] Given the above facts, I find that it fails to meet such criteria.

Accordingly, I find that objection 10 has no merit and recommend that it be overruled.

Objection 11:

Dycora, during the critical period, maintained unlawfully overbroad rules which interfered with employee free choice and destroyed laboratory conditions for a fair election.

In support of this objection, the Union cites the existence of a rule in the Employer's employee handbook which, in pertinent part, states as follows: "The computer and telephone systems are important assets and have been installed to facilitate business communication. Although you may be able to use codes to restrict access information left on the systems, it must be remembered that these systems are intended solely for business use…Some positions may be

[42] Cortez thus testified that he was first assigned to the facility in early May and was present there every other day at first and then every day during the week before the election, but only in the break room (in the basement), the only place where he was allowed to be. He testified he was present at the facility about 8 hours per day when he was there. (Tr. 225; 228–229; 253.)

[43] Indeed, Cortez testified that he not only posted various flyers, but also distributed union literature to employees in the break room—and left such literature at the tables there.

[44] Cortez also saw antiunion literature posted in the refrigerator, but did not see who posted it

[45] I would note that this failure to apply the *Cambridge Tool* criteria was repeated in objection after objection. Although the Union cited this criterion in setting forth the analytical framework to be applied at the beginning of its brief, it failed to apply the criteria when discussing the evidence in support of each objection, and thus did not discuss how the evidence proffered matched the criteria required to conclude that the alleged conduct likely affected the results of the election. Rather, the Union simply alleged that the Employer, for example, had done "X," claimed it was objectionable, and left it to the decision maker to figure out why—presumably by applying the *Cambridge Tool* criteria. In this regard, I would note that the party filing objections not only has the burden of proof to establish that certain conduct has occurred, but also the *burden of persuasion* to establish that such conduct satisfied the criteria under *Cambridge Tool* and was therefore objectionable. I find the Union failed to meet these burdens.

authorized to have Internet access for business reasons. Internet use must be reserved for business purposes only" (U Exhs. 2; 4) Citing *Jurys Boston Hotel*, 356 NLRB 927 (2011), the Union argues that this rule is overbroad and therefore unlawful—and objectionable--because it prohibits employees from using computers and the Internet to engage in conduct protected by Section 7 while off duty. The "overbroad' rules in *Jurys Boston*, however, involved restrictions on solicitation, the wearing of union buttons, and "loitering," the type of overly broad rules that have long been held unlawful by the Board. By contrast, the Board has found rules prohibiting the use of communication systems such as email and phone systems unlawful only if employees have access to those systems to begin with, and/or when the rules are discriminatorily applied or enforced. See, e.g., *Purple Communications, Inc.*, 361 NLRB 1050 (2014), and multiple cases discussed and cited therein. There is no an iota of evidence in this case that employees have access to either computer or telephone systems, or evidence that such access, assuming it exists, was discriminatorily enforced or applied.[46] Moreover, even assuming that some unit employees had access to and did use these systems, I am not persuaded, in light of the multi-pronged criteria set forth in *Cambridge Tool*, that the mere existence of the rule(s) would warrant a new election because it had the "tendency to interfere with the employees' freedom of choice" and "could well have affected the results of the election." In that regard, I note that the Board has found that the mere maintenance of an invalid rule may be an insufficient basis on which to overturn election results. See, e.g., *Delta Brands, Inc.*, 344 NLRB 252, 253 (2006); *Safeway, Inc.*, 338 NLRB 525, 525-526 (2002). In this case, given the speculative nature of how many employees—if any—were actually affected by the rule(s); the fact that the Union and its supporters had various alternative avenues of reaching bargaining unit employees, including use of a bulletin board and frequent jobsite visitation by union agents during the pre-election period; the lack of closeness in the vote; and the lack of evidence of dissemination or lingering "fear," among bargaining unit employees, I find that it cannot be reasonably concluded that this conduct could well have affected the results of the election.

Accordingly, and considering the above, I find that objection 11 lacks merit and recommend that it be overruled.

Based on my findings and conclusions as discussed above, I recommend that objections 4, 5, 6, 8, 9, 10, and 11 be overruled. Accordingly, because the conduct alleged in these objections does not warrant setting aside the election, I direct that, in the absence of exceptions to my recommended Order, Case 32–RD–213130 be severed from Case 32–CA–215700 and remand Case 32–RD–213130 to the Regional Director to process this matter in accordance to this recommended Order and to issue an appropriate certification.

[46] In this regard, it is notable that the General Counsel has not alleged the rule(s) in question as unlawful. Indeed, it is difficult to ascertain, given the nature of the Employer's business (operating a nursing home) and the nature and description of the bargaining unit positions, how many employees would normally have access to—let alone actually use—a computer or even a telephone system at work. I cannot and will not make an inference, let alone a presumption, that employees in fact have access to these systems, for the Union bears the burden of proof in this instance, particularly in light of the fact that it is seeking to overturn the results of an election.

CONCLUSIONS OF LAW

1. Dycora Transitional Health—Fresno, LLC (Respondent) is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

2. Service Employees International Union, Local 2015 (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing to notify or bargain with the Union before discontinuing its practice of allowing employees to consume left-over food after residents had been fed, Respondent failed and refused to bargain with the Union, in violation of Section 8(a)(5) and (1) of the Act.

4. Respondent did not otherwise violate the Act as alleged in the complaint.

5. Respondent did not engage in objectionable pre-election conduct that warrants setting aside the results of the election.

REMEDY

The appropriate remedy for the 8(a)(1) violations I have found is an order requiring Dycora Transitional Health—Fresno, LLC (Respondent) to cease and desist from such conduct and take certain affirmative action consistent with the policies and purposes of the Act.

Specifically, having found that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to bargain with Service Employees International Union, Local 2015 (Union) before discontinuing its practice of allowing employees to consume left-over food after residents had been fed, I shall recommend that Respondent be ordered to cease and desist from such conduct. Additionally, Respondent will be required to post a notice to employees, in English and Spanish, assuring them that Respondent will not violate their rights in this or any other related manner in the future. Finally, to the extent that Respondent communicates with its employees by email or regular mail, it shall also be required to distribute the notice to employees in that manner, as well as any other means it customarily uses to communicate with employees.

Accordingly, based on the forgoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended[47]

ORDER

Respondent, Dycora Transitional Health—Fresno, LLC, Fresno, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[47] 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.

(a) Failing and refusing to bargain with the Union before discontinuing its practice of allowing employees to consume left-over food after residents had been fed.

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

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

(a) Within 14 days after service by the Region, post at all its facility in Fresno, California, where notices to employees are customarily posted, copies of the attached notice marked "Appendix."[48] Copies of the notice, on forms provided by the Regional Director for Region 32, 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, the 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities 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 December 28, 2017.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 32, 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.

I further recommend that the Board overrule the objections in Case 32–RD–213130 and certify the results of the election held on May 31, 2018. In the absence of exceptions to this decision and order, Case 32–RD–213130 shall be severed from the unfair labor practice case herein and, shall be remanded to the Regional Director for action consistent with my findings and Order.

Dated: Washington, D.C. February 28, 2019

Ariel L. Sotolongo
Administrative Law Judge

[48] If this Order is enforced by a Judgment of the 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."

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.

In recognition of these rights, we hereby notify employees that:

WE WILL NOT implement any changes in the wages, hours, or working conditions of our bargaining unit employees, including discontinuing our practice of allowing employees to consume left-over food after residents had been fed, without first notifying the Union and giving it an opportunity to bargain.

WE WILL, upon request, bargain with the Union as the exclusive collective bargaining representative of employees in the following appropriate bargaining unit concerning terms and conditions of employment:

All full-time and regular part-time certified nursing aides, nursing assistants, restorative nursing aides, cooks, dietary aides, activity assistants, and receptionists employed by Respondent; excluding registered nurses, licensed vocational nurses, social service assistants, central supply clerks, office clerical employees, confidential employees, professional employees, guards, and supervisors as defined in the Act.

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

DYCORA TRANSITIONAL HEALTH—FRESNO LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Oakland Federal Bldg., 1301 Clay Street, Room 300-N, Oakland, CA 94612-5211
(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/32-CA-215700 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.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (510) 671-3034.