

Nos. 08-70234, 08-70793 & 08-71242

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NEVADA SERVICE EMPLOYEES UNION, LOCAL 1107, SEIU

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

and

VALLEY HOSPITAL MEDICAL CENTER, INC.

Intervenor

VALLEY HOSPITAL MEDICAL CENTER, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

NEVADA SERVICE EMPLOYEES UNION, LOCAL 1107, SEIU

Intervenor

**ON PETITIONS FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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**BRIEF FOR
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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The National Labor Relations Board (“the Board”) had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”), which empowers the Board to prevent unfair labor practices. This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)) because the unfair labor practice occurred in Las Vegas, Nevada. The Board’s Decision and Order issued on December 28, 2007, and is reported at 351 NLRB No. 88. (D&O 1-13.)¹ The Board’s Order is a final order under Section 10(e) and (f) of the Act.

Nevada Service Employees Union, Local 1107, SEIU (“the Union”) filed its petition for review on January 18, 2008. Valley Hospital Medical Center, Inc. (“the Hospital”) filed its petition for review of the Board’s Order on February 26, 2008. The Board filed its cross-application for enforcement of its Order on March 24, 2008. The Union intervened on behalf of the Board’s position against the Hospital on April 17, 2008, and the Hospital intervened against the Union’s

¹ References in this brief are to the original record. “D&O” refers to the Board’s Decision and Order, which includes the attached decision of the administrative law judge. “Tr” references are to the transcript of proceedings before the administrative law judge. “GCX,” “RX,” and “CPX” are references to the exhibits of the General Counsel, the Hospital, and the Charging Party, respectively, that were admitted at that hearing. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

petition for review on April 7, 2008. All filings were timely, as the Act places no time limitation on filing for review or enforcement of Board orders.

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that the Hospital violated Section 8(a)(3) and (1) of the Act by discharging union steward Joan Wells for her criticism of the Hospital regarding nurse staffing because that criticism was protected by Section 7 of the Act.

2. Whether the Board acted within its broad remedial discretion in rejecting the Union's request for additional remedies.

STATEMENT OF THE CASE

Acting on a charge filed by the Nevada Service Employees Union, Local 1107, affiliated with the Service Employees International Union, the Board's General Counsel issued a consolidated complaint, alleging, among other things, that the Hospital had violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging Joan Wells because of her union activities.² (D&O 6; GCX 1(ai).) The Hospital filed an answer denying the allegation. (D&O 6; GCX 1(ak).)

² The consolidated complaint included a number of other allegations that were subsequently withdrawn at the hearing. As a result, the only matter tried at the hearing was the lawfulness of Wells' discharge. (D&O 6.)

An administrative law judge conducted a hearing and concluded that the Hospital violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging Wells because of her public complaints about nurse understaffing. The Hospital filed exceptions to the judge's determination. The Union filed exceptions to the remedy recommended by the judge. The Board considered the Hospital's and the Union's exceptions, set forth its own analysis of the violation, and adopted the judge's recommended order as modified. (D&O 1-13.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background

Valley Hospital Medical Center operates a full service hospital providing inpatient and outpatient services in Las Vegas. (D&O 6; GCX 1(ai), (ak).) The Union became certified as the collective-bargaining representative of the Hospital's registered nurses in 1999 and, thereafter, entered into a succession of collective-bargaining agreements with the Hospital. The latest of these agreements was effective from June 1, 2004 to May 31, 2006. In April or May 2006, the parties commenced negotiations over a successor collective-bargaining agreement. Those negotiations did not result in a quick agreement and continued into the fall of 2006, in part because the parties could not resolve certain staffing

issues. (D&O 6; CPX 1.)

B. Wells' September 13 Statements

Joan Wells, a registered nurse in the Medical Intensive Care Unit (“MICU”), and the Union’s chief steward and executive vice president, was a member of the Union’s negotiating committee. (D&O 1, 6; Tr 113-20, 129-33, 143-46, 209.)

On September 12, during the course of its negotiations with the Hospital, the Union held a rally and press conference to release a report that compared and ranked the performance of the Hospital, along with that of others in the Las Vegas area. (D&O 1, 7; Tr 222-26.) In the report, the Union assigned grades to local hospitals based on data taken from a hospital reporting agency. The Union gave the Hospital a grade of “F.” (D&O 1, 7; GCX 6.)

On September 13, the Las Vegas Review Journal, a local newspaper, reported on the Union’s rally and press conference in an article entitled “Hospital nurse-to-patient ratio rated,” and subtitled “Report called bargaining ploy of labor unions.” In that article, the newspaper reported the grades that the Union had assigned to the various hospitals, including the “F” grade given to Valley Medical, and the response of hospital administrators. Quoting a representative of the Hospital, the article noted that the Hospital stated that: “We regret that the [Union] attempted to discredit hospitals in The Valley Health System by taking data out of context and manipulating it to achieve bargaining goals.” (D&O 1, 7; RX 1.) The

article also quoted Wells as stating that because of a shortage of nurses at the Hospital: “You don't get medications to patients on time. They (patients) could be lying in their own excrement for who knows how long. You can't even do the basic things you want to do.” (D&O 1, 7; RX 1.)

The article quoted another management spokesperson, who opined: “It's no coincidence that highest grades go to the hospitals with a contract [with the union] and the lowest go to the hospitals with the most difficult negotiations.” The article went on to point out that “[i]n 2004, Nevada was second to California for the worst registered nurse-to-population ratios in the nation, according to the U.S. Department of Health and Human Services.” (D&O 1, 7; RX 1.)

Also on September 13, the Union published an online story by Wells on its website. In that story, Wells asserted, among other things, that:

The level of care for patients at Valley Hospital is a growing concern because management isn't giving us the staff we need. Here's an example: In the past, there were four Telemetry Technicians that would watch the heart rhythms for all of the patients in the hospital. Recently, the hospital has cut staff down to two people on most days.

This means that one person is watching the heart rhythms for the twenty-five critically ill patients in the Medical ICU plus about 44 other hospital patients, and the other technician is watching the heart rhythms of all remaining patients in the hospital. Do you want to be one of one hundred sixty-nine people depending on one overworked Telemetry Technician?

On medical-surgical floors, nurses may have eight or more

patients. An irregular heartbeat can develop quickly, and fast action is needed. This means that without the help of technicians watching patients' heart rhythms a patient could have a heart attack and possibly die.

UHS, the for-profit company that owns Valley Hospital, makes more than enough money to pay for additional staff. Right now, they are choosing not to, and that's just not acceptable. As nurses and patient advocates, we're committed to fighting for safe and enforceable staffing ratios. (D&O 1-2, 7; RX 2.)

Following publication of the September 13 newspaper article and Wells' online story, Human Resource Director Dana Thorne and Chief Nurse Michelle Nichols directed Antoinette Pretto, the Hospital's risk manager, to investigate Wells' assertions. Pretto interviewed Wells in early October. Pretto asked Wells for specific dates, times, and names that would support the content of the September 13 publications. Wells said that her statements were "general statements" based, in part, on her personal experience. Wells referred Pretto to the Hospital's medication administration records in which nurses record delays in the administration of medication as validation for one of her points. In support of her statement regarding telemetry technician understaffing, Wells told Pretto she had personally observed instances of only two telemetry technicians being on duty. (D&O 2, 7-8; Tr 50-56, 249-57, 330-34, 337-45.)

On October 4, Pretto provided Thorne with a summary of her interview with Wells, stating essentially that Wells had failed to provide specific examples or

information regarding untimely administration of medication, patients lying in excrement, or reduction in telemetry staffing. The summary quoted Wells as saying she did not “keep notes everyday when [she] worked” and that her publicized comments were “general statements based on working in ICUs during [her] career.” Pretto told Thorne that inasmuch as Wells could not substantiate her assertions, she believed the publicized statements were false. (D&O 2, 8; Tr 50-60, 247, RX 6.)

On October 7, an RN scheduled for the 7:30 a.m. MICU shift called in sick. As a result, the charge nurse increased the number of patients assigned to the remaining nurses. When the other nurses, including Wells, reported for their 7:30 a.m. shifts, three of them found that they had been assigned three patients each, and one, Tracy Canty, found that she was assigned four patients. The scheduled nurses became upset because the customary standard in that unit was a nurse assigned to no more than two patients. (D&O 2, 8; Tr 257-60, 261-68, 379-84.) In protest, the nurses briefly refused to relieve their colleagues from the overnight shift. Upon consultation with their union representative, they abandoned that action in favor of filing a written protest and then went on to perform their assigned duties. Ultimately, only one nurse was assigned three patients, and no nurse was assigned four patients. (D&O 2, 8; Tr 259, 384 RX 7.)

On October 12, Human Resource Administrator Thorne interviewed Wells

concerning the nurses' October 7 protest. Wells told Thorne that the nurses were reacting to that day's posted assignments, including the assignment of four patients to Canty. Following the interview, Thorne notified Wells that she was suspended pending investigation of the September 13 publications and the October 7 incident. (D&O 2, 8; Tr 87, 273-75.) Later, Thorne prepared a written discharge notice for Wells on which the September 13 publications were listed as offenses. (D&O 2, 9; Tr 13-22, 120-21.)

C. Wells' October 13 Statements and Discharge

On October 13, the Union distributed a leaflet at the hospital bearing the Union's logo and a photograph of Wells. The leaflet was headed: "UHS' New ICU Standard: 4 Patients for Every Nurse." The leaflet continued, quoting Wells as stating: "I was suspended yesterday for standing up, with my co-workers, to management's doubling of the patient load in ICU. Expanding intensive care patient loads to 3 and even 4 patients is simply unsafe, unacceptable and needlessly endangers patients. Now more than ever, we have to stand together for our patients." (D&O 2, 9; RX 8.)

On October 20, Thorne met with Wells for the purpose of terminating her for her September 13 statements, which the Hospital concluded were false and disparaging. In that meeting, Thorne asked Wells about the Union's October 13 leaflet. Wells acknowledged that she had made the statement attributed to her

there. Thorne asked Wells which nurse had been assigned four patients, and Wells named Canty but admitted that Canty had not, in fact, cared for four patients.

(D&O 2, 9; Tr 93.)

Thorne asked Wells to step out of her office momentarily. During that break, Thorne added the statement Wells made in the October 13 leaflet to the list of reasons for Wells' discharge. When Thorne called Wells back into her office, she handed Wells a written termination slip that listed her September 13 and October 13 statements as the reasons for her discharge. (D&O 2, 9; Tr 93, GCX 8.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing findings of fact, the Board (Members Liebman, Kirsanow and Walsh) concluded that the Hospital violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging union steward Joan Wells because she publicly criticized the Hospital regarding nurse staffing. (D&O 1, 5, 12-13.)

The Board's Order requires the Hospital to cease and desist from the unlawful conduct found and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Order requires the Hospital to offer Wells full reinstatement to her former job or, if that job no longer

exists, to a substantially equivalent job, without prejudice to her seniority or any other rights or privileges, to make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, and to expunge from its files any reference to Wells' unlawful termination and to notify her in writing that this has been done and that the termination will not be used against her in any way. The Order also requires the posting of an appropriate notice. (D&O 5, 12-13.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Hospital violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discharging Union steward Joan Wells because she offended the Hospital with her protected criticisms of the Hospital's staffing policies. The material facts of this case are undisputed. The Hospital admittedly discharged Wells for her publicized statements of September 13 and October 13. The Board found, without dispute from the Hospital, that Wells' statements on those dates related to an ongoing labor dispute between the Hospital and Union over the Hospital's staffing policies, which were the subject of contemporaneous collective-bargaining negotiations. The Board also found that the Hospital did not show that any of Wells' statements—whether it be the September 13 newspaper statement, her online

statement of that same date, or her October 13 statement published in a union leaflet—ran afoul of the Act’s protection.

Each of Wells’ statements was clearly and publicly linked to the parties’ ongoing labor dispute. Thus, the public would have recognized Wells’ opinions as the partisan expression of an adherent to one side of that dispute. The Hospital does not contend otherwise.

Rather, the Hospital argues that Wells’ statements were unprotected, assertedly because they were false, or were made with reckless disregard for their truth or falsity. Substantial evidence supports the Board’s findings to the contrary. Indeed, the Hospital points to only one statement by Wells that even arguably was untrue. However, as the record shows and as the Board found, while the statement concerning the “doubling of the patient load in ICU” was misleading, it was not literally untrue. And, in any event, employees are allowed some leeway for hyperbolic expression in the heat of an emotional labor dispute.

There is no merit to the Hospital’s argument that the Board requires proof of “evil motive” to find employee public statements unprotected. That argument is based on a misreading of two cases that rejected the Board’s fact finding. Contrary to the Hospital’s contention regarding *Endicott* and *St. Luke’s*, those courts accepted the Board’s formulation of the *Jefferson Standard* test for determining the line between protected and unprotected activity regarding employee public appeals.

Those two decisions rejected the Board’s fact finding, not its statement of the law. The overwhelming weight of judicial authority supports the Board’s view of *Jefferson Standard*.

Finally, the Union did not show that the Board abused its discretion by not granting the Union’s request for additional remedies. The Board ordered its traditional remedies, including make-whole relief for Wells and the posting of a notice in “customary places.” The Union argues that the Board should have held that the Hospital’s communication policy, which arguably limited employee statements to the public, was a violation of the Act. The Board found, however, that since the issue was not raised in the complaint, nor fully and fairly litigated at the hearing—indeed the Union only raised that matter in its post-hearing brief—it would be improper to grant the Union’s request for relief.

The Board also found that the Union did not justify its request for special e-mail posting of the Board’s notice because, under the Board’s procedures, such a remedy required that the matter be fully litigated in the unfair labor practice proceeding. It is undisputed that it was not; therefore, this Court should not consider the Union’s request.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE HOSPITAL VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING UNION STEWARD JOAN WELLS FOR HER CRITICISM OF THE HOSPITAL REGARDING NURSE STAFFING BECAUSE THAT CRITICISM WAS PROTECTED BY SECTION 7 OF THE ACT

A. Applicable Principles and Standard of Review

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the right to form, join or assist a labor organization and to engage in other “concerted activities” “for the purpose of . . . mutual aid or protection[.]” Those rights are enforced by Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)), which makes it an unfair labor practice for an employer to discriminate in regard “to any term or condition of employment to encourage or discourage membership in any labor organization[.]” and by Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7.”

Accordingly, an employer violates Section 8(a)(3) and (1) of the Act by discharging an employee for engaging in union or other concerted activities

protected by the Act. *See Retlaw Broadcasting Co. v. NLRB*, 53 F.3d 1002, 1007 n.2 (9th Cir. 1993).

As this Court recently stated: “[B]oth the courts and the Board have long recognized that nurses’ working conditions are directly related to patient care and safety.” *Washington State Nurses Ass’n v. NLRB*, 526 F.3d 577, ___, 2008 WL 2096970, at *4 (9th Cir.) (and cases cited therein). Accordingly, as the Board noted here (D&O 3), “employees’ statements regarding patient care and/or staffing levels have been found protected where it was clear from the context of the statements that they related to a labor dispute and/or terms and conditions of employment.” *See Misericordia Hosp. Med. Ctr. v. NLRB*, 623 F.2d 808, 813 (2d Cir. 1980) (approving the Board’s finding that employees who participated in authoring a report on ratio of staff to patients were protected by the Act).

The right of employees to engage in protected concerted activities includes the right of employees “to improve their lot as employees through channels outside the immediate employee-employer relationship.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1967). *Accord NLRB v. Electrical Workers Local 1229*, 346 U.S. 464 (1953) (*Jefferson Standard*); *Glendale Assoc’s, Ltd. v. NLRB*, 347 F.3d 1145, 1153 (9th Cir. 2003). In general, such appeals are protected so long as they “relate[] to an ongoing dispute between the employees and the[ir] employer[]”

and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act's protection." *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000) (and cases cited), *supplemented by* 338 NLRB 531 (2002), *affirmed sub nom.*, *Jensen v. NLRB*, 86 Fed.Appx. 305, 2004 WL 78160 (9th Cir. 2004).

It is settled that the "primary responsibility for drawing the line between protected and unprotected activity falls on the Board." *NLRB v. Lummus Indus., Inc.*, 679 F.2d 229, 234 (11th Cir. 1982). *Accord NLRB v. Parr Lance Ambulance Service*, 723 F.2d 575, 577 (7th Cir. 1983); *American Telephone & Telegraph Co. v. NLRB*, 521 F.2d 1159, 1161 (2d Cir. 1975). When supported by substantial evidence on the record as a whole, the Board's factual findings are conclusive. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548, 551 (9th Cir. 1997).

In this case, the Board found (D&O 2-3 n.5), and the Hospital admits (Br. 12), that it discharged Wells because of her statements on September 13 and October 13 regarding understaffing at the Hospital and its effect on patient care. The Hospital does not dispute, as the Board found (D&O 3), that Wells' statements related to the nurses' terms and conditions of employment being discussed in contemporaneous collective-bargaining negotiations. Thus, Wells' statements were protected by the Act absent a convincing showing by the Hospital that they were so disloyal, recklessly or maliciously false as to lose the Act's protection. As

we show below, the Hospital utterly failed in making that defense to Wells' unlawful discharge.³

B. Substantial Evidence Supports the Board's Finding that the Hospital Did Not Show that Wells' Communications Were Disloyal, or Recklessly or Maliciously False

As shown in the Statement, in its reasons for Wells' discharge, the Hospital cited Wells' statements quoted in the local newspaper article of September 13, her September 13 story published on the Union's website, and her October 13 statements in a union leaflet. The Hospital contends (Br. 17-20) that Wells' statements were knowingly false or made with reckless disregard for their truth or falsity. The Board analyzed Wells' statements in the context of the underlying labor dispute between the parties over nurse staffing and rejected the Hospital's arguments. Substantial evidence supports the Board's determination.

³ The Board found (D&O 2-3 n.5) that motive is not an issue here in light of the Hospital's admission that it discharged Wells for her statements regarding terms and conditions of employment. The Hospital does not contest that finding.

1. The Hospital did not show that Wells' September 13 newspaper statements were outside the protection of the Act

The Hospital does not contest the Board's finding (D&O 3, 4) that Wells' statements to the newspaper were clearly related to the parties' underlying labor dispute. That was clear from the article's headline, which noted in a sub-heading the hospital management view that the report was a "bargaining ploy of labor unions." (RX 1.) The article went on to quote a hospital representative's critique of the Union's report as "taking data out of context and manipulating it to achieve [the Union's] bargaining goals." (RX 1.)

Against this background, Wells was quoted in the article on "the effect of nurse-to-patient ratios on nurses' ability to do their jobs, stating that as a result of understaffing, "[y]ou don't get medications to patients on time. They could be lying in their own excrement for who knows how long. You can't even do the basic things you want to do." (RX 1.) The article also reported union officials as saying that their "primary disagreement" with the Hospital was over staffing ratios. (RX 1.)

Viewed in the context of the parties' underlying labor dispute, the Board reasonably found (D&O 4) that Wells' statements were not disloyal, and not so egregious as to cause Wells to lose the Act's protection. Thus, the Hospital presented no evidence that Wells' statements were uttered "at a critical time in the

initiation of” the hospital’s business, rather than in the course of routine collective bargaining for a successor agreement, which the parties had successfully concluded in the past. *See Jefferson Standard*, 346 U.S. at 472. Nor did the Hospital show that Wells’ statements were made “in a manner reasonably calculated to harm the [Hospital’s] reputation and reduce its income.” *Id.* To the contrary, as the Board reasonably found (D&O 4), Wells’ statements fell well within the reach of the Act’s protection because the article makes it “apparent that Wells’ intent was not to disparage or harm the Respondent but to pressure the Respondent to increase staffing and thereby improve nurses’ working conditions.” *See Mount Desert Island Hospital*, 259 NLRB 589, 593 (1981), *enforced* 695 F.2d 634 (1st Cir. 1982).

The Board also reasonably concluded that Wells’ statements were not maliciously or knowingly false, or made with reckless disregard of their truth or falsity. On the contrary, Wells’ statements were, as the Board found (D&O 4), based on her own experiences and on “the experiences of other nurses,” as told to her and which she reasonably believed to be true. *See KBO, Inc.* 315 NLRB 570, 571 (1994) (noting that an employee who makes a statement in good-faith reliance on the reports of coworkers is entitled to the protection of the Act, even if those reports turn out to be inaccurate), *enforced mem.*, 96 F.3d 1448 (6th Cir. 1996).

Moreover, although Wells’ “excrement” comment may have been graphic,

the Board reasonably found (D&O 4) that it was not offered as a factual accounting of something that had happened, but was stated in the conditional, as something that could happen if staffing conditions were not corrected.⁴ In these circumstances, the public would have been able to recognize Wells' remarks for what they were—the biased, hyperbolic comments of a partisan in a labor dispute. Indeed, as noted, the article, itself, revealed the partisanship at play by quoting management's rejoinder that the Union was “taking data out of context and manipulating it to achieve bargaining goals.” (RX 1.) Plainly, the Hospital failed to show that Wells' press-conference statements were beyond the protection of the Act.

2. The Hospital did not show that Wells' September 13 website statements were unprotected

Similarly, the Board reasonably found (D&O 4) that Wells' September 13 website story was not out of bounds. It is clear that the story concerned the same underlying labor dispute addressed in the Union's press conference the day before.

⁴ Thus, contrary to the Hospital's claim (Br. 18-19), Wells' statement regarding patients possibly being forced to lie in their excrement never purported to be a factual statement based on Wells' or any other nurse's observation. The Hospital, itself, recognizes (Br. 18-19) that Wells was only speaking of the “potential[ity]” of that situation arising if the understaffing problem was not fixed. Given the hypothetical nature of Wells' statement, it makes no sense for the Hospital to continue to argue whether the statement had a factual basis.

And although the story made specific reference to telemetry technician staffing, the Hospital does not dispute the Board's finding (D&O 4) that Wells' statements in that story pertained to "the impact of telemetry technician staffing levels on nurses' terms and conditions of employment."

Further, Wells directly referred to the ongoing dispute with management over staffing levels. She noted (RX 2): "UHS, the for-profit company that owns Valley Hospital, makes more than enough money to pay for additional staff. Right now, they are choosing not to, and that's just not acceptable. As nurses and patient advocates, we're committed to fighting for safe and enforceable staffing ratios." As the Board noted (D&O 4) Wells' statements were made on a union website, one day after a union rally that addressed staffing levels. Thus, again, Wells' statements clearly were related to the ongoing labor dispute over staffing.

As with the September 13 newspaper article, the Board found that, viewed in context, Wells' story was neither disloyal nor maliciously false. Rather, as the Board reasonably found (D&O 4), and again without dispute from the Hospital: "Wells' statements were . . . intended not to disparage or harm the Hospital but to pressure the Hospital to increase staffing and thereby improve nurses' working conditions[] . . . [and were] based . . . on [Wells'] own observations as well as on conversations with the telemetry technicians and the person who was in charge of

scheduling them.”

The Hospital takes issue with only one aspect of the Board’s findings regarding Wells’ September 13 web story. It contends (Br. 17-18) that Wells’ statements—that management had cut telemetry technician staffing levels and had chosen not to hire additional staff—were made without concern for their truth because Wells had no information from any source supporting such statements. The Hospital’s argument misses the point. Plainly, Well’s statements did not purport to reflect inside knowledge of management decision making. Rather, they spotlighted management’s unfavorable response, as expressed in the ongoing negotiations, to the nurses’ demands for increased staffing.

3. Wells’ October 13 statements were protected

Finally, Wells did not forfeit the Act’s protection by her statements in the October 13 union leaflet. In that leaflet (RX 8), Wells was quoted as stating that she had been suspended for “standing up, with my co-workers, to management’s doubling of the patient load in ICU.” Wells’ remark referred to the October 7 incident in which Wells and other nurses protested their having been assigned three patients, and in one case four patients, when they reported for the 7:30 a.m. shift. The leaflet displayed the Union’s logo and stated that in a “negotiating session, management proposed contract language gutting the restrictions on floating that we had in our contract, and giving management absolute power to float.” The leaflet

then encouraged employees to “Join Us at the Rally for Quality Patient Care” later that day. (RX 8.) Again, Wells’ statements plainly were tied to a labor dispute and the Hospital does not contend otherwise.

The Hospital also does not contest the Board’s finding (D&O 5) that “Wells’ statements were intended not to injure the [Hospital’s] business, but to pressure the [Hospital] to improve nurses’ working conditions by providing sufficient staffing to enable [them] to carry out their duties effectively.” And, as Wells’ statements were embodied in a union call to a rally in support of its demands, the public would have recognized the leaflet and Wells’ statements therein for the partisan propaganda that it was. *Cf. Jefferson Standard*, 346 U.S. at 477-78 (the employees’ handbill was unprotected because it made no reference to the labor dispute between the parties and was distributed as the authoritative opinion of trained technicians on the quality of the employer’s technology and product).

The Hospital contends (Br. 20-21) that Wells’ October 13 statement concerning the doubling of the nurses’ load in the ICU should be denied the protection of the Act because it was knowingly false. The Board disagreed. As the Board noted (D&O 5), “at least temporarily, four patients were assigned to nurse Canty on October 7.” As the Board further noted (D&O 5), “Wells’ statements regarding ‘doubling of the patient load in ICU’ and ‘[e]xpanding intensive care patient loads to 3 and even 4 patients’ were hyperbolic insofar as they did not

reflect the temporary nature of the situation.” Thus, Wells’ statement, while perhaps misleading, was not literally untrue. In any event, in the context of an emotional labor dispute, the Act allows some leeway for hyperbolic remarks. An employee does not automatically lose the protection of the Act because on a single occasion she happens to exaggerate the truth. *See Sierra Publ’g Co v. NLRB*, 889 F.2d 210, 217 (9th Cir. 1989) (public appeal must “be evaluated in its entirety and in context”); *NLRB v. Mount Desert Island Hospital*, 695 F.2d 634, 640-41 (1st Cir. 1982) (rejecting employer’s argument that because employee’s criticisms were “arguably” not well founded, they were not protected, because criticisms were not made “in reckless disregard of the truth[]”); *Emarco*, 284 NLRB 832, 834 (1987) (examining employee’s remarks “in the context of emotional labor dispute”).

C. Neither *St. Luke’s* Nor *Endicott* Would Require the Board To Reach a Different Result on the Facts of this Case

In this case, applying *Jefferson Standard* and its progeny, the Board found, as shown above, that Wells’ statements explicitly concerned the labor dispute between the Hospital and the Union and were not so egregious as to lose the Act’s protection. The Hospital concedes (Br. 15-17) that *Jefferson Standard* is the controlling test regarding employee public communications. The Board explicitly applied that test here.

Thus, as shown, in accord with *Jefferson Standard*, the Board applied a

multi-factored, balancing test to determine if, according to the Hospital's affirmative defense, Wells' statements were beyond the protection of the Act. Thus, the Board considered the nature of the underlying labor dispute, the relation of Wells' statement to that labor dispute, and whether the Hospital showed that Wells' statements were so disloyal or egregiously false as to reflect an intent to harm the Hospital, rather than garner support for a legitimate, but partisan position in that dispute.⁵ In addition, with respect to disloyalty, the Board considered whether Wells' statements were made at a "critical time" in the Hospital's business and were so disparaging that they could be seen as "reasonably calculated to harm

⁵ In *Jefferson Standard*, the Supreme Court reversed the D.C. Circuit and upheld a Board ruling denying reinstatement to broadcasting technicians who distributed handbills to the public disparaging the quality of programming by their employer. In doing so, the Court upheld the Board's view of Section 10(c)'s "for cause" exception to Section 7 guarantees, as opposed to the lower court's view that the Board was required to make an explicit finding that the employees' conduct must be found unlawful as a precondition to finding it unprotected. The Court's decision rested in large part on the fact that the handbills made no reference to the union, the contemporaneous labor controversy between the parties, or to their ongoing collective-bargaining negotiations. Instead, the Court found, in agreement with the Board, that the handbills "attacked public policies of the Company [regarding 'finance and public relations'] which had no discernible relation to [the labor] controversy" that divided the parties, who had reached impasse over the arbitration of discharges. *Jefferson Standard*, 346 U.S. at 476. Since *Jefferson Standard*, the Board, with court approval (*see infra*), has analyzed employee public communications under two prongs: 1) according to their stated relation to an underlying labor dispute; and 2) their intended impact—viewed objectively—whether to injure the employer or promote public support for an obviously partisan position.

the [Hospital's] reputation and reduce its income.” *Jefferson Standard*, 346 U.S. at 474-76.

Nonetheless, citing *American Golf Corp. (Mountain Shadows)*, 330 NLRB 1238 (2000), *supplemented by* 338 NLRB 581 (2002), *affirmed sub nom.*, *Jensen v. NLRB*, 86 Fed.Appx 305, 2004 WL 78160 (9th Cir. 2004), the Hospital argues (Br. 15-16) that the Board improperly protects “all employee false, defamatory and disparaging statements unless they are ‘maliciously false,’ and requires proof of an evil motivation for such statements[.]”⁶ An examination of the Board’s decision in this case refutes the Hospital’s contention. As the Board stated here (D&O 3): “Statements . . . are maliciously untrue . . . if they are made with knowledge of

⁶ The Hospital’s citation of *American Golf* is incorrect. The case that it cites was remanded by the Board for further hearing and superseded by *American Golf (Mountain Shadows)*, 338 NLRB 581 (2002). In the latter case, the Board found that the employee’s statements were disloyal because, among other things, they disparaged the employer’s product and invited the employer’s competitors to bid against it. *Id.* at 583.

their falsity or with reckless disregard for the truth.” Thus, in the Board’s view, a “maliciously untrue” analysis includes consideration of whether the challenged statements were made with “knowledge of their falsity or with reckless disregard for the truth,” and is not confined to whether they embodied an evil purpose.

The Board has long adhered to this view. As the Board has stated, “[i]n determining whether an employee’s communication to a third party constitutes disparagement of the employer or its product, great care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues . . . [for,] ‘absent a malicious motive’ an employee's right to appeal to the public is not dependent on the sensitivity of [his employer] to his choice of forum.” *Allied Aviation Serv. Co. of New Jersey, Inc.*, 248 NLRB 229, 232 (1980). *Accord NLRB v. Lummus Indus., Inc.*, 679 F.2d 229, 234 (11th Cir. 1982); *Blue Circle Cement Co., Inc. v. NLRB*, 41 F.3d 203, 211 (5th Cir. 1994); *Mohave Electric Coop., Inc. v. NLRB*, 206 F.3d 1183, 1189 (D.C. Cir. 2000).

This Court and others have approved that interpretation of the Supreme Court’s holding in *Jefferson Standard*. In addition to cases cited above, *see, for example, Sierra Publ’g Co. v. NLRB*, 889 F.2d 210, 217 (9th Cir. 1989); *Five Star Transp., Inc. v. NLRB*, 522 F.3d 46, 52-55 (1st Cir. 2008); *NLRB v. Mount Desert Island Hospital*, 695 F.2d 634, 640-41 (1st Cir. 1982); *Misericordia Hosp. Med. Ctr. v. NLRB*, 623 F.2d 808 (2d Cir. 1980); *Community Hosp. of Roanoke Valley,*

Inc. v. NLRB, 538 F.2d 607 (4th Cir. 1976).

Contrary to the Hospital's contention (Br. 21, 22-23), the District of Columbia Circuit's recent opinion in *Endicott* approves the Board's interpretation of *Jefferson Standard*, although finding a misapplication of the rule in that case. The court stated there that "the Board's formulation [of its test for determining a loss of protection of the Act] accurately reflects the holding in *Jefferson Standard*["] *Endicott Interconnect Technologies, Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006). That court's disagreement with the Board did not concern the Board's statement of the law but whether the Board had even considered that the employee's statements may have reflected "disloyalty." *Id.* Rather than remanding the case to the Board to supply what the court believed was missing fact finding, the court went on to find—we submit, inappropriately, under the substantial evidence standard—that the employee's communications were "unquestionably detrimentally disloyal[.]" *Id.*

St. Luke's Episcopal-Presbyterian Hospitals, Inc. v. NLRB, 268 F.3d 575, 580-81 (8th Cir. 2001) is similar. There, the court disagreed with the Board, not because it applied an unacceptable version of the *Jefferson Standard* test, but because, in the court's view, substantial evidence did not support the Board's determination that the employee's statements were not made "with 'reckless disregard of [their] truth or falsity[.]'" In the court's view, the evidence showed

that the employee's statements were knowingly and "materially false." *Id.* at 580.⁷

In short, the overwhelming weight of authority supports the line drawn by the Board in this instance between protected and unprotected activity. By contrast, the Hospital has failed to supply this Court with satisfactory, much less compelling, reasons for disturbing the line established by the Board.

II. THE BOARD ACTED WITHIN ITS BROAD REMEDIAL DISCRETION IN REJECTING THE UNION'S REQUEST FOR ADDITIONAL REMEDIES

The Union attacks the Board's remedial order on two grounds: 1) it argues (Br. 7-10) that, given the evidence that was presented to the administrative law judge, the Board was compelled to order the Hospital to rescind its communication policy; and 2) it argues (Br. 11-13) that the Hospital should have been required to post the notice acknowledging its unfair labor practices, not only in the traditional places as ordered by the Board, but also electronically on the Hospital's internal intranet.⁸

⁷ The Hospital's contention (Br. 23 n.9) that the Board is bound to follow the "precedents" established by *St. Luke's* and *Endicott* is without merit. As shown, those cases did not impose upon the Board a rule, but merely took issue with the Board's factual findings.

⁸ Before the Board, the Union also requested that the notice be distributed by handbilling. The Board rejected that as an unwarranted addition as well. The Union has not renewed that request to this Court. Therefore, it has waived that contention. See *Retlaw Broadcasting Co. v. NLRB*, 53 F.3d 1002, 1005 n.1 (9th Cir. 1993).

Initially, the Union concedes (Br. 6) that the Board’s remedial authority is a broad discretionary one, subject to limited judicial review. As the Supreme Court observed in *Phelps-Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941), “[b]ecause the relationship of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board’s discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.” *Accord Golden Day Schools, Inc. v. NLRB*, 644 F.2d 834, 839-40 (9th Cir. 1981). Accordingly, the Board’s choice of remedies is not to be disturbed unless its order represents “a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.” *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943). *Accord Teamsters Cannery Loc. 670 v. NLRB*, 856 F.2d 1250, 1260 (9th Cir. 1988). The Union in its brief does not come close to making the requisite showing.

With respect to the Hospital’s communication policy, we start by noting that the General Counsel’s unfair labor practice complaint did not allege that the hospital’s policy violated the Act.⁹ It is well accepted that that the General

⁹ As a result, there is no support for the Union’s claim (Br. 9) that the policy “was clearly within the scope of the complaint.”

Counsel's decision whether to include a matter within a complaint is nonreviewable as an exercise of prosecutorial discretion. *See Beverly Health and Rehab. Services v. Feinstein*, 103 F.3d 151, 153 (D.C. Cir. 1996). Moreover, at no point during the hearing did the General Counsel move to add that allegation to the proceedings and have it determined by the administrative law judge. Only in its post-hearing brief to the administrative law judge did the Union, but not the General Counsel, raise and seek a remedy for the alleged unlawful communication policy. Based on these facts, the Board reasonably found (D&O 1 n.1) that granting the Union's requested remedy would be "improper." *See Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 116 (D.C. Cir. 1996) ("[w]hen one party utterly fails to raise a significant issue before the ALJ, the record developed with regard to that issue will usually be inadequate to support a substantive finding in its favor and, generally speaking, neither the ALJ nor the Board should consider such an issue[']").

Apart from not being included in the complaint, the lawfulness of the communication policy was not, contrary to the Union's contention (Br. 8-10), fully and fairly litigated at the hearing. It is not enough for the Union to show, as it claims (Br. 8, 9), that, at the hearing, the Hospital relied on its communication

policy to justify its decision to discharge Wells.¹⁰ For an issue to be “fully and fairly litigated,” the law requires more. The issue must have been tried with the “express or implied consent of the parties.” *See The Henry Bierce Co. v. NLRB*, 23 F.3d 1101, 1106 (6th Cir. 1994).

There is no question that the Hospital did not expressly consent to an unfair labor practice adjudication of its communication policy. Nor has the Union shown that the Hospital impliedly consented to have that issue determined. For, contrary to Union’s argument: “Implied consent is not established merely because one party introduced evidence relevant to an unpleaded issue and the opposing party failed to object to its introduction. It must appear that the parties *understood* the evidence to be aimed at the unpleaded issue. Also, evidence introduced at a hearing that is relevant to a pleaded issue as well as an unpleaded issue cannot serve to give the opposing party fair notice that the new, unpleaded issue is entering the case.” *Id.* at 1107 (emphasis added). *Accord NLRB v. I.W.G.*, 144 F.3d 685, 688-89 (10th Cir. 1998); *NLRB v. Quality C.A.T.V.*, 824 F.2d 542, 547 (7th Cir. 1987) (“the simple presentation of evidence important to an alternative claim does not satisfy the requirement that any claim at variance from the

¹⁰ Notwithstanding the judge’s assertion (D&O 9-10) and the Union’s contention (Br. 8, 9), it is not clear that the Hospital relied on its communication policy as grounds for Wells’ discharge. After all, the Hospital did not mention that policy in

complaint be ‘fully and fairly litigated’ in order for the Board to decide the issues without transgressing . . . due process rights”).

As to the Union’s remaining argument that the Board should have required the Hospital to electronically distribute the unfair labor practice notice, the Union has never attempted to meet the evidentiary standards established by *Nordstrom, Inc.*, 347 NLRB No. 28 (2006), 2006 WL 1530141, for consideration of that remedy. In *Nordstrom*, which the Board relied on in rejecting the Union’s argument (D&O 1 n.1), the Board recognized that e-mail distribution of notices was not a customary but a special remedy that could be justified, but only after full litigation of the issue. In taking that position, the Board noted that: “[I]t would like the benefit of a concrete fact pattern before deciding whether to depart from [its] standard notice-posting remedy and take the unprecedented step of requiring intranet or other electronic posting.” It also observed: “There may be material differences among employers’ intranet systems, and we are reluctant to proclaim a ‘one-size-fits-all’ approach[] . . . [where] a factual context would sharpen the issues, raise pragmatic considerations, and ensure [the airing of] the best possible arguments from parties who have a stake in the outcome.” The Board held that “such a record should be made before we enter such an order, not afterward in the

Wells’ discharge papers nor in any of the preliminary reports investigating her statements that ultimately led to her discharge. (GCX 4, RX 6, 12.)

compliance stage.” *Id.* Because the Union does not and cannot claim that the e-mail distribution issue was fully litigated in the hearing below, it would be inappropriate for this Court to grant the Union’s request to ignore the Board’s *Nordstrom* procedure and remand the issue for determination in a compliance proceeding.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Hospital's and the Union's petitions for review and enforcing the Board's Order in full.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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v.)
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and)
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VALLEY HOSPITAL MEDICAL CENTER, INC.)
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board
Certifies that its final brief contains 7,731 words of proportionally-spaced, 14-point

type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 13th day of June, 2008

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the
Clerk of the Court by first-class mail the required number of copies of the Board's

final brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the address[es] listed below:

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Dated at Washington, DC
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