Alexander Linn Hospital Association *and* Hospital, Professional and Allied Employees of New Jersey. Cases 22-CA-8226, 22-CA-8286, and 22-CA-8342

August 20, 1979

DECISION AND ORDER

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

On March 26, 1979, Administrative Law Judge Thomas R. Wilks issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Alexander Linn Hospital, Sussex, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Rescind its contract with Greene & Kellogg, Inc., with respect to the performance of EKG and stress-testing work at its hospital."

2. Substitute the following for paragraph 2(e):

"(e) Upon request, bargain collectively with the above-named labor organization as the exclusive representative of all the employees in the appropriate units set forth above, with respect to a decision or the effects of a decision to subcontract the performance of EKG and stress-testing work at its hospital."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

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

WE WILL NOT fail and refuse to bargain with Hospital, Professional and Allied Employees of New Jersey, or any other labor organization representing our employees in an appropriate unit, respecting a decision or the effects of any decision to transfer work of any employees in the following appropriate units:

All full-time and regular part-time licensed practical nurses, graduate nurses, laboratory technicians, X-ray technicians and EKG/EEG technicians employed at the Employer's Sussex facility but excluding all service and maintenance employees, office clerical employees, watchmen, gurards, all other employees and all supervisors as defined in the Act.

All full-time and regular part-time registered nurses, graduate nurses and nurse anesthetists employed at the Employer's Sussex facility, but excluding all other professional employees, director of patient care service, in-service educator, health care coordinator, watchmen, guards, all other employees and all supervisors as defined in the Act.

WE WILL NOT discourage concerted activities engaged in by our employees for employees' mutual aid or protection by terminating them or otherwise discriminating against employees in any manner with regard to their rates of pay,

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In sec. III of his Decision, the Administrative Law Judge inadvertently refers to employee Boyko rather than employee Kolk as entering patient Cook's room on February 18, 1978.

[2] We adopt the Administrative Law Judge's conclusion, for the reasons set forth by him, that Respondent violated Sec. 8(a)(1) of the Act by discharging nurse Kolk for having engaged in protected, concerted activity through her conversation with patient Cook on February 18, 1978. In so doing, we emphasize that under Kolk's version of that conversation—the version credited by the Administrative Law Judge—she merely responded to questions raised by patient Cook and her responses clearly were made in an attempt to assuage Cook's concerns over the adequacy of patient care in the event of a strike and to reasure Cook so that she would not become upset.

[3] We shall modify par. 2(a) of the Administrative Law Judge's recommended Order to conform to the language customarily used by the Board in cases in which the rescission of contracts has been ordered. See, e.g., *B. F. Goodrich General Products Company, a Division of the B. F. Goodrich Company*, 221 NLRB 288, 291 (1975).

Additionally, in par. 2(e) of his recommended Order, the Administrative Law Judge provided a general bargaining order. However, the complaint did not allege, nor did the Administrative Law Judge find, that Respondent generally refused to bargain with the Union. We therefore shall modify the recommended Order to remedy the specific 8(a)(5) violation found herein. See, e.g., *Lloyd Well, an Individual d/b/a Pere Marquette Park Lodge*, 237 NLRB 855 (1978).

wages, hours of employment, tenure of employment, or any term or condition of employment.

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

WE WILL rescind our contract with Greene & Kellogg, Inc., insofar as it relates to our EKG and stress-testing services.

WE WILL reestablish our former EKG and stress-testing services at our Sussex, New Jersey, hospital.

WE WILL, upon request, bargain collectively in good faith with the above-named labor organization as the exclusive representative of the employees in the aforementioned appropriate units with respect to our decision or the effects of our decision to subcontract the performance of EKG and stress-testing work at our hospital.

WE WILL offer Margaret Ulbricht and Elizabeth Kolk immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make whole Elizabeth Kolk for any loss of earnings she may have suffered by reason of our discrimination against her, with interest.

WE WILL make whole Margaret Ulbricht, with interest, for any loss of earnings she may have suffered by reason of our subcontracting of EKG and stress-testing work to Greene & Kellogg, Inc.

ALEXANDER LINN HOSPITAL ASSOCIATION

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge: Pursuant to unfair labor practice charges filed by Hospital, Professional and Allied Employees of New Jersey (herein called the Union), a hearing in this matter was held upon a consolidated admended complaint issued by the Regional Director and an answer filed by Alexander Linn Hospital Association (herein called Respondent).

Upon the entire record, including my observation of the demeanor of witnesses, and consideration of briefs, I make the following:

FINDINGS OF FACT

I. BUSINESS OF THE RESPONDENT

Respondent is a New Jersey corporation engaged in the business of providing and performing services in the operation of a voluntary nonprofit hospital in Sussex, New Jersey. All parties agree, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background*

On or about April 28, 1977, a majority of the employees of Respondent, by a secret-ballot, Board-conducted election designated and selected the Union as their exclusive representative for the purposes of collective bargaining with Respondent in two separate units. One unit consisted of all full-time and regular part-time licensed practical nurses, graduate nurses, laboratory technicians, X-ray technicians, and EKG/EEG technicians employed at Respondent's Sussex facility, but excluding all service and maintenance employees, office clerical employees, professional employees, watchmen, guards, all other employees and all supervisors as defined in the Act. The other unit consisted of all full-time and regular part-time registered nurses, graduate nurses, and nurse anesthetists employed at Respondent's Sussex facility, but excluding all other professional employees, director of patient care service, in-service educator, health care coordinator, watchmen, guards, all other employees, and all supervisors as defined in the Act. Thereafter, on or about July 29, 1977, the Union was certified by the Regional Director as the exclusive collective-bargaining representative of the employees in each of the aforementioned units for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Negotiations between the Union and Respondent began on or about October 20, 1977, and continued on 14 various dates through March 31, 1978, at which time the parties executed two separate contracts for each of the aforementioned units.[1] During the course of negotiations the Union conducted a strike meeting on January 18. A strike commenced on February 19 and terminated on March 31. The union negotiating team consisted of its counsel Alfred Osterweil, Ann Twomey, president of the Union, and employees Maria Boyko, Elizabeth Kolk, Cynthia Shanahan, Dean Patterson, Jacqueline Diggles, and Richard Pickett. The negotiating team for Respondent included counsel James Clark, Hospital Administrator Raffaele Marzella, Director of Patient Care Services Kathleen Wendowski, Comptroller Steven Kirby, and Managerial Representatives Tremble, Forcier, and Davis.

B. *Issues*

1. Did Respondent on or about March 30, 1978, unilaterally and permanently subcontract its EKG and stress-testing work without notice or bargaining with the Union, and thus violate Section 8(a)(5) and (1) of the Act?

[1] All dates hereinafter are 1978, unless otherwise indicated.

2. Did Respondent on or about April 17, 1978, discharge employee Elizabeth Kolk because of her union or other concerted, protected activities in violation of Section 8(a)(3) and 8(a)(1) of the Act?

3. Did Respondent on or about January 17, 1978, disseminate to its employees a memorandum urging employees to exert influence on the union leadership to effectuate a change in the time and place of the union's strike vote, and thus violate Section 8(a)(1) of the Act?

C. *The Subcontracting Issue*

There is little or no factual dispute to this issue. The EKG and stress-testing work was, prior to the strike, performed primarily by technician Margaret Ulbricht. She is a technical unit employee, and the work is clearly unit work. Ulbricht engaged in the strike. During the strike the EKG and stress-testing work was performed by an outside entity, i.e., Greene & Kellogg, Inc. hereinafter called G & K. At first, G & K performed this worked on an *ad hoc* basis inasmuch as its personnel were present in the hospital performing respiratory services for Respondent which it had performed since July 1977 under a subcontract. G & K was willing to accomodate Respondent. G & K had attempted prior to the strike to obtain the EKG stress-testing and certain other work from Respondent on a similar subcontractual basis. In October 1977 G & K's formal offer, which had been submitted in September, was rejected by Respondent on the basis that it was not economically advantageous. G & K's agent manager, Grippo, who is located at the hospital, thereafter submitted a new offer at a lower cost to the hospital. Respondent's administrator, Marzella, obtained a report on March 11 of the economic feasibility of the arrangement. Marzella, however, solicited a new offer which limited the scope of the subcontract to EKG and stress-testing work. On March 20 he received a formal offer from G & K limited to EKG and stress-testing work. Marzella orally informed G & K agent Grippo that Respondent would accept the offer and that G & K should proceed to make arrangements to have a representative of G & K's Albany, New York, headquarters present to execute a contract. A contract was thereafter signed on March 30, effective that date.

The Union was not notified nor advised of the subcontracting of EKG work to G & K despite the fact that concurrent collective-bargaining negotiations were carried on. The collective-bargaining contracts were executed on March 31. The labor agreements contained a management prerogative clause, section 13 of which reserves to Respondent the right, *inter alia*, to "discontinue, consolidate, reorganize any department or branch; transfer any or all operations to any other location or discontinue the same in whole or in part; . . . to subcontract any or all operations as it deems necessary provided any subcontracting or transfer of operations from the hospital shall not be for the purpose of laying off employees in the bargaining unit" Very little, if any, explicit negotiations were addressed to that clause. The Union finally accepted Respondent's proposals, including section 13, by telegraphic notice of March 2, although the contract was not executed until March 31.

During the strike on March 20 Ulbricht had been contacted by Grippo and offered a job with G & K inasmuch as Grippo had understood her job would be eliminated. Ulbricht expressed interest, and on March 30 Grippo offered her a job and she accepted. On March 31, however, she declined the job.

On March 3 Marzella wrote to Ulbricht notifying her that the position that she had held prior to the strike had been "filled" and that she would be given "preferential consideration" when her position became available again. Marzella testified that he meant by this letter that she had been replaced during the strike by G & K, i.e., temporarily replaced in order that EKG and stress-testing could continue to be performed during the strike. On April 3 Marzella wrote to Ulbricht and confirmed Ulbricht's declination of a job with G & K. On April 4 Marzella advised Ulbricht by letter that she could not be recalled to her former job because it was "filled," but that she would be placed on a preferential rehire list for that job when it or any other position for which she was qualified became available. Marzella testified that as of March 20 Ulbricht had been permanently "replaced" by G & K.

Ulbricht testified that 6 months before the strike she had heard rumors that G & K was attempting to obtain the EKG and stress-testing work. However, it is clear that Respondent had rejected that attempt. At some point during negotiations in February, Union President Twomey was advised by fellow union bargaining committee member Patterson that Patterson had overheard Marzella mention to another person, away from the bargaining table, of the possibility of Respondent's subcontracting of Ulbricht's work to G & K. This is the extent of the Union's awareness of the impending permanent subcontracting, i.e., a mere rumor of the possibility of subcontracting. Neither party referred to the G & K subcontracting during negotiations. Ulbricht had discussed with Boyko, union vice president and committee member, her replacement by G & K. But clearly, at that point G & K was merely performing the work on a temporary basis as its prior solicitation for the work had been rejected.

The General Counsel does not allege and the record does not support a finding that the subcontracting of EKG and stress-testing work was motivated by antiunion considerations. Rather, it is argued that Respondent was obliged to notify and bargaining with the Union with respect to the decision to permanently subcontract that work, and to bargain over the effects of subcontracting, even though Respondent was motivated by economic considerations. The General Counsel cites appropriately, *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203 (1964).

Respondent does not contend that the management prerogative clause justified its conduct. Indeed, that clause on its face does not apply to the subcontracting which results in the layoff of unit employees. Herein, the subcontracting was such as to eliminate unit work and to cause the layoff of Ulbricht or her replacement in that position. The impact on the unit, therefore, is manifest and not waived by any negotiated management's rights proviso.

Respondent argues that the Union at no time requested negotiations with respect to the subcontracting of EKG and stress-testing work. However, the General Counsel's position, that the Union had not waived its right to an opportu-

nity for bargaining by failing to raise the matter, despite its awareness of oblique rumors of permanent subcontracting and in the absence of clear notification by Respondent of an imminent event, is well founded in Board precedent. *R. L. Sweet Lumber Company*, 227 NLRB 1084, 1086 (1977); *Jack L. Williams, D.D.S. d/b/a Empire Dental Co.*, 211 NLRB 860, 868 (1974), enfd. 538 F.2d 337 (9th Cir. 1976); *Florida-Texas Freight, Inc.*, 203 NLRB 509, 510 (1973), enfd. 489 F.2d 1275 (6th Cir. 1974).

The Union herein was first aware that the work in issue was permanently subcontracted after the event had become realized.

Respondent's chief defense to this issue is that it had a right to subcontract the work, even on a permanent basis, without notice or bargaining, because such had occurred during the course of a strike and flowed from economic considerations. Respondent, in support of its position, cites the decisions of the Circuit Court of Appeals for the Seventh and Ninth Circuits, which are inconsistent with the Board's position.[2]

The Circuit Court for the Ninth Circuit stressed the right of an employer to maintain his business during a strike, to maintain his bargaining posture, and to permanently replace strikers. The Circuit Court for the Seventh Circuit emphasized the economic exigencies which might have led the employer to economic extinction had the subcontracting been subjected to negotiations. The present factual context presents no similar compelling circumstances. Respondent herein had already achieved his objective of maintaining services by arranging for the ad hoc services of G & K during the strike. Respondent was in no dire straits at the time that it decided to convert the arrangement to that of a permanent one. It did so after negotiation and dickering with G & K as to the costs involved. The conversaion to a permanent contract was in no way related to the maintenance of Respondent's bargaining posture. Indeed, the Union had already acceded to Respondent's last proposals. The end of the strike was clearly at hand. As to the Respondent's right to replace strikers, that is not the issue. The Respondent is free to replace strikers. However, the permanent subcontracting of unit work moves into a realm well beyond the replacement of a single person. What is involved herein is not the fate of a single person but the abolition of the unit work which affects not only the individual who last held that position, but also affects other unit persons who might have succeeded to that position. In any event, my decision is premised upon Board precedent, notwithstanding circuit court decisions to the contrary. Cf. *Iowa Beef Packers, Inc.*, 144 NLRB 615 (1963). Accordingly, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by its failure to notify the Union and provide the Union with an opportunity to bargain over the decision to permanently subcontract the EKG and stress-testing work, or to give the Union an opportunity to bargain concerning the implementation of that decision.

D. *The Discharge of Elizabeth Kolk*

Registered nurse Elizabeth Kolk was employed by Respondent from October 1971 until April 1978 when she was discharged. Although she was active in organizing efforts for the Union, there is no evidence that Respondent was aware of or hostile to such efforts. There is no evidence that Respondent was hostile or opposed to the union organizing effort of any employee or that it interfered with the rights of its employees to organize or to vote for the Union.

Kolk was a member of the Union's negotiating committee, but her participation was not as active as other members. There is no evidence of Respondent's animosity toward any other member of that committee. Kolk participated in the strike. On February 21 she received a letter from Administrator Marzella wherein he advised her that he had been apprised that she engaged in an "unprofessional-like manner" in a conversation she had with a patient on the evening of February 18, the night before the strike. He therefore advised her that she was on notice that, pending an investigation, "appropriate action" would be taken. On March 3 she was advised orally and by letter that she was being offered unconditional reinstatement to her former position effective March 6, but that, in view of the unresolved question of alleged misconduct, she was to report to "personnel" to give her version of the alleged incident in order that an investigation and "evaluation" could be made. The strike ultimately ended somewhat later, and Kolk reported to personnel on April 10, at which time she was interviewed in a prearranged meeting with Marzella, personnel director Josephine Davis, and director of patient care services Kathleen Wendowski. Kolk was accompanied by Union Vice President Maria Boyko.

Prior to the meeting of April 10, Marzella had received reports from various persons, including nurses and surgeon Idjadi, to the effect that on the evening shift Boyko entered the room of patient Cook, who was admitted for a phlebitic condition, and engaged in a conversation wherein Kolk, who was recognized by Cook as a union activist, advised Cook that she had chosen an inopportune time to enter the hospital because of the impending strike; and told her further, in effect, that her well-being would be jeopardized by the lack of personnel. These reports were in turn based upon what Cook allegedly told certain employees and what she later told Dr. Idjadi. Marzella had not spoken to Cook prior to April 10. Also, no attempt was made by any respondent agent to contact Kolk prior to April 10 to obtain her version. In the past, Wendowski had handled similar disciplinary situations whereby she obtained statements from employees involved immediately or shortly after the occurrence of the event. However, by the time that Wendowski had taken statements from employees involved in the February 18 incident, Kolk had left the premises. The next day Kolk was on strike.

During the April 10 interview, Kolk was advised of the substance of the accusations against her and was requested by Marzella to present her side of the story.[3] Kolk testified

[2] *Hawaii Meat Company Limited* v. *N.L.R.B.*, 321 F.2d 397 (9th Cir. 1963); *N.L.R.B.* v. *Robert S. Abbott Publishing Company an Illinois Corporation*, 331 F.2d 209 (7th Cir. 1964).

[3] Marzella took the initiative in this stage of the proceedings. The General Counsel suggests that this departs from past procedure wherein Wendowski usually initiated disciplinary proceedings and investigations. In light of Dr.

that she narrated at that interview exactly what transpired in her conversation with patient Cook on the evening of February 18. Inasmuch as Cook was not called to testify, I credit Kolk's account of that conversation which is contradicted only by hearsay evidence.[4] According to Kolk, she was on duty on the evening of February 18. Her duties did not call for her to visit Cook, who was alone in her room. However, as she had done in the past during previous admissions of Cook, she took the opportunity during some downtime to visit Cook, who had few visitors, and to strike up a personal, casual conversation. During the course of their talk, which initially revolved about trivial matters, Cook asked Kolk if she intended to participate in the strike. Kolk answered affirmatively. Cook asked if certain other nurses were going to engage in the strike. Again, Kolk answered affirmatively. Cook asked who wold staff the hospital, and Kolk referred to the prior strike notice given by the Union and informed Cook that arrangements were made for nonstrikers to work extended hours and that sufficient personnel would be available. At one point, nurse Szymt briefly entered the room and in the course of examining Cook's leg, Cook became perturbed and admonished Szymt and became upset. Szymt left the room.[5] This was the only time Kolk observed Cook becoming upset. Kolk testified that her manner was such as to calm and reassure Cook and that she answered Cook's questions so that Cook would not become upset. After a few minutes of conversation, Kolk departed. At the point in time she left Cook, the patient appeared calm. Kolk did not report this conversation to her supervisors.

After Kolk gave the foregoing version at the April 10 meeting, Marzella stated that he now had two versions and he would have to decide what to do. Kolk and Boyko testified that Kolk asked whether her work record (she had not received any prior reprimands in almost 7 years of employment) and the fact that her personnel file contained a letter of commendation (received as part of a group commendation) would have any hearing on her fate. At that point, Marzella responded that because Kolk had participated in the strike, he would have to credit the patient's version against her version. Kolk and Boyko testified that Marzella, although requested, refused to identify the names of persons who had submitted contrary information. Kolk was thereupon suspended by Marzella pending further investigation. According to Marzella, he did not make any reference to Kolk's strike activity nor did he say that he would discredit Kolk because of that activity. He also denied that the identity of informants was requested. He was corroborated by the testimony of Davis and Wendowski in this regard. Indeed, according to Marzella, after Kolk gave her version of the incident, he promised that he would thereafter interview Szymt and Cook in a further investigation while Kolk remained suspended from work. At that point Boyko asked that the April 10 session be considered the first step in a grievance procedure, and Marzella agreed to this.

Boyko was an employee of Respondent at the time of her testimony, and it can be argued that in that capacity greater credence should be given to her because she knowingly gave testimony that would be adverse to her Employer. However, Boyko was not merely a disinterest employee. She was a union representative and had an interest in successfully presenting Kolk's case. More importantly, her demeanor revealed her to be less than a dispassionate, objective witness. She appeared to exhibit a most hostile attitude toward Respondent. After a review of the demeanor of all witnesses, including a consideration of such factors as the ability to testify with certainty and the ability to testify with responsiveness and lack of hesitation, I credit the testimony of Marzella, Wendowski, and Davis.

According to Marzella, subsequent to the April 10 meeting he interveiwed Szymt, who denied that she upset Cook, and he interveiwed Cook by telephone and received a written account in letter form from her of the February 18 conversation. Based on that conversation and letter, Marzella concluded that Kolk indeed engaged in unprofessional conduct, i.e., that she had told the patient, whose condition required tranquility in order to prevent movement of a blood clot to critical organs, that her well-being would be jeopardized by the absence of sufficient personnel due to the strike. He reported his conclusion to Wendowski whose function was to preside over the second step of disciplinary procedure. Wendowski, upon receiving this information, decided to terminate Kolk on her conclusion that Kolk's conduct was so unprofessional to warrant discharge. Wendowski testified to her past decisions to discharge employees, e.g., in 1977 she discharged employee Linda Carter because of that employee's intrusion upon a patient's tranquility with her own personal and financial problems. Significantly, Cook had been the cause of an earlier termination of a nurse for alleged mistreatement during a prior admission. The General Counsel adduced no evidence to the effect that discharge for conduct as alleged to have been engaged in by Kolk was disparate or extraordinary.[6]

Subsequently, the Union's grievance with respect to Kolk's discipline and discharge proceeded to Marzella's level. On or about May 30 he met with Union President Twomey, Kolk, and Boyko. Present during this meeting was also Davis. The matter was discussed. Marzella reviewed the situation and decided to uphold the discharge on the ground of his belief that Kolk had engaged in conduct which interfered with the hospital-patient relationship, interfered with a doctor-patient relationship, and that she failed to notify the charge nurse of her conversation, wherein Cook became upset on the evening of February 18, thus failing to exercise proper professional judgment.

Although I credit Kolk as to the actual conversation she had with Cook, I conclude that Respondent had reasonable cause to believe that Kolk did engage in misconduct on February 18. In view of the lack of evidence of respondent hostility to any employee who engaged in union activities

Idjadi's personal and pressing complaint made directly to Marzella, I find nothing extraordinary or nefarious about his involvement at this point.

[4] There is some evidence that Cook was again hospitalized subsequently for other unstated reasons. Respondent made no request to postpone the hearing or to obtain a deposition for the testimony of Cook, or was any arrangement made to otherwise obtain her testimony.

[5] Szymt was not called to contradict Kolk as to this point, although Szymt was not present during Kolk's conversation with Cook.

[6] The General Counsel's assertion in the brief that Wendowski contradicted herself as to who actually made the decision to discharge is unsupported by the record.

and the lack of significant disparity of treatment toward Kolk, I do not conclude that Respondent discharged Kolk because of her union activities prior to February 18. I conclude that Respondent honestly believed that Kolk had engaged in misconduct and that this was the motivation for her termination. I therefore do not find that Respondent violated Section 8(a)(3) in this respect. However, another issued to be resolved is whether Respondent violated the Act by discharging Kolk because of suspected misconduct perpetrated during the course of protected activities, when in fact no such misconduct occurred.

In *N.L.R.B.* v. *Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964), the Court held:

> In sum, §8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

The General Counsel argues that Kolk was in a position analogous to strikers who engaged in the protected activity of appealing to and attempting to convince such nonemployees as customers of the appropriateness of the Union's position.[7] However, although Kolk was not yet a striker and the main thrust of her conversation did not explicitly relate to the appropriateness of the Union's bargaining position, I agree she was engaged in concerted, protected activities. According to Kolk's credited account of the conversation, the patient, by her questions, implicitly challenged the propriety of the employees' decision to support the strike because of the fear of resulting inadequate care. Kolk assuaged and assured the patient and by so doing she effectively defended, supported, and joined with her fellow employees' decision to engage in concerted, protected activities, and implicitly allied herself with the underlying motivation for that activity, i.e., support of the Union's bargaining position with respect to wages and conditions of employment. An employee's appeal, espousal, and defense of fellow employees' concerted activities is integral to the employee's right to engage in those activities. I conclude that it is immaterial whether such conduct occurred immediately prior to or during the actual cessation of services of which adequate advance notice was given in this case.

I find it unnecessary to decide whether or not Kolk was obliged to conform to a higher standard of conduct because of the nature of Respondent's enterprise; i.e., health care services.[8] Assuming that she was so obliged to act with more care than an industrial or any other nonhealth care, service employer, her deportment was prudent, cautious, and served not only the interest of the Union but also that of Respondent by assuring the patient that the employees' exercise of their right to strike would not interfere with the hospital's ability to provide adequate care. A refusal to respond to the patient's inquiries would have been far more provocative of suspicion and anxiety in the patient than was her honest response that indeed she and some of the other nurses and employees would engage in a work stoppage but that others would be available for service.

I conclude that Respondent believed and was aware that Kolk was engaged in concerted, protected activities on the evening of February 18 and that it discharged her in the erroneous belief that, in the course of those activities, she engaged in misconduct. Inasmuch as a good-faith belief of misconduct is no defense under the rationale of *Burnup & Sims*, I conclude that Respondent herein violated Section 8(a)(1) of the Act. Inasmuch as I find that Respondent was not motivated by antiunion animus, I find no violation of Section 8(a)(3) of the Act.[9]

E. *The January 17 Notice*

Negotiations for contracts in the two units commenced on October 20, 1977. In January the Union announced to its members that a meeting would be held on January 18 for the purpose of conducting a strike vote at the Pochuck Valley Fire House, which is located about 4 miles from the hospital. On January 17 the area was subjected to a snowstorm and the roads which traversed a hilly terrain were iced. The weather forecast called for an additional 6 inches of snow. In the early afternoon of January 17, Marzella telephoned Boyko and offered the site of the hospital's solarium for the use of the Union for the strike vote. At about 2 or 3 p.m. Boyko informed Marzella that the union leadership rejected the offer because it considered the fire hall to offer greater privacy and, moveover, arrangements had already been made for the use of the fire hall. Marzella testified that he became concerned about the safety of the employees and concluded that a greater employee turnout would be afforded by the use of the solarium. That day Marzella distributed to employees, and posted, fliers containing the following message:

> Your Union leaders have called for a strike vote this Wednesday at the Pochuck Valley Fire House.
>
> Because this matter is of such grave importance, and because the consequences of a strike could be so horrendous to the future of all of us, I have offered the facilities of our hospital for this important election to your Union leaders. I have offered the use of the Solarium so that complete privacy can be assured.
>
> It is important that every employee eligible to participate in this strike vote have the opportunity to do so. With the terrible weather conditions, this will only be possible if the election is held here where everyone works.

[7] Citing *Montgomery Ward & Co., Inc.*, 155 NLRB 999 (1965), 374 F.2d 606 (10th Cir. 1967).

[8] Cf. *Beth Israel Hospital* v. *N.L.R.B.*, 437 U.S. 483 (1978), where the Court evaluated the legislative history of the health care amendments to the Act with regard to the Board's evaluation of no-solicitation rules. The Court rejected the contention that because a hospital is involved in that case that a more restrictive, no-solicitation rule was justified. The Court cited the legislative history of the health care amendments in which reference was made to special consideration for the needs of patients. However, such reference is in the context of sufficient advance notice of a strike or picketing to prevent disruption of care and not in the context of a curtailment of employees' other rights to engage in concerted activity *vis-a-vis* the patient.

[9] See *General Motors Corporation*, 218 NLRB 472 (1975), for a discussion of the *Burnup & Sims* rationale by Administrative Law Judge Winkler whose decision was adopted by the Board. The General Counsel cites *Delco-Remy Division, General Motors Corporation*, 234 NLRB 995 (1978), in which an 8(a)(3) motivation was also found. However, in that case, the Board and the Administrative Law Judge also relied on evidence of union animus.

> Your Union leaders have not accepted this offer which could have enabled their people to have the convenience of voting at their workplace. I hope you will urge them to take advantage of this offer so that everyone will have an opportunity to make their voice heard in this critical election.

Subsequently several employees called the union representatives and asked where the strike vote would take place. There is no evidence that Respondent's flier had any impact on the actual number of employees who attended the meeting that was subsequently held at the fire hall. The union vice president testified that it had had no palpable effect. The solarium had been used for the Board-conducted election and is no proximate to any supervisory or administrative offices.

The General Counsel contends that the flier constituted an intrusion into the internal affairs of the Union and is violative of Section 8(a)(1) of the Act under the rationale of *General Electric Company, Battery Products, Capacitator Department*, 163 NLRB 198 (1967), Cert. denied in part 400 F.2d 713 (5th Cir. 1968); *General Electric Company*, 150 NLRB 192, 276, affd. 418 F.2d 736 (2d Cir. 1967), cert. denied 397 U.S. 965 (1970); and *Wooster Division of Borg-Warner Corp.* 356 U.S. 342 (1958).

I find, however, that the facts of this case are more akin to that of a recent decision in which the Board distinguished between the *General Electric* and *Borg-Warner* cases and held that a communication to employees constituted noninterference in union affairs and was protected as free speech under Section 8(c) of the Act. *Westinghouse Electric Corporation, Distribution Equipment Division*, 232 NLRB 56 (1977).

In the *Westinghouse* case prior to a scheduled strike vote the employer mailed to employees letters wherein it characterized a strike as premature and likely to adversely affect business. The letter also advised the employees as follows:

> So be sure you attend the meeting and give careful thought and consideration to this serious question before you cast your ballot. You should request the type of ballot that will allow you to express your true feelings. Also you should be given the opportunity to vote on the company's proposal when it is presented.

The Board observed that in the *Westinghouse* case the employer did not, as in *Borg-Warner*, enmesh the subject of strike votes in the bargaining process at the bargaining table whereby it insisted to impasse upon a contractual proviso which intruded into the internal procedure of the Union. It also observed that the employer, as in *General Electric*, did not appeal to employees to take a strike vote on company property, on company time, in a prescribed manner, and under nonunion supervision, while simultaneously it engaged in other unfair labor practices which affected the impact of the communication upon the employees.

The General Counsel argues that the communication in the instant case related only to procedures to be followed by union members' prior to the conducting of a strike vote and, as such, is therefore distinguishable from *Westinghouse* and does not constitute free speech. Respondent's flier did in fact urge that a strike vote be conducted at the solarium. The similarity with the General Electric case ends there. The strike vote herein had already been arranged by the Union. Respondent made no attempt to interject itself in any other fashion into the mechanics of the vote. It was motivated by a desire for the safety of employees and full participation in the vote. It cannot be gainsaid that this was a matter of mutual concern to it and the Union. Urging a particular location for the locus of the meeting under the circumstances of this case is no more intrusive into the internal procedures of the Union than urging that employees attend, participate, and express themselves as to the type of ballot to be used, and demand opportunities to vote on the company's proposal at a scheduled union meeting. Respondent herein engaged in no concurrent unfair labor practices which would have tended to affect the nature of the flier.

Under the circumstances of this case, I do not conclude that Respondent interfered with employees' rights guaranteed in Section 7 of the Act by interjecting itself into the purely internal affairs of the Union. Accordingly, I conclude that this allegation ought to be dismissed.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. At all times material, the Union has been and is the exclusive bargaining representative of employees of Respondent in the following units:

> All full-time and regular part-time licensed practical nurses, graduate nurses, laboratory technicians, X-ray technicians and EKG/EEG technicians employed at Respondent's Sussex facility but excluding all service and maintenance employees, office clerical employees, professional employees, watchmen, guards, all other employees and all supervisors as defined in the Act.
>
> All full-time and regular part-time registered nurses, graduate nurses and nurse anesthetists employed at Respondent's Sussex facility, but excluding all other professional employees, director of patient care service, in-service educator, health care coordinator, watchmen, guards, all other employees and all supervisors as defined in the Act.

4. By failing and refusing to notify and bargain with the Union concerning the subcontracting of EKG and stress-testing work, and the effects of such subcontracting, Respondent has violated Section 8(a)(5) and (1) of the Act.
5. By terminating Elizabeth Kolk, Respondent has violated Section 8(a)(1) of the Act.
6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent engaged in certain unfair labor practices, I will recommend that it be ordered to cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(1) of the Act by terminating Elizabeth Kolk and violated Sec-

tion 8(a)(5) and (1) of the Act by unilaterally subcontracting the EKG and stress-testing work to Greene & Kellogg, Inc., without prior notice to or bargaining with the Union concerning that decision, or the effects of the implementation of that decision, I will recommend that Respondent rescind its contract with Greene & Kellogg, Inc., reinstate the EKG and stress-testing work to its *status quo ante* prior to the strike, and reinstate Margaret Ulbricht and Elizabeth Kolk to their former or substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered as a result of the discrimination against them. Any backpay found to be due them shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[10]

On the basis of the foregoing findings of fact, conclusions of law, and the entire record herein, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[11]

The Respondent, Alexander Linn Hospital, Sussex, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Failing and refusing to notify and bargain upon request with Hospital, Professional and Allied Employees of New Jersey, or any other labor organization representing its employees in an appropriate unit, respecting a decision or the effects of a decision to subcontract the work of any employee in the following appropriate units:

> All full-time and regular part-time licensed practical nurses, graduate nurses, laboratory technicians, X-ray technicians and EKG/EEG technicians employed at Respondent's Sussex facility but excluding all service and maintenance employees, office clerical employees, professional employees, watchmen, guards, all other employees and all supervisors as defined in the Act.
>
> All full-time and regular part-time registered nurses, graduate nurses and nurse anesthetists employed at Respondent's Sussex facility, but excluding all other professional employees, director of patient care service, in-service educator, health care coordinator, watchmen, guards, all other employees and all supervisors as defined in the Act.

(b) Discouraging concerted activities engaged in by employees for employees' mutual aid or protection by terminating them or otherwise discriminating against employees in any manner with regard to their rates of pay, wages, hours of employment, tenure of employment, or any term of condition of employment.

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

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

(a) Rescind after proper notice its contract with Greene & Kellogg, Inc., with respect to the performance of EKG and stress-testing work at its hospital.

(b) Reestablish its own EKG and stress-testing work and offer to Margaret Ulbricht, whose employment was terminated as a result of the subcontract with Greene & Kellogg, Inc., immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings suffered in the manner prescribed in the section of this Decision entitled "The Remedy."

(c) Offer to Elizabeth Kolk immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings suffered in the manner prescribed in the section of this Decision entitled "The Remedy."

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of monies due under this Order.

(e) Upon request, bargain collectively with the abovenamed labor organization as the exclusive representative of all the employees in the appropriate units set forth above with respect to rates of pay, wages, hours of employment, or other terms and conditions of employment.

(f) Post at its Sussex, New Jersey, hospital copies of the attached notice marked "Appendix."[12] Copies of said notice on forms provided by the Regional Director for Region 22, after being duly signed by its authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

It is further ordered that so much of this complaint as alleges unfair labor practices not found herein be dismissed.

[10] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."