

Highgate LTC Management, LLC d/b/a Northwoods Rehabilitation and Extended Care Facility at Rosewood Gardens and New York's Health & Human Service Union 1199/SEIU, AFL-CIO.
Cases 3-CA-23616 and 3-CA-23730

June 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On January 24, 2003, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions,² and to adopt the recommended Order as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² The judge found that the Respondent violated Sec. 8(a)(1) of the Act by promulgating an overbroad restriction on off-duty employee access to the Respondent's facility. This allegation, however, was not included in the complaint. Accordingly, we reverse the judge's finding and have deleted the relevant provisions from the Order and notice.

Chairman Battista finds it unnecessary to pass on whether the Respondent violated Sec. 8(a)(1) by surveilling its employees' union activity on April 24, 2002, because any such violation would be cumulative of the finding that the Respondent violated Sec. 8(a)(1) by surveilling its employees' union activity on April 19, 2002.

No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act when (a) Manager Catherine Donato told employees that they could not engage in protected activities during nonworking time in nonworking areas of the Respondent's property; (b) Supervisor Nancy Nopper told employee Denise King that she could not talk about the Union while at work; (c) Supervisor Nopper told employee Ronnie Currie to remove a Union pin from his uniform; and (d) the Respondent promulgated a rule prohibiting employees from wearing tags, buttons, or stickers while on duty. Further, no exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(5) by denying the Union's request for access to its facility to observe employees' working conditions and by failing to provide the Union with certain requested information.

³ To ensure that the employees are accorded an appropriate period of representation, we shall amend the remedy so that the one year certification period begins on the date that the Respondent remedies the violations found herein. See *Mar-Jac Poultry Co.*, 136 NLRB 785, 787 (1962).

modified below and orders that the Respondent, Highgate LTC Management, LLC d/b/a Northwoods Rehabilitation and Extended Care Facility at Rosewood Gardens, Rennselaer, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

“(c) Promulgating or maintaining work rules prohibiting its employees from wearing tags, buttons, or stickers while on duty.”

2. Substitute the following for paragraph 2(c).

“(c) Within 14 days of the date of this Order, notify all employees in the bargaining unit herein, in writing, that it is rescinding the rule promulgated on April 12 prohibiting employees from wearing tags, buttons, or stickers while on duty, and that they are not prohibited from engaging in union and other protected activities while they are on the Respondent's property, as long as they are not in immediate patient-care areas.”

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting New York's Health & Human Service Union 1199/SEIU, AFL-CIO (the Union) or any other union.

WE WILL NOT engage in surveillance of your union or other protected concerted activities.

WE WILL NOT inform you that you are prohibited from engaging in union or other protected concerted activities while on our property.

WE WILL NOT prohibit you from wearing tags, buttons, or stickers while on duty.

WE WILL NOT refuse to meet in a timely manner with the Union for the purpose of negotiating a contract.

WE WILL NOT refuse to give the Union information that it requested, which information is relevant and necessary to it as the collective-bargaining representative of certain of our employees.

WE WILL NOT refuse to bargain with the Union by refusing to grant the Union's request for access to our facility in order to observe the equipment and working conditions at the facility.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce you in the exercise of your Section 7 rights.

WE WILL offer Denise King 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 any other rights and privileges previously enjoyed, and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL rescind the work rules adopted on April 12, 2002, involving your right to wear tags, buttons, or stickers while on duty.

WE WILL provide the Union with the information it requested in items 3, 4, 5 and 19 of the Union's information request to us dated June 13, 2002, and

WE WILL, on the Union's request, grant the Union access to our facility for reasonable periods and at reasonable times sufficient to allow the Union to observe your work.

HIGHGATE LTC MANAGEMENT, LLC D/B/A
NORTHWOODS REHABILITATION AND EX-
TENDED CARE FACILITY AT ROSEWOOD
GARDENS

Alfred Norek, Esq., for the General Counsel.
Matthew DeMarco, Esq. (Schwarz & DeMarco LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on November 12, 2002, in Albany, New York. The amended consolidated complaint herein, which issued on September 18, 2002,¹ was based upon unfair labor practice charges and an amended charge that were filed on May 14, July 24, and August 2, by New York's Health & Human Service Union 1199/SEIU, AFL-CIO (the Union). The complaint alleges that Highgate LTC Management, LLC d/b/a Northwoods Rehabilitation and Extended Care Facility at Rosewood Gardens (the Respondent) violated Section 8(a)(3) of the Act by terminating employee Denise King on about May 10, and violated Section 8(a)(5) of the Act by refusing to provide certain

¹ Unless indicated otherwise, all dates referred to herein relate to the year 2002.

requested information to the Union on about June 13, and by failing and refusing to do so in a timely manner, by refusing to meet with the Union in a timely manner for the purpose of negotiating a collective-bargaining agreement, and by refusing to grant the Union access to its facility in order to observe the employees' working conditions. In addition, the complaint alleges numerous 8(a)(1) violations: that it directed its employees to remove union buttons from their clothing, engaged in surveillance of its employees' union activities, and informed its employees that they were prohibited from engaging in union activities, or discussing the Union, while on the Respondent's premises. It is further alleged that the Respondent violated Section 8(a)(1) of the Act by promulgating rules stating that employees were not permitted access to the interior of the Respondent's facility when they were not on duty and that employees could not wear badges or stickers in support of any particular cause or candidate while on duty, and added these rules to its employee handbook.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

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

III. FACTS AND ANALYSIS

A. Election and Certification

The Union filed a petition with the Board on April 24 in Case 3-RC-11224 to represent certain of the Respondent's employees. After an election that was conducted on May 31, the Union was certified by the Board on June 10 as the collective-bargaining representative of the following employees of the Respondent:

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

B. Bargaining, Information, and Access Requests

The complaint alleges that on June 13 the Union, by letter, requested that the Respondent bargain with it in order to negotiate a collective-bargaining agreement, but that the Respondent failed to respond to this request in a timely manner, in violation of Section 8(a)(5) of the Act. The complaint also alleges that by the same June 13 letter, the Union requested that the Respondent provide it with certain information that was relevant and necessary for it as the collective-bargaining representative

of certain of its employees. It is alleged that the Respondent violated Section 8(a)(5) of the Act by not providing any information in response to this request until August 9, and never providing information in response to items 3, 4, 5, and 19 of the June 13 letter.

By letters dated June 13, Patricia Lippold, the Union's staff director, wrote identical letters to the Respondent's owners, administrator, and counsel. The first part of the letters requested that the Respondent begin bargaining with the Union on June 27, and continue negotiations on the next four consecutive Thursdays at the Respondent's facility and that the members of the Union's bargaining committee be released from work to attend these sessions. The second part of the letters requested that the Respondent provide it with twenty items "for the purposes of bargaining." The requests that allegedly were never responded to are:

3. Date and amount of most recent pay raise, if any, for all employees in the bargaining unit.
4. Date and amount of most recent bonus, if any, issued to all employees in the bargaining unit.
5. Copies of any and all records of discipline for all employees in the bargaining unit.
19. Copies of any and all documents setting forth policies regarding health and safety in the workplace.²

By letter dated June 28, Matthew DeMarco, counsel for the Respondent, wrote to Lippold:

We are the attorneys for Northwoods Rehabilitation and Extended Care Facility at Rosewood Gardens. We are in receipt of your letter of June 13, 2002 in which you request information for the purposes of collective bargaining. We have forwarded a copy of your request to Rosewood and are reviewing the same. The requested documentation, as it may exist and be relevant to collective bargaining, will be forwarded to you. We will be in further contact with you regarding available dates and a place, for the commencement of bargaining.

By letter dated July 8, Lippold wrote to counsel for the Respondent, *inter alia*:

I have reviewed your letter dated June 28, 2002 indicating that you will be representing Rosewood Gardens Nursing Home Administration in contract negotiations with 1199 SEIU.

Since the bargaining dates I recommended in previous letters have now passed, I would like to suggest other dates. I can be available July 15th, 16th, 18th, 19th or any day the following week.

By letter dated July 19, Lippold wrote, again, to counsel for the Respondent, as a "follow up to my letter of June 13, 2002 requesting information and bargaining dates." She asked that the information requested for the period May 31, 2001, to the pre-

² At the commencement of the hearing, counsel for the General Counsel proposed a stipulation that these items were relevant and necessary to the Union as the collective-bargaining representative of certain of the Respondent's employees. Counsel for the Respondent, while refusing to stipulate to the necessity of this requested information, did stipulate that they were relevant.

sent be sent to the Union's office in Albany. The letter also states:

The Union is anxious to commence negotiations and we have not received any of the information that we requested nor have we heard back from you concerning the dates we proposed for bargaining or received any information requested in my letter. I have contacted you [sic] of-fice several times and have received no response.

I would also like to schedule a time for union representatives to enter the facility to observe employee work process and working conditions. I propose July 29th, 30th or 31st of 2002.

Please contact me at (518) 489-4749 to confirm dates for bargaining and union representative visits.

By letter dated August 9, counsel for the Respondent sent Lippold documents ". . . in response to your request for information . . . as set forth in your letter of June 13, 2002." As set forth above, it is alleged that there are two distinct violations herein: that the 8-week delay in responding to the Union's June 13 request for information violated Section 8(a)(5) of the Act, and that the response did not adequately address items 3, 4, 5, and 19 of the June 13 request.

Counsel for the Respondent's August 9 letter responded to items 3, 4, and 5 in the following manner: for item 3, "Date and amount of most recent pay raises. Rosewood employees receive annual increases of 0-2.5%, based on merit on their anniversary date." For item 4: "Date and amount of most recent bonus. Rosewood does not provide bonuses for employees. As needed, Rosewood provides work incentives." For item 5: "Disciplinary records. Other than individual write-ups, the facility does not maintain disciplinary 'records.' You do not specify any time period, nor any particular issue as a basis for your request. If you wish to provide further information, we will give your request further consideration." There was no specific response to item 19.

By letter dated August 26, Lippold wrote to counsel for the Respondent, *inter alia*:

This is in response to your letter of August 9, 2002 and the information provided with that letter. As detailed below, certain documents requested by me in my June 10, 2002 letter have not been produced and I request that you provide them at the earliest possible time.

1. Paragraph 4—most recent bonus. You state that bonuses are not provided but work incentives are provided. I believe my request for bonuses encompasses work incentive payments and request that you provide information reflecting the nature of these incentives and the date and amount of work incentive(s) paid to each bargaining unit employee.

2. Paragraph 5—disciplinary records: Individual employee write-ups are generally considered disciplinary records and we request copies of all write-ups as well as warning notices, suspension notices and discharge notices issued to any bargaining unit employee over the past five years.

....

5. Paragraph 19—health and safety policies: We received no documents in response to this request. I would assume that Rosewood Gardens has written policies or guidelines concerning a variety of health and safety matters, such as exposure to contaminants, infectious diseases, needle-stick injuries, lifting and other work-related hazards.

We are still awaiting your response regarding scheduling a time for a union representative to obtain access to the building to observe working conditions as requested in our July 19th letter.

By letter dated August 28, Lippold wrote again to counsel for the Respondent stating:

This letter is a follow up to my letter dated August 26, 2002 regarding Rosewood Gardens compliance with the union's information request.

I had neglected to include that you had not fully responded to item number three on our June 10th, 2002 letter. We are seeking the date and amount of the most recent pay raise each individual employee received.

Lippold testified as to why the information requested was relevant and necessary to the Union. As to item 3, she testified that she wanted to know what pay raises had been granted in the prior year to assist in preparing a wage proposal for bargaining. As to item 4, employees were telling her that some employees received bonuses while others didn't and she wanted to know why, and she needed this information to assist her in preparing a wage proposal for negotiations. For item 5: "we did need to know what disciplinary actions had been taken before, in order to formulate a proposal in discipline discharge grievances." In addition, in its future representation of these employees, it was necessary for the Union to know the extent of each employees' past discipline in evaluating and prosecuting future disciplinary actions. The Union needed item 19 because there are a lot of issues and regulations regarding health and safety in the industry, and the Union needed to know what information the Respondent was distributing to its employees in order to bargain effectively about this issue. Since the Respondent's reply on August 9, the Union has received no further response to its June 13 request, nor has the Respondent ever offered the Union an explanation for the delay from June 13 to August 9.

Terri-Ann-Montanye, Respondent's corporate director of human resources for the Respondent's parent corporation, testified for Respondent about the reasons for the delay in responding to the Union's information request. She testified that she received Lippold's June 13 letter prior to receiving the certification from the Board. Because of that, she put the letter "on the side" until she received the certification, about a week later. She then took the letter to Sandy Condit, Respondent's HR payroll coordinator at the facility and told her to "start gathering this information." She testified that the Respondent "... does not have the most sophisticated software, so most of this was done manually, which takes a little longer. . . ." For example, for the Union's request on health insurance, the Respondent had to manually inspect every insurance bill for the unit employees. For the request of the names of the bargaining

unit employees, with their addresses, telephone numbers, job classification, date of hire and social security numbers, this also had to be performed manually by the human resources employee at the facility. It was the fact that these requests and others had to be individually performed that caused the delay from mid-June until August 9. Montanye testified that, as far as she is concerned, all the requests have been complied with. She testified that, in about mid-October, she gave Lippold some requested information regarding health insurance, and said to Lippold, "This takes care of everything" and Lippold responded that it did. She did not respond to Lippold's letters of August 26 and 28 because, "I thought this was all taken care of." She testified further that there is a difference between a bonus and a work incentive. The Respondent recently offered a sign-on bonus, additional money to encourage individuals to work for the Respondent. An example of a work incentive is if it needed somebody to work an additional shift, they would offer a few extra dollars if the employee volunteered for overtime work.

As regards the alleged violation of delaying collective bargaining, Lippold testified that when she did not receive a response to her June 13 letter, after receiving counsel for the Respondent's June 28 letter, she made a number of phone calls to counsel's office, but these calls were not returned. By letter dated August 21, the Respondent notified Lippold that Leroy Kotary would be its negotiator, and gave the address and telephone number that he could be reached at "... to schedule dates for negotiations." That was the first time that the Respondent notified the Union who would be negotiating on its behalf and there had been no negotiations between the parties prior to that date. The first negotiating session took place on September 19.

As stated above, Montanye testified that she did not receive the Board certification until about a week after it issued. After receiving the certification, she met with Respondent's owners to decide whether counsel in this matter would also serve as the Respondent's negotiator and before Montanye went on vacation on August 19, they decided to retain Kotary as their negotiator. She testified that during the period between Lippold's June 13 letter and Respondent's August 21 response, the Respondent's owners were away for 2 weeks and Kotary "wasn't available" for some unspecified period of time.

In addition to these allegations, it is also alleged that since about July 19, the Respondent has ignored, or denied, the Union's request for access to the facility for the purpose of observing the employees' working conditions, which was necessary for the Union as the bargaining representative of certain of the Respondent's employees, in violation of Section 8(a)(5) of the Act. As stated above, Lippold's July 19 letter to counsel for the Respondent requested that the Respondent allow Union representatives to enter the facility to observe the employees' working conditions, and Lippold's August 26 letter to counsel stated that the Union was still waiting for a response to that request. Lippold testified that the Union wanted to observe the employees working at the facility in order to best formulate their bargaining demands. The Respondent has never responded to these requests and has never granted the Union the access that it requested, although the parties are presently negotiating that issue along with other aspects of a proposed contract. Lippold

testified that during the summer, she asked one of the Respondent's owners, Diana Koehler, if the Union could have access to the facility in order to observe the employees' working conditions, and the layout and equipment at the facility, and Koehler responded that the Union would never set foot in the facility. Koehler, who is not named in the complaint, did not testify.

Section 8(d) of the Act requires the parties ". . . to meet at reasonable times. . . ." On June 13, the Union requested that the Respondent commence bargaining with the Union, which had been certified by the Board three days earlier. The letter suggests June 27 as the date for commencement of the negotiations. Despite Lippold's subsequent calls and followup letter, the Respondent did not respond to these requests until August 21, when it notified the Union that Kotary would be negotiating on its behalf. Respondent's defense to this delay is that it did not receive the certification for about a week after it issued, its owners were away for about two weeks during this period, and that Kotary was not available for some unspecified period during this time. Stated bluntly, this is a rather lame and transparent excuse for failing to respond to the Union's bargaining request for a period in excess of 2 months. Respondent never explained why it took over two months to select an individual as its chief negotiator, especially when it had been employing an experienced and capable law firm during the election process who, even if they were not chosen to act as the Respondent's chief negotiator, presumably, could have recommended others for that position. In addition, even if Respondent were having difficulty selecting a negotiator, it did not explain why it did not so notify the Union, rather than waiting almost ten weeks before replying to the Union's bargaining request. The court, in *Calex Corp. v. NLRB*, 144 F.3d 904, 909 (6th Cir. 1998) stated: "Dilatory and delaying tactics that undermine the process of collective bargaining are indicative of bad faith bargaining." I find that the Respondent's dilatory tactics in failing to respond to the Union's bargaining request for over 2 months violated Section 8(a)(5) of the Act. *J & J Towing Co.*, 307 NLRB 198 (1992).

There are two distinct allegations regarding the Union's information request dated June 13 and supplemented on August 26 and August 28. That the Respondent's delay in responding to the request violated the Act, and that the Respondent never properly responded to 4 of the 20 requests. Initially, the four items in dispute are clearly relevant and necessary to the Union as the collective-bargaining representative of these employees. I found Lippold to be an articulate and credible witness and credit her testimony regarding the Union's need for the twenty items requested. Items 3 and 4 relate to the Respondent's history of granting wage increases and extra compensation to its employees, certainly relevant and necessary to the Union in preparing its wage demands. The Union would need the information requested in item 5 for future disciplinary matters involving the unit employees and the information requested in item 19 in order to learn what safety measures the Respondent employed in order to determine whether additional safety measures are needed.

When a union is entitled to requested information, it is entitled to it without unreasonable delay, in a timely manner, or "as

promptly as circumstances allow." *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989); *Decker Coal Co.*, 301 NLRB 729, 740 (1991); *Providence Hospital*, 320 NLRB 790, 794 (1996). In *Beverly California Corp.*, 326 NLRB 153, 157 (1998), the Board stated: "It is well established that when a union makes a request for relevant information, the employer has a duty to supply the information in a timely fashion or to adequately explain why the information was not furnished. The Respondent, however, never gave an explanation for failing to comply with the Union's request for 2 months." In determining timeliness, "It is appropriate to consider whether the nature of information is conducive to rapid response, and whether the information is readily obtainable in the employer's files in assessing whether the employer's delay is great enough to violate its duty." *Capitol Steel & Iron Co. v. NLRB*, 89 F.3d 692, 698 (10th Cir. 1996). Obviously, it is a lesser burden for an employer to respond to a minor request that can be retrieved from a computer or a brief search of some files as compared to a large request that requires substantial manual retrieval. It appears to me that the Union's June 13 request falls in the latter category and that the Respondent has adequately explained the delay in responding to this request. The Union's June 13 letter requested twenty separate items. As credibly testified to by Montanye, many of these items had to be retrieved manually. A careful review of the Union's request convinces me that the seven week period between the receipt of the request and the response, was not an inordinate amount of time, considering the nature and extent of the request. I therefore recommend that this allegation be dismissed.

It is next alleged that the Respondent never properly responded to items 3, 4, 5, and 19. The complaint alleges, and Lippold testified, that the Union never received satisfactory responses to these items. Montanye testified that in October, when she gave Lippold some requested information and said, "This takes care of everything" Lippold agreed that it did. Although I generally found Montanye to be a credible witness, I do not credit this testimony. Initially, as stated above, I found Lippold to be an extremely believable witness. In addition, I find it significant that the Respondent never responded to Lippold's letters of August 26 and 28 requesting the information that the Respondent failed to provide in its August 9 response. I find Montanye's attempted explanation for its failure to respond (she thought that it had been taken care of) disingenuous since the purported conversation with Lippold did not take place until October, and there would be no reason for Lippold to request this information if it had already been provided. Finally, I agree with Counsel for the General Counsel that these items were not properly responded to. For example, Item 3 should have been answered by stating the amount of increases that each employee earned, rather than stating, generally, that employees receive annual increases of 0-2.5 percent based upon merit; item 4 should have been responded to by giving the additional amount of compensation (bonuses or incentive pay) rather than stating that the Respondent does not provide bonuses, but grants work incentives. These responses, as well as the responses to items 5 and 19, are not good faith complete responses to the Union's request. I therefore find that the Respondent violated Section 8(a)(5) of the Act by not fully re-

sponding to items 3, 4, 5, and 19 of the Union's information request.

The final issue in this area is whether the Respondent refused the Union's request for access to its facility, in violation of Section 8(a)(5) of the Act. In *Holyoke Water Power Co.*, 273 NLRB 1369, 1370 (1985), enf. 778 F.2d 49 (1st Cir. 1985), the Board established a balancing test for determining whether an employer's denial of access to its facility for the union representing some of its employees violates Section 8(a)(5) of the Act:

Each of two conflicting rights must be accommodated. *Fafnir Bearing Co. v. NLRB*, 362 F.2d 716 (2nd Cir. 1966). First there is the right of employees to be responsibly represented by the labor organization of their choice and, second, there is the right of the employer to control its property and ensure that its operations are not interfered with. As noted by the Supreme Court in *Babcock & Wilcox* [Co.], 351 U.S. [105, 112 (1956)], the Government protects employee rights as well as property rights, and "accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other."

Thus, we are constrained to balance the employer's property rights against the employees' right to proper representation. Where it is found that proper representation of employees can be achieved only by the union's having access to the employer's premises, the employer's property rights must yield to the extent necessary to achieve this end. However, the access ordered must be limited to reasonable periods so that the union can fulfill its representation duties without unwarranted interruption of the employer's operations. On the other hand, where it is found that a union can effectively represent employees through some alternative means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access.

In *Hercules, Inc.*, 281 NLRB 961, 969 (1986), the administrative law judge, as affirmed by the Board, stated:

Thus, it is settled that the relevance of, and need for, the information does not translate into an absolute or unquestioned right to access. On the other hand, it is equally clear that, circumstances permitting, the Union does have a statutory right to invade Respondent's property rights in order to obtain live and direct information of the kind involved in this case and "that property rights alone will not suffice as a reason for denial of rights guaranteed under the Act." *Fafnir*, supra.

It is the Respondent's burden to establish that its property interests outweigh the Union's need for access. *Hercules*, supra at 970. In the instant matter the Respondent never defended against the Union's request based upon safety or proprietary reasons. In fact, the Respondent never officially responded to the Union's request. Its only response was Koehler's statement to Lippold that the Union would never set foot in the facility.

In balancing the interests pursuant to *Holyoke*, it is clear that the Union has a real and substantial interest in visiting the facility to observe the employees work and the Respondent's layout

and equipment. Just to cite examples testified to by Lippold, there is a real danger of employees' sticking themselves with needles and incurring back problems caused by lifting heavy objects. The Union can most intelligently learn of these dangers, and possible ways of avoiding them, by observing the unit employees at work. As the Board stated in *C.C.E., Inc.*, 318 NLRB 977, 978 (1995):

Likewise, in this case, there can be no adequate substitute for a union representative's direct observation of the plant equipment and conditions, and employee operations and working conditions, in order to evaluate matters such as job classifications, safety concerns, work rules, relative skills, and other matters necessary to develop an informed and reasonable negotiating strategy. This is particularly true in the circumstances of this case where the parties are bargaining for an initial contract.

I therefore find that by denying the Union's request for access to the facility, the Respondent violated Section 8(a)(5) of the Act. *New Surfside Nursing Home*, 322 NLRB 531 (1996).

C. Events of April 19 and 24

It is next alleged that on April 19, the Respondent, by its admitted agents Kay Donato, director of nursing, Peter Demerevski, executive housekeeper, and Howie Evans, director of maintenance, engaged in surveillance of its employees' Union and other protected concerted activities, and informed its employees that they were prohibited from engaging in these activities while on the Respondent's property at the facility, and that Evans further engaged in surveillance of the employees' Union and protected concerted activities on April 24. The Respondent's facility is located at the top of a hill adjacent to a parking lot used by employees and visitors. Access to the Respondent's facility is from Route 4. From there you turn and follow a hill up curving to the right which leads to the parking lot and the adjacent facility. It is undisputed that because of the curve in the road and the trees, you cannot see the turn off from Route 4 from the facility. On April 19, Union representatives together with a number of employees were present at the bottom of the hill in the morning and the afternoon stopping cars exiting and entering Route 4 and distributed Union authorization cards to the occupants of the cars. In the morning they commenced distributing cards at about 6:15; in the afternoon, at about 2:30. On each of these occasions they remained for about an hour.

A number of witnesses testified to these events. Denise King, who was employed by the Respondent as a certified nurses' assistant (CNA), testified that she was not scheduled to work on that day. On that morning, she was at the bottom of the hill leading to the facility with two union representatives, Robin Ringwood and Ingrid Remkus, and about six or seven employees handing out union authorization cards to employees just as they turned off Route 4 on to the road leading to the facility and to employees who were leaving work and were driving down the access road prior to turning onto Route 4. She testified that, a few minutes after they arrived at the bottom of the hill, Donato, Evans and Demerevski appeared at the top of the hill and were watching them. Shortly thereafter, they moved closer to the employees and stood about five or six car lengths away

from the employees. At one point, Donato told the Union representatives and employees, "You can't pass out cards here." When the employees and union representatives returned at about 2:30, Donato, Evans and Demerevski returned as well, standing about five or six car lengths away from them and watching them, but in the afternoon they did not say anything to the employees and union representatives. Amanda Lee, who is employed by the Respondent as a CNA, testified that she was also present in the morning and afternoon distributing union authorization cards to employees coming to and leaving the facility on that day. In the morning there were about 10 to 15 employees present together with three union representatives. In the afternoon there were about 23 individuals present. In the morning, Donato, Evans and Demerevski stood further up the road from them and did not walk closer. In the afternoon, they moved to about six or seven car lengths away from them, observing them. During the afternoon session, Donato said to them, "You can't do this here." She testified that while they were handing cards to stopped cars, nobody was blocked from getting to work. Ronnie Currie, who is employed by the Respondent as a CNA, testified that he arrived at the facility at about 6 a.m. and was distributing union leaflets with about six or seven employees to people in cars entering and leaving the facility. During this period Donato, Evans and Demerevski were watching them from about six car lengths away. He and the others remained there for about an hour, as did Donato, Evans and Demerevski. He and other employees returned at about 2:30 p.m. and Donato, Evans, and Demerevski were there again, and were standing a little closer than they were in the morning. He could not recollect how many employees were present in the afternoon. As they were handing a card to a person who had stopped her car, Donato told them, "You can't be handing out cards."

Remkus testified that she arrived at the bottom of the hill leading to the Respondent's facility at about 6 a.m. on April 19. All of the participants stood on the first 20 feet of the road leading from Route 4, which the police told them was city property. There were about 12 to 15 employees with her that morning. She observed Donato, Evans and Demerevski "standing at the top of the hill watching what was going on." She and the employees handed cards to employees entering the facility and left at about 7:45 a.m. She returned at 2:45 p.m., this time with 15 to 20 employees. The same three management representatives were present and, at one point, Donato "... was standing six inches away from a worker who was signing a card in her car and screaming things at us."³ Donato said: "You can't sign cards here. This will not happen at Rosewood."

Demerevski, Evans, and Donato each testified that they did not report for work that day until after the morning leafleting had been completed although they did observe the union representatives and employees stopping cars and giving the occupants cards to sign between 2 and 3 on that day. Demerevski testified that at a little after 2 he was asked by the Respondent's administrator to see what was happening at the bottom of the

hill. He, Evans, and Donato went to a location about 10 to 15 feet from the bottom of the hill to observe the employees "... making sure that they did not come on our property. . . ." There were between 10 and 15 individuals stopping cars at the bottom of the hill and handing cards to the occupants. There was "a little bit" of a blockage of the road due to their stopping the cars. While they were there, neither he, Evans, nor Donato said anything to these people. Evans testified that he was told by the administrator that family members of patients were complaining about a problem at the bottom of the hill that caused them a delay of a few minutes. He went there with Donato and Demerevski and stood with them next to a sign that is 15 feet from Route 4.⁴ They were standing about 10 to 15 feet from where the union representatives and the employees were standing handing cards to the occupants of the cars entering and leaving. At one point, Donato told one of the Union representatives that they were not allowed to hand out cards on the property, that they had to go elsewhere to do it. Donato testified that when she arrived at the facility at about 7:30 a.m. on April 19, she was told that there had been some activity at the bottom of the hill earlier that morning that created a problem with people getting up and down the hill. At about 2 p.m. somebody told her that family members of residents said that "the hill was being obstructed." She was told to go down the hill to see "what was occurring and making sure that it was not on our property." At one point, she told a union representative, "You can't be doing this on our property, you can't be stopping cars, talking to people, when you have another car behind them trying to get into the facility." She may also have said this to employees.

There is also an allegation that the Respondent, by Evans, engaged in surveillance of its employees' union activities on April 24. Remkus testified that on that day, she and another union representative met with about ten of the Respondent's employees in the parking lot of a closed Grand Union store across Route 4 from the entrance to the hill leading to the Respondent's facility. While they were meeting, Evans drove into the parking lot in Respondent's van, drove out and then returned a few minutes later. Ringwood spoke to him, and then he left again. Evans testified that he drove the Respondent's van to the bottom of the hill to watch the union representatives and employees:

. . . everybody left, they walked across Route 4 . . . over the hill into the parking lot, so I don't know if they were coming back over to stand at the bottom of the hill, it was late, I wanted to go home, so I drove across the street to ask somebody if they were going to be coming back over and nobody paid attention to me . . . so I left. Then I went back over and I parked at the bottom of the hill and I waited for probably ten minutes, they were still over there, so I wanted to see what they were going to do, so I drove over and I drove right up to them . . . and I motioned for somebody to come over to talk to me. They said that I could not be there and that I was invad-

³ One of the pictures received in evidence regarding this incident shows Donato about 6 inches from a union organizer, whom Donato appears to be yelling at.

⁴ Evans testified that he was told to measure the distance of 15 feet from Route 4 to determine where the Respondent's property ended and the town's began, and it was at the sign that they were standing adjacent to.

ing their privacy . . . and I just asked a blond hair lady that had an 1199 shirt on if they were in fact coming back over, because I had to be there until they left and I wanted to go home and she said she didn't know if they were going to be there or not . . . and I drove back over and parked there again at the bottom of the hill and they left within five minutes.

I find that on April 19, employees and union representatives distributed union authorization cards to employees driving to, and from, work on two occasions: in the morning from about 6:15 to 7:15, and in the afternoon from about 2:30 to about 3:30. On each of the occasions there were two union representatives and about 10 to 15 employees. Although only King affirmatively testified that she was not scheduled to work that day, I believe that it is fair to assume that all of the employees participating in the leafleting were doing it during nonworking time. Further, although I found counsel for the General Counsel's witnesses credible, I believe that they were mistaken in believing that Donato, Demerevski, and Evans were watching them in the morning as well as the afternoon. As there would be no reason to lie about this issue, I credit the testimony of Respondent's witnesses that they only observed the afternoon leafleting. Although it is not crystal clear from the testimony, I believe that the evidence herein (including the photographs) supports a finding that the card distributions by the Union was conducted principally off Respondent's property, i.e., within fifteen feet of Route 4. In that regard, it appears to me that there is a contradiction in Respondent's arguments herein. It argues that Donato, Evans, and Demerevski were sent to observe the solicitations because employees and relatives of residents were delayed getting to the facility because of the Union's activities, although the evidence only establishes very minor delays while, at the same time, it argues that its actions were lawful because the solicitations were taking place on its property. The difficulty with this argument is that if the Union strictly adhered to the rule that it solicit only on the 15 foot area adjacent to Route 4, there would be a bigger backup of cars than if it were allowed to have the cars pull over to the side further up the road, presumably on the Respondent's property.

The underlying principal herein, as stated in *Milco, Inc.*, 159 NLRB 812, 814 (1966), is: "Union representatives and employees who choose to engage in their union activities at the employer's premises should have no cause to complain that management observes them." Similarly, in *Hoschton Garment Co.*, 279 NLRB 565 (1986), the Board stated that ". . . an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance." See also *Roadway Package System, Inc.*, 302 NLRB 961 (1991). However, if there is more than a happenstance observation of the union activity, a violation may be established. In *Impact Industries*, 285 NLRB 5 (1987), the Board found a violation because the employer's "conduct went beyond the 'mere observation' permitted by *Hoschton*" by engaging in "'well-nigh continuous scrutiny of employee hand-billing' over a substantial period of time and for discriminatory reasons expelled employee leafleters from its property." In *Eddyleon Chocolate Co.*, 301 NLRB 887, 888 (1991), the Board repeated that mere observation is not a violation as long as the employer does not

"do something out of the ordinary." In that case, the Board found a violation because the employer's behavior was "well out of the ordinary. These incidents bear little similarity to the brief, casual employer observation of union activity found not to be unlawful in the cases cited by the judge." In *Kenworth Truck Co.*, 327 NLRB 497, 501 (1999), the employer's human relations manager, Peters, stood outside the plant in close proximity to the employees for about one hour while they hand-billed employees departing from the facility. The judge, as affirmed by the Board, citing *Roadway* and similar cases, stated:

In general, where as here, employees are conducting protected activities openly, open observation of such activities by an employer is not unlawful. However, if the observation goes beyond casual and becomes unduly intrusive a violation occurs. . . . In these circumstances, I find Peters went beyond unobtrusive observation of openly conducted protected activity. His conduct was coercive in that it patently tended to discourage employees from either joining the distribution effort or receiving the tendered literature.

Parsippany Hotel Management Co., 319 NLRB 114, 126 (1995), stated: "The law is clear that an employer may observe public union activity, particularly when it occurs on company premises, without violating the Act. The situation is different, however, when company officials do something out of the ordinary."

I find that Donato, Evans, and Demerevski's presence and actions at the bottom of the hill on the afternoon of April 19 was substantially more than "mere observation." Their actions were "well out of the ordinary" and were "unduly intrusive." The handbilling was not taking place in front of the facility; it was down the hill by the public road. In addition, they were not just observing the activity from a distance; rather, they traveled to within 10 to 15 feet of the employees and the union representatives, and sometimes substantially closer, continuously watching them. In addition, Donato told them that they were not allowed to distribute cards because they were on the Respondent's property. I therefore find that the Respondent's surveillance of the union handbilling on the afternoon of April 19 violated Section 8(a)(1) of the Act.

It is independently alleged that Donato's statement, "You can't pass out cards here" or "You can't do that here" violates Section 8(a)(1) of the Act. This statement was made to all of those assembled at the bottom of the hill, the employees and Union representatives. As the Board stated in *Materials Processing, Inc.*, 324 NLRB 719 (1997):

. . . the union agent and the employees were handbilling together when Sandor [plant manager] approached them. Thus, when Sandor addressed the union agent he was in fact addressing the leader of a group of people that was distributing union literature. He did not specify, either to the union agent or the employees, that he was only asking the union agent to leave. Thus, even accepting Sandor's account of the handbilling incident, we agree with the judge that it was reasonable for the employees to believe that Sandor was addressing them when he told the union agent that he could not distribute union literature on company property. Accordingly, we agree

with the judge that the Respondent violated Section 8(a)(1) by denying access to off-duty employees who were engaging in activity protected by Section 7 of the Act.

As the employees were engaging in protected activities during nonworking time, in nonworking areas and principally on public property, with only minimal delays in people getting to the facility, the Respondent had no right to restrict these activities. Donato's statement therefore violates Section 8(a)(1) of the Act. *Automotive Plastic Technologies, Inc.*, 313 NLRB 462 (1993); *Pikeville United Methodist Hospital of Kentucky, Inc. v. NLRB*, 109 F.3d 1146 (6th Cir. 1997).

It is also alleged that the Respondent violated Section 8(a)(1) of the Act by Evan's actions on April 24. Regardless of his credible testimony that he drove across the street into the Grand Union parking lot only because he was anxious to leave, there could be no valid reason for the Respondent to observe its employees' protected activities while clearly off its property. Seeing the Respondent's van following them across the street could clearly chill an employee's Section 7 rights. I therefore find that this violates Section 8(a)(1) as well.

D. *The Discharge of King*

King began working for the Respondent in September 1997 as a CNA. On March 12, as she was leaving work, she took a leaflet from a union representative outside of the parking lot at the facility. A few days later she met with some Union representatives at a local restaurant. She testified that in about mid-March, she approached Evans and told him that she thought that they needed a Union at the facility; he said that he wasn't interested. Evans did not testify about this incident. She testified further that in April she attended a meeting of employees with Montanye. At this meeting, where Montanye spoke about the Union and distributed antiunion material to the employees, King said that the employees "needed some type of order in order to help out with different situations." Montanye testified that she met in April with groups of the Respondent's employees about the Union, but, although she assumes that King was at a meeting, she has no recollection of her at these meetings, nor does she remember King speaking at the meetings. King testified further that in April, while she was in a hallway at the facility, Nancy Nopper, the first floor nursing supervisor, said to her, "Don't always believe what you hear. The grass isn't always greener on the other side." Sometime later that month, while she was talking to a fellow employee in the hallway at the facility about a union meeting the prior evening, Nopper walked by and told King that she wasn't allowed to talk about that on the unit. Nopper testified that in late April and May there was a lot of discussions among employees about the Union, and she told several employees that they were not to discuss it unless they were on a break and were out of the resident care areas. King "may have been" one of the employees that she spoke to.

King was scheduled for a thirty 37-1/2 hours workweek. In addition, she regularly volunteered to work overtime and averaged 12/14 overtime hours a week. The events that lead to her discharge occurred on May 5, a day on which she was not originally scheduled to work. However, on that day, the assistant director of nursing called her and asked her if she would

work from 3 to 7 p.m. and she said that she would. While she was dressing for work that day, her 4-year old son fell and his leg was bleeding and he was crying. She cleaned the cut as much as she could, wrapped it, and left him with her 15 year old daughter. She arrived at the facility at about 3 and saw Nopper, Currie, and Pam Townsend, another CNA, and told Nopper what had happened with her son. She testified that Nopper told her that she would be working on the second floor⁵ and that when she got there she should call her son's father. She went to the second floor and tried to call him on his cell phone, but could not get through to him, so she called her home and spoke to her daughter and heard her son crying. She asked her daughter to call her son's father, but she could not reach him either. King then told the second floor supervisor, "Diane," that she had an emergency and had to go home and she went downstairs, where she met Justin Swain, a registered nurse and the evening supervisor on the shift. Townsend and Currie were standing with him at the time. She told Swain what had occurred with her son and her attempts to contact his father, and Swain asked her what she was going to do, whether she was going home to attend to her son. He said that if it were him, he would attend to his son. She said that she was going home because she could not contact the boy's father. Swain said, "Okay" and she left. Prior to that day, when she had to leave work early to attend to problems at home, she asked her supervisor for permission to leave, and she was always told that she could leave.

King worked the 7 a.m. to 3 p.m. shift on the following day. At about 9:30 that morning Nopper told her that Donato wanted to see her. She went to Donato's office, and Donato asked her what happened on the prior day. She told her about what happened, and what she told Swain, and Donato said, "That's not what Justin said." King told her that Currie and Townsend were present and she said that she would investigate the matter and get back to her, and King returned to work. King worked her regular hours, and some overtime hours on May 6, 7, 8, and 9. On the afternoon of May 10, Nopper told her that Donato wanted to speak to her, so she went to Donato's office. Donato told her that she had completed the investigation, and that she was being terminated. King asked what did she mean that she was being terminated, and Donato said, "You left the facility without letting your supervisor know and that's called abandonment." King asked Donato if she questioned Currie and Townsend, but she didn't respond and King left the facility. By letter dated September 12, Donato wrote to King offering "to unconditionally reinstate your former position as CNA at the same rate of pay and benefits. Report to work on or before September 20, 2002 to accept this reinstatement. If you do not

⁵ King testified on cross-examination that on her way downstairs prior to speaking to Swain, she met Shift Supervisor Patricia Jablonski, and asked her if she could work on the first, rather than the second floor, that day. Jablonski said that she didn't know. This testimony is confusing for a number of reasons, principally that King had already decided to go home and was on her way downstairs to tell Swain that she was leaving. There would therefore be no reason for her to ask Jablonski about working on the first, rather than the second floor that day. Further, King testified that there is no real difference between working on the first and second floor.

return on that date, the offer will be deemed withdrawn.” By letter dated September 20, Donato notified King that “all forms and documentation pertaining to your May 2002 termination have been removed from your personnel file.” On September 23 King wrote that she has accepted the per diem position, and since that time she has worked for the Respondent one Saturday and one Sunday every month as a per diem employee.

On May 21, the Respondent posted the following notice at numerous locations at the facility:

To: ALL ROSEWOOD STAFF

From: Kay Donato, Director of Nursing

Date: May 21, 2002

On Friday, May 10, I terminated Denise King’s employment. I understand that some of you disagree with my decision. As in all situations, I fully investigated this incident and I assure you that my decision was fair and right. Denise admitted that she intentionally left the facility without permission. That is job abandonment.

JOB ABANDONMENT IS SERIOUS.

Job abandonment is a serious violation of the rules and has the real potential to cause serious injury to the residents, and, frankly, to the other staff members who are left to get all the care done.

In my thirteen years in Administration, I have always accommodated the family needs of the staff when I could. I recall many times when Denise needed to adjust her time for personal and family reasons- and I always did the best I could.

I have always taken my responsibilities as Director of Nursing seriously, and have made decisions in a professional manner. I am shocked that over the past week I have been personally attacked by the Union and its supporters for doing my job. I believe that the vast majority of you- if you were in my position, would have made the same decision. I understand that the Union is confusing the issue and trying to use Denise’s job abandonment as a political ax. Don’t make the mistake of letting the Union use this to get control over your lives.

VOTE NO UNION ON 5/31/02

During her employment at the Respondent, King never received any warnings about her work and her work was never criticized. On May 14, 2001, she was voted CNA of the year by the Respondent’s employees and received the award at a banquet that she attended with Donato.

CNA Amanda Lee testified that she received a telephone call from Swain at about 4:40 p.m. on May 5 asking her if she could come in to work that day because somebody had to go home. She said that she could be there at about 7; he asked if she could be there at 6. She said okay, and she got there at 6 and worked until 11 p.m. At about 8, as she was going on a break, Swain told her, “Make sure you are going on a break, not going home” and he and Jablonski started to laugh. When she has needed to leave work early she spoke to her supervisor and has always received permission to leave. Currie worked two con-

secutive shifts on May 5: 7 to 3 p.m. and 3 to 11 p.m. He testified that he and Townsend were in the area with Swain when King came to speak to Swain at about 3 p.m. Currie could not tell whether she was coming from upstairs or from the outside. She told Swain that her son was hurt, but that she was unable to get in touch with his father and that she was still trying to contact him. Swain said that his priority would be with his son, and “if you got to go, you got to go.” King said that she had to go, but she was going to try once more to contact the boy’s father. She stepped away for a few minutes, and when she returned, Swain asked her what she was going to do. On direct examination, he testified: “[S]he said, well I am going to check with you then I am going to leave and then he said, OK and walked away and she walked away, I don’t know what happened after that.” On cross-examination, he testified: “[S]he said, I can’t get in touch with him I am going to leave and he said, OK and he walked into the office, didn’t say nothing else and she went her way and I just went on.” None of the Respondent’s representatives has ever questioned him about this incident. When he has had to leave work early, he tells his supervisor of the problem; these requests have never been denied.

May Hulick, who began her employment with the Respondent as a staff RN at the end of April, testified that she was the charge nurse on the second floor for the 3 to 11 p.m. shift at the facility on May 5. At about the start of the shift, King, whom she had not previously met, approached her and said that she was leaving. Hulick asked her who she was and she identified herself. Hulick asked her if the supervisor was aware that she was leaving, she said that he was, and she left. About a half hour later, Hulick called Swain and asked him if she was going to get a replacement: “He sounded surprised, like he didn’t realize she had left.” On the following day she got a phone call from Donato saying that she was investigating the prior day’s situation with King, and Hulick wrote a statement for her. The statement says that King “. . . was on the 2nd floor telling other CNAs she was going home. She said the ‘supervisor was aware’ and then left.” Nopper testified that she worked the 7 a.m. to 3 p.m. shift that day. As she was getting ready to leave, King came to her and told her about her son and said that she had not been able to get in touch with somebody to care for him. Nopper said that she really needed her and told her to use the telephone to contact the person she was trying to reach. Before King returned, Nopper left for the day. She testified that 3 to 7 p.m. is a “critical period” at the facility because of the work that takes place caring for, and feeding, the residents during those hours.

Swain, an RN who is employed by the Respondent as a per diem generally 2 days a week, was the evening supervisor at the facility on May 5. He testified that prior to speaking with King on that day, Jablonski told him that “there was an issue regarding Denise going to the second floor to work.” Since King was assigned to work on the second floor that day, he approached her and asked her if there was a problem with her assignment that day. She told him that there was no problem with the assignment, but that there was an issue about a family member, and she was not sure whether she was going to stay. He told her: “If there is an issue all you have to do is tell me

. . . all she had to do is say, I got to go and my exact words to her were, if there's a problem, do what you have to do, but if not I expect you to work and go upstairs. . . ." King said, "Okay, I'll go upstairs" or "Okay, I'll stay." About an hour later, Hulick called him and asked if he was going to send her a replacement. He went upstairs to speak with Hulick, who told him that King left, and said that it was OK with Swain. That was the first that he knew that she left. He then wrote a report of the incident in the nursing supervisor book. On May 8, Swain was requested by Donato to give a statement regarding the May 5 incident. In this statement he stated that he told her that if she had to leave because there was an emergency, "you can do what you have to do. If the situation is not an emergency then you will be expected to work." Both statements say that King's response was that she would stay and work. He testified that at no time on May 5 did King ask for permission to leave nor did he give her permission to leave. He testified further that he does not specifically remember any other employees being present when he spoke to King that afternoon, but it is possible since he was in a common area.

Donato testified that when she reported for work on May 6 she learned of the prior day's incident involving King from Nopper, and by reading Swain's entry in the nursing supervisors' book. She called King into her office: "it was our intent to find out what was her side of the story." King said that her child was hurt, she could not get hold of the father, and Swain gave her permission to leave. Swain, on the other hand, told her that King said, that she would go upstairs and that she went upstairs and that he assumed she was going on duty. Swain, Hulick and Jablonski each gave her written statements of what occurred. Jablonski's statement states that King asked her to speak to Swain about whether she could work on the first floor. She testified that other than Swain, Hulick and Jablonski: "There were no other witnesses that came forward." She does not recall that Currie and Townsend were witnesses to the event or that King told her that they were witnesses. The only disciplinary notice previously given to King was dated March 23, 1999. It is a step 1 "Progressive Discipline" notice. It states that she was absent on January 4 and 5, with a doctor's excuse, and on February 14 and 23 and March 23. She testified that King is an "exceptionally good CNA" and "a very kind young lady, she certainly knows her business." As regards King's activities on behalf of the Union, she testified: "I have no knowledge of who was for the Union or who was not for the Union." She also testified: "I had an idea that there was union activity going on, but whether or not that Denise was part of that, I couldn't tell you for sure" and she does not recall whether King was one of the employees involved in the April 19 leafleting.

There are some credibility determinations that must be made herein before discussing the burdens set forth in *Wright Line*, 251 NLRB 1083 (1980). King testified that she told Swain that she was going home, and he said okay. Swain testified that she said, "Okay, I'll go upstairs" or "okay, I'll stay" and that was the last he heard of the situation until Hulick called him to ask if he was going to give her somebody to replace King. Currie's testimony is not as clear cut; he first testified that King told Swain, "I am going to check with you then I am going to leave"

and Swain said okay, and then he testified that King said, "I can't get in touch with him and I am going to leave" and Swain said okay. This is a difficult credibility determination because I found neither King nor Swain clearly more credible than the other. Although I found King to be a generally credible witness, a "wrinkle" in her credibility was the testimony about her request to work on the first, rather than the second, floor which, as stated above, was difficult to understand as she had already decided that she was going to leave to care for her son. On the other hand, her testimony was mostly supported by Currie, whose testimony I found credible and believable, although a little confused. Based upon Currie's testimony, I credit King's testimony over Swain and find that she told him that she was going home and he said "okay."

I find that counsel for the General Counsel has clearly satisfied his burden under *Wright Line*. Initially, I find that the Respondent knew of King's support for the Union. The uncontradicted testimony is that King told Evans that she thought that the employees needed a Union. In addition, King was one of about fifteen employees who were handing Union cards to cars entering the road leading to the facility on April 19. Donato, Evans, and Demerevski were from 5 to 15 feet from the employees (and sometimes even closer as the photograph shows) for a period of about 1 hour. I do not credit Donato's testimony that she was not aware of King's union sympathies. Rather, I find that for the 1 hour that she was watching the employees distribute union cards, she had to be aware that King was one of the employees distributing cards and supporting the Union. In addition, Donato never satisfactorily explained why she did not interview Currie and Townsend while investigating the events on May 5. She obtained statements from Swain, Hulick, and Jablonski, but not Currie and Townsend. Based upon the credited testimony, I find that Currie and Townsend were present when King spoke to Swain, and it is reasonable to assume that, on May 6, when Donato challenged King on the events of the prior day, King would give her the names of the witnesses who would support her. I therefore find that the failure of Donato to interview Currie and Townsend about the May 5 incident is further evidence of the Respondent's discriminatory intent. Further support for finding that counsel for the General Counsel has satisfied his initial burden is the uncontradicted evidence that King was an excellent employee who, the prior year, had been voted the CNA of the year at the facility. Finally, on May 21, the Respondent posted a notice throughout the facility defending its termination of King. At the end of this notice, in bold letters, is the statement: "VOTE NO UNION ON 5/31/02." This cements the connection between King's discharge and the union campaign.

Having found that the counsel for the General Counsel has satisfied his initial burden under *Wright Line*, it must next be determined whether the Respondent has satisfied its burden that it would have fired King even absent her union activity. I find that it has not. King, who had been employed by the Respondent for five years, was, admittedly, an excellent employee who had to leave work early on May 5 to care for her son. She came to work that day, on a day that she was not originally scheduled to work, because she received a call from Respondent asking her to work that day. She arrived for work in a timely manner

and left only after determining that her son was hurt and that there was nobody home to properly care for him. Considering her work history with the Respondent, the worst that can be said for King's actions on May 5 was that it may have been caused by a misunderstanding with Swain. She told Hulick that she had permission to leave that day, and considering the situation, she may have been mistaken in her belief in what she told Swain. Even if I had credited Swain, Respondent's actions appear to be inappropriately harsh toward King's possible misdeed. If Donato's investigation had included obtaining statements from Currie and Townsend, and had determined that she believed Swain, Hulick and Jablonski, I would have more confidence in the bona fides of the investigation than I do when the investigation specifically excluded witnesses who might have supported King. Having found that the Respondent has not satisfied its burden that it would have terminated King even absent her union activity, I find that by discharging her on May 10, the Respondent violated Section 8(a)(3) of the Act.

E. April 12 Handbook Restrictions

The complaint alleges that on about April 12, the Respondent promulgated the following rules as an addendum to the employee handbook:

Employees are not permitted access to the interior of the facility, and other working areas, during their off-duty hours.

Employees shall not wear any other tags, buttons, stickers, or other items of identification or in support of any particular cause or candidate while on duty.

It is alleged that the Respondent promulgated these rules in response to the Union's organizing campaign and to discourage employees from engaging in Union and protected concerted activities, in violation of Section 8(a)(1) of the Act.

The parties stipulated that on about April 12, the Respondent distributed to its employees an addendum to its Employees' Handbook. The cover sheet, from Montanye, states that the Respondent "has adopted and expanded our policies on identification and non-solicitation effective April 1, 2002. Please review the attached and add the attached policies to your handbook." Attached are three pages of "General Regulations" covering identification, solicitation, errands, good housekeeping, illness, lockers, smoking, telephone courtesy, and transportation. The only restrictions that are alleged to violate the Act are the two quoted above.

King testified that prior to April 12 she was not aware of restrictions on going to the facility on days off. She used to go to the facility to pick up her paycheck and to visit residents. In addition, prior to April 12 employees were allowed to wear pins and buttons on their uniform while at work. She has had an American flag pin, as well as a CNA pin and a hospice pin on her uniform. She received a copy of the new rules with her paycheck on April 12, and has never been told that these rules are no longer in effect. When she began her employ with the Respondent she was given a copy of the Respondent's handbook, but does not know if it contained any provision about employee access during off-hours. Lee testified that prior to April 12, "there was no issue about. . ." wearing pins or buttons

on your uniform: "You could wear them." Employees wore CNA buttons, hospice pins, and American flags pins and stickers. Also, prior to April 12, off-duty employees were allowed to be on the property. She has only been at the facility during nonworking time to pick up her paycheck. Currie testified that prior to April 12, he was not aware of any restrictions on employees wearing any tags or pins on their uniform. Some employees wore flags or CNA pins. Also, prior to April 12, he was not aware of any restriction of employees coming to the facility when they were not scheduled to work. He has come to the facility to pick up his pay check, and to visit the residents and play his keyboard for them. When he was hired, he was given a copy of the Respondent's handbook, but does not recall whether it referred to employee access to the facility during nonworking time. The handbook did state that the employees were required to wear their uniforms while working, but he does not recall whether it said anything about whether employees could wear pins and buttons.

Nopper, who has been employed at the facility since May 2001, testified that at some unspecified date she saw that Currie and another employee were wearing union pins, "and since we had a no pin policy," she told them to remove the pins. As to the Respondent's policy prohibiting the wearing of buttons, pins or badges: "As far as I know it's always been in effect." She has seen employees wearing American flag pins on occasion, and did not tell them to remove them. Montanye, who began her employment with the Respondent in October 2000, testified that, at that time, the Respondent was still operating under old handbooks created in August 1999. She created some revisions in March 2001. These revisions include the following under the classification of "Solicitation. Solicitation or distribution of literature for any purpose by employees on facility premises is prohibited . . . Solicitation, distribution of literature or trespassing by non-employees is prohibited anywhere on the premises of the facility." She testified that in about March, in a Board proceeding involving another of Respondent's facilities in Cortland, New York, "I found that the solicitation policy that we had written in our book, was a very broad solicitation policy, it was just broad. So, my focus here was to narrow it to give a little bit clearer definition." In other words, she changed the prior rule in order to comply with what she felt were the Board's requirements for rules of this kind. She went on vacation in about March 20 and returned on about April 1. She returned a little too late to include the revision in the employees' March 29 paycheck, so it was given to the employees with their pay on April 12. At the time, she had no knowledge that the Union was attempting to organize the Respondent's employees.

I find that there is insufficient evidence to establish that the Respondent issued its modified no-solicitation rule on April 12 in response to the Union's organizational campaign "in order to stifle and interfere with the employees' exercise of their Section 7 rights." *Youville Health Care Center, Inc.*, 326 NLRB 495 (1998). The sole evidence of early union activity at the facility is King's testimony that on March 12 she was given a leaflet by a union representative outside the parking lot at the facility and that, in about mid-March, she told Evans that she thought that the employees needed a union. However, I found Montanye to

be a generally credible witness and credit her testimony that she was on vacation from about March 20 to April 1 and was unaware of the Union's organizational activities prior to the issuance of the modified rules. However, I find that the no-solicitation rule issued on April 12 violates Section 8(a)(1) of the Act because it is overbroad. In *Heartland of Lansing Nursing Home*, 307 NLRB 152, 159 (1992), the administrative law judge, as affirmed by the Board, stated:

The Board has established a specific policy covering health care facilities. *Springfield Hospital*, 281 NLRB 643, 665 (1986). This policy requires that such an employer's "ban on employee solicitation be limited to immediate patient care areas." *Eastern Maine Medical Center*, 253 NLRB 224, 226 (1980). The Respondent's rule is not so limited and is presumptively invalid. There has been no showing that union solicitation in working areas of the Respondent's facility which are not immediate patient care areas would either disrupt care or disturb residents. Accordingly, I find that the Respondent's no solicitation rule is overly broad and violates Section 8(a)(1).

See also *Health Care & Retirement Corp.*, 310 NLRB 1002 (1993). In *Lafayette Park Hotel*, 326 NLRB 824 (1998), one of the respondent's rules that the Board examined required the employees to leave the premises immediately after the completion of their shift and not to return until their next scheduled shift. The Board, citing *Tri-County Medical Center*, 222 NLRB 1089 (1976), stated that a rule that denies employees access to nonworking areas will be found invalid unless the employer can justify the rule for business reasons. The Board, in *Lafayette Park* also said that any ambiguity in the rule must be construed against the employer, who promulgated the rule. The rule herein denies off-duty employees "access to the interior of the facility, and other working areas." This could be construed to cover hallways and other areas that are not considered immediate patient care areas. As the Respondent has failed to justify these restrictions, I find that this rule violates Section 8(a)(1) of the Act.

The final allegation involves the addendum to the handbook prohibiting tags, buttons, stickers, or other items "in support of any particular cause . . . while on duty." The evidence establishes that prior to the advent of the Union, the employees were allowed to wear pins with American flags or CNA buttons while at the facility. Even Nopper testified that she never asked employees to remove American flag pins on their uniform; it was only the union pin that she told Currie and another employee to remove.

The Board has long recognized the right of employees to wear union insignia on their uniforms while at work as a legitimate form of union activity. An employer may not prohibit such activity, absent a showing of "special circumstances." *Evergreen Nursing Home*, 198 NLRB 775, 778 (1972). In hospitals and nursing homes, an employer can establish "special circumstances" by adducing evidence of a potential adverse effect that such buttons would have upon patients at the facility. Other relevant factors in making this determination would be the extent of the prohibition, the condition of the patients or residents, and the size and visibility of the insignia. *London*

Memorial Hospital, 238 NLRB 704, 708 (1978). The Respondent's prohibition herein must fall for a number of reasons. Principally, as was true in *George J. London*, the rule is not restricted to patient-care areas. It prohibits employees from wearing the insignia "while on duty," which would include hallways and cafeterias, as well as patient-care areas. In addition, the Respondent has produced no evidence to establish that "special circumstances" exist herein justifying the rule. I therefore find that the restriction on wearing tags, buttons, stickers or other items while at work violates Section 8(a)(1) of the Act.

Finally, in April, while King was talking to a fellow employee in a hallway of the facility about a union meeting the prior evening, Nopper told her that she was not allowed to talk about that on the unit, and on May 17, Nopper told Currie that he had to remove the small union pin that he was wearing. For the reasons discussed above, I find that both of these incidents violate Section 8(a)(1) of the Act as unlawful infringements upon the employees right to engage in their Section 7 rights in nonpatient care areas.

CONCLUSIONS OF LAW

1. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. The Respondent violated Section 8(a)(1) of the Act in the following manner:

(a) Engaging in surveillance of its employees' union activities on April 19 and 24.

(b) Informing its employees that they were prohibited from engaging in union and other protected activities while on the Respondent's property.

(c) Promulgating and distributing rules on April 12 denying its employees access to the interior of the facility during their off-duty hours.

(d) Prohibiting its employees from wearing tags, buttons, stickers, or other items while on duty.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by discharging Denise King on May 10, 2002.

5. The Respondent violated Section 8(a)(1) and (5) of the Act in the following manner:

(a) Failing and refusing to meet with the Union in a timely manner for the purpose of negotiating a collective-bargaining agreement.

(b) Failing and refusing to provide the Union with information that it requested, which information was relevant and necessary to the Union as the collective-bargaining representative of certain of its employees.

(c) Failing and refusing to allow the Union access to its facility, which is necessary for the Union as the collective-bargaining representative of certain of its employees.

6. The Respondent did not violate the Act as further alleged in paragraph 13(c) of the consolidated amended complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and

desist and to take certain affirmative action designed to effectuate the policies of the Act. As the Respondent discriminatorily discharged King on May 10, it must offer her reinstatement to her former position and make her whole for any loss of earnings and other benefits that she suffered as a result of the discrimination, computed on a quarterly basis from the date of discharge to the date of a full offer of reinstatement to her former position and hours, less any net interim earnings as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Although the Respondent, by letter dated September 12, offered her reinstatement, the fact that she is only employed by the Respondent 2 days a month as a per diem employee makes it unclear whether that reinstatement offer was a full and unconditional offer. As the Respondent unlawfully promulgated rules restricting employee access to the facility during off-duty hours, and prohibiting employees from wearing tags, buttons, or stickers while on duty, the Respondent shall notify its employees, in writing, that these rules have been rescinded and, in addition, that they are not prohibited from engaging in Union, or other protected concerted activities while on the Respondent's property, as long as they are not in immediate patient-care areas. As the parties are engaged in negotiations, there is no affirmative remedy necessary for its delay in responding to the Union's request to commence negotiations. In addition, the Respondent shall provide the Union with the information it requested in items 3, 4, 5, and 19 of the Union's June 13, 2002 request. And finally, upon request, the Respondent shall provide the Union with reasonable access to its facility, as requested by the Union on July 19, 2002.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, Highgate LTC Management, LLC d/b/a Northwoods Rehabilitation and Extended Care Facility at Rosewood Gardens, Rennselaer, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in surveillance of its employees' Union and protected concerted activities.

(b) Informing its employees that they are prohibited from engaging in union or other protected concerted activities while on the Respondent's property.

(c) Promulgating or maintaining work rules prohibiting denying its employees access to the interior of its facility during their off-duty hours, or prohibiting its employees from wearing tags, buttons or stickers while on duty.

(d) Discharging or otherwise discriminating against any employee for supporting the Union or any other union.

(e) Failing and refusing to meet in a timely manner with the Union for the purpose of negotiating a collective-bargaining agreement.

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(f) Failing and refusing to provide the Union with the information that it requested, which information was relevant and necessary to the Union as the collective-bargaining representative of certain of its employees.

(g) Failing and refusing to allow the Union access to its facility, necessary for the Union as the collective-bargaining representative of certain of its employees.

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

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

(a) Within 14 days from the date of this Order, offer Denise King 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 previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth above in the remedy section of this Decision.

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

(c) Within 14 days of the date of this Order, notify all employees in the bargaining unit herein, in writing, that it is rescinding the rules promulgated on April 12 regarding employee access to the facility during their off-duty hours and the wearing of tags, buttons, or stickers while on duty, and that they are not prohibited from engaging in Union and other protected concerted activities while on the Respondent's property, as long as they are not in immediate patient-care areas.

(d) Upon the Union's request, grant access to its facility for reasonable periods and at reasonable times sufficient to allow the union representatives to fully investigate, inspect and observe the equipment and working conditions at the facility.

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

(f) Within 14 days after service by the Region, post at its facility in Rennselaer, New York, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reason-

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

able steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 12, 2002.

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

IT IS FURTHER ORDERED that the consolidated amended complaint is dismissed insofar as it alleges violations of the Act not specifically found.