

Jackson Hospital Corporation d/b/a Kentucky River Medical Center and United Steelworkers of America, AFL-CIO-CLC and Anita Turner.
Cases 9-CA-37734, 9-CA-37795-1, -2, 9-CA-37875, 9-CA-38084-1, -2, 9-CA-38237, 9-CA-38468, and 9-CA-37796

September 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS
SCHAUMBER AND WALSH

On February 20, 2002, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions, a supporting brief, an answering brief, and a reply brief; the General Counsel filed cross-exceptions, a supporting brief, and an answering brief; and the United Steelworkers of America, AFL-CIO-CLC (the Union) filed cross-exceptions, a supporting brief, and answering brief.

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

The Board has considered the decision and the record¹ in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order as modified below.

1. The judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union since August 11, 2000. The General Counsel and the Union have excepted to the judge's dismissal of the allegation that the Respondent unlawfully refused to meet and bargain with the Union from April 26 through August 11, 2000. We find it unnecessary to pass on that portion of the judge's decision. The alleged violation sought by the General Counsel and the Union would be cumulative to the 8(a)(5) violation the judge found and would not affect the remedy in this case inasmuch as no unilateral

¹ We take notice of the court of appeals decision enforcing the Board's bargaining order based on the Union's certification as the exclusive collective-bargaining representative of the unit employees following the decertification election. *NLRB v. Kentucky River Medical Center*, 33 Fed. Appx. 735 (6th Cir. 2002), enfg. 333 NLRB No. 29 (2001) (not reported in Board volumes).

² The Respondent and the General Counsel have 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ The record shows, and the judge correctly found in fn. 81 of his decision, that employee Debbie Miller was suspended on August 21, 2000. However, in his conclusion of law 4(c), the judge erroneously dated the suspension as occurring on August 22, 2000. We hereby correct this inadvertent error.

changes were alleged to have occurred from April 26 through August 11.

2. After the record was closed in this case, the General Counsel moved to reopen the record to litigate two additional alleged discriminatees. The judge granted the motion. During the reopened hearing, testimony was adduced that Supervisor Jan Pelfrey stated, inter alia, that the employees who engaged in the strike "had to go." The judge considered this evidence as relevant to the originally alleged discriminatees and as relevant to the two additional alleged discriminatees. The Respondent asserts that there was an "understanding" between the General Counsel and the Respondent that the evidence in the reopened hearing would be limited to the two additional alleged discriminatees. Based on this asserted "understanding," the Respondent did not object to the testimony.

We find that there was no such understanding. The General Counsel's motion to reopen the record does not reflect the General Counsel's agreement to any such limitation on the use of reopened hearing evidence, and the judge's order reopening the record contains no such limitation.⁴

We further find that, even absent Pelfrey's statements, the record in the initial phase of this proceeding contains abundant evidence of threats, including multiple threats of discharge, supporting the judge's finding of antiunion animus. Accordingly, the record in the initial phase of this proceeding supports the judge's finding that the General Counsel met his initial burden of proof, regarding the 8(a)(3) allegations, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Jackson Hospital Corporation d/b/a Kentucky River Medical Center, Jackson, Kentucky, its officers, agents, successors and assigns, shall take the action set forth in the Order as modified.

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

"(e) Failing and refusing to recognize and bargain with the Union as the collective-bargaining representative of the employees in the following bargaining unit:

⁴ Member Schaumber finds no need to rely on Pelfrey's statements in the analysis of the 8(a)(3) allegations. In addition, Member Schaumber does not pass on the alleged 8(a)(1) threat by Supervisor Hicks, inasmuch as the finding of a violation would be cumulative of other 8(a)(1) threat findings and would not affect the remedy for this unlawful conduct.

All full-time and regular part-time registered nurses, the team leader, and the continuing education coordinator; nonprofessional employees, including the medical records employees, admission employees and purchasing employees; and technical employees, including certified respiratory therapy technicians, x-ray technicians, licensed practical nurses, the DRG coordinator, medical lab technicians and the physical therapy assistant employed by the Respondent at its 540 Jetts Drive, Jackson, Kentucky facility, but excluding the registered respiratory therapist, medical technologists, utilization review nurses, business office clerical employees, and confidential employees, and all professional employees, guards and supervisors as defined in the Act.”

2. Substitute the following for paragraph 2(a) and reletter the subsequent paragraphs accordingly.

“(a) Within 14 days from the date of this Order, offer to the following-named employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

Clara Gabbard	Lois Noble
Sandra (Barker) Hutton	Maxine Ritchie
Eileene Jewell	Laotta Sizemore
Debbie Miller	Melissa Turner

“(b) Make the above-named employees whole for any loss of earnings and other benefits that they have suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.”

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 interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the National Labor Relations Act by threatening you with discharge or other discrimination if you engage in a strike on behalf of United Steelworkers of America, AFL–CIO–CLC.

WE WILL NOT, without lawful justification, photograph you, or create the impression that we are photographing you, while you are engaging in a strike or other activities on behalf of the Union.

WE WILL NOT discharge or suspend you, or issue warnings to you, in retaliation for your engaging in strike activities or in any other union or concerted activities that are protected by Section 7 of the Act.

WE WILL NOT fail or refuse to recognize and bargain with the Union as the collective-bargaining representative of our employees in the following bargaining unit:

All full-time and regular part-time registered nurses, the team leader, and the continuing education coordinator; nonprofessional employees, including the medical records employees, admission employees and purchasing employees; and technical employees, including certified respiratory therapy technicians, x-ray technicians, licensed practical nurses, the DRG coordinator, medical lab technicians and the physical therapy assistant employed by Kentucky River Medical Center at our 540 Jetts Drive, Jackson, Kentucky facility, but excluding the registered respiratory therapist, medical technologists, utilization review nurses, business office clerical employees, and confidential employees, and all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT change the lunch or break schedules, or change the shift schedules, or change any other term or condition of employment of our employees who are employed in the above-described unit without prior notice to, and bargaining with, the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Order of the National Labor Relations Board, offer to the following-named employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

Clara Gabbard	Lois Noble
Sandra (Barker) Hutton	Maxine Ritchie
Eileene Jewell	Laotta Sizemore
Debbie Miller	Melissa Turner

WE WILL make the above-named employees whole for any loss of earnings and other benefits that they have suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Order of the National Labor Relations Board, remove from our files any references to our unlawful discharges of the employees who are named in the preceding paragraph, and WE WILL, within 14 days from the date of the Order of the National Labor Relations Board, remove from our files any reference to the unlawful suspension of Debbie Miller, and WE WILL, within 14 days from the date of the Order of the National Labor Relations Board, remove from our files any references to the warning notices that we unlawfully issued to Diana Taulbee, and WE WILL within 3 days thereafter notify those employees in writing that this has been done and that our actions will not be used against them in any way.

WE WILL, on request by the Union, rescind all our changes in the lunch, break, and shift schedules of the employees employed in the above-described unit, and WE WILL make whole any of our employees for any loss of earnings or other benefits that they have suffered as a result of those changes.

WE WILL, on request by the Union, bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with the Union as the exclusive collective-bargaining representative of our employees in the above-described unit, and WE WILL embody in a signed agreement any understanding reached.

JACKSON HOSPITAL CORPORATION
D/B/A KENTUCKY RIVER MEDICAL
CENTER

Deborah Jacobson and Engrid Vaughn, Esqs., for the General Counsel.

Don T. Carmody, Esq., of Woodstock, New York, and *Johann Herklotz, Esq.*, of Lexington, Kentucky, for the Respondent.

Joe Stulgross, Esq., of Pittsburgh, Pennsylvania, and *Jeffrey C. Trapp, Esq.*, of Louisville, Kentucky, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Jackson, Kentucky, on 13 dates in 2001 from January 9 through August 2, 2001. On various dates from June 16 through November 29, 2000,¹ United Steelworkers of America, AFL-CIO-CLC (the Union) filed charges under the Act in

¹ Unless otherwise indicated, all dates mentioned in this decision were between December 1, 1999, and November 30, 2000.

Cases 9-CA-37734, 9-CA-37795-1, -2, 9-CA-37875, and 9-CA-38084-1, -2 alleging that Jackson Hospital Corporation d/b/a Kentucky River Medical Center (the Respondent) has been engaging in unfair labor practices as set forth in the Act. On July 10, Anita Turner, an individual, filed a charge in Case 9-CA-37796, also alleging unfair labor practices by the Respondent. Thereafter, the General Counsel of the National Labor Relations Board (the Board) issued a series of complaints alleging that the Respondent had violated Section 8(a)(1), (3), and (5) of the Act by various acts and conduct. The Respondent filed answers to those complaints admitting that this matter is properly before the Board but denying the commission of any unfair labor practices. Trial on those complaints was conducted on 11 dates from January 9 through February 15, 2001. On January 30, 2001, the Union filed the charge against the Respondent in Case 9-CA-38237, and on May 9, 2001, the Union filed the charge against the Respondent in Case 9-CA-38468. The General Counsel issued two more complaints based on those latter charges, and the Respondent filed answers, again admitting jurisdiction but denying the commission of any unfair labor practices. The General Counsel thereafter submitted motions to consolidate the last two complaints with the earlier complaints and to reopen the hearing; the Respondent did not oppose those motions. The trial on all of the complaints, as consolidated (the complaint), was reopened on August 1, 2001, and it closed on August 2, 2001.

Upon the testimony and exhibits entered at trial,² and after consideration of the briefs that have been filed by the General Counsel, the Charging Party Union, and the Respondent, I make the following³

FINDINGS OF FACT

I. JURISDICTION

As it admits, the Respondent, a corporation, is engaged in the operation of an acute care hospital at Jackson, Kentucky. During the 12 months immediately preceding the issuance of the complaint, the Respondent, in conducting its business operations, received gross revenues in excess of \$250,000, and during that same period the Respondent purchased and received at its Jackson facility goods valued in excess of \$50,000 directly from suppliers located at points outside Kentucky. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care facility within the meaning of Section 2(14) of the Act. As the Respondent further admits, the Union

² Certain passages of the transcript have been electronically reproduced; some corrections to punctuation have been entered. Where I quote a witness who restarts an answer, and that restarting is meaningless, I sometimes eliminate words that have become extraneous; e.g., "Doe said, I mean, he asked . . ." becomes "Doe asked . . ." In quotations of exhibits, I have made some corrections of insignificant grammatical and punctuation errors rather than use "(sic)." Many extraneous usages of "you know" and "like" have been omitted. Also in quotations of exhibits, I have spelled out certain abbreviations that are peculiar to the medical field such as "ح" for "with" and "\$" for "without." All bracketed words within quotations are mine.

³ The General Counsel and the Union are in accord on all issues; therefore, where I herein recite that the General Counsel takes a position, I mean to include the Union as well.

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

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Allegations

1. The Respondent's operation and supervisory structure

The Respondent is one of several subsidiaries of Community Health Systems, Inc. (CHS) which is located in Brentwood, Tennessee. It operates a 55-bed hospital and, in doing so, employs about 170 employees in the collective-bargaining unit as described below (the unit). The Respondent's chief executive officer is David Bevins. Reporting directly to Bevins are several supervisors including Randy Cooper, chief financial officer, and Michele Obenchain, chief of nursing operations. Reporting directly to Obenchain at the time of the events herein were coordinators of joint departments and heads of certain departments that were not combined under coordinators. Robin McGlothen was the coordinator for the Respondent's combined medical-surgery (floor) unit, and Patricia Hoover was the coordinator for the combined operations of the emergency room and intensive care unit. (Departments that were under coordinators did not have separate department heads.) Majorie Fair was the department head for the surgery department; other department heads and other supervisory staff will be mentioned as the narrative progresses. Phyllis Gibbs and Allena Hale were "house supervisors"; they functioned as the chief nurse on duty when Obenchain was not present. (The Respondent admitted the supervisory status of, or stipulated to the relevant authorities of, all personnel whom the General Counsel alleges to be supervisors within Section 2(11) of the Act.)

In early 1998, the Respondent stipulated with the Union that the following of its employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time registered nurses, the team leader, and the continuing education coordinator; nonprofessional employees, including the medical records employees, admission employees and purchasing employees; and technical employees, including certified respiratory therapy technicians, X-ray technicians, licensed practical nurses, the DRG coordinator, medical lab technicians and the physical therapy assistant employed by [the Respondent] at its 540 Jetts Drive, Jackson, Kentucky, facility, but excluding the registered respiratory therapist, medical technologist[s], utilization review nurses, business office clerical employees, [and] confidential employees, and all []professional employees, guards and supervisors as defined in the Act.

On June 8, 1998, after a Board-conducted election, the Board certified the Union as the collective-bargaining representative of the unit employees. Thereafter, the parties engaged in 25 bargaining sessions, the last one of which occurred on December 1, 1999. No contract was entered.

On June 9, 1999, during the course of the bargaining that was then being conducted, an employee filed a decertification petition in Case 9-RD-1904. On November 5, 1999, the Respondent, the petitioner in the decertification case, and the Union entered a stipulation that the above-quoted unit description

was (still) appropriate for bargaining and that a Board election would be conducted for the employees in that unit on December 10, 1999 (a date which turned out to be 9 days after the date of the last bargaining session between the parties). The election was conducted as scheduled, but the ballots were impounded because unfair labor practice charges had been filed. On March 30, 2000, the ballots were counted, and the Union was certified for a second time on August 2 (the recertification or the second certification).

2. Allegations of the complaint

The complaint alleges that on April 26, 2000, the Union requested that the Respondent resume bargaining and that, since May 15, in violation of Section 8(a)(5), the Respondent has refused to meet and bargain with the Union. The Respondent contends that any refusal on its part was excused by certain conduct of the Union and because, since it is currently testing the recertification in a court of appeals, it cannot now be lawfully compelled to bargain with the Union pursuant to the first certification.

The unit employees engaged in a strike from July 8 until August 15 (the July 8 strike). The complaint alleges that, before the July 8 strike began, in violation of Section 8(a)(1), supervisors of the Respondent threatened several employees that they would be discharged if they engaged in such a strike. Pursuant to the Union's August 15 offer to return to work, the Respondent began reinstating some of the former strikers (the strikers) on August 20. The Respondent, however, discharged four of the strikers upon receiving the offer to return to work; those discharged employees were Angie Gayheart, Melissa Turner, Eileen Jewell, and Lois Noble. The Respondent contends that it discharged Gayheart for strike activities that are not protected by the Act (violence toward nonstriking employees); it contends that it discharged Turner for conduct that occurred during the strike, albeit not strike activity as such (being disruptive while escorting a relative to the emergency room on a certain night during the strike); it contends that it discharged Jewell for conduct which preceded the strike but which was not discovered by the Respondent until a date during the strike (failure to properly clean operating room instruments); and it contends that it discharged Noble because she had been an unsatisfactory probationary employee at the beginning of the strike. The Respondent discharged nine other strikers after they had been reinstated; the Respondent contends that it did so solely because of their poststrike misconduct or unsatisfactory work performance. The General Counsel denies that any of these 13 alleged discriminatees engaged in misconduct or unsatisfactory work performance; the General Counsel contends that employees were discharged because of their protected concerted activities, or union activities, including (in the case of Gayheart) their protected strike activities.⁴ Other 8(a)(3) allegations are that, after the strike, the Respondent denied light duty to a 14th

⁴ The complaint alleges that the July 8 strike was caused by the Respondent's unfair labor practices. The evidence showed, however, that the Respondent did not refuse reinstatement to any striker on the ground that he or she had been permanently replaced. The unfair labor practice strike allegation was therefore rendered moot. (The General Counsel does not mention the allegation on brief.)

striker and that it unlawfully issued warnings to 2 of the strikers whom it discharged.

On November 16, 2000, in Case 9–CA–37909, the General Counsel issued an 8(a)(5) complaint alleging that the Union had, since August 31, 2000 (or about 2 weeks after the Union’s August 15, 2000 offer to return to work from the July 8 strike), requested bargaining pursuant to the recertification and that, since August 31, the Respondent was refusing to recognize and bargain with the Union. On January 31, 2001 (i.e., during the course of the trial before me), in *Kentucky River Medical Center*, 333 NLRB No. 29 (2001) (not reported in Board volumes), the Board addressed the November 16 complaint and held that the Respondent had been refusing to bargain with the Union in violation of Section 8(a)(5) since August 31, 2000. Again, the complaint in this case alleges that the Respondent’s refusal to meet and bargain began earlier, on May 15, 2000. In addition, the complaint alleges that, in further violation of Section 8(a)(5), following the Union’s August 15 offer to return to work from the July 8 strike, the Respondent engaged in certain unilateral actions; to wit: changes in employees’ shift schedules and breaktimes. As noted, the Respondent contends that it did not have a duty to bargain with the Union at the time of the alleged unilateral actions; additionally, the Respondent contends that some of its actions were not significant enough to require bargaining, even if it did have a duty to bargain at the time.

B. The Alleged 8(a)(5) Violations

1. The alleged refusal to meet for purposes of bargaining

Facts

Randall Pidcock is a district organizing coordinator for the Union, and he was the only witness called by the General Counsel in support of the prestrike 8(a)(5) allegations. Attorney Don T. Carmody represented the Respondent during the bargaining that was conducted (and Carmody represented the Respondent at the trial before me).

It is undisputed that, at the end of the final, December 1, bargaining session, Pidcock told Carmody that he would submit something, in writing, to the Respondent by the end of the next day. Whether that something is properly categorized as “information” or “a proposal” is a question of terminology, the parties employing either term as it suits them. I find that what was requested would properly be considered a proposal, but the distinction is essentially meaningless. At any rate, it is further undisputed that Pidcock failed to furnish Carmody with anything as a putative fulfillment of his December 1 promise until August 11 (or for over a month after the July 8 strike began). On April 26, the Union requested the Respondent to resume bargaining, and on May 15 the Respondent refused that request. The General Counsel contends that the Respondent’s refusal, which has continued, violated Section 8(a)(5). The Respondent defends its refusal by arguing that: (1) because of Pidcock’s failure to fulfill his December 1 promise, it was legally excused from complying with the Union’s requests to bargain, at least for the period from April 26 through August 11 and (2) the Board’s August 2 recertification of the Union pursuant to the results of the decertification election: (a) extinguished the 1998 certification of the Union and (b) is being tested before the

Sixth Circuit, thus excusing the Respondent from meeting with the Union for purposes of collective bargaining, at least until that test is complete.

The December 1, 1999 bargaining session. Pidcock testified that he became the chief negotiator for the Union in May 1999, or about a year after the Union’s bargaining with the Respondent had begun. Pidcock identified the contract proposal that other union representatives had presented to the Respondent at the start of negotiations in the fall of 1998. The Union’s proposal included: “A wage increase of 6% annually across the board with the following inequities.” The remainder of the page is blank; that is, no “inequities” were listed.

Carmody did not testify, and, except for a short redirect examination, the General Counsel did not examine Pidcock about the content of the December 1 meeting. The record of what happened at that meeting therefore consists of the Respondent’s cross-examination of Pidcock, the Respondent’s cross-examination of alleged discriminatee Gayheart who was a member of the Union’s bargaining committee, the Respondent’s direct examination of Obenchain, who was a member of the Respondent’s bargaining committee, and the cross-examination of Obenchain. On brief, however, the parties rely only on the testimony of Pidcock; therefore, I shall not detail the related testimonies of Obenchain and Gayheart.

Pidcock testified that at the conclusion of the December 1 bargaining session:

the only thing that was left, as I recall, was whether or not we were going to amend our proposal. That was specifically related to the information about the six percent pay increase, and whether or not the increases that had already been given by Kentucky River Medical Center was going to be credited as part of that six percent, or was it going to be six percent in addition to. And the other items that we had talked about at that time had been addressed on that day. Earlier in the day there was questions and we said, “Okay, we will get that information to you.” However, later in that same session we addressed those things and withdrew certain proposals. Which automatically addressed and took care of those concerns that you [Carmody, as the Respondent’s chief negotiator] had.

Pidcock was then asked and he testified:

Q. So, is it your testimony that when the session concluded on December 1 of 1999, you owed Kentucky River Medical Center no information?

A. No. We owed them the decision on whether or not we were going to modify our proposal on wages.

Q. And that’s the only information?

A. The only information that was left outstanding, as I recall.

Pidcock freely admitted, however, that he did not get this information, or proposal, to the Respondent until he sent a letter to Carmody on August 11, as discussed *infra*.

Pidcock testified that he was not a participant in the drafting of the Union’s original proposal, and he did not know of any wage “inequities” to which it referred, but he added that at the December 1 bargaining session: “If I’m not mistaken, we

agreed to just withdraw that and just to delete that portion of the proposal.”

Events after the December 1 meeting. As noted above, the ballots of the December 10, 1999, decertification election were not counted until March 30, 2000. On direct examination (i.e., before Pidcock gave the above testimony on cross-examination), Pidcock identified various pieces of correspondence between himself and Carmody. The correspondence started with a letter from Pidcock dated April 26 which asks Carmody “to submit dates you are available for contract negotiations up to and including the time we can successfully reach an agreement.” Carmody replied by letter dated May 15 stating:

I request that you explain to me, on behalf of Kentucky River, how you expect me to provide you with proposed negotiation dates, “. . . up to and including the time we can successfully reach an agreement,” when you have continued to fail, amongst other things, to submit to us a complete economic proposal since last fall. As you know, when we last met this past December 1st, you promised to fax a variety of information to my office by the close of the next business day, including your complete economic package. Instead, you thereafter abandoned negotiations, and the first we have heard from you, nearly five months later, is this self-serving, surrealistic letter of April 26th.

I insist that you inform me, in writing, about what your intentions are in the circumstances, relative to the resumption of bargaining. Then, I would be informed enough to respond otherwise to your correspondence.

Although Carmody here (and in later correspondence) referred to the Union’s promise to send its “complete economic package,” on brief, page 14, the Respondent argues only that: “At this [the December 1] meeting, with an apparent appreciation for the Hospital’s predicament in not being able to meaningfully address economic issues without a current *wage* proposal, the Union agreed to fax a *specific wage* proposal to the Hospital the next day.” Also on brief, page 20, the Respondent states: “The Union’s breach of its agreement to provide a *current wage proposal* was a delay tactic on a fundamental economic item that rendered meaningful bargaining progress futile.” (Emphasis in both quotations is added.) Moreover, the credible testimony is that, by the end of the December 1 meeting, Pidcock promised only to send the Union’s answer of whether it would give the Respondent credit for past wage increases in computing the 6-percent wage increase that its original proposal requested, not a “complete economic package.”

By letter dated May 17, Pidcock replied to Carmody’s May 15 letter by stating:

Please be advised that your obligation to bargaining is not contingent upon any information requested in your letter of May 15, 2000.

Therefore, if we do not receive dates that you will be available to bargain within one week (7 days) from the receipt of this letter, I will proceed to file charges with the NLRB for refusal to bargain.

By letter dated May 24, Carmody (whose law office is in Woodstock, New York) replied:

Your letter is misguided in instructing me about an obligation to bargain. As if you didn’t already know, the information I sought in my May 15th correspondence concerns, more directly, Kentucky River Medical Center’s ability to bargain, irrespective of any obligation. I am not going to waste time taking you, once again, through the sordid history behind your promises to submit a complete economic package, and how your failure to do so had hindered meaningful bargaining. Moreover, I am not going to travel to Jackson, Kentucky, again, simply to be told, again, that you will be submitting your full economic package to me via facsimile transmission by the close of business the following day. We’ve been down that road far too often, from our September 16th session, to our October 13th session, through our November 1st meeting, into our December 1st session, and beyond.

As for your threat of filing yet another unfair labor practice charge, as long as I simply promise you that I’ll be faxing you proposed bargaining dates by the close of business tomorrow, I can rest assured that I will not be found guilty of refusing to bargain for at least one hundred and forty-seven days (that being the hiatus from December 1, 1999, when you abandoned bargaining, to April 26, 2000, when you resurfaced), in light of the National Labor Relations Board’s dismissal of Kentucky River’s comparable charge against you for refusing to bargain. Therefore, if what’s good for the goose is good for the gander, you will hear from me again next fall, on October 18th.

In meantime, please either submit your complete economic proposals, or explain why you remain so fearful of doing so.

(Carmody’s reference to “comparable charges” is apparently a reference to dismissed Section 8(b)(3), bad-faith bargaining, charges that the Respondent had filed against the Union; see the discussion in *Kentucky River Medical Center*, slip op. at 1 fn. 1.

On June 7, at a local hotel’s meeting room, Pidcock read Carmody’s May 24 letter at a series of meetings of the unit employees (who worked various shifts). Pidcock testified that, at the conclusion of the meetings, the employees voted to authorize the Union to call an unfair labor practice strike. As noted above, the strike began on July 8 and ended with the Union’s August 15 unconditional offer to return to work. (As also noted above, because the Respondent did not deny reinstatement to any striker on the ground that he or she had been permanently replaced, it is unnecessary to decide herein if any unfair labor practices caused or prolonged the July 8 strike.)

By letter dated July 15 (or 1 week after the strike had started), Carmody wrote Pidcock:

I understand that you or other Steelworker representatives have been showing a copy of my letter of May 24th around, misrepresenting to Kentucky River employees that what it means is that I am refusing to meet and bargain with you until next October. Although my letter clearly speak[s] for itself, I thought I might prove useful to redirect your attention to the main focus of my letter, which you’ve chosen to overlook.

As far as my reference to October was concerned, perhaps now you can appreciate how Kentucky River felt when you disappeared for nearly five months. What my letter plainly communicated to you was, if Kentucky River were to treat you the same, it would be October before you'd hear from us again. However, my letter also closed with the request that you either submit your complete economic proposals, or explain why you remain so fearful of doing so. I'm sure you would honestly admit that you know that this was the true thrust of my letter: obtaining either your full economic demands, or an explanation of why you still insist on withholding them. However, it also appears that you've chosen to ignore this renewed request, since I haven't received your complete economic package, let alone any explanation or anything else. . . .

Kindly respond to my letter of May 24th, so that Kentucky River will have some idea of what could be expected during further bargaining, such that any future session could be more productive than you had rendered our meetings since last fall, when you first began to duck your obligation to precisely define your money demands.

(The May 31 Board proceeding to which Carmody referred involved allegations of unilateral actions that are not involved herein; according to the testimony of Pidcock, that matter was the subject of a non-Board settlement agreement.)

As previously mentioned, on August 2, the Board certified that the Union had won the decertification election and was (still) the collective-bargaining representative of the union employees.

By letter dated August 11 (when the strike had continued for over a month), Pidcock wrote Carmody:

In reviewing my notes from our last bargaining session in December 1999, I realize that you had asked whether the Union intended to modify its proposal in light of the wage increase granted during 1999. I had hoped to discuss this matter directly across the table with you and the members of your committee, but, unfortunately, you have rebuffed my numerous requests for a meeting date.

In response to your inquiry on this subject, the Union is unwilling to modify its wage proposal at this time—the proposal stands as originally submitted. The members of the committee and I await your response and counterproposal on this and the many other proposals you have not yet responded to.

I also request, once again, that you suggest dates on which we might meet in order to discuss the employee's idea [i.e., the employees' ideas] for improving the workplace.

As noted above, the Union made its unconditional offer to return to work on behalf of the strikers on August 15.

By letter dated August 29, Carmody wrote Pidcock:

I am in receipt of your letter of August 11, 2000. Kentucky River Medical Center does not intend to dignify your letter with any response other than to inform you that it is our position that your correspondence has been negated by the Decision and Certification of Representative

issued by the National Labor Relations Board on August 2nd. In this connection, Kentucky River does not consider your correspondence, asking for the opportunity to "discuss the employee's (sic) idea for improving the workplace," but perhaps even intending to perpetuate collective bargaining negotiations arising out of your organization's certification from June of 1998, as a request to meet and negotiate a collective bargaining agreement deriving from the Board's August 2nd certification.

By letter to Carmody dated August 31, Pidcock referred to the August 2 recertification and again requested: "Please suggest dates which you will be available to meet." By letter dated September 14, Carmody replied that, although he understood that the Union was then requesting to bargain based on the August 2 recertification, he nevertheless was refusing to bargain with the Union in order to test that certification in the courts because:

Kentucky River maintains that the election conducted on December 10th, underlying the Board's August 2nd certification, should have been set aside on account of your organization's objectionable and unlawful refusal to bargain, related to our last negotiation session on December 1, 1999. Thus, you failed both before and after the bargaining session of last December 1st to follow through on your promises to negotiate economics and to provide relevant information germane and conducive to such bargaining; instead, you simply disappeared for nearly five months, only to resurface precisely where we had left off, while still refusing to provide the promised information.

(These last statements by Carmody foreshadow its defense, as discussed, *infra*.)

While Pidcock was on cross-examination, the Respondent referred him to his April 26 request to resume bargaining and asked:

Q. Why did you wait so long [to request bargaining] following the [decertification] election?

A. Well, we had made it known all throughout negotiations that we were willing to bargain, and that we wanted to bargain. We had made numerous requests prior to that. During the period of time—I mean, it was obvious to me at our December the 1st session that—I mean, both of us knew that we had decert [i.e. the decertification election] coming up on December the 10th. The ballots were impounded and neither of us knew what the outcome of that was going to be. And although there was a continuous obligation on your part to continue to bargain with us we just chose not to pursue that obligation until such time as we knew the outcome of the election.

Q. So, is the short answer to what you just testified to that you were awaiting the outcome of the election before attempting to contact Kentucky River Medical Center?

A. Before we attempted to pursue that, or force it, if you will, whatever, yes, that's the case.

Pidcock was further asked on cross-examination and he testified:

Q. Is it fair to say that following the session of December 1 of 1999 that [there had been] some information of an economic nature that you had promised to forward on to the Kentucky River Medical Center, and that as time went on you'd forgotten about that. Along comes about August of 2000 and you in a meeting with Mr. Stuligross [the Union's attorney] to discuss the future of this case, as you put it, you review your bargaining notes and you discover you had left something unattended as concerns providing economic information to the Kentucky River Medical Center. Is that fair to say?

A. I think it is, yes.

Q. Why hadn't you checked your bargaining notes sooner than August 11 of 2000?

A. Well, I don't have an answer for that. We periodically discuss things relative to charges and look through my notes, and all I can say is that we realized on that—at that—at or about that time [August 11] that that had not been done. And decided that should be done immediately.

In other words, Pidcock had simply forgotten about his December 1 promise, and he did not attempt to refresh his recollection, even after Carmody's May 24, June 15, and July 15 letters refusing to meet with the Union until that promise was fulfilled.

Conclusions on the Refusal to Meet Allegations

The issues are: (1) whether the Respondent was excused from responding to the Union's April 26 request to bargain because the Union had not requested bargaining between December 1 and April 26; (2) whether the Respondent was excused from bargaining from April 26 until August 11 because of the Union's admitted failure to provide the Respondent with a complete wage proposal during that period; and (3) whether the Respondent is excused from bargaining with the Union for any period after August 2 because: (a) the August 2 recertification extinguished the Union's 1998 certification, or (b) because the Respondent has been testing the Union's August 2 recertification before a circuit court.

The Board has held that an employer is not excused from meeting and bargaining with a certified union solely because a decertification petition had been filed. *Dresser Industries*, 264 NLRB 1088 (1982). The Respondent, in fact, did continue to bargain with the Union after the filing of the decertification petition and through December 1. Obviously, the Union could have requested bargaining to continue immediately after the December 1 meeting. Moreover, the ballots of the December 10 decertification election were counted on March 30, and the Union was then announced as the winner of that election, but the Union still did not request bargaining sessions until April 26, or about a month later. I find unappealing Pidcock's testimony that he did not request bargaining between December 1 and the ballot count because he wanted to see what the election results were; certainly, an employer who refused to bargain until ballots were counted would run afoul of the principles of *Dresser*. Moreover, Pidcock (and the General Counsel) offered no reason for Pidcock's not requesting bargaining for a month after the election results were announced. Nevertheless, delays in requesting bargaining such as the Union's 4-month delay here have never been held, alone, to constitute abandonment of

a union's bargaining rights so that an employer is privileged to refuse to bargain when such a request is finally made. In fact, in *Spillman Co.*, 311 NLRB 95 (1993), enfd. 41 F.3d 1507 (6th Cir. 1994), where the employer argued that a union's 6-month failure to request bargaining constituted an objective consideration that justified its refusal to meet with the union when the request was finally made, the Board stated:

We have found union inactivity for much longer periods than the 6 months at issue here to be insufficient to support an employer's good-faith doubt. See *Flex Plastics*, 262 NLRB 651, 657 (1982), enfd. 726 F.2d 272 (6th Cir. 1984), and cases cited. Moreover, the Union's reassertion of its bargaining rights in January 1992[] negated any inference to be drawn from the preceding period of inactivity. See *Pioneer Inn & Pioneer Inn Casino*, 228 NLRB 1263, 1264 (1977), enfd. 578 F.2d 835 (9th Cir. 1978).

That is, in *Spillman* the Board and the Sixth Circuit rejected the defense of unpardonable inactivity by the union, and I do the same here.

I do, however, accept the defense that the Respondent was excused from meeting with the Union until the Union fulfilled its December 1 promise.

The General Counsel cites *Circuit-Wise, Inc.*, 309 NLRB 905 (1992), for the unqualified proposition that an employer "cannot condition resumption of face-to-face meetings on [a] union's submission in writing of any changes in its bargaining positions." In that case, however, the union had not previously promised to make another proposal before meeting again. In this case, the Union did. The General Counsel states on brief, page 5: "The Union admittedly failed to convey its response to this request until August 2000. (GC Exh. 8.) However, a request that the Union modify its wage proposal is clearly distinguishable from a request for information." The General Counsel does not state what that distinction is, and she does not attempt to excuse Pidcock's failure on any account. But whether the Respondent's request to Pidcock is properly characterized as a request for information, or as a request for a proposal, it nevertheless was a request that Pidcock fulfill his December 1 promise to submit a new, or at least clarified, proposal before further negotiation sessions.⁵

Further on brief, the General Counsel makes much of the rhetoric of Carmody's letters to Pidcock, especially the goose/gander analogy in Carmody's May 24 letter. It is clear, however, that an analogy was all that Carmody was making. Carmody did refer to October 18, but he was not refusing to meet with the Union until that date; he was no more than stating that he felt that, if he did so, the Region would not issue a complaint against the Respondent because the Region had refused to issue a complaint against the Union even though the Union had failed to request bargaining for a comparative period. The analogy is, of course, false because a refusal to meet

⁵ At another point the General Counsel cites *Capitol Steel & Iron Co.*, 89 F.3d 692 (10th Cir. 1996), for the proposition that a "union's slow response to an information request does not excuse an employer's subsequent delay in providing requested information." Here, however, the Respondent is not charged with a delay in furnishing information; the Respondent is charged with a refusal to meet with the Union.

when requested is not comparable to a failure to make such a request.⁶ Nevertheless, the analogy was employed only for the purpose of securing the fulfillment by the Union of its December 1 promise, as the very next sentence of the May 24 letter plainly states. It is true that that next sentence demanded the Union's "complete economic proposals" even though Pidcock had promised only a wage proposal; until August 11, however, Pidcock did not test Carmody's broader demand by submitting, at least, the Union's promised wage proposal. The same may be said of Pidcock's ignoring Carmody's extensive letter of July 15 which again asked for fulfillment of Pidcock's December 1 promise to provide (at least) an answer of whether the Union's 6-percent-wage-increase proposal included the last increases that the Respondent had given before the December 1 bargaining sessions.

Pidcock admitted that, at the close of the December 1 bargaining session, the Union "owed them the decision on whether or not we were going to modify our proposal on wages." Pidcock also acknowledged that he forgot about that obligation until August 11 when he and his attorney were going over their notes. At that point, Pidcock sent Carmody a letter stating that the Union's wage proposal "stands as originally submitted." The Respondent accepted Pidcock's August 11 letter as fulfillment of Pidcock's December 1 promise, but it continued to fail to meet with the Union. The refusal to meet with the Union after August 11 will be discussed below. But at this point, it is appropriate to hold, as I do, that, because the Union did not fulfill its December 1 promise to submit a wage proposal until August 11, the Respondent did not violate Section 8(a)(5) by refusing to meet with the Union between the April 26 request to bargain and August 11.

The Respondent seeks to excuse its failure to meet and bargain with the Union after August 11 on the ground that it is testing the August 2 recertification at the circuit court level. The Respondent cites *Peabody Coal v. NLRB*, 725 F.2d 357 (6th Cir. 1984), for the proposition that "the Board cannot rely on a technical 8(a)(5) violation to support other unfair labor practice charges." *Peabody* holds no such thing. In *Peabody*, the court held, as many courts have held, that, because a refusal to bargain is the only way that an employer can test a certification of a union, a test of certification cannot be used as evidence of animus that would support an 8(a)(3) violation. As well, the court in *Peabody* refused to enforce an 8(a)(5) order that the Board had issued for an alleged unilateral action, but it did not refuse enforcement because the respondent was testing certification; the court refused to enforce the Board's order because it found that no unilateral action had occurred.⁷ The court in *Peabody* certainly did not hold that the Board cannot find 8(a)(5) violations if an employer is otherwise testing a Board certification of a representative. And the law is just the opposite; as succinctly stated by the General Counsel on brief:

⁶ See *Spillman Co.*, supra, and cases cited therein.

⁷ The alleged unilateral action in *Peabody* was a withholding of a wage increase; the court denied enforcement because it found that the withholding, in absence of a past practice that would call for a grant, was a maintenance of the status quo, not a unilateral action.

Indeed, it is well established that an employer's duty to bargain "relates back" to the date of the election if its objections to the election are rejected by the Board and, ultimately, the courts. For this reason, an employer is considered to act "at its peril" if it makes any unilateral changes in terms and conditions of employment following a union election victory. See *Dow Chemical Co. v. NLRB*, 660 F.2d 637, 654 (5th Cir. 1981)[,] and cases cited therein; *Sundstrand Heat Transfer [, Inc.] v. NLRB*, 538 F.2d 1257, 1259 (7th Cir. 1976); *Mike O'Connor Chevrolet-Buick-GMC Co.*, 209 NLRB 701, 703 (1974), enforcement denied on other grounds, 512 F.2d 684 (8th Cir. 1975). Moreover, if the union is an incumbent union, the employer is prohibited from making any unilateral changes until such time as the union is declared the loser of the election. *W.A. Krueger Co.*, 299 NLRB 914 (1990); *G.H. Bass Caribbean, Inc.*, 306 NLRB 823 (1992). Thus, even if the ballot count in a decertification election discloses a majority of votes against the union, the employer's duty to bargain with the union before making any changes in employees' terms and conditions of employment continues while the Board considers any objections to the election filed by the union, even if those objections are ultimately overruled.

That is, the Respondent may be found to violate Section 8(a)(5), even if it is also testing a certification.

The Respondent on brief, pages 22–23, also states that:

As stated above, there are actually two certifications relevant to Kentucky River's alleged refusal to bargain. The first involved Kentucky River's conduct prior to August 2, 2000, when Kentucky River was obligated to negotiate with the Union pursuant to the Union's original 1998 certification, and the second involves Kentucky River's obligation under the second certification of the Union after the results of the decertification election were certified. As of August 2d, the original certification no longer existed because it was superseded by the second certification, which remains in effect until set aside.

Certainly, the second certification does not state that it supercedes the 1998 certification. And the Respondent cites no authority for the proposition that a certification that issues pursuant to a union victory in a decertification election supercedes a certification that was outstanding at the time the decertification election was held. Moreover, the Respondent's position essentially is that, because the employees selected the Union as their collective-bargaining representative in the December 10, 2000 decertification election, they lose their rights to union representation that they earned pursuant to their choice in the 1998 election, at least until the second certification is tested at the circuit court level. This is a cynical interpretation of the statutory provisions that are designed to insure, not defeat, the effectiveness of the employees' choice of a collective-bargaining representative. I reject that interpretation of the Act. I find and conclude that, during the test of the Union's August 2, 2000 recertification, the Union's 1998 certification has continued in effect. And I therefore find and conclude that the Respondent's failure to meet and bargain with the Union as the statutory representative

of the unit employees after August 11, 2000, violated Section 8(a)(5) of the Act.

2. The alleged unilateral actions

The complaint alleges that in August, without prior notice to or consultation with the Union, the Respondent changed the break and lunch schedules of the housekeeping and maintenance employees and that it changed the shift schedules of the nursing employees, both in violation of Section 8(a)(5). The Respondent does not deny making changes to the housekeeping and maintenance employees' break and lunch schedules. The Respondent argues, however, that the changes in the lunch and break periods are de minimis and do not warrant the finding of a violation of Section 8(a)(5). The Respondent makes no such argument regarding its changes in the nurses' shift schedules. (In fact, the Respondent does not mention the changed shift schedules on brief.)

Donald and Geneva Jones, husband and wife, are, respectively, employees of the Respondent's maintenance and housekeeping departments. Before the July 8 strike, employees in the maintenance and housekeeping departments enjoyed the benefit of being allowed to schedule their half-hour lunches and 15-minute breaks when convenient. Taking advantage of this benefit, the Joneses were often able to take their breaks and lunches together. When they returned from the July 8 strike, however, their respective supervisors gave them written schedules of definite periods for lunches and breaks. The newly established schedules thereafter made it impossible for the Joneses to take lunches or breaks together.⁸ As well as the Joneses, all other employees of the maintenance and housekeeping departments had their lunch and break schedules changed from flexible to definite times of the day. (The lengths of the break and lunch periods were not changed.)

Polly Neace and Stella Strong are medical-surgery unit nurses who live near each other. Strong and Neace testified that before the strike they worked alternate weekends, and they alternated working Tuesdays through Thursdays during some weeks and Mondays through Fridays during the following weeks. The identical schedules allowed Neace and Strong to carpool together. After they returned from the July 8 strike, they were given schedules that varied throughout the week and on weekends, thus eliminating their chances to carpool. Emergency room registered nurse, Janie Jenkins, testified that, before the July 8 strike, she was always scheduled to work from Tuesdays through Fridays, with Saturdays through Mondays off. Since she returned from the strike, she has regularly been scheduled to work Mondays. Shirley White, an intensive care unit nurse, testified that before the strike she worked 8-hour shifts Wednesdays through Fridays, and 12-hour shifts on alternate weekends; after she returned from strike, her scheduled workdays varied throughout each week. Emergency room nurse, Kim Watkins, testified to similar changes in her shift schedules after she returned from strike. All of this testimony

⁸ Donald Jones testified that when his supervisor, Mike Thorpe, gave him his poststrike lunch and break schedules, he "looked at it, and I said, 'Can I eat dinner with my wife, her lunch schedule?' He said, no."

about changed schedules was supported by documentation, and it was credible.

Strong and Neace jointly sent a letter to McGlothen, medical-surgery unit coordinator, asking that their hours be returned to prestrike schedules. McGlothen replied:

We are in receipt of your August 29th request concerning days off. The Unites Steelworkers of America, AFL-CIO, CLC, has filed unfair labor practice charges with the National Labor Relations Board which apparently relate to your request. We must refer you to the Union.

Additionally, Watkins complained about the schedule changes in a letter to Hoover, who was then the emergency room and intensive care unit coordinator. Hoover replied to Watkins with language that was identical to that of McGlothen's letters to Strong and Neace.

The Respondent does not dispute that, after the Union's August 15 offer to return to work, without prior notice to or consultation with the Union, it changed the housekeeping and maintenance employees' lunch and break periods from flexible times to fixed periods. Nor does the Respondent dispute that it changed the nurses' shift schedules without bargaining with the Union. In defense, the Respondent cites *Xidex Corp. v. NLRB*, 924 F.2d 245, 253 (D.C. Cir. 1991), for the proposition that "not every minor unilateral change in working conditions constitutes an unfair labor practice. To violate Section 8(a)(5), the change must be 'material, substantial and significant.'"⁹ The Respondent also cites *Litton Systems*, 300 NLRB 324 (1990), enf'd. 949 F.2d 249 (8th Cir. 1991), cert. denied 503 U.S. 985 (1992), which held that eliminating a grace period at the end of employees' breaks by installing a buzzer system was not a matter of sufficient materiality to warrant a bargaining order. From these two cases, the Respondent (at Br. 27) advances the factual conclusion and argument: "The slight alteration in break and lunch schedules, without changing their duration, cannot be considered the type of 'material, substantial and significant' change in working conditions needed to establish a violation of Section 8(a)(5). Accordingly, it cannot be said that Kentucky River committed an unfair labor practice by scheduling employee breaks and meal periods."

The first thing to notice about the Respondent's proffered factual conclusion is that it is totally without support; the Respondent offers no reason why the changes would have had no significant impact on the employees. (Certainly, the Respondent does not attempt to answer the Joneses, Watkins, Neace, and Strong.) The first thing to notice about the argument is that, again, it makes no attempt to defend the unilateral changes of the nurses' schedules. Moreover, in *Litton Systems*, the employees lost no more than moments for which they were being paid anyway. And in *Xidex*, the employer had changed lunch periods of employees for only 2 days, but the court still found a violation of Section 8(a)(5) under its "material, substantial and

⁹ The interior quote is from Board cases that *Xidex* cites. The Respondent does not mention it on brief, of course, but in *Xidex* the court also enforced a Board finding of an 8(a)(5) violation because of the employer's refusal to bargain with its employees' union during the pendency of a decertification petition. The case is therefore further authority for my conclusion in the previous section of this decision.

significant” test. The court expressed reservation about whether, standing alone, the 2-day change was material, but it enforced the Board order because it agreed that the change was made as a part of a pattern of conduct that was designed to undermine the employees’ support for the Union. I would find the same in this case, even if the unilateral changes had not been as “material, substantial and significant” as they clearly are. Rather than giving reasons for the schedule changes, McGlothen and Hoover responded to the written appeals of Strong, Neace, and Watkins with identical suggestions that they consult the Union. Obviously, the only purpose of those callous responses was to emphasize the inability of the Union to help the employees out of their immediate predicaments and to thereby undermine the Union’s support among the employees. This conclusion is fortified by my findings, *infra*, that the Respondent repeatedly threatened the employees with discharge or other discrimination because of their strike activities, and that it engaged in other unfair labor practices, in order to discourage and undermine the Union’s support among the employees. Therefore, even under *Xidex*, the Respondent must be held to have violated Section 8(a)(5) by changing the employees’ shift schedules and lunch and break periods.

Even without evidence of intent to undermine the Union, however, the Respondent’s action had a substantial impact on the unit employees, as demonstrated by the testimonies of the Joneses, Strong, Neace, and Watkins. Therefore, the changes were mandatory subjects of bargaining.¹⁰ Finally, the Respondent contends that no violation can be found because the Union did not request bargaining after it learned of the Respondent’s break and shift schedule changes. This is another cynical argument; the Respondent was not even agreeing to meet with the Union when the employees returned from strike, and a request to bargain about the accomplished facts of the changes assuredly would have been futile. Moreover, a failure to request bargaining has been held to be a defense to a unilateral action allegation, but only where the union involved was given notice prior to the action complained of.¹¹

Accordingly, I find and conclude that the Respondent violated Section 8(a)(5) by changing the lunch and break schedules, and the shift schedules, of the unit employees without prior notice to or consultation with the Union.

C. The Alleged 8(a)(1) Violations

1. Threat by Hicks

Paragraph 8(a) of the complaint¹² alleges that: “About April 2000, Respondent, by Ken Hicks . . . threatened an employee that employees who went on strike would be discharged.” Hicks is the supervisor of the X-ray department. Alleged discriminatee Melissa Turner testified that in April, shortly after the ballots of the decertification election were counted and it appeared that the Union had won that election, she and Hicks

¹⁰ See *Larsen Supply Co.*, 251 NLRB 1642 (1980) (unilaterally changing break and lunch periods from flexible to fixed times held violative); and *Carbonex Coal Co.*, 262 NLRB 1306, 1313 (1982) (unilaterally changing shift schedules held violative).

¹¹ Cf. *Citizens National Bank of Willmar*, 245 NLRB 389 (1979).

¹² Sec. 8(a)(1) complaint paragraph numbers are those of the complaint that the General Counsel issued on December 21, 2000.

had a discussion that began with reference to a warning notice that Turner had received.¹³ According to Turner:

He said that if we went on strike and it was ruled an economic strike that we would be replaced and if when the strike was over—they had a position open for us, we would have a job; if there was no position for us, we would not have a job.

The Respondent called Hicks who testified that several employees came to him and asked him what might happen if a strike occurred. Hicks did not recall if Turner was one such employee, but he testified:

The only response that I ever gave toward that was this; [if] it had been ruled an economic strike, that the Hospital could replace their positions, permanently replace them, and that, if that were to happen, they could return to their job if that replacement were to leave that position. That would be the only way they would be able to come back to that job. That’s the only thing that I ever said when asked that question.

Under *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1969), employees who make an unconditional offer to return to work from an economic strike may be denied reinstatement if their employer has permanently replaced them, but those economic strikers also have a right to be reinstated if and when the permanent replacements are terminated. Hicks’ testimony precisely fit the rule of *Laidlaw*, but that testimony sounded too scripted to believe. On the other hand, Turner’s testimony appeared to be a reflective, and an accurate, representation of what Hicks had told her. I credit that testimony. I therefore find that Hicks told Turner that if a future strike was ruled economic, the strikers would be replaced (without specifying whether replacements would be permanent or temporary) and that the strikers would be reinstated only if the Respondent had openings at the time that an offer to return to work was made, but if the Respondent did not then have such openings the employees would lose their jobs.

The Respondent first contends that no violation can be found, even if Hicks did make the statements that Turner attributed to him, because Turner did not testify that she felt coerced or intimidated by Hicks’ statements. As the Board plainly stated in *Haines Hosiery*, 219 NLRB 338 (1975):

We long have recognized that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on Respondent’s motive, courtesy, or gentleness, or on whether the coercion succeeded or failed. The test is whether Respondent has engaged in conduct which reasonably tends to interfere with the free exercise of employee rights under the Act. [Footnote citing: *N.L.R.B. v. Illinois Tool Works*, 153 F.2d 811 (C.A. 7, 1946), *enfg.* 61 NLRB 1129 (1945).]

¹³ The complaint does not allege that the issuance of the warning notice violated the Act.

That is, to prove an 8(a)(1) violation the General Counsel need not show that an unlawfully threatened employee subjectively felt coerced by the employer's conduct. The issue is whether a reasonable employee would have felt threatened by the employer's conduct. Contrary to the position of the Respondent on brief, *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844 (2001), does not announce a new test that requires evidence of a threat's subjective impact on employees who hear it. The issue in *Kolkka Tables* was not whether a threat in violation of Section 8(a)(1) had occurred. The issue in *Kolkka Tables* was whether an employer's "admittedly unlawful threat" to a striking employee that he was discharged was, itself, a discharge of that employee within Section 8(a)(3). Overruling prior cases that had held that such a statement was only a tactical maneuver to get a striking employee to return to work, the Board held that such a statement was a discharge when a "reasonable employee would reasonably believe" that he was being discharged. That is, the legality of the "admittedly unlawful threat" under Section 8(a)(1) was not in issue in *Kolkka Tables*, but, if anything, *Kolkka Tables* reaffirmed primacy of the reasonable-employee standard.

In *Hicks Ponder Co.*, 186 NLRB 712, 726 (1970), enf. 458 F.2d 19 (5th Cir. 1972), the employer sent to its employees letters stating that it had the right to fill the jobs of the strikers and that when the strike was over those employees whose jobs had been filled while they were striking would lose their jobs. The Board found that the statement misrepresented the employees' *Laidlaw* rights and was a threat in violation of Section 8(a)(1). In *George Webel Feed Mills & Pike Transit Co.*, 217 NLRB 815, 818 (1975), the Board found the same violation where the employer told its employees in a meeting:

If the employees go on strike, and we hope this never happens, they cannot get unemployment compensation. The employees who do not want to strike will be able to continue to work, and the law will protect them. Employees who go on strike can be replaced with other employees, and when they are replaced they have no job.¹⁴

Conversely, in *Eagle Comtronics, Inc.*, 263 NLRB 515, 516 (1982), which is cited by the Respondent on brief, the employer informed employees only that, if they went on strike, they could be replaced by applicants who had applications on file. The employer did not, however, indicate that, as a result, striking employees would lose their jobs. The Board found no violation because the statement did not contravene *Laidlaw* and was only a simple description of the employer's legal prerogative. The Board stated:

Unless the statement may be fairly understood as a threat of reprisal against employees or is explicitly coupled with such threats, it is protected by Section 8(c) of the Act. Therefore, we conclude that an employer may address the subject of striker replacement without fully detailing the protections enumerated in *Laidlaw*, so long as it does not threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with those detailed in *Laidlaw*.

¹⁴ Punctuation corrected.

In so reasoning, the Board, at its footnote 8, specifically distinguished the case before it from *Hicks-Ponder* and *Webel Feed Mills*.

Unlike the employer in *Eagle Comtronics*, Hicks did not simply state that economic strikers would be replaced in the event of an economic strike. Hicks told Turner that the strikers would be replaced *and he added* that the strikers would thereby lose their jobs. This was not just an abbreviated statement of the Respondent's right to replace economic strikers; it was a misrepresentation of the employees' rights to strike without fear of losing their rights of reinstatement to their jobs, either immediately or ultimately after the departure of permanent replacements. As such, Hicks' statement to Turner would have left with any reasonable employee the impression that his or her job would be forever lost if he or she went on strike.

The Respondent cites *Hankins Lumber Co.*, 316 NLRB 837 (1995), as a case in which the Board held that no violation occurred where an employee testified that his supervisor told him that he would "hate to lose" the employee but would put someone in his place if the employee went on strike. Such a holding would have been consistent with *Eagle Comtronics*, because the employer did not threaten that the employees would lose their jobs when they were replaced. Indeed, the administrative law judge in *Hankins Lumber* stated that he viewed the alleged supervisory statements as nonviolative because they were as consistent with lawful replacement as with unlawful discharge for striking. The Board, however, did not dismiss the allegation for that reason. The Board dismissed the allegation because the judge had discredited the employee's testimony that the supervisor had made the statements in the first place. Therefore, the expressed view of the judge was pure dictum that the Board would have had no reason to review. *Hankins Lumber*, therefore, is no authority on this point.

Hick's statement to Turner that the strikers would not have a job after an economic strike, therefore, was a threat in violation of Section 8(a)(1), as I find and conclude.¹⁵

2. Threat by Gibbs

Paragraph 8(b) of the complaint alleges that: "About June 25, 2000, Respondent, by Phyllis Gibbs . . . threatened employees that they would be discharged if they went out on strike and that someone was going to get hurt." Gibbs is a "House Supervisor," or the supervisor in charge of the nursing staff during certain shifts when Obenchain, the chief of nursing operations, is not present.

Current employee Polly Neace¹⁶ testified that in early July, in the medical-surgery unit, she was present when Gibbs was engaged in a conversation with several employees about the impending July 8 strike. According to Neace:

What I remember is Tony Smith started asking . . . "What would happen to our jobs if we went on strike?"

¹⁵ *Santa Rosa Blueprint Service*, 288 NLRB 762 (1988), cited by the Respondent, also found a violation of Sec. 8(a)(1) where the employer told the employees that by striking, "you risk loss of your jobs."

¹⁶ By use of the term "current employee" I indicate that the employee was employed by the Respondent at the time of his or her testimony.

And Phyllis said, "Think about it. You don't have a contract. Think about it." Then at that time I got up and started to leave.

Neace further testified that, as she was leaving, employee Clarence Combs approached Gibbs and the other employees who were standing around. Neace testified that, as she did so, "I heard Clarence say, 'How do you get a contract, Phyllis?' And I walked on down the hall and I didn't hear anything else."

Combs, a currently employed X-ray technician, testified that, as he approached the same gathering:

As I walked up to the desk, I heard Phyllis tell the other nurses that: "If you all go on strike, you know you'll be fired." . . .

And I asked her, "Well, Phyllis, how are you supposed to get a contract then?"

She said, "I don't know. I don't know those things." She said, after that, "I'm afraid that if you go on strike it's going to get real ugly and somebody is going to get hurt."

Strong, also a current employee, testified:

[E]veryone was not there during the whole time. Once the conversation kind of got started, a few of us sort of left at different times. I didn't hear everything that was said between all the people, but . . . I do know for sure that I did hear Phyllis Gibbs saying that if we went on strike that we would be fired.

And I do know that I heard Clarence Combs tell Phyllis that, no, that was not true.

And she did say that if we did not have a contract that we could be fired.

And I did hear Clarence say, "How do you get a contract?"

Then I left. I went down the hallway. That's all that I heard.

Gibbs denied making any such statement (or statements). She did testify on direct examination:

There was one night when they were sitting there and I could have made the statement that there was no contract, but in reference to [saying that] they would be dismissed or people would get hurt, it was just not there.

On cross-examination Gibbs was asked if she remembered any conversations with the employees about their not having a contract. Gibbs testified:

[T]here could have been that one night when they were all sitting there, and I was, I don't know what I was doing. I don't remember the whole conversation, but I do remember thinking years ago when I was affiliated with a union and a union member, you know, we had the contract and that's, we went on strike sometimes to settle the contract. And I knew that they didn't have a contract at Kentucky River Medical Center yet, so the significance [of] that was, I didn't know anything about it.

Gibbs therefore did not deny that she was a party to the conversation, and on direct examination she essentially admitted that she was the first participant to bring up the nonexistence of a contract. (Certainly, Gibbs did not testify that anyone else

brought up the topic.) The obvious question arises: Why would Gibbs have brought up the subject of contract-existence in the first place? On cross-examination Gibbs tried to convey the impression that she innocently thought that employees must have a collective-bargaining agreement before they went on strike. I do not believe that testimony. Nor do I believe Gibbs' testimony that "the significance of that was, I didn't know anything about it." During the conversation in question, Gibbs did not bring up to the topic just to display her ignorance. Also, she did not ask the question in order to find out if the employees had a contract; she already knew that they did not have a contract. She brought up the fact of their lack of a contract, I find, to premise a threat.

The testimonies of the employees are not in perfect symmetry, but this is to be expected in accounts of any multiparticipant conversation, especially one in which the participants are coming and going.¹⁷ Also, Strong, Neace and Combs are not alleged discriminatees who have an interest in the outcome of this case. Rather, they are current employees who, as the Board has recognized, are subject to recriminations, especially if they give false testimony. As stated in *Federal Stainless Sink Division of Unarco Industries, Inc.*, 197 NLRB 489, 491 (1972):

The average employee [who is providing information in a proceeding to which his employer is a party] is keenly aware of his dependence upon his employer's good will, not only to hold his job but also for the necessary job references essential to employment elsewhere.¹² Bearing this truism in mind, it is plain to see that the employee witnesses who testified against respondent, especially Carol Maxwell and Winkler, did so knowing that they were in considerable peril of economic reprisal. Having thus much to lose, their testimony, adverse to respondent, was in a sense contrary to their own interests and for this reason not likely to be false.¹³

¹² *Wirtz v. B.A.C. Steel Products, Inc., et al.*, 312 F.2d 14, 16 (C.A. 4).

¹³ See, in this connection, *Georgia Rug Mill*, 131 NLRB 1304, 1305, modified on other grounds 308 F.2d 89 (C.A. 5).

Also, in *Flexsteel Industries*, 316 NLRB 745 (1995), the Board stated that, although there is no presumption of credibility to be afforded to their testimony, "the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests."

Strong, Neace, and Combs were credible in their testimonies that Gibbs told them that, because they then had no contract, if they engaged in the then-forthcoming July 8 strike things would get "real ugly" and that they would be discharged or they would otherwise be "hurt." I therefore find and conclude that the Respondent, by Gibbs, in violation of Section 8(a)(1), threatened

¹⁷ As is demonstrated by Neace's above-quoted testimony about leaving the conversation when Combs was arriving, the Respondent's statement on brief that Neace was present for the entire conversation is false.

employees with discharge or other recriminations if they engaged in a strike.¹⁸

3. Threat by Blankenship

Paragraph 8(c) of the complaint alleges that: “About June 30, 2000, Respondent, by Diane Blankenship . . . threatened employees that if the [July 8] strike was not ruled to be an unfair labor practice strike, there would be people who would not be returning to work.” Blankenship is the supervisor of the Respondent’s laboratory.

Sally Dunn, a current laboratory employee¹⁹ who worked under Blankenship, testified that during “the last of June” she was present in the laboratory with fellow employees Elaine Halsey, Sharon Sparks, Kevin Hamlin, and Cheri Napier²⁰ when Blankenship entered. According to Dunn:

Elaine Halsey, a co-worker, asked her what would happen if we went on strike.

[Blankenship] said “If you strike, you strike.”

. . .

And . . . we had talked about what their attorneys had done. Diane [said] that she had saw a letter.

And I said “Diane, I don’t know what letter you saw, but I saw one when we took our vote to go out on strike that stated that they would not come back to the bargaining table, meaning the Hospital, would not come back to negotiate for 147 days.”

. . .

And then I made the remark to Diane: “I don’t understand why they cannot get together, the Hospital and the Union, and sit down and get this ironed out. We’ve been two years. We voted this in twice. I don’t understand.”

She went on to say, “If this is not ruled an unfair labor practice strike, some of you-all will not be coming back.”

Dunn testified that, among the employees present, she was the only one wearing a union button and that Blankenship was looking directly at her when she made the last comment.²¹

¹⁸ See *Wilkie Metal Products*, 333 NLRB 603 (2001) (statement that “things could get ugly” if the employees engaged in protected activities was a threat).

¹⁹ Dunn was, at the time that she gave this testimony, an alleged discriminatee, but only to the extent of having received an allegedly unlawful oral warning. I do not, however, believe that the prospect of success in proving the unlawfulness of the warning was enough to tempt Dunn to lie. As discussed *infra*, Dunn was subsequently in violation of Sec. 8(a)(3).

²⁰ At various points, the transcript refers to a “Sharon” or “Sherry” Napier. According to the Respondent’s records and Blankenship’s testimony (Tr. 2835), however, the Respondent employees no “Sharon Napier” in the laboratory. It does employ a “Cheri” Napier, and that is the person whom Dunn apparently intended to refer.

²¹ This testimony was given on the fifth day of trial. Dunn testified consistently on the third day of trial, but the reporter lost the recording of part of the day. The reporter created vol. 4A of the transcript to combine all testimony of all witnesses who were recalled, on various days, to repeat the lost portions of their testimonies. (The Respondent’s statement on brief that Dunn was not asked about this exchange with Blankenship during her original direct examination on day 3 of trial is incorrect. According to my notes, during her day-3 direct examination, Dunn testified about this exchange just after her testimony about the

Alleged discriminatee Debbie Miller testified that, “three weeks before we actually went on strike,” she was in the laboratory when Elaine Halsey and Sharon Noble were also there. Miller testified:

Well, Elaine had made the comment that if we went on strike, you know, what was they going to do in the lab for workers?

Diane had said that if we went on strike, if we didn’t win the unfair labor practice, that some of us wouldn’t be coming back to work.

The General Counsel did not specifically ask Dunn if Miller was present during the occasion about which she testified, and the General Counsel did not ask the corresponding question of Miller.

Blankenship denied making the comment (or comments) that Dunn and Miller attributed to her. Blankenship testified:

I believe the occasion that you’re referring to, I came into the laboratory one morning and our laboratory secretary Elaine Halsey seemed to be upset. . . . She wanted to know what would happen to the people who went on strike. . . . And she wanted to know if they would lose their jobs.

And I said, you know, there was a possibility under my understanding that they could be replaced if it was not ruled an unfair labor practice. But I had no knowledge of that. And I encouraged her to call the NLRB for information as to what their stand on this issue was.

Blankenship testified that Dunn, Sharon Sparks, Kevin Hamlin, and Cheri Napier were present at this exchange. Blankenship testified that Miller was not present on “the occasion.” Neither party called Halsey, Sparks, Hamlin, Napier, or Noble as a witness.

The first question is whether the General Counsel has shown that one event or two occurred. Counsel for the General Counsel, of course, knew that she was calling both Dunn and Miller to testify to the allegation, but she did not ask Dunn if Miller was present, and she did not ask Miller if Dunn was present. Without such specific questions, I can only find that there was only one event, and that finding accords with Blankenship’s testimony about “the occasion.” But I do not believe Blankenship’s testimony that on that occasion she only stated to the employees that she believed that economic strikers could be replaced. Miller and Dunn, however, were credible in their testimonies that they were present when Blankenship told a group of laboratory employees that, if the coming July 8 strike was not found to be an unfair labor practice strike, some of the strikers would not be coming back, with no reference to the Respondent’s rights to replace economic strikers. Blankenship’s unqualified statement was therefore a threat that the Respondent would deny reinstatement rights to economic strikers. As such, it violated Section 8(a)(1), as I find and conclude.

Union’s delivery of a strike notice to the Respondent and just before her testimony about seeing certain signs that were posted in the laboratory windows, as discussed *infra*.)

4. Threat by Burnette

Paragraph 8(d) of the complaint alleges that: "About June 2000, Respondent, by Edward Burnette, threatened employees that if they went out on strike they would lose their jobs." Burnette, a physician, is the director of the Respondent's emergency room.²² Emergency room registered nurse Geneva Hutchinson testified that, during 1999, Chief Nursing Officer Obenchain called her to Obenchain's office and issued to Hutchinson an oral warning based on reports to Obenchain by Burnette. This testimony was not disputed by the Respondent. Moreover, the Respondent stipulated that "the Hospital warns employees based on complaints about them from Dr. Burnette." Therefore, although the Respondent's answer formally denies that Burnette is its agent, I find that, as alleged by the complaint, Burnette is an agent of the Respondent within Section 2(13) of the Act.

Hutchinson, a current employee, testified that shortly before the July 8 strike began, at a moment when there were no patients in the emergency room, she and employees Anita Turner (who is a charging party in this matter) and Brenda Brewer engaged in a discussion with Burnette. According to Hutchinson:

Dr. Burnette said, "You know, you-all need to just talk to me about this union business. What exactly are you all hoping to accomplish? . . . We need to see what the problem is, see what we can do about it."

So everybody gave their opinion. I was telling him, you know, how unfair it is here. Favoritism. "It's just not done right."

And he . . . listened to Anita and the others, and then he kind of got mad and he said, "The only thing I can't see out of this is how you-all could even consider going on a picket line with illiterate people and kitchen help. You're professional people. . . . The only thing [that] they're doing is hurting this Hospital and setting yourself up to be fired."

. . . .

I said, "Dr. Burnette, you got your right to your opinion, but, you know, we feel this way. We need help." . . .

Then he said to me, "Well, you deserve to be fired."

Turner testified consistently with Hutchinson. Brewer, an alleged discriminatee, testified, but she was not asked about this alleged conduct of Burnette.

The Respondent did not call Burnette to testify. I found Hutchinson and Turner believable, and I do credit their testimonies. Of course, Burnette's statement to the emergency room group that they were setting themselves up to be fired by going on strike with other employees (including the illiterate ones) was a blatant threat to discharge employees for their protected union activities. Accordingly, I find that, in June, in violation of Section 8(a)(1), the Respondent, by Burnette, threatened employees that they would be discharged if they engaged in a strike.

²² See R. Exh. 17 which lists Burnette as "ER Director."

5. Threat by Hale

Paragraph 8(e) of the complaint alleges that: "About June 2000, Respondent, by Allena Hale . . . threatened employees that if they went out on strike they would be discharged." Hale is a "house supervisor"; as such, she is in charge of the nursing staff during certain shifts when Obenchain, chief of nursing operations, is not present.

Janie Jenkins has been employed as a registered nurse in the Respondent's emergency room for about 12 years. The emergency room is adjacent to the Respondent's intensive care unit. Jenkins testified that on June 18, a day that the Union held a prestrike rally near the premises, she walked into the intensive care unit where she saw Hale talking to employees Louise Gross and Shirley White. According to Jenkins:

I said, "What are you-all talking about?"

Allena said, "We're talking about the strike."

I said, "What about it?"

She said, "Well, you know if you-all go on strike without a contract you'll be fired."

I said, "Who told you that?"

She said, "Well, that's just what I've been told."

. . . .

I told her that I had called the Labor Board and they had sent me a pamphlet and I was trying to study that for myself because I didn't want to take the Union's word or the Hospital's word; I wanted it straight from the Labor Board. The lady that sent the book to me highlighted about unfair labor [practices]. And I [said to Hale that I] thought it was unfair labor because they wouldn't go back to the table and talk.

. . . .

Well, she said that we were good friends and she hated to see her friends fired.

Jenkins then left the area. White testified consistently with Jenkins. In addition, White testified that, after Jenkins left the intensive care unit, she continued the conversation about a possible strike with Hale. According to White:

I said, "Did they tell you that in the management meeting?"

And she stated that, "No, they don't tell me that stuff." Again she said, "I have been told that you will lose your job, and I don't want to see anyone lose their job because you do not have a contract."

Hale denied threatening any employee with discharge for striking. She testified that on one occasion she came upon some employees, including Shirley White and Louise Gross, who were discussing the possibility of a strike. Hale testified:

And I said, "Girls, you—you're striking, do you have a contract?"

And they said, "That's why we're going on a strike is to get a contract."

And then they proceeded to tell me that if they went on strike, that the Union was going to pay all their bills including their house bills and buy their food and what have you.

I said, "Well, I've never heard of that."

(Hale testified that, if she had had any information that employees would be discharged for striking, she would have told her sister-in-law, alleged discriminatee Beverly Clemons, which she did not do.)

On cross-examination, Hale evaded questions of why she asked the employees if they already had a contract until:

Q. Well, my question is about when you asked them, "Do you have a contract?" when they were talking about striking, why did you ask them that?

A. Well, they said they were going on a strike. I—I didn't know how they could, you know, what they were striking for.

Hale obviously stopped herself from saying that she did not see "how they could" strike without a contract. It appears to me that Hale, like Gibbs, used professed ignorance of labor law to premise a threat to employees that they would be discharged if they went on a strike before they had a contract. At any rate, I credit the employees' testimony and find that Hale told the employees that they would be discharged for engaging in a strike.

On brief, the Respondent notes that Jenkins and White acknowledged that they were friends of Hale, and it cites *Alterman Transport Lines*, 308 NLRB 1282 (1992), for the proposition that, if a supervisor is a friend of a threatened employee, no violation may be found. The administrative law judge in *Alterman* did note that the employee who had allegedly been threatened testified that his conversation with the supervisor was friendly, but the judge did not dismiss the allegation on that account. The judge dismissed the allegation because he discredited the employee's testimony that the threat had even occurred. Because the critical testimony had been discredited, the Board had no need to review the judge's dictum that he did not believe that he could find a violation on the basis of a conversation that the employee had characterized as friendly. Moreover, the Board in *Haines Hosiery*, supra, specifically rejected the administrative law judge's dismissal of an 8(a)(1) allegation on the basis of "the longstanding and friendly work relationship" between the supervisor and the employee.²³

Accordingly, I find and conclude that the Respondent, by Hale, threatened its employees with discharge if they went on strike and thereby violated Section 8(a)(1).

6. Cooper's discriminatory posting rule

Paragraph 8(f) of the complaint alleges that: "About July 4, 2000, Respondent, by Randy Cooper . . . informed employees that they could not post union literature without the permission of the human resource director and allowed anti-union literature to remain posted while union literature was removed." Cooper is the Respondent's chief financial officer.

²³ The Respondent further cites *House of Raeford Farms, Inc.*, 308 NLRB 568 (1992), enf.d. 7 F.3d 223 (4th Cir. 1993), cert. denied 511 U.S. 1030 (1994), for the proposition that if a supervisor is expressing a personal opinion, no violation may be found. In *Raeford Farms*, however, the Board did, in fact, find that the supervisor's "out of a job" threat was a violation.

The Respondent's cafeteria and the surgery unit have doors that face each other in the main hall of the facility. The door to the cafeteria is usually open; the door to the surgery unit is usually shut. Rita Neace, a housekeeping employee, testified that on July 4 she ate lunch in the cafeteria with housekeeping employee Geneva Jones. According to Neace, at the time that she and Jones were eating lunch, there was posted on the surgery-unit door a letter-size union handbill. As Jones and Neace were seated in the cafeteria, Jones faced the cafeteria door through which she could see the surgery unit door. Neace faced Jones at the table, so her back was to the cafeteria doorway. Neace and Jones testified that Jones told Neace that she had just seen Gerri Hurst, an admitting clerk, removing the union handbill from the surgery unit door. Neace left the table and went to the hall where she met Hurst who was standing there with Cooper. Further according to Neace:

I asked Gerri, "Did you take down the Union notice?" Her answer to me was, "Yes."

....

I said, "Well, I'll go back and get another notice and re-post it."

Mr. Cooper said, "No. Those papers look ugly and unsightly and they [do] not need to be posted all over the Hospital. They need to be posted in a special place."

....

I asked him where that "special place" was, and he didn't give me a place, but he said I would have to wait until the next day and have the human resource director, Naomi Mitchell, approve the paper before it could be posted.

....

I asked him did he think that the letter would be approved? And he said that he didn't know; I'd just have to wait till the next day.

....

I said, "Well, that's all right, there's one posted at the time clock." So, I just went ahead on and went back and finished my lunch.

Neace testified that there was, in fact, another copy of the union handbill posted at a nearby timeclock.

When asked if other items had been posted on other doors in the hallway, Neace referred only to Christmas-time decorations. When asked if postings were made in other parts of the Hospital, Neace replied: "Yes, there are notices posted with directions to different departments on doors. On the windows at the nurses' station there's Polaroid pictures, there's Christmas cards, photo Christmas cards that were posted this year, [and] menus to restaurants." Neace denied that, before this incident, she had ever been told that she needed permission to post items in the Hospital.

Hurst did not testify. Cooper testified that on July 4 he and Hurst were in the hall, exchanging greetings, when Hurst turned toward a union handbill that was on the surgery unit door. Hurst removed the handbill and, shortly after she did so, Neace came out of the dining room. Neace asked Hurst why she had removed the handbill; Hurst replied that it looked "tacky."

Neace replied that she would get another and repost it. Cooper testified:

At that point, my comment to her was, "You can't put it up in that area."

And she asked why not, and I told her that was a patient care area, that according to the solicitation and distribution of literature policy in the Hospital handbook, that literature could not be posted in areas of patient care, therapy rooms, corridors, or areas where patients or family members are counseled by physicians.

....

Rita asked me how she went about posting some information, and I informed her that the policy is that you submit it to get administrative approval.

And she asked me how she did that, and I told her she could submit it to Naomi Mitchell, who was the human resource director, and that she would submit it to administration for approval, and if it was approved, it would be placed in the employee bulletin board that is down [another] corridor by the time clock.

....

Rita said that that was okay, that she had another sign posted by the nurse's station.

To the extent that the testimonies of Neace and Cooper differ, I credit Cooper.

The personnel policy manual of Community Health Systems, the Respondent's parent, has a no-distribution rule which specifically prohibits distribution of literature in immediate patient care areas "such as corridors in the patient treatment areas." The General Counsel does not challenge the lawfulness of this rule, and the corridor in question led to the surgery unit and other patient care areas.

The complaint alleges that Cooper's action toward Neace violated Section 8(a)(1) because the Respondent "allowed anti-union literature to remain posted" at the same time. I find *infra*, that the Respondent allowed one piece of anti-union literature to be posted in the business office area for a few days during the July 8 strike, and there is undisputed employee testimony that the Respondent allowed personal messages to be posted about the nurses' stations. There is, however, no evidence that the Respondent allowed antiunion literature to be posted in patient care areas such as the door to the surgery unit.²⁴ The General Counsel makes no argument on brief how this allegation has been proved (by evidence of disparate enforcement or otherwise). I shall therefore recommend that this allegation of the complaint be dismissed.

7. Threat by Obenchain

Paragraph 8(g) of the complaint alleges that: "About July 7, 2000, Respondent, by Michele Obenchain, threatened to seek

²⁴ There is also evidence by the uncontradicted testimony of employee Shirley White that once, in early 2000, Obenchain tore a union leaflet from an employee bulletin board. At the time, the bulletin board also contained nonwork-related materials such as babyshower announcements, but Obenchain left those other items undisturbed. The employee bulletin board, however, was not in a patient care area. (The complaint does not allege that Obenchain's conduct violated the Act.)

the revocation of an employee's nursing license if she joined the [July 8] strike." Obenchain is the Respondent's chief nursing officer and, as such, she is subordinate only to Bevins, the chief executive officer.

Anita Turner (a Charging Party in this matter) was an emergency room registered nurse until she voluntarily resigned after the July 8 strike was over. Turner was scheduled to work from 9 a.m. until 9 p.m. on July 8; the announced starting hour of the strike on July 8 was 7 p.m. Turner testified that on July 7 she met Supervisors McGlothen, Hoover, and Obenchain in McGlothen's office. At the time, according to Turner:

I said, "I guess you all know I will be leaving the facility at 7:00 tomorrow night."

....

Ms. Obenchain . . . looked very angry. Her whole facial features changed. Her voice was loud. And she told me that if I left the facility she would . . . report it to the [Kentucky] Board of Nursing [and that] she had done it before and [that] people had lost [State nursing licenses for] up to two years. And she would see that I lost my license.

I just told them, "I've already talked to the Board of Nursing; I know my rights on this," and I left.

Turner worked the next day until 8 p.m. (when the emergency room was cleared of critical patients), and then she joined the strike.

Obenchain essentially admitted the remarks that Turner attributed to her. Obenchain testified that, after Turner told her that she had already consulted the Kentucky nursing authority, she also called the authority and found that the State would not consider a nurse's going on a strike to be patient abandonment, in violation of the nurse's license commitment, in cases where the nurse had given prior notice of intent to join a strike.

A ground for immediate discharge that is listed in the personnel manual of Community Health Systems is "Failure to maintain a required license, certification, registration or accreditation." Therefore, by Obenchain's statement to Turner that she would cause Turner to lose her nursing license if Turner joined the July 8 strike at the hour that it started, the Respondent necessarily violated Section 8(a)(1), as I find and conclude.²⁵

8. Security guards' videotaping of strike activities

Paragraph 8(h) of the complaint alleges that: "About July 8, 2000, and throughout the strike, Respondent, by its security service, videotaped or gave the impression of videotaping, without any justification, employees engaged in lawful strike activity." The Respondent hired Storm Security Service during the July 8 strike. George Snodgrass, who testified for the Respondent, is the director of Storm Security's special operations unit. It is undisputed that, from at least the second week of the strike through the end of the strike on August 15, officers of Storm Security appeared in the areas around the Hospital where

²⁵ The cases cited by the Respondent on brief are inapplicable; they involved threats of discharge for nonprotected activities, not threats for protected activities such as joining a strike.

the strikers had gathered and picketed carrying videotaping cameras.

Alleged discriminatee Melissa Turner testified that during the July 8 strike she joined the picketing about 4 days per week, for about 6 hours per day. Turner testified that on one occasion when she drove her automobile on the public road that borders the Hospital and parked at the side of the road opposite the Hospital, a security guard pointed a video camera at her, as if videotaping. Turner also testified that the strikers maintained an open tent just inside the Respondent's property line. On several occasions, Turner testified, she saw guards pointing video cameras directly at the tent. On those occasions the strikers were doing nothing more than talking or barbecuing. At other times, the guards pointed video cameras at the strikers when they were peacefully picketing or chanting slogans. Turner denied that, at any of the times that the apparent videotaping activity was being conducted, confrontations were in progress.

Alleged discriminatee Leotta Sizemore also testified that Storm Security's guards would regularly videotape, or appear to videotape, peaceful picketing activities and any activities that the strikers engaged in under their tent, such as preparing and consuming meals.

Current employee Sally Dunn²⁶ testified that Storm's guards "would video us when we walked up and down the roadway" with picket signs. Dunn further testified that Storm's guards would videotape activities in the strikers' tent, including a birthday party for one of the strikers. Dunn further testified that the strikers' last paychecks were distributed from a podium that management placed at the front of the Hospital. The guards videotaped the strikers as they approached the podium to receive the checks. The checks of nonstriking employees were not distributed in this manner.

Alleged discriminatee Lois Noble testified: "If we [would] walk with our picket signs, they would come up to the road to follow us so they could get a good angle, I guess, with the camera and they videotaped us. If we chanted, they'd videotape us. If the Hospital's bus, the white bus [that shuttled strike replacements between a remote parking lot to the Hospital], would come, they'd always be videotaping us."

None of the guards who did, or appeared to do, the videotaping testified. When Snodgrass was called as the Respondent's witness, and he testified on direct examination:

Well, we only will actually turn the camcorder on and make a videotape when we have cause to believe, or actually see something, again, improper, illegal occurring. At that point, we'll use the video camera to document that activity.

Snodgrass testified that instances of trespassing and blocking the public highway were "pretty much" the only times that the security guards "had occasion to turn on the video cameras." Snodgrass testified that the Respondent used a bus to carry nonstrikers from a remote parking lot to the Hospital, and, on a "random basis" and "perhaps a half a dozen times" that he observed during the strike, picketing employees would block the

bus in the public road that bordered the Respondent's property. Snodgrass was asked and he testified:

Q. To your knowledge, did either you or any of your security guards that you've testified about aim video cameras at the pickets without actually recording the activity?

A. We always, whenever the bus was coming, or one of our vehicles was coming, we were radio-equipped, we were aware of the fact that they were coming. So we always had the video cameras up at that point and ready to record. We did not always actually hit the record button. It just depended on what the circumstance was.

Snodgrass testified that Storm Security's guards began the practice of holding the cameras at the ready after the first time that pickets blocked the public road leading to the Hospital.

On cross-examination, Snodgrass was also asked and he testified:

Q. And is it also true that during times when the security officer believed that there might be something unlawful that might occur, that those cameras were to be out and ready for use?

A. Yes, sir.

At another point on cross-examination, Snodgrass was asked and he testified:

Q. Now, to your knowledge, did the Hospital ever demand that the pickets remove the—any of those tents from the Hospital's property?

....

A. [M]y understanding is the police came to measure it, and it was in agreement with the police to provide the people with some safe area off the edge of the highway [and] that the Hospital said, "Go ahead, do it."

Q. So the Hospital basically said we don't object to the tents being there?

A. Well, I think they did object, but I think they had to do it.

Q. They were persuaded by the police not to . . . demand that the tents be removed?

A. Correct. I think that's the best way to put it.

The Respondent did not offer any of the videotapes that it made; however, Snodgrass testified that he reviewed all of the videotapes and none showed strikers barbecuing "or anything of that kind."

All of the above employee testimony was credible, and the Respondent does not deny that the guards appeared to record peaceful protected concerted activities including employees' walking the picket line on the public road that led to the Hospital, chanting, and preparing food for strikers. Most importantly, the Respondent does not deny establishing a podium in front of the Hospital from which it distributed paychecks to strikers and then videotaping the strikers as they approached. The Respondent attempts to justify only the videotaping, or the appearance of videotaping, of activities that were conducted on the Respondent's property (i.e., the activities in the open tent) by arguing that the employees were trespassers. Individuals who have permission to be on the property can, in no sense of the

²⁶ Again, Dunn had not been discharged by the Respondent at the time that she gave this testimony.

word, be considered “trespassers.” As Snodgrass’ cross-examination makes clear, the Respondent permitted the strikers tents to be placed on its property. (Again, the Respondent was not too happy about it, but the police prevailed upon it to agree to allow the strikers to be there.) Therefore, this defense is unavailing.

The Board has long held that, absent proper justification, photographing of employees engaged in protected concerted activities violates the Act because it has a tendency to intimidate those employees. *F. W. Woolworth, Co.*, 310 NLRB 1197 (1993). Pretending to take photographs can be just as coercive as actually doing so. *NLRB v. Rybold Heater Co.*, 408 F.2d 888, 891 (6th Cir. 1969). Moreover, the Board has held that photographing in the mere belief that “something ‘might’ happen does not justify [an employer’s] conduct when balanced against the tendency of that conduct to interfere with the employees’ right to engage in concerted activity.” *Flambeau Plastics Corp.*, 167 NLRB 735, 743 (1967), enfd. 401 F.2d 128, 136 (7th Cir. 1968), cert. denied 393 U.S. 1019 (1969). The same principles apply to photography by videotaping. See, for example, *Frontier Hotel & Casino*, 323 NLRB 815 (1997).

In the most recent case of *Saia Motor Freight Line*, 333 NLRB 784 (2001), the Board found no violation in the employer’s photographing of striking employees because the employer showed that: (1) those employees had actually impeded traffic; (2) it did not begin photographing the employees until the impeding of traffic began; and (3) it engaged in the photography only after failure of appeals to police to take action to minimize dangerous traffic congestion (including at least one near-miss of a rear-end collision). In this case, the only evidence about traffic blocking of the public road was Snodgrass’ testimony that “perhaps a half a dozen times” the pickets blocked the bus that carried replacements from a remote parking lot to the Hospital. Assuming the truth of this testimony, it is to be noted that, if the blockages of the bus had been any more than momentary, Snodgrass assuredly would have so testified. If traffic other than the bus itself was blocked, or if any dangerous conditions had been caused by the picketers, Snodgrass would have so testified. Additionally, the Respondent did the videotaping, and presumably it still had the videotapes at time of trial. If any of those videotapes had shown blockages of traffic, the Respondent assuredly would have produced them. I draw an adverse inference against the Respondent for its failure to produce any such tapes, and I would discredit Snodgrass’ testimony on that account, alone. As well, Snodgrass was particularly unconvincing in giving this unsupported testimony, and I discredit it on that ground also. Other factors distinguishing this case from *Saia Motor Freight* are that the Respondent offered no evidence that the pickets on the public road presented any danger to anyone, and the Respondent offered no evidence that it complained to the police, without results, before it began making videotapes of employees who were picketing on the public road.

The Respondent cites *Roadway Express, Inc.*, 271 NLRB 1238, 1240, 1244 (1984), for the proposition that: “Gathering evidence for use in legal proceedings also constitutes a sufficient justification for videotaping protected activities.” In *Roadway Express*, the Board based its decision, in part, on the

fact that the employer proved a colorable basis for seeking injunctive relief under *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970). The Respondent here, however, does not claim a colorable basis for any legal proceeding against the Union, or against any picketing employees, for which its videotapes could have been evidence. (Also in *Roadway Express* the employer demonstrated its intent to litigate by showing that it had cataloged and preserved its photographs; again, if the Respondent had preserved its videotapes for evidentiary purposes, it would have presented them to me.)

The Respondent further cites *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 701 (7th Cir. 1976), for the proposition that “anticipatory photographing . . . does not violate § 8(a)(1) of the Act where the photographs are taken to establish, for purposes of an injunction suit, that pickets engaged in violence.” This quote from *Colonial Haven* is correct as far as it goes, but it is a purest dictum. The court enforced the Board’s order in *Colonial Haven*, and it did so upon the reasoning:

Still, there can be little question that, under certain circumstances, picket-line photography can have a tendency to interfere with, restrain, and coerce employees in their efforts to engage in concerted activities. Here, there is absolutely no evidence that [Colonial Haven Nursing] Home even instituted proceedings seeking injunctive relief, much less relied upon the photographs as necessary or vital evidence. Nor was there evidence that Home employees were engaged in violence, trespass or blocked ingress or egress to the home. The evidence as to the stopping of delivery vehicles on a few occasions never attempted to pinpoint an exact date for such occurrences, so that there is nothing in the record supporting an inference that such momentary stoppages occurred at a time contemporaneous with the attempted photo-taking by [the employer’s named agent].

In this case, again, there is no credible evidence of misconduct by the picketing employees as they picketed on the public road, and the Respondent did not institute any action against the Union, and the Respondent has made no attempt to show that its videotapes could have been evidence in any theoretical litigation. At minimum, therefore, the Respondent’s citation of *Colonial Haven* is unavailing.

In summary, the Respondent has not presented any credible justification for its videotaping, or appearing to videotape, the peaceful picketing and other strike activities of the employees.²⁷ I therefore find and conclude that by videotaping striking employees, and by creating the impression of videotaping striking employees, all without lawful justification, the Respondent has violated Section 8(a)(1).

9. Posting of antiunion signs

Paragraph 8(i) of the complaint alleges that: “About July 8, 2000, and continuing throughout the [July 8] strike, Respondent, by Diane Blankenship, threatened employees by allowing to be displayed in a laboratory window and other places in the Hospital signs stating, among other things, ‘GONE STEEL-

²⁷ The General Counsel has not alleged a separate violation by the Respondent’s establishing an outdoor podium and requiring the strikers to appear before it to collect their post-July 8 paychecks.

WORKERS' and 'EX-KRMC EMPLOYEES.'" Blankenship is the supervisor of the Respondent's laboratory.

Current employee Sally Dunn²⁸ identified photographs of two signs that, at some point during the July 8 strike, were taped in a laboratory window, facing outside. One of the signs stated "GONE STEELWORKERS"; that sign had been created by taking a sign that had originally said "GO STEELWORKERS" and inserting "NE," in a similar font, after "GO." The other sign that Dunn identified was headed "GO SCABS"; following that heading was something of an acrostic:

S STUPID
T THICK-HEADED
R RUDE
I IGNORANT
K KOOKY
E EX-KRMC EMPLOYEES
R ROTTEN
S SLOBS

At the bottom of the "EX-KRMC EMPLOYEES" sign, "GO SCABS" was again printed, but in much larger type. Dunn did not testify during what portion of the strike she saw either of the signs posted. (Capitalizations in this paragraph are original.)

Blankenship testified that nonstriking employee Toby Arnold called her at home one evening during the strike and:

[H]e said, "I think I may be in trouble." And I asked him what he'd done. And he said he took one of the "Go Steelworkers" signs. And he said, "I added an 'NE,' and I put it in the window, then someone came down from the strike line and took a picture of it."

Blankenship testified that she told Arnold to take down the sign "immediately." Blankenship further testified that she never saw the "Gone Steelworkers" sign, or the "Ex-KRMC Employees" sign, posted in a laboratory window.

On cross-examination, Blankenship admitted that, although she never saw the signs posted in a laboratory window, she did see the "Ex-KRMC Employees" sign posted on the door of the Purchasing Office for "several days." Blankenship further admitted that she saw the "Ex-KRMC Employees" sign posted on a door to a conference room for "probably" more than 1 day. Blankenship acknowledged that employees have access to the areas of those doors.

There is no evidence that Blankenship, or any other supervisor, ever saw the "Gone Steelworkers" sign, and the General Counsel's failure to ask Dunn (the only witness whom the General Counsel called on the allegation) over what time period it was that she saw the sign posted causes me to credit Blankenship that she told Arnold to take down the sign as soon as she heard that it had been put up. I would therefore recommend that the complaint be dismissed insofar as it relates to the "Gone Steelworkers" sign. There is also no evidence that Blankenship, or any other supervisor, saw the "Ex-KRMC Employees" sign posted in the laboratory window, and I shall also recommend that that allegation of the complaint be dismissed.

²⁸ Dunn had not been discharged at the time that this testimony was given; moreover, it is not in dispute.

The "Ex-KRMC Employees" signs which were posted in the interior of the Hospital, however, constitute a different matter. For at least 2 days, according to Blankenship's testimony, the Respondent allowed the signs to be maintained. The signs could have had no intended meaning other than that strikers would lose their employment status solely because they were striking employees. That is, the signs were threats, in writing, to discharge strikers. To be sure, the employees who saw the signs in the interior of the Hospital were nonstrikers, but the signs would nevertheless have had the tendency to coerce the choice of any such employee who may have considered joining the strike.

I therefore find and conclude that the Respondent, in violation of Section 8(a)(1), by Blankenship, and by other supervisors who did not remove the "Ex-KRMC Employees" signs from the interior of the Respondent's facility, threatened employees with discharge because they had engaged in the July 8 strike.

10. Trusty's and Pelfrey's removal of union literature from Automobiles

Paragraph 8(j) of the complaint alleges that: "About July 9, 2000, Respondent, by Denice Trusty and Jan Pelfrey, in a retail parking lot, removed union literature from automobile windshields." Trusty is the admitting and data processing supervisor in the Respondent's business office; Pelfrey is the Respondent's purchasing agent, and during the July 8 strike she also served as the supervisor of the Respondent's housekeeping department.

Alleged discriminatee Debbie Miller testified that during the July 8 strike she and employee Charlene Cochran placed union handbills on the windshields of automobiles that were parked in the lot of a local hardware store. She and Cochran then went to a parking lot across the street to engage in further such distributions. While they were across the street, they looked back and saw Trusty and Pelfrey in the hardware store's parking lot.

According to Miller: "Denise was in the Blazer. She was driving and Jan Pelfrey was out taking the literature back off of the cars." Miller and Cochran went back to the hardware store's parking lot, and Cochran "replaced the flyers," further according to Miller. On cross-examination, Miller testified that Pelfrey and Trusty appeared to see them come back to the hardware store's parking lot because Trusty's Blazer "sped off."

Cochran testified that Pelfrey took union literature from only one automobile and that Trusty did not speed off when she and Pelfrey left the parking lot.

Pelfrey testified that, beginning at some point after the inception of the July 8 strike, the Respondent's attorney advised her not to drive her personal vehicle to the Hospital. With permission, she sometimes parked in the hardware store's lot and Trusty (or others) picked her up there to take her to work. Pelfrey further testified that, as the Respondent's purchasing agent, she also often goes to the hardware store during the day; she further testified that Trusty sometimes drove her on such errands during the strike. On one such occasion, she saw a union handbill on her vehicle and removed it. Pelfrey testified that the only vehicle from which she took a handbill was her own. Trusty testified consistently with Pelfrey.

I credit Trusty and Pelfrey (and Cochran) that Pelfrey removed union literature from only one automobile; and I further find that the automobile was owned by Pelfrey. This was no violation of the Act, and I shall recommend dismissal of this allegation of the complaint.

D. The Alleged 8(a)(3) Violations

The complaint alleges that the Respondent has violated Section 8(a)(3) by denying light-duty work status to Brenda Brewer, by issuing an oral warning to Sally Dunn, by discharging Dunn, and by discharging 12 other employees; to wit:

Vickie Bowling	Debbie Miller
Beverly Clemons	Lois Noble
Clara Gabbard	Maxine Ritchie
Angie Gayheart	Laotta Sizemore
Sandra (Barker) Hutton	Diana Taulbee
Eileene Jewell	Melissa Turner

The complaint also alleges that the Respondent issued two written warning notices to Taulbee in violation of Section 8(a)(3). Although not separately alleged in the complaint, I find *infra*, that Miller was unlawfully suspended before being discharged.

The General Counsel contends that the Respondent discharged, or otherwise disciplined, the above-named employees because of their lawful strike activities. The Respondent contends that it discharged all of the employees except Gayheart for job misconduct or incompetence. The Respondent contends that it discharged Gayheart for strike activities that exceeded the protections of the Act; to wit: violence. The legal standards that determine the disposition of Gayheart's case will be discussed separately below. The law that determines the dispositions of the other 8(a)(3) allegations is stated in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, General Counsel has the initial burden of persuading the Board that he has established a *prima facie* case sufficient to support an inference that union activity that is protected by the Act was a motivating factor in the employer's action that is alleged to constitute discrimination in violation of Section 8(a)(3).²⁹ Once the General Counsel has met his initial burden, the burden shifts to the Respondent to demonstrate that the alleged discriminatory conduct "would have taken place even in the absence of the protected conduct." *Wright Line*, *supra* at 1089. To meet its burden under *Wright Line*, it is not enough for the employer to show that an alleged discriminatee engaged in misconduct for which he or she "could have" been discharged or otherwise disciplined. The employer must demonstrate that it "would have" discharged, or otherwise disciplined, the employee for the misconduct in question. *Structural Composites Industries*, 304 NLRB 729, 730 (1991); the emphasis is original. Such an evi-

dentiary demonstration must be made by a preponderance of the evidence, and, if it is not, a violation will be found.³⁰

Therefore, in the case of each alleged discriminatory act against each alleged discriminatee (again, excluding Gayheart), the first inquiry is whether the record contains a *prima facie* case of discrimination that is proscribed by the Act. Such a *prima facie* case is established by proof that: (1) the employee engaged in union activities that are protected by the Act; (2) the Respondent knew or suspected that the alleged discriminatee had engaged in such activities at the time that the Respondent decided to take the action alleged to be discriminatory; (3) the acts alleged to be discriminatory, in fact, occurred; and (4) the Respondent's decision to discharge or otherwise discipline the alleged discriminatee was motivated, at least in part, by animus toward those activities. *Chelsea Homes*, 298 NLRB 813 (1990). If such a *prima facie* case is held to have been established, any defense that has been presented will then be addressed. The defense will be held to preponderate unless the General Counsel rebuts it by showing that it is pretextual, either by showing that it is without factual basis or by showing that it was not in fact relied upon. If the General Counsel does show that the asserted defense is pretextual, the inference of wrongful motive remains intact, and a violation will be found.³¹

The Respondent denies that Brewer participated in the July 8 strike, but it admits that it knew that each of the other alleged discriminatees engaged in the strike. The Respondent denies that it discharged Sizemore, but it admits taking all of the other actions that the complaint alleges to have been discriminatorily motivated within the prohibitions of Section 8(a)(3). Because the relevant knowledge of union activities (except in Brewer's case) is admitted, and because the alleged discriminatory acts (except in Sizemore's case) are admitted, the remaining issue in deciding whether the General Counsel has presented a *prima facie* case for each of the alleged discriminatees is whether the General Counsel has proved the necessary element of unlawful animus, or motivation. Evidence of animus behind each of the alleged discriminatory acts is found in the repeated threats by supervisors (or by an agent, in the case of Dr. Edward Burnette) that employees who engaged in a strike would be discharged (or, at least, would not be reinstated). Specifically, as I have found above: (1) Hicks told Melissa Turner that economic strikers would lose their jobs; (2) Gibbs threatened employees Strong, Neace, and Smith that, because they did not already have a contract, they could be discharged, or otherwise "hurt" for striking; (3) Blankenship told Miller and Dunn that, if the July 8 strike was not ruled an unfair labor practices strike, some employees would not be returning to their jobs; (4) Burnette threatened emergency room employees that if they engaged in a strike they would be discharged; (5) Hale threatened several employees that they would be discharged for engaging in a

²⁹ See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), which reaffirms that the General Counsel's initial burden is one of persuasion, not just production of some evidence which may create the required inference.

³⁰ *Wright Line*, 251 NLRB at 1087; *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

³¹ As stated in *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984): "[A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." See also *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982).

strike because they did not already have a contract; (6) Obenchain threatened registered nurse Anita Turner that Obenchain would cause Turner to lose her nursing license, and therefore be subject to immediate discharge, if she went on strike; and (7) Blankenship and other supervisors did not remove the “EX-KRMC Employees” signs from the interior of the Hospital and thereby threatened employees with discharge because they had engaged in the July 8 strike. Finally, as I find below in the discussion of the discharge of Bowling, housekeeping department employee Patricia Nease heard Supervisor Pelfrey telling Supervisor Faye Kipp that the strikers “had to go” and that, because Bowling was a leader of the employees, she should be harassed until she reacted in a way that would provide a reason to discharge her. This extreme level of expressed hostility by Pelfrey and the other supervisors (or agents) clearly raises the inference of unlawfulness in the subsequent adverse actions against each of the alleged discriminatees. I will now discuss the case of each of the 14 alleged discriminatees; in so doing, I shall not recapitulate the extensive evidence of animus that supports the prima facie cases except by noting that the Respondent “repeatedly threatened” to discharge the July 8 strikers.

(Each of the 14 disciplinary cases is introduced by a syllabus that contains a summary of the allegations of the complaint, the contentions of the parties, and my ultimate findings and conclusions for the 8(a)(3) allegations of that case. These syllabuses are designed only to provide an overview that will assist the reviewer, and they are couched in most general terms. The full and precise statements of the positions of the parties, and the full and precise statements of my reasons for my findings and conclusions, are contained in the texts that follow the syllabuses.)

1. Discharge of Vickie Bowling

Vickie Bowling was employed by the Respondent as a housekeeping employee until she was discharged by letter dated February 28, 2001.³² Bowling testified that she participated in the July 8 strike and picketed almost daily. The General Counsel contends that the Respondent discharged Bowling because of her participation in the July 8 strike. The Respondent answers that it discharged Bowling because, on January 24 she loudly cursed a fellow employee in a public area of the Hospital. Ultimately, I find that Bowling did commit the misconduct that the Respondent attributes to her and that the Respondent did not violate the Act by discharging Bowling.

Bowling regularly worked from 3 until 11:30 p.m. Immediately before and after the July 8 strike, Jan Pelfrey supervised the housekeeping department. (As noted above, Pelfrey’s usual responsibility was the Purchasing Department.) About 2 weeks after the strike was over, the Respondent hired Faye Kipp as supervisor of the housekeeping employees.

The duties of housekeeping employees on the second shift included cleaning rooms in a designated area and answering pages for emergency cleaning duties (cleaning up spills and the like) all over the Hospital. Bowling testified that at the start of

her shift on January 24 Kipp told her that David Turner and Pam Ritchie were to clean rooms in their designated areas until 6 p.m. and then go to the physical therapy department to strip and wax the floors there. Kipp also told Bowling that, during pauses in the stripping and waxing operations, Turner and Ritchie were to return to their designated work areas to clean rooms and to also answer emergency pages. (Bowling testified that there were 30-minute pauses between coats of wax.)

It is undisputed that January 24 was an extremely busy day for the housekeeping employees. Bowling further testified that during the period from 3 until 6 p.m. on January 24, she saw Turner and Ritchie working together at a very slow pace, even though they had many rooms to clean in their designated areas of the Hospital. After 6 p.m., Bowling saw Ritchie sitting on a chair in the main corridor of the Hospital, doing nothing. Bowling told Ritchie that there were many rooms to clean in Ritchie’s designated area and that there were many pages for housekeeping assistance (which Ritchie would have heard). Ritchie replied that Kipp had told her to do nothing but strip and wax the physical therapy department’s floors, and Ritchie remained seated. Bowling went on to other duties and a few minutes later she returned to where Ritchie was sitting. Bowling testified that she got “mad” and:

I told her—basically I can’t be exactly [sure] what I said. I told her that we needed some help on the damn floor; I couldn’t do all the fucking work myself.

Bowling testified that Ritchie did not reply. Bowling was asked, and she testified:

Q. Did you say anything else?

A. They had paged again, and I . . . think I said, “Well, shit. There’s another damn page.”

. . . .

Q. Describe what your tone of voice was as you recall when you said these things to Pam?

A. I wasn’t screaming, but I’m sure it was louder than my normal voice.

Q. Did you see anyone else around during this encounter?

A. No, I did not.

Bowling testified that about 20 minutes later she called Kipp at home. Bowling told Kipp that she and Turner needed help because Ritchie was doing nothing and that Ritchie had told her (Bowling) that Kipp had told her (Ritchie) to do nothing during pauses in the stripping and waxing processes. Kipp repeated that Ritchie was to return to her regular duties during pauses in the waxing processes. Kipp also stated in that telephone call that she would call Ritchie and talk to her about the matter. Further according to Bowling, she worked the full shift that date and never heard a page for Ritchie to come to the telephone.

On January 26, the next date that Bowling was scheduled to work, Kipp met Bowling at the timeclock and took her to a conference room. There Bowling met with Kipp, Pelfrey and Human Resources Director Mitchell. Kipp asked Bowling for her version of the encounter with Ritchie. According to Bowling:

³² All dates in Bowling’s case are from July 8, 2000, until February 28, 2001, unless otherwise indicated.

I told her I got mad and I jumped Pam.
And she asked me if I had cussed Pam.

I told her I didn't know, I was mad, I could have, I won't say I didn't, and I won't say I did. . . . And I told her that if I did, I would apologize to Pam just as soon as I seen her.

. . . .

She said that I had cussed Pam out very badly in front of a whole bunch of people.

Kipp then showed Bowling a section of the Respondent's employee handbook. The section of the handbook entitled "Standards of Conduct" states:

To uphold the standards of excellence in patient care and services promised to the community, there are certain standards of conduct which must be met by all employees at all times. Employees who fail to maintain proper standards of conduct or whose behavior interferes with safe, orderly or efficient operations will be subject to disciplinary action, up to and including discharge.

It is the Hospital's expectation that you will conduct yourself on the job in a professional manner, extending courtesy, consideration and cooperation to patients, visitors and other employees.

. . . .

The circumstances of the situation and an employee's overall work record are considered before deciding on a course of disciplinary action. The Hospital will apply progressive disciplinary action which includes verbal or written counseling, suspension, probation or immediate discharge, depending on the nature of the conduct involved and the circumstances of the situation. While it is not possible to anticipate every situation, the following are offered as examples of unacceptable behavior.

After that, the handbook lists 16 examples of "unacceptable behavior," the 10th of which is: "Fighting or using obscene, abusive or threatening languages or gestures." Kipp then handed Bowling another paper which said that Bowling was suspended indefinitely, pending investigation of her alleged misconduct. Bowling then left the premises.

On February 2, Bevins sent a letter to Bowling telling her to schedule an investigatory interview with Mitchell. The interview was held on February 6. Pelfrey and Kipp were also present. Mitchell asked Bowling again what had happened between her and Ritchie on January 24. Bowling again described the busy evening and what she had then observed of Ritchie. Mitchell asked if Bowling had cursed Ritchie. Bowling further testified:

I said, "I will not say that I did, and I will not say I didn't. . . . I was mad. I could have, but I will not sit here and say I did or I didn't because I'm not sure of my words. I don't really remember exactly what I might have said."

On cross-examination, Bowling also claimed that she could not recall what she had said to Ritchie, other than what she admitted to during her direct examination. By letter dated February 28, Bevins informed Bowling that "your employment

with KRMC is terminated based upon investigation undertaken in connection with your suspension on 1-26-01."

The General Counsel asked Bowling if she had ever heard anyone else in the Hospital "cuss in an area where there were members of the public and patients present." Bowling replied that, earlier in January, in a hall near a public waiting room, she heard Pelfrey tell guard Gene Pelfrey, "the son-of-a-bitches [are] taking me back to court."³³ Bowling testified that there were "quite a few people" in a nearby waiting area at the time. Also on direct examination, Bowling described exchanges between and among employees and supervisors, but she described none that occurred in public areas, with loud voices, and with the degree of demeaning curses that I ultimately find that Bowling directed at Ritchie on February 24. Also, the General Counsel called former employee Ronald Oakes to give anecdotes of cursing which do not reasonably compare with Bowling's. Moreover, Oakes was a most negatively impressive witness who showed a clear bias to assist Bowling in any way that he could (including gratuitously lacing his testimony with profanity of his own, apparently just to show me how vulgar I should expect the Respondent's employees to be). For these reasons, I need not recite the other examples of cursing that were given by Bowling or any of the examples given by Oakes.

As further evidence of disparate treatment, the General Counsel introduced records of three other employees: (1) On June 12, 1997, Oakes was given a "Verbal Reprimand" because he "reacted badly in front of several people when told B-shift would have to clean clinics & business office." Oakes' conduct was described by an accompanying memorandum as including the word "damn." (2) On June 13, 1997, a "First Reprimand" warning notice was also given to Sarah Bowling (no known relation to alleged discriminatee Bowling) for using an unstatesed curse word while giving a report to other nurses. (3) On October 14, 1999, Chief Nursing Officer Obenchain issued Kathy Little a 3-day suspension for "Attitude" and "Abusive Language." In a narrative that accompanied the order of suspension, Obenchain described repeated argumentativeness by Little. Also Obenchain described two occasions where Little used the "F-word" before witnesses. Obenchain does not describe the circumstances of the first occasion, but for the precipitating event Obenchain wrote:

On October 14, 1999, several complaints were received that Kathy was argumentative and trying to get others to do her work (hang blood, change IV's, do an admission). She walked into the conference room, slammed the door and stated "I hate this f—ing place; they treat me like s—. I am having f—ing problems at home." . . . the witnesses to this were: [names of 4 other employees].

The General Counsel offered no other evidence to demonstrate disparate treatment against Bowling.

In defense, Ritchie was called by the Respondent and asked:

Q. Would you please explain to the Administrative Law Judge what happened on that occasion, as best you can recall?

³³ If Supervisor Jan Pelfrey is related to guard Gene Pelfrey, the fact is not demonstrated in the record.

A. I had to strip and wax physical therapy and it had to be done at night because of—no one was there to work. And she was told to take up the slack for me because I couldn't be back on the floor if they needed me. And she apparently didn't want to do it because I had discharges back there, and she came screaming in the hallway . . . and cussing. Told me I needed to get back there and do my "blank" work. That she wasn't going to do my "blank" work for me.

JUDGE EVANS: Was the word "fucking?"

THE WITNESS: Yeah.

JUDGE EVANS: Okay, thank you.

Ritchie testified that Patty Nease, another housekeeping employee, came into the hallway during the incident with Bowling. Ritchie testified that never before had Bowling, or any other employee, used the type of language that Bowling directed to her on January 24 or ever used that type of language around her while she was working at the Hospital.

Ritchie testified that she then called Kipp at home and told her what had happened. Kipp told Ritchie that she would call Bowling and tell Bowling that she had to help Ritchie. Ritchie further identified a written statement that she gave Kipp on January 26. In that statement, Ritchie described Bowling's January 24 conduct and further stated that there were patients in the hallway at the time. Ritchie testified that the written statement was accurate.

The Respondent called Nease who testified consistently with Ritchie. Nease also testified that, during the confrontation of Ritchie by Bowling, one patient and one visitor were in a nearby vending machine area. Nease further testified that she noticed that the patient appeared upset by the incident. Nease further identified a written statement that she gave to Kipp on January 25, which statement was consistent with her testimony.

While Nease was on cross-examination the General Counsel confronted her with a statement that she had signed and dated on December 6, 2000. The statement, in full, is:

To whom it may concern:

I, Patricia Nease, on or about Sept. 7, 2000, overheard a conversation between Jan Pelfrey and Faye Kipp while standing outside her office at the building. Jan told Faye, "they all had to go," talking about the strikers. She told her Vickie had to go one way or the other because, if they could get rid of Vickie, the rest would quit. Faye said she wanted no part of this because they all were good workers. Jan said she would handle it by getting Michelle Noble [another housekeeping employee] to dog and ride her, trying to get Vickie to blow up, causing her to lose her job. She said she wanted all the strikers ridden and written up 3 times so they would be terminated. She wanted Vickie to be the first to go.

Nease affirmed that the factual representations in her December 6 statement were true, but she added (without being asked) that Pelfrey later told Kipp that she would step down as supervisor of the housekeeping department "because she said she knew she couldn't treat them fairly."

The Respondent called Pelfrey who testified that, as well as being the Respondent's purchasing agent, she supervised the

housekeeping department for 3 or 4 weeks before the July 8 strike until about 2 weeks after that strike terminated on August 20. (Pelfrey testified that she agreed to temporarily assume the additional responsibilities of the housekeeping department when the former supervisor transferred to another department.) The Respondent's counsel showed Pelfrey Nease's written statement and asked if she had ever said such things. Pelfrey answered that she had not. Pelfrey testified that she did tell Kipp that she did not want to be over the housekeeping department at that time, "because I just had a hard time, you know, being over them and trying to be fair to them and not, making sure that I did treat them all fair and stuff." When asked why she felt that way, Pelfrey replied: "Well, because during the strike I was arrested; my nephew was arrested; I had a lot of hard feelings there." Pelfrey further denied that she was ever asked for a recommendation about how to discipline Bowling for her January 24 conduct.

On cross-examination, Pelfrey acknowledged that Kipp continued to report to her for "a couple of months" after the July 8 strike ended. Pelfrey testified that Kipp told her about the January 24 incident between Bowling and Ritchie, but she only told Kipp to tell Bevins and Cooper about it. Pelfrey further testified that she also reported the matter to Cooper, her immediate superior, and to Bevins, but she did not make a recommendation to them about what to do about the matter.

Kipp testified that in early September she interviewed with Pelfrey for the position of supervisor of the housekeeping department; at the time, Pelfrey stated that she was looking for someone to take over the direct supervision of the housekeeping department "because of feelings that she [Pelfrey] had and she realized that the feelings were hindering her with doing a good job and that she was looking for somebody that she felt would be fair and that would treat everybody the same to take over."

Kipp further testified on direct examination that Ritchie called her at home during the night of January 24 and reported that Bowling had cursed her because Ritchie was not helping with room cleaning. Kipp testified that she told Ritchie to return to room cleaning as soon as the stripping and waxing job was done. Kipp further identified the written statements that Ritchie and Nease had given her about the incident. In describing the January 26 meeting in which Bowling was suspended, Kipp identified Pelfrey as "my supervisor at the time." Kipp testified that she did not discuss suspending Bowling with Bevins; she testified that she did report what she knew to Pelfrey and Mitchell, and she believed that they had recommended the suspension to Bevins. Kipp testified that she later recommended to Bevins that Bowling be discharged based on the written statements of Ritchie and Nease and the failure of Bowling to deny her conduct during the meetings with Pelfrey and Mitchell.

On cross-examination Kipp acknowledged that Bowling, as well as Ritchie, had called her on the night of January 24. Kipp testified that Bowling stated that she was overwhelmed with work because Ritchie was not helping with room cleaning. Kipp testified that she told Bowling that she would tell Ritchie to help with the room cleaning when she was through with the waxing job. Kipp further acknowledged that during the January

26 meeting Bowling argued that on January 24 she had been upset because she had been overworked. Further on cross-examination, Kipp admitted that, during her interview with Pelfrey for the position of department head, she stated that she would take the job only if “everybody would be treated the same.” Kipp denied, however, that Pelfrey had said, at any time, that she wanted to get rid of the strikers.³⁴ Kipp also acknowledged that the Respondent had a progressive disciplinary system that included a warning, a second warning, and suspension before discharge. She further acknowledged that the purpose of the system was to give employees a chance to correct their conduct, and she acknowledged that she had never warned Bowling about her improper language.

Bevins testified that he made the decision to suspend Bowling on Kipp’s recommendation and a review of the written statements of Ritchie and Nease. (Bevins testified that he did not receive a recommendation from Pelfrey to discharge Bowling, although he admitted that he was present when Pelfrey and Cooper were discussing what Kipp had reported to them.) Bevins testified that he decided to discharge Bowling, “for profane and abusive language to an employee in a public area” in accordance with the Respondent’s handbook section that is quoted above and in accordance with the policy of Community Health Systems. That manual (which was introduced in evidence by the General Counsel) is prefaced by the statement: “This manual contains policies and procedures relating to personnel management of employees of all hospital and medical facility employees of Community Health Systems, Inc., and its subsidiaries or affiliates.” The manual contains a 4-step progressive disciplinary system, and in a section entitled “Dischargeable Offenses,” the manual states: “The following is a partial listing of violations which may result in an employee’s immediate discharge.” This is not a complete listing, and other causes may result in discharge. Then follows a listing of 24 categories of offenses, the 11th of which is: “Threatening, intimidating, coercing, using abusive language, or otherwise interfering with the job performance of fellow employees or visitors.”

Conclusions on Bowling’s Discharge

On December 6, or well before the events of January 24, Nease gave a written statement to the General Counsel that on September 7, she overheard Pelfrey tell incoming Supervisor Kipp that she wanted all the strikers to “go,” that Bowling should be the first striker to “go” because, if she was discharged, the remainder of the strikers in the housekeeping department would quit, that Kipp demurred, and that Pelfrey then stated that she would, herself, employ the stratagem of having another employee “dog and ride” Bowling “to get Vickie to blow up, causing her to lose her job.” On direct examination, Nease did not exhibit the slightest reluctance to testify adversely to Bowling. On cross-examination, however, Nease repeatedly expressed forgetfulness about things that one would tend not to forget. Moreover, Nease’s eagerness to gratuitously add putatively exculpatory material to her statement’s quote of

³⁴ Counsel for the General Counsel elicited this denial, even though the Respondent had not asked for it while Kipp was on direct examination.

Pelfrey (by testifying that Pelfrey also said that was stepping down because she could not treat the strikers fairly) shows that Nease held allegiance to the Respondent (or antipathy toward Bowling or the Union), and her failure to repudiate her December 6 statement shows that that statement must be true. Also, there is no other explanation for Kipp’s testimony that, during her interview with Pelfrey, she told Pelfrey that she would insist that all employees be treated equally. I therefore find that Nease overheard Pelfrey tell Kipp that Bowling should be entrapped into precipitating her own discharge because she had joined the July 8 strike. And I further find, as Nease’s written statement also related, that Pelfrey told Kipp on September 7 that: “she wanted all the strikers ridden and written up 3 times so they would be terminated.”³⁵

Because of this credibility resolution, Bowling presents the very strongest prima facie case of all of the alleged discriminatees who were discharged for alleged job-related misconduct. No other alleged discriminatee was shown to be the object of a specific management intent to discharge an employee because of his or her protected activities. Moreover, I firmly believe that Pelfrey, as well as Kipp, recommended to Bevins that Bowling be discharged. But even if only Kipp made the recommendation, Kipp testified that she was the subordinate of Pelfrey on January 24; and, from at least September 7, Kipp clearly had her marching orders in regard to Bowling.

However, even given this strongest evidence of unlawful animus, the Respondent, under *Wright Line*, has presented a defense to the allegation that its discharge of Bowling was unlawful. Well before *Wright Line*, the Board stated in *Klate-Holt Co.*, 161 NLRB 1606, 1612 (1966):

The mere fact that an employer may desire to terminate an employee because he engages in unwelcome concerted activities does not, of itself, establish the unlawfulness of a subsequent discharge. If an employee provides an employer with a sufficient cause for his dismissal by engaging in conduct for which he would have been terminated in any event, and the employer discharges him for that reason, the circumstance that the employer welcomed the opportunity to discharge does not make it discriminatory and therefore unlawful.³⁶

Both the Respondent’s employee handbook and the policy manual of Community Health Systems prohibit, on pain of discharge, Bowling’s conduct of January 24. The Respondent’s handbook lists as a possible first-offense discharge: “Fighting or using obscene, abusive or threatening languages or gestures.” The policy manual of Community Health Systems (which the General Counsel placed in evidence and upon which the General Counsel relies heavily in the presentation of the cases of some of the other alleged discriminatees) lists as a violation “which may result in an employee’s immediate discharge”: “Threatening, intimidating, coercing, using abusive language, or otherwise interfering with the job performance of

³⁵ See *Alvin J. Bart & Co.*, 236 NLRB 242 (1978).

³⁶ An effective defense under *Klate Holt*, of course, is an effective defense under *Wright Line*. See, for example, *A&T Mfg. Co.*, 276 NLRB 808 (1985).

fellow employees or visitors.” Bowling admitted that, in a public area of the Hospital, she loudly told Ritchie that “we needed some help on the damn floor,” and “I couldn’t do all the fucking work myself,” and “Well, shit. There’s another damn page.” As well, I credit the testimonies of Ritchie and Nease that Bowling used the obscenity “fucking,” loudly, and more than once, as she addressed Ritchie in that public area. I further credit the testimony of Nease that at the time, well within hearing distance, a patient and another member of the public were present.³⁷ These rules are crystal clear, and the General Counsel does not deny that they apply directly to Bowling’s admitted (and proved) conduct.

Even though Bowling violated a clearly stated policy of the Respondent, because of the Respondent’s demonstrated animus, I would nevertheless find a violation in Bowling’s case if the General Counsel has shown significant evidence of disparate treatment of other employees.³⁸ On brief, however, the only evidence of disparate treatment that the General Counsel argues to have been established is the discredited testimony of Oakes. Also, Oakes testified to no event that involved the same degree of profanity as that employed by Bowling on January 24. Moreover, Oakes certainly did not testify that the profanity that he had used (or witnessed) involved a public display of confrontational, demeaning cursing of one employee by another. And confrontational, demeaning (or “abusive” as the Respondent’s rules read) cursing of one employee by another is the conduct in which Bowling engaged. (Bowling did not just engage in “cussing” as the General Counsel argues on brief.) Finally on the point of disparate treatment, Bowling testified that she once heard Pelfrey tell a guard: “the son-of-a-bitches are taking me back to court.” Although that testimony was not mentioned by the General Counsel on brief, I am constrained to point out that I do not find it to be evidence of disparate treatment. Although the event happened in a public area, it was not a confrontational berating of one employee by another; moreover, there is no evidence that patients or members of the public were present or that Pelfrey’s comment to the guard was brought to the attention of higher supervision.

Rather than showing disparate treatment of Bowling, the record shows consistent treatment of other employees similarly situated. Evidence adduced by the General Counsel (but not mentioned by the General Counsel on brief) shows that Oakes received a warning notice just for using “damn.” And employee Sarah Bowling received a warning notice for using an unspecified curse word in the company of only other employees. Employee Little, however, received a 3-day suspension for using the F-word, not in a public area, but in a conference room. Suspension is the penultimate penalty in Respondent’s progressive

disciplinary system; if that penalty was invoked for only cursing in general, in a private area of the Hospital, then the Respondent’s subjecting Bowling to the ultimate penalty for the cursing of another employee, in a demeaning fashion, and in a public area, seems entirely reasonable, especially in the absence of credible evidence of disparate treatment.³⁹

On September 7, Pelfrey told Kipp that Bowling could be provoked into “blow[ing] up” and thereby lose her job. Apparently Pelfrey knew that Bowling had a short fuse and a foul mouth. And Pelfrey clearly hoped that these combined character traits of Bowling would rid the Respondent of at least one striker and possibly more. In view of the widespread evidence of threats to discharge strikers that I have found above, it is further fair to find, as I do, that Pelfrey’s attitude was reflective of an antiunion policy that was held by the Respondent, not just Pelfrey’s personal opinion based on her arrest during the July 8 strike, or her nephew’s arrest, or anything else. Nevertheless, neither Bowling’s heavy workload on January 24 nor Ritchie’s perceived loafing was a provocation by the Respondent that would tend to excuse Bowling from loudly and abusively cursing Ritchie in a public area of the Hospital. But Bowling did exactly that, and she thereby presented the Respondent with a sufficient reason for her discharge. And, as in *Klate-Holt*, the fact that the Respondent welcomed the opportunity to discharge the employee who had previously engaged in unwelcome protected activities does not, of itself, render that discharge unlawful. I therefore find that the Respondent has demonstrated by a preponderance of the evidence that it would have discharged Bowling because of her January 24 conduct, even absent her protected activity of engaging in the July 8 strike. I shall recommend dismissal of this allegation of the complaint.

2. Denial of light-duty status to Brenda (Noble) Brewer

Brenda (Noble) Brewer⁴⁰ is a registered nurse who works in the Respondent’s emergency room. The General Counsel contends that on August 21 the Respondent refused to place Brewer on light-duty status because she “supported” the July 8 strike.⁴¹ As noted above, the General Counsel contends that other alleged discriminatees were discriminated against because they participated in the July 8 strike. The Respondent contends that Brewer did not support the July 8 strike, or participate in it, and the Respondent further contends that she was not eligible to be placed on light-duty status because her request for light duty was based on an injury that she incurred while she was working for another employer. Ultimately, I find that the allegation for Brewer must be dismissed because of the General Counsel’s failure to present a prima facie case on her behalf.

³⁷ The Charging Party’s statement on brief that Bowling testified that there were “no patients present” is false; as quoted above, Bowling testified only that she did not see “anyone else around” at the time.

³⁸ Compare: *Avondale Industries*, 329 NLRB 1064, 1066 (1999), where the Board rejected defenses that were based on published employee rules and evidence that other discharges were consistent with those rules. In so doing, the Board stated: “The insurmountable problem for the Respondent’s defense in this case, however, is that the General Counsel has presented significant countervailing evidence of disparate treatment.”

³⁹ In *A&T Mfg. Co.*, supra, the Board dismissed the 8(a)(3) allegation regarding the discharge of employee Jimmy Popp. There was even stronger evidence of a specific, unlawful intent to discharge Popp; nevertheless, Popp had committed an immediately dischargeable offense under the employer’s written rules, and there was no evidence of disparate treatment.

⁴⁰ By time of trial, alleged discriminatee Brenda Noble’s surname had changed to Brewer.

⁴¹ Br. 71.

Brewer testified that for the 4 years prior to time of trial, she worked 7 a.m. to 7 p.m. on Saturdays and Sundays. On direct examination, Brewer was asked, and she testified:

Q. Did you actually participate in [the July 8] strike by picketing?

A. No.

Q. Did you support that strike?

A. Yes.

Q. Did you ever indicate [to] anyone in supervision or management your support of that strike?

A. At one point I wore a button on my lab coat that said "Support Steelworkers."

Q. When did you wear that button?

A. I don't recall the exact days.

Q. Over what period of time?

A. A couple of months. . . . It was probably before the strike started, and—I can't remember if [I] wore it after the strike or not.

Brewer further testified that a local radio advertisement that was broadcast during the strike named emergency room nurses who supported the strike; the advertisement did not name Brewer, but the advertisement did state that there was another nurse "who's unable to stand on the picket line due to another job." Brewer, who worked full time elsewhere, testified that the advertisement referred to her.

Brewer testified that she worked weekdays at a local pharmacy. On June 27, she injured her neck while working there. Brewer worked for the Respondent Saturday, July 3, and part of July 4, but she had to leave work early that day because of the pain. On July 7, the day before the strike commenced, Brewer came to the Respondent's facility and met with Pat Hoover, her supervisor. Hoover was the coordinator (supervisor) for the emergency room and intensive care unit.⁴² Brewer presented Hoover with a note from Brewer's personal physician stating that Brewer would be unable to return to work for at least 2 weeks because of her injury. Brewer acknowledged at trial, however, that her doctor told her at the end of that 2 weeks that she should not work for "at least another month."

As noted in the discussions of the cases of some of the other alleged discriminatees, after the Union's August 15 offer to return to work, Bevins sent to strikers notices of the dates (and shifts) that they were to report for work. If Brewer received such a notice, the General Counsel did not offer a copy of it into evidence. Nevertheless, on August 18 Brewer reappeared at the Hospital with a doctor's note that said that she could return to work with a 20-pound lifting restriction. When she presented the note to Hoover, Hoover said that there was no problem because other nurses could help her if she needed to lift things that she could not lift by herself. On August 25, Brewer returned to the Hospital to view a training video. Afterwards, Brewer met with Director of Nursing Obenchain who

told Brewer that, because she had not been injured at the Respondent's facility, she could not be placed on light duty because of "corporate policy." Brewer asked from whom Obenchain had heard of such a corporate policy; Obenchain replied that it was one Bruce Jones who worked at the headquarters of Community Health Systems, the Respondent's parent corporation. Obenchain further gave Jones' telephone number to Brewer. Brewer told Obenchain that she knew that employees Anita Gabbard and Geneva Hutchinson had been injured while working elsewhere but returned to light duty with the Respondent and that one of them had precisely the same lifting restriction that Brewer had. Brewer further testified that Obenchain replied that, nevertheless, it was "her" (Obenchain's) policy that an employee could not be placed on light duty if he or she had been injured while working for another employer.

Brewer testified that she did call Jones. Jones told her that there was no corporate policy that prevents an employee from being placed on light-duty status just because the employee had been injured while working for another employer. Brewer acknowledged, however, that Jones also told her that "there may be a Hospital policy that does." Brewer reported to Obenchain the results of her call to Jones; Obenchain replied, according to Brewer, "that her policy was I would not return to work with restrictions." Brewer remained on medical leave until September 9 when she secured a doctor's release to return to work without lifting restrictions.⁴³

Alleged discriminatee Laotta Sizemore testified that, after she had a stroke in 1997, she was left with limited use of her left arm and leg. She, nevertheless, was placed on light duty in the emergency room. Emergency room registered nurse Geneva Hutchinson testified that in 1998 she injured her wrist while working for another employer. Hutchinson called then-Supervisor Allen Slosts and reported that she could not even open an intravenous bag because of her injury. In a second telephone call, Slosts told Hutchinson that he had conferred with Obenchain and Obenchain had said that there was no reason that Hutchinson could not be assigned light duty in the emergency room. Hutchinson was thereafter allowed to work 3 weeks on light-duty status.

In the Respondent's case, Obenchain testified that she did not place Brewer on light-duty status because Jones told her that she was not obligated to do so because Brewer had been injured while working elsewhere. On cross-examination, Obenchain admitted that alleged discriminatee Mellisa Turner was allowed light-duty status in X-ray when she had the nonwork-related condition of cystitis. Obenchain further acknowledged that the extensive personnel manual of Community Health Systems nowhere states that employees who are injured elsewhere are to be denied light-duty status. On redirect examination, the Respondent did not ask Obenchain why Turner, Hutchinson and Sizemore were permitted to work on light-duty status and Brewer was not.

⁴² The complaint does not name Hoover as a supervisor within Sec. 2(11); however, as a coordinator of two departments, Hoover clearly had supervisory authorities within the statute, and the Respondent did not object to receipt of evidence about Hoover's conduct on the ground that her status was not alleged. Hoover did not testify.

⁴³ Therefore, Brewer was denied work for a total of 2 weekends, those of August 26–27 and September 2–3, by the Respondent's refusal to place her on light duty.

Conclusions on the Denial of Light-Duty Status to Brewer

The evidence of disparate treatment, which I find credible, raises at least a suspicion that the Respondent discriminated against Brewer by denying her the benefit of light-duty status. Under *Wright Line*, however, the first question is whether the General Counsel has presented a prima facie case of unlawful discrimination against Brewer. Brewer testified that she wore prounion insignia before the July 8 strike began, but she was entirely vague as to when or how often she did so; moreover, that vague testimony was uncorroborated. More importantly, the only evidence of animus that the General Counsel has presented is the Respondent's animus against strikers. Brewer acknowledged that she did not participate in the strike "by picketing." I take this to mean that Brewer never appeared at the picket line, not that she appeared on the line but that she simply did not carry a picket sign. And, at minimum, if Brewer had ever appeared on the picket line, the General Counsel assuredly would have brought out the fact. There is also no evidence that any of the Respondent's supervisors heard the radio broadcast that supposedly referred to Brewer as a striker. Even if all the Respondent's supervisors heard the broadcast, and even if they all believed that it referred to Brewer, none would have had reason to believe that Brewer actually was not participating in the picketing because she worked at another job, rather than because she had been injured as she had told them, in writing, on July 7. Nor did the Respondent treat Brewer as a striker; the employees who were known to have been on strike received messages of when to report to work after the Union's August 15 offer to return to work. According to this record, the Respondent sent no such message to Brewer.

Just before the July 8 strike began, Brewer presented the Respondent with a note from her physician that she could not work for at least a period of 2 weeks, and that 2-week period of disability turned out to be at least a month more, as Brewer acknowledged. I am therefore entirely suspicious that Brewer would have been unable to work during the strike, even on light duty. My suspicions are heightened by the failure of the General Counsel to ask Brewer if she did "actually participate" (counsel's words, as quoted above) in the concerted withholding of labor during the July 8 strike. At any rate, at no point after July 8 did Brewer (or the Union on her behalf) notify the Respondent that she was able to work (with or without restrictions) but that she was not going to do so because she had joined the strike. It was not until August 18, 3 days after the strike was over, that Brewer notified the Respondent that she could return to work. For all that the Respondent then knew, any prior absences of Brewer had been caused by her prestrike injury.

In summary, the General Counsel contends that the Respondent discriminated against Brewer because she wore prounion insignia and thereby "supported" the July 8 strike. I have discredited Brewer's testimony that she wore prounion insignia; moreover, wearing prounion insignia at some point does not, of itself, prove support of any subsequent strike. Also, the General Counsel has proved the Respondent's animus only against the employees' protected activities of joining a strike; abstract "support," even if Brewer somehow gave it, was not shown to

be the object of the Respondent's animus.⁴⁴ The General Counsel has failed to show, however, that Brewer participated in that strike. Finally, if Brewer could somehow be said to have supported or participated in the strike, there is no evidence that the Respondent knew it. Therefore, the General Counsel has not presented a prima facie case that the Respondent unlawfully discriminated against Brewer by denying her light-duty status. I shall recommend that this allegation of the complaint be dismissed.

3. Discharge of Beverly Clemons

Beverly Clemons, a nurse's aide, was hired by the Respondent in 1995 and discharged on August 31. The General Counsel contends that the Respondent discharged Clemons because of her participation in the July 8 strike. The Respondent contends that it discharged Clemons solely because of she was extremely insubordinate to Obenchain and that she was guilty of other conduct that constituted "violating patient confidentiality."⁴⁵ Ultimately, I find and conclude that the Respondent did not reasonably believe that Clemons had violated patient confidentiality, but Clemons was insubordinate toward Obenchain and the Respondent lawfully discharged her for that reason.

As found above, the Respondent repeatedly threatened to discharge employees such as Clemons who participated in the July 8 strike; therefore, a prima facie case for Clemons' discharge has been proved, and, under *Wright Line*, the Respondent's defense for that discharge must be addressed.

On July 7, Clemons told Supervisor Allena Hale that she would not be crossing the picket line during the strike that was scheduled to begin the next day. Toward the end of Clemons' shift, Obenchain called Clemons to her office. Present when Clemons got there were Human Resources Department Manager Mitchell and a secretary. According to Clemons' undisputed testimony, Obenchain told her that patient complaints had been lodged against her. Clemons asked that another employee be allowed to be a witness to any further discussion of the matter, but Obenchain refused. Clemons then walked out of the meeting.⁴⁶

Clemons participated in the strike and returned to work on August 20. When she returned, she carried a small tape recorder in a pocket of her uniform. Clemons further testified that, early in the shift on August 20, she took the tape recorder from her pocket and laid it momentarily on the nurses' station desk because: "I had heard people saying that you weren't supposed to hide the tape recorder; if I had it, I was supposed to let them know that I had it."

⁴⁴ For this reason, I also find irrelevant the General Counsel's evidence that Brewer served as an observer for another union in a prior Board election. (And it is to be further noted that the Union has participated in two subsequent Board elections for the Respondent's employees; if Brewer had been a union observer in either, the General Counsel assuredly would have brought out the fact.)

⁴⁵ Br. 91.

⁴⁶ The complaint contains no allegations of deprivations of employees' Sec. 7 right to have a witness present during an interview that might reasonably lead to discipline, as described in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), and its progeny.

On August 24, Clemons' next workday, Clemons again brought the tape recorder to work. During the morning she was paged to Obenchain's office where Mitchell was again present. Obenchain asked Clemons if she had her tape recorder with her; Clemons replied that she did; Clemons took the recorder from her pocket, turned it on, and stated that "I brought it in for you." Further according to Clemons:

And she [Obenchain] kept insisting that I was using [the recorder] in the patients' rooms, and I told her no, I would not do that, and she kept insisting and kept insisting, and I said that I would not do that because that's patient confidentiality and I knew not to do that.

Clemons returned to work, but shortly thereafter she was again paged to Obenchain's office. Obenchain told Clemons to leave the recorder in her office and that she would be suspended if she did not. Clemons took the tape from the recorder, gave the recorder to Obenchain, and then she left Obenchain's office. Shortly after that, Clemons was again paged to Obenchain's office. Clemons brought employee Grace McGuinn as a witness, but Obenchain refused to allow McGuinn to stay. Further according to Clemons on direct examination, after McGuinn left the office Obenchain asked Clemons if she intended to bring the recorder back to the premises; Clemons replied that she would when she felt that she needed to do so; Obenchain responded that Clemons was indefinitely suspended and should leave the premises.

Clemons testified that it was still not her quitting time, that she was upset, and that she did not want the nurses seeing her in an upset condition; she therefore went to the kitchen where she knew that there was a readily available telephone. There she called her husband to come and pick her up. (Clemons does not drive.) Further according to Clemons, Obenchain followed her to the kitchen and then back out to the nursing floor where Clemons clocked out. Obenchain again told Clemons to leave the premises; Clemons refused to do so until her husband arrived to pick her up. By letter dated August 31, Obenchain informed Clemons that she was discharged; no reason was given.

On cross-examination Clemons admitted that she knew that it would be improper to operate the recorder at any point where patients might be, such as hallways. Clemons testified that she brought the recorder to the facility: "Because I felt they were harassing me and I thought it was because of the strike." Clemons was asked, and she testified:

Q. Let me ask you this, Mrs. Clemons; were you at any time told by [Obenchain] that you could not use a tape recorder?

A. She didn't really say I couldn't use it. She just said that . . . their lawyer said that it was against the law to have it. She never did say that I couldn't use it. She just said that the lawyer said it was against the law to have it.

Clemons admitted that, had she not then been suspended, she would have brought the recorder back to the facility on her next workday "for security sake."

On direct examination, Obenchain testified that, after Clemons returned to work from strike, Supervisor McGlothen

(who did not testify) told her that another employee had told McGlothen "that Ms. Clemons had a voice-activated tape recorder in her pocket and had taken and showed it to another employee in a patient's room." Obenchain testified that she then called Clemons to her office where Clemons admitted that she had shown the recorder to another employee in a patient's room. Obenchain told Clemons that "that was a breach of patient confidentiality." Obenchain thereafter conferred with Bevins and counsel who advised Obenchain to ascertain if Clemons intended to bring the recorder back. When Clemons did confirm that she did intend to bring the recorder back:

I informed her at that point that I would have to put her on investigative suspension.

At which point she picked up the tape recorder, shoved it up to my mouth and said, "Would you repeat that into this tape recorder?"

And I said, "No, ma'am, I will not."

. . . .

I told her she was on investigative suspension and she was to leave the building. She left my office.

Obenchain further testified that, when Clemons left her office:

I followed her to the dietary department, and I said, "Beverly, I have requested that you leave the building at this time. You're to clock out and go home."

She came back up to the med-surg unit. She clocked herself out, she walked over to the counter and started writing notes in the notebook.

I again informed her that she was to leave the building at that time.

I notified security that it was my understanding her husband was on his way to pick her up, that her husband, per Mr. Bevins, was not to be allowed into the Hospital. And I again told her that she was to leave the building. . . . Finally, she did leave the building after the third request.

When Obenchain was asked what she reported and recommended to Bevins, she testified:

I told him she had been insubordinate. I told him that she had refused to leave the tape recorder home, that she had been insubordinate to me both in shoving the recorder up to my face to quote into the tape recorder. She had been insubordinate three times in not leaving the building when she was requested to leave.

On cross-examination, Obenchain agreed that Clemons told her that she had brought, and would bring, the tape recorder "to record the managers." Obenchain also agreed that Clemons told her that she had no intention of recording anything about patients, and she told Obenchain that she had not used the recorder in a patient care area. Obenchain admitted that she was not aware of any breach of patient confidentiality that Clemons committed with the tape recorder, but she then ventured that Clemons' possession of the recorder, "had the potential for it."

Bevins testified that, upon receiving Obenchain's recommendation, he decided to discharge Clemons "for insubordination, for bringing a tape recorder to work, and [for] recording conversations of employees which took time away from her

job, and when the recorder was taken from her and given back to her and she was [asked], would she bring it back the next day, she said yes, after being ordered not [to do so]. Then she stuck the recorder in [Obenchain's] face and asked her did she want her to record her." Bevins did not testify that Clemons' failure to leave the Hospital immediately when told to do so by Obenchain had anything to do with her discharge.

Clemons, during her cross-examination, was asked and she testified:

Q. Is it your testimony that you did not take the tape recorder back and attempt to tape record Michelle Obenchain, [and] say to her anything to the effect 'will you say that again to me'?

....

A. Yes, I know I did not do that.

Conclusions on Clemons' Discharge

Clemons admitted that during her August 24 interview with Obenchain, Obenchain told her that the Respondent's lawyer had said that it was "against the law" for Clemons to possess the recorder in the Hospital. Nevertheless, Clemons told Obenchain that she intended to bring the recorder back to the Hospital if she felt that she needed to. Further, Clemons admitted that she, in fact, would have brought the recorder back the next day if she had not been suspended. Obenchain testified that she recommended to Bevins that Clemons be discharged, in part, for this conduct, and Bevins testified that he acted on that recommendation.

The General Counsel does not contend that Clemons had a statutory right to disobey an order not to bring the recorder back to the Hospital.⁴⁷ Instead, the General Counsel only argues in a footnote that, although Clemons admitted that Obenchain told her that it was illegal to have the recorder in the Hospital:

This . . . is not the same as telling Clemons that the Hospital was prohibiting her from bringing it. If Clemons had been advised that it was not ["against the law" for her to have it, then there would be no operative rule prohibiting it. [Br. 61.]

The General Counsel's logic escapes me. Certainly, as any reasonable employee would know, if an employer tells an employee that his or her conduct is illegal, a fortiori the employer is presumably telling the employee to stop engaging in that conduct. Clemons is presumably a reasonable employee, and her express refusal to agree to leave her recorder at home can only be considered insubordination.

Moreover, Obenchain also testified that, after she told Clemons that she was suspended for not agreeing to leave the recorder at home, Clemons "shoved it up to my mouth and said, 'Would you repeat that into this tape recorder?'" Although on cross-examination Clemons denied asking Obenchain to repeat her remarks into the recorder, the General Counsel did not call Clemons on rebuttal to deny that she held the recorder close to Obenchain's face during their last office meeting. I credit

Obenchain on both accounts; I find that, as Obenchain testified, Clemons placed the recorder close to Obenchain's mouth and asked her to repeat her words. That conduct was a separate, and an egregious, act of insubordination.

The cross-examination of Obenchain showed that she did not have reason to believe that Clemons had used her recorder to violate patient confidentiality. And Obenchain's testimony that Clemons was insubordinate by refusing to leave the Hospital immediately when told to do so on August 24 was proven to be irrelevant because Bevins, who made the discharge decision, did not cite Clemons' slow departure as a reason for the discharge. Nevertheless, Obenchain and Bevins testified that Clemons was discharged for her insubordination as well as her other alleged conduct, and the General Counsel has not shown that other employees were permitted to engage in insubordination comparable to Clemons' without being discharged.⁴⁸ I therefore find that the Respondent has demonstrated by a preponderance of the evidence that it would have discharged Clemons for her insubordination, even absent her protected activities of participating in the July 8 strike. I shall therefore recommend dismissal of this allegation of the complaint.

4. Warning to, and discharge of, Sally Dunn

Sally Dunn was employed by the Respondent as a phlebotomist under Laboratory Supervisor Dianne Blankenship.⁴⁹ The principal responsibility of a phlebotomist is to draw blood from patients and return it to the laboratory where it is tested by technicians. The complaints allege that about August 22, 2000, the Respondent issued an oral warning to Dunn and that on or about June 4, 2001, it discharged Dunn, in both cases because of her participation in the July 8 strike. The Respondent contends that the warning was issued solely because of Dunn's misconduct of smoking while working and that her discharge was imposed because Dunn had engaged in a theft of time. Ultimately, I find and conclude that, under *Wright Line*, the Respondent has proved by a preponderance of the evidence that Dunn engaged in the conduct that it attributes to her and that the Respondent did not violate the Act by either warning Dunn or by discharging her.

Dunn was active for the Union before the strike in that she wore union buttons, distributed union literature at the Hospital, spoke out for the Union at work, and appeared in local radio and television promotions by the Union. Dunn was also one of only two employees who presented the 8(g) notice to the Respondent before the July 8 strike, and Dunn regularly picketed during the strike. Also, during the 11 trial sessions that I conducted in this matter before her discharge, Dunn was the General Counsel's assisting witness under Fed.R.Evid. 615.

As found above, the Respondent repeatedly threatened to discharge employees such as Dunn who participated in the July 8 strike; therefore, a prima facie case for Dunn's warnings and discharge has been proved, and, under *Wright Line*, the Respondent's defenses must be addressed.

⁴⁷ The General Counsel also does not contend that the order against bringing a tape recorder to the Hospital was the announcement and implementation of a new work rule that the Respondent established in violation of Sec. 8(a)(5).

⁴⁸ See *Klate-Holt Co.*, supra.

⁴⁹ As I have found above, Blankenship threatened the laboratory employees that strikers would lose their jobs if the July 8 strike was not ruled an unfair labor practice strike.

Warning to Dunn

Dunn testified that, early in the morning of August 22, her second day back from strike, she took a fasting blood sample from a patient. After the blood was drawn, she went to search for the patient's nurse to tell her that the blood had been drawn and that the patient could have coffee, as he was then requesting. As she did so, she went to an outdoor area, taking her assigned tray of needles and supplies with her. While she was doing that, she lit a cigarette and smoked it "for a minute and a half." Later in the morning, further according to Dunn, she took a permitted 15-minute break from 10:35 to 10:50 a.m. When she returned from break, she went to the nursing floor and drew blood from another patient. When she returned from doing that, Blankenship called her into the laboratory office. Denise Asher, a laboratory technician who testified for the Respondent, was also present. According to Dunn:

Diane said, "They said you took a 30 minute break."

.....

I asked who 'they' was, [and] I said, "No, Diane, I didn't." I said, "I took a 15 minute break, I left at 10:35, got back at 10:50. I've been on the floor getting a stick and doing an AccuCheck." I said, "You can pull the tickets," which is a computer printout and you sign the time that you do it, also your initials is put on that.

And she said, "It doesn't matter [who had made the report to Blankenship], they said you did; so consider this a verbal warning."

Diane went on to say, "Did you take a tray out[side] this morning with a cigarette?"

.....

[I told Blankenship that] I went outside to find the nurse and tell her that the blood test had been drawn, that the patient was requesting coffee.

.....

She looked at me when I told her that, and she said, "But did you smoke out there?"

I said, "Yes, I did, Diane. I lit a cigarette. I maybe smoked for a minute and a half. Yes, I smoked outside and found the nurse, but no, I did not, Diane, take a 30 minute break. Why would I tell you I smoked and lie about a break when you could go in and pull the lab slips?"

.....

She again repeated to consider that a verbal warning.

Alleged discriminatee Debbie Miller testified that, a few months before the strike began, a rule was passed prohibiting smoking on a porch outside the laboratory. When Miller asked Blankenship where she could then smoke (without walking as far as her parked automobile), Blankenship replied: "Well, just do like Sally [Dunn] does, when you go get a stick take the long way around and you can smoke as you go."

Blankenship testified that she accepted Dunn's denial of taking a too long break, but when Dunn admitted smoking when she was not on break, "I told her then that I would have to give her a verbal warning for that." Blankenship testified that she has never told any employee (presumably including Miller) that smoking when also in possession of a tray is permissible.

Asher testified that Blankenship called Dunn and her to Blankenship's office where Blankenship told Dunn that she had received reports that Dunn had smoked while she was in possession of her phlebotomist's tray and that she had taken a 30-minute break. Dunn admitted that she had smoked a cigarette when a nurse stopped her outside the building, but she denied taking a break of more than 15 minutes. Blankenship told Dunn that there was "[n]ot really any proof" of Dunn's taking an excessively long break but that she was giving Dunn an oral warning for "smoking in the nonsmoking area" which Dunn had admitted to Blankenship.

Conclusions on the Warning to Dunn

Asher and Blankenship were credible in their testimonies that Blankenship warned Dunn only about her smoking while in possession of a phlebotomist's tray. The General Counsel has not shown that other employees were permitted to smoke while in possession of phlebotomists' trays. Neither Dunn nor any other employee credibly testified that Blankenship came to know that such conduct had been engaged in without discipline by Blankenship. Miller's testimony that Blankenship told her to follow Dunn's example and smoke while returning to the laboratory with a tray simply was not credible. Not even Dunn testified that she had engaged in such conduct before, and Miller's testimony therefore has no logical predicate. I shall therefore recommend dismissal of the allegation that the Respondent orally warned Dunn in violation of Section 8(a)(3).

Discharge of Dunn

The identification badges that the Respondent's employees wear are also used to electronically record the hour and minute that they arrive and depart work. Employees who fail to bring their badges to work sign "time audit sheets" attesting to their arrival and departure times in order to get paid for their hours. In April 2001, Dunn's scheduled hours were from 3 a.m. until 1 p.m. Dunn testified that on April 28 she arrived at work at 3 a.m., but, she also testified, she had left her badge at home. At 1 p.m., Dunn completed a time audit sheet in order to claim her work hours for that date. The Respondent contends that its supervisors believed that Dunn arrived at work later than 3 a.m. on April 28 and that Dunn falsified the time audit sheet that she completed. The Respondent contends that it discharged Dunn solely for that reason.

On April 14, Dunn clocked in at 7:28 a.m., or 4 hours and 28 minutes late. On April 27, Blankenship approached Dunn and asked why she had been so late on April 14. After Dunn gave her (personal) reason, Blankenship told Dunn that she was talking to all laboratory employees who had recently been late. (Blankenship did not, however, issue a reprimand to Dunn at that time.)

On April 28, Bill Moore was the phlebotomist who was scheduled to work until 3 a.m., at which point he was to be relieved by Dunn. Chuck Arnold is a phlebotomist who was scheduled to work with Dunn from 5:30 a.m. until 1 p.m. on April 28. A. J. Arrowood is a laboratory technician (and not a phlebotomist). On the night of April 27-28, Arrowood was scheduled to work from some point before midnight until 6:30 a.m. Dunn testified that when she arrived at the laboratory on April 28, Moore was not there. She was met by Arrowood who

told her that she would be working her shift by herself because Arnold had called in sick. Dunn went to the door to Blankenship's office where she saw a "Laboratory Call-In" sheet that had been signed by Moore. The sheet recited that Moore had called 4 other employees and Blankenship in an attempt to find a substitute for Arnold. Three of the employees had said, "no," one claimed illness, and beside Blankenship's name, Moore had written "No Answer."

Dunn further testified that the laboratory was very busy that morning, with one "code-blue," or life-threatening situation, in the emergency room. Also, part of the problem with working as the only phlebotomist that morning was that blood had to be drawn from two patients at 5:30 a.m., and from two other patients at 6 a.m. Dunn testified that, although it was not his job, Arrowood agreed to help her by doing one of the 5:30 a.m. "sticks" and one of the 6 a.m. sticks. Arrowood's shift was over at 6:30 a.m. Dunn testified that she completed the 10-hour shift without help from anyone else. Dunn completed a time audit sheet that represented that she had worked from 3 a.m. until 1 p.m. on April 28, and she left it on Blankenship's desk for processing.

On Sunday, April 29, Dunn worked without incident. Dunn testified that on April 30, Blankenship came to the laboratory about 8 a.m., and the call-in sheet was still on her door. Dunn did not speak to Blankenship at the time. At 9 a.m., Dunn went to Cooper's office. Dunn told Cooper that the laboratory had been short-staffed on April 28 and that things could have been perilous for patients, especially if there had been two code-blues instead of only one. Cooper asked Dunn if Blankenship knew of the situation. Dunn replied that she should because of the indications on the call-in sheet that had been placed on her office's door. Cooper thanked Dunn for the information.

At 3 a.m. on May 7, Dunn's next scheduled workday, Blankenship met her at the timeclock. Blankenship told Dunn not to clock in and handed her two letters, both from Bevins. The first letter stated that Dunn was indefinitely suspended "pending an investigation into your recent accounting of time." The second stated: "This is to inform you that we desire to schedule an investigatory interview with you for the purpose of inquiring into your explanation of recent tardiness and accounting of time." The second letter also directed Dunn to contact Mitchell to schedule an appointment.

On June 1 (after cancellation of three prior meetings by the Respondent for reasons that the General Counsel does not question) Dunn met with Mitchell and Blankenship. The meeting consisted of only two questions by Mitchell and two answers by Dunn. Mitchell asked Dunn if she had completed the time audit sheet for April 28 that she had submitted and if the sheet was accurate. Dunn replied affirmatively to both questions. Mitchell thanked Dunn and told her that the meeting was over. By letter dated June 4, Bevins informed Dunn that she was discharged, "based upon the investigation undertaken in connection with your suspension on May 6, 2001." Dunn testified that no one in the Respondent's management con-fronted her with any evidence that she appeared at work on April 28 later than 3 a.m. Except for that which pertains to her time of arrival on April 28, none of this testimony by Dunn was disputed by the Respondent's witnesses.

On cross-examination, Dunn testified that she may have arrived at work a few minutes before 3 a.m. on April 28, but she insisted that she was there at 3 a.m. Dunn agreed that April 28 was the first time that she had ever submitted a time audit sheet. As will be discussed below, the Respondent contends that Dunn could not have been at work by 3 a.m. because, inter alia, on April 28 Moore saw Dunn driving toward the Hospital well after 3 a.m. when he was driving home. Further on cross-examination, Dunn denied that she saw Moore on April 28 after she left work.

The Respondent called Blankenship, Toby Arnold (not Chuck Arnold) and Bevins in defense of the allegations based on Dunn's discharge.

Blankenship testified that when she spoke to Dunn on April 27 about her 4-hour tardiness during the week before, she also mentioned to Dunn that she had been tardy several times in the recent past. Blankenship testified that she emphasized the importance of being at work on time, but she agreed that she did not issue any discipline to Dunn on April 27.

Blankenship further testified that Cooper called her to his office on April 30 and told her what Dunn had told him earlier in the morning. Blankenship told Cooper that she would review the computer printouts to see if the workload on April 28 really had been dangerously high. Three things that the printouts showed were: (1) the workload on April 28 had actually been quite low; (2) Dunn showed no computer transactions until 3:28 a.m.; and (3) two blood-drawings that were scheduled for 3 a.m. were performed by Arrowood.⁵⁰ Blankenship testified (without contradiction by way of rebuttal) that blood-collections that are scheduled for 3 a.m. are the responsibility of the phlebotomist who begins his or her shift at 3 a.m., not the laboratory technician.⁵¹ Blankenship further testified that these three factors, combined with her having mentioned tardiness to Dunn on April 27, and combined with the fact that Dunn had never before April 28 submitted a time audit sheet, caused her to become suspicious. She therefore secured the timeclock records for April 28. The records, as introduced in evidence, show that Moore clocked out at 3:03 a.m.

Blankenship testified that, because Moore had remained at the Hospital until after 3 a.m., she felt that checking with him would be a good way to determine if Dunn had actually been there by 3 a.m. Rather than contacting Moore directly, however, Blankenship (for reasons that went unexplained) asked (antiunion) employee Toby Arnold⁵² to find out from Moore if Moore had seen Dunn that morning. Arnold reported back that Moore told him that he saw Dunn the morning of April 28, but not at the Hospital; Arnold reported to Blankenship that Moore had reported to him that, after Moore left the Hospital, his truck broke down on the public road and that Dunn, then on her way to the Hospital, had stopped to offer him help. Blankenship then went to Bevins, the Respondent's chief executive officer, and recommended that Dunn be placed in investigatory suspension. Blankenship's account of her meeting with Dunn on May

⁵⁰ The Respondent produced these records at trial.

⁵¹ The Tr. 2821, L. 14, is corrected to change "done" to "Dunn."

⁵² It was Toby Arnold who produced the "EX-KRMC EMPLOYEES" antiunion sign discussed above.

7, and her account of her meeting with Dunn and Mitchell on June 1, do not materially differ from Dunns.⁵³

On June 2,⁵⁴ further according to Blankenship, she met with Bevins, Toby Arnold, and Moore. At that meeting, Moore stated that he saw Dunn on the public road after he left work on April 28. Moore further stated that he had told Arnold that Dunn had stopped to offer him help, but he stated that he, at that point, did not recall Dunn offering to help him. Bevins then caused a memorandum of the June 2 meeting to be created. The memorandum concludes:

He [Moore] said that his truck had stopped several times that morning after he left work. He said he did see Sally [Dunn] at the time heading toward the Hospital. He said he could not recall the exact location at which he saw Sally Dunn but that it was between the Hospital entrance and McDonald's. He said he could not remember whether she offered to help but he did remember seeing her at the time. He said that this was some time shortly after 3:05 a.m. and he had checked out from work a few minutes after 3:00 a.m. himself.

Moore signed and dated the memorandum in Blankenship's presence. Although neither party called Moore to testify, the Respondent called Arnold who testified consistently with Blankenship about what Arnold had said at the June 2 meeting. Bevins testified that, after the June 2 meeting, he decided to discharge Dunn: "For falsification of a time card, edit sheet which is related to the time card, accounting of time."

Conclusions on Dunn's Discharge

Contrary to her testimony, Dunn was not at work on April 28 by 3 a.m. Two simple facts compel this finding, neither of which the General Counsel mentions on brief: (1) Dunn testified that Moore was not present when she arrived at work; and (2) Moore's time record shows that he did not clock out until 3:03 a.m. If Dunn had really been present at 3 a.m., the General Counsel would have called her in rebuttal to testify how it could have been that she did not see Moore before he left the laboratory.

As well as ignoring Dunn's testimony as it compares to Moore's time record, the General Counsel also ignores the fact that, before it discharged Dunn, the Respondent had in hand a signed statement by Moore that he had seen Dunn outside the Hospital (between the entrance and McDonald's) at some time after 3:05 a.m. Rather than deal with these facts, the General Counsel only faults the Respondent for bringing the antiunion Toby Arnold into the matter, and the General Counsel only argues that there is an inconsistency between Moore's admission to Blankenship and Bevin that he had told Arnold that Dunn offered to help him and Moore's inability to recall that offer. Apparently, Blankenship thought she could trust Arnold. And, of course, one can remember representing a fact to another and then later question if that representation had been correct. ("Yes, I know I told you that, but now I'm beginning to wonder, myself.") At any rate, the Respondent's case that relies on the hard evidence of Moore's timecard and Dunn's testimony that Moore was not at the Hospital when she arrived on

April 28 preponderates over any argument that the General Counsel can base on Moore's self-questioning recollection of such a tangential (to Moore) matter.

In summary, Moore represented to the Respondent in a signed statement that he clearly remembered that on April 28 he saw Dunn after 3 a.m. on the public road. And Moore's statement was corroborated by: (1) Moore's timecard; (2) the computer printout that showed that Dunn had made no entry until 3:28;⁵⁵ (3) the fact that a technician had made a 3 a.m. blood-collection that Dunn should have made; and (4) the fact that Dunn's claim of a heavy workload was unsupported by the computer records. The Respondent's proof of Moore's statement and its corroboration is sufficient proof that, before it discharged her, the Respondent possessed a reasonable (and, I am confident, accurate) belief that Dunn had not come to work by 3 a.m. and that she had committed a theft of time by submitting a false time audit sheet.⁵⁶ I therefore find and conclude that the Respondent has shown by a preponderance of the evidence that it would have discharged Dunn even absent her protected activities.⁵⁷ Accordingly, I shall recommend dismissal of this allegation of the complaint.⁵⁸

5. Discharge of Clara Gabbard

Clara Gabbard, a ward clerk, was hired by the Respondent in 1990 and discharged on August 31. The General Counsel contends that the Respondent discharged Gabbard because of her participation in the July 8 strike. The Respondent contends that it discharged Gabbard because she failed to appear for a scheduled work shift. Ultimately, I find and conclude that the Respondent treated Gabbard disparately and that she was unlawfully discharged.

As found above, the Respondent repeatedly threatened to discharge employees such as Gabbard who participated in the July 8 strike; therefore, a prima facie case for Gabbard's discharge has been proved, and, under *Wright Line*, the Respondent's defense for that discharge must be addressed.

Before 2000, Gabbard worked every weekend, from 7 a.m. until 3:30 p.m. From the beginning of 2000 until the strike began, Gabbard was scheduled to work only on alternate weekends. Gabbard testified that she did participate in the strike and that she appeared on the picket line nearly every day. Gabbard also testified that she identified herself on two audiotapes that she made for the Union and that the tapes were played by a local radio station multiple times during the strike.

⁵⁵ The General Counsel did not call Dunn in rebuttal to testify about what activities, other than those that required computer entries, she engaged in between 3 and 3:28 a.m.

⁵⁶ Acts of theft are specifically excluded from the operation of the Respondent's published progressive disciplinary system.

⁵⁷ *Wright Line*, supra; *Klate-Holt Co.*, supra.

⁵⁸ Although not mentioned by the General Counsel, the Charging Party on brief argues that, in 1997, the Respondent disparately confronted another employee with the evidence of her theft of time. The prior case, however, involved a physical alteration of records (erasures), and there was a legitimate question of who had done it. Also, the Charging Party makes no suggestion of how Dunn could have meaningfully responded, even if she had been confronted with the Respondent's evidence. (The Charging Party, as well as the General Counsel, does not address that evidence on brief.)

⁵³ The Tr. 2843. L. 13, is corrected to change "didn't" to "did."

⁵⁴ See the date of the signature on the R. Exh. 64.

The Honey Festival is a 2-weekend county fair type of event that is held in Jackson each year during the weekend before the Labor Day weekend and during the Labor Day weekend itself. In 2000, those weekends were Saturday and Sunday, August 26 and 27, and Saturday and Sunday, September 2 and 3. For several years Gabbard has been the chairperson and principal organizer of the Honey Festival. As such, she attempts to be at each major event of the festival. In the years before 2000, the events of each first weekend of the Honey Festival occurred after the first shift, and Gabbard was able to attend those events without asking for permission to be off. Therefore, in previous years, Gabbard asked to be excused from work only during each Labor Day weekend. According to Gabbard, that permission was always given. In 2000, however, events were scheduled for hours that conflicted with Gabbard's shift schedule for August 26 and 27.

Gabbard testified that on August 17, Supervisor Robin McGlothen called her to give her the poststrike schedule. McGlothen told Gabbard that her first workday would be Sunday, August 20. (No mention of August 19 was made; August 20 was the first day that any strikers were returned to work.) According to Gabbard:

I said, "Robin, just a reminder,⁵⁹ I will not be there the next two weekends because of the Honey Festival.

She said, "We'll talk about that later."

And I said, "Robin, there's nothing to talk about; it's the Honey Festival, I will not be working the next two weekends."

(McGlothen, who is no longer employed by the Respondent, did not testify.) Gabbard did work August 20. The schedule for the remainder of August was posted at the time, and on that schedule Gabbard was slated to work the weekend of August 26 and 27. Gabbard testified that during her August 20 shift she left a note for McGlothen stating: "Just a reminder. As we had talked earlier, I have Honey Festival the next 2 weekends, August 26th and 27th [and] Sept. [2nd and 3rd]. I will not be working here any of those days." Gabbard further testified that on Friday, August 25, fellow employee "Anita" (whose last name is not indicated in the record) told her that she was, in fact, scheduled to work August 26 and 27. Upon hearing that, Gabbard telephoned Allena Hale, the house supervisor (or the supervisor of the nursing staff during a shift for which Obenchain is not present). According to Gabbard:

I said, "I can't work the weekend Saturday and Sunday, it's the Honey Festival."

And she said, "Are you scheduled?"

I said, "I don't know. I don't know whether I'm scheduled or not. Anita says that I'm on the schedule, but I can't work, it's the Honey Festival. . . . And I said, but I

⁵⁹ Gabbard's reference to a "reminder" is explained by other testimony by Gabbard that in April she sent a note through another employee to McGlothen that stated: "Be off the Honey Festival and the weekend before." There is, however, no evidence that McGlothen received this note or that, if she did, she understood what dates Gabbard was referring to.

won't be there this weekend or next weekend, because it's the Honey Festival."

And she said, "Okay, talk to you later."

On Friday, September 1, Gabbard again called Hale. According to Gabbard:

I said, "Allena, this is Clara. Will you please put a note in the supervisor's book that I'm not working this weekend because it's the Honey Festival?"

And again she said, "Are you scheduled?"

I said, "I don't know whether I'm scheduled or not, honey, I'm just telling you, I won't be there. I'm at the Honey Festival."

[Hale said,] "Okay."

Hale testified for the Respondent, but she was not asked anything about Gabbard; specifically, Hale was not asked to deny this testimony. In fact, by September 1 Gabbard was not scheduled to work September 2 and 3. By letter dated August 31 (and apparently not received by Gabbard until after her September 1 telephone call to Hale), Obenchain informed Gabbard that she was discharged. Obenchain stated no reason for the discharge.

Bevins testified that he made the decision to discharge Gabbard "for failing to honor, failing to serve her schedule in accordance with the way that it was presented to her and posted."

When Obenchain was on direct examination, she was not asked why Gabbard was discharged; rather, she was asked what she knew of Gabbard's change of "employment status." Obenchain replied:

It's our policy within the nursing department that, in order to request the day off for the next month, you must have that request into our office by the 15th of the month at 7:00 a.m. for us to make out the schedule for the next month. When Ms. Gabbard came back to work [from strike] on approximately the 20th, she brought in a note dated August 20th, requesting the last weekend in August off and the first weekend in September. For us to have arranged her coverage for the last weekend in August, she would have had to have that in my office by the 15th of July. And to have the first weekend in September off, she would have had to have that in my office by August 15th. . . .

At that point [August 20], when the med-surg coordinator, Robin McGlothen, told me this [Gabbard's August 20 note] had come in, I said that we need to inform Ms. Gabbard what the policy is.

For times when that happens [i.e., when an employee has not given notice sufficiently in advance to not be scheduled for a certain date], an employee is allowed to use a policy called "trade and cover." They get someone to take their shift, in trade; they will work another shift or they just give their shift away to somebody of equal status to be able to work that shift. We mailed a certified letter to Ms. Gabbard's house with the trade and cover policy in it, explaining that she would be responsible to find her own replacement for those two weekends because the request had not come in at the appropriate time. The letter was returned back to us undelivered.

On the Friday evening before the first weekend off [i.e., August 25], she called the [House] Supervisor [Hale] after I had left the facility, and said, "I'm just calling to tell you I won't be in." . . . The same thing happened on the second weekend in which she should have gotten her own coverage. She just picked up the phone and called, said, "I won't be there," and [Gabbard] made no attempt to get her own coverage for that shift.

Although the Respondent did not ask Obenchain specifically why Gabbard was discharged, on cross-examination, Obenchain was asked the reason. Obenchain testified: "Ms. Gabbard violated [the Respondent's attendance policy by] not covering her own shift when she knew she had not asked for those days off in adequate time."

Obenchain identified a copy of the certified letter dated August 21 that McGlothen sent to Gabbard in response to Gabbard's note of August 20. McGlothen's letter states: "Our policy requires requests-off to be in by 7:00 a.m. the 15th of the previous month (i.e., July 15 for days off in August). Attached is a copy of the Trade & Cover policy. You will be required to find your own coverage for the dates requested off." A copy of the policy, which is summarized by Obenchain's above-quoted testimony, was enclosed; also a form for trading shifts was enclosed. The written policy is captioned "Trade/Coverage." It is introduced by:

Provision is made for all employees to be off or trade shifts when unexpected events arise in their personal lives and they are unable to give a thirty-day notice.

Following that statement is one section that lists steps for two employees to get supervisory approval to "trade" shifts and another section that lists steps for one employee to have another employee "cover" her assigned shift (with no trade involved). Both sections conclude with statements that indicate that trading employees have, or the covering employee has, the responsibility for the shift that they have agreed to work.

On cross-examination, Obenchain admitted that she considered no penalty other than discharge for Gabbard. Obenchain testified that she considered no lesser penalty because: "She did not come to work. She did not cover her shift." Obenchain was shown the personnel file of Jerri Howard (who is presently a supervisor). The file reflects that Howard received a verbal warning for being a no-call, no-show on January 20, 1999, because Howard had agreed to cover a shift for another employee, apparently under the trade-and-cover policy, and then "called in and said she was going to refuse to work that shift." Obenchain admitted that Gabbard was "not a no-call, no-show" because she did call (and write) that she was not going to be there for the August 26 and 27 weekend. Obenchain was asked and she testified:

Q. Now according to your way of thinking regarding Ms. Gabbard, she [Howard] should have been discharged, shouldn't she?

A. No, ma'am.

Q. She violated your policy, didn't she?

A. Yes, ma'am. On[ly] a different policy. . . .

Q. The question is, what's the difference?

A. One, the trade and cover policy applied to Ms. Gabbard. Trade and cover does not apply to that [Howard's] particular incident. That was also done by a different manager.

. . . .

Q. The distinction that you've made between Jerri Howard's situation when she received the verbal warning and Clara Gabbard's situation when she was discharged, is that the only distinction you can think of?

A. Clara violated the trade and cover policy.

JUDGE EVANS: No, that's not the question. . . . Tell us again, what's the reason that Howard only received a verbal warning and Gabbard was discharged?

THE WITNESS: I honestly don't know at this point.

When further asked on cross-examination if employees are always discharged if they fail to cover their shifts, Obenchain answered that Gabbard was the only such employee of whom she knew. When asked how she had known that Gabbard had not attempted to find someone to cover her shifts, Obenchain replied, "I assume she didn't because she sure didn't get it." When asked if an employee would be discharged if she tried to find someone to cover her shift but could not, Obenchain testified that she did not know. Further on cross-examination, Obenchain also agreed that it was a greater disadvantage to the Hospital for an employee to be a no-call, no-show than to give notice of intended absence but not comply with the trade-and-cover policy. Obenchain further admitted that the Respondent's records reflect that, in September 1998, Gabbard and employee Billie Sheffel did trade shifts; neither covered one of the shifts, and neither was discharged. (The record does not show what, if any, punishment Gabbard and Sheffel received for this offense.)

Gabbard, during her cross-examination, acknowledged that she received notice of a certified letter, but she went to the Post Office on a Wednesday, and it was closed. She admitted that she was "not in any hurry" to get the letter and that she made no further effort to get the letter because: "after August the 20th, I was busy with the Honey Festival and "with life." Gabbard further admitted that she had previously used the trade-and-cover policy to cover her planned absences.

Conclusions on Gabbard's Discharge

Without a doubt, Gabbard arrogantly refused to follow the trade-and-cover policy; she announced, orally and in writing, that she just was not going to be at work on August 25 and 26, and September 2 and 3, no matter what shifts she was scheduled for. Moreover, Gabbard most probably knew the import of the certified letter that the Respondent had addressed to her, and she arrogantly refused even to pick it up. And Obenchain's assumption that Gabbard made no attempt to get another employee to cover her shift appears entirely reasonable. (If Gabbard had made such attempts, she assuredly would have told someone in supervision.) Gabbard's case, therefore, does not present a sympathetic employee. Nevertheless, Gabbard's arrogance, of itself, does not divest her of the protections of the Act.

On brief, the Respondent states that "Obenchain recommended Gabbard's termination for failure to follow the trade-

and-cover policy.” Obenchain did not testify what recommendation that she made to Bevins, but assuming that the Respondent’s statement on brief is true, the immediate question is: Is there a penalty for failing to follow the trade-and-cover policy? The trade-and-cover policy itself contains no express penalty for failing to follow it in the case of intended absence. The policy, rather, appears to be no more than a permissive “[p]rovision” which allows an employee to avoid an “incident of absence” under the Respondent’s progressive-discipline absenteeism rules. Pursuant to those rules, two unexcused absences warrant only the first-stage penalty of a verbal warning, not discharge. That is, the trade-and-cover policy is simply not a disciplinary policy, but, even if it were, the penalty for its violation is not immediate discharge.

On brief, the Respondent cites the section of the personnel manual of Community Health Systems which does state that a no-call, no-show offense is punishable by immediate discharge. Obenchain, however, did not testify that she considered Gabbard to be a no-call, no-show employee. Obenchain also admitted that an employee such as Gabbard, who gives advance notice of an absence, presents a lesser disadvantage to the Respondent than a no-call, no-show employee. And Obenchain did not testify that Gabbard’s absences on August 25 and 26 presented any disadvantage to the Respondent. (Apparently, the Respondent found a substitute ward clerk, or just did without a ward clerk, without disruption of patient care.) Nevertheless, even if Gabbard’s situation could have been the equivalent of a no-call, no-show situation, Obenchain could not explain why, during the year before, Howard was let off with a verbal (first-step) warning but Gabbard was discharged. At most, Obenchain testified that she was not involved in Howard’s discipline, but the fact remains that Gabbard was treated disparately compared to Howard. And poststrike-Gabbard was treated disparately compared to prestrike-Gabbard. In September 1998, Gabbard and employee Billie Sheffel did trade shifts; neither covered one of the shifts, and neither was discharged. On brief, the Respondent attempts to distinguish that case by arguing that the trade-and-cover policy was introduced in “2/16/99.” The copy of the policy that the Respondent placed in evidence does bear that date, but it also states that the “[o]riginal” date of the policy was “May 2, 1995,” and at another point the 1999 policy states that the rules for requesting days off “are still the same.”

In summary, the Respondent defends the discharge of Gabbard on the basis of her transgression of the nondisciplinary trade-and-cover policy, but, even assuming that that policy was disciplinary, the General Counsel has shown that Gabbard was treated disparately. Therefore, under *Wright Line* the inference of unlawful discrimination against Gabbard remains intact, and I find and conclude that the Respondent discharged Gabbard because of her protected activity of participating in the July 8 strike in violation of Section 8(a)(3).⁶⁰

⁶⁰ It is further to be noted that Obenchain predicated the necessity of Gabbard’s following the trade-and-cover policy on Gabbard’s failure to give written notice of her planned August absences by July 15, or her planned September absences by August 15. On July 15, however, Gabbard was still engaged in the July 8 strike, and she could not have then known when the strike would end. Also, the Union made its offer to return to work on precisely August 15, but there is no evidence that

6. Discharge of Angie Gayheart

Angie Gayheart, who was a clerical employee in the Respondent’s admitting office, was hired by the Respondent in 1995, and she was discharged at the termination of the July 8 strike. As previously noted, Gayheart was one of five employee-members of the Union’s negotiating committee. The General Counsel contends that the Respondent discharged Gayheart because of her activities as a negotiating committee member and because of her participation in statutorily protected activities during the July 8 strike. The Respondent contends that it discharged Gayheart solely because of certain of her strike activities that were unprotected. Ultimately, I find and conclude that the Respondent lawfully discharged Gayheart for strike violence.

Defenses of strike violence are not addressed under *Wright Line*, supra. Where action is taken with respect to an employee’s tenure of employment on the employer’s claim of misconduct arising out of a course of protected activity (such as strike activity), under *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), an unfair labor practice finding is called for unless the employer has sustained the burden of showing that it held an honest belief that the employee engaged in serious misconduct; 379 U.S. at 23. Once the employer establishes that it had such an honest belief, the burden shifts to the General Counsel to affirmatively show that the misconduct did not in fact occur. *Rubin Bros. Footwear*, 99 NLRB 610, 611 (1952), enf. denied on other grounds 203 F.2d 486 (5th Cir. 1953). See also *Teledyne Industries v. NLRB*, 911 F.2d 1214, 1222 (6th Cir. 1990). Bevins testified that he personally made the decision to discharge Gayheart “for threatening and intimidation of two employees, one of which was an employee’s child during the strike and the second was an employee in the admitting department.” Respondent did go forward with evidence in support of that defense.

Gayheart’s Alleged Threats to Kimberly Howard

Shortly before the July 8 strike began, Kimberly Howard was hired by the Respondent to work in its admitting office. Howard testified that during the week before the strike began:

I was doing the training at the Hospital, and Angie Gayheart and another one of the workers were . . . supposed to be training me. And they were talking about the strike. They were both going . . . out on the picket line, and they were asking me and the other girl that was training that day if we were going to go out with them, or if we were going to cross.

And we both said that we didn’t know, because we [were] informed by Ms. Trusty [the office supervisor] not to talk about, anything about the strike, so we didn’t tell them yes, we were, or no, we’re not.

And they were talking about the strike that had happened previously at one of the coal companies here. They had a strike a few years earlier. . . . Angie Gayheart was talking about some of the houses that were burned of the

Gabbard knew of that fact by that date. Therefore, Obenchain’s interpretations of the Respondent’s rules also directly penalized Gabbard for her protected activity of striking.

people that crossed the picket line at the coal company. And the other girl started laughing that was working with her, and Angie started laughing, too, and [Gayheart] said that, "Matches accidentally get dropped like that sometimes." And then she said, "I know where you live. Don't—don't you live up near where I do?"⁶¹

She said, "I pass your house all the time."

And I said, "Well, I don't know. Where do you live?"

And she did say that she lived up the same road that I do.

And I said, "Yes, I've just lived up there for about a year."

She said, "Yeah, I thought that's where you lived. I've seen you there before."

Howard testified that she filed a complaint with the local police against Gayheart for this conduct, but, after some time passed without any action by Gayheart, she decided that Gayheart had not been serious. Howard therefore did not serve Gayheart with a copy of the complaint and the matter was dismissed.

As previously noted, the Respondent provided bus service between the Hospital and a remote parking lot so that the non-strikers would not be required to drive their personal automobiles across the picket line. Howard further testified that, at some point during the strike, after work, Gayheart and other strikers followed the bus to the lot. Howard testified:

And when we [the nonstrikers, in our personal automobiles] came down the hill from the parking lot, they were yelling threatening things again, and she [Gayheart] kept saying stuff about burning houses down. And . . . Angie kept saying stuff about that when I drove by them. She kept yelling at me.

Howard testified that she thereafter reported both of these incidents to Trusty.⁶²

Gayheart's Alleged Threat to Marilyn Turner's Son

Marilyn Turner, a nonunit business office employee who did not join the July 8 strike, is the mother of an adult daughter and a 3-year-old son.⁶³ Turner's daughter, Angela Haddix, is a bargaining unit employee who also did not join the strike. Turner's son, Matthew, daily attends a Montessori school whose property is adjacent to the Respondent's. Turner had a practice of driving Haddix to work with her, and, on the way, she would drop Matthew at the school. Turner testified that on July 10, after dropping Matthew at the school, she drove with Haddix through the picket line and parked her automobile in the Respondent's parking lot which is at the front of the Hospital. Then Turner and Haddix began walking across the parking lot toward the front entrance of the Hospital. Turner testified that,

⁶¹ The Tr. 1507, LL. 11 and 12, is corrected to change "I know where you live, Donna. Don't you live up near where I do." to "I know where you live. Don't—don't you live up near where I do."

⁶² Howard further testified to later being followed to her driveway by someone who was driving a vehicle that looked like one that she knew to belong to Gayheart's husband; Howard, however, could not identify Gayheart as the driver.

⁶³ Marilyn Turner is no relation to alleged discriminatee Melissa Turner who is also mentioned in the following discussion of Gayheart's strike conduct.

as she and Haddix were walking, she heard, and saw, Gayheart speaking through a bullhorn (amplified megaphone). According to Turner, Gayheart:

. . . told her [Haddix], at that time, not to go on into work, to join them. And [Haddix] just didn't respond to that. So [Gayheart] told her to go right on ahead and go on in; she knew where she lived, and she knew that she would have to go home at night.

Turner did not report Gayheart's July 10 remark to supervision at that time (and she did not report the matter to the local police at any point). Haddix did not testify.

Marilyn Turner further testified that, about 7:30 a.m. on July 12, she again dropped Matthew off at the Montessori school; then, with Haddix, she again drove across the picket line on to the Respondent's property. Before she drove into the parking lot, however, she drove to a rear entrance of the building, out of sight and earshot of the strikers who were at the picket line. At the rear entrance, Turner let Haddix out of the automobile. Turner then drove back around to the front of the Hospital and to the parking lot. Turner parked, got out of her automobile, and walked into the front entrance of the Hospital. Turner testified that, as she walked across the parking lot toward the building, she heard, and saw, Gayheart speaking on the bullhorn again. According to Turner:

And she [Gayheart] said, "I saw you let your baby out, Marilyn." Well, I thought she was just being sarcastic because I had let Angie, my daughter, out around back. So I didn't really pay attention to that.

And as I walked on, she said, "I know Matthew is at the daycare, and I know Matthew will be coming out to play later, and I'll be watching for him."

Turner testified that she became so upset and so fearful for her son's safety that she immediately telephoned the Montessori school and told his teacher that no one but she was to pick up Matthew. Turner then went to the local police and filed a complaint in which she named Gayheart and described Gayheart's conduct of that date. There is no evidence of the disposition of the State charges that Turner filed against Gayheart. On cross-examination, Turner acknowledged that she continued to send Matthew to the Montessori school during the remainder of the strike.

Trusty testified that Turner told her of Gayheart's July 12 conduct; Trusty escorted Turner to the police department on July 12 to make her report. Trusty further testified that she reported to Bevins what Turner had reported to her. Trusty also testified that she relayed to Bevins that Howard had told her that Gayheart had said that "matches can be dropped; houses can be easily burned."

Denials of Gayheart's Misconduct

In rebuttal, the General Counsel called Gayheart who denied saying anything to Marilyn Turner over the bullhorn on July 10 or 12. Gayheart testified that on July 12 fellow striker (and alleged discriminatee) Melissa Turner had possession of the bullhorn and that only Melissa Turner was using it on that date. Gayheart further testified that Melissa Turner attempted to get

Gayheart to take the bullhorn and say something to Marilyn Turner. According to Gayheart:

[A]nd Missy [Melissa Turner] tried to get me to holler at Marilyn and I wouldn't. I told her if she wanted to holler she would have to do it. So, she [Melissa Turner] got the bull horn and said, "Mommy took her baby to the back door and dropped her off." And that was all that was said. Marilyn went on in toward the back of the building.

Gayheart further specifically denied saying anything to Marilyn Turner about her son Matthew, and she denied that she heard anyone else on the picket line doing so.

Melissa Turner testified in rebuttal that she was with Gayheart on the picket line on July 12; Melissa Turner testified that she saw Marilyn Turner drive Haddix to the rear of the Hospital; Melissa Turner testified:

And then she [Marilyn Turner] came back out and parked in the parking [lot], and I got on the bullhorn, and I hollered and asked her if her daughter was afraid to be called any names from the people on the picket line. [And I asked Marilyn Turner over the bullhorn] why she took her [Haddix] to the back of the building.

Melissa Turner denied that she said anything over the bull horn about Marilyn Turner's son or that she heard anyone else say anything about him.

Further in rebuttal, Gayheart denied stating in Howard's presence that she knew of houses being burned during a coal strike and that matches "could be dropped." Gayheart further denied knowing the "actual house" that Howard lived in. Gayheart further denied saying anything to Howard when she crossed the picket line, and Gayheart denied ever going to the parking lot where the bus discharged nonstrikers.

Credibility Resolutions and Conclusions

I believe, and credit, Marilyn Turner's testimony about Gayheart's conduct of July 10 and 12. I specifically find that, on July 12, Gayheart told Turner, through a bullhorn, that she (Gayheart) would be watching for Turner's son Matthew at the daycare center throughout the day. Marilyn Turner was completely credible that she saw, as well as heard, who was speaking on the bullhorn, and I do not believe the rebuttal testimonies of Gayheart and Melissa Turner to the effect that the bullhorn was used only by Melissa Turner to address Marilyn Turner. Therefore, the General Counsel has failed to meet his burden under *Rubin Bros. Footwear*, supra, which holds that, where an employer has shown that the allegedly unprotected conduct has occurred, the General Counsel must prove that the accused employee was, in fact, innocent.⁶⁴

I further believe, and find, that Gayheart told Howard that she knew where Howard lived and that "matches can be dropped" when employees such as Howard fail to honor a

picket line. Howard was credible in her testimony, and Gayheart (who, while testifying, assumed a demeanor too meek to believe) was not.

Before 1984, the Board's position was that verbal statements, as opposed to physical acts of intimidation and coercion, would generally not be sufficient acts of misconduct to warrant the employer's refusal to reinstate a striker. The Board changed that position in *Clear Pine Mouldings*, 268 NLRB 1044 (1984), affd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986). The Board stated:

In the past, the Board has held that verbal threats by strikers, "not accompanied by any physical acts or gestures that would provide added emphasis or meaning to [the] words," do not constitute serious strike misconduct warranting an employer's refusal to reinstate the strikers. On the other hand, the Board has held that verbal threats which are accompanied by physical movements or contracts such as hitting cars, do constitute serious strike misconduct. The Board summarized its standard . . . in *Coronet Casuals* [207 NLRB 304 (1973)], where it stated that "absent violence . . . a picket is not disqualified from reinstatement despite . . . making abusive threats against non-strikers."

We disagree with this standard because actions such as the making of abusive threats against nonstriking employees equate to "restraint and coercion" prohibited elsewhere in the Act and are not privileged by Section 8(c) of the Act. [Footnote omitted.] Although we agree that the presence of physical gestures accompanying a verbal threat may increase the gravity of verbal conduct, we reject the per se rule that words alone can never warrant a denial of reinstatement in the absence of physical acts. Rather, we agree with the . . . First Circuit that "[a] serious threat may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker." We also agree with the . . . Third Circuit that an employer need not "countenance conduct that amounts to intimidation and threats of bodily harm."

In *Georgia Kraft Co.*, 275 NLRB 636 (1985), strikers went to the home of a nonstriking employee and told him "we'll take care of you [if you return to work]." The Board noted that the surrounding circumstances were that the strikers were drunk, they cursed in front of the nonstriker's pregnant wife and young daughter, and they refused repeated requests to leave. Upon considering such circumstances, the Board found that the "take care of you" remark was coercive and intimidating because it was, in effect, a threat of bodily harm. In this case, the relevant surrounding circumstance was that Marilyn Turner had just dropped off her child at the daycare center in full view of Gayheart. Turner was going into a building where she could not protect her child, and Gayheart was staying outside where she could possibly harm him. Gayheart's mentioning of Matthew therefore could only have been designed to instill fear of such harm in his mother, and it reasonably would have done so. Turner was not a unit employee and had no immediate interest in the strike, but whether Gayheart was attempting to coerce Turner into joining the strike, or whether Gayheart was at-

⁶⁴ Because proof of Gayheart's innocence was required under *Rubin Bros. Footwear*, the General Counsel would not have satisfied his burden if the testimonies of Melissa Turner and Gayheart had only created the possibility that it was Melissa Turner, not Gayheart, who had threatened Marilyn Turner on July 12. See *Axelson, Inc.*, 285 NLRB 862, 864 (1987).

tempting to coerce Turner into persuading Haddix to join the strike, Gayheart's conduct was coercive, and it was unprotected. Because the Respondent discharged Gayheart solely for those coercive remarks, it did not violate the Act. I shall therefore recommend dismissal of this allegation of the complaint.

7. Discharge of Sandra (Barker) Hutton

Sandra (Barker) Hutton⁶⁵ was an admitting office employee who was hired by the Respondent in 1996 and discharged by letter dated September 6. Hutton testified that she wore union buttons regularly until the strike began, and during the strike she engaged in some picketing. The General Counsel contends that the Respondent discharged Hutton because she participated in the July 8 strike and because she otherwise supported the Union. The Respondent answers that it discharged Hutton because she failed to attend compulsory training sessions. Ultimately, I find and conclude that the Respondent treated Hutton disparately and that she was unlawfully discharged.

During the 2 years before the strike began, Hutton was classified as a PRN (pro re nata, or, as needed) employee, but she regularly worked from 1 a.m. until 7 a.m. Also, during the several years before the strike and continuing after the strike ended on August 15, Hutton worked from 8 a.m. until 4 p.m. in the local county attorney's office. Hutton testified that, before the strike, when a member of the Respondent's management needed to contact her, he or she would usually call her at the county attorney's office. That testimony was not disputed.

After the Union's August 15 offer to return to work, Bevins sent a form memorandum, dated August 17, to each striker. The memorandum stated that the Union's offer had been received and that: "Accordingly, we have scheduled you, and we expect that you will report back to work on [blank space] to the shift beginning at [blank space]." The expected dates and shifts for most recipients were handwritten into the blanks. The memorandum that went to Hutton, however, did not; instead, the blanks in the memorandum to Hutton were completed: "a PRN basis" and "unknown," respectively. Additionally, Bevins' memorandum to Hutton indicated that before she returned to work she needed to report to a named administrative employee to receive an annual PPD (tuberculin) test for which Hutton was then (admittedly) due. The PPD test is an injection which, after about 48 hours, discolors the immediate epidermal area in a certain way if it is positive for tuberculosis. On August 21, Hutton took the PPD test, and on or about August 23 it was "read" as negative.

As will be detailed below, in 2000 the Respondent undertook a program to ensure that employees acted in compliance with certain Federal regulations that deal with hospital billing practices. The Respondent contends that (with a few exceptions like the housekeeping department employees) all of its employees were required to view a 1-hour "compliance" video by September 1 and that some employees were also required to take a 4-hour "compliance" computer training class by September 6 (as well as view the compliance video). The Respondent contends that Hutton was one employee who was required to both view

the compliance video and take the computer class. The Respondent further contends that Hutton failed to view the compliance video by September 1 and that she was discharged for that reason. Hutton also did not undergo the 4-hour compliance computer training by September 6; the Respondent, however, does not mention her failing to do so as a factor in the decision to discharge her.

Hutton testified that, about August 28, while she was at work at the county attorney's office, she received a telephone call from Karen Howard, another employee in the business office. Howard told Hutton that she was calling on behalf of Denise Trusty, the business office's admitting and data processing supervisor, to tell Hutton that she would need to view the 1-hour compliance video and attend the 4-hour computer training class before she would be eligible to return to work and that Howard would call Hutton during "the next couple of days to schedule it." Hutton testified that within 2 days she was called by business office employee Pat Warren who also said that she was calling on behalf of Trusty. Warren scheduled Hutton for the video and computer training classes at 3 p.m. on August 30. Hutton took time off from her job at the county attorney's office and appeared at the appointed hour. Warren met Hutton and stated that "the computers were down" and that the video and computer training sessions would have to be rescheduled. Hutton went to the office of Trusty who told Hutton that she would contact Hutton "in the next couple of days" to let her know when she was scheduled for the compliance video and the computer training. Hutton further testified, "She did inform me at that time that I couldn't return back to work until I did the training." On September 6, after hearing nothing from Trusty, Hutton called Trusty; Trusty told Hutton that no more training sessions were then scheduled and that Hutton should call Trusty back on September 11. On September 11, Hutton called Trusty's office; Trusty was not there and Hutton left a message with Howard to have Trusty call her. Further according to Hutton, in none of her telephone calls with Trusty or her staff did anyone tell her that there was a deadline for reviewing the compliance video or receiving the computer training.

On September 12 Hutton received a letter from Cooper. Dated September 6, the letter stated:

All employees were required to view the General Compliance Video by HCFA [Health Care Financial Administration, a branch of the United States Department of Health and Human Services] and corporate [i.e., the Respondent's parent corporation] no later than August 27, 2000. Because you changed your telephone number, we were not able to reach you until August 21st. You were informed that the video would be shown sixteen times scheduled during all shifts from the time you were notified until the end of the cycle. You made no effort to attend any video session.

This serves as notice that you are purged from our PRN listing. If you have any questions, please contact Naomi Mitchell at [telephone number].

Cooper signed the discharge letter as "Chief Financial Officer/Facility Compliance Chair." (Mitchell, again, is the Respondent's human resources director.) As well as denying that

⁶⁵ By time of trial, alleged discriminatee Sandra Barker had resumed her maiden name of Hutton.

she was ever told that there was a deadline for viewing the compliance video, Hutton denied ever being “informed” that the video would be shown 16 times before August 27. Hutton did acknowledge that her home telephone number had been changed and that she had not notified the Respondent of the fact.

As found above, the Respondent repeatedly threatened to discharge employees such as Hutton who participated in the July 8 strike; therefore, a prima facie case for Hutton’s discharge has been proved, and, under *Wright Line*, the Respondent’s defense for that discharge must be addressed.

According to Cooper, in April 2000 he and other chief financial officers of Community Health Systems’ subsidiaries met at the parent corporation’s headquarters in Tennessee. There they were told that an agreement with the Federal Government was in the making that would require certain billing-related training for the subsidiaries’ employees. Cooper testified that on May 9, Community Health Systems did sign a formal agreement with the Office of Inspector General and the Health Care Financing Administration (“which is Medicare and Medicaid,” as Cooper put it). The agreement was designed to insure that the billing practices of the staffs of Community Health Systems’ subsidiaries complied with certain Federal regulations. The agreement was therefore called the “Compliance Agreement.” Cooper was designated (apparently by Community Health Systems) as the “Compliance Chair” for the Respondent. As the compliance chair, Cooper was given the responsibility of seeing to it that the Respondent fulfilled the requirements of the Compliance Agreement. One “component” (Cooper’s word) of the Compliance Agreement required that employees who were in “revenue-producing” departments (such as nursing and business office employees) view a 1-hour video about how charges were to be recorded. (No records of who viewed the compliance video, and when, were offered; Mitchell, however, testified that there were about 250 of such employees and supervisors.) A second component of the Compliance Agreement, Cooper further testified, required that employees who were directly involved in bill handling (herein, “bill handling employees”) undergo both the compliance video and a 4-hour interactive Internet computer training course. (Respondent introduced records of who underwent the computer training, and when; those records reflect that there were about 70 of such employees and supervisors.) Further according to Cooper, the Compliance Agreement required that the two training components were to be completed by all designated employees within 120 days after the May 9 signing of the agreement.⁶⁶ Cooper testified that, although a deadline of September 9 was set for the viewing of the 1-hour video by the Compliance Agreement,⁶⁷ Community Health Systems set a deadline of September 1 for employees to complete the 1-hour video compliance training and a deadline of

September 6 for employees to complete the 4-hour computer training. Cooper testified that Community Health Systems set the earlier dates as deadlines so that it could report to the appropriate authorities by September 9. Cooper testified that he understood that any failure to have the specified employees view the compliance video and/or the computer training in the time allotted would have meant “[l]oss of my job.”

Under the Compliance Agreement, Hutton, as an admitting office employee, was one of the employees who was required both to view the 1-hour compliance video and to undergo the 4-hour computer training. Cooper testified that he was told (apparently by someone at Community Health Systems) that any employee who did not view the video by September 1 was to be terminated. (Cooper did not testify that he was instructed that any bill handling employee who did not receive the computer training by September 6 was to be terminated. As will be seen, several employees who did not meet that deadline were not terminated.)

Cooper testified that he did not receive the compliance video from Community Health Systems until August 9 (or about a week before the Union’s August 15 offer to return to work from the July 8 strike and 11 days before the beginning of the reinstatement of strikers on August 20). Cooper testified that in early August he conducted a meeting of all department heads; in that meeting he told the department heads that any employee who did not complete the training that was required by the Compliance Agreement would be discharged. Cooper identified a memorandum that he sent to all department heads on August 9. The memorandum refers to an accompanying schedule of 1-hour meetings for the showing of the compliance video; the memorandum concludes that all employees in the respective departments must attend, “NO EXCEPTIONS.” (Cooper did not mention any document that may have contained instructions to department heads about scheduling the computer training that was required of the bill handling employees by the Compliance Agreement.) The schedule for video showings was from Monday, August 14 through midnight, Saturday, August 26.⁶⁸ Cooper testified that the only employees exempted from viewing the compliance video by September 1 were those who were on FMLA leave. Cooper was not asked if the bill handling employees were excused from the computer training component of the Compliance Agreement’s requirements if they were on FMLA leave or if they could have been excused from the computer training for any other reason. The Respondent’s records show that the first computer training of employees began on August 28, and they show that no computer training was conducted on August 30, the date that Hutton was told that the computers were down.

Cooper testified that, upon learning of the Union’s August 15 offer to return to work, he met with department heads and told them to immediately contact returning strikers to schedule the compliance video training for them. (Cooper did not testify what instructions he may have given the department heads,

⁶⁶ No copy of the Compliance Agreement was produced for the record, and Cooper acknowledged that he had never seen it. Nevertheless, the General Counsel did not object to Cooper’s testimony about its terms.

⁶⁷ One hundred twenty days from May 9 would have been September 6, but, apparently, Cooper, or Community Health Systems, just counted the period as being an even 4 months from the signing of the Compliance Agreement.

⁶⁸ Six showings per day were scheduled for the weekdays of those 2 weeks, and showings were scheduled twice each day for the Saturdays that fell on August 18 and 25 and for the Sundays that fell on August 19 and 26.

before or after the computer training began on August 28, about scheduling of that training for the bill handling employees who were returning from strike.) Cooper further testified that he established a system of sign-in sheets which assured that each employee attended at least one of the compliance video sessions. Cooper testified that he sent Hutton's letter of discharge after reviewing the sign-in sheets and discovering that she had not viewed the compliance video. As is uncontested, Hutton was the only employee who failed to view the compliance video by September 1.

When Cooper was on cross-examination, he reaffirmed that there were two components of the training that were required by the Compliance Agreement, the compliance video (for virtually all employees) and the computer training (for bill handling employees). Cooper further re-affirmed that he was told by Community Health Systems that any employee who failed to complete the compliance training that was specified for him or her was to be discharged. He was also asked, however, why the records that the Respondent had introduced show, as they do, that business office employee Jamie Bradley failed to receive the 4-hour computer training until September 11; Cooper replied that Bradley was a "weekend" worker and that "she did not work prior to viewing this 4-hour training." Also, the Respondent's records reflect that Drs. Usman, Burnette, and Khalid, received the computer training on September 12, October 28 and December 6, respectively. When asked on redirect examination why Usman was allowed more time to complete the computer training component of the Compliance Agreement, Cooper replied:

He's an ER physician, and the physician compliance training is a separate four-hour—the computer training is a separate four-hour from the employee, and there were development problems, and the physicians were not a mandatory in the four-hour, except for those employed, and there was a date extension on those.

When asked why Khalid and Burnette were allowed more time to complete the computer training, Cooper replied:

Those people have to have a number put into a system and get confirmation, and those were in the pipeline awaiting information back from corporate with the sign-in or log-in information for them to get credit for doing that four-hour training. There was an issue of CME's, continuing [medical] education credit, for the physicians.

(Although Burnette is not an employee under Section 2(3) of the Act, he was treated as an employee under the Compliance Agreement, as indicated by the Respondent's records of who took the computer training and by Cooper's failure to use non-employee status as a reason for exempting Burnett from the requirements of the agreement.)

Trusty testified on direct examination that on August 17 she spoke by telephone with Hutton and told Hutton that, before returning to work, she would have to test negative on a tuberculin test and, after she did so, she would have to come for a "mandatory" 1-hour compliance video. Trusty testified that she did not then mention the computer training to Hutton because, by August 17, "the PC wasn't ready." (Again, the Respondent's

records show that no one completed the computer training before August 28.) Trusty testified that Hutton agreed to come in for the PPD and to call her when the results were read. Hutton, however, did not call. Trusty testified that she found out that Hutton's PPD had tested negative, and:

I called Sandy on the 22nd of August and told her that the PPD was fine, and that she could come for the compliance training on the video. I told her from August the 22nd to, I think, August 27th, that there would be six showings a day, and I told her the times, and she chose August the 23rd at three o'clock. We didn't have a viewing showing at that time; there was nobody scheduled to do it, or they would have been in the middle of one. So, because she worked, I told her I would do it at three, myself.

Trusty testified that although Hutton agreed to be there for the video at 3 p.m. on August 23, she did not appear at that time. Trusty testified that her assistant, Pat Warren, reported to her on August 30 that she had spoken to Hutton and she had told Hutton that she could come at 3 p.m. on that date for both the computer training and the compliance video.

Trusty agreed that Hutton appeared at the Hospital on August 30 and that she was told that the computers were down. Trusty did not testify to any reason why Hutton was not shown the compliance video on August 30. Trusty testified that Warren scheduled Hutton for the computer training on August 31, but Hutton again did not appear. (If Warren also scheduled Hutton for the compliance video on August 31, Trusty did not mention it.)

Further, according to Trusty:

[Hutton] called on September the 6th and wanted to know when's the next viewing and PC compliance was. I told her it had to be done that day, and I was willing to stay late and do it for her, with her, if she wanted to. She said, "I'll get back with you on it," because [she] works, and I guess she had to see what time she would get off, that type of stuff. I stayed until seven thirty that night, and she did not come.

Trusty further testified that she told Cooper that Hutton had failed to appear for the video and computer components of the compliance training.

On cross-examination Trusty agreed that, when she had wanted to reach Hutton by telephone, she would call the county attorney's office first, rather than her home, because she knew that Hutton worked 40 hours per week there. Trusty also testified that she sometimes had trouble reaching Hutton at the county attorney's office and that she sometimes tried many numbers for Hutton without success, but she did not testify that she had difficulty in reaching Hutton at the county attorney's office in either August or September.

As noted above, on direct examination Trusty testified that she told Hutton on August 17 that viewing the compliance video was "mandatory." On cross-examination, however, Trusty testified that she did not mention the compliance video (or the computer training) to returning strikers who did not have current PPD (tuberculin test) clearance. Specifically, Trusty testified that she did not mention the compliance train-

ing to those, such as Hutton, who did not have a current PPD because a PPD clearance was required before the compliance training could be given. Also, Trusty's notes of her calls to the strikers do not include any reference to the compliance video, but they do include references to the PPD requirement that some returning strikers, including Hutton, had.

The Respondent called Karen Howard who testified that she was "pretty sure" that she once called Hutton to tell her when one "middle of the night" compliance video viewing was available. The Respondent did not ask Howard if she received any telephone calls from Hutton when Hutton was attempting to reach Trusty.

The Respondent called Warren who was a member of the Respondent's "Compliance Committee." Warren testified that she was responsible for scheduling all employees for the compliance video. Although Trusty had testified that employees who had not received a negative PPD could not watch the compliance video, Warren testified that they could but they could not work until their PPD test results were received. Warren further testified that she witnessed Trusty's calling all business office employees on August 17 and that Trusty told each, including Hutton, that they were required to undergo the 4-hour computer training as well as the 1-hour video training (even though Trusty on cross-examination testified that she did not, and Trusty's notes indicate nothing about the training). Warren further testified that she met Hutton when she appeared for the training on August 30 and told her to return the next day because the computer server was down. Warren testified, specifically, that she told Hutton: "We have to have it done by tomorrow evening. The 31st was our deadline." Warren testified that on August 31 Hutton called her and said that she could not come that day; Warren told Hutton to call back when she knew that she could come and schedule a session for the training. A few minutes later, Hutton called again; Trusty took the call on a speaker telephone, and Warren listened. Trusty told Hutton to come to take the training the next day (September 1) after her work at the county attorney's office and that she (Trusty) would wait for Hutton. Hutton agreed to do so. Warren testified that she told about 200 employees, including Hutton, that viewing the 1-hour compliance video was mandatory. Warren testified that two other employees had not completed the compliance training by September 1, "and we were trying to give them a couple more days, and I think we extended it until the 6th. We gave like a five-day leeway." On cross-examination, Warren repeated that the deadline for watching the video "was extended, though, until the 6th [of September]." Warren further testified that when she and Trusty gave times to Hutton to come to the Hospital to do the computer training, "We had informed her that if she had the time after the four-hour training, we could do the one-hour video."

Hutton acknowledged that in late July her home telephone number changed (because she was then going through a divorce). Hutton also testified, however, that she regularly worked at the county attorney's office during the weeks following the strike, that Trusty did not call her there regarding the scheduling of the compliance video or the computer training, that she answers the telephone at the county attorney's office, and that she received no messages at the county attorney's of-

fice that anyone at the Hospital was trying to reach her. Hutton denied that she told anyone at the Hospital that she would call to schedule, or reschedule, an appointment for the compliance video and then not do so. Hutton also denied that on September 6 Trusty offered to stay late for her to view the compliance video or undergo the compliance computer training.

The General Counsel introduced a copy of a memorandum dated September 1 from Human Resources Manager Mitchell to one Ira Hartman. According to Cooper, Hartman is a member of Community Health Systems' compliance department. Mitchell testified that it was her responsibility to report the Respondent's compliance status to Hartman. In that memorandum Mitchell recites that: (1) all employees of the Respondent have completed the compliance video except Trish Gross and Joyce Elam, both of whom were on FMLA leave; (2) only two employees have not completed the computer training, Bradley and Lisa Terrill; (3) Terrill was on vacation until September 5, and "she will complete the training upon returning to work"; and (4) "Janie Bradley lives out of town through the week and [is] home on weekends. [She] will not be working until she has completed it which is scheduled for next weekend." As noted, the Respondent's records show that Bradley completed the computer component of the compliance training on September 11.

Conclusions on Hutton's Discharge

By his letter of September 6, Cooper told Hutton that she was being purged from the Respondent's PRN roster (i.e., discharged) because all employees had been required to view the compliance video "no later than August 27, 2000" and that she had failed to do so. Cooper acknowledged the falsity of his premise, however, by testifying that the real deadline for viewing the video was September 1. Even that date was not the real deadline; both Trusty and Warren testified that the deadline for viewing the video was September 6 (Warren did so by testifying that the deadline for watching the video was "extended" to September 6, and Trusty did so by testifying that she set an appointment for Hutton on September 6.)

More importantly, according to the testimonies of Trusty and Warren, the last day for completion of the compliance program by Hutton was shifted from August 27 to 30, to August 31 to September 1 to 6. Those changes would have required at least three telephone calls, but in none of them, even according to Trusty's and Warren's accounts, was Hutton told that she would be discharged if she failed to complete the compliance training by some deadline. Additionally, both Trusty and Warren met with Hutton on August 30; each then had another excellent opportunity to tell Hutton that she needed to complete the compliance training by some certain date or be discharged. It is therefore apparent that, as Hutton testified, she was only told by Trusty and Warren that she could not work until she did complete the training; she was not told that she would be discharged if she did not complete the training by some deadline. Cooper testified that he had told members of the Compliance Committee, which included Trusty and Warren, that employees who did not complete the compliance training on time would be discharged. Trusty's and Warren's failure to pass that information along to Hutton is a strong indication that the Respondent

was more interested in securing Hutton's discharge than in having her view the compliance video.

Another strong indication that the Respondent did not want Hutton to view the compliance video lies in the events of August 30. In his September 6 letter of discharge, Cooper falsely premises the discharge on the assertion that: "You made no effort to attend any video session." Hutton did appear on August 30, and Cooper's statement is simply false. Moreover, according to Trusty, Hutton came to the Hospital on August 30 for the purposes of both viewing the video and undergoing the computer training. Warren, however, met Hutton at the appointed hour on August 30 with the news that the server was down and the computer training was not available that day. The computer training was an internet-based interactive program; the compliance video was a videotape that would require no computer function. The Respondent offers not the slightest suggestion of why, if the viewing of the compliance video was separately so important, Hutton could not have then been offered a chance to view it. The failure of the Respondent to offer the compliance video to Hutton on August 30 is further evidence that the Respondent was more interested in discharging Hutton than in having her view the compliance video.

Another false premise of Cooper's letter of discharge to Hutton is his implication that she was given little time to view the compliance video because she had changed her telephone number. Hutton had moved without telling the Respondent of her new home telephone number, but the Respondent had seldom called her there before. Hutton worked 8 hours a day at the county attorney's office, and whenever anyone really wanted to talk to her they called here there, as Trusty admitted. More importantly, neither Trusty nor Warren (nor Karen Howard) testified that they attempted to call Hutton at her old home telephone number to tell her that she would need to view the compliance video, or to do the computer training, by some deadline. Therefore, Cooper's false implication that the currency of Hutton's telephone number somehow caused her discharge is another strong indication that Hutton's discharge, not her comportment with a bona fide employment condition, was the Respondent's true objective.

Further belying the Respondent's assertion of a legitimate reason for discharging Hutton is the existence of significant evidence of disparate treatment. It is true that Hutton was the only employee who did not complete the viewing of the compliance video by the deadline of August 27 (as Cooper's discharge letter states), or September 1 (as Cooper testified), or September 6 (as Trusty and Warren testified). Nevertheless, the compliance video viewing was only one component of the compliance training, at least for bill handling employees such as Hutton. The other component, presumably coequal in significance,⁶⁹ was the computer training. Other bill handling employees, however, were allowed to delay the coequal computer training until well after September 6. Drs. Usman, Burnette, and Khalid, received the computer training on September 12, October 28, and December 6, respectively. Cooper offered

three different reasons for Usman's delay: (1) there were development problems in the computer training for physicians, (2) the computer training for the physicians was "not mandatory," and (3) "there was an extension on those." Just why an extension would have been necessary for a "not mandatory" program went unexplained. And the multiplicity of excuses shows that the truth lies elsewhere. For Khalid and Burnette, Cooper came up with two more excuses: (1) they had not received their log-in numbers, and (2) "there was an issue" of CME credit. If it was so compelling that the Respondent have all employees complete the compliance training by September 6, it seems that the Respondent would have gotten Burnette and Khalid their log-in numbers well before October 28 or December 6. Also, Cooper made no suggestion of why Burnette's and Khalid's CME credit "issues" needed to be resolved before the Respondent could comply with the Compliance Agreement.

More direct evidence of disparate treatment lies in the indulgence the Respondent afforded to business office employee Jamie Bradley. Bradley failed to receive the 4-hour computer training until September 11. When asked why she was allowed to wait so long after September 6, Cooper replied that Bradley was a "weekend" worker and "she did not work prior to viewing this four-hour training." This treatment of Bradley is precisely how Hutton testified that she was told she would be treated until she completed the compliance training. (Again, Hutton credibly testified that Trusty and Warren told her only that she would not be allowed to work until she completed the training.) The Respondent suggests no reason that Bradley was allowed to continue her failure to take the computer training past September 6 without suffering any penalty, other than a loss of some paid work hours, but Hutton was discharged for her failure to view the compliance video by August 27 (or September 1 or 6). The disparity of the Respondent's treatment of Bradley becomes especially glaring when one recalls Cooper's testimony that he understood that any failure to have the employees complete the compliance training on time would have meant "loss of my job."

The comparative treatment of Bradley is important in an additional way. On September 1, Mitchell told Hartman: "Janie Bradley lives out of town through the week and is home on weekends. She will not be working until she has completed it which is scheduled for next weekend." September 1 was a Friday; that weekend was September 2 and 3; the "next weekend" was September 9 and 10. Therefore, as of September 1, Bradley had permission to delay the computer training component of the compliance training until September 9, 10, or (as it turned out) 11. This is the apparent reason that Cooper's September 6 letter did not cite Hutton's failure to undergo the computer training, as well as her failure to view the compliance video, as a reason that she was being discharged. Cooper must have realized that he could not have referred to the computer training component of the compliance training in his September 6 letter because, at the same time, another business office employee, Bradley, was being allowed to delay the completion of that component of the

⁶⁹ At no point did Cooper testify that, under the Compliance Agreement, the computer training was somehow less important than the compliance video viewing requirement.

compliance training until well after September 6.⁷⁰ The element of disparate treatment therefore is manifest.

Finally, as the General Counsel points out, Mitchell's September 1 memorandum to Hartman states that only two employees had not viewed the compliance video, Gross and Elam who were on FMLA leave. There is no explanation for Mitchell's failure to mention Hutton unless the Respondent already considered Hutton to be a nonemployee by September 1. That is, the Respondent had already determined to discharge Hutton by September 1, even though, only 2 days before, on August 30, Hutton had appeared at the Hospital to view the compliance video (as well as to undergo the computer training) and was turned away. And the Respondent had determined to discharge Hutton by September 1 even though, according to Trusty and Warren, the deadline for viewing the compliance video had been extended until September 6. The manifest disposition to discharge Hutton, as well as the disparate treatment of Bradley and the others, is further evidence that the reason advanced for the discharge of Hutton is false.

In conclusion, the Respondent's defense for the discharge of Hutton is so replete with falsehoods and with obvious and unexplained inconsistencies that I credit Hutton's testimony wherever it conflicts with that of Warren or Trusty. Respondent's presentation of its false defenses, moreover, is a failure under *Wright Line* to demonstrate that it would have discharged Hutton even absent her participation in the July 8 strike. I therefore find that Hutton's discharge was an implementation of the Respondent's repeated threats to discharge employees, such as Hutton, who had engaged in the July 8 strike. Accordingly, I conclude that the Respondent discharged Hutton in violation of Section 8(a)(3) and (1) of the Act.

8. Discharge of Eileene Jewell

Eileene Jewell was employed by the Respondent from about 2 months after the Hospital opened in 1987 until she was discharged on August 17, 2000.⁷¹ Jewell was first employed as a nurses' aide, and at some point thereafter she was transferred to be a housekeeping employee in the surgery department. For her last 6 or 7 years, Jewell was employed as an operating room technician whose duty it was to clean, dry, and sterilize surgical instruments and to keep records of the sterilization procedures that she conducted. The General Counsel contends that the Respondent discharged Jewell because she wore pronoun insignia before the July 8 strike and because she participated in that strike. The Respondent contends that it discharged Jewell because it discovered during the strike that, before she went on strike, Jewell had failed to properly clean and sterilize some surgical instruments. Ultimately, I find and conclude that the Respondent treated Jewell disparately by not affording her the benefits of its progressive disciplinary system and that it therefore unlawfully discharged Jewell.

⁷⁰ The indulgences afforded to Bradley, Usman, Burnette, and Khalid further explain why Cooper's, Trusty's, and Warren's direct examinations skirt, as they do, the computer training component of the requirements of the Compliance Agreement.

⁷¹ As noted above, Jewell is one of four employees who were not reinstated pursuant to the Union's August 15 offer to return to work from the July 8 strike.

As found above, the Respondent repeatedly threatened to discharge employees such as Jewell who participated in the July 8 strike; therefore, a prima facie case for Jewell's discharge has been proved, and, under *Wright Line*, the Respondent's defense for that discharge must be addressed.

Marjorie Fair is the Respondent's operating room director, and, as such, she was Jewell's supervisor at the inception of the July 8 strike. (Jewell also wore pro-union insignia before the strike and, on at least one occasion before the strike, Fair acknowledged to Jewell that she knew that Jewell was a pro-union employee.) By letter dated August 17, without stating a reason, Hospital Administrator Bevins informed Jewell that she was discharged. Bevins testified that, after consulting with Fair and Chief Nursing Officer Obenchain, he made the decision to discharge Jewell "for failure to apply proper procedures to the cleaning of instruments used within the operating room. The instruments came back with tissue and blood after cleaning, which will be a serious threat to patients on which these instruments may be used and could result in serious infections as a result of those instruments being unsterile."

Fair, who became the Respondent's operating room director on June 19, testified that she did an inventory of surgical instruments while Jewell and other employees were on strike. She noticed several trays of surgical instruments that had been improperly sterilized; she noticed that some of the instruments had not been cared for properly; and she noticed lapses in, and apparent falsification of, records of sterilizing procedures. Those records are required for continued accreditation of the Hospital by the Joint Commission of Accreditation for Hospitals (JCAHO).

Fair testified that she drafted four warning notices for Jewell during the July 8 strike, none of which she delivered because Jewell was participating in the strike. (1) Fair's first warning for Jewell, dated July 26, states that it is for the disciplinary violation of "unsat[isfactory] work performance." In the form's section for "Action Taken," Fair checked "Written Warning." (Other disciplinary options were "Verbal Reprimand," "Termination," "Disciplinary Suspension," and "Investigative Suspension.") In an area for "Discussion," Fair wrote:

Instrumentation not cared for in an appropriate manner. Delicate and very expensive instruments thrown in tray without care. Rust evident in ratchet mechanisms—proves instruments were not dried prior to sterilization—EJ initials on tape. Employee on strike line.

(The reference to initials is a reference to a procedure that requires any technician who packs items for sterilization to initial the tape that is used on the packing.) (1) On the notice form there is also a space for "Corrective Action Recommended," but Fair wrote nothing for that space. (2) The second written warning that Fair drafted for Jewell is not dated, but Fair testified that she signed it in late July. The notice states that Jewell had engaged in "substandard work." In the section for "Discussion," Fair wrote: "Did not maintain sterilization record as required by hospital standards, policies, and procedures, as well as JCAHO standards." In the form's space for "Corrective Action Recommended," Fair wrote: "Recommend termination—poor work ethic. This is third writeup in short period." In fact, it

was only the second warning notice that Fair had drafted by that point. (3) Fair did draft a third warning notice for Jewell which she signed on August 9; that notice recites that it is issued for “Substandard Work” and “Heckling of patient.” Under “Discussion,” Fair wrote: “Ortho[pedic] tray—dried blood found in tray & on instruments. Patient [name]—heckl-ing of patient from strike line when being dc’d [discharged?] from CP [cardiopulmonary?] surgery. No [number?] identified [Jewell].”⁷² (4) The fourth warning notice that Fair drafted for Jewell is also dated August 9. It states that Jewell is being issued a warning for “Substandard Work.” As “Discussion,” Fair wrote: “Improper and inadequate cleaning of orthopedic instruments. Cannulated [i.e., cylindrical] instruments found to be retaining human tissue and rust—handwriting on tape as well as misspellings [were] consistent with [Jewell’s] handwriting.” For the third and fourth warning notices, Fair wrote nothing in the spaces for “Corrective Action Recommended.”

The Respondent asked Fair, and she testified:

Q. Ms. Fair, would it be fair to say that you detected two types of errors, documentation and sterilization?

A. Yes.

Q. Did you make any recommendations regarding Ms. Jewell’s employment on the basis of the documentation errors alone?

A. Yes, I did.

Q. What was that recommendation?

A. I recommended termination.

Q. And who did you make that recommendation to?

A. Michelle Obenchain, the CNO.

Q. Okay. The final decision to terminate was not made by you, was it?

A. No, it was not. It was an administrative decision.

The Respondent also introduced voluminous records to show that Jewell had falsified records or neglected her recordkeeping responsibilities.⁷³ The Respondent also called one Debbie Gross to testify that she witnessed Jewell engaging in recordkeeping derelictions. And the Respondent also inquired of Obenchain about what Fair had reported to her about Jewell’s recordkeeping practices. On cross-examination of Fair, however, it was demonstrated that at least one other employee, Martha Jackson, could have been responsible for the recordkeeping problems, to the extent they may have existed. Fair also admitted that she “must have” also discovered errors by Jackson, but she did not discipline Jackson.

On further cross-examination by counsel for the General Counsel, Fair was asked and she testified:

Q. Now you didn’t talk to Eileene Jewell about any of this, did you?

⁷² Fair was not asked to explain the notice’s abbreviations. Also, the General Counsel did not ask Fair on cross-examination to explain her reference to “Heckling of patient.” (Of course, if Jewell’s alleged “heckling” of a discharged patient had proved to be no more than an appeal not to patronize the Respondent further, additional discussion on that point would be required.)

⁷³ R. Exh. 30, as corrected by a posthearing stipulation and submission, consists of 118 pps.

A. Well, I didn’t have an opportunity to. But, had she been at work, I would have. Yes.

Q. Had she been at work, would you have talked to her about it, warned her about it, and then given her an opportunity to improve?

A. I don’t know. After eight years of being in there, those are—that’s kind of basic stuff. You know. Her job—that was her job. And if she’d been in there that long and didn’t know how to do it, I don’t know how much of a chance I’d have given her. If I had talked to her once and the problem had persisted, I may not have been that tolerant.

Q. But you would have talked to her at least once?

A. Well, yes, at least once.

Immediately, counsel for the Union asked, and Fair testified:

Q. Ms. Fair, you testified, I believe, that you would have talked to [Jewell] at least once to give her an opportunity to correct the problems that you found, is that right?

A. Yes, I would have.

Q. And in general it’s true that Kentucky River Medical Center believes in a progressive discipline process, right?

A. Correct.

Q. And so I guess the reason that Ms. Jewell didn’t hear about these warnings is because she’s on strike, right?

A. Correct.

Q. And because she was on strike, she didn’t have an opportunity to correct the errors that you found, isn’t that right?

A. No, she didn’t have that opportunity, but this was her job.

Obenchain testified that during the July 8 strike, over a period of several days, Fair brought to her examples of Jewell’s lapses in recordkeeping. Fair also brought to her trays of surgical instruments that Jewell had not properly cleaned before sterilization, and Fair brought to her instruments that Jewell had allowed to rust. Additionally, Obenchain described other surgical instruments that Fair had showed her as having been processed by Jewell:

I’m not an OR nurse, let me clarify. But what it was, was a bone [surgery instrument] tray. And [Fair] explained to me that this one piece of tubing was a hollow tubing I believe to use as a drill into the long bones. And it was occluded with tissue—fatty tissue that was still in it. And on the outside of that same instrument where the grooves were, were caked with tissue. This would have been a massive infection if that instrument had ever been used on another patient. You cannot sterilize that kind of tissue.

(The “hollow” instrument that Obenchain described apparently was of the type of “cannulated” instrument that Fair described in the second August 9 warning notice that she issued to Jewell.) Obenchain testified: “I recommended to Mr. Bevins that Ms. Jewell be terminated based on the fact that she did not do her job. There were many instances of this and that this could have been life-threatening to a patient if these instru-

ments had been used.” On cross-examination, Obenchain testified that Jewell had been discharged for her failures in recordkeeping, as well as failures to properly clean surgical instruments; Obenchain insisted that Jewell’s recordkeeping responsibilities were “equally important” as her responsibilities for cleaning surgical instruments.

Conclusions on Jewell’s Discharge

As noted, Bevins testified that he made the decision to discharge Jewell and that he made that decision because of Jewell’s failure to properly clean surgical instruments. Bevins did not mention Jewell’s alleged recordkeeping problems in his testimony, and on brief the Respondent expressly disavows any suggestions that Jewell’s recordkeeping practices played any part in her discharge. In so doing, the Respondent does not mention its leading of Fair to testify that she recommended the discharge of Jewell because of her recordkeeping practices “alone.” The Respondent does not mention the voluminous exhibits that it introduced to support Fair’s testimony in regard to Jewell’s recordkeeping practices. And the Respondent does not mention the testimonies of Obenchain and Gross that it introduced in further support of a defense that it discharged Jewell, at least in part, for her recordkeeping practices. The Respondent’s attorney is a highly sophisticated labor law attorney. I simply do not believe that he advanced all of this evidence because, before doing so, he had failed to ask Bevins why he discharged Jewell. Moreover, Obenchain testified on cross-examination that Jewell was discharged, in part, because of her recordkeeping lapses; Obenchain would not have done so unless, at some point, Bevins had told her that that was the case. It is obvious that the Respondent simply abandoned its recordkeeping defense for Jewell’s discharge at some point between the time that that defense was destroyed by the cross-examination of Fair and the time that Bevins testified. The advancement of this sham defense, at least, casts a suspicion on the remaining defense that the Respondent offers for Jewell’s discharge.

The sole reason the Respondent now assigns for the discharge of Jewell is that “she left blood and human tissue on surgical instruments [that] she supposedly had cleaned.”⁷⁴ The General Counsel did not call Jewell in rebuttal to deny that she had, at least once, failed to clean from a tray of surgical instruments matter that could not be sterilized, blood and human tissue. Nor does the General Counsel dispute the testimonies of Obenchain and Bevins that such unclean instruments could cause a patient serious infection. Nevertheless, the General Counsel and the Charging Party argue on brief that a violation of Section 8(a)(3) has been proved in Jewell’s case because of the Respondent’s demonstrated animus (i.e., its repeated threats to discharge strikers such as Jewell), the Respondent’s knowledge of Jewell’s union sympathies and strike activities, and the failure of the Respondent to afford Jewell the benefit of its progressive disciplinary system which calls for oral and written

warnings, and a disciplinary suspension, before a discharge.⁷⁵ I agree.

In a context of animus, a finding that an employer has failed to follow its own established disciplinary procedures will support an inference of discriminatory motivation. See, for example, *Ingles Markets, Inc.*, 322 NLRB 122, 125 (1996); *Florida Tile Co.*, 300 NLRB 739, 741 (1990), *enfd.* 946 F.2d 1547 (11th Cir. 1991). Such a context of animus was demonstrated by the Respondent’s repeated threats to discharge employees who engaged in the July 8 strike.

The Respondent’s written disciplinary policy does contain 25 categories of immediately dischargeable offenses, and the progressive disciplinary system does not apply to those listed infractions.⁷⁶ The only one of those 25 categories that arguably applies to Jewell’s job misconduct is “failure to perform reasonable assigned tasks.” Strictly read, any employee’s failure to do any job satisfactorily would fall within that rule. The Respondent, however, does not argue that it has ever applied such a harsh interpretation of that disciplinary rule, and it does not argue that Jewell’s case represents its first such interpretation. Moreover, the fact that Fair issued warning notices demonstrates that Jewell’s misconduct was less than that which would ordinarily cause a discharge without the employee being given the chances to improve that are afforded by the Respondent’s published progressive disciplinary system.

Fair, during her cross-examination, admitted that, had Jewell not been on strike, she would have delivered the warning notices to Jewell and allowed her to have chances to improve her performance. The Respondent argues: “Whether Fair would have counseled Jewell if she had not been on strike is irrelevant since Bevins, rather than Fair, made the decision to terminate Jewell.”⁷⁷ Bevins, however, did not testify as to why he disregarded the Respondent’s established progressive disciplinary system in deciding to discharge Jewell; nor did he testify that he told Fair that, if she ever found another unclean tray of surgical instruments, she should discharge the guilty employee on the spot, without giving the employee the benefit of the prior delivered warnings and disciplinary suspension that are required by the Respondent’s progressive disciplinary system.

I do not minimize the peril that a tray of unclean surgical instruments may present to a patient. Nevertheless, I must note that Respondent’s defense for the discharge of Jewell assumes that a surgeon, or a nurse who was assisting a surgeon, would not notice the blood and tissue that Fair claims to have noticed. I am further skeptical of Fair’s testimony that she, in fact, found multiple contaminated trays of instruments that had been packed by Jewell. Certainly, any employer could meet a returning striker with claims of prestrike job errors, thus seriously undermining the striker’s right to reinstatement under *NLRB v. Erie Resistor Corp.*, 373 U.S. 321 (1963), and its progeny.

Assuming, however, the truthfulness of Fair’s testimony, it is to be noted that her (undelivered) warning notices categorized

⁷⁴ Br. 70.

⁷⁵ See sec. B.7 of Community Health Systems’s policy manual, as contained in GC Exh. 57, which lists the four steps of the Respondent’s progressive disciplinary system.

⁷⁶ *Id.*

⁷⁷ Br. 75.

Jewell's failures only as "substandard work," and the Respondent's listing of immediately dischargeable offenses does not include mere "substandard work." Again, I appreciate that Jewell's substandard work may have endangered a patient (or patients—the number of affected surgical instrument trays was not proved by the Respondent). There are, however, innumerable opportunities in the daily workings of a hospital for life threatening endangerments of patients by simple failures by employees to do their routine jobs according to the standards of their employers.⁷⁸ Common logic, as well as the existence of the Respondent's published progressive disciplinary system, indicates that the Respondent would not necessarily discharge an employee for nonintentional mistakes about which that employee had not received warnings, even if the life of a patient is endangered by those mistakes. This is especially true for long-service employees such as Jewell who had worked for the Respondent almost from its opening in 1987.⁷⁹ These factors cause me to find, as I do, that the Respondent has not demonstrated by a preponderance of the evidence that, even absent her protected strike activities, it would have discharged Jewell.⁸⁰ I therefore find and conclude that the Respondent violated Section 8(a)(3) by discharging Jewell.

9. Suspension and discharge of Debbie Miller

Debbie Miller was hired by the Respondent in 1993 and discharged on August 22. Miller was a phlebotomist who worked under Laboratory Supervisor Dianne Blankenship. As I have found above, Blankenship threatened the laboratory employees, including Miller, that strikers would lose their jobs. The General Counsel contends that the Respondent carried out that threat by discharging Miller because of her participation in the strike. The Respondent contends that it discharged Miller solely because of her insubordination which consisted of her telling Blankenship to "take this job and stick it in your ass," which remark Miller admits making. Ultimately, I find and conclude that the Respondent not only discharged Miller unlawfully, but before doing so it also suspended her in violation of Section 8(a)(3).⁸¹

⁷⁸ For example, Laboratory Supervisor Blankenship acknowledged that, in January 1999, phlebotomist Patricia Bailey knowingly collected a sample from the wrong patient. Blankenship further acknowledged that Bailey's error "could have been fatal," but her punishment of Bailey was only a 5-day suspension.

⁷⁹ If the Respondent employed any employee longer than Jewell, it certainly did not mention the fact at trial. Also, if Jewell had received any other discipline during her long service, the Respondent did not mention the fact at trial.

⁸⁰ I further note the Respondent's strategic abandonment of its defense that it discharged Jewell, at least in part, because of her record-keeping deficiencies. The Respondent's extensive effort to adduce that defense upon which it ultimately does not rely smacks of a "shifting defense" that the Board has always held to be evidence of pretext. See, for example, *NLRB v. Future Ambulette*, 903 F.2d 140 (2d Cir. 1990), enfg. as modified 293 NLRB 884 (1989).

⁸¹ On August 21, Blankenship sent Miller home before Miller's shift had ended. Although the complaint does not allege that act as an unlawful suspension, the matter was fully litigated. As the Board states in *Poly-America, Inc.*, 328 NLRB 667 (1999): "It is well established that the Board may find and remedy a violation, even in the absence of a

As found above, the Respondent repeatedly threatened to discharge employees such as Miller who participated in the July 8 strike; therefore, a prima facie case for Miller's suspension and discharge has been proved, and, under *Wright Line*, the Respondent's defenses must be addressed.

The Breathitt County Voice is a local newspaper that has a running column called "*A Piece of Your Mind*." Individuals are allowed to make anonymous telephone calls to the newspaper and, with certain restrictions, leave brief recordings of their points of view on sundry topics. One of the restrictions is that individuals' names may not be used. The August 16 column contains such pearls as: "The restaurant needs to call Orkin" and "I don't want your man. If I did, I would come and get him." The August 16 column also contains many comments (all negative) about the strike and the strikers. Two of the comments, in immediate succession, are: "Is your mother still paying your bills now that you're on the picket line?" and "Why would anyone use their 15-year-old daughter to gain ground for the Union? Maybe we should call child services." Miller's 15-year-old daughter Amanda participated in some of the picketing during the July 8 strike.

On August 21, Miller returned from strike to work on the second shift. Also working that shift were several laboratory employees who had not participated in the strike, including Toby Arnold, an antiunion employee.⁸² During the shift, according to Miller, the former nonstrikers refused to speak to her and grabbed incoming orders in order to prevent her from answering any of them herself. At a time that she, as a result of these tactics, had nothing else to do, Miller picked up a copy of the August 16 newspaper and read the "*A Piece of Your Mind*" column. Miller testified that she believed that the second quoted comment referred to her because she was the only striker whose 15-year-old daughter had engaged in the picketing during the July 8 strike. Miller testified that, upon reading the comment:

I asked them all which one of them had put that in the paper. And they wouldn't answer. So I asked Toby, did he do it. And he said "No."

And I told him, "Well, I would hate to think that you all would be so low to bring my child into this. You have a child. How would you feel if somebody would put that in the paper about your child?"

And he says, "Well, that sounds like a threat to me."

And I said, "I didn't threaten you, Toby." I said "I don't go around threatening people."

He said, "Well, neither do I."

Later in the shift, further according to Miller, she went to collect a blood sample; when she returned to the laboratory, Blankenship was there, even though it was not a usual hour for Blankenship to be at the Hospital. Miller testified:

specified allegation in the complaint, if the issue is closely connected to the subject matter of the complaint and has been fully litigated."

⁸² Again, Arnold created the "EX-KRMC EMPLOYEES" sign discussed above.

And before I could even sit my tray down, [Blankenship] said, "Toby called me and said you threatened him."

I said, "Toby's ass. I didn't threaten him."

And she said, "Well, I'm not gonna tolerate that kind of talk in here."

And I said, "Well, why not? You do it."

And she said, "Well, what was you all discussing?"

And I said, "Well, we was discussing the article in the paper. I asked him which one put that in the paper about Amanda."

...

And she said, "Well, you need to get your stuff and go home."

And I said, "Well, why are you sending me home?"

She said, "Because you threatened Toby."

I said, "I didn't threaten Toby, Diane. He's lying."

And she said, "No, he's not. . . . Go get your stuff and I'll let you know my decision tomorrow."

...

So as I was starting to go, and I told her, "Diane, you have children, too. Wouldn't it make you mad if somebody put that in the paper about them?"

And she said, "Well, I never would involve my children in something like that."

And that's when I told her, "Well you can just take this job and stick it in your ass." Then I left.

By letter dated August 22, Bevins informed Miller that her employment had been terminated "on account of your behavior last evening."

Bevins testified that "Debbie Miller was discharged for gross insubordination by threatening children of a supervisor and by telling the supervisor that she could take the job and cram it up her ass." (Bevins did not mention Miller's reading the newspaper while on duty as a reason for discharging her; moreover, Blankenship did not testify that newspapers were contraband in the laboratory, and Miller credibly testified that employees were allowed to read when they had nothing else to do. I therefore need not discuss certain testimony regarding reading practices in the laboratory.)

Arnold testified for the Respondent that Miller accused the entire evening shift's complement of placing the comment in the newspaper and:

I said, "I don't know what anybody else did, but I'm telling you, you know, that I didn't put anything about you in the newspaper."

And then she said, "Just remember, you've got a child, too."

And I said, "Well, is that a threat?"

And she kind of looked at me and she said, "No."

And then I just walked off. And that was it, and we didn't speak for a while.

...

And then later I had to walk by her again, and she . . . said, "Just remember, I don't make threats, I make promises."

And I said, "Well, that's fine," like that.

(Arnold testified to other conduct by Miller, but that conduct was outside the presence of Blankenship or any other supervisor, and Arnold did not testify that he reported that other conduct to supervision.)

Blankenship testified that Arnold had called her at home and told her that Miller had made threatening remarks to him. When she got to the laboratory, Arnold told her:

that she [Miller] had been sitting at the phlebotomy desk for a while reading the paper. And she came back and asked him had he put something in the paper about a 15-year-old girl in Social Services. And he told her, "No," that he hadn't. She said something to the effect that, "Well, you know that you have a son, too. How would you like it if something happened to him?" And he said, you know, "Are you threatening my son?" And she said, "Well, you know, if it wasn't you then it was some of the low-lifes that work the evening shift in here. And I'll find out who it was."

Blankenship then came to the laboratory where she met Miller. Further, according to Blankenship:

But when I got there, she wasn't in the laboratory, she was in the emergency room. And when she came back, I asked her what was going on between her and Toby. And she said, "Nothing."

And I said, "Well, Toby feels like that you're harassing him about this thing in the paper. And you made threatening remarks about his child."

And she said, "Toby's ass," were her exact words, "He's lying."

...

And I said, "I think you should just go home now and tomorrow I'll contact you and we'll see where we're going to go from here about this situation."

And she just kind of threw her hands up and went into the break area. And she was gone—uh, about five minutes. And when she came back in, she just—she told me, she said, "Take the job and cram it."

And I said, "Okay, but you need to leave now."

And then she started saying [that] she hoped that everybody in there got what they deserved, and she said we were all son of a bitches, and that she hoped we all got what we deserved.

And Toby told her good-bye. And then she cussed him a little bit. And I went to the door and asked her to leave. I told her [that] she needed to go ahead and leave. And she did.

(Blankenship admitted on cross-examination that she knew that Arnold was taunting Miller when he told her goodbye.) Blankenship further testified that, after Miller left, she spoke to Bevins that night and told him "the gist" of what she had testified to.

In rebuttal, Miller denied stating to Arnold that she did not make threats because she made only promises. She further denied threatening Blankenship's children.

Conclusions on Miller's Suspension and Discharge

The issue is whether the Respondent's suspension and discharge of Miller was a manifestation of the threats by its supervisors, including Blankenship, to discharge strikers, or would the Respondent have suspended and discharged Miller even absent her participation in the July 8 strike.

Again, Bevins testified that "Debbie Miller was discharged for gross insubordination by [1] threatening children of a supervisor and [2] by telling the supervisor that she could take the job and cram it up her ass." The first reason, of course, is false. There is no evidence or contention that Miller threatened the children of Blankenship or any other supervisor. Assuming, however, that Bevins meant to testify that Miller threatened Arnold or Arnold's children, I find that the preponderance of the credible evidence is that she did not do so; nor do I believe that the Respondent's supervisors believed that she had done so.

On August 21, Miller asked Arnold and other nonstrikers if they had caused to be placed in the local newspaper a comment about her daughter's participation in the Union's picketing during the July 8 strike. Arnold denied it. According to Miller she then replied, "How would you feel if somebody would put that in the paper about your child?" Arnold, however, testified that Miller replied, "Just remember, you've got a child, too." Miller and Arnold agree that Arnold then told Miller that he felt that Miller was making a threat and that Miller then denied that she was threatening him. Arnold additionally testified that Miller came to him minutes later and said that she made promises, not threats. Miller denied making this additional comment. I believe, and credit, Arnold. Nevertheless, I can find no threat by Miller in Arnold's testimony. First, Miller told Arnold that she was not threatening him; then she said that she did not make threats, only promises. There was still no "promise," or threat, to do anything to, or about, or with, Arnold's children. Nor was there any statement that she would be, or could be, in proximity to Arnold's children at a time when Arnold was not present (a factor that distinguishes Gayheart's case). At most, Miller was asking Arnold to be considerate of her feelings as a parent who was being accused of taking undue advantage of her child.

Arnold testified that he reported to Blankenship what Miller had said to him. Blankenship, apparently recognizing that there really was no threat in Arnold's report, enlarged on it. Blankenship testified that Arnold had reported to her that Miller had told him, "Well, you know that you have a son, too. How would you like it if something happened to him?" Blankenship further testified that Arnold reported to her that, at that point, he asked Miller if she was threatening him. Blankenship further testified that Arnold reported to her that, rather than denying that she was then making a threat, Miller answered Arnold's question by threatening other employees by stating "if it wasn't you then it was some of the lowlifes that work the evening shift in here. And I'll find out who it was." All of this testimony by Blankenship is, of course, completely undermined by Arnold's testimony that did not include the specific threat to Arnold's son and did not include a threat to seek out (and, implicitly, to harm) the other employees. Finally, Blankenship did not even mention the "promise" statement that Arnold attributed to

Miller. All of which is to say that Miller did not threaten Arnold, and Blankenship knew it; otherwise, she would not have found it necessary to enlarge on Arnold's report. Presumably Blankenship reported to Bevins what she (falsely) testified that Arnold had reported to her. Therefore, Bevins' testimony that he discharged Miller, in part, because she had threatened Arnold (or Arnold's children, or Blankenship's children) rests entirely on the knowingly false report that Blankenship gave to Bevins.

Nor does the evidence support the Respondent's defense that it discharged Miller, in part, because of her unprovoked vulgarity toward Blankenship. Blankenship refused to accept Miller's denial that she had threatened Arnold's children, and then Blankenship told Miller to leave the laboratory. Miller's shift was not over; therefore, Blankenship's ordering Miller to leave the laboratory was a suspension. On brief, the Union contends that Miller's suspension was unlawful. I agree. Again, Blankenship's finding it necessary to enlarge on Arnold's report shows that Blankenship did not actually believe that Miller had threatened Arnold's children. The defense for the suspension, therefore, rests on a pretext.

Moreover, as the Union further contends on brief, Miller's reaction to her unlawful suspension, albeit crude, did not justify the Respondent's discharging her. In *Scientific Ecology Group, Inc.*, 317 NLRB 1259 (1995), an employee was unlawfully discharged. As he departed the premises, he told his supervisor, "Stick it up your ass." The Board approved the administrative law judge's reasoning that the remark (albeit profane, insubordinate, and crude) was not an act of actual or threatened violence, and it did not disqualify the unlawfully discharged employee from reinstatement because unlawfully discharged employees should be afforded some latitude in their oral responses. Similarly, the Respondent's provoking Miller by unlawfully suspending her afforded her at least the same latitude for oral response. The Respondent's discharge of Miller, as well as its suspending her, therefore violated Section 8(a)(3), as I find and conclude.

10. Discharge of Lois Noble

Lois Noble, a phlebotomist, was hired on April 11 and discharged on August 28. The General Counsel contends that the Respondent discharged Noble because of her participation in the July 8 strike. The Respondent contends that it discharged Noble solely because she was a probationary employee who proved to be unsatisfactory. Ultimately, I find and conclude that the Respondent presented only pretexts to defend Noble's discharge and that it discharged Noble in violation of Section 8(a)(3).

As found above, the Respondent repeatedly threatened to discharge employees such as Noble who participated in the July 8 strike; therefore, a prima facie case for Noble's discharge has been proved, and, under *Wright Line*, the Respondent's defense for that discharge must be addressed.

Noble was a PRN employee; that is, she was on call if another employee could not appear for work or if gaps in schedules otherwise appeared. Noble testified that during her employment interview she told Laboratory Supervisor Dianne Blankenship that she did not have a telephone but that she

could be reached by Blankenship's calling her mother-in-law who lives "at the bottom of the hill from me." Some time after she was hired, Noble secured her pager by which the Respondent could contact her when needed. Noble testified that, thereafter, the Hospital would reach her either through her mother-in-law or by the pager. Noble testified that, in addition to being on call, "I was on the schedule every week. I had certain hours I was scheduled for." (Documentary evidence that the General Counsel adduced in support of this last assertion is discussed below.)

Noble testified that she wore a union button nearly every day before the strike and that she participated in the strike. At the end of the strike, other employees received from Bevins memoranda stating that the Union's offer to return to work had been received and that: "Accordingly, we have scheduled you and we expect that you will report back to work on ___ to the shift beginning at ___." Memoranda to other strikers had the blanks filled in with the date and shift, respectively, of the expected returns. The memorandum that Noble received, however, had "we will contact you" in the first blank and nothing in the second. (That is, Noble was one of the four strikers whom the Respondent did not reinstate pursuant to the Union's August 15 offer to return to work. Again, other employees were reinstated as early as August 20.)

On Thursday, August 24, Blankenship called Noble's pager. Noble called Blankenship back, and Blankenship asked Noble to report on August 28, not for a shift but for a conference. According to Noble's testimony, when she arrived Blankenship told her that she had been trying to reach Noble "all the previous week" and had been unable to do so. Noble replied that the only page that she had received during the week was Blankenship's page of August 24. Blankenship then told Noble that during the week of July 4 Noble had made five incorrect Medicare computer entries and that those mistakes had cost the Hospital money. Further according to Noble, Blankenship stated that: "You understand, this is your 90-day evaluation. . . . I'm going to recommend your termination." Blankenship then told Noble to sign some probationary review papers and to return her identification badge, which Noble did. Noble has not been called for work by the Respondent since August 28, and the Respondent admits that she was discharged on that date. (Unlike the other alleged discriminatees in this case, however, Noble did not receive a discharge letter.) Noble testified (without contradiction) that, before the discharge interview, Blankenship never told her that the laboratory had experienced difficulty in reaching her to get her to come in for shifts in addition to those for which she had been prescheduled.

The General Counsel placed in evidence the laboratory schedules for the period of time from when Noble was hired in April until the inception of the July 8 strike.⁸³ For most of the approximately 20 employees in the laboratory, the schedules are typed with employees' hours, usually for the same shifts each week. Handwritten changes are often entered. As the schedules reflect, Noble worked during 13 weeks before the strike. Noble worked four shifts during her first 2 weeks (as was handwritten in the schedule, probably because she was a

new employee). Thereafter, the laboratory schedule shows that Noble was prescheduled (as typed) for "4, 4, 4, 2, 1, 2, 3, 0, 2, 2, and 4 shifts per week," with the shifts being varied from day to day and week to week. During the last 7 weeks of Noble's tenure before the strike: (1) Although Noble was prescheduled for two shifts during the week of May 21, she was written in for one more. (2) Although Noble was preschedule for two shifts during the week of May 28, she was written in for two more. (3) Although Noble was preschedule for three shifts during the week of June 4, she was written in for one more. (4) Although Noble was prescheduled for no shifts during the week of June 11, she was written in for four. (5) Although Noble was prescheduled for two shifts during the week of June 18, she was written in for one more. (6) Although Noble was prescheduled for one shift during the week of June 25, she was written in for two more. (7) During the last week before the strike (the week of July 2), Noble was prescheduled for a shift on each of 4 days; to wit: July 2, 4, 5, and 6, but she was written in for no additional shifts. Additionally, the typed schedule lists Noble as "Off" for July 7 and 8. Noble testified that at least four of the written in entries were occasions upon which she was called (or paged) at home to work.⁸⁴

Although Noble denied being unavailable for calls as a PRN employee, she did admit to having difficulties in the other area that Blankenship mentioned in the discharge interview, computer procedures. On direct examination Noble was asked if, prior to the July 8 strike, Blankenship had "talked to you about something you had done at work that wasn't right?" Noble answered that, between June 1 and June 15, Blankenship:

. . . said that I had skipped a test on ordering it in the computer. And she told me that I had to be very careful when ordering the tests and to be careful and to make sure I didn't let it happen again. . . . She was friendly, yet, firm about it. I didn't feel like I was getting bawled out because we were in the lab in the middle of the room with everybody else. . . . So I didn't think she was that upset with me.

Noble testified that in her previous employment she had not used computers. Noble testified, however, that: "On a number of occasions I had mentioned that I was worried about messing up on the computer. And she [Blankenship] told me that I was doing fine, not to over-stress out about it. That to take my time, but I was doing good."

Bevins testified that he decided to discharge Noble "for failure to meet the standards which are required by an employee in her position by rendering substandard care during her probationary period." Bevins testified that he received the information upon which he based his decision to discharge Noble from Blankenship, but he did not testify what that information was.

When Blankenship was on direct examination, the Respondent asked: "Would you please relate to the Administrative Law Judge what you are aware of that led to the decision to no longer employ Ms. Noble?" Blankenship began a multiparagraph answer that began with:

⁸⁴ As I discuss *infra*, the Respondent objected to the receipt of none of the evidence that supports the findings of this paragraph.

⁸³ On these exhibits, Noble appears as "Napier," her maiden name.

Ms. Noble was a PRN employee who was in her 90-day probationary period. I had several concerns about her work. Some mistakes that she made and just her general abilities and how she was picking up the job that was expected of her. Also, we had lots of problems reaching her when we needed her because she didn't have a phone. And as a PRN person, I impressed upon her when she was hired that we needed to be able to get in touch with her when we needed her so she could come in.

Blankenship did not define or detail what she meant by "lots of problems" in contacting Noble. Specifically, she did not deny that she had been given, and that she had successfully used, Noble's pager's number or reached Noble through her mother-in-law.

The "mistakes" that Blankenship attributed to Noble had to do with Noble's answering of a Medicare computer inquiry. The inquiry had to do with laboratory tests that physicians ordered to be repeated within a 24-hour period. As of July 1, 2000, Medicare will not pay for a duplicated test; it will, however, pay for a repeated test if a physician has ordered the test to be repeated. If a phlebotomist entered in the computer that he or she has drawn blood for a test, and if the same test had been done within the previous 24 hours, the computer would, in effect, challenge it as a duplicate. The phlebotomist was to enter a "modifier" or code that indicated that it was a repeat test that had been ordered by the doctor, not a duplicate. Blankenship testified that she did an "in-service" teaching session with the laboratory personnel before July 1 so that they would know how to attach the required modifier when making computer entries.

Blankenship further testified that on July 3 she checked the records of over 800 tests that had been done on July 1 and 2. She found six errors; all were by Noble, and all involved failure to indicate that the tests were repeats, not duplicates, even though they actually had been repeats. Blankenship testified:

Had these gone through billing in that way, then none of those procedures would have been paid. And also, the bigger concern is that you're not complying with Medicare's regulations. And if you don't comply, and you don't show that you are making effort to comply, then you are—you can be found guilty of fraud. And CHS [Community Health Systems, the Respondent's corporate parent] takes it very seriously . . . [b]ecause it can lead to millions of dollars in fines and also lead to you not being able to participate in Medicare.

After this, Blankenship was asked, and she testified:

Q. Did you have any occasion to speak with anyone in management at Kentucky River Medical Center about your discovery of these [computer] errors?

A. Yes . . . [o]ur compliance officer, Randy Cooper.

Q. Okay. And what can you recall that—that occasion, anything that you might have said out loud to each other on that occasion?

A. I said it was obvious that she was not paying attention. Because the errors were random. Most of the things she entered [on the computer] that day were right. But she

had five on one day, and one on the next that were incorrect. And no one else was having a problem with this.

And he said that well, obviously, you know, her mind wasn't on what she was doing. Because it's not a skill-based issue.

(Blankenship did not testify that she made any recommendations to Cooper about Noble's tenure with the Respondent, and Cooper denied any involvement with Noble's discharge.) Blankenship further testified that, although Medicare did not require the duplicate-or-repeat entries until July 1, the Respondent had been requiring the computer entries "for some time."

Blankenship further testified that on August 28 she told Noble that she was still in her 90-day probationary period because of her absence on strike; further according to Blankenship:

And I told her that I was making a recommendation that she not be continued in employment. And the reasons for that were that I didn't feel that she was performing up to our requirements, that she had made errors in orders. She was not picking the skills up to the level that I liked. And the situation with the modifiers—I went over that with her and told her, you know, that those numbers were really strange. Because I had never seen that. I haven't seen it since, that number of errors. And I told her at that point I didn't feel that it was in our best interest to keep her on as an employee. That we were letting her go.

Blankenship testified that the records that supported her analysis of Noble's computer errors had been routinely shredded.

For the last question of Blankenship's direct examination, counsel for the Respondent asked, and Blankenship testified:

Q. Now was Ms. Noble at work on this particular occasion—at this particular time when you discovered these errors?

A. No.

The records in evidence support this testimony; Noble was not scheduled to work on July 3, the "particular time" that Blankenship discovered Noble's computer errors. Noble was scheduled to work on July 4, but Blankenship was not. On July 5 and 6, however, both Noble and Blankenship were scheduled to be at work.

Because she had testified that, as of July 1, Medicare required that a "modifier" be attached to computer files to indicate that a test was a repeat and not a duplicate, I was constrained to ask Blankenship, and she testified:

JUDGE EVANS: All right. And how do you attach that modifier? Do you answer "yes" or "no"—

THE WITNESS: You answer "yes" or "no" to a little—there's a column on the order in the computer screen that you're—that you're ordering it. And it says, "repeat test" and at that point, you type a "yes" or a "no."

JUDGE EVANS: And on what occasion do you type "yes," and on what occasion do you type "no?"

The Witness: The computer flags you—you enter the test and if it is a duplicate test, if this test has been entered previously that day, within a 24-hour time frame, a red screen will come across and say, "This is a duplicate or-

der.” At which point, you change your—if you’ve entered an “N,” you change it to a “Y,” or you enter the “Y,” saying that—I mean, it’s very straightforward and very obvious.

JUDGE EVANS: Next question.

On cross-examination, Blankenship acknowledged that she had problems contacting other PRN employees, as well as Noble, and Blankenship acknowledged that PRN employees are not required to be available, or even “reachable,” every time that she attempts to call them. Nor are PRN employees required to come to work when they are reached, and Blankenship did not testify that Noble ever refused to come in when she was reached.⁸⁵

Also on cross-examination Blankenship acknowledged that, in January 1999, phlebotomist Patricia Bailey collected a blood sample from the wrong patient. Blankenship further acknowledged that Bailey’s error “could have been fatal,” but her punishment of Bailey was only a 5-day suspension. Blankenship also acknowledged having given Bailey a verbal warning on one other occasion. On redirect examination, Blankenship was asked to distinguish between Noble’s errors and Bailey’s “incidents” (plural). Blankenship replied that Bailey “was not on her probationary period when she got her verbal warning.” Blankenship gave no reply regarding Bailey’s sample-collecting error.

It was also brought out in Blankenship’s cross-examination that she issued to James Smith, another probationary employee, oral and written warnings for tardiness and absenteeism, but she did not discharge Smith. On redirect examination, Blankenship stated that Smith had had car troubles and that “he was a very good phlebotomist.”

Although Blankenship had testified on direct examination that Noble’s mistakes of July 1–2 were the only ones of 700 or 800, she acknowledged on cross-examination that her pretrial affidavit states: “Noble’s were the only mistakes out of between 75 and 200 transactions. That is 75 to 200 transactions entered into the computer from throughout the Hospital.”

Blankenship further acknowledged that the Respondent’s written policies require that PRN employees work only two shifts per month, that Noble worked many more shifts each month than that, and that Noble was regularly scheduled.

Blankenship acknowledged on cross-examination that she could not remember if Noble had been present when she gave the inservice instruction on how to attach the modifier to the computer entries that Medicare began requiring on July 1. When Noble was on cross-examination, she admitted to having received training only from another employee, Sharon Sparks. Noble testified that Sparks instructed her that, when the computer asked if a test were a duplicate, to always answer, “No.” When asked if she did always answer, “No,” Noble replied evasively: “What if it wouldn’t take ‘No’?”⁸⁶

⁸⁵ In Dunn’s case, it was noted that three of the four laboratory employees who were called to replace Chuck Arnold on April 28, 2001, simply said, “No.”

⁸⁶ Neither side called Sparks to testify.

Conclusions on Noble’s Discharge

Noble’s evasive answer make it clear that, at least on some occasions, she failed to indicate on her computer entries that certain medical tests were repeats (for which Medicare pays) and not duplicates (for which Medicare does not pay). This finding, however, does not conclude the inquiry. In view of the animus that was displayed by the Respondent’s multiple threats to discharge strikers such as Noble, the issue under Wright Line remains: Would the Respondent have discharged Noble for her erroneous computer entries, or for any other reason, even absent her protected activity of engaging in the July 8 strike?

Bevins testified that he decided to discharge Noble because she had been “rendering substandard care.” The Respondent did not ask Bevins what he meant by “substandard care,” but Bevins presumably meant substandard care of patients; no other interpretation makes any sense. The Respondent, however, introduced no evidence that Noble rendered substandard care to any patient, and, under *Wright Line*, the Respondent’s defense fails on that account, alone. Therefore, without more, I would find and conclude that the Respondent violated Section 8(a)(3) by discharging Noble. But there is more.

On brief, the Respondent states: “The Hospital decided not to retain Noble, a probationary PRN phlebotomist, beyond her probationary period after she made multiple Medicare computer errors that no one else made and after being warned that further mistakes could not occur.”⁸⁷ This statement, to the extent that it implies that Noble had received a warning of discharge or other discipline, is false. The only support that the Respondent cites for its assertion that Noble once received a warning is Noble’s testimony on direct examination that, in early June, Blankenship had “talked to [her] about something [she] had done at work that wasn’t right.” Noble did testify that Blankenship told her that “I had to be very careful when ordering the tests and to be careful and to make sure I didn’t let it happen again,” but Noble did not testify that she received any sort of disciplinary warning at the time. Moreover, the circumstances of the incident as Noble described them (being in the middle of the laboratory with other people around) do not permit an implication that a disciplinary warning was given. Additionally, Blankenship did not mention this “warning” in her testimony; if Blankenship had considered the June incident to have included a disciplinary warning, she assuredly would have so testified. Also, Noble described her June mistake as “skipp[ing] a test on ordering it in the computer.” Blankenship testified that she discovered Noble’s July 1–2 computer errors on July 3. What Noble’s June mistake entailed was not developed in the record, but if Blankenship had considered it to have been of the same type that she found on July 3, she would have mentioned that in her testimony, as well.

Moreover, assuming (illogically) that Bevins was referring to Noble’s computer problems when he cited Noble’s “rendering substandard care” as the basis for his decision to discharge her, there is no evidence that those problems ever came to the attention of Bevins. At trial, Blankenship testified that she told Noble that she “was making a recommendation that she not be continued in employment” because of her failure to properly

⁸⁷ Br. 96.

make computer entries. Blankenship, however, did not testify that she, in fact, made such a recommendation to Bevins (or to anyone else) before Noble's discharge.⁸⁸ Finally on this point, Bevins testified that he got his information about Noble from Blankenship, but he did not testify what that information was or how it led him to the conclusion that Noble had rendered "substandard care."

Assuming, however, that Blankenship meant to testify that she did recommend to Bevins that Noble be discharged because of her computer failings, and (illogically) further assuming on the basis of that assumption that Bevins acted on such a recommendation, I find that the computer errors defense for the discharge of Noble was a pretext.

The first suspicion about the computer errors defense is that it, like so many of the Respondent's other defenses in this case, was advanced at trial along with a sham defense. At trial, the Respondent asserted the defense that Blankenship had experienced difficulty in reaching Noble when she needed a PRN phlebotomist. That defense, and Blankenship's testimony in support of it, was shown to be a complete sham because: (1) The records clearly indicate that Noble was regularly scheduled, in advance, to work and that, in addition, she often worked additional shifts; (2) until she was ready to tell Noble that she was discharged, Blankenship never mentioned to Noble that she had had trouble finding her; (3) Blankenship admitted that PRN employees such as Noble are not required to always be "reachable"; and (4) even if they are reached, PRN employees are not required to accept call-ins. This assertion of a sham defense at trial,⁸⁹ only to drop it when it is proved to be a sham, at least renders suspect the Respondent's remaining defense for the discharge of Noble.

The Respondent's remaining defense for the discharge of Noble is that which it argues on brief, to wit: On August 28, Blankenship discharged Noble because, on July 3, Blankenship noticed that, on July 1 and 2, Noble had failed to note on the Respondent's computer that 6 medical tests were repeats (again, for which Medicare pays) and not duplicates (and again, for which Medicare does not pay).

As I stated in the case of Jewell (who, again, was discharged for alleged errors that Supervisor Fair discovered while Jewell was on strike), I am skeptical of discharges of strikers for alleged prestrike deficiencies about which the strikers were not confronted before their strikes began. Again, this is because the blind-siding of returning strikers with previously unnoticed deficiencies assuredly undermines their Section 7 right to engage in a strike. Noble's case presents an even stronger suspicion than Jewell's. In Jewell's case, Fair testified that she did not confront Jewell with her errors because she did not discover the errors until Jewell was already out on strike. Blankenship,

⁸⁸ The only superior that Blankenship testified she spoke to about Noble's computer problems was Cooper; but Cooper testified that he had nothing to do with the discharge of Noble.

⁸⁹ I would also note that, when the General Counsel anticipated the "reachability" defense for Noble's discharge with a great deal of testimonial and documentary evidence, the Respondent did not object on relevance grounds, and the Respondent consumed a great deal of time by cross-examining Noble on the topic which it now treats as irrelevant.

however, admits that she discovered the alleged computer errors of Noble on July 3, before Noble went on strike.

At the very end of Blankenship's direct examination, counsel for the Respondent asked her if Noble was present "at this particular time when you discovered these errors." Obviously, counsel was calling for an answer that was limited to the date that Blankenship said that she had discovered Noble's computer errors, July 3. Blankenship replied to that unduly narrow question, truthfully, that Noble was not. The evidence, however, shows that Blankenship had ample opportunity on both July 5 and 6, when both she and Noble worked, to confront Noble with any serious computer errors that Blankenship may have found on July 3. Nevertheless, Blankenship allowed Noble to work July 5 and 6 without saying anything to her about the errors. As well as having been able to confront Noble with the errors on July 5 and 6, Blankenship could also have called (or paged) Noble on July 3, when she found the allegedly serious computer errors. Also, on July 4 Blankenship could have come to the Hospital, or at least called, to speak to Noble. (After all, Blankenship came into the Hospital at 3 a.m. to discharge Miller, and she came to the Hospital after 5 p.m. to suspend Dunn; it is therefore not the situation that Blankenship had to be "on the clock" to perform her supervisory duties.) Blankenship, however, did none of these things. All of which is to say that, if Blankenship had actually considered Noble's computer errors to have been as serious as the Respondent now argues (be they classified as "substandard care" or anything else), Blankenship would have used her more-than-ample opportunities to prevent Noble from working two full shifts without at least some word of admonition, if not to discharge her.⁹⁰

Obviously, Noble's computer errors were not serious, and they certainly did not constitute "substandard care" of any patient (or of anything else that Bevins may have had in mind when he gave that answer). At most they were nonintentional, bookkeeping type errors, and Blankenship's implication that the full weight of Medicare would come crashing down on the Respondent because of what Noble had done, or failed to do,⁹¹ is entirely without foundation. On brief, the Respondent cites as support for Blankenship's claim, the False Claims Act, 31 U.S.C. § 3729-3733 (1994). As the Union points out on brief, however, that statute penalizes only *knowingly* false claims.⁹²

⁹⁰ Counsel's carefully crafted, unduly narrow, last question to Blankenship on direct examination ("at this particular time when you discovered these errors") was obviously designed to delude me into finding that Blankenship had had no opportunity to confront Noble with her computer errors. There was no other reason to ask the question in this manner. The tactic was also a tacit admission that the Respondent's case against Noble has the fatal flaw of condonation.

⁹¹ Sense cannot be made of Blankenship's above-quoted explanation of the "very straightforward and very obvious" procedure for entering into the computer the modifier that indicates that a test is a reimbursable repeat and not a duplicate. Given Blankenship's inability to explain the procedure, I do not credit her testimony that she believed that Noble's errors could only have been the product of inattention. Nor do I believe Blankenship's unsupported testimony that only Noble made computer mistakes on July 1 or 2.

⁹² See *U.S. ex rel. Hochman v. Nackman*, 145 F. 3d 1069, 1073 (9th Cir. 1998), where the court noted: "Congress specifically amended the False Claims Act to include this definition of scienter, to make 'firm

The contention that the Respondent could be penalized for six nonintentional, bookkeeping type, errors is therefore doubly dubious and doubly indicative of pretext.⁹³ Further evidence of pretext is found in Blankenship's exaggeration at trial of the comparative number of Noble's alleged errors. Blankenship testified that Noble's errors were 6 out of 800 computer transactions; in her affidavit, however, she testified that Noble's errors were 6 out of "between 75 and 200 transactions." I credit the affidavit,⁹⁴ and I find that this exaggeration of the numerical significance of Noble's computer errors is further evidence of a pretext.⁹⁵ More evidence of pretext is found in the undenied testimony of Noble that: "On a number of occasions I had mentioned that I was worried about messing up on the computer. And she [Blankenship] told me that I was doing fine, not to over-stress out about it. That to take my time, but I was doing good." If this testimony had not been truthful, Blankenship assuredly would have so testified. Further evidence of pretext is found in the Respondent's disparate treatment of Noble. The Respondent merely suspended employee Patricia Bailey for an error that "could have been fatal" to a patient; and the Respondent repeatedly warned, without discharging, probationary employee James Smith for his attendance problems.⁹⁶ Finally, Blankenship's fault with Noble was that Noble failed to indicate that the six erroneously entered tests were repeats and not duplicates.⁹⁷ Medicare does not reimburse the Respondent for duplicates; the advancement of the proposition that Medicare would fault the Respondent for not claiming that the tests were reimbursable defies all logic and is further evidence of pretext.

In summary, in response to the General Counsel's prima facie case that the General Counsel has presented for Noble's discharge,⁹⁸ the Respondent has gone forward with no evidence that comports with the reason assigned for that discharge by Bevins, the decisionmaker. Moreover, what evidence the Respondent has gone forward with is entirely pretextual. Accordingly, I find that the Respondent has not met its burden under

... its intention that the act not punish honest mistakes or incorrect claims submitted through mere negligence." (Legislative history citations omitted.) And the court held: "Because the *qui tam* plaintiffs failed to present evidence upon which a reasonable factfinder could conclude that the defendants knowingly presented false claims, we affirm the district court's grant of summary judgment to the defendants." I simply do not believe that the Respondent's counsel was ignorant of the scienter requirement of the statute that he cites, and I am constrained to say that I find his tactic most disappointing.

⁹³ See *Yukon Mfg. Co.*, 310 NLRB 324, 340 (1993), where the Board found that: "The aggrandizement of the offense is, itself, indicative of pretext."

⁹⁴ See *Alvin J. Bart & Co.*, 236 NLRB 242 (1978).

⁹⁵ See *Yukon Mfg.*, supra.

⁹⁶ Discharging prounion probationary employees without warnings, while giving warnings to other probationary employees, has been held to be evidence of unlawful discrimination. See *Electro-Wire Truck & Industrial Products Group*, 305 NLRB 1015 (1991).

⁹⁷ The Respondent does not contend that Noble's computer errors caused, or even could have caused, the Respondent to lose a significant amount of profit.

⁹⁸ Again, it is to be remembered that Blankenship was one of the supervisors who threatened that strikers, such as Noble, would be discharged.

Wright Line, and I conclude that the Respondent discharged Noble in violation of Section 8(a)(3).

11. Discharge of Maxine Ritchie

Maxine Ritchie, a registered nurse, was hired by the Respondent on May 15 and discharged on August 28, 1 week after she had been reinstated from the July 8 strike. The General Counsel contends that the Respondent discharged Ritchie because of her participation in the strike. The Respondent contends that it discharged Ritchie solely because she proved to be an unsatisfactory employee during her 90-day probationary period. Ultimately, I find and conclude that the Respondent presented only pretexts to defend Ritchie's discharge and that it discharged Ritchie in violation of Section 8(a)(3).

As found above, the Respondent repeatedly threatened to discharge employees such as Ritchie who participated in the July 8 strike; therefore, a prima facie case for Ritchie's discharge has been proved, and, under *Wright Line*, the Respondent's defense for that discharge must be addressed.

The point in time that Ritchie became a registered nurse is not disclosed by the record; nor is the precise amount of nursing experience that Ritchie had before being employed by the Respondent disclosed. At trial, however, it quickly became apparent that Ritchie was relatively new to the nursing field.

The operation of the Respondent's intensive care unit (ICU) is combined with the operation of its emergency room (ER). At the time of the events in question, the "coordinator" (supervisor) of the ICU/ER operation was Pat Hoover.⁹⁹ Ritchie testified that when she was interviewed for employment by Obenchain, Obenchain told her that another registered nurse was needed in the ICU/ER operation. Ritchie told Obenchain that she had little experience in ICU work and no experience in ER work. Obenchain, nevertheless, hired Ritchie to be a full-time ICU/ER nurse; Obenchain told Ritchie that she would be cross-trained to work in the ER.

The Respondent's personnel policies manual, section A.5, states:

During the first 90 days of employment, all non-exempt employees are considered to be on an "introductory status."

....

Each supervisor is responsible for completion of a written evaluation at the end of a new non-exempt employee's introductory period, along with a recommendation of continued employment or termination.

(The witnesses referred to this "introductory" 90 days as the probationary period.)

Ritchie participated in the strike and returned to work on August 21. On that day, Hoover presented Ritchie with a 10-page "Introductory Evaluation Form." Hoover had signed and dated the form "8/10/2000." On August 10, of course, Ritchie was still on strike. Hoover's "Comment" on the form was:

⁹⁹ Hoover did not testify; Geneva Hutchinson, a witness for the General Counsel, testified that Hoover had not been employed by the Respondent since about a month after the July 8 strike ended on August 15. The Tr. 911, LL. 12-13, is corrected to change "Hooper" to "Hoover."

“Have not worked a lot with Maxine; relied on preceptors.” (When asked to define “preceptor,” Obenchain testified: “It’s an experienced nurse who will take on a relatively new nurse or a new employee and teach them our policies and procedures, how to use our equipment, and then will document that they have satisfactorily completed their introductory period for them to go on to full status.”) On the pages that follow the supervisor’s comments, the introductory evaluation form lists and defines three levels of accomplishment to be used by the supervisor to indicate the probationary employee’s different levels of achievement in different job functions. The form designates these levels as “Exceeds Standards,” “Meets Standards,” and “Does Not Meet Standards.” (For purposes of brevity, I shall refer to these levels as “superior,” “satisfactory,” and “unsatisfactory.”) On the form that Hoover prepared for Ritchie, Hoover checked “satisfactory” for every listed job function. Ritchie testified that on August 21 Hoover told her that she never grades probationary employees as “superior.” The topics of the form which Hoover marked as “satisfactory” include:

According to the policy and procedure of the ICU and KRMC, properly provides individualized nursing care to critically ill clients.

Observes, recognizes and interprets clinical signs and symptoms and reports and/or treats appropriately.

Has working knowledge of all ICU equipment/monitoring systems and their usage.

Performs duties with little or no supervision as described in the ICU policy and procedure.

Coordinate[s] work to assure that care is administered in a manner that is both time and cost efficient.

Follows and maintains universal precautions.

Following these entries is an area that contains blanks for supervisory comments about “Overall Performance,” “Goals for Next Year,” and “Areas for Growth.” Hoover made the following entries:

Overall performance: Maxine is learning and growing in ICU—has been to ER a few times.

Goals for next year: To obtain TNCC [which abbreviation went unexplained].

Areas for growth: Will need full orientation to ER. Can function as a second person in ICU.

For “Supervisor’s recommendation,” Hoover checked “Recommend Continued Employment” rather than the only alternative, “Recommend Termination.” Hoover’s signature to the form is dated August 10. Beneath Hoover’s signature, in a space designated for “Administration,” is Obenchain’s signature which is also dated August 10.

Before the July 8 strike, except for 3 days when she worked in the ER, Ritchie worked only in the ICU. During that period, preceptors were regularly assigned to oversee Ritchie’s work. From August 21 through 24, Ritchie worked again in the ICU and preceptors were again assigned to oversee her work. Ritchie named the preceptors who worked with her as Cathy Tincer, Louise Gross, and Gayle Moore. On August 25, Ritchie was assigned to work on the second shift in the ER; no preceptor was assigned to oversee her work. House Supervisor Phyllis

Gibbs was in charge of all nursing personnel on that shift after Obenchain had left for the day. During Ritchie’s August 25 assignment to the ER, Ritchie worked with registered nurse Sue Chapman (although Chapman was not her preceptor).

Injections of Demerol, a narcotic, are mixed for dispensation according to whether they are to be injected directly into a muscle (intermuscularly or IM) or into an “access” for intravenous (IV) feedings. An IV access can be preexisting or created after the order for an IV injection is given by a physician. Ritchie testified that, unless a physician specifically orders that a Demerol injection be through an IV access, it is to be given intermuscularly. If, however, the physician does not specify IM or IV, and the patient already has intravenous access, the injection can be given intravenously through that access. None of this testimony was disputed.

Ritchie testified that at one point during the August 25 shift she and Chapman were busy caring for a male patient in bed-3 of the ER. The beds are curtained off from each other and Ritchie did not notice that, as she and Chapman were busy with the male patient in bed-3, another male patient was brought to bed-2. Ritchie testified that, as she and Chapman were working at bed-3, one Dr. Abordo, an ER physician, came to her and said: “Give him 25 [cubic centimeters] of Demerol and 12.5 [cubic centimeters] of Phenergan.” Then Abordo left the bed-3 area. As Ritchie did not know that a male patient had been admitted to bed-2, she assumed that the Demerol order was for the male patient in bed-3. The patient in bed-3 already had an intravenous access, so Ritchie left the bed-3 area and mixed the Demerol for an intravenous injection. When she returned with the mixture to the bed-3 area, Chapman told her that the Demerol could not be for that patient because it would react with another medication that she (Chapman) had already been told to give that patient. Chapman further told Ritchie that the Demerol was probably for the patient that was now in bed-2 and that Ritchie should check that patient’s chart. Ritchie, still holding the hypodermic that contained the mixture for intravenous access injection, did so. (Ritchie testified that nurses are not supposed to lay down a hypodermic with a narcotic solution in it.) On viewing the chart of the patient in bed-2, Ritchie saw that the physician had not indicated which way the Demerol was to be dispensed, so she proceeded to bed-2 area to see if the patient already had an IV access; Ritchie still had the hypodermic, with the Demerol IV solution, in her hand. As Ritchie approached the patient in bed-2, Chapman called to House Supervisor Gibbs, who by then had entered the ER, to stop Ritchie. Gibbs approached Ritchie and told her to stop; Ritchie replied to Gibbs that she had not intended to give the Demerol, as it was then mixed, to the patient in bed-2 unless he already had access for intravenous injections (in which case, again, she could have appropriately used the mixture that she had prepared). The patient in bed-2 did not have intravenous access at the time, so Ritchie (according to standard procedures) destroyed the intravenous preparation and prepared another mixture for IM injection and dispensed it to the patient in bed-2. Later in the shift, Ritchie saw Gibbs writing something which she believed was a report of her conduct. (As discussed below, the Respondent introduced an August 25 memorandum from Gibbs to Obenchain that did discuss the incident.)

Further according to Ritchie, on August 28 she was called to Obenchain's office where she was met by Obenchain and Hoover. Ritchie testified that Hoover told her that she did not have the 90 days of her probationary period "in" and that she was being discharged as a probationary employee. Ritchie protested that she did have 90 days in, but Hoover responded, "Not legally." Ritchie asked if she was being discharged because of the incident of August 25; Hoover replied, "That's a good part of it." Ritchie denied any wrongdoing; Hoover replied that she and Obenchain had heard differently. Ritchie replied that she would prefer to resign, and Obenchain allowed her to do so. None of this testimony is disputed. Ritchie filed a claim for unemployment compensation. Ritchie testified that during a telephonic hearing on that claim, Obenchain admitted that Ritchie had not "presented" any harm to a patient or to the Hospital. This testimony is also not denied.

On cross-examination, Ritchie was referred to the events of August 25; she was asked, and she testified:

Q. Is it fair to say that you—your experience in ER at—on that occasion at that time—was it overwhelming for you?

A. Probably, because I was just training and I'd not spent much time in there.

Ritchie further acknowledged that she worked only 60 days before the strike and 4 days afterwards. Ritchie further testified that her previous employer (singular) did have an ICU, but she did not work much there because she was needed more to care for "nursing home" type patients.

Bevins testified that, on Obenchain's recommendation, he decided to discharge Ritchie "for failure to meet standards as required of a person in her position during her probationary period by rendering substandard care."

Obenchain agreed with Ritchie that, when she hired Ritchie, she told Ritchie that she would be cross-trained to work in the ER, as Obenchain put it, "over a period of time."

Obenchain testified that, before the July 8 strike began, she received several oral reports of difficulties that other nurses were having while working with Ritchie in the ICU and in the ER. After Ritchie's return from strike, she began receiving written reports from supervisors and from nurses who were acting as Ritchie's preceptors in the ICU. Obenchain identified four memoranda, or notes, that concerned two incidents in the ICU: (1) By memorandum dated August 21 (again, Ritchie's first day back from strike) Hoover (who, again, did not testify) informed Obenchain that ICU nurse Cathy Tincer had reported to her (Hoover) that Ritchie was involved in an incident that proved that Ritchie could not operate an intravenous feeding pump. (An IV pump injects medications at timed intervals into an IV fluid that a patient is receiving.) Obenchain further identified an August 21 note from Tincer to Hoover over the same incident; Tincer's note is initialed "CT, RN." (2) Obenchain further identified a note regarding Ritchie, dated August 23, from registered nurse Alice Robinson (who did not testify). Robinson's note stated that, on August 22, Ritchie did not know what to do with a patient and that she could not find something when she was sent for it. Robinson further complained in her note that Ritchie had failed to understand an oral

order from Dr. Adeem Shaikh and had left it to another nurse to complete the order taking.¹⁰⁰ Obenchain was also shown the Respondent's Exhibit 41, an unsigned note dated August 22 which deals with apparently the same incident of Ritchie's asking another nurse to confirm an oral order by telephone. Obenchain testified that she recognized the handwriting of the exhibit as that of Tincer, but the handwriting is decidedly different from Tincer's August 21 note which (again) is initialed "CT, RN."¹⁰¹ The handwriting does appear, however, to be the same as that of Hoover's August 21 note, and the note begins "Was reported to me" which sounds more like something that a supervisor, such as Hoover, would write.¹⁰² I find that the last note was made by Hoover (not Tincer) and that it referred to the same incident as mentioned in Robinson's note. Obenchain testified that, after the July 8 strike, ICU Nurse Patricia Draughn, as well as Tincer and Robinson, also gave her oral reports of Ritchie's inability to set IV pumps.

Finally, Obenchain identified an undated memorandum from Gibbs which deals with the August 25 incident that was described by Ritchie. The memorandum starts: "Here's an example of why the girls do not feel Maxine is up to par." Thereafter Gibbs relates that on August 25:

[A] patient was to have an IM injection, but she [Ritchie] mixed the injection to give IV in a 10cc syringe (and it was full with Demerol, Phenergan and NS [normal saline]). Sue [Chapman] was watching her [and] when [Ritchie] went behind the curtain, proceeded to tell the patient what she was going to do (give him a shot in his hip). Sue asked me to stop her, which I did. Then Sue indicated what she had done [and] the med[icine] had to be wasted [and the] patient got a new syringe. I don't know if she thought she gave [i.e., thought that she was supposed to give] the pain med[icine] that way or if she did it without realizing what she was doing. Anyway, that's a simple nursing function which makes me wonder about complicated ones.

FYI, [Gibbs' signature]

P.S. I did not write a variance because a mistake wasn't actually made on the patient.

(As discussed in more detail in Taulbee's case, *infra*, a "variance" is a formal incident report that nurses submit to supervision about mistakes that they have found that other nurses have made.) Gibbs testified for the Respondent about other topics, but she was not asked anything about Ritchie.

Obenchain testified that she met with Bevins and:

I explained to him that she was not going to make her introductory period and recommended that her employment be terminated. . . . I explained to him what the pre-

¹⁰⁰ Robinson's note states in relevant part: "Maxine stated she did not fully understand the MD and asked him to repeat the order twice and still did not understand what he had said. MD was phoned at home to confirm what part she did understand and to complete the order."

¹⁰¹ Compare the initial "Ws," the final "Ds," "Es," and "Ss," and the word "to," in each document.

¹⁰² The note states: "Was reported to me that Maxine was given a verbal order from Dr. Shaikh and did not write the full order because she didn't understand what he said. She did not question him. Left it for another nurse."

ceptors were seeing—not being able to use IV pumps, not taking orders as easily as she should have been, that type of thing. It was explained to him at the time that I requested that she not be kept on as an employee.

Later, after going through the above-quoted exhibits, Obenchain testified: “I told [Bevins] of the incidents we had. And what the nurse-preceptors had documented. And that I recommended that we not keep Ms. Ritchie in her employment.”

On direct examination, Obenchain was not asked about the favorable reviews that Ritchie had received from Hoover. On cross-examination, however, Obenchain testified that “Ms. Hoover was a brand new supervisor to this facility who came on board towards the end of June. She was under the impression that [the Introductory Evaluation Form] had to be completed at the end of 90 [calendar] days . . . [w]hich it did not because she had not been there for six weeks.” When her attention was drawn to the fact that the Respondent’s personnel manual states that the probationary period is “90 days,” and not “90 working days,” Obenchain replied, “it depends on the individual.” At another point, Obenchain testified that she and Hoover decided to extend Ritchie’s probationary period, but she did not recall when that decision was made. Obenchain acknowledged that she did not tell Ritchie that her probationary period had been extended; Obenchain testified that she thought that Hoover had done so. Obenchain further admitted that, as well as having signed the introductory evaluation form that recommended that Ritchie be retained as a permanent employee, she read it and she discussed it with Hoover before signing it. (On redirect examination, Obenchain was not asked why she did sign it.)

Obenchain further acknowledged that one of the Respondent’s policy manuals provides that:

It is the policy of the nursing service to discourage unnecessary verbal and telephone orders to avoid problems of understanding or misinterpretation. When they are necessary, the following procedures will be followed. . . .

Any nurse that feels unsure of taking a verbal or telephone order or questions it, may ask another nurse to take the order or to call the physician back to verify the order.

Further on cross-examination, Obenchain agreed that even an experienced registered nurse would require some training in a new employer’s ER, but she testified that such training should take no more than 6 weeks.

Obenchain testified that Ritchie should have been assigned a preceptor when she worked in the ER, and that it would have been the responsibility of the supervisor (Hoover) to make that assignment. Obenchain testified, however, that she did not know if that assignment was made, and she did not dispute Ritchie’s testimony that she was assigned no preceptor when she worked in the ER on August 25.¹⁰³ Finally on cross-examination, Obenchain testified that she did not recall if she spoke to nurses Louise Gross or Gayle Moore whom Ritchie named (as well as Tincer) as her preceptors in ICU.

¹⁰³ Obenchain testified that on August 25: “She would have been assigned a preceptor. Do I know who it is? No.”

The Respondent called Tincer (a nonstriker) as its witness, but its counsel did not ask Tincer about the circumstances of her August 21 note to Hoover which is mentioned above. (Nor did counsel ask Tincer about the unsigned note which Obenchain attributed to Tincer but which I have found to have been created by Hoover.) Tincer did testify that, before the July 8 strike, she served as a preceptor for Ritchie on the day shift for 2 or 3 days. After doing so, she once reported to Hoover that Ritchie “could not function well with an IV pump.” Tincer further testified that IV pumps are common instrumentalities throughout the Hospital. On cross-examination, Tincer estimated that a nurse “fresh out of school” would need 6 months of floor nursing and 60 to 90 days thereafter to learn to be a competent ICU nurse. Tincer did not testify that she made any oral reports about Ritchie to Hoover or any other supervisor after the strike.

The Respondent also called Patricia Draughn, a registered nurse (and another nonstriker) who testified that she served as Ritchie’s preceptor, but Draughn did not testify when she did so or for how long. Draughn testified that Ritchie had problems with the IV pumps, but did not testify what that trouble was. Draughn also testified that Ritchie asked several questions that were fundamental to nursing. Draughn testified that she reported these observations to someone in management whom she did not name, and she did not testify when she did so.

Conclusions on Ritchie’s Discharge

The General Counsel’s duty under *Wright Line* to demonstrate animus had been met by proof of the Respondent’s many threats to discharge employees who engaged in a strike. The issue therefore is whether, even absent Ritchie’s strike participation, the Respondent would have discharged her. The Respondent contends that it discharged Ritchie because she was an incompetent probationary employee. The General Counsel contends that the reasons that the Respondent advances for the discharge are pretexts.

Perhaps Ritchie should have still been a probationary employee on August 28, but she was not. This is because Obenchain, on August 10, approved her “continued employment” (or “full status” as Obenchain called it) on the introductory evaluation form. Therefore, the Respondent’s progressive disciplinary system applied to Ritchie. The Respondent, however, did not give Ritchie the benefit of its progressive disciplinary system by warning (and suspending) Ritchie before discharging her. As I stated in Jewell’s case: In a context of animus, a finding that an employer has failed to follow its own established disciplinary procedures will support an inference of discriminatory motivation. See, for example, *Ingles Markets, Inc.*, 322 NLRB 122, 125 (1996); *Florida Tile Co.*, 300 NLRB 739, 741 (1990), *enfd.* 946 F.2d 1547 (11th Cir. 1991). Again, such a context of animus was demonstrated by the Respondent’s repeated threats to discharge employees who engaged in the July 8 strike. Moreover, even if Ritchie is to be treated as a probationary employee, in Noble’s case it was shown that the Respondent does give warning notices to probationary employees. (Again, Blankenship gave warning notices to probationary employee James Smith.) Therefore, even if Ritchie was a probationary employee, she should have been given warnings under the pro-

gressive disciplinary system, and the Respondent's discharging her without affording her the benefits of that system raises a strong inference of unlawful discrimination.

Indulging, however, in the assumption that Ritchie should have been treated as a probationary employee on August 28, and further disregarding the evidence of disparate treatment that the warnings to Smith represent, I would still find that the Respondent discharged Ritchie unlawfully.

The clearest evidence that the Respondent's reasons for discharging Ritchie are pretexts lies in its claim that it discharged Ritchie, in part, because she once asked another nurse to call and confirm an oral order that had been left by an employer physician, Dr. Shaikh. The Respondent's quoted policy manual discourages oral orders such as that left by Dr. Shaikh, and the manual further adds that when oral orders are nevertheless necessary: "Any nurse that feels unsure of taking a verbal or telephone order or questions it, may ask another nurse to take the order or to call the physician back to verify the order." Although Obenchain confirmed the currency of this procedure on cross-examination, she was not asked on redirect examination why it would not permit, if not require,¹⁰⁴ the exact conduct for which the Respondent faults Ritchie. As well as demonstrating the purely pretextual nature of the Respondent's effort to justify the discharge of Ritchie, this bogus defense raises a significant suspicion about the Respondent's two other criticisms of Ritchie—that she could not operate IV pumps and that she did some unspecified something wrong on August 25.¹⁰⁵

Hoover completed an introductory evaluation form for Ritchie on August 10. On that form Hoover rated Ritchie as "satisfactory" in every specified category of ICU nursing job functions including "[h]as working knowledge of all ICU equipment/monitoring systems and their usage." Presumably IV pumps were included among that equipment because the Respondent's witnesses testified that IV pumps are used throughout the Hospital (not just in the ICU). Ritchie testified that, when Hoover presented the form to her on August 21, Hoover told her that she never gave higher marks than "satisfactory" to any new employee. I cannot, as the General Counsel requests, draw an adverse inference against the Respondent for not calling Hoover because she is no longer employed by the Respondent.¹⁰⁶ Nevertheless, the Respondent could have introduced forms on which Hoover had rated new employees higher than "satisfactory," if any such forms existed, and I do draw an adverse inference against the Respondent for not presenting any such documentation. Therefore, Ritchie's testimony in this regard stands uncontradicted, and I do credit it.

Presumably, Hoover would not have used "satisfactory" as the highest possible grade for a new employee without the ap-

proval of her supervisor, Obenchain. Moreover, although Obenchain testified that Hoover had been premature in completing the introductory evaluation form for Ritchie, she did not testify that Hoover's marks and comments on that form could have meant anything other than, at least, their plain meaning and that Ritchie was, at least, a "satisfactory" probationary employee. Nor did Obenchain testify why she, in writing, approved Hoover's favorable assessment of Ritchie's job skills if she did not agree with that assessment. Nor did Obenchain testify why she, in writing, approved of Hoover's recommendation that Ritchie should be "continued" as a permanent (or "full status" as Obenchain called it) employee if she did not agree with that recommendation. Therefore, regardless of the vague criticisms that the Respondent's witnesses advanced toward Ritchie's performance before the August 10 evaluation (including the witnesses' criticisms about how Ritchie operated the IV pumps), they were necessarily considered insignificant by management, including Obenchain, before Ritchie returned from the July 8 strike. The Respondent's references to Ritchie's alleged prestrike failings therefore are necessarily pretexts.

Obenchain testified that, after Ritchie returned from strike on August 21, and at some time before August 25, she received reports from preceptors Tincer, Robinson, and Draughn that led her to believe that Ritchie was not competent. Obenchain's testimony that Tincer, Robinson, and Draughn gave her oral reports about Ritchie went completely uncorroborated,¹⁰⁷ and I find that testimony incredible. Moreover, even if such oral reports were given to Obenchain, she could not have honestly relied upon them without talking to the other preceptors who worked with Ritchie, Louise Gross, and Gayle Moore.¹⁰⁸

The only poststrike report from Tincer to which Obenchain could have referred was Tincer's written note of August 21 which complained that Ritchie could not operate an IV pump. At trial, I stated that the note was hearsay and received for the report only. When the Respondent called Tincer, however, counsel did not ask her about the substance of the note. Thus, the substance of Tincer's report was shielded from cross-examination when it should not have been; it is therefore not to be credited. I further do not believe Obenchain's testimony that she relied upon the report. Again, Obenchain had approved of Hoover's August 10 introductory evaluation form that stated that Ritchie was competent in operating the ICU equipment, presumably including the IV pumps. I do not believe that Obenchain believed that Ritchie's ability to operate an IV pump had degenerated so greatly that she could not be taught to do it right again. (After all, August 21 was Ritchie's first day back from strike.) Nor do I believe that the Respondent discharged Ritchie for her reported failures to properly operate IV pumps without some supervisor's first checking out the reports and, at least, offering Ritchie some instruction on the correct way to operate the pumps. (In fact, there is no evidence that any super-

¹⁰⁴ Obenchain testified that Dr. Shaikh's country of origin is Pakistan, and she agreed that he spoke with some accent, but she testified that he spoke with "very little accent."

¹⁰⁵ Or, as stated in *Cincinnati Truck Center*, 315 NLRB 554 (1994): "Finally, we find that the Respondent's reasons for warning and terminating [the alleged discriminatee] are so implausible that they not only fail to establish the Respondent's affirmative defense under *Wright Line*, but actually strengthen the case for finding that the Respondent's true motivation was animus against union activity. [Citations omitted.]"

¹⁰⁶ See *Irwin Industries*, 325 NLRB 796, 811 fn. 12 (1998).

¹⁰⁷ Again, Tincer was not asked about such oral reports; Draughn was completely vague; Robinson was not called to testify, and Obenchain made no notes of such reports.

¹⁰⁸ Obenchain testified that she could not recall talking to Gross and Moore about Ritchie. If Obenchain had talked to those employees she would have remembered it.

visor, or even any preceptor, or other employee, ever told Ritchie that there was some deficiency in the way she operated the IV pumps.)

Obenchain further testified that her recommendation to Bevins that Ritchie be discharged relied on Robinson's August 23 note that on August 22 Ritchie had to ask where something was and that she asked another nurse to call a physician to confirm an order that he had given. Because Robinson did not testify, we do not know why Ritchie (again, a relatively new employee to the ICU) should have known where the object was. This criticism of Ritchie is simply too unfounded and too picaresque to believe that it was the basis of an honest recommendation for discharge. And, again, Ritchie's asking another nurse to confirm a physician's order is precisely what the Respondent's policy manual requires, as Obenchain admitted.

The Respondent's final attack on Ritchie is that there is some unspecified something in Gibbs' memorandum about the August 25 incident in the ER that proves Ritchie would have been discharged, even absent her protected strike activities. Obenchain did not testify what it was in that memorandum that, to her, indicated fault on the part of Ritchie. Gibbs' memorandum is hardly self-explanatory, especially since it concludes that "a mistake wasn't actually made on the patient." Additionally, any fault on the part of Ritchie is rendered doubly problematical in view of Obenchain's failure to deny that, during the telephonic unemployment hearing for Ritchie, she admitted that Ritchie had not presented any harm to a patient or the Hospital. Moreover, Bevins did not testify that he read Gibbs' memorandum; and, even if Obenchain orally reported the memorandum's substance to him, Bevins did not testify what part of that report caused him to decide to discharge Ritchie. Instead, Bevins offered only the vague "rendering substandard care" explanation for the discharge.

In summary, the Respondent's position is that the incident of August 25 was part of the reason for Ritchie's discharge even though: (1) Ritchie had told Obenchain when she was hired that she had had no experience in ER work; (2) Obenchain admitted that she told Ritchie that she would be cross-trained "over a period of time" to work in the ER; (3) the introductory evaluation form for Ritchie that Obenchain had approved had stated that Ritchie needed a "full orientation to ER"; (4) Obenchain admitted that even an experienced nurse could take as much as 6 weeks to train in ER work; (5) Ritchie was working only her fourth ER shift on August 25; (6) Ritchie was not assigned a preceptor on August 25, even though Obenchain admitted that she should have been; and (7) the Respondent cannot state what it was in Ritchie's performance of August 25 that constituted "rendering substandard care." All of this is too much to believe, and I do not.

The most that can be said about the August 25 incident is that a syringe of medicine was wasted, and not even Obenchain testified that the economic loss to the Hospital on that account was part of her reason for recommending Ritchie's discharge to Bevins. On brief, page 86, the Respondent contends that Ritchie admitted on cross-examination that the August 25 incident proved that she was "overwhelmed in the ER." The Respondent's failure to fulfill its promise to train Ritchie in the ER, and its failure to provide her with the required preceptor,

would explain her feeling overwhelmed, at least on August 25. Moreover, as the transcript quotation above makes clear, counsel had asked Ritchie only if she was overwhelmed "at that time." Counsel did not ask Ritchie if she felt overwhelmed by the entire ER experience. Finally, although the Respondent called Gibbs to testify, she was not asked to deny Ritchie's account of the August 25 incident; specifically, Gibbs did not deny that, when she stopped Ritchie, Ritchie told her that she did not intend to give the IV mixture of Demerol to the patient in bed-2 unless he already had IV access. Nor did Gibbs testify why she did not accept that explanation. I draw an adverse inference against the Respondent for failing to ask Gibbs about these matters, and I find that Ritchie did give the explanation and that Gibbs accepted it. Because Obenchain, in the unemployment hearing, admitted that Ritchie had presented no harm to the patient, Gibbs must have conveyed that acceptance to Obenchain, and Obenchain must have accepted it also.¹⁰⁹

That is, the Respondent's reference to the August 25 incident as a basis for the discharge for Ritchie is just as much a pretext as its other defenses. I therefore find that the Respondent has not shown by a preponderance of the evidence that it would have discharged Ritchie even absent her participation in the July 8 strike. Accordingly, I find and conclude that the Respondent discharged Ritchie in violation of Section 8(a)(3).

12. Discharge of Laotta Sizemore

Laotta Sizemore, a registered nurse, was hired by the Respondent in 1992 and was terminated on August 21.¹¹⁰ Whether Sizemore resigned or was discharged is an issue in this case. The General Counsel contends that Sizemore was discharged because of her participation in the July 8 strike. The Respondent denies that it discharged Sizemore. The Respondent contends that Sizemore resigned her status as a full-time employee and thereafter asked to be made a PRN employee.¹¹¹ The Respondent further contends that the General Counsel has failed to show that the Respondent's refusal to rehire Sizemore as a PRN employee was unlawful. Ultimately, I find and conclude that the Respondent discharged Sizemore and that it did so because of her participation in the July 8 strike; the General Counsel therefore had no duty to prove an unlawful refusal-to-hire in Sizemore's case.

As found above, the Respondent repeatedly threatened to discharge employees such as Sizemore who participated in the

¹⁰⁹ Gibbs' statement in her August 25 memorandum that Ritchie told the patient that she was about to give the Demerol "in his hip" is seemingly inconsistent with Ritchie's testimony that, when Gibbs stopped her, she was only checking to see if the patient had IV access. Nevertheless, without Gibbs' testimony on the point, under oath and subject to cross-examination, I would not find that Ritchie, in fact, made that statement to the patient.

¹¹⁰ August 21 was established as the date for Sizemore's termination by Human Resources Manager Mitchell who testified that it was on that date that Obenchain told her to create the appropriate personnel action form for the termination.

¹¹¹ As discussed in Hutton's and Noble's cases, "PRN" status is a part-time status in which an employee may be given specific hours in a week, less than 40, or may be called when needed, or some combination of such arrangements. As further noted above, employees must work two shifts per month to retain PRN status.

July 8 strike; therefore, a prima facie case for Sizemore's discharge has been proved, and, under *Wright Line*, the Respondent's defense for that discharge must be addressed.

Sizemore was once the Respondent's assistant director of nursing, immediately subordinate to Obenchain. That position was abolished, however, and by time of trial Sizemore had voluntarily become a staff nurse in the emergency room under Pat Hoover, coordinator of the emergency room and intensive care unit. Before the strike began, Sizemore regularly wore union buttons and spoke openly for the Union. Sizemore engaged in the strike and often joined in the picketing. As noted above, the Respondent repeatedly threatened to discharge employees such as Sizemore who participated in the July 8 strike; therefore, a prima facie case for Sizemore's discharge has been proved, and, under *Wright Line*, the Respondent's defense must be addressed.

On August 9 (or 6 days before the Union's offer to return to work), Sizemore was hired as a full-time nurse-manager at Appalachian Regional Healthcare (ARH), a hospital in Hazard, Kentucky, about 30 miles from the Respondent's facility. On August 15, the date of the Union's offer to return to work, Sizemore wrote Obenchain that: "Effective today I would like to change my status from full-time employee to PRN." The letter then goes on to ask Obenchain to check on how much vacation time that Sizemore is then owed, but it does not say that Sizemore is resigning, and it does not mention Sizemore's having taken another job.¹¹² Sizemore testified that she could have worked both for the Respondent on a PRN basis and for ARH on a full-time basis because her schedule in Hazard was "very flexible."

By letter dated August 17, and apparently before Sizemore's August 15 letter was received by Obenchain, Bevins informed Sizemore that, pursuant to the Union's offer to return to work, Sizemore was expected to report to work at 5 p.m. on August 22. Sizemore testified that on August 22, about 4 p.m., she met employee Phyllis Chambers at a store in Jackson. Chambers then possessed a copy of the Hospital's nursing schedule for the coming 2 weeks and gave it to Sizemore. The schedule (a copy of which was received in evidence without objection) showed that Sizemore had originally been scheduled to work on August 22, and thereafter, but a line had been drawn through the listings for August 22 and the subsequent days. Then, in spaces below the original entry, Sizemore's name was repeated with "PRN" written beside it; no hours of work in the future were indicated.

Sizemore testified that after seeing the schedule she attempted to telephone Obenchain and Hoover, but she was told that they were not available, and her calls were not returned. Shortly thereafter, Kim Watkins, another registered nurse, asked Sizemore to take a coming shift for her. Sizemore agreed, and she and Watkins then filled out a standard form¹¹³ request-

ing that Sizemore be allowed to take Watkins' shift; then Sizemore and Watkins submitted the request to supervision. Shortly after that, Sizemore called Acting Supervisor Jerri Howard to see if she was then scheduled for Watkins' shift or any other; Howard replied that Sizemore was not. Since that point, Sizemore has not been called to work, or worked, at the Respondent's facility. Sizemore received no written or oral notice of termination. Sizemore denied that she told anyone in supervision that she had quit, and no supervisor testified that Sizemore ever stated that she had quit (or was quitting or intended to quit).

On cross-examination, Sizemore testified that, if the Respondent had placed her on PRN status when she asked, she could have worked any shift that the Respondent asked her to because she could have traded shifts with her supervisor at ARH, Suzanne Price. (Price, as discussed below, testified for the Respondent.) Sizemore further testified that it was Price, herself, who told her that such shift trades at ARH could be easily made.

Bevins testified that: "Ms. Sizemore was terminated by the Kentucky River Medical Center for failure to serve the appropriate resignation [period] for her position as a registered nurse which would require three weeks, or 15 days, resignation time prior to leaving our facility."

Respondent called Price who testified that Sizemore has continued to work for ARH as an emergency room nurse-supervisor since August 9. According to Price, Sizemore was first scheduled to work from 10 a.m. until 6 p.m., but from August 28 and thereafter Sizemore has been scheduled to work from 5 p.m. to 1:30 a.m. Price did testify that, when she interviewed Sizemore for employment at ARH, Sizemore told her that she was also looking for a part-time job as well. Price testified that she told Sizemore no more than that she would work with Sizemore in scheduling her around any part-time job that she may take; Price added, however: "[W]hen they're working full-time for me, that's their main job. That is where their priority should be." And Price testified that she told Sizemore precisely that. Price further testified that changes to accommodate a part-time schedule for Sizemore sometimes could be made, but: "It wouldn't be very easy. . . . We could not do it on a regular basis at all. . . . Maybe once or twice a month."¹¹⁴

Obenchain testified that, at some point after the Respondent received the Union's August 15 offer to return to work, she telephoned Sizemore and told her to report on August 22 (as did Bevins' letter to Sizemore mentioned above). Obenchain admitted thereafter receiving Sizemore's August 15 letter requesting to be changed to PRN status. Obenchain did not testify that she did not grant Sizemore's request to become a PRN employee because the Respondent needed no more PRN registered nurses at the time. Instead, Obenchain testified that she recommended to Bevins that the Respondent not retain Sizemore as a PRN employee, or as a full-time employee, be-

¹¹² The Respondent does not contend that Sizemore's inquiry about her accrued vacation time would have conveyed an impression of an intent to resign. Nor did Obenchain testify that the inquiry left her with such an impression.

¹¹³ The forms are discussed above in the discussion of Gabbard's case.

¹¹⁴ I therefore find to be disappointing the General Counsel's unqualified statement on Br. p. 40, that "Price also corroborated Sizemore's testimony that she could switch shifts with Price in order to accommodate shifts scheduled by Respondent."

cause Sizemore had failed to comply with the Respondent's personnel manual, section F.2, "Resignations," which states:

Employees should provide advance written notice of resignations which include the reason for terminating and the last day of work. Appropriate advance notice is: . . . [listings of length of required notices of resignations for various positions, including 15 working days for registered nurses] . . . Employees wishing to resign in good standing and be eligible for rehire . . . must give appropriate written notice. *Employees who do not give appropriate notice will not be eligible for rehire.* [Emphasis in original.]

When asked on direct examination what her understanding of this section was, Obenchain answered:

It's my understanding since I have been there, that if any employee who wishes to either resign or go to a PRN status, [he or she] must work out a resignation per this policy to be able to be eligible to remain as a PRN employee for the Hospital.

. . . .

What this requires is, RN's work 15 working days. So she would have been required to give us 15 working days before changing her status.

The Respondent introduced no evidence that this interpretation of its personnel manual had previously been applied to any employee.

On cross-examination, Obenchain agreed that section F.2 of the Respondent's personnel manual does not state that employees wishing to convert to PRN status must first resign, but she added: "That's how we interpret that policy." Obenchain further acknowledged that the Respondent's personnel manual, section D.4, specifies what is to happen when an employee is converted from full-time status to PRN status; Obenchain further acknowledged that section D.4 does not require employees to resign to make that change in status. Obenchain was then asked and she testified:

Q. So there's nothing in the policy that says that you have to resign in order to go from regular full time to PRN?

A. You have to work out your period of time like Policy F.2 says.

Q. I'm asking if there's a policy that says that?

A. No. I guess not in those exact words. That's how we interpret this policy.

. . . .

Q. And is there any place within that whole document of General Counsel's 57 [the Respondent's personnel manual] where a resignation is required before an employee can move from full time to PRN status?

A. There is not. It is our practice to enforce that, as I stated before . . . [b]ased on these two policies [F.2 and D.4] combined.

Q. But that's not stated in the policies themselves, is that right?

A. Right.

Obenchain further acknowledged that section D.4 states that, for employees who change from full-time to PRN status: "Employee's anniversary date remains the date that he/she was employed as a regular full-time or part-time employee." Obenchain further agreed that, if an employee who wanted to change to PRN status did resign, that employee's original hire date would be lost. Obenchain further admitted that, when she received Sizemore's request to change status, she did not attempt to notify Sizemore that she interpreted the Respondent's personnel policy manual as requiring: (1) 15 days' notice before submitting a request for transfer to PRN status and (2) termination of the requesting employee if that notice is not submitted. Obenchain testified Sizemore already knew about these interpretations because: "She was the assistant director of nursing for many months; she enforced these policies."

Conclusions on Sizemore's Termination

The first factual issue is whether the Respondent discharged Sizemore or it simply accepted her resignation. In arguing that Sizemore resigned, the Respondent refers to Sizemore's August 15 letter to Obenchain as "Sizemore's letter resigning full-time employment." Sizemore's letter does not say that she is resigning full-time employment. The letter does not say that Sizemore is doing anything. Certainly, the letter did not declare that Sizemore was thenceforth to be treated only as a PRN employee, nor did the letter otherwise indicate that Sizemore would no longer appear at work on assigned regular schedules (such as the subsequently created schedule that called for her to be at work on August 22). The letter says simply: "Effective today I would like to change my status from full-time employee to PRN." A statement of an employee that she "would like" a change in status is nothing more than a request; only tortured reasoning could make it into something more. Certainly, it was not a resignation. I therefore find that the Respondent discharged Sizemore.

The clearest proof that Obenchain knew that Sizemore's request to be made a PRN employee was nothing more than a request lies in the fact that Obenchain initially granted the request and had Sizemore put on the schedule as a PRN employee. The schedule for the week of August 21 (which was placed in evidence without objection from, or disputation by, the Respondent) first listed Sizemore as working full-time, beginning August 22. That entry, however, was stricken and Sizemore was relisted as a PRN employee. Schedule making was the duty of the department manager, Hoover (who, again, did not testify). Sizemore's August 15 letter requesting a change of status to PRN was addressed to Obenchain, not Hoover. Hoover would not have know about the request, or made the "PRN" entry on the schedule next to Sizemore's name, unless Obenchain had told Hoover of Sizemore's request and unless Obenchain told Hoover that the request was granted. Quite obviously, it was after the schedule for the week of August 21 was created that Obenchain changed her mind and decided to discharge Sizemore. And it was necessarily after the Respondent discharged Sizemore that Obenchain created the pretext that the discharge was required by the Respondent's written policies.

Section F.2 of the Respondent's policy manual is entitled "Resignations," and it refers to nothing else. Specifically, section F.2 does not refer to transfers of status of employees from full time to PRN. Nevertheless, Obenchain, referring to section F.2, testified that: "It's my understanding since I have been there, that if any employee who wishes to either resign or go to a PRN status [he or she] must work out [for 15 working days] a resignation per this policy to be able to be eligible to remain as a PRN employee for the Hospital." This bare statement of Obenchain's understanding is supported by nothing. Immediately it is to be noticed that, although Obenchain injected "or go to a PRN status" into her reading of section F.2, the section itself does not mention going to PRN status. Certainly, the wording of the policy does not indicate anything to support Obenchain's interpretation that Sizemore "would have been required to give us 15 working days before changing her status." If Obenchain had previously interpreted section F.2 in this manner, she assuredly would have so testified; she did not. Additionally, Obenchain's novel interpretation squarely conflicts with section D.4 of the Respondent's personnel policy manual which does spell out the required procedures for an employee's converting from full-time to PRN status. Section D.4 makes no mention of resignation, and it further provides the benefit that, once an employee does convert to PRN status, his or her seniority date remains the same. Of course, if, as Obenchain maintained, section F.2 requires an employee to resign to become a PRN employee, he or she would lose the seniority-retention benefit of section D.4.¹¹⁵ Without evidentiary support, I would not find that the Respondent intended this result at any time before Sizemore made her request.¹¹⁶

I therefore find that the Respondent discharged Sizemore after first making her a PRN employee. Because neither logic, nor a reasonable interpretation of the Respondent's written policies, nor past practice, supports Obenchain's professed reasoning for discharging Sizemore, it must be concluded that the defense that is asserted for Sizemore's discharge is a pretext. By asserting only this pretext to rebut the prima facie case that the General Counsel has presented for Sizemore, the Respondent has necessarily failed to show that it would have discharged Sizemore even absent her participation in the July 8 strike. I therefore conclude that the Respondent discharged Sizemore in violation of Section 8(a)(3).

I realize, of course, that Sizemore accepted a full-time job at ARH during the strike. Price's testimony that Sizemore could not easily trade shifts with her at ARH was credible, and I further realize that Sizemore necessarily testified falsely that her hours at ARH could easily be worked around her hours as a PRN employee with the Respondent. Nevertheless, other of the Respondent's employees hold full-time jobs elsewhere and work PRN for the Respondent. (Discriminatee Hutton, as dis-

cussed above, worked full time at the county attorney's office; Sizemore, without contradiction, also named Wanda Roberts as another such PRN employee.) Moreover, there is no evidence that the Respondent even knew that Sizemore had accepted full-time employment elsewhere when it discharged her on August 21.¹¹⁷ Also, Obenchain did not testify that she recommended Sizemore's termination because she had taken another job; Obenchain, again, testified that she recommended Sizemore's termination to Bevins because of Sizemore's failure to give a 15-day notice before making a request to be made a PRN employee. Finally on this point, to retain PRN status, employees are required to work only two shifts per month. Sizemore may not have been able to be absent for ARH as often as she indicated, but it is doubtful that she would have been available for PRN calls less than twice per month. (And Obenchain did not cite Sizemore's potential unavailability as a reason for treating her request to become a PRN employee as a resignation.)

On brief, page 93, the Respondent asserts: "The Hospital merely declined to hire Sizemore as a PRN after she resigned without proper notice." From its conclusion that Sizemore resigned her employment, the Respondent argues that Sizemore's case is, in effect, a refusal-to-hire case. The Respondent argues that, under the principles of *FES*,¹¹⁸ the General Counsel must show that the Respondent was hiring (or had concrete plans to hire) registered nurses as PRN employees at the time that the Respondent refused to rehire Sizemore as a new, PRN, employee. This theory would have some validity if Sizemore had actually resigned or had been lawfully discharged.¹¹⁹ Here, however, Sizemore did not resign and she was, as I have found, unlawfully discharged. Also, Sizemore did not make application for PRN status after she was discharged. Sizemore made her application to become a PRN employee before she was discharged.

(As I have found on the basis of the August 21 schedule that is in evidence, the Respondent initially granted Sizemore's request to be made a PRN employee. Even if the schedule did not prove that Sizemore was made a PRN employee before she was discharged, the remedy would be the same. This is because I would find, in that case, that the Respondent unlawfully denied PRN status to Sizemore. The only reason that Obenchain advanced for not granting PRN status to Sizemore was that Sizemore had not given 15 days' notice before making her request. As demonstrated above, this defense is entirely bogus, and the inference raised by the General Counsel's prima facie case remains intact.)

13. Discharge of Diana Taulbee

Diana Taulbee "Dianne Taulbee" at various points during the proceeding) is a registered nurse who was hired by the Respon-

¹¹⁵ The Union extensively cross-examined Obenchain about the conflicts inherent in her interpretations of secs. F.2 and D.4. Nevertheless, on brief, the Respondent does not attempt to reconcile Obenchain's interpretations.

¹¹⁶ At minimum, I reject Obenchain's testimony that, because Sizemore was once the assistant director of nursing, she should have known of the tortured interpretation of the Respondent's personnel manual that Obenchain advanced at trial.

¹¹⁷ At one point Obenchain testified that Sizemore's letter of August 15 stated that, as well as wanting to change to PRN status, Sizemore "had taken another position." The letter, however, did not state that Sizemore had taken another position.

¹¹⁸ 331 NLRB 9 (2000).

¹¹⁹ *Stamford Taxi, Inc.*, 332 NLRB 1372 (2000). (Cases of lawfully discharged employees who are denied rehiring are analyzed under *FES*.)

dent in 1992. Taulbee worked a shift from 11 p.m. to 7 a.m. as a floor nurse in the medical-surgery unit under House Supervisor Phyllis Gibbs. On several occasions before the July 8 strike Taulbee wore union buttons and she regularly participated in the strike by picketing. On August 30 and September 15, the Respondent issued warning notices to Taulbee. The complaint alleges that those warning notices were issued in violation of Section 8(a)(3). The complaint further alleges that, by issuing those two notices, the Respondent “constructively discharged its employee Diana Taulbee.” Taulbee, however, never told the Respondent that she was quitting, and the Respondent did issue to Taulbee a letter of discharge on September 22. The allegations regarding Taulbee were therefore not tried on the complaint’s original theory of constructive discharge. The General Counsel contends on brief that the Respondent warned Taulbee, and discharged her (or constructively discharged her) because she wore prounion insignia before the July 8 strike and because she participated in that strike. The Respondent contends that it issued the warning notices to Taulbee because of her derelictions of duty, and it contends that it discharged Taulbee solely because, immediately after receiving the September 15 warning notice, she abandoned her shift and her assigned patients. Ultimately, I find and conclude that the warning notices were issued to Taulbee unlawfully but that the Respondent lawfully discharged her.

As found above, the Respondent repeatedly threatened to discharge employees such as Taulbee who participated in the July 8 strike; therefore, a prima facie case for Taulbee’s discharge has been proved, and, under *Wright Line*, the Respondent’s defense for that discharge must be addressed.

Taulbee described a “variance” as a form report of something usual that needs correction in the future. Nurses write variances when they find something amiss in the care of a patient by other nurses. Taulbee testified that her first day back at work from strike was August 21. A few days later she found the intravenous feeding pump rates on two patients to be incorrect. She reported the matter to Gibbs. Gibbs told Taulbee to write variances on what she had found. Taulbee did so. The nurse involved was Caddis Hudson. When Obenchain was on cross-examination, she examined Hudson’s personnel file and agreed that Hudson received no discipline over the incident. In fact, Obenchain testified that variances, themselves, are not to be used for disciplinary purposes.

Telemetry is a monitoring system that produces constant readings of a patient’s vital signs. The vital signs of patients throughout the Hospital who are “on telemetry” are transmitted for reading to a central station that is located in the intensive care unit. When telemetry is being conducted for patients whose beds are in the medical-surgery unit, a floor nurse such as Taulbee can obtain the readings by calling the telemetry station in the intensive care unit or by walking to the station and taking the readings herself.

Taulbee testified that on August 30, at the end of her shift, she was called into the office of Medical-Surgery Unit Coordinator Robin McGlothen (who, again, did not testify). McGlothen told Taulbee that “several variances” had been written on her by other nurses. One of the variances was for failure to maintain telemetry on a patient on July 6 (or 2 days

before the strike began). A second variance was for not maintaining the proper IV flow rate on another patient after the strike. A third variance was for not having an IV going on another patient when it should have been, also after the strike. After McGlothen told Taulbee what the variances concerned, she presented Taulbee with a warning notice. On the notice, in a space for “Corrective Action Recommended,” McGlothen had written: “Need to check in intensive care unit herself to see if patient is on telemetry. Also needs to be more careful concerning intravenous fluids and documentation.” Taulbee testified that McGlothen told her that she had failed to make sure that telemetry that had been ordered by a physician was still getting readouts in ICU after the patient was transferred from ICU to the floor on July 6. Taulbee testified that she told McGlothen that “I could almost guarantee that patient had telemetry during my shift.” McGlothen told Taulbee that she should go to the intensive care unit to get the readings and make sure that the telemetry is working. Taulbee replied to McGlothen that she had “always” called the intensive care unit to get telemetry readings, rather than walking there to get them. Taulbee further testified, in reference to the intravenous-feedings remark that is on the August 30 warning notice, that McGlothen also told her that, after the strike, another nurse came on duty and found that a patient of Taulbee’s did not have a prescribed intravenous feeding going and that the patient had told the incoming nurse that he (or she) had not had an intravenous feeding at any time during the night. Taulbee further testified that McGlothen told her that the incoming nurse found that the pump rate of another intravenous feeding was set at the wrong speed. Taulbee testified that pump rates can be easily altered, even by the patient. Taulbee also testified: “The last time I had charted on that patient’s IV was at 4:00 that morning. The patient did have an IV at that time.” Taulbee further testified that sometimes intravenous feedings “go bad” and are intentionally discontinued, and that sometimes nurses are too “busy” to chart the discontinuance; Taulbee added, however, “I’m not saying it [being too busy] happened.”

Taulbee further testified that on September 13 she found that a patient was not being given oxygen as a physician had ordered. After checking with her supervisor, Taulbee obtained the oxygen and gave it to the patient; then she wrote a variance on the employee who should have given the oxygen to the patient, Registered Nurse Gerri Howard. When Obenchain was on cross-examination, she examined Howard’s personnel file and agreed that Howard did not receive any discipline over the incident.

For each shift change, the floor nurses who are leaving will meet with the incoming nurses. The shifts’ nurses review a Cardex system of recordings of medication schedules, and the departing nurses will give the incoming nurses an oral report of the patients’ occurrences during of the shift that is concluding. Taulbee testified that when her shift ended at 7 a.m. on Friday, September 15, Obenchain met her and stated that on the previous Saturday, September 9, she failed to give a report on a patient. According to Taulbee:

I simply looked at her and asked her, "What do you want, Michelle? What is it you want? Do you want me to quit? Do you want me to resign? What is it you want?"

....

Her words to me was, "Well, Diana" [and nothing more].

...

I looked at her. I did not say anything else at that point. I finally looked at her and I said, "Is there anything else, Michelle?"

Her words was, "No, I guess not."

I said, "Well, I'm going home and I'm going to bed. I need sleep."

Taulbee then left the Hospital. Taulbee did not deny that she had failed to "report off" on one patient out of the group that had been assigned to her on September 9. Taulbee testified:

Sometimes you're maybe reporting off to two different nurses. There's a possibility that those first seven patients could have went to some other nurse; the last patient could have went to one other person by itself. You simply forget.

Taulbee testified that previously when nurses have forgotten to report off on a patient:

We just call the nurse at home and ask if there's anything pertinent to that patient, since they failed to give [a] report to us, that we needed to know other than what was on the Cardex.

When asked how often such a thing happened, Taulbee replied, "It was not that infrequently. It happened. I would say maybe once a month at least." Taulbee testified that she had been at home during the morning of September 9, but no nurse had called her for a missing report.

Taulbee testified that, when she arrived for her next shift, at 11 p.m. on September 15, Gibbs presented her with a sealed envelope that contained a written warning notice from Obenchain. On the notice, Obenchain had left blank a box for "Second Written Warning." Obenchain had also left blank a box for: "Termination (effective [date to be filled in])." Obenchain had, however, checked a box for "Third/Final Written Warning." Obenchain wrote in a space for "Discussion" that: "On 9/9/00 [Taulbee] had a patient in Room [number]. She didn't report off to on-coming nurse. She left the Hospital and did not call back to give report." In a space for "Corrective Action Recommended" is written: "Must give report to on-coming nurse. Failure to document correctly or report correctly to on-coming nurse(s) can result in termination." Taulbee testified that, upon Gibbs' giving her the notice:

I read through it, got very upset with it, laid it down on her desk, told her that was enough. I'd had enough. I couldn't take any more; that was it.

And she just said, "Diana, wait just a minute."

I said "No, enough is enough. I've had it." And I turned around and walked out.

Taulbee further testified that on Monday, September 18, she called Obenchain to ask what her employment status was. Obenchain replied that Taulbee was "on suspension." Two days later, Taulbee called Obenchain again and asked the same ques-

tion; Obenchain replied that Taulbee was on "investigative suspension on advice by the Hospital lawyer to investigate the variances."¹²⁰ By letter dated September 22, Obenchain informed Taulbee that she had been terminated and that she could contact Human Resources Director Naomi Mitchell for the reasons. Taulbee did make an appointment with Mitchell. Obenchain appeared at the appointment but abruptly walked out of Mitchell's office when Taulbee asked for a statement of the reason for her discharge.

On cross-examination, Taulbee admitted that she does not have personal knowledge that Obenchain is aware that missed reports are later given by telephone. About her reaction to the warning notice, Taulbee was asked, and she testified:

Q. Now, when you read this [warning notice] . . . [tell us] what your reaction was to this and what you did at that particular point.

....

A. I read it. I laid it back down on Ms. Gibbs' desk. I told her I'd had enough, that was enough, no more, that was it. I actually felt like I was being pushed to leave the place, I really did.

Q. You felt like you were being pushed to leave?

A. Yes.

Q. You didn't feel like you'd been terminated. You felt like you were being pushed to leave.

A. No, I felt this was going to be my termination.

Q. That it was "going to be" your termination?

A. I felt this was my termination, yes.

Q. Which is it, Ms. Taulbee? Did you feel it was going to be your termination or did you feel that it was your termination?

A. My termination.

....

Q. Now, if your receipt of [the warning notice] was not your termination, if it was not your termination, and you were to have responded to it in the way that you did, and walked off the job, would that have been unprofessional of you?

A. Yes, I would say so.

Q. Would you have been abandoning your job if you had left without being terminated?

A. I would not have been any good for any patients that night, I would tell you that.

(The Respondent's counsel did not pursue Taulbee for an answer to his last quoted question.) Further on cross-examination, Taulbee denied that Gibbs tried to talk her into not leaving, even though she had testified on direct examination that Gibbs had said, "Diana, wait just a minute," and even though her pre-trial affidavit states that, when Gibbs handed her the September 15 warning notice: "I became very upset and told Phyllis that I could not take it anymore, that I'd had enough and was leaving. Phyllis tried to talk me into staying and I told her I had enough, and I left."

¹²⁰ Although the General Counsel had to lead Taulbee to the phrase "to investigate the variances," Obenchain did not deny the testimony.

Bevins testified that, after consultation with Obenchain, he decided to terminate Taulbee “for abandonment of her patients by walking out of the building during her scheduled work shift.”

Obenchain did not dispute any of Taulbee’s testimony about their oral exchanges. Obenchain further testified that after Gibbs reported to her on September 15 that Taulbee had left her shift without authorization, she recommended to Bevins that Taulbee should be terminated for “[a]bandonment of her shift that night” and that Bevins agreed. (It was on cross-examination that Obenchain was asked about variances and she testified: “They’re not to be used for discipline purposes.”)

Gibbs testified that on August 15:

I told [Taulbee] that she had a note. And she followed me back to the office and I gave her the note. And she opened it up and she got really, really mad and she threw it down on the table and she said, no, and I said . . . “Diane.”

And she said, “No, hell no. And she turned and walked toward the door.

And I said, “Diane, wait, let’s talk.”

She said, “No, no more.” And she left. I paged overhead twice and got no response. And then maybe five minutes later after I didn’t get a response I called Michele and told her that she evidently left the facility.

Conclusions on Taulbee’s Warning Notices and Termination

Obenchain testified that variances are not to be used for disciplinary purposes. Nevertheless, McGlothen told Taulbee that the August 30 warning notice was being issued to her because of variances that had been written by other nurses. Also, Taulbee testified, without contradiction, that the problems alluded to by the warning notice, and by McGlothen when McGlothen presented the warning notice, had innocent explanations.¹²¹ One of those explanations was that Taulbee had always relied on telephone reports that a patient was on telemetry, something that McGlothen did not dispute at the time and something that the Respondent did not dispute at trial. The Respondent introduced no evidence that Taulbee’s other explanations were investigated by McGlothen; certainly, there is no evidence that they were investigated before McGlothen issued the warning to Taulbee.¹²² Moreover, Taulbee wrote variances on Hudson and Howard for similar incidents, and the Respondent issued no warning notices to them. Therefore, the General Counsel has shown that the Respondent discriminated against Taulbee by showing that: (1) without investigation, the Respondent based a warning notice solely on a variance, something that Obenchain admitted was improper, and (2) the Respondent excused similar

¹²¹ The possible exception is the essentially clerical failure by Taulbee to record that an IV had “gone bad” No supervisor, however, testified that this error by Taulbee created any problem for the patient or the Hospital.

¹²² I do not draw an adverse inference against the Respondent for not presenting McGlothen, whom it no longer employs. I do, however, rely on the facts that the Respondent did not produce the variances, or explain why it could not do so, or produce any evidence that the variances, if they ever existed, were investigated before the issuance of the warning notice.

conduct by Hudson and Howard. All of which is to say that the Respondent has not showed by a preponderance of the evidence that it would have issued the August 30 warning notice to Taulbee even absent her participation in the July 8 strike. I therefore find and conclude that the Respondent issued that warning notice in violation of Section 8(a)(3).

Unlike the August 30 warning notice that the Respondent issued to Taulbee, the September 15 warning notice has at least some basis in fact because Taulbee admitted that she could have failed to give a shift-change report on one patient. There is no question that such reports are required for continuous patient care, and Taulbee’s failure to give a report is not an illogical subject of discipline.¹²³ Taulbee testified that nurses had occasionally failed to give a report, but she did not testify that they had done so with complete impunity. To the extent that such an assertion is implicit in Taulbee’s testimony, the General Counsel failed to introduce any evidence that would tend to corroborate it. (That is, no other nurses were called to testify that they ever failed to give a report without receiving a warning notice.) Nevertheless, on the notice Obenchain wrote that Taulbee had left the Hospital without giving report on one patient and “did not call back to give a report.” This statement was a concession that telephone reports were acceptable when a nurse forgets to give a report on a patient before leaving the Hospital at shift change. Obenchain’s faulting Taulbee for not calling back to the Hospital, however, is illogical to the point of disbelief; certainly, if a nurse forgets to report on a patient, she is unlikely to remember to call back and give that report after she has left the Hospital. Obenchain necessarily would have known this, and she would have known that it was the incoming nurse who is more likely to first realize that a report had been omitted. And Obenchain would have known that it is the responsibility of the incoming nurse to make the call to the departed nurse, as Taulbee testified; it is not the other way around, as the September 15 warning implies. Moreover, even if it was Taulbee’s responsibility to remember what she had previously forgotten and to call back to give the report, Obenchain aggrandized Taulbee’s offense by checking the box on the warning that indicated that it was Taulbee’s “Third/Final Written Warning.” Taulbee had received only one warning notice, and that notice, as I have found above, was issued unlawfully. Therefore, even if the Respondent has shown that it could have lawfully issued a first warning notice to Taulbee for her failure to give a patient report, it has not shown that it would have given Taulbee a “third” and “final” warning notice, even absent her participation in the July 8 strike.¹²⁴ Accordingly, I find and conclude that the Respondent also issued the August 30 warning notice to Taulbee in violation of Section 8(a)(3).

The complaint’s final allegation for Taulbee is that the Respondent constructively discharged her by unlawfully issuing her the warning notices of August 30 and September 15. As

¹²³ This is to be contrasted from Gabbard’s case where the discriminatee was ostensibly disciplined for failing to fill out a form that could only have benefitted her, not some patient or the Hospital itself.

¹²⁴ Again, see *Yukon Mfg. Co.*, 310 NLRB at 340, where the Board found that: “The aggrandizement of the offense is, itself, indicative of pretext.”

noted in *Controlled Energy Systems*, 331 NLRB 251 (2000), the Board has applied constructive discharge theories where employees quit their employment in two situations: (1) where employees are offered a “Hobson’s choice” between sacrificing their jobs or their statutory rights,¹²⁵ and (2) where in response to an employee’s union activities, an employer deliberately makes working conditions so unbearable that the employee is forced to quit.¹²⁶ In either situation, however, an employer contends that the alleged discriminatee had voluntarily quit. In this case, however, the Respondent makes no such contention. The Respondent contends that it discharged Taulbee for abandonment of her shift after she, admittedly, walked off the job on September 15. Therefore, this is not a constructive discharge case.¹²⁷

The issue therefore becomes whether the Respondent has demonstrated by a preponderance of the evidence that it would have discharged Taulbee for abandoning her shift on September 15, even absent her participation in the July 8 strike. I find that it has.

As quoted above, on cross-examination Taulbee successfully evaded answering whether her walking off the job on September 15 was patient abandonment. She did, however, admit that, if she was not actually discharged on August 15, it would have been at least “unprofessional” for her to have left the Respondent’s premises in the manner that she did. Of course, it would have been a great deal more than just unprofessional. At minimum, a hospital nurse’s walking off the job without giving notice of strike (or by giving some other type of notice that would allow the Hospital’s administration to continue the care that the nurse had been providing) presents an immediate peril to the nurse’s assigned patients. In some instances that peril could be grave. That fact, apparently, is why the Respondent’s personnel manual lists as an immediately dischargeable offense: “Absence from the facility during working hours without authorization.”¹²⁸

The General Counsel and the Charging Party dispute neither the existence of the Respondent’s rule nor the compelling logic that supports it. Instead, the General Counsel and the Charging Party, in essence, contend that Taulbee was provoked into walking off the job by the Respondent’s issuance of the September 15 warning notice. Again, neither the General Counsel nor the Charging Party cite any case wherein issuance of warning notices has been held to provoke, or justify, an employee’s walking off (or quitting) his or her job. Moreover, the precipitating September 15 warning notice did not, on its face, state that Taulbee was then discharged and thereby give her license to leave. Although the warning notice form had a box for “Terminated,” with a space for any termination date, Oben-

chain made no mark in that box or space. Moreover, the final four words of Obenchain’s text were that future misconduct by Taulbee “can result in termination.” That is, if anything, the warning notice was an affirmative statement that Taulbee was not being discharged. Therefore, in neither deed nor word did the Respondent provoke Taulbee’s walking off the job. Additionally, Taulbee admitted at trial that Gibbs told her to “wait,” and she admitted that her pretrial affidavit states: “Phyllis tried to talk me into staying.” I credit the affidavit.¹²⁹ I further credit Gibbs’ testimony that she attempted to persuade Taulbee not to leave the shift on September 15 and that, after Taulbee left the floor anyway, she had Taulbee paged to return to the unit. (And I discredit testimony by Taulbee that she did not hear the page.) That is, before Taulbee walked off the job on September 15, Obenchain in writing, and Gibbs orally, had made it clear to her that she had not been discharged.

Nor do I believe Taulbee’s testimony that she believed that she had been discharged by Obenchain’s September 15 warning notice. As quoted above, Taulbee’s testimony on that point vacillated. Taulbee testified that, when she first read the September 15 warning notice, she thought she had been terminated; then she testified that she thought she was being “pushed to leave,” something that is completely inconsistent with a belief that she had already been terminated. At minimum, therefore, Taulbee was not credible in the parts of her testimony in which she claimed that she believed that she had been discharged by the September 15 warning notice itself. Moreover, as I have stated before, the Board considers what a “reasonable employee” would think. I find that no reasonable employee could believe that she was discharged by operation of a warning that: (1) stated that it was only a warning (albeit a third and final one); (2) did not state that it was a discharge; and (3) further stated that future misconduct “can result in termination.”

The General Counsel alternatively argues that, if Taulbee was discharged (as opposed to constructively discharged), the discharge was unlawful. The General Counsel’s sole argument in support of this alternative contention is that an unlawful purpose is shown by a shifting defense. In this respect, the General Counsel contends that Obenchain originally stated that Taulbee had been suspended over “the variances,” not job abandonment. Obenchain did not deny Taulbee’s testimony that, on or about September 20, Obenchain told her that she was suspended while the Respondent investigated “the variances.” Because that testimony is undenied, I must credit it. The term “variance,” however, can apply to multiple situations, including presumably patient abandonment, whether a “variance” document about it had been created or not.¹³⁰ Moreover, Obenchain’s short reply about a suspension is too slender a reed to find that the job abandonment defense was a post hoc creation to defend the discharge. Finally, the General Counsel cites no case in which the Board has held that such a “shift” (if it can be

¹²⁵ See, e.g., *Goodless Electric Co.*, 321 NLRB 64, 67–68 (1996).

¹²⁶ See, e.g., *Grocers Supply Co.*, 294 NLRB 438 (1989).

¹²⁷ Even if the issue had been presented, I nevertheless would find that a constructive discharge has not been proven. Neither the General Counsel nor the Charging Party argues that the unlawful warning notices had made Taulbee’s working conditions unbearable, and neither party contends that Taulbee’s case fits within the “Hobson’s Choice” theory.

¹²⁸ Obenchain concisely referred to this type of misconduct by nurses as “patient abandonment,” and so do I.

¹²⁹ See *Alvin J. Bart & Co.*, 236 NLRB 242 (1978).

¹³⁰ Even if a variance had been not been created over the September 15 event, it is clear that Supervisors Obenchain and Gibbs investigated the matter before Taulbee was disciplined. This circumstance is to be distinguished from the variances that underlay the August 30 warning notice to Taulbee which were not shown to have been independently investigated by McGlothen or any other supervisor.

called that) in a defense, alone, has been held to constitute a failure of a respondent to meet its burden under *Wright Line*. Indeed, in *Precision Industries*, 320 NLRB 661 (1996), the Board noted that, although the finding of a shifting defense may (along with other evidence) permit an inference of discrimination, it does not compel such that inference. I find that the inference is not appropriate in this case in view of clear and convincing evidence that Taulbee was discharged only for abandonment of her shift.

In summary, Taulbee was neither constructively discharged nor provoked by the Respondent into walking off the job on September 15. But, without authorization, Taulbee did walk off the job on that date. That conduct by Taulbee was in the teeth of the Respondent's written rule that patient abandonment is an immediately dischargeable offense.¹³¹ The General Counsel has not come forward with any evidence of disparate treatment in this respect and has therefore shown no reason why the rule should not apply to Taulbee's case.¹³² It therefore must be found that the Respondent has shown that it would have discharged Taulbee even absent her participation in the July 8 strike. Accordingly, I shall recommend dismissal of the allegation that the Respondent discharged (or constructively discharged) Taulbee in violation of Section 8(a)(3).¹³³

14. Discharge of Melissa Turner

Melissa (Missy) Turner was hired by the Respondent as an X-ray technician in 1991. Before the July 8 strike, Turner regularly wore union buttons to work and passed out union handbills at a parking lot entrance. Turner also participated in the strike.¹³⁴ The Respondent, however, did not reinstate Turner after the Union submitted its August 15 offer to return to work. Instead, by letter dated August 17, the Respondent informed Turner that she was being discharged; no reason was given. The General Counsel contends that the Respondent discharged Turner because of her participation in the July 8 strike. On brief, page 112, the Respondent asserts: "The Hospital terminated Turner after it received reports that she loudly called a former hospital doctor a pervert in a public area of the Hospi-

¹³¹ I find, as well, that Taulbee's evasion of the question of whether her conduct of September 15 constituted patient abandonment was, in effect, an admission that it was exactly that.

¹³² As previously noted, in *A&T Mfg. Co.*, 276 NLRB 808 (1985), the Board dismissed the 8(a)(3) allegation regarding the discharge of employee Jimmy Popp. There was even stronger evidence of a specific, unlawful intent to discharge Popp; nevertheless, Popp had committed an immediately dischargeable offense under the employer's written rules, and there was no evidence of disparate treatment.

¹³³ I credit previously unmentioned testimony by Taulbee that Gibbs told her that she had lost one of the best nurses that she had ever had. It is further true that Obenchain treated Taulbee quite rudely when Taulbee returned to the Hospital for the promised explanation for her discharge. Gibbs' opinion of Taulbee, however, did not give Taulbee license to walk off the job without authorization. And Obenchain's rudeness did not retroactively convert the discharge from being lawful to unlawful.

¹³⁴ As I have found above, in April Turner was threatened by X-ray Department Supervisor Hicks that, if the then forthcoming strike was held to be economic, the strikers would lose their jobs. Also, I have above discredited Turner's testimony in support of alleged discrimination by Gayheart who was discharged for strike violence.

tal." The alleged conduct by Turner occurred on July 17 (that is, while the strike was still in progress). Turner was inside the Hospital on that date, not as a striker but to accompany her sister, Trish Gross, who had been brought there as a patient for emergency treatment. Ultimately, I find and conclude that Turner did engage in the conduct that the Respondent attributes to her, but I also find and conclude that the Respondent provoked her into that conduct and that the Respondent discharged Turner unlawfully.

As found above, the Respondent repeatedly threatened to discharge employees such as Turner who participated in the July 8 strike; therefore, a prima facie case for Turner's discharge has been proved, and, under *Wright Line*, the Respondent's defense for that discharge must be addressed. (Although the conduct of Turner upon which the Respondent bases its defense occurred during the strike, the Respondent does not contend that it discharged Turner for strike misconduct; therefore, her case is to be analyzed under the principles of *Wright Line*, not *Rubin Bros. Footwear*, supra.)

Anita Turner, a charging party in this proceeding, is a former employee of the Respondent's, and she is the mother of sisters Melissa Turner and Trish Gross.¹³⁵ Anita Turner and Trish Gross, as well as Melissa Turner, participated in the July 8 strike. Anita Turner and Trish Gross were involved in the events of July 17 that I will discuss below. Tim Gross is Trish Gross' husband; Tim Gross was also involved in the events of July 17 that I will describe below, but he has never been employed by the Respondent. Neither of the Grosses testified.¹³⁶

Turner testified that on July 17, in the office of a Jackson-area physician, Gross was preliminarily diagnosed with bacterial meningitis. The physician told Gross' family that she should be taken to a hospital immediately. Turner, Anita Turner, and Tim Gross escorted Gross to the Respondent's facility, arriving at approximately 7:30 p.m. Turner testified that, after being received through the emergency room, Gross was taken to the X-ray department for a chest X-ray and a CT scan. (Anita Turner then left the Hospital.) Turner went with Gross into the X-ray room and was helping Gross disrobe for the chest X-ray when a guard entered the room and "told me that I could not be in there with her because of patient confidentiality." Turner left the room and Tim entered. A few minutes later, Tim came out of the X-ray room with Gross. Turner further testified that Gross said that "she would have the tests if me, or if not myself, her husband, could go in with her." Otherwise, Turner testified, Gross "refused to have anything done." Tim escorted Gross back to the emergency room.

Turner stayed outside the emergency room's interior door and spoke to House Supervisor Alena Hale, Medical-Surgical Unit Coordinator Robin McGlothen, and Part-Time Supervisor

¹³⁵ As I have found above, Obenchain unlawfully threatened Anita Turner with loss of her nursing license if she went on strike. As I have also found above, the Respondent's agent Dr. Edward Burnette threatened Anita Turner and other emergency room employees with discharge if they engaged in the July 8 strike.

¹³⁶ Unless otherwise indicated, subsequent references to "Turner" are to Melissa Turner. References to "Gross" are to Trish Gross. The transcript is corrected where, at various points, it misspells the Grosses' name as "Groves."

Jerri Howard, all of whom had come to the area. Also present was a Dr. Usman, a staff emergency room physician. Hale and McGlothen told Turner that, if and when Gross came back to the X-ray department from the emergency room, neither she (Turner) nor Tim Gross could go with Gross when she received the CT scan because of "patient confidentiality." Turner told the supervisors, and Usman, that, as an X-ray technician herself, she knew that it was not hospital policy that neither she nor Tim could stay with Gross because of any considerations of patient confidentiality. Turner also pointed out to McGlothen, Hale, Howard, and Usman that she had previously performed X-rays on certain relatives of each of them while each of them was present with their respective relatives. Turner testified that McGlothen told her that, nevertheless, she could not go with Gross into the X-ray department "under these circumstances." (Turner did not testify that McGlothen explained what "circumstances" she was referring to; nor did Turner testify that she asked.) Turner admitted crying and being upset while she was talking outside the emergency room door, but she denied that she was loud. Turner testified that she was upset because she thought that "the circumstances" to which McGlothen referred was the ongoing strike and that the Hospital was allowing the strike to interfere with the treatment that her sister should be receiving. Turner further testified that, during the evening in question, she noticed that family members of other patients were being allowed to go with those other patients into the X-ray department.

Turner testified that the CT scan and X-rays on Gross were delayed until 11 p.m. (or about 3-1/2 hours after she first came to the emergency room) when the Hospital finally allowed Tim Gross to accompany Gross into the X-ray department. After receiving the CT scan and X-rays, Gross was admitted to a medical-surgery unit room, and Turner stayed with her until 1 a.m. None of this testimony by Turner was disputed by the Respondent. (Turner further testified that, at some point after a spinal tap was performed on Gross, Gross was diagnosed with viral, rather than bacterial meningitis; viral meningitis is a condition that is not as threatening. Gross was discharged from the Hospital within a week.)

On cross-examination, Turner admitted that on July 17, when she was outside the emergency room, she raised her voice, but she denied screaming, and she denied that persons who were 50 feet away could have heard her. She also flatly denied that anyone could have heard her from the nearest nurses' station.

Bevins testified that he decided to terminate Turner "for behavior within our facility which impugned the reputation of the Hospital's radiology department and a member of our medical staff. It was in a public area, [on] a very loud basis." Bevins gave no other testimony about his decision to terminate Turner. Specifically, Bevins did not testify from whom he got any report (or reports) upon which he based his decision to discharge Turner. Cooper, the Respondent's chief financial officer, however, testified that he made a report to Bevins about reports that he, in turn, had received about Turner's conduct of July 17.

Cooper testified that, during the evening of July 17, when he was at home, McGlothen called him and asked him to come to the Hospital. On direct examination, Cooper did not testify as

to what McGlothen told him when he arrived, but he did testify what he, in turn, told Bevins. According to Cooper:

[I told Bevins that] I had received a call from Robin McGlothen that Missy Turner's sister, Trish Gross, had been admitted to the emergency room. . . . And that the ER physician was ordering a CT scan of Ms. Gross, and Missy Turner was making an incident that she would not allow her sister to go in to have that procedure done without Missy being present with her sister. . . . I [also] informed Mr. Bevins that Robin also told me that Missy made a statement rather loudly that there was a pervert employed in the Radiology Department. . . . I recall saying [to Bevins] that Robin told me that [Gross'] husband was also requesting to go in with Ms. Gross.

And [I] was instructed [by Bevins] to complete a release form to be signed by Mr. Gross to release the Hospital from any liability of potential exposure.

Bevins dictated to Cooper the following language to be typed and presented to Tim Gross for signature before he would be allowed to accompany his wife into the X-ray department: "I agree to release Kentucky River Medical Center of all responsibility of injury or exposure to radiation due to my presence during my wife's CT scan." Then followed one blank line designated for the signature of "Tim Gross" and, below that, three other blank lines followed, each of which was designated for "Witness." Cooper testified that he typed the release form and then approached Tim Gross. Cooper told Tim Gross that he had talked to Bevins and that:

We had no problem with him accompanying his wife into the CT area, but, because of liability, I'd ask for his signature on the release form releasing the Hospital from any potential liability. He refused to sign the release, and told me that I knew why they [i.e., the members of Gross' family who were at the Hospital by that point, including Anita Turner] wanted Missy to go in there with Trish, that there had been two rapes committed in the Radiology Department, and for me not to act like I did not know what he was talking about.

Cooper testified that he had not, in fact, known what Tim Gross was talking about. Cooper testified that he then reported Gross' refusal to Bevins. (Tim Gross never did sign any sort of waiver for Cooper.)

On cross-examination, Cooper acknowledged that he knew of no prior occasion upon which a form such as that which was dictated by Bevins had been used by the Respondent. (When Bevins testified, he was not asked about the form; that is, Bevins also did not claim that the signing of any such form had previously been required of persons who wished to accompany another person, family or otherwise, into the X-ray department.)

Cooper also testified on cross-examination that, when he arrived at the X-ray department that night, McGlothen told him that some sort of confidentiality policy would prevent either Turner or Tim Gross from accompanying Trish Gross into the X-ray department. Cooper testified that no supervisor of the X-ray department was present at that hour, so he asked a departmental employee for a copy of any confidentiality form that the

department used; the employee did not know where such a form could be located, but she thought it, and a statement of the policy requiring it, did exist and that it would prevent Gross' husband or Turner from accompanying Gross while the CT scan was being done. Cooper testified that he searched through some policy manuals that night, looking for a copy of the confidentiality policy, but he found none that applied to the situation then at hand. After the search, Cooper telephoned Bevins, as Cooper described on direct examination.

House Supervisor Hale testified for the Respondent that she came to the area on July 17 and:

Missy [Turner] was upset because she could not go in the X-Ray Department with her sister [Trish Gross]. Her mother [Anita Turner] was trying to get Missy to be quiet. And she was telling her to "Shut-up, shut-up." All she [Anita Turner] was interested in was getting the sister [Gross] treated.

And Missy said, "No, I am afraid for her to go in there by herself because you all heard about Dr. Dailey's little pervert thing."

(Dr. Dailey is the "former hospital doctor" to whom the Respondent refers on brief, as quoted above. The General Counsel's witnesses testified, without contradiction, that Dr. Dailey was a staff radiologist who had been fired by the Respondent well before the July 8 strike. The Respondent offered no testimony about why it discharged Dailey, but Turner, on cross-examination, testified about rumors of his conduct that could fairly be characterized as perverted.) Hale further testified that Melissa Turner "wasn't screaming, but she was loud because she was upset."

On cross-examination, Hale testified that, when Turner made her comment about a "pervert," no member of the public was present and that no employee, other than part-time supervisor Jerri Howard, was present.

Hale further acknowledged on cross-examination that it was she who told "a nurse" (apparently McGlothen) that Turner could not go with Gross while Gross' CT scan was being done because of a patient confidentiality policy. Hale said that she did so, without consulting either Gross or Turner, because: "My understanding—you don't let anyone go in. I've been there, like I said, 12-and-a-half years. That's always been my understanding. No one goes in to x-ray because of patient confidentiality." Hale then agreed, however, that it would not be a violation of patient confidentiality rules, as she understood them, if a person accompanied a patient into the X-ray department upon the patient's request. Hale testified that a member of the Respondent's security department was present but she did not recall whether she was the one who called for security personnel. Then Hale acknowledged that her pretrial affidavit stated: "To make sure that Missy did not go into x-ray, I had called security and had a guard stationed outside the door."

Howard testified for the Respondent that she was working as a floor nurse when she heard Hale say that she had been requested to come to the emergency room area because there was trouble. (Howard accompanied Hale, Howard testified, because she was a part-time supervisor, herself.) As she and Hale approached the emergency room area, she could hear, from some

distance, Turner being "very loud"; as she and Hale got closer, Howard could hear Anita Turner attempting to get Melissa Turner to be quieter. On direct examination, Howard testified:

[T]he reason [Turner] was so upset, she was not wanting her sister to go in there [to X-ray] alone and the staff had even arranged for Trish's husband to go and Missy still wasn't—she wasn't happy with that. She wanted to be the one to go. She was very adamant that she be the one to go. She made comments, references to Doctor Dailey. He was the radiologist. She had made sexual references. I don't recall exactly what she said. I just know that that was the reason she didn't want Trish to go alone and that she wanted to be the one to go with her.

Howard testified that in the area around the emergency room and the X-ray department, where Turner was being "very loud," there were other visitors and other patients.

On cross-examination, Howard acknowledged that she knew that Tim Gross was not being allowed to go into X-ray until he signed some sort of release. When asked specifically if Turner had been insisting that she be "the one" to go with Gross, and not Gross' husband, Howard replied: "She wanted to go. I don't know necessarily if she wanted to be the one, the only one." Howard was further asked and she testified:

Q. Well, if a patient asks for someone to go with them, is that—has that been permitted? Have you ever seen that happen?

A. It has been permitted, yes.

Q. And, you haven't had to have that person sign a release, have you?

A. No.

Q. And, was one of the things that Missy was saying in the hallway when you encountered her that night, that she thought that the Hospital's refusal to let her go into the procedure with her sister, that that was not according to policy? That that's not the way they normally did things?

A. Yes. I remember Missy had said to me, the only thing that she had said to me, was, "You know, Jerri, that's not right."

Q. And, you understood her to be referring to her belief that that's not the way the Hospital normally does things?

A. Yes.

Howard agreed with Hale that there is no issue of patient confidentiality if a patient asks for someone to be with him or her while he or she is in the X-ray department.

On rebuttal, Turner testified that Dailey had been discharged by the Hospital "three to 6 months" before the strike. Turner was asked, and she flatly denied saying anything about Dr. Dailey when she was at the Hospital on July 17. Turner further testified that the only reason that she requested to go with her sister into the X-ray department was that her sister asked her to. She admitted that she was crying and upset, but she denied that she would have been audible to persons in a nearby waiting area. On cross-examination, Turner denied that her mother tried to get her to lower her voice.

Also in rebuttal, Anita Turner testified that, after accompanying Turner and the Grosses to the emergency room, she left the Hospital for an unspecified period of time. Anita Turner testified that Gross is “a little claustrophobic” and that Gross was nervous about being put into the CT-scan machine (the cylindrical structure of which affords minimal room for the patient who is inside it). Anita Turner testified that, before she left the Hospital, she suggested to Gross that Melissa Turner go with Gross into the X-ray room during the CT scan and that Gross agreed with her. Anita Turner testified that when she returned, Gross was in a hallway refusing to take a chest X-ray unless she was accompanied by either her husband or Turner. Anita Turner went to the X-ray department where she found Supervisors McGlothen, Howard, and Hale. Anita Turner asked McGlothen why Gross’ husband (Tim) or sister (Melissa Turner) could not go with Gross into the X-ray department. McGlothen replied, “Patient confidentiality.” Anita Turner replied, “Yeah,” in an ironic tone that actually expressed disbelief, and then she returned to Gross in the hallway. There she found Melissa Turner who was crying and upset as she was telling Dr. Usman that he knew that patient confidentiality was not an issue. McGlothen, Hale, and Howard then came to the hallway. Then she heard Melissa Turner tell McGlothen that patient confidentiality issues did not apply, as they had not applied when McGlothen had gone into X-ray when McGlothen’s mother was being X-rayed, before the strike, by Melissa Turner. Anita Turner further testified that:

Jerri [Howard] was going on about people on the picket line and that was going on when I walked out into the hallway. . . . She was just saying about she had nothing against everybody on the picket line. I told everyone to shut up. I told them I wanted them to forget the strike; forget the Union; forget the problems. We were there for one purpose and it was because I had a daughter that was about to die. . . . They hushed. Nothing [else] was said. I went back in E.R. Missy went with me. Doctor Usman went with me and I don’t know where the other three went.

Anita Turner described the tone of the voices in the hallway:

Just a volume of several people [who] were talking and were upset. I don’t know what kind of volume. Just like if you two were talking and I was trying to talk over you, maybe something like this, a little louder.

Anita Turner flatly denied that, during any part of the time that she was in the presence of Melissa Turner, Melissa Turner said anything about Dr. Dailey or any current member of the Hospital’s staff.

Anita Turner further testified that, several months after the strike was over, she had a telephone discussion with Hale. Turner testified that she told Hale that the Respondent was taking the position that Melissa Turner had been discharged “because she had caused a disturbance in a patient care area with visitors around.” Anita Turner testified that Hale replied: “Anita, that’s a lie. There was no one around that area that heard anything.” The Respondent did not call Hale to rebut this testimony.

On cross-examination, Anita Turner admitted that there were patients in the nearby X-ray waiting room, but she denied that there were any in the corridor when the confrontation was going on.

Conclusions on Turner’s Discharge

Alleged discriminatee Turner, and her mother, testified that when Turner was being prevented from accompanying her sister into the X-ray department, she was excited and crying, and that her voice was somewhat raised, but she was not yelling or screaming. This testimony was essentially corroborated by Hale (who testified that Turner “wasn’t screaming), and I credit it. Although Turner’s volume could not be described with precision by the witnesses at trial, or by me in this narrative, I fully credit Anita Turner’s testimony that, while she was present, all voices were “[j]ust a volume of several people who were talking and were upset . . . [j]ust like if you two were talking and I was trying to talk over you.”¹³⁷

Hale testified that Turner said, “I am afraid for her to go in there by herself because you all heard about Dr. Dailey’s little pervert thing.” Howard corroborated Hale to some extent by testifying that Turner “made sexual references” about Dr. Dailey. Turner denied mentioning Dr. Dailey while she was protesting her not being allowed to accompany Gross. If Hale had wanted to lie about Turner’s conduct, she could have testified that Turner was yelling (or screaming); she could have testified that patients or visitors were within hearing distance (which she did not), and she could have made Turner’s remark about Dr. Dailey a lot worse. For these reasons, and because Hale’s demeanor was more favorable than Turner’s, I credit Hale at least to the extent of finding that Turner, at some point during the hubbub of July 17, referred to the departed Dr. Dailey as being a pervert (or stated that Dr. Dailey had done perverted things when he worked in the X-ray department).

The patient confidentiality canard that Hale created to keep Turner, who was still participating in the July 8 strike, out of the X-ray department on July 17 was of the purest of fictions. This is clear for a multiplicity of reasons: (1) The Respondent offered no testimony that would tend to dispute Turner’s testimony that Gross wanted her in the X-ray department when the CT scan was being performed. In fact, Cooper admitted that Tim Gross had told him that “they,” the members of Gross’ family, wanted Turner to be in the room with Gross with her when the CT scan was being performed. (2) Hale, Howard, McGlothen, and Usman did not dispute Turner when she pointed out to them that they had accompanied relatives who had been in the X-ray department. (3) When McGlothen told Cooper that Hale had told her that patient confidentiality required that Turner, and even Gross’ husband, be excluded without signing some sort of waiver, Cooper searched the X-ray department diligently but found no form for such a waiver or any statement of such a pol-

¹³⁷ On brief, the Respondent cites *NLRB v. Howell Automatic Machine Co.*, 454 F.2d 1077 (6th Cir. 1972), as holding that uncorroborated testimony of interested parties’ relatives can never be credited. The case does not go that far; moreover, the testimonies of Melissa and Anita Turner about Melissa Turner’s volume were essentially corroborated by Hale. Finally, the Board has never adopted a rule against crediting relatives of alleged discriminatees.

icy. Cooper's search, itself, demonstrates that the Respondent would have put any such policy in writing. At trial, however, the Respondent produced no documentation as support for the claim of patient confidentiality that Hale, McGlothen, and Howard made to Turner. (4) Even Bevins did not testify that there were any patient confidentiality policy considerations that would have excluded Turner. (5) When Bevins dictated waiver language for the occasion to be presented to Tim Gross, he included nothing about patient confidentiality; the only waiver that Bevins proposed was for liability for radiation exposure. It is not surprising, therefore, that the Respondent makes no argument on brief that Gross' privacy as a patient would have been violated if the Respondent had granted her request to have Turner with her during the CT scan.

It is also not surprising that Turner, knowing perfectly well that she was being lied to by Hale, McGlothen, and Howard, became upset and somewhat loud on July 17.¹³⁸ It is therefore not surprising that Turner used any argument that she could think of to get past the guard that Hale had posted at the X-ray department's door.¹³⁹ Calling the departed Dr. Dailey a pervert was apparently such an argument. The epithet was, at minimum, unkind; at worst, however, it was heard only by the Respondent's supervisory staff (according to Hale's admission at trial and according to Hale's admission to Anita Turner before trial). Moreover, although Bevins testified that the report of Turner's conduct that he received was that it was on "a very loud basis," Cooper, who gave the report, testified that he told Bevins no more than that Turner used her voice, "rather loudly," a seemingly lesser intrusion into the relative quietness that one might expect of a hospital. Moreover, upset and loud family members are not entirely unknown to hospitals. Even if there had been a member of the public that could have heard Turner (which there was not), that member of the public would not necessarily have been shocked by Turner's statement, or its volume, to the point of lowering his or her regard for the professionalism of the Hospital, as Bevins assuredly knew. This is especially true if the visitor had known, as Bevins assuredly knew, that Dr. Dailey was no longer employed by the Respondent.¹⁴⁰

I have agreed with the Respondent that Bowling's cursing of a fellow employee violated its written, immediate discharge, rule against "Threatening, intimidating, coercing, using abusive language, or otherwise interfering with the job performance of fellow employees or visitors." In upholding the discharge, however, I specifically found the Respondent had not provoked Bowling into her conduct, and I found that nonemployees were present. In Turner's case, however, nonemployees were not present, and the Respondent provoked Turner into her intemperate remark by excluding her on the palpable pretext of patient confidentiality.

Cooper did not testify that he told Bevins that Turner had been excluded from the X-ray department on the stated ground

of patient confidentiality. Nevertheless, I find that he did so. This is because Cooper testified that he knew that Turner was being excluded on the stated basis of patient confidentiality when he called Bevins, and it is certain that Cooper, in explaining to Bevins what had been happening, would have given the reason for the supervisors' acting as they had toward Turner. Bevins, knowing that the patient confidentiality ruse would not withstand even minimal scrutiny, necessarily knew that Turner would have been, and had been, provoked into her conduct. Nevertheless, Bevins seized upon Turner's reasonably foreseeable reaction to the supervisors' provocation to discharge her.

That is, Bevins' stated basis for the discharge of Turner is clearly a pretext. The Respondent having offered no other reason for the discharge, I find that it has not shown that it would have discharged Turner even absent her strike activities. Accordingly I conclude that the Respondent violated Section 8(a)(3) by discharging Turner.

CONCLUSIONS OF LAW

1. The Respondent, Jackson Hospital Corporation d/b/a Kentucky River Medical Center, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care facility within the meaning of Section 2(14) of the Act.

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

3. By the following acts and conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act:

(a) Threatening employees with discharge or other discrimination if they engaged in a strike on behalf of the Union, or because they have become or remained members of, or because they are in sympathy with, or because they have given assistance or support to, the Union.

(b) Videotaping striking employees, and creating the impression of videotaping striking employees, both without lawful justification.

4. By the following acts and conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act:

(a) Discharging the following-named employees on or about the dates in 2000 that are set opposite their respective names:

Clara Gabbard	August 31
Sandra (Barker) Hutton	September 6
Eileene Jewell	August 17
Debbie Miller	August 22
Lois Noble	August 28
Maxine Ritchie	August 28
Laotta Sizemore	August 21
Melissa Turner	August 17

(b) Issuing warning notices to employee Diana Taulbee on August 30 and September 15, 2000.

(c) Suspending employee Debbie Miller on August 22, 2000.

5. By the following acts and conduct, the Respondent has engaged in unfair labor practices affecting commerce within the

¹³⁸ McGlothen's unexplained reference to "under these circumstances," reasonably added to Turner's upset.

¹³⁹ I credit Hale's affidavit that she summonsed the guard. Again, see *Alvin J. Bart & Co.*, 236 NLRB 242 (1978).

¹⁴⁰ Tellingly, none of the Respondent's witnesses acknowledged at trial what the Respondent acknowledges on brief, that on July 17 Dr. Dailey was no longer employed by the Respondent.

meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act:

(a) Failing and refusing, since August 11, 2000, to recognize and bargain with the Union as the collective-bargaining representative of the employees in the following unit of employees, which unit is appropriate for bargaining under Section 9(a) of the Act:

All full-time and regular part-time registered nurses, the team leader, and the continuing education coordinator; nonprofessional employees, including the medical records employees, admission employees and purchasing employees; and technical employees, including certified respiratory therapy technicians, x-ray technicians, licensed practical nurses, the DRG coordinator, medical lab technicians and the physical therapy assistant employed by Kentucky River Medical Center at its 540 Jetts Drive, Jackson, Kentucky, facility, but excluding the registered respiratory therapist, medical technologists, utilization review nurses, business office clerical employees, confidential employees, and all professional employees, guards and supervisors as defined in the Act.

(b) Changing, on or about August 20, 2000, the lunch and break schedules, and the shift schedules, of the unit employees without prior notice to and bargaining with the Union.

6. The remaining allegations of the complaint have not been proved.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action that is designed to effectuate the policies of the Act. The Respondent must be required to post the appropriate notice to all employees and, because the Respondent unlawfully discharged eight employees, it must offer those employees reinstatement and make them whole for any loss of earnings or other benefits, computed on a quarterly basis, from the date of their discharges until the dates of the Respondent's proper offers of reinstatement, 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).

For those unilateral changes that I have found to have been unlawfully implemented, the Respondent shall be ordered to rescind them, on request by the Union, and to make any employee who was adversely affected by those changes whole for any loss of earnings or other benefits, as prescribed in *Ogle Protective Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), plus interest as computed in accordance with *New Horizons for the Retarded*, supra.

Because of the Respondent's egregious misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁴¹

ORDER

The Respondent, Jackson Hospital Corporation d/b/a Kentucky River Medical Center, of Jackson, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge or other discrimination if they engage in a strike on behalf of the Union, or because they have become or remained members of, or because they are in sympathy with, or because they have given assistance or support to, the Union.

(b) Photographing striking employees, or creating the impression of photographing striking employees, in either case without lawful justification.

(c) Discharging or suspending employees, or otherwise discriminating against employees, because they have become or remained members of the Union or because they have given assistance or support to it.

(d) Issuing to employees warning notices because they have become or remained members of the Union or because they have given assistance or support to it.

(e) Failing and refusing to recognize and bargain with the Union as the collective-bargaining representative of the employees in the above-described bargaining unit.

(f) Changing the lunch or break schedules, or changing the shift schedules, of the unit employees, or changing any other term or condition of employment of the unit employees, without prior notice to and bargaining with the Union.

(g) In other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

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

(a) Offer to the following-named employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment without prejudice to their seniority or any other rights or privileges that they previously enjoyed, and make those employees whole for any loss of earnings or other benefits that they have suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

Clara Gabbard	Lois Noble
Sandra (Barker) Hutton	Maxine Ritchie
Eileene Jewell	Laotta Sizemore
Debbie Miller	Melissa Turner

(b) Within 14 days from the date of this Order, remove from its files any references to its unlawful discharges of the employees who are named in the preceding paragraph, and remove from its files any reference to the unlawful suspension of Debbie Miller, and remove from its files any references to the

¹⁴¹ 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.

warning notices that it unlawfully issued to Diana Taulbee, and within 3 days thereafter notify those employees in writing that this has been done and that its actions will not be used against them in any way.

(c) On request by the Union, rescind all unilateral actions found to have been effected in violation of Section 8(a)(5) and make whole, in the manner set forth in the remedy section of this decision, any of its employees for any loss of earnings or other benefits that they have suffered as a result of those unilateral actions.

(d) On request, bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with the Union as the exclusive collective-bargaining representative of its employees in the above-described unit, and embody in a signed agreement any understanding reached.

(e) Preserve and, within 14 days of a request, or within 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 Jackson, Kentucky facility copies of the attached notice marked

“Appendix.”¹⁴² Copies of the notice, on forms provided by the Regional Director for Region 9, 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. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the 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 1, 2000, the approximate date of the first unfair labor practice found.

(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 complaint is dismissed insofar as it alleges violations of the Act not specifically found.

¹⁴² If this Order is enforced by a judgment of the United States court of Appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”