

**Washoe Medical Center, Inc. and Operating Engineers Local No. 3, International Union of Operating Engineers, AFL-CIO.** Cases 32-CA-18511-1, 32-CA-18514-1, 32-CA-18579-1, 32-CA-18611-1, 32-CA-18828-1, and 32-CA-18948-1

September 29, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND SCHAUMBER

On January 9, 2002, Administrative Law Judge Jay R. Pollack issued the attached decision and, on January 15, 2002, an Erratum containing revised Conclusions of Law. The Respondent, the General Counsel, and the Charging Party each filed exceptions and a supporting brief. The Respondent filed an answering brief.<sup>1</sup>

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 record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions only to the extent consistent with this Decision and Order.<sup>3</sup>

There were no exceptions to, and thus we adopt, the judge's finding that the Respondent violated Section 8(a)(1) by interfering with protected employee solicitation and distribution. As we explain below, we also adopt the judge's finding that the Respondent violated Section 8(a)(1) by denying union representation to bargaining unit employees at grievance meetings; however, we find it unnecessary to pass on his finding that this conduct also violated Section 8(a)(3). Further, we adopt the judge's recommended dismissal of the allegation that the Respondent violated Section 8(a)(5) and (1) by declaring impasse on April 6, 2001, and implementing its economic proposals. We reverse the judge's finding that the Respondent violated Section 8(a)(1) by interrogating employees regarding a potential strike, and violated Section 8(a)(5) and (1) by unilaterally discontinuing its pay-for-performance merit pay system for unit employees.

<sup>1</sup> The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

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

<sup>3</sup> We shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

Denial of Representation

We adopt the judge's finding that the Respondent unlawfully denied union representation to employees Tuttle and Mathew at grievance meetings in November and December 2000. The denial of the right to union representation interfered with employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1) of the Act.<sup>4</sup>

In its exceptions, the Respondent contests the judge's finding that the "grievance meetings" were pre-disciplinary investigatory interviews. For the reasons given by the judge, we find no merit in this contention.

Under *Weingarten*, an employee at a union-represented workplace has a Section 7 right to ask for union representation at an investigatory interview that she "reasonably believes . . . will result in disciplinary action."<sup>5</sup> If the employer grants the request, the union representative is entitled not only to attend the investigatory interview, but to provide "advice and active assistance" to the employee.<sup>6</sup> Thus, it is well settled that "[t]he union representative cannot be made to sit silently like a mere observer."<sup>7</sup>

In the present case, it is not disputed that Union Representative Freitas attended the investigatory interviews of employees Tuttle and Mathew at their request. Thus, the employees were entitled to Freitas' active assistance. The denial of that right violated Section 8(a)(1).

The Respondent asserts that Section 9(a) of the Act grants union representatives solely the right to be present at grievance adjustments, not the right to actively participate. Section 9(a), however, does not control this case. Although these meetings were referred to as "grievance meetings," they were, as mentioned, pre-disciplinary investigatory meetings. That is, they were held to determine whether discipline should be imposed.<sup>8</sup> Thus, the

<sup>4</sup> The second amended consolidated complaint and notice of hearing alleged that the denial of representation violated Sec. 8(a)(1), (3), and (5) of the Act. The judge found that the Respondent violated Sec. 8(a)(3) and (1). He did not address the 8(a)(5) allegation, and there are no exceptions to that aspect of the judge's decision. In light of our disposition of this matter on 8(a)(1) grounds, we do not reach the judge's 8(a)(3) finding. Such a finding would not affect the remedy.

<sup>5</sup> *NLRB v. J. Weingarten*, 420 U.S. 251, 257 (1975). As set forth by the judge here, if the employee makes a valid request, the employer must either grant it, discontinue the interview, or offer the employee the choice of proceeding with the interview without union representation or foregoing the interview altogether. See, e.g., *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982).

<sup>6</sup> *Barnard College*, 340 NLRB 934 (2003).

<sup>7</sup> *Id.* (citing *Talsol Corp.*, 317 NLRB 290, 331-332 (1995), enfd. 155 F.3d 785 (6th Cir. 1998)).

<sup>8</sup> The meetings were not to impose discipline that had been determined, during which an employee is not entitled to union representation.

applicable principles are those of *Weingarten*, not those set forth in Section 9(a) and its proviso.

#### Impasse and Implementation

The judge recommended dismissal of the allegation that the Respondent violated Section 8(a)(5) and (1) by declaring impasse on April 6, 2001, and implementing its economic proposals. In support, the judge found that since December 1999, the parties had engaged in 30 negotiating sessions. Despite the participation of a Federal mediator, they remained apart on more than 19 important issues including compensation, health insurance, contract term, and a 401(k) plan. The judge also considered evidence that the unit employees had twice voted, within a 3-month period immediately prior to the Respondent's impasse declaration, to reject the Respondent's final offer. The judge concluded that "the parties were at impasse notwithstanding the [Respondent's] unfair labor practices." Accordingly, he recommended dismissal of the allegation.

The General Counsel excepts. He contends that the judge considered only the unfair labor practices found in the instant case and failed to consider, in addition, the cumulative effect on the negotiations of the unfair labor practice previously found by the Board in *Washoe Medical Center*,<sup>9</sup> i.e., that the Respondent violated Section 8(a)(1) and (5), starting in November 1999, by unilaterally setting initial wage rates for new unit employees.

We agree with the judge that the General Counsel has not established a causal nexus between the unfair labor practice of the prior case and the impasse in the instant case. The unfair labor practice that was the subject of the prior case was the 1999 unilateral increase in starting wage rates for new employees. Although the Union objected to the unilateral character of the increase, it did not object to the fact of the increase, i.e., an increase for new unit employees. In the instant case, the parties reached impasse in April 2001, after 30 bargaining sessions over a period of nearly a year and a half, some with the participation of a Federal mediator. Significantly, the issue of increased wage rates for new employees was not an issue at the time of impasse. Thus, it does not appear that the Respondent's previous unilateral change in beginning wage rates was the source of "friction . . . [that] undermined the Union's ability to engage in effective negotiations" or that it was "directly responsible for the length of the negotiations" leading up to the impasse in bargaining.<sup>10</sup> In the absence of any such evidence, we do not agree with our dissenting colleague that the Respon-

dent's declaration of impasse in April 2001, was "inevitably tainted" by the Respondent's unilateral change in beginning wage rates in about June 1999. We find, therefore, that the General Counsel has not established a causal nexus between the unfair labor practice of 1999 and the impasse in April 2001.<sup>11</sup>

Finally, there is no evidence that the denial of *Weingarten* rights in the instant case played any role in the impasse of April 2001.

In light of the parties' bargaining history, their good-faith negotiations over a protracted period of time, the critical nature of the issues that remained unresolved when the Respondent declared impasse, and the inability of a Federal mediator to facilitate agreement, we find that the parties were deadlocked when the Respondent lawfully declared impasse in April 2001, notwithstanding the Respondent's unfair labor practices.<sup>12</sup> Accordingly, the impasse was a lawful one, and the postimpasse changes were privileged. Therefore, we dismiss this allegation.

#### Interrogation

We reverse the judge's finding that the Respondent unlawfully interrogated employees regarding a potential strike.

The critical facts are these. Immediately following service upon the Respondent of the Union's strike notice, the Respondent sent a letter and preprinted response card to unit employees informing them that it had received the strike notice and stating:

<sup>11</sup> Member Liebman would find that the impasse was tainted by the Respondent's ongoing refusal—found unlawful in *Washoe Medical Center*, supra—to bargain over starting wages for new hires. Refusal to bargain over "an integral part of the economic package" on which the employer has taken unilateral action is "critical" in determining whether impasse occurred. *Brown-Graves Lumber Co.*, 300 NLRB 640, 642 (1990), enfd. 949 F.2d 194 (6th Cir. 1991). Moreover, starting wages affect bargaining-unit employees "in the most fundamental way—in their paychecks." *Intermountain Rural Electric*, 305 NLRB 783, 789 (1991), enfd. 984 F.2d 1562 (10th Cir. 1993). In this case, the "unfettered discretion" exercised by the Respondent in setting starting wages resulted in more than half of new hires receiving pay above the base rate. 337 NLRB at 208 fn. 24. The Union repeatedly attempted to bargain over the issue, pointing out that it affected not only new employees but all the unit members because the starting rates the Respondent had been offering had failed so far to recruit new hires, and working conditions were consequently eroding. The Respondent refused on each occasion, id. at 208–209, and the violation was the subject of a pending Board charge for months before the Respondent declared impasse. It is therefore not surprising that the Union had stopped asking to bargain over the issue by that time. Particularly considering that the Respondent was also refusing to discuss any interim pay increase for all unit members, id., the impasse was inevitably tainted by the ongoing violation.

<sup>12</sup> *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968); *NLRB v. Cambria Clay Products*, 215 F.2d 48, 55 (6th Cir. 1954).

<sup>9</sup> 337 NLRB 202 (2001), motion for reconsideration denied 337 NLRB 944 (2002).

<sup>10</sup> *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 139 (D.C. Cir. 1999).

[W]e have a real and present need to make decisions necessary to ensure uninterrupted continuity of care to our patients. Therefore, we need to know whether you intend to work or not. Please indicate your decision on the enclosed response card and return it to the Nursing Administration Office by 4:00 p.m. on Tuesday, June [sic]. If you do not complete and submit the enclosed response card by this date, we must assume you intend not to work on June 26.

The next paragraph on the same page of the letter, which was italicized for emphasis, stated:

*[N]o one can require you to strike if you do not want to do so . . . Regardless of your decision, no reprisal can or will be taken against you.*

The remainder of the letter contained information regarding work schedules and security measures during the strike. The enclosed response card, referred to in the body of the letter, sought the name and unit or department of the employee and contained spaces for indicating whether or not the employee intended to work during the strike. The card reiterated the Respondent's targeted time for submission, and its assumption that employees who did not return a card did not intend to work during the strike. The response card itself did not contain assurances against reprisals.

The judge, relying principally on *Preterm, Inc.*,<sup>13</sup> and *Holyoke Visiting Nurses Assn.*,<sup>14</sup> found that the Respondent violated the Act by failing to assure unit employees "that there would be no reprisals for failing to answer the interrogatory." We disagree. In our opinion, the judge has parsed the contents of the Respondent's prestrike letter and enclosed response card so finely as to rob that correspondence of its clear, commonsense meaning and, as well, to defeat the limited privilege accorded to employers to question employees on matters related to their Section 7 rights under conditions established in *Johnnie's Poultry*.<sup>15</sup>

In *Johnnie's Poultry*, the Board established safeguards designed to minimize the coercive effect of otherwise unlawful employer interrogation under circumstances where an employer has a legitimate need to know. The employer must communicate to employees the purpose of the questioning, assure employees that no reprisals will be taken against them, and obtain employees' par-

ticipation on a voluntary basis. Further, the questioning must occur in a context free from employer hostility and must not itself be coercive in nature. The questions must not exceed the necessities of the legitimate purpose or otherwise interfere with the employees' statutory rights.<sup>16</sup>

We find that the Respondent's prestrike letter to employees satisfies the *Johnnie's Poultry* standards. The judge found, in effect, that the explanations and assurances contained in the letter did not extend the privilege to the enclosed response card. We disagree. We find nothing in the *Johnnie's Poultry* standard that requires an employer to repeat a separate assurance for each subpart of an otherwise lawful prestrike inquiry into employees' strike intentions.

As shown, here the Respondent's prestrike letter contained a straightforward, factual explanation of the Respondent's legitimate purpose for ascertaining employees' intentions regarding work during the strike. The letter was tailored to serve only that legitimate purpose. It described the means of collecting the needed information—an enclosed response card—and the timeframe for submission. It acknowledged the voluntary nature of the Respondent's request for the information by explaining what the Respondent would do in the event of nonsubmission—assume that the nonresponsive employee did not intend to work during the strike. Importantly, in the very next paragraph and in emphatic typeface, the letter assured employees that "regardless of your decision to strike or not, no reprisal can or will be taken against you" as a result of their decisions regarding strike participation. Contrary to our dissenting colleague's assertion, this assurance was unambiguous and evenhanded.<sup>17</sup>

<sup>16</sup> 146 NLRB at 775.

<sup>17</sup> Member Liebman would find the letter unlawfully coercive, but not for the reason stated by the judge. Although not quoted by the majority, the letter stated as follows:

As you know, Nevada is a right-to-work state and no one can *require you to strike* if you do not want to do so. We ask that you carefully consider your decision and look within your own conscience. The decision to *walk off the job and leave patients* is an intensely personal decision that should be void of *peer pressure or intimidation*. Regardless of your decision, no reprisal can or will be taken against you. [Emphasis added.]

In its conclusion, the letter again referred to "peer pressure or intimidation" to "walk off the job and leave patients," and urged employees to "elect to work and not place this union's self-interest above that of your patients and fellow employees."

Where an employer makes a lawful inquiry of employees' intent to strike, it must give explicit assurance that the employer will not retaliate regardless of the answer. E.g., *Holyoke Visiting Nurses Assn.*, 313 NLRB 1040, 1049 (1994). Notwithstanding the Respondent's generalized assurance that "regardless of your decision, no reprisal can or will be taken against you," its more specific and one-sided emphasis that "no one can require you to strike" and its references to "peer" pressure to "walk off the job and leave patients" could reasonably be read to

<sup>13</sup> 240 NLRB 654, 656 (1979), decision supplemented 273 NLRB 683 (1984), enf. 784 F.2d 426 (1st Cir. 1986).

<sup>14</sup> 313 NLRB 1040, 1049–1051 (1994) (applying *Johnnie's Poultry* safeguards in cases of interrogation of prospective strikes by health care institutions).

<sup>15</sup> 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (1965).

Accordingly, in the specific circumstances of this case, we find that the Respondent's prestrike letter to employees satisfied the *Johnnie's Poultry* standard, and that the assurances expressed in the letter extended to the enclosed response card, which was referenced in the letter. The relationship between the letter and the response card was clear on the face of the letter and sufficient to provide the required safeguards necessary to forestall any coercive impact the letter and the response card might otherwise have had.<sup>18</sup>

Our dissenting colleague contends that the clear explanations and assurances against reprisal contained in the Respondent's letter to employees were somehow negated by references in the letter to "peer pressure or intimidation" and by requests that employees consider the potential effect of a strike on patient care in deciding whether to participate or not. To the contrary, these statements express reasonable concerns at issue in any strike situation at an acute care hospital, and employees of a hospital would reasonably recognize the legitimacy of these concerns. The Respondent's opposition to a strike was protected by Section 8(c). It was therefore lawful, and did not undermine the expressed assurances against reprisal. It is too great a stretch to suggest, as our colleague does, that employees would reasonably interpret the statements, either standing alone or in the context of the Respondent's strike preparations as a whole, as a threat that strikers would not be protected against reprisals, or that their jobs could be in jeopardy, or as contravention of the clear and unequivocal assurances against reprisal contained in the Respondent's letter.<sup>19</sup>

---

promise protection only for employees who chose not to strike. The assurance of no reprisal was therefore insufficient. Contrast *Preterm, Inc.*, 240 NLRB 654, 656 (1979) (employer's inquiry, found lawful, did not characterize employees' options and stated only that they were "free to make your own decision" and that "[n]o reprisals will be taken against you whatever your decision may be"). The combination of the inquiry about employees' intent to strike with these one-sided remarks was coercive, notwithstanding the purported assurance of no reprisal. In this context, and contrary to the majority's implication, the General Counsel was not required to show that the references to peer pressure to abandon patients, or the assertion that no one can be required to strike, were by themselves threats that independently violated Sec. 8(a)(1).

<sup>18</sup> We agree with the Respondent that *Holyoke Visiting Nurses Assn.*, supra, is distinguishable from the instant case. In *Holyoke*, the Board found unlawful an employer's prestrike questionnaire that did not contain any assurances against reprisals. Similarly, in *Preterm, Inc.*, the Board found unlawful an employer's prestrike questioning of employees regarding their intent to work during a strike, in instances where the interrogation was accompanied by a threat that employees who refused to answer would be putting their jobs in jeopardy.

<sup>19</sup> Our dissenting colleague misinterprets our position. We do not intend to suggest that the General Counsel was required to show that the statements were, by themselves, independent violations of the Act. We simply observe that on the facts of this case the statements were not,

### Discontinuance of Merit Pay

We find that the Respondent did not violate the Act by discontinuing its merit pay system for unit employees and denying them a new, automatic increase. Contrary to the judge, we find that the parties discussed the proposed change during their negotiations, and the Union acquiesced in the changes. Accordingly, we dismiss this allegation of the complaint.

The Respondent had a policy and practice of giving annual merit increases to employees each year based on their performance evaluations. The percentage of increase changed from year-to-year, at the Respondent's discretion, depending upon the Respondent's evaluation of its economic situation and wage comparisons with similar institutions. On May 30, 2000, while the merit pay-for-performance policy was still in effect, the Respondent announced to employees and the Union that it was going to discontinue the existing merit pay system and institute an automatic 4-percent increase for nonunit employees, effective July 1, 2000.<sup>20</sup> The Respondent explained that the unit employees would not receive the automatic raise, but rather that their wages were subject to the ongoing collective-bargaining process.<sup>21</sup> The Respondent expressly assured the unit employees and the Union that it would "continue to meet and negotiate wages and other economic issues with the [unit employees'] representative."

When the Respondent and the Union next met for negotiations, on June 7, the Union's chief negotiator, Peter Ford, stated that he was "disappointed" that the unit employees would no longer receive the merit pay increase and would not receive the automatic 4-percent raise. Bruce Stickler, the Respondent's attorney, responded that the Respondent intended "to bargain with [the Union] over wage increases at the table." Ford protested that the Respondent's plans were divisive, giving other employees wage increases while denying them to unit employees. Ford said, "I understand what you're doing, and we

---

and reasonably could not have been, understood as somehow undermining the Respondent's clear assurances against reprisals.

<sup>20</sup> In light of the 1-month delay between the announcement of the Respondent's intent to discontinue the merit pay policy and the implementation date, there was adequate time available for the Union to protest the change or request bargaining. Thus, it cannot be said that the Respondent announced the change as a fait accompli. As we discuss, infra, the parties met for negotiations three times between May 30 and July 1; the Union did not object to the discontinuance, request to bargain about it, or request that the Respondent continue to award the merit raises.

<sup>21</sup> The Union was certified as the exclusive representative of the unit employees in October 1999, and the parties engaged in negotiations for an initial bargaining agreement in December 1999. The negotiations concluded upon the Respondent's lawful declaration of impasse in spring 2001.

probably don't disagree with the position you've taken, in fact, it may be technically correct, but it's divisive to the [unit employees]." Stickler repeated that the Respondent would negotiate with the Union, and Ford answered, "We're going to be looking for more than four percent." Further, the Union informed the Respondent that it had no objection to an interim pay raise; the Respondent said it would take the suggestion "under advisement." During subsequent negotiation meetings with the Respondent, the Union raised no objections to the discontinuance of the merit pay policy, and made no request to bargain about it or any request to continue it. Notably, the Respondent did not refuse to bargain further over merit increases or other future wage policies.

In these circumstances, we find that, upon receiving notice of the Respondent's intention to discontinue the merit pay increase policy, Ford, on behalf of the Union, acquiesced in the discontinuance of the policy and agreed to address the issue of wage increases during the parties' contract negotiations. Thus, we find that the discontinuance of the merit pay policy was not a unilateral change in the employees' terms of employment.<sup>22</sup> We therefore find that the Respondent did not violate the Act in this respect.

#### ORDER

The National Labor Relations Board orders that the Respondent, Washoe Medical Center, Inc., Reno, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully applying its solicitation/distribution policy so as to prevent union solicitation/distribution in its cafeteria.

(b) Unlawfully depriving employees of their right to union representation at an investigatory interview that the employee reasonably believes might result in disciplinary action.

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

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

(a) Within 14 days after service by the Region, post at its Reno, Nevada facilities copies of the attached notice marked "Appendix."<sup>23</sup> Copies of the notice, on forms

<sup>22</sup> Compare *Daily News of Los Angeles*, 304 NLRB 511 (1991), remanded 979 F.2d 1571 (D.C. Cir. 1992), decision supplemented 315 NLRB 1236 (1994), enf. 73 F.3d 406 (1996), cert. denied 519 U.S. 1090 (1997); *Bottom Line Enterprises*, 302 NLRB 373 (1991), enf. mem. sub nom. *Master Window Cleaning v. NLRB*, 15 F.3d 1087 (9th Cir. 1994). See, generally, *NLRB v. Katz*, 369 U.S. 736 (1962).

<sup>23</sup> 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

provided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the attached notice to all current employees and former employees employed by the Respondent at any time since July 1, 2000.

(b) 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 Respondent has taken to comply.

#### 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 apply our valid solicitation/distribution policy so as to bar union solicitation or distribution in our cafeteria.

WE WILL NOT unlawfully deprive employees of their right to union representation at an investigatory interview that the employees reasonably believe might result in disciplinary action.

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

WASHOE MEDICAL CENTER, INC.

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."

*Sharon Chabon, Esq.*, for the General Counsel.  
*Stephanie L. Dodge and Jeffrey J. Ward, Esqs. (Stickler & Nelson)*, of Chicago, Illinois, for the Respondent.  
*Alan G. Crowley, Esq. (Van Bourg, Weinburg, Roger & Rosenfeld)*, of Oakland, California, for the Union.

## DECISION

### STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Reno, Nevada, on October 2, 3, and 4, 2001. On October 18, 2000, Operating Engineers Local No. 3, International Union of Operating Engineers, AFL-CIO (the Union) filed the charge in Case 32-CA-18511 alleging that Washoe Medical Center Inc. (Respondent) committed certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). The Union filed the charge in Case 32-CA-18514 on October 20, 2000, the charge in Case 32-CA-18579-1 on November 21, 2000, and the charge in Case 32-CA-18611 on December 6, 2000. On January 31, 2001, the Regional Director for Region 32 of the National Labor Relations Board issued an order consolidating cases, consolidated complaint and notice of hearing against Respondent in the above four cases alleging that Respondent violated Section 8(a)(1), (3), and (5) of the Act. Respondent filed a timely answer to the complaint denying all wrongdoing. On April 9, 2001, the Union filed the charge in Case 32-CA-18828 against Respondent. Thereafter on June 28, 2001, the Regional Director issued a complaint in Case 32-CA-18828. On June 20, 2001, the Union filed the charge in Case 32-CA-18948. The complaint issued in Case 32-CA-18948 on August 24, 2001. A complaint consolidating all allegations in all six cases issued on September 28, 2001.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses and having considered the posthearing briefs of the parties I make the following.<sup>1</sup>

### FINDINGS OF FACT AND CONCLUSIONS

#### I. JURISDICTION

Respondent is a Nevada corporation with an office and place of business in Reno, Nevada, where it is engaged in the operation of an acute care hospital and medical center. During the 12 months prior to issuance of the complaint, Respondent purchased and received goods valued in excess of \$50,000 directly from suppliers located outside the State of Nevada. Respondent admits and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

<sup>1</sup> The credibility resolutions have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

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

## II. THE ALLEGED UNFAIR LABOR PRACTICES

### A. Background and Issues

On October 21, 1999, the Board certified the Union as the exclusive collective-bargaining agent of the nurses employed by Respondent.<sup>2</sup> The parties began negotiations for a collective-bargaining agreement in December 1999, and these negotiations continued until the spring of 2001, when Respondent declared impasse. Respondent implemented the economic portions of its last and final offer on April 16, 2001.

The consolidated complaint alleges that Respondent violated Section 8(a)(1), (3), and (5) of the Act by: (1) failing and refusing to allow Union Representative Bill Frietas, to participate and represent employees who were utilizing Respondent's internal grievance procedure; (2) unilaterally changing its solicitation-distribution policy; (3) unilaterally ceasing its annual pay-for-performance (merit pay) program for unit employees; (4) declaring impasse at a time when there were unremedied unfair labor practices; (5) implementing certain terms and conditions of its last and final offer; and (6) by interrogating employees through the use of a form concerning their participation in a potential strike without giving the employees assurances that no reprisals would be taken against them if they failed to return the form. The answer denied the commission of any unfair labor practices. Further, Respondent alleges that the parties were at impasse when it declared impasse and implemented its economic proposals.

### B. The Alleged Refusal to Permit Union Representation at Internal Grievance Meetings

Respondent discharged registered nurse Melanie Tuttle on November 15, 2000. Tuttle filed an appeal pursuant to Respondent's internal grievance procedure on November 20, 2000.<sup>3</sup> The second-step meeting was held on December 1,

<sup>2</sup> The appropriate bargaining unit certified by the Board is:

All full-time and regular part-time Registered Nurses, including all graduate nurses awaiting licensing, and Per Diem nurses (all nurses who have worked an average of at least 4 hours a week during the quarter prior to the eligibility date), employed by Respondent, excluding all other employees, managerial employees, guards, and supervisors as defined in the Act.

<sup>3</sup> Respondent's grievance procedure is a four-step process. The first step provides that the employee having a grievance or complaint must present it to his/her supervisor within 10 working days of the infraction. If the infraction is not resolved, then the employee may move to the second step that provides that within 3 working days of the first step the employee may request a hearing before the department manager, or director, and supervisor concerned. Notes taken and any necessary witness or witnesses should be presented. If a satisfactory settlement is not achieved, the employee may proceed to the third step. The third step provides for a meeting between the appropriate vice president and the department manager or director involved. If this third step fails to produce a satisfactory solution, the employee may proceed to a fourth step. The fourth step provides that within 10 working days of the third step, the employee may request a hearing before a grievance committee. The grievance policy further provides that "attorneys or other legal advisors are not permitted to accompany an aggrieved employee or

2000. Present for Respondent were Kim Redmon, human resources specialist, and Joanne Kohls, manager of social services/pastoral care. Bill Frietas, union representative, accompanied Tuttle. At the commencement of the meeting, Frietas asked Redmon to explain why Tuttle had been discharged. Redmon replied that Frietas was “not there to either ask questions or to participate in any way except to be a ‘neutral party.’” Frietas answered that he was present to represent Tuttle and that he intended to ask questions. Frietas argued that according to the NLRB, he had a right to represent Tuttle. Redmon answered that Tuttle and Frietas were present under Respondent’s grievance procedure and that Frietas could not speak. Frietas and Redmon disagreed on whether Frietas could act as a representative and then Redmon left, presumably to check on Respondent’s position regarding this dispute. After 30 minutes, Redmon returned and told Frietas that he was to be present as a neutral party and witness. Frietas requested that Respondent hold the meeting in abeyance until both parties checked their positions. The meeting was never resumed.

On December 11, 2000, Frietas attempted to attend a second-step grievance meeting for Lyla Mathew, another registered nurse. Redmon and Dean Schmaltz, director of cardiopulmonary services were present for Respondent. Mathew and Frietas appeared for Mathew. At the beginning of the meeting, Redmon told Frietas that he was present under Respondent’s rules, that he was there as a neutral party and could not ask questions. Frietas replied that the Union could not represent employees under such restrictions. Frietas and Mathew left the meeting. The record shows that Frietas never requested bargaining over the Tuttle or Mathew grievances at any negotiation meetings after these aborted grievance meetings. The record reveals that the Union and Respondent had reached tentative agreement on a grievance procedure on June 7, 2000. However, in December 2000, the parties had not reached overall agreement on a contract and neither party was contending that they were at an impasse.

Under the Supreme Court’s decision in *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), an employee’s right to union representation arises “only in situations where the employee requests representation,” and is “limited to situations where the employee reasonably believes that the investigation will result in disciplinary action.” *Id.* at 257–258.

Once an employee makes a valid request for union representation, the employer is permitted one of three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all. *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982); *General Motors Co.*, 251 NLRB 850, 857 (1980). Under no circumstances may the employer continue the interview without granting the employee union representation unless the employee voluntarily agrees to remain unrepresented after having been presented by the employer with the choices mentioned in option (3) above, or if the employee is otherwise aware of those

choices. *NLRB v. J. Weingarten*, *supra*; *Williams Pipeline Co.*, 315 NLRB 1 (1994).

The “right to representation under Weingarten does not extend to those employer-employee meetings where the sole purpose is the imposition of predetermined discipline.” *Texaco, Inc.*, 251 NLRB 633, 636 (1980); *Baton Rouge Water Works, Co.*, 246 NLRB 995, 997 (1979). The decision to discharge Tuttle and Mathew had already been made by Respondent prior to the second-step grievance meetings. However, the discipline was subject to review and reversal at the grievance meetings. The Board has held that where an employer “inform[s] the employee of a disciplinary action and then seek[s] facts or evidence in support of that action . . . the employee’s right to union representation would attach. *Baton Rouge Water Works*, 246 NLRB at 997. Thus, Tuttle and Mathew did have a reasonable belief either that an investigation was intended or that lesser discipline could result from the second-step meeting. Because Respondent did not reach a final, binding decision concerning specific discipline prior to the two meetings in question, the meetings were investigatory interviews and subject to the rule of *Weingarten*. *Henry Ford Health System*, 320 NLRB 1153, 1155 (1996).

In addition, Section 9(a) of the Act has been held to give the Union the right to be present during the adjustment of any grievance (whether or not its presence is wanted by the employer or grievant). *Shoppers Food Warehouse*, 315 NLRB 258 (1994); *Harowe Servo Controls, Inc.*, 250 NLRB 958, 1049 (1980). The Act requires employers to bargain with the statutory representative about grievances before, as well as after, the execution of a collective-bargaining agreement. In this regard Section 9(a) guarantees to the bargaining representative an opportunity to be present at the adjustment of grievances without qualification. See *Circuit-Wise, Inc.*, 306 NLRB 766 (1992); *Henry Ford Health System*, *supra*. Here, Respondent permitted Frietas to attend the grievance meetings but did not permit him to speak. This type of qualification is contrary to what is intended by Section 9(a). *Harowe Servo Controls, Inc.*, *supra*. Accordingly, I find that Respondent violated Section 8(a)(1) and (3) by denying Tuttle and Mathew union representation at these grievance meetings.

Respondent contends that it lawfully chose to discontinue the interviews after the Union demanded representation rights. I find that argument inapplicable in these circumstances. In a grievance meeting after *Weingarten* rights were invoked, the burden was on the Respondent to clearly advise the employee that she could choose to continue the meeting without representation. Respondent never notified the employees that they could continue the meetings in the absence of union representation but that the meetings would terminate, if the employees insisted on representation. Respondent’s actions here suggested that seeking representation caused an employee to lose grievance rights available to nonrepresented employees.

#### C. *The Alleged Unilateral Change of the Solicitation/Distribution Policy*

Since March 1999, Respondent has maintained a solicitation and distribution policy, which states:

---

participate in any step of the grievance procedure.” Further, the policy provides that utilization of the grievance procedure is at the hospital’s discretion.

A. *SOLICITATION*: Employees of the Hospital may not solicit for any purpose during working time. Furthermore, employees of the Hospital may not solicit, at any time, for any purpose, in immediate patient care areas, such as patients' rooms, operating rooms, and places where patients receive treatment, such as x-ray and therapy areas, or in any other area that would cause disruption of healthcare operations or disturbance of patients, such as corridors [sic] in patient treatment areas, and rooms used by patients for consultations with physicians or meetings with families or friends.

B. *DISTRIBUTION*: Employees may not distribute literature for any purpose [sic] during working time. Furthermore, employees may not distribute literature, at any time, for any purpose, in working areas. Working areas are all areas in the Hospital, except cafeterias, gift shops, employee lounges, lobbies, and parking areas.

C. *DEFINITION WORKING TIME*: Working time includes the working time of both the employee doing the soliciting or distributing and the employee to whom the soliciting or distribution is directed. Working time does *not* include off-duty periods, such as break periods or mealtimes.

Further, Judy Watland, vice president and chief nursing officer issued a memorandum dated September 14, 2000, citing the cafeteria as an example of a nonworking area where employees could distribute union literature.

On October 18, 2000, after a negotiation meeting, certain of the nurse-members of the union negotiation committee decided to prepare and distribute a flyer to inform the unit employees of what had happened at that meeting. The employees prepared a union flyer at the Union's office, and thereafter, five employee-members of the bargaining committee returned to the hospital and went to the cafeteria. The five employees seated themselves at a table near the entrance to the cafeteria and waited for other employees to approach their table. Nurses approached the table to take union flyers and to ask about the day's negotiation session. Stephanie Dodge, an attorney for Respondent and Carolyn Laravee, nursing manager, CCU/telemetry, were told by security that there was a group of employees and nonemployees distributing literature in the cafeteria. Dodge and Laravee went to the cafeteria to investigate. Dodge and Laravee approached the table where the five employees were handing out leaflets. A security officer stood approximately 6 feet away. Dodge told the employees that she was not trying to be unreasonable but that the employees could not hand out union literature. Dodge stated that the employees needed permission from Respondent's human resources department. Dodge also said that the employees could not stay in the cafeteria for long periods of time, that the cafeteria was used for employees to eat and they usually spent 30 to 45 minutes in there and that if the employees were going to stay they needed to purchase food. According to Yolanda Crobarger, registered nurse, Dodge said that the employees should not be passing out literature in the cafeteria and that they needed to use the cafeteria in an appropriate manner. Crobarger asked Dodge if the employees could use the nurses' mailboxes to distribute the flyers. Dodge answered that the mailboxes were for hospital

business. Crobarger pointed out that another group had used the mailboxes and Dodge answered that everyone would be treated the same. Dodge denied telling the employees they had to buy food and that they could not pass out flyers. I credit the testimony of Crobarger that was corroborated in part by employee-registered nurse Nancy Winston and Laravee.

On October 19, Crobarger spoke with Laravee about the previous day's incident in the cafeteria. Crobarger told Laravee that she felt that Laravee had been put in a compromising position. Crobarger showed Laravee Judy Watland's September 14 memorandum clarifying Respondent's solicitation/distribution policy. Later that day, Watland called Crobarger and acknowledged that she had distributed the September 14 memorandum and told Crobarger that she would contact Respondent's attorneys. Watland called Crobarger again that day or the next day and told Crobarger that the employees could distribute the flyers in the cafeteria as long as they "behaved professionally."

While General Counsel argues that Respondent changed its solicitation/distribution policy, I do not believe the facts establish such a change. Rather, the facts show that on one occasion Respondent's attorney prohibited the distribution of union literature in the cafeteria and required the employees to purchase food to remain in the cafeteria. On October 19 or 20, Watland reaffirmed that employees had the right to distribute union literature in the cafeteria and that the cafeteria was a nonworking area of the hospital. Thus, I find that Respondent violated Section 8(a)(1) of the Act in interfering with the employees' distribution of union literature on October 18. I do not find that Respondent unilaterally changed its valid distribution/solicitation policy.

#### *D. The Alleged Unilateral Change in Annual Merit Pay Increases*

When the Union won the representation election in July 1999, Respondent had in effect a "Policy and Procedure-Staff Level Pay for Performance No. 605.355." This policy provided for an annual review of employees pursuant to a prescribed scoring system. Section IV of this policy, achievement levels, provided the guidelines for determining the amount of the pay raise and, section V of this policy, eligibility for pay-for-performance, sets forth the eligibility for receiving the merit increase.

For many years, Respondent's registered nurses had received an annual merit pay increase. Each year the nurses received a performance review and based on the points achieved through that evaluation received a pay increase. As set forth in policy no. 605.355, the amount of the increase was determined by where the points fell within a specified range. Each year the percentage increase of the pay for performance changed. This change was based on Respondent's evaluation of its economic situation and wage comparisons with similar institutions. During fiscal years 1997 through 1999 nurses were eligible for raises ranging between 1 and 7 percent.

It is undisputed that the determination of pay-for-performance provisions and the eligibility for pay-for-performance provisions were effective until July 2000. It is also undisputed that effective July 1, 2000, Respondent discontinued the merit pay program. Respondent instituted an auto-

matic 4-percent wage increase for nonunit employees but did not provide any wage increase for unit employees from July 1, 2000, until April 16, 2001.

By letter dated May 30, 2000, Respondent notified all its employees that it was changing from its merit pay system to an automatic raise plan. However, the bargaining unit employees would not receive the automatic raise but rather their wages were subject to the collective-bargaining process. The letter stated that Respondent would “continue to meet and negotiate wages and other economic issues with the nurses’ representative.” Respondent informed the Union of this change at the same time that it notified the employees.

On June 7, Respondent and the Union had a bargaining session. Bruce Stickler, attorney for Respondent testified, that Pete Ford, the Union’s chief negotiator, stated that he was “disappointed” that bargaining employees would no longer receive the merit pay increase and would not receive the automatic 4-percent raise now being given to nonunit employees. Stickler responded that Respondent’s intent “was to bargain with [the Union] over wage increases at the table.” Ford stated that what Respondent was doing was divisive, affording other employees wage increases while not affording the nurses increases. Ford stated that “I understand what you’re doing, and we probably don’t disagree with the position you’ve taken; in fact, it may be technically correct, but it’s divisive to the nurses.” Stickler again stated he would negotiate with the Union and Ford answered, “We’re going to be looking for more than four percent.”

Following a discussion concerning the cost of the Union’s wage proposal, the parties engaged in more than 4 hours of negotiations. The June 7 session resulted in the signing of six significant tentative agreements—management rights, union stewards, grievance procedure, no strike/no lockout, layoff procedure and subcontracting. During the June 7 meeting, neither Ford nor any other member of the union negotiation committee objected to the ending of the merit pay program nor did they seek to negotiate a continuance of the program.

The parties conducted two more sessions before the merit pay program ended on July 1, 2000. These sessions were held on June 8 and 28. The Union did not object to the end of the variable merit program or request to bargain about the decision at either session. Jennifer Schultze, Respondent’s personnel director, and Stephanie Dodge, attorney and chief negotiator, testified that at no time during negotiations did the Union request to bargain regarding the variable merit program nor did the Union submit any such proposals.

Karen Willemsen, a union bargaining committee member testified that Stickler argued that the merit pay system was not a past practice. He argued that there was no guarantee that there would be a merit increase each year. The Union offered to bargain about an interim pay raise but Respondent rejected that offer. Christine Fourgis, a union bargaining committee member, testified that the Union informed Respondent that the Union had no objection to an interim pay raise. Respondent answered that it would take that under advisement.

It is well settled that unilateral action by an employer without prior discussion with the union amounts to a refusal to negotiate about the effected conditions of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). Moreover, a showing of subjective

bad faith on the employer’s part is unnecessary to establish a violation. *Id.* at 747. The Board looks to whether a change has been implemented in conditions of employment. It simply determines whether a change in any term and condition of employment has been effectuated, without first bargaining to impasse or agreement and condemns the conduct if it has. *Daily News of Los Angeles*, 315 NLRB 1236 (1994), remanded 979 F.2d 1571 (D.C. Cir. 1992), decision supplemented 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (1996), cert. denied 519 U.S. 1090 (1997).

The Board held in *Bottom Line Enterprises*, 302 NLRB 373 (1991), that when, as here, parties are engaged in negotiations for a collective-bargaining agreement, an employer’s obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole. The Board in *Bottom Line* recognized two limited exceptions to that general rule; when a union engages in tactics designed to delay bargaining and “when economic exigencies compel prompt action.” See *RBE Electronics*, 320 NLRB 80, 81 (1995). See also *Visiting Nurses Services of Western Massachusetts*, 325 NLRB 1125, 1130 (1998), enfd. 177 F.3d 52 (1st Cir. 1999), cert. denied 528 U.S. 1074 (2000); *Pleasantview Nursing Home*, 335 NLRB 961 (2001).

I find that Respondent had an established merit pay system. For many years the nurses had received an annual merit increase pursuant to written policies. Each year the percentage increase of the pay for performance changed. The policy in effect for the period July 1, 1999, to June 30, 2000, was still in effect when Respondent chose to discontinue merit pay. On May 30, 2000, the Respondent notified the employees and the Union of the discontinuance of the merit pay plan. Respondent lawfully determined to discontinue the merit pay plan and establish an automatic 4-percent pay increase for nonunit employees. Respondent could lawfully make those two changes because the nonunit employees were not represented by any union. However, Respondent could not discontinue the established merit pay system for bargaining unit employees without first bargaining to impasse with the Union. See *RBE Electronics*, supra. Under *RBE Electronics*, the defense of waiver does not apply where negotiations are in progress. *Id.* at 81–82.

#### *E. Respondent’s Declaration of Impasse and Implementation of its Economic Proposals*

On April 6, 2001, Respondent declared impasse and announced its intention of implementing its last and final offer of March 13. On April 16, 2001, Respondent implemented the economic terms of its last and final offer. As a result of that implementation, all unit employees received inter alia, a wage increase of \$1.56 per hour and eligibility to receive a wage increase of 4 percent pursuant to Respondent’s compensation program. Respondent contends that implementation of its final proposal was privileged by the fact that the parties were at a bargaining impasse. General Counsel contends that the parties cannot be at impasse because of unfair labor practices in the instant case and an unfair labor practice found by Administra-

tive Law Judge Lana Parke in a prior case, pending exceptions before the Board.<sup>4</sup>

General Counsel, citing *White Oak Coal*, 295 NLRB 567, 568 (1989), argues that “lawful impasse cannot be reached in the presence of unremedied unfair labor practices.” The General Counsel further cites *Dynatron/Bondo Corp.*, 333 NLRB 750, 752 (2001), which states: “Indeed, an employer that has committed unfair labor practices cannot ‘parlay an impasse resulting from its own misconduct into a license to make unilateral changes.’”

However, not all unremedied unfair labor practices committed during negotiations will lead to the conclusion that impasse was declared improperly, thus precluding unilateral changes. See *Alwin Mfg. Co.*, 326 NLRB 646, 688 (1988), *enfd.* 192 F.3d 133 (D.C. Cir. 1999). Only “serious unremedied unfair labor practices that affect the negotiations” will taint the asserted impasse. *Dynatron/Bondo Corp.*, *supra*. Thus, the central question is whether the Respondent’s unlawful conduct detrimentally affected the negotiations over a new collective-bargaining agreement and contributed to the deadlock.

In *Dynatron/Bondo Corp.*, the Board citing the Court of Appeals for District of Columbia Circuit in *Alwin Mfg. Co.*, *supra*, identified at least two ways in which an unremedied unfair labor practice can contribute to the parties’ inability to reach an agreement. First, an unfair labor practice can increase friction at the bargaining table. Second, by changing the status quo, a unilateral change may move the baseline for negotiations and alter the parties’ expectations about what they can achieve, making it harder for the parties to come to an agreement.

The record in the instant case leads me to conclude that the parties were at impasse notwithstanding the unfair labor practices. The parties were negotiating for a first-time contract. Negotiations began on December 1, 1999, and continued for 31 sessions until August 8, 2001. Throughout the negotiations the parties reached and signed 48 tentative agreements.

On April 6, 2001, after 30 negotiation sessions, Respondent declared impasse in the negotiations and notified the Union of its intent to implement the economic terms of its last and final offer. Although the parties had reached 48 tentative agreements regarding economic and noneconomic issues, they remained apart on more than 19 issues, including health insurance, 401(K), term of contract, and compensation. Respondent’s submission of its last and final offer came after numerous requests by the Union for a last and final offer. A Federal mediator attended the parties’ negotiation meetings on November 16 and 30, 2000. The Union had the unit employees vote on Respondent’s December 7, 2000 offer. The bargaining unit rejected the proposal of December 7. On March 1, 2001, the Union again demanded a last and final offer. On March 31, Respondent did, in fact, present its last and final offer. Bill Freitas, chief negotiator for the Union stated that he would recommend that the employees reject the proposal. On March 13, 2001, Respondent posted its last and final offer. On March

21, the employees rejected the offer by a large majority. The March 21 meeting scheduled with the mediator was canceled. On April 6, the Union offered no counters to Respondent’s last and final offer and Respondent would not move off its last and final offer. Thus, the meeting was adjourned. Respondent declared impasse and an intent to implement its economic proposals. The Union stated that Respondent could not impose its proposals because it had outstanding unfair labor practices.

By definition, an impasse occurs whenever negotiations reach that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless. *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete*, 484 U.S. 539, 543 (1988). After an impasse has been reached on one or more subjects of bargaining, an employer may implement any of its preimpasse proposals. *Western Publishing Co.*, 269 NLRB 355 (1984).

“A genuine impasse in negotiations is synonymous with a deadlock; the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position.” *Hi-Way Billboards*, 206 NLRB 22, 23 (1973). In *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *enfd.* 395 F.2d 622 (D.C. Cir. 1968), the Board listed the following factors for determining whether an impasse existed:

The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of [the] negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Finally, because impasse as a defense to a charge of an unlawful unilateral change, the burden of proof rests on the party asserting that impasse exists. *North Star Steel Co.*, 305 NLRB 45 (1991); *Roman Iron Works*, 282 NLRB 725 (1987).

In the instant case the parties met in 30 bargaining sessions from December 1999 to April 2001, prior to Respondent’s implementation of its final offer in April 2001. The inability of the Federal mediator to facilitate agreement is also a factor supporting a finding of impasse. *NLRB v. Cambria Clay Products*, 215 F.2d 48, 55 (6th Cir. 1954). The parties had negotiated for a long time. The Union had requested a last and final offer and that offer had been rejected by a large margin. After the last and final offer had been rejected, the parties refused to move from their positions and the negotiations continued to be deadlocked. It appears that both parties believed they were at impasse. Under these circumstances, I find that the parties were at impasse on April 6 and 16, 2001.

I find no evidence that Respondent’s unlawful conduct detrimentally affected the negotiations over a new collective-bargaining agreement and contributed to the deadlock. I believe the parties would have reached, and did reach, impasse whether or not Respondent committed any unfair labor practices.

#### *F. The Alleged Interrogation Regarding a Potential Strike*

On June 13, 2001, the Union gave Respondent a notice pursuant to Section 8(g) of the Act that nurses in six-named hospi-

<sup>4</sup> In *Washoe Medical Center*, JD-SF-80-00 (2000) (Washoe I), Judge Parke found that Respondent violated Sec. 8(a)(5) and (1) by failing and refusing to bargain with the Union over the starting wages of new hires. Exceptions are currently pending before the Board.

tal units would engage in an unfair labor practice strike and picketing commencing at 6:30 a.m. on June 27. On June 14, Respondent sent the nurses in the affected units a letter informing them that it had received the 10-day strike notice and provided them, inter alia, with information related to work schedules during the strike. The letter contained the following assurances:

As you know, Nevada is a right to work state and no one can require you to strike if you don't want to do so. We ask that you carefully consider your decision and look within your own conscience. The decision to walk off the job and leave patients is an intensely personal decision that should be void of peer pressure or intimidation. Regardless of your decision, no reprisal can or will be taken against you.

Attached to the letter was a form captioned "CONFIDENTIAL." The purpose of this form was to ascertain whether unit employees would be participating in the strike. It requested the employee's name, department, whether they would work and their signature. Under the signature line the form states:

Please hand deliver this card to the Nursing Administration Office no later than (5 DAYS AFTER RECEIPT OF NOTICE-INCLUDING DATE/TIME). If you do not return a card, it will be assumed that you will not work during the strike.

The General Counsel alleges that Respondent violated the Act by not giving the employees assurances that no reprisals would be taken against them for failing to return the form. Respondent alleges that it lawfully sought to determine its need for replacements for the upcoming strike. Respondent citing *Preterm, Inc.*, 240 NLRB 654, 656 (1979), decision supplemented 273 NLRB 683 (1984), enfd. 784 F.2d 426 (1st Cir. 1986), contends that assurances "regardless of your decision, no reprisal can or will be taken against you." was sufficient under Board law.

The Board has held that "once a healthcare employer receives a 10-day notice and a strike therefore appears imminent it may properly attempt to determine the need for replacements by asking employees if they intend to strike." *Preterm, Inc.*, 240 NLRB 654, 656 (1979), decision supplemented 273 NLRB 683 (1984), enfd. 784 F.2d 426 (1st Cir. 1986); See also *Fairprene Industrial Products Co.*, 292 NLRB 797 (1989); *Mosher Steel Co.*, 220 NLRB 336 (1975), enfd. 532 F.2d 1374 (5th Cir. 1976). In *Preterm*, above at 656, the Board held that an employer polling its employees as to their strike intentions had an obligation to fully explain the purpose of the questioning, to assure the employees that no reprisals would be taken against them as a result of their response, and to refrain otherwise creating a coercive atmosphere. The Board found the following statements contained in Respondent *Preterm's* letter to satisfy the Board's requirements in full. The *Preterm's* letter stated the following:

Our purpose in asking you is to make it possible to schedule incoming patients and have employees available to take care of them. We want to assure you that you are free to make

your own decision. No reprisals will be taken against you whatever your decision may be. If you refuse to answer, we will not know whether you will be working and will therefore have to schedule a replacement.

In *Holyoke Visiting Nurses Assn.*, 313 NLRB 1040 (1994), the Board held that the strict safeguards of *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965), should not be relaxed in cases of interrogation of prospective strikers by health care institutions. The Board held that the rationale of *Johnnie's Poultry* is premised on the establishment of specific safeguards designed to minimize the coercive impact of otherwise unlawful employer interrogation into the concerted protected and union activities of its employees. Here, as in *Holyoke Visiting Nurses Assn.*, there was no assurance that there would be no reprisals for failing to answer the interrogatory. Further, the Board held in *Holyoke Visiting Nurses Assn.* that under *Johnnie's Poultry* the questioning must take place in a context free from employer hostility to union organization. In the instant case, there were the unfair labor practices of preventing union solicitation and distribution and an unlawful unilateral change. Accordingly, I find that the interrogation without assurances that there would be no negative consequences from the failure to respond to the questionnaire violated Section 8(a)(1) of the Act.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By interrogating employees regarding a potential strike without giving proper assurances, Respondent violated Section 8(a)(1) of the act.
4. By interfering with lawful employee solicitation and distribution, Respondent violated Section 8(a)(1) of the Act.
5. By denying union representation to employees at grievance meetings, Respondent violated Section 8(a)(3) and (1) of the Act.
6. By unilaterally discontinuing its pay-for-performance merit pay system for bargaining unit employees, Respondent violated Section 8(a)(5) and (1) of the Act.
7. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.
8. Respondent has not otherwise committed unfair labor practices as alleged in the complaint.

#### REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act. I shall also recommend that Respondent rescind its unlawful unilateral changes, and make whole those employees, who suffered loss due to the unilateral changes, with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]