

**Kingsbridge Heights Rehabilitation Care Center and  
1199 SEIU, United Health Care Workers East.**  
Cases 2–CA–37660 and 2–CA–37898

January 31, 2008

DECISION AND ORDER

BY MEMBERS LIEBMAN AND SCHAUMBER

On July 9, 2007, Administrative Law Judge Mindy E. Landow issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

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

<sup>1</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.

The Respondent excepts to the judge's finding that it violated Sec. 8(a)(1) through Assistant Administrator Rutenberg's May 9, 2006 statement to employees—that they would not be able to return to work for 3 weeks if they engaged in a 3-day strike—on the ground that the statement was accurate when made because the Respondent had reached a verbal agreement with employment agencies that required it to hire temporary employees for 3 weeks. In finding this exception without merit, we note that the lawfulness of the alleged agreement is not presented. Rather, the record does not support the Respondent's assertion that such an agreement had been reached. In particular, we note the absence of any corroborating documentary evidence as well as Executive Director Sieger's testimony that prior to the May 9 employee meeting, she directed Rutenberg to tell employees that if there was a strike, the Respondent "may" not be able to bring them back to work for 3 weeks. As the individual who both initiated discussions with temporary employment agencies regarding the hiring of replacements and who negotiated with the agencies over the terms of their hire, Sieger was in the best position to know the status of the negotiations. The fact that Sieger told Rutenberg to tell employees that there was only a possibility that the Respondent would not be able to bring them back to work for 3 weeks indicates that the negotiations were ongoing and that the Respondent's plans to hire temporary replacements for 3 weeks in the event of a strike were not yet fixed. That this was, in fact, the status of the negotiations as of May 9, is further evidenced by Rutenberg's subsequent statement to employees on May 12, as well as by the Respondent's letter to employees of the same date, that there was, in effect, a possibility that the strikers would not be able to return to work immediately after a 3-day strike. Thus, Sieger's own testimony establishes that as of May 9, the Respondent had no firm plans to hire replacement employees for a 3-week period. Given this, we agree with the judge that the Respondent lacked a substantial business justification for Rutenberg's May 9 statement to employees, which was an unqualified assertion that they would be unable to return to work for 3 weeks if they elected to strike.

No exceptions were filed to the judge's findings that the Respondent did not violate Sec. 8(a)(1) of the Act by threatening employees that it would delay their reinstatement to work if they engaged in a strike and

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Kingsbridge Heights Rehabilitation Care Center, Bronx, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*Nancy Slahetka, Esq.*, for the General Counsel.

*Joel E. Cohen, Esq. (McDermott, Will & Emery)*, of New York, New York, for the Respondent.

*Hanan B. Kolko, Esq. (Meyer, Suozzi, English & Klein, PC)*, of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MINDY E. LANDOW, Administrative Law Judge. Based upon charges filed on May 12 and September 25, 2006,<sup>1</sup> In Cases 2–CA–37660 and 2–CA–37898 by 1199 SEIU, United Health Care Workers East (the Union), a consolidated complaint was issued against Kingsbridge Heights Rehabilitation and Care Center (Respondent) on November 30.

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by engaging in surveillance of employees engaged in union activities by videotaping employees who were engaged in informational picketing and by threatening to delay employees' reinstatement to work after they engaged in a 3-day strike and made an unconditional offer to return to work. Respondent filed an answer denying the material allegations of the complaint. On February 21, 2007, a hearing was held before me in New York, New York.

On the entire record, including my observation of the demeanor of the witnesses and resolution of other issues regarding their credibility, as discussed below, and after considering the briefs filed by counsels for the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, with an office and place of business located at 3400–26 Cannon Place, Bronx, New York, is engaged in the operation of a nursing home providing residential nursing care to patients. Annually, in the course and conduct of its business operations, Respondent de-

then made an unconditional offer to return to work in its meeting with employees on May 12, 2006, or in its letter to employees of the same date.

<sup>2</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

<sup>1</sup> All dates herein are in 2006, unless otherwise specified.

rives gross revenues in excess of \$100,000, and purchases and receives at its Bronx, New York facility products, goods, and materials valued in excess of \$5000 from other enterprises located within the State of New York, each of which enterprises receives these products, goods, and materials directly from points outside the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### Background to the Instant Dispute

The Union has represented Respondent's employees for a number of years. The most recent collective-bargaining agreement between the parties (the agreement) expired on April 30, 2005, and has not been extended. As of the date of the hearing, Respondent was abiding by the terms and conditions of this expired Agreement, with the sole exception of the arbitration provision.

It appears from the record that, commencing in about June 2005, Respondent failed to make timely or complete payments to various benefit funds provided for in the agreement. On December 6, 2005, the Union filed an unfair labor practice charge with the Board regarding this conduct. On January 1, 2006, the Union notified employees that due to Respondent's failure to make payments to the benefit funds, their hospital, health, prescription drug, dental, and related benefits would terminate.<sup>2</sup>

Sometime in early 2006, facility Operator Helen Sieger, together with Assistant Administrator Solomon Rutenberg, met with union representatives, including Executive Vice President Jay Sackman and Vice Presidents Neva Shillingford and Isaac Nortey,<sup>3</sup> to discuss these delinquencies. Sieger had asked for a delinquency report and testified that this report showed that Respondent was more current in its payments to the Union's funds than other facilities. She asked why the Union was picketing Respondent but not other facilities more in arrears to the union funds.<sup>4</sup> According to Sieger, Sackman told her that it was because Respondent had not executed a contract with the Union, while the other facilities had done so. Sackman stated that there were contractual remedies for such delinquencies; however, as Respondent was not bound by any such agreement, the Union's only recourse was to picket and strike the facility. According to Sieger's un rebutted testimony, Sackman also stated that without a signed contract, the Union would have no remedy but to continue to picket and strike the facility.

After an investigation of the unfair labor practice charges filed by the Union, on May 1, a complaint was issued alleging that Respondent violated the Act by failing and refusing to make timely or complete payments to several contractual benefit funds.<sup>5</sup> At the inception of the hearing, the parties reached a

<sup>2</sup> According to the letter, at the time Respondent was 4 months in arrears in making payments to the Union's benefit, pension, and education funds and 37 months behind in payments to the child care and job security funds. The total amounts owed to the funds were \$854,542 with accrued interest of \$59,337.

<sup>3</sup> Nortey testified herein, Sackman and Shillingford did not.

<sup>4</sup> The Union's picketing activity is discussed below.

<sup>5</sup> As counsel for Respondent noted during the development of this evidence, I had previously been assigned to serve as a settlement judge

settlement of most of the issues raised by the complaint and entered into a settlement agreement which was approved by Administrative Law Judge Steven Fish on June 8.<sup>6</sup> The remainder of the case was severed for hearing. The Union and Respondent thereafter entered into a non-Board settlement of all outstanding matters, and Judge Fish entered a final Order on June 26.<sup>7</sup>

### The Union's Plan to Picket and Strike the Respondent

Prior to the effectuation of the above-described settlement, in February 2006, employees took a strike vote. Shortly thereafter, the Union's executive council approved a 3-day strike, which was scheduled to take place on May 16–19. The employees further planned to engage in two instances of informational picketing at Respondent's facility, on March 15 and on May 15.

On February 27, Nortey sent Rutenberg a letter informing him of the Union's plan to engage in informational picketing on March 15, from 2 to 5 p.m. The picketing took place as scheduled. The Union secured a police permit for the event, which took place across the street from the nursing home.

The evidence establishes that Respondent maintains video surveillance cameras throughout its facility which monitor the entrances and exits and internal offices and corridors as well. It is undisputed that, upon instructions from the Respondent, two individuals made separate video tape recordings of the picketing activity on March 15, throughout its duration. One individual stood outside the main entrance to the facility, at times holding the camera and at others placing it on a tripod. Another individual taped the event from a second-floor window. These cameras were aimed at the picketing activity occurring across the street, rather than at the entrances and sidewalk adjacent to Respondent's facility.

According to Sieger, all instances of union picketing and related activities at Respondent's facility have been similarly and openly videotaped for at least the last 15 years and there has never been any objection from the Union; nor has there been any allegation that participants in such activities have been subject to retaliation. Upon cross-examination, Nortey acknowledged that he had long known that Respondent had videotaped the Union's rallies and picketing, and the two employees who testified to this issue admitted that they were aware of this, as well. Noeler Worrell testified that she had observed videotaping at prior rallies and had concerns about it, but acknowledged that she participated in the March 15 picketing and had planned to attend the May 15 event as well. Fay Whitter testified that the videotaping had dissuaded her from taking part in a rally in 2002, before she had become a member of the Union, but she had participated on March 15. She too, expressed concern about the fact that the picketing was being videotaped, but admitted that it did not stop her from going

in this matter. The parties were asked if they had any objection to my continuing to hear the instant case. No party voiced an objection.

<sup>6</sup> The settlement provided for, among other things, a schedule for Respondent to make payments to the union funds in order to become current as well as an undertaking that Respondent would make future payments on a timely basis and post a notice to employees.

<sup>7</sup> As a result of this settlement, the General Counsel requested that the complaint be dismissed.

forward on this occasion. Neither of these employees knew of anyone who had been the subject of reprisals or disciplinary action for their participation in picketing or other union activity.

Although Sieger testified that two recordings were made of the 3-hour event, only one videotape, of approximately 30 minutes in length, was produced in response to a subpoena duces tecum issued by counsel for the General Counsel, seeking all such material. On cross-examination, Sieger testified that she was certain that another tape existed, and that it would be produced if it could be found. From the exhibit which is in evidence, it appears that there were various points in time when the camera was turned off. The tape shows that, at the inception of the 3-hour period, but apparently before any picketing has begun, approximately 10 individuals are standing outside the main entrance to the facility. They are then seen walking across the street. Nortey is seen consulting with an individual who was identified as Facility Administrator Lawrence Abrams and a police officer stationed in a scooter. After some discussion, Nortey and Abrams walk across the street together, toward the facility. As they approach, Nortey is heard telling Abrams, "You can't tell us where the fuck to be. Only the police." Abrams' reply is that he is not going to argue with him. Nortey is then seen proceeding to the other side of the street, to join the picketers. The participants are noisy, but contained. There appear to be approximately 50 individuals marching in a circle on the sidewalk, holding signs and chanting slogans, some of which contained ad hominem attacks against Sieger.<sup>8</sup> Traffic passes by, unimpeded. According to the testimony of General Counsel's witnesses, the rest of the picketing similarly proceeded without incident, and Respondent so stipulated.

#### Informational Picketing Prior to March 15, 2006

The Union had previously engaged in informational picketing at Respondent's facility. The last prior occasion occurred on September 28, 2005, and also took place across the street from Respondent's facility. Employee Worrell testified that she had participated in two previous union rallies, which were held at the same location. Nortey and Worrell testified, without contradiction, that the prior instances of picketing or other union activity at Respondent's facility in which they had participated was peaceful and did not result in any arrests.

#### Other Incidents Cited by Respondent

In justifying its decision to record the picketing on March 15, Respondent cites to two prior incidents allegedly involving union agents or employees. Sieger testified that at some time in 2000, an unnamed union delegate requested to have a conference room made available for a meeting with the night staff, and Respondent agreed. According to Sieger, "[w]hat they did is they came into the building, stormed upstairs with cameramen, started taking pictures and video tapes of residents that objected . . . They went into a staff bathroom, threw paper all

<sup>8</sup> Some of the picket signs said, "We are the care givers," "We need our contract," "We need our benefits," and "Children need medical care." The chants included "We are the Union, We cannot be deterred," "Insulin," "What do you want? Benefits," "No Justice, No Peace," and "Helen Sieger full of shit."

over, took pictures of that and put it into a newspaper." Sieger, who was not present at the time, stated that she found out about this incident when she saw a newspaper article and accompanying photographs in the New York Daily News, and also received a report from a nurse on the unit. In an article entitled "Nursing Homes of Shame" the News profiled several local nursing homes including Respondent. There is a photograph of one unnamed resident, in bed, and of a bathroom littered with what appears to be paper towels and toilet tissue. The article also makes reference to the fact that, "[f]ollowing The News' unannounced visit, seven workers were fired, including one who helped The News get inside. Under pressure from Local 1199, Helen Sieger reinstated all but one." The article further reported that the same night the newspaper visited the Respondent's premises, the workers voted in favor of a protest. Sieger did not testify as to the specific involvement of any union official in this event, and Respondent offered no corroboration for her assertion that the Union was responsible for bringing the Daily News into the facility. Neither General Counsel nor the Union offered any testimony regarding what involvement the Union may have had in facilitating access to the facility for the newspaper. According to Sieger's account, residents were frightened by the commotion, and required both individual and group therapy to recover from this traumatizing event.

Sieger additionally testified that, also in 2000, a group of about 30 union officials entered Respondent's facility without permission, proceeded to the office of Administrator Ernest Regan without an appointment, threw items off his desk and sat on it. Again, Sieger was not present at the facility, and failed to name any specific agents of the Union who participated on this occasion. According to Sieger's testimony, the incident was captured on Respondent's internal security cameras. No such evidence was offered by Respondent, and there was no further evidence presented regarding this incident or supporting Sieger's assertions of union involvement on this occasion.

Sieger further stated that because of issues regarding union representatives coming onto the premises and meeting with employees without permission, an arbitration was held before the impartial industry chairman regarding union access, which resulted in an award on May 26, 2005, setting forth comprehensive guidelines for the parties to abide by with regard to the issue of union access to the facility. The arbitration decision makes no reference to any particular dispute; nor does it mention either of the above described incidents. There is no evidence that either party has failed to comply with the terms of this award.

On January 18, the Union held a demonstration at Resort Nursing Home, located in Brooklyn, New York, a facility that was, at the time, operated by Sieger. No notice of the demonstration was provided to the employer, and Resort filed an unfair labor practice charge regarding the incident with the Boards' Brooklyn office. Resort had videotaped the demonstration, and the Region asked to view the videotape to assist it in determining whether there had been, in fact, a violation of Section 8(g) of the Act.<sup>9</sup> After conducting its investigation, includ-

<sup>9</sup> Sec. 8(g) of the Act requires that when an employer is a health care institution, a labor organization must provide the employer and the

ing viewing the videotape of the incident, the Region concluded that the Union had not engaged in a strike or picketing as such has been interpreted by the Board and the courts and dismissed the charge.<sup>10</sup>

Sieger further testified that in May 2006, after the dates of the strike which had been planned for earlier in the month (discussed below), employees came forward and complained that they had been threatened and intimidated by three employees<sup>11</sup> in the event they would have refused to participate in the strike. Sieger discharged them. As a consequence, the Union filed unfair labor practice charges regarding the terminations, which were dismissed by the Region. The dismissal was upheld on appeal. Although Sieger stated that the individuals who were threatened filed police reports, she did not offer any testimony regarding whether these reports resulted in any action being taken by the police or other law enforcement officials.

#### The Alleged Threats to Delay Reinstatement

On April 27 and May 1, the Union provided Respondent with written notice of its intention to conduct a rally, leaflet and picket on May 15 and engage in a 3-day strike commencing on 6 a.m. Tuesday, May 16, and ending at 6 a.m. Friday, May 19.<sup>12</sup> On the Tuesday during the week prior to the anticipated strike (May 9), Respondent held a meeting with its employees on the second floor in the East Wing of Respondent's facility at about 1:45 p.m., which lasted approximately 20 minutes. Rutenberg and Abrams were present, among others. According to Worrell, at this meeting, "Mr. Solomon [Rutenberg] said that if we do go on the strike for three days, we cannot come back in for the next three weeks. Because he cannot hire workers to be there for three days. So we will be off for three weeks." Another employee present, Evelyn Riley (who is Worrell's sister) asked Rutenberg to put his statement in writing, and he agreed to do so.

Respondent subsequently held another meeting with employees on the Friday prior to the strike (May 12), which Worrell did not attend as she was not working on that date. Employee Fay Whitter did attend, and testified that, "we were advised that if we went out on strike we might not be able to return to work when we think we could, within those three days. We were told that we might have to stay out longer depending on what the contract was that they got for the people to come and work."

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Federal Mediation and Conciliation Service (FMCS) with at least 10 days written notice of its intent to engage in "any strike, picketing or other concerted refusal to work."

<sup>10</sup> When cross-examined regarding this occurrence, Sieger claimed she did not know when the action at Resort occurred and repeatedly stated that she could not recall whether the Union had engaged in any picketing at any of her facilities between that date and March 15; that it would be "something she would have to look up."

<sup>11</sup> In questioning Sieger, Respondent's counsel referred to these employees as "Union delegates." Sieger, however, provided no testimony to establish this fact. In its brief, Respondent characterizes these individuals alternatively as "employees," "Unionized employees," or "1199 employees."

<sup>12</sup> The strike notice stated, *inter alia*, "this strike is in protest of your unfair labor practices which, among other things, have resulted in the loss of the aforesaid employees' healthcare benefits."

At this meeting, Rutenberg also distributed a letter to employees. Dated May 12, the letter provides as follows:

The Union has called a 3-day strike for next week as you all know. The strike is supposed to protest our "unfair labor practices." For your information, the "unfair labor practices" are close to being finally settled with the Labor Board and includes a payment schedule to pay off fund delinquencies, as we have asked the Union for months. This will include payments to the benefit fund (for health benefits) which the Labor Board says we are required to make. So exactly what "unfair labor practices" are you striking for?

Also, you should know that because we have a duty to our patients, we will have to hire temporary replacements for you and we probably will have to keep them on in the jobs of those who strike until the Union agrees not to call further strikes over the next few months or until a union contract is signed. There are two reasons for this. First, it is hard to get replacements for only a three day period. Second, since we don't know when you might strike again, we have to make sure that we will have continuity of care for patients until open issues with the Union are resolved. We hope you understand why we have to protect our patients.

Sieger testified that, in anticipation of the strike she attempted to find replacement employees for the approximately 250 unit employees and contacted several agencies, naming three specifically: Town, Big Apple, and Juno. Sieger testified that her discussions with these agencies revealed that, to replace the unit employees, Respondent would have to pay a significantly higher rate than it typically pays for temporary workers and that she would have to commit to hire such employees for a period of 5 weeks to cover the agencies' expenses in mass recruitment. Sieger further stated that she was able to "negotiate it down to three weeks in exchange for having to pay for orientation" for the replacements. Sieger then directed Rutenberg to advise employees that if there was a strike, Respondent may not be able to bring them back to work for 3 weeks, because she wanted employees to be apprised of everything that was going on. Respondent presented no evidence regarding any written agreement with any entity named by Sieger.<sup>13</sup>

With employees gathered for the May 15 rally, Union Executive Vice President Sackman announced that due to Respondent's agreement to make payments to the union funds both the rally and strike were cancelled. Union Vice President Shillingford sent Abrams a letter to such effect on that date.

#### Counsel for the General Counsel's Motion to Amend the Complaint

After resting subject to rebuttal, but before Respondent presented its case, counsel for the General Counsel made a motion to amend the complaint to add an allegation that, by distributing the May 12 letter to employees, Respondent threatened to delay the reinstatement of employees, thereby engaging in an addi-

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<sup>13</sup> At the hearing, Respondent stipulated that there was no written contract between it and "Town" regarding replacements for the strike.

tional, independent violation of Section 8(a)(1).<sup>14</sup> Respondent opposed the motion fundamentally due to what it contends is a lack of adequate notice or opportunity to meaningfully litigate the issue.

The issue of the letter was first raised in these proceedings during Respondent's opening statement, setting forth the theory of its defense to the allegations of the complaint:

The Employer told—did not tell people that if you go on strike you're going to be out for three weeks. What the Employer said was "If you go out on strike and we have to hire replacements, we may have to make a commitment to keep them for three weeks. So we will not be able to return you to your jobs until the replacements leave.

Moreover, since there was a history in this industry of 1199 calling two or three day strikes, which reek (sic) havoc on a healthcare employer, the employees were also told that if there is going to be continued two and three day strikes, the Employer may, in essence, have to keep employees out until the Union agrees not to strike again or agrees to sign a contract. Again the only issue being who the Arbitrator is going to be under the contract.

All of this that was said was not only said verbally but was put out in a writing to employees that said exactly what was said verbally and was distributed to employees. It was not "we are punishing you because you're going out on strike." It was "we are doing what we have to do to make sure we have continuity of coverage." No one was told that they were going to be permanently replaced. Nobody was told that they were going to be fired. It was only a question of these are the things we may have to do—may have to do—in order to provide continuing coverage for sick, elderly patients. And it was put in writing.

Respondent then agreed to stipulate the letter into evidence. Subsequently, Respondent reiterated that the letter had been sent into the Region as part of its defense to the allegations of the charge.

### III. ANALYSIS AND CONCLUSIONS

#### The Unlawful Videotaping of Employees—Applicable Legal Standards

The complaint alleges that, by videotaping the March 15 picketing, Respondent violated Section 8(a)(1) of the Act, a contention Respondent denies. Respondent argues that its actions are lawful because it is a health care facility with a duty to protect its residents; the surveillance is necessary due to the Union's alleged history of trespass and violent behavior; that in taping the picketing it is merely lawfully seeking to preserve evidence and, further, that there is no evidence that the video-

taping has chilled employees in the exercise of their Section 7 rights.

In *F. W. Woolworth Co.*, 310 NLRB 1197 (1993), the Board reaffirmed the principle that observation of open, public union activity on or near its property does not constitute unlawful surveillance. The Board has also held that:

Photographing and videotaping such activity clearly constitute more than mere observation, however, because such pictorial recordkeeping tends to create fear among employees of future reprisals. The Board in *Woolworth* reaffirmed the principle that photographing in the mere belief that something might happen does not justify the employer's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity [internal citations omitted]. Rather, the Board requires an employer engaging in such photographing or videotaping to demonstrate that it had a reasonable basis to have anticipated misconduct by the employees.

*National Steel & Shipbuilding Co.*, 324 NLRB 499 (1997), *enfd.* 156 F.3d 1268 (3d Cir. 1998).

"[T]he inquiry is whether the photographing or videotaping has a reasonable tendency to interfere with protected activity under the circumstances;" *Id.*; *Trailmobile Trailer, LLC*, 343 NLRB 95, 96 (2004).

Thus, "the Board may properly require a company to provide a solid justification for its resort to anticipatory photographing." *NLRB v. Colonial Haven Nursing Home*, 542 F.2d 691, 701 (7th Cir. 1976). Although an employer has the right to maintain security measures necessary to the furtherance of its legitimate business objectives, an employer's subjective, honest belief that unprotected conduct may occur does not constitute proper justification for the recording of protected activity; rather, an employer must show that it had a reasonable, objective basis for anticipating misconduct. *National Steel & Shipbuilding Co.*, *supra* at 499 *fn.* 5; *Trailmobile Trailer*, *supra* at 96 (and cases cited therein).

As noted above, Respondent maintains an extensive security surveillance system at its facility. This is not alleged to be unlawful. Rather, it is the discrete, separate video surveillance and recording of the picketing activity which occurred across the street from Respondent's facility on March 15, which is the subject of the complaint. In this case, Respondent has failed to meet its burden of proof to establish that the separate video recording of employees' protected conduct was based upon any legitimate security concern or to otherwise show that it had a reasonable basis to anticipate misconduct by its employees.

#### Respondent as a Health Care Employer

As an initial matter, Respondent notes that it is a healthcare facility, and has had a surveillance system in place for many years, without any protest from the Union. In connection with this argument, Respondent cites to *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069 (2004). Under the facts of that case, which involved the installation of surveillance cameras at entrances to the building, near the timeclocks, in elevators, and in designated smoking areas, the administrative law judge found that there was no evidence that the cameras

<sup>14</sup> The relevant paragraph of the complaint (par. 6) originally alleged that Respondent, by Solomon Rutenberg, at Respondent's facility, on or about the dates indicated below in 2006, threatened employees that Respondent would delay their reinstatement to work if those employees engaged in a strike and then made an unconditional offer to return to work: (a) On various occasions in or around March and April. (b) On or about May 11. In its brief, counsel for the General Counsel moved for withdrawal of par. 6(a) of the complaint. This motion is hereby granted.

were being used to record employees engaged in protected activity. *Id.* at 1082. Such an instance is clearly distinguishable from the instant case, where the surveillance at issue was precipitated by, and confined to, a specific instance of protected conduct. In *Jewish Home*, *supra*, while finding that no unlawful conduct had occurred, the administrative law judge specifically drew that comparison: “The situation here is, thus, distinguishable from those cases where an employer has been found to violate the Act by installing cameras directed at employee picketing or other activity.” *Id.* (citations omitted).<sup>15</sup> Respondent has cited no authority for the proposition that, as a health care employer, it is generally exempt from the applicable legal standards regarding the video surveillance of employees’ protected conduct.

#### Alleged Instances of Prior Union Misconduct

Respondent further relies upon evidence of what it characterizes as “inappropriate and unlawful Union conduct” throughout the course of its dealings with the Union and argues that the Union’s history has “forced [Respondent] to protect its residents by videotaping Union activities in and around [its] premises” and further, to “take measures to document the activity around the facility to ensure there is adequate evidence of misconduct if any when resident health and wellness is disturbed.” There are two issues raised by the evidence proffered by Respondent in support of these contentions: (1) whether, in the first instance, the evidence of purported instances of union misconduct is reliable and otherwise probative of the assertions put forth and (2) assuming the evidence shows what Respondent suggests, whether Respondent has met its burden of establishing that there was a reasonable basis for its resort to the anticipatory videotaping of protected conduct. Here, Respondent has failed on both accounts.<sup>16</sup>

With regard to the first issue, involving the sufficiency of the evidence, I find as a general matter, that Sieger was neither a reliable nor wholly credible witness with regard to her descriptions of particular events. As noted above, at significant times, Sieger’s testimony was not predicated upon first hand knowledge or observation, was uncorroborated by other evidence and was frequently nonspecific and conclusory. I also found her to be an uncooperative and evasive witness on cross-examination, in particular when questioned about the Union’s activities at Resort Nursing Home. Thus, as discussed in further detail below, while Sieger sought to blame the Union for various acts of prior misconduct, I find that Respondent has generally failed to

<sup>15</sup> Moreover, in that case, there were no exceptions filed to the administrative law judge’s dismissal of the allegations relating to the alleged unlawful surveillance. *Id.* at fn. 1. It is well settled that the Board’s adoption of a portion of a judge’s decision to which no exceptions are filed is not precedent for any other case. *ESI, Inc.*, 296 NLRB 1319 fn. 3 (1989); *Anniston Yarn Mills*, 103 NLRB 1495 (1953).

<sup>16</sup> Again, this argument fails to acknowledge that both the perimeter and interior of Respondent’s facility are continually monitored by a video surveillance system which would record and preserve evidence of trespass or other instances of misconduct at any time, including those times when its employees are engaged in protected conduct. In fact, Sieger acknowledged that at least one of the instances cited by Respondent (where union agents allegedly stormed the office of administrator Regan), had been captured on videotape.

come forward with probative evidence or specific detail to establish union culpability or, alternatively, to explain why it could not do so.

This is particularly apparent when considering the two occurrences which took place in 2000. In the first such instance, personnel from the New York Daily News were escorted into the nursing home and pictures were taken of at least one resident and elsewhere in the facility. The intrusion was then documented in an article in the newspaper. Although Sieger sought to place the blame on the Union, there is no probative evidence that this is the case. In fact, the newspaper article states that access was facilitated by an employee of the facility, not by any agent or official of the Union.<sup>17</sup> I further note that Sieger testified that she first learned of this unauthorized visit upon reading the article in the newspaper. I find it inherently improbable that an act of trespass such as Sieger described would not have been brought to her attention immediately and in the first instance by a member of her staff,<sup>18</sup> which leads me to question whether Sieger has a reliable memory of this event, to the extent she may have had knowledge of it at the time. I further note that Respondent’s existing security system cameras would have been in position to record at least some portion of the incident, which clearly involved unauthorized entry to the facility. Thus, there would be no logical reason for Respondent to rely upon additional videotaping of events occurring outside its facility to protect itself from an intrusion of this sort, or to preserve evidence of what clearly was a circumstance of trespass.

The second 2000 incident, by Sieger’s account, involved a group of some 30 individuals who entered the nursing home without an appointment, went to administrator Regan’s office and threw items off his desk and sat on it. Again, Sieger was not present during this incident, there was no testimony from any individual who was or who witnessed what occurred. Further, no specific details were offered to substantiate Respondent’s claim that the Union was responsible for this act of trespass. Moreover, the facility’s existing security system would have, and in this case did, capture this occurrence. I note that the tape of this episode would have provided direct evidence of what had occurred. It was not produced herein, and no explanation was proffered for Respondent’s failure to do so. I thus infer that either it was not preserved (which, of course, undermines Respondent’s assertion regarding its intention to preserve evidence) or that it would have not corroborated Sieger’s testimony regarding what actually took place on this occasion.

In any event, even if I were to assume that the Union, or its employee agents, were involved in these two incidents, I find that such events, which occurred 6 years prior to the videotap-

<sup>17</sup> Although Sieger prefaced her testimony about this incident with a reference to a delegate’s request for the use of a conference room to meet with employees, she provided no evidence to link the two occurrences. Moreover, there was no evidence presented from which an appropriate inference could be drawn that the two occurrences were more than circumstantially related or that employee delegates or union officials used the facility for anything more than their stated purpose.

<sup>18</sup> Inasmuch as the article makes reference to employee discharges, apparently in connection with the event, it appears as though Sieger did have prior knowledge of the News’ unauthorized visit.

ing in question, are too remote in time to provide a sufficient justification for Respondent's decision to record the protected picketing activity of its employees. The Board has found anticipatory videotaping to be lawful when there is some meaningful temporal relationship between prior misconduct and the acts being recorded. For example, in *Smithfield Foods*, 347 NLRB 1225, 1228 (2006), the Board concluded that the videotaping of protected conduct was permissible after union organizers engaged in repeated instances of trespass and the employer called the police who asked the handbillers to remain on public property. The employer's redirection of its security cameras to monitor the union organizers outside the facility had a reasonable basis, "in light of the physical proximity of the handbilling to the Respondent's property and the temporal proximity of the previous trespassing incident." By contrast, in *Trailmobile Trailer LLC*, supra at 96, the Board found that an employer's security concern was not a sufficient justification for videotaping employees where the employer did not install surveillance cameras until 8 months after vandalism occurred. I further note that there is no evidence that the police were called to investigate either of the 2000 events, which has been a factor duly considered by the Board in determining whether an employer has demonstrated sufficient justification for recording its employees' protected conduct. See *Smithfield Foods*, supra; *Saia Motor Freight Line*, 333 NLRB 784 (2001) (employer lawfully videotaped handbilling activity when it became dissatisfied with efforts of police to control situation). *Berton Kirschner*, 209 NLRB 1081 (1974), enf. 523 F.2d 1046 (9th Cir. 1975) (discussed infra).<sup>19</sup>

Respondent additionally argues that it is aware of unlawful disruptions that the Union has engaged in at other local health-care institutions, notably at Staten Island University Hospital (reported as *Service Employees District 1199 (Staten Island University Hospital)*, 339 NLRB 1059 (2003), where the Board found that an admitted union agent violated Section 8(b)(1)(A) by subjecting employees to abusive tactics such as profanity, racial and sexual slurs, and threats of physical harm). With regard to this matter, Sieger testified only that the decision was brought to her attention by counsel. She failed to testify however, as to any specific knowledge she might have had of acts of union misconduct in connection with that matter, how that might have some relevance to any event which has occurred at Respondent's facility or the picketing in question herein, or how that may have influenced her decision to videotape the March 15 picketing activity.

Respondent further relies upon the termination, in May 2006, of three of Respondent's employees allegedly for making intimidating threats made to employees who were not planning to join the Union's strike, characterizing this conduct as the "Union's" threat, Respondent argues that the fact that the threats postdated the specific videotaping at issue misses the point.

<sup>19</sup> Moreover, as noted above, Respondent's legitimate security concerns regarding trespass protected by its existing system of video cameras. See *National Steel & Shipbuilding Co.*, 324 NLRB at 500-501 (employer's installation of a tripod mounted video camera trained on the situs of union rallies not justified by security concerns due, in part, to continuing operation of existing security system).

Respondent notes that these threats occurred prior to the issuance of the instant complaint and argues that they must be considered as part of a continuing pattern that impacts the propriety of an order the General Counsel seeks in this case—one which would prohibit future videotaping of union picketing and demonstrations.<sup>20</sup>

As an initial matter, Respondent failed to identify the employees in question in this record, and further failed to show their affiliation, if any, with the Union, other than presumed union membership. There is no evidence, either direct or circumstantial, that the Union initiated, condoned, or ratified these actions. Moreover, Respondent has failed to show how videotaping union rallies or other activity would have conceivably either prevented or captured evidence of such conduct. It appears, rather, that the matter was handled in an appropriate manner—by contacting law enforcement personnel and taking disciplinary action with regard to the employees in question.

#### Respondent's Contentions Regarding the Preservation of Evidence

In further defense to the allegations of the complaint, Respondent points to the fact that the Board has asked for its video evidence in its investigation of alleged picketing at Resort Nursing Home and argues that an employer who is asked to submit such evidence by the Board itself cannot then be accused of engaging in unlawful surveillance when it documents evidence in an analogous situation.<sup>21</sup>

In support of the above contention, and more generally, Respondent argues that by videotaping union picketing, it was merely legitimately seeking to preserve evidence. Respondent notes that the Board has upheld defenses to surveillance charges based upon an employer's need to preserve proof. In *Concord Metal, Inc.*, 295 NLRB 912 (1989), cited by Respondent, the Board, agreeing with the administrative law judge, found that limited photography of picketing was lawful where (1) the union was picketing the employer at two locations; (2) the signs did not identify the union by name; (3) there was a common situs for the picketing; thus secondary boycott charges were a "distinct possibility"; and (4) there was evidence that the

<sup>20</sup> Respondent further argues that all the foregoing instances of union misconduct occurred while the Union knew it was being videotaped and invites me to speculate as to what sort of misconduct might occur if the Union knew its conduct could not be established through video evidence. This argument ignores the obvious fact that not one of the above-cited instances of alleged misdeeds would have been depicted and preserved by video cameras trained across the street from Respondent's facility.

<sup>21</sup> To the extent Respondent appears to argue that it engages in videotaping of union rallies and picketing to protect itself against violations of Sec. 8(g), the evidence demonstrates that the Union provided Respondent with all required notices pursuant to Sec. 8(g) of the Act both before and after the informational picketing on March 15. Respondent makes the point that the Union changed the location of the May 15 planned demonstration. In fact, this change was minor and, in any event, notification of such a change is not required by Sec. 8(g) which requires notification only of the date and time that picketing will commence; there is no requirement that a union provide notice of the locations at which it intends to picket. *Hospital Worker Local 250*, 255 NLRB 502, 505 (1981).

picketers blocked an entrance to the employer's facility thereby delaying a delivery. *Id.* at 921. None of these circumstances obtain in the instant case. Similarly, *Karatjas Family Lockport Corp.*, 292 NLRB 953, 956 (1989), also cited by Respondent, is inapposite insofar as that case involved a situation where the employer took photographs of nonemployee, paid pickets in order to preserve evidence of alleged trespass.

Respondent additionally relies upon *Roadway Express*, 271 NLRB 1238 (1984), where the Board found that photography of protected activity to preserve or collect evidence of illegal picketing was lawful. In that instance the administrative law judge, affirmed by the Board, based his decision in part on the fact that 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, has not claimed any colorable basis for the initiation of legal proceedings against the Union, or the picketing employees, for which the videotapes of picketing could or would have been evidence. Furthermore, in *Roadway Express* the employer demonstrated its intent to use those tapes for the purposes of litigation by showing that it had catalogued and preserved its photographs. Here, by contrast, in response to a subpoena seeking all videotapes of the event, Respondent could produce only 28 minutes of videotape relating to the picketing, notwithstanding the fact that it is undisputed that two video cameras were stationed to record the entire 3-hour event. I find that Respondent's unexplained failure to produce this subpoenaed material demonstrates that it failed to preserve it and conclude that such a failure undermines its contention that it was legitimately seeking to preserve evidence in the event of future litigation. Thus, Respondent has failed to preserve and has not otherwise shown that its videotapes could have been evidence in any litigation, theoretical or real.

In *Berton Kirschner*, supra, also cited by Respondent, the Board concluded that the photographing of union representatives while handbilling employees did not violate the Act where the union representatives had been asked to leave the employer's property, and thereafter returned and where the police were called because the union representatives continued to engage in acts of trespass. The Board found that "[i]n these circumstances, including the fact that Respondent promptly called the police on this one date as well as the fact that there were several later handbillings by the Union without incident, we cannot conclude that respondent, by taking pictures of handbillings which in part were on its property engaged in surveillance, or engaged in conduct that would have created the impression of surveillance." 209 NLRB at 1081.

Thus, as Respondent correctly observes, an employer may photograph handbillers or pickets to support a legal trespass claim.<sup>22</sup> However, the Employer must have more than a mere belief that something might happen; rather, an employer must

<sup>22</sup> See, e.g., *Washington Fruit & Produce Co.*, 343 NLRB 1215, 1217 (2004) (no violation where an employer monitors protected activity because of a reasonable concern about a recurrence of trespassing); *Cf. Snap-On Tools, Inc.* 342 NLRB 5 (2004) (repositioning of security camera to monitor handbilling violated Act where there were no previous incidents of trespassing); *Robert-Orr Food Service*, 334 NLRB 977 (2001) (same).

demonstrate a reasonable basis to expect misconduct. *National Steel & Shipbuilding Co.*, supra; *Cf. Saia Motor Freight Line*, supra, where 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 photographed employees 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).

All of the foregoing only underscores Respondent's failure to adduce any evidence of violence, trespass, or the blocking of ingress or egress during those instances where the Union has picketed Respondent's facility, all of which have been recorded for at least the past 15 years. Further, there is no evidence of misconduct as employees picketed on the sidewalk across the street from Respondent's facility on March 15. Rather, the only probative evidence in this record is of peaceful and lawful conduct during picketing or other group activities. Thus, I conclude that the forgoing instances of alleged union misconduct cited by Respondent, either singly or in the aggregate, fail to meet Respondent's burden to establish a "solid justification" for its resort to anticipatory videotaping of the March 15 informational picketing. See, e.g., *National Steel & Shipbuilding Co.*, supra at 502 (even where there is a history of violence or misconduct associated primarily with strikes at an employer's facility, such history did not justify the surveillance of peaceful union rallies conducted during nonstrike periods). Moreover, to the extent Respondent is relying upon Sieger's subjective reaction to what she perceived as union transgressions, this does not constitute sufficient cause to warrant the recording of protected activity. Rather, Respondent is obliged to prove a reasonable, objective basis for anticipating that misconduct will occur, *id.* at 499 fn. 1. Here, Respondent has failed to prove that it videotaped the March 15 informational picketing due to any legitimate security concern or reasonable basis to conclude that the Union would be engaging in unlawful or unprotected conduct. The evidence rather, "establishes a clear connection between union activity and the installation of the cameras, which would have been apparent to employees." *Trailmobile Trailer, LLC*, supra at 96.

#### Respondent's Contentions Regarding the Absence of a Chilling Effect on Protected Conduct

Finally, Respondent argues that employees continue to engage in protected activity despite their knowledge of the surveillance. It is asserted that because Respondent's unionized employees do not fear reprisals for their union activity, the type of surveillance engaged by Respondent is lawful. In support of this argument, Respondent relies upon evidence that employees continued to participate in protected activity notwithstanding their knowledge that their activities were being videotaped. Moreover, it is undisputed that there has been no allegation of retaliation against employees for their participation in rallies or picketing activities.

The standard for determining an 8(a)(1) violation is whether the employer engaged in conduct that reasonably tends to interfere with the free exercise of employees' Section 7 rights. This

standard is objective; the subjective perceptions of individual employees are not taken into account. Moreover, the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on an employer's motive or on whether the coercion actually succeeded or failed. *American Freightways Co.*, 124 NLRB 146, 147 (1959); *Curwood, Inc.*, 339 NLRB 1137, 1140 (2003).

Thus, in the instant case the fact that employees continue to engage in protected conduct notwithstanding Respondent's surveillance of their activities is not determinative of whether there has been a violation of Section 8(a)(1) of the Act.<sup>23</sup> Rather, the appropriate focus for inquiry is "whether the photographing or videotaping has a reasonable tendency to interfere with protected activity under the circumstances of each case." *Washington Fruit & Produce Co.*, supra at 1217 (quoting *National Steel & Shipbuilding Co.*, supra). Moreover, a lack of retaliation against participants will not, in and of itself, mitigate the reasonable tendency of an employer's videotaping to interfere, restrain, or coerce employee's rights to engage in protected concerted activity. *National Steel & Shipbuilding Co.*, supra at 502. Employees do not need to be actually intimidated by videotaping for it to be unlawful. See *Center Construction Co.*, 345 NLRB 729, 744 (2005).

In summary, the Respondent has not met its burden of proving a "solid justification" for its videotaping of the peaceful picketing of its employees. I therefore find and conclude that by videotaping picketing employees, without proper justification, thereby engaging in surveillance of employees engaged in protected conduct, the Respondent has violated Section 8(a)(1) of the Act, as alleged in the complaint.

#### The Threat to Delay Reinstatement

##### General Counsel's Motion to Amend the Complaint

As noted above, after resting, but prior to the presentation of Respondent's case-in-chief, counsel for the General Counsel moved to amend the complaint to add the allegation that, by distributing the above-described May 12 letter to employees, Respondent engaged in an independent violation of Section 8(a)(1). Respondent objected to the proposed amendment, claiming a lack of notice and due process.<sup>24</sup>

<sup>23</sup> Moreover, as counsel for the General Counsel argues, even though Respondent had engaged in videotaping of employee demonstrations for years and there was no evidence of retaliatory action, there is evidence that employees did have concerns about being recorded while engaging in protected conduct.

<sup>24</sup> In particular, Respondent appears to argue that because I deferred ruling on whether I would grant the motion to amend the complaint until after the parties had briefed that issue, it was precluded from litigating the issue on the merits. In its brief, Respondent cites several transcript references in support of this argument. Most of them are inapposite, dealing with other issues entirely. On one occasion cited by Respondent there was, in fact, a discussion of my decision to defer ruling on the General Counsel's motion. As the transcript makes plain, at that time the parties were cautioned that they were "on notice that this is an issue." At that time, there did not appear to be any misunderstanding regarding the fact that, if I found it appropriate to grant the General Counsel's motion, I would proceed to consider the merits of the proposed amendment to the complaint. To argue to the contrary would suggest that I was contemplating reopening the record to con-

Rule 102.17 of the Board's Rules and Regulations allows for the amendment of a complaint before, during, or after a hearing upon such terms as may be just. *Folsom Ready Mix, Inc.*, 338 NLRB 1172 fn. 1 (2003). Whether it is just to grant such a motion depends upon whether the new allegations are closely related to the allegations of the complaint, and whether the amendments are so late that the respondent will be prejudiced by them. See *Payless Drug Stores*, 313 NLRB 1220, 1221 (1994); *New York Post*, 283 NLRB 430, 431 (1987).

In the instant case, I find that the new allegation proposed by the General Counsel in her motion to amend the complaint arises from the same factual circumstances and course of conduct that forms the basis for certain of the other allegations of the complaint, and relies upon the same legal theory. I also find that the motion was not too late as the issue was fully and fairly litigated. At the hearing, Respondent was the first to raise the issue of the letter, apparently citing it as part of its proffered defense to the allegations the complaint. The letter was thereafter stipulated into evidence. The General Counsel then adduced testimony regarding the context in which the letter was distributed to employees, and Respondent had the opportunity to cross-examine her witnesses on such issues. Moreover, the document speaks for itself. Further, the motion to amend the complaint was made prior to the presentation of any evidence by Respondent in its case-in-chief and Respondent adduced testimony regarding why it had been distributed to employees from its own witness. In this regard, by Respondent's own admission, the distribution of the letter is part and parcel of the same course of conduct alleged to be unlawful, and Respondent's proffered defense to such allegations is predicated upon the same legal theory. While it would have been preferable for counsel for the General Counsel to have made the motion to amend the complaint at an earlier point in these proceedings, I find that the issue was fully and fairly litigated, and the Respondent was not denied due process. I therefore grant counsel for the General Counsel's motion to amend the complaint.

#### The Unlawful Threat to Delay Reinstatement

The complaint alleges that Respondent violated the Act by threatening employees that, Respondent would delay their reinstatement if they went on strike and then made an unconditional offer to return to work. Respondent asserts that employees were informed that their reinstatement might be delayed for 3 weeks if they went out on strike and that this was due to the difficulty of hiring replacements en masse for a period of 3 days. Respondent further contends that it had a legitimate business justification for replacing the employees for this period of time, and for explaining this to its employees.

Under Section 8(c) of the Act, an employer may lawfully furnish accurate information, especially in response to employees' questions, if it does so without making threats or promises of benefits. *Lee Lumber & Building Material Corp.*, 306 NLRB 408 (1992). See also *Eagle Comtronics*, 263 NLRB 515 (1982). In *Sutter Health Center*, 348 NLRB 637 (2006), the Board, affirming the administrative law judge, found among other

consider the issue on its merits, a request which was not made by any party and under the circumstances of the case, a contention which cannot be given serious credence.

things, that Respondent had violated Section 8(a)(1) by notifying certain unit employees that their reinstatement to work after a strike would be delayed. In that case, it was also found that the respondent violated Section 8(a)(1) and (3) by delaying the reinstatement of those employees, and the administrative law judge found that the independent 8(a)(1) violation was “entirely derivative of and dependent on the allegation that the delayed reinstatement was improper.” *Id.* at 647. In the instant case, of course, there was no strike, and therefore no unconditional offer to return to work or any delay in the reinstatement of striking employees.

The Board has found that an employer’s communications to employees which are not compatible with their legal rights and remedies under the Act are independent violations of Section 8(a)(1). For example, as General Counsel notes, when an employer informs unfair labor strikers that they have been permanently replaced, such a statement violates the Act. *Grinnell Fire Protection Systems*, 328 NLRB 585 (1999). Similarly, it has been held that, while an employer need not inform economic strikers of the full scope of their legal entitlements under *Laidlaw Corp.* 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99 (7th Cir. 1969), *cert. denied* 397 U.S. 920 (1969), it may not describe a consequence of such a strike which is inconsistent with such rights. In *Eagle Comtronics*, *supra* at 516, a situation involving economic strikers, the Board stated:

[A]n 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*. . . [.] As long as an employer’s statement on job status after a strike are consistent with the law, they cannot be characterized as restraining or coercing employees in the exercise of their rights under the Act.

Similarly, the Board has found that, while an employer has a right to permanently replace employees engaged in an economic strike, in the event it fails to do so, its false communication to employees to such effect violates Section 8(a)(1) of the Act. See, e.g., *Noel Corp.*, 315 NLRB 905, 907 (1994) (manager’s statement to employees that striking employees would be permanently replaced and that the respondent had hired such replacements at a time when “the task of marshalling a measurably complete replacement program was not yet even under way” was an unlawful threat of termination).

Based upon the foregoing precedent, therefore, it would appear that the question of whether Respondent’s communications to its employees were violative of the Act or protected by Section 8(c) hinges upon whether, at the time the statements were made, they were an accurate (even if incomplete) reflection of employees’ legal rights and remedies given the extant circumstances.

General Counsel presented evidence relating to three instances where the issue of delayed reinstatement was presented to employees. This evidence is wholly un rebutted. In the first, occurring on or about May 9, employees were told, “[I]f we do go on the strike for three days, we cannot come back in for the next three weeks. Because he cannot hire workers to be there

for three days. So we will be off for three weeks.” Later that week, on Friday, May 12, another meeting was held for employees and the message conveyed was, “we were advised that if we went out on strike we might not be able to return to work when we think we could, within those three days. We were told that we might have to stay out longer depending on what the contract was that they got for the people to come and work.” On that date, Respondent additionally issued a letter to its employees, which in salient detail states:

Also, you should know that because we have a duty to our patients, we will have to hire temporary replacements for you and we probably will have to keep them on the jobs of those who strike until the Union agrees not to call further strikes over the next few months or until a union contract is signed. There are two reasons for this. First, it is hard to get replacements for only a three day period. Second, since we don’t know when you might strike again, we have to make sure that we will have continuity of care for patients until open issues with the Union are resolved. We hope you understand why we have to protect our patients.

Thus, in meetings with employer representatives employees were told, respectively, that they either “will” or “might” be out for a 3-week period should they strike. In its letter, Respondent goes further and states that employee reinstatement “probably will” be delayed until the Union agrees not to call further strikes or until a new agreement is reached.

Counsel for the General Counsel argues that the statements made in the employee meetings and set forth in the letter to employees are unlawful because they do not accurately reflect the law. In this regard, counsel for the General Counsel argues that the parties anticipated that the strike would have been an unfair labor practice strike.<sup>25</sup> In such an instance, it is contended, the strikers would have been entitled to full reinstatement upon an unconditional application, even if the employer would have been required to dismiss other employees who were hired as replacements. Relying upon *Pennant Foods Co.*, 347 NLRB 460 (2006), *Grinnell Fire Protection Systems Co.*, *supra*, and *Cagle’s Inc.*, 234 NLRB 1148 (1978), the General Counsel argues that it is an unfair labor practice to tell unfair labor practice strikers that their reinstatement will be delayed, as that is an incorrect statement of an employer’s obligations with regard to such employees.

In the alternative, counsel for the General Counsel argues that even if the strike had been an economic strike, Rutenberg’s statements were unlawful because Respondent has not presented evidence that it had a legitimate and substantial business

<sup>25</sup> At the hearing, counsel for the General Counsel stated that she was not intending to prove that the strike would have been an unfair labor practice strike but, merely that the parties were anticipating that the strike would have been an unfair labor practice strike. The General Counsel further stated that she was putting forth this theory in response to Respondent’s anticipated defense that it had a sufficient business justification to delay reinstatement to employees. Respondent disputed this characterization of the anticipated strike, asserting that the strike was an economic strike in support of the Union’s demand that the Respondent agree to the selection of the impartial chairman as the arbitrator for disputes arising under the Agreement.

justification for delaying its employees' reinstatement after the strike and an unconditional offer to return to work; therefore Respondent's statement to such effect tended to interfere, restrain, or coerce employees in the exercise of their Section 7 rights.

Respondent contends that the evidence fails to support General Counsel's assertion that employees were threatened with a delay in reinstatement. Rather, it is asserted that the evidence shows that Rutenberg "explained to Union members that, if the Union went on strike, the Center may not be able to reinstate them for three weeks because the temporary agencies would not agree to send such a large number of employees for a shorter period of time." Thus, it is argued, Rutenberg simply explained why reinstatement might have to be delayed due to Respondent's need to replace workers en masse. Relying upon *Sociedad Espanola de Auxilio Mutuo y Beneficiencia*, 342 NLRB 458 (2004), Respondent further argues that employers who engage in defensive lockouts may utilize temporary employees to replace striking workers where there is a legitimate or compelling reason to do so. Respondent claims that, in making the disputed statements to employees, it was providing its employees prior to the anticipated strike with information about why a lockout might have to ensue based upon a legitimate need for temporary workers to provide coverage during the strike. As Respondent argues, its explanation (provided both verbally and in the letter) demonstrates a legitimate business reason for the delay of reinstatement at a healthcare institution because there was no other way to bring in over 250 temporary employees without a minimum term of 3 weeks. Thus, neither the statements made at the meetings or in the letter constituted a threat of reprisal for engaging in union activity.

As an initial matter, I make no finding about whether a strike which never materialized would or would not have been an unfair labor strike, especially in light of the fact that there is no such allegation set forth in the complaint. Here, the General Counsel has neither pled nor proven the existence of unfair labor practices prior to the strike vote taken in February 2006, and has further failed to meet its burden to show how any of the subsequent unfair labor practices alleged and found herein might have been a contributing cause for the decision to strike. See *Tufts Bros.*, 235 NLRB 808, 810-811 (1978).<sup>26</sup>

I assume, therefore, for purposes of the instant analysis, that the strike, had it occurred, would have been an economic strike. There is a separate issue of whether Rutenberg framed his discussion of the anticipated strike in any particular manner, which might possibly have some arguable relevance in assessing the legality of his statements. I find, however, that the evidence is at best equivocal regarding this matter, and cannot draw any particular conclusion about whether Rutenberg was articulating his comments in the context of an anticipated unfair

<sup>26</sup> To the extent the General Counsel is relying upon the fact that the Regional Director for Region 29 had previously issued a complaint against Respondent, such reliance is misplaced. The allegations contained therein do not establish the existence of any unfair labor practices. Moreover, I note that pursuant to the parties' settlement, the General Counsel requested dismissal of the complaint.

labor practice or economic strike.<sup>27</sup> Based upon the comments attributed to Rutenberg by employee witnesses, I do find, however, that he was discussing their reinstatement under the assumption that employees would have made an unconditional offer to return to work, after the strike had concluded.

In any event, it is apparent from the record that Respondent planned to temporarily, rather than permanently, replace its striking employees. An employer may hire permanent replacements for economic strikers. *NLRB v. McKay Radio & Telephone Co.*, 304 U.S. 333, 345-346; *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967). However, where an employer fails to show that economic strikers have been permanently replaced prior to their unconditional offer to return to work, an economic striker is entitled to immediate reinstatement, absent a demonstrated business justification. *Teledyne-Stillman*, 298 NLRB 982, 985 (1990), enf. 938 F.2d 627 (6th Cir. 1991), *Harvey Mfg.*, 309 NLRB 465, 470 (1992). The burden of proof in this regard is on the employer. *NLRB v. Fleetwood Trailer Co.*, supra at 378; *Laidlaw Corp.*, 171 NLRB at 1368. If an employer fails to establish such a "legitimate and substantial business justification" it violates Section 8(a)(3) and (1) of the Act, regardless of intent. *NLRB v. Fleetwood Trailer Co.*, supra at 380; see also *Laidlaw Corp.*, supra at 1368.

In the present case, Respondent proffers two asserted business justifications: (1) that it could not contract for temporary employees for any period of time less than 3 weeks and (2) that it was entitled to lock out its employees and utilize temporary workers to continue operations.

Respondent's contention that the exigencies of replacing approximately 250 employees on a temporary basis necessitated contracting with agencies for a longer period than the anticipated 3-day strike is compelling; it is, however, not supported by adequate evidence. It is apparent from the record that during the week prior to the date of the strike, when the comments at issue were made to employees, Respondent had not yet entered into any agreement with any particular agency or group of agencies to provide temporary workers during the anticipated strike. Sieger's testimony regarding her discussions with three named replacement agencies was nonspecific, as if negotiations with all three had been exactly the same, a situation which I find to be highly improbable, absent some further explanation or factual development. I further note that Sieger failed to testify that she agreed to such terms. Moreover, there is no evidence of any written agreement, or proposal to such effect. There is also a lack of evidence to show that, at any relevant time, Respondent was under a binding commitment to pay for such services.

Further, the statements made to employees during the meeting held the Friday prior to the strike tend to show that Respondent had no definite plans regarding replacement employees ("we *might not* be able to return to work when we think we could, within those three days . . . *depending on the contact* was that they got for the people to come and work"). Similarly, the assertions in the letter issued to employees fail to indicate the

<sup>27</sup> While Rutenberg clearly made reference to (and disputed) the existence of unfair labor practices, he also addressed the fact that there were "open issues" between the parties.

existence of a binding obligation, (“we *will have* to hire temporary replacements for you and we *probably will* have to keep them on the jobs of those who strike . . .”) (Emphasis added). The conditional nature of such communications to employees tends to refute Respondent’s assertion that there was a plan, or any commitment, based upon requirements from supplier agencies, for temporary replacements to be hired for a defined period of 3 weeks.

Therefore, while I credit Sieger’s testimony to the extent that I find that she had discussions with various agencies to replace striking employees, and that there was discussion of hiring employees for a period of time exceeding that of the anticipated strike, I find from the record that during the time Respondent was issuing statements to employees regarding their reinstatement after a strike, Respondent’s plans to replace its employees in the event of a strike were inchoate. Sieger’s testimony is by itself insufficient to prove the existence (or necessity) of a 3-week commitment for replacement employees.<sup>28</sup>

Respondent has cited no authority to convince me that given the incomplete evidence regarding the apparently undeveloped nature of its plans as late as the Friday prior to the strike, it has carried its burden of showing that it had a sufficient business justification to assert its right to delay the reinstatement of employees after an unconditional offer to return to work had been made.<sup>29</sup> I find therefore, under the circumstances established by the record herein, that when Rutenberg told employees that “if [they] do go on strike for three days, [they] cannot come back in for the next three weeks. Because he cannot hire workers to be there for three days. So [they] will be off for three weeks,” he was falsely communicating to employees that a delay in their reinstatement was a *fait accompli* based upon contractual arrangements which, at the time, failed to exist. Thus, by making these statements to employees, Respondent violated Section 8(a)(1) of the Act. *Eagle Comtronics*, supra; *Noel Corp.*, supra.

<sup>28</sup> In this regard I note that the first thing Sieger mentioned when asked about her discussions with temporary agencies was the fact that the “rate we were paying for replacement people would be much higher.” This testimony tends to show that, while it would have been more costly to replace employees for a shorter period that remained an option.

<sup>29</sup> In those situations where the Board has concluded that a substantial business justification existed for a delay in reinstatement, the quantum of evidence has been more substantial than that proffered by the Respondent herein. For example, in *Pacific Mutual Door Co.*, 278 NLRB 854, 856 (1986), the employer lawfully delayed reinstating strikers for 30 days pursuant to its contract with a company providing strike replacements where the contract was in evidence and the record showed that the 30-day cancellation provision was a necessary condition of the employer getting temporary employees from the referring company. See also *Encino-Tarzana Regional Medical Center*, 332 NLRB 914 (2000), and *Sutter Roseville Medical Center*, supra at 646, where it was specifically noted that the General Counsel had not alleged an unlawful delay in the reinstatement of economic strikers where there were specific contractual obligations to guarantee temporary replacements from staffing agencies a minimum period of employment. Cf. *Harvey Mfg.*, supra at 470 (employer’s private contractual arrangement with an agency providing temporary strike replacements requiring a 10-day termination notice did not privilege the employer to continue hiring replacement employees after the union’s unconditional offer to return to work).

By contrast, the un rebutted testimony is that by the following Friday, Respondent couched its communication to employees in significantly different terms, advising them that they might not be able to return to work . . . depending on the contract [that Respondent obtained for replacement workers]. Here, I agree with Respondent that it was truthfully advising employees of a possible outcome of the strike and find its communications to employees were not inconsistent with their rights under the Act and therefore not violative of the Act.

The letter distributed to employees states that the employer “probably will” have to keep temporary replacement employees on the job until the Union agrees not to call strikes or until a contract is signed for two reasons: (1) the difficulty of obtaining replacements for a 3-day period and (2) uncertainty over when other strikes might be called. Thus, the letter goes beyond what was verbally conveyed to employees and advises them that their reinstatement may be delayed, not for a period of 3 weeks, but for some indefinite period either until the Union agrees not to call further strikes or until an agreement is reached.

The General Counsel contends that this statement is unlawful because it does not furnish employees accurate information about their reinstatement rights and because it threatens a lockout of employees. With regard to this latter contention, the General Counsel argues that Respondent never informed the Union that it intended to enforce its bargaining demands by locking out employees, as the Board requires. In support of this position, the General Counsel relies upon *Eads Transfer*, 304 NLRB 711 (1991), *enfd.* 989 F.2d 373 (9th Cir. 1993). In that case, the Board found an employer’s claimed economic lockout was violative of Section 8(a)(1) and (3) of the Act because it had not notified the union that its refusal to reinstate economic strikers was in fact due to a lockout. Instead, the employer, without making any reference to a lockout or to its bargaining demands, refused without explanation to reinstate seven economic strikers when they made an unconditional offer to return to work. The Board held that if the employer wanted to invoke its rights under *Harter Equipment*, 280 NLRB 597 (1986), *enfd.* sub nom. *Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987),<sup>30</sup> it had to declare the lockout either before or immediately after the strikers made their unconditional offers to return to work. Here, as noted above, there was no strike or unconditional offer to return to work. Thus, Respondent’s obligation to formally declare a lockout had not yet matured.<sup>31</sup>

The General Counsel further argues that there is no evidence that there were lawful reasons for an anticipated lockout. While it would be unfounded, on this record, to assess whether a lockout, had it occurred, ultimately would have been lawful, in its letter to employees Respondent posits two circumstances where employer lockouts of striking employees have been found to be

<sup>30</sup> In *Harter Equipment*, supra the Board held that an employer’s use of temporary replacements during a lockout in support of its legitimate bargaining demands does not violate the Act.

<sup>31</sup> Nevertheless, an argument can be made that employees were so informed. See *Ancor Concepts, Inc.*, 323 NLRB 742, 744 (1997), *enfd.* denied on other ground 166 F.3d 55 (2d Cir. 1999), discussed *infra*.

lawful: to secure a commitment from a union to refrain from further strikes and in support of an employer's bargaining demands.

With regard to the former, Sieger testified, without contradiction, that in early 2006 she met with Union Representatives Sackman, Shillingford, and Nortey. Her un rebutted testimony is that, at this time, Sackman told her that, as it had no contractual recourse for Respondent's continuing fund delinquencies, the Union would continue to engage in picketing and strikes unless Respondent entered into a contract. The General Counsel urges that I not credit Sieger in this regard. I find however, in contrast to certain of her other testimony, discussed above, that Sieger's account of this meeting was presented with corroborating detail and in a forthright manner. I further note that either the General Counsel or the Union could have presented a witness to rebut this testimony, including Nortey, who testified herein, and failed to do so. I find therefore, that the Union informed Respondent that it could anticipate further strikes and there is no evidence that the Union ever retracted that statement, or provided Respondent with assurances to the contrary.

Under certain circumstances, the Board has held that where a union would not agree to refrain from additional strike activity, an employer has established that it possesses a substantial business justification for a lockout and for placing restrictions on the reinstatement of economic strikers. See *Bali Blinds Midwest*, 292 NLRB 243, 246 (1988) (partial lockout lawful where in anticipation of possible repetition of strike); *General Portland, Inc.*, 283 NLRB 826, 826 fn. 2, 838, 840 (1987) (partial lockout lawful where employer reasonably feared and sought assurances against "quickie strikes" and employees still on strike failed to give such assurances).

Further, when Respondent alternatively informed employees that their reinstatement would probably be delayed until the parties reached agreement on a contract, Respondent was arguably asserting its legal right to lock out its employees in support of its bargaining demands. See, e.g., *Ancor Concepts, Inc.*, supra at 744, where the Board explained that an employer's timely announcement of a lockout does not depend on the use of "formal words" to describe its bargaining tactics. The Board thus held that the employer's assertion that it would not reinstate strikers until the parties reached a new agreement was sufficient to inform striking employees that the employer had locked them out in support of its bargaining position.

Respondent further argues that it could lawfully lock out its employees due to its duty to care for the residents of the nursing home. In this regard, the Board has held that where a health care employer has legitimate concerns about maintaining continuous quality patient care, it may be entitled to lock out its regular employees and operate with replacements. See *Sociedad Espanola de Auxilio de Puerto Rico*, supra at 460-461. In that case, the Board found that a hospital's decision to lock out employees following the union's announcement that it intended to conduct two 2-day strikes did not violate the Act, even after the union cancelled the first planned strike, as the hospital's decision was based upon its legitimate concern that it could not find enough replacements during the Christmas holiday season.

Again, while it is neither warranted nor possible for me to assess whether, under any of the above cited theories, a lockout of Respondent's employees would have been deemed lawful had it come to pass, I cannot conclude that Respondent's statements to employees in this regard were either false or inconsistent with their rights under the law. I find therefore, that the distribution of the May 12 letter to employees does not violate Section 8(a)(1) of the Act, as alleged. Accordingly, I shall recommend that this allegation of the complaint be dismissed.

#### CONCLUSIONS OF LAW

1. The Respondent is, and has been at all material times, an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By engaging in surveillance of its employees by videotaping employees who engaged in informational picketing, without proper justification, and by threatening to delay the reinstatement of employees after they engaged in a strike and made an unconditional offer to return to work, Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

3. Respondent has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that Respondent has engaged in conduct violative of Section 8(a)(1) of the Act by (1) engaging of surveillance of employees by videotaping the picketing activities of its employees without proper justification, and by (2) threatening to delay the reinstatement of employees if they engage in a strike and make an unconditional offer to return to work, I shall recommend that it be ordered to cease and desist from such behavior and to take certain affirmative action designed to effectuate the policies of the Act, including the posting of a notice to employees assuring them it will not commit violations of the type found herein or any like or related violations of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>32</sup>

#### ORDER

The Respondent, Kingsbridge Heights Rehabilitation and Care Center, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in surveillance of its employees union activities with video cameras, without proper justification.

(b) Threatening to delay the reinstatement of employees if they engage in a strike and make an unconditional offer to return to work.

<sup>32</sup> 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.

(c) In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed 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 facility in Bronx, New York, copies of the attached notice marked "Appendix."<sup>33</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 March 15, 2006.

(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 that the Respondent has taken to comply.

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<sup>33</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

#### 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 engage in surveillance of you while engaged in union activity by videotaping such activity without proper justification.

WE WILL NOT threaten to delay your reinstatement to work if you engage in an strike and make an unconditional offer to return to work.

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.

KINGSBRIDGE HEIGHTS REHABILITATION CARE  
CENTER