The Fremont-Rideout Health Group d/b/a Fremont Medical Center and Rideout Memorial Hospital

The Fremont-Rideout Health Group d/b/a Fremont-Rideout Home Health *and* California Nurses Association, AFL–CIO. Cases 20–CA–33521, 20–CA–33649, 20–CA–33801, and 20–CA–34017

December 30, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

On January 29, 2009, Administrative Law Judge John J. McCarrick issued the attached decision. The General Counsel, the Respondent, and the Charging Party each filed exceptions, supporting briefs, and answering briefs, and the Respondent and the Charging Party filed reply briefs.[1]

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,[2] and conclusions only to the extent consistent with this Decision and Order.[3]

[1] The Charging Party also filed a motion to strike certain portions of the Respondent's answering brief, and the Respondent filed an opposition. In view of our disposition of this case, we find it unnecessary to pass on the motion.

[2] The Respondent has implicitly 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.

There is no exception to the judge's recommended dismissal of the cafeteria surveillance allegation. The parties also do not except to the judge's findings of violations pertaining to the interrogation and threat involving RN Hau Dao, the refusal to allow Dao to work her scheduled shifts, the surveillance of union activity by a security guard, and the installation of surveillance cameras at the Respondent's facilities.

[3] We shall modify the judge's recommended Order and substitute a new notice to conform to the violations found. In addition, in accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB,* 647 F.3d 1137 (D.C. Cir. 2011), we shall modify the judge's recommended remedy by requiring that backpay shall be paid with interest compounded on a daily basis. Finally, we shall modify the judge's recommended Order to provide for the posting of the notice in accordance with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

Background

The Respondent operates two acute care facilities: Fremont Medical Center (Fremont) and Rideout Memorial Hospital (Rideout). Since September 20, 2006, the California Nurses Association (the Union) has been the certified bargaining representative of approximately 450 registered nurses (RNs) in a single Fremont-Rideout bargaining unit. In December 2006, the Respondent and the Union began contract negotiations in the Fremont-Rideout unit, but, as of the date of the unfair labor practice hearing, they had not reached agreement on a contract.

The complaint alleged as unlawful a number of the Respondent's statements and actions between April 2007 and May 2008.[4] The judge recommended dismissal of allegations that certain statements made to RNs Katherine Zubal and Roxann Moritz violated Section 8(a)(1); that discipline issued to RNs Heather Avalos and Tami Clark violated Section 8(a)(3) and (1); and that the Respondent's repromulgation and enforcement of a no-access policy directed at nonemployees violated Section 8(a)(1). We reverse the judge and find those violations.[5] The judge further found that the Respondent's reassignment of staff scheduling duties away from Rideout Intensive Care Unit (ICU) RNs Paula Oakes and Susan Osher constituted an unlawful removal of bargaining unit work in violation of Section 8(a)(5) and (1). We agree with the judge.[6] The judge found other violations of Section 8(a)(5) and (1) based on (1) a June 6 memo from Sue Chambers, the director of women and children's services; (2) a January 8 email from Postanesthesia Care Unit Manager Sharon Hoey; and (3) the Respondent's March 10 refusal to supply certain information to the Union. As described below, we reverse each of those findings and dismiss those complaint allegations.

[4] All dates are between April 2007 and May 2008, unless noted otherwise.

[5] We agree, however, with the judge that the Rideout ICU charge nurse RNs—including Oakes, Osher, Avalos, and Clark—are statutory employees, not supervisors. Rideout ICU RNs serve as charge nurses less than 50 percent of the time during their shifts. In that role, they assign already-scheduled RNs to patients on their respective shifts. The judge found the charge nurses did not exercise independent judgment in assigning nurses to patients. He pointed out that the assignments were based on such factors as patient ratios, acuity numbers, proximity of patient beds, and continuity of care—none of which establish independent judgment. Instead, these assignments were routine and clerical in nature. We also agree with the judge that the preparation of monthly staff schedules by Oakes and Osher does not itself constitute the exercise of independent judgment as defined in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006).

[6] Because the judge failed to include a make-whole provision for any loss of pay suffered by Oakes or Osher as a result of the loss of their scheduling duties, we have modified the judge's recommended Order accordingly.

The 8(a)(1) and (3) Allegations

1. Instruction to limit union talk to the break room on breaktime

The Respondent has a solicitation/distribution (S/D) policy that forbids employees from "solicit[ing] . . . for any purpose, in immediate patient care areas, such as patients' rooms, and places where patients receive treatment, such as therapy areas, or in any other area that would cause disruption of health care operations or disturbance of patients, such as corridors in patient treatment areas and rooms used by patients for consultations with physicians or meetings with families or friends." On its face, the policy does not restrict mere discussion of unions, i.e., union "talk" that does not include a "solicitation." The Respondent does not have a rule barring discussion of nonwork subjects in any areas of the hospital, and employees are permitted to discuss nonwork subjects anywhere on the premises.

Fremont RN Katherine Zubal testified that, in April, her supervisor, Karen Bezuidenhout, told her that she had heard that Zubal was talking to coworkers about the Union. Bezuidenhout added that she preferred that Zubal talk about the Union while on her break and in the break room. In response, Zubal said that the employees had been discussing the Union for some time.[7]

The complaint alleges that, "by telling employees they were required to go to non-work areas during non-work times to discuss the Union," Bezuidenhout "selectively and disparately" enforced the S/D policy. The judge dismissed the allegation. In doing so, he found that Zubal had engaged in "discussions with fellow employees about the union." Significantly, the judge never found that Zubal had actually engaged in union solicitation at work or that Bezuidenhout had approached Zubal because she believed that Zubal had done so. Nevertheless, the judge rejected, on the basis that it was not pled or litigated, the General Counsel's contention that Zubal's conduct was "discussion" rather than "solicitation" and therefore was not subject to the S/D policy. The judge then concluded that the evidence failed to show discriminatory enforcement of the S/D policy, because the General Counsel failed to show under *Register-Guard*[8] that the Respondent permitted solicitations that were comparable to Zubal's union discussions. We reverse.

To begin, contrary to the judge, we find that the General Counsel's contention that Zubal was engaged in "talk" rather than "solicitation" was closely related to an express allegation in the complaint and fully litigated at the hearing. Paragraph 7(a) of the complaint, which alleged that Bezuidenhout violated the Act by "telling employees that they were required to go to non-work areas during non-work times to discuss the Union," was sufficient notice to the Respondent that Bezuidenhout's comments were at issue. See *Pergament United Sales,* 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). We further find that Bezuidenhout's directive to Zubal to talk about the Union on her break and in the break room unlawfully restricted protected union activity.[9] In essence, the Respondent extended its no-solicitation policy to an action (discussion of the Union) that the policy does not cover. Bezuidenhout's directive therefore violated the Act without regard to whether the Respondent permitted similar "solicitations" under *Register-Guard*, supra.

2. Instruction to stop all union activities

The Respondent's S/D policy also prohibits "distribut[ion of] literature at any time, for any purpose in working areas. Working areas are all areas in the hospital, except employee lounges and parking areas." On August 29, Director Sue Chambers spoke with RN Roxann Moritz in a hallway of Fremont's postpartum department. Moritz had been giving union literature to another nurse, and Chambers told her that she could not do so. When Moritz replied that she could, Chambers repeated that she could not and then added that "she [Chambers] had been told to stop all union activities." The judge, again applying *Register-Guard* and finding no evidence that the Respondent had allowed "like solicitation or distribution on behalf of other organizations," dismissed the allegation that Chambers' conduct violated Section 8(a)(1).

We reverse. Chambers' statement—that she had been told to stop *all* union activities—not only exceeded the scope of the Respondent's S/D policy but also, irrespective of that policy, constituted an unlawfully broad restriction on protected union activity in the workplace.[10]

[7] The judge credited Zubal's testimony. The Respondent attempted to attack her testimony by relying on another witness' inconsistent and uncorroborated testimony, which the judge implicitly discredited. Bezuidenhout did not testify.

[8] 351 NLRB 1110 (2007), enfd. in part sub nom. *Guard Publishing Co. v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009).

[9] See *Powellton Coal Co*., 354 NLRB No. 60, slip op. at 5–6 (2009), incorporated by reference in 355 NLRB No. 75 (2010) (employer unlawfully prohibited employees from engaging in conversations about the union); *Wal-Mart Stores*, 340 NLRB 637, 639 (2003), enfd. in relevant part 400 F.3d 1093 (8th Cir. 2005) ("'[S]olicitation' for a union is not the same thing as *talking about a union or a union meeting* or whether a union is good or bad.") (emphasis in original) (quoting *W. W. Grainger, Inc*., 229 NLRB 161, 166 (1977), enfd. 582 F.2d 1118 (7th Cir. 1978)).

[10] See *Santa Maria El Mirador*, 340 NLRB 715, 718 (2003) ("this kind of activity could not take place on [the employer's] property");

Accordingly, the credited testimony establishes a violation of Section 8(a)(1) without regard to whether the Respondent had allowed solicitation or distribution on behalf of other organizations.

3. Discipline of RNs Avalos and Clark

Heather Avalos and Tami Clark worked as RNs in Rideout's ICU department. They were known union supporters. On June 8, Director of Nursing Operations Steve Frost issued discipline to Avalos and Clark based on misconduct allegedly committed by Avalos on June 5 and Clark on June 7.[11] The essentially identical warnings stated in relevant part:

> It has been reported to management that Heather Avalos, on June 5, 2007 [or Tami Clark, on June 7, 2007], has been observed and documented for conducting personal business by soliciting and passing out information and materials and speaking to staff members during working hours in patient areas of Rideout Hospital. Some employees reported your words and actions as threatening and intimidating and [this] must never occur again.
>
> This consultation is to provide you a warning that management will not tolerate the distribution of any solicitation materials or related discussion with any employee, patient or visitor during work time in work areas of any facility of [the Respondent]. Your actions cause a distraction from the primary purpose of Nurse support and dissen[s]ion between staff that undermines collaboration and a positive reaffirming work environment for all employees and patients.

The warnings further asserted that Avalos and Clark had violated, inter alia, the Respondent's S/D policy and rules 8 and 11 (prohibiting "[d]iscourteous treatment of the public or other employees" and "[u]se of abusive or provocative language, fighting, agitating a fight, or attempting bodily injury on the [Respondent's] premises").

The warnings gave no other factual details about the alleged incidents. Avalos testified without contradiction that Frost told her that he issued the warning "because we were threatening nurses and intimidating nurses, and threatened bodily harm . . . [and] discourteous treatment of employees and the public." Avalos denied engaging in such conduct. Clark testified, also without contradiction, that when she asked Frost whether he thought she had really done this, he replied, "[I]t's not what you do, [it's] how people perceive you." In his discussions with Avalos and Clark, Frost never identified a complainant, and the Respondent did not call any witnesses at the hearing to supply a factual basis for the warnings.

After the warnings were issued, Union Representative Glen Sharp contacted Teri Smith, the Respondent's administrative director of human resources and labor relations. Smith temporarily withdrew the warnings while she investigated the matter. About 2 weeks later, by identical memos to Avalos and Clark, Smith permanently withdrew the warnings. This rescission memo, effective June 20, stated in pertinent part:

> While the [S/D] policy represents what the Hospital believes to be common sense, and properly recognizes the environment in which we work and the best interests of the patients we serve, we acknowledge that in the past, enforcement of that policy has been lax, thus the action [i.e., the warnings] was not appropriate in these circumstances.
>
> While we certainly would prefer that all of our employees would abide by the policy, this is to advise that, until such time as actions may be taken to enforce the policy in a consistent manner, you have the same right to solicit and distribute for the cause you have chosen, i.e., support of the union, as does any employee to solicit and distribute literature for other causes.

The General Counsel alleged that the warnings violated Section 8(a)(1) and (3) of the Act. The judge dismissed both allegations. Regarding Section 8(a)(1), he found, applying *Register-Guard*, supra, that the General Counsel had failed to establish discrimination with respect to "like solicitation or distribution on behalf of other organizations." Regarding Section 8(a)(3), the judge found that the General Counsel had not met its burden to show that union activity was a motivating factor in the discipline. The judge found "no evidence of antiunion animus" because, in his opinion, the Respon-

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Waste Management of Palm Beach, 329 NLRB 198, 199–200 (1999) ("you can't do this kind of thing out here").

Like Bezuidenhout's remark to Zubal, we find that Chambers' remark was closely related to a specific allegation in the complaint and that the matter was fully litigated at the hearing. The allegation in par. 7(c) that Chambers "inform[ed] employees that they could not . . . engage in any discussions about the Union" was sufficient notice to the Respondent that Chambers' remark was at issue. See *Pergament*, supra at 334. The Respondent's counsel called Chambers to testify about the incident and questioned her thoroughly about whether she said that she had been directed to "stop all union activity." The judge discredited Chambers' denial of the remark.

[11] Neither Avalos nor Clark had previously been disciplined during their respective employment of 24 years and 11 years.

dent had applied a facially lawful S/D policy in a "nondiscriminatory manner."[12]

The General Counsel and the Charging Party contend that the judge erred in failing to find animus. The Charging Party also argues, inter alia, that the Respondent did not meet its *Wright Line* burden,[13] because it admitted to lax enforcement of its S/D policy and because a high-level human resources director rescinded the warnings, asserting that the disciplinary action "was not appropriate in these circumstances." We find merit in these exceptions, and we therefore reverse the judge and find that the warnings violated Section 8(a)(3) and (1) of the Act.

Under *Wright Line*, a violation of Section 8(a)(3) is established here if the General Counsel showed that the employees' union activity was a motivating factor in the discipline, unless the Respondent proved, as an affirmative defense, that it would have issued the discipline even in the absence of their union activity. See *Bruce Packing Co.,* 357 NLRB No. 93, slip op. at 3 (2011). To establish its affirmative defense, the Respondent "cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." Id. (quoting *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), enfd. mem. 99 F.3d 1139 (6th Cir. 1996)).

The General Counsel's initial burden requires a showing that (1) the employee was engaged in union activity; (2) the employer had knowledge of that activity; and (3) the employer bore animus toward union activity. See, e.g., *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 4 (2011). We find that the General Counsel carried this burden**.** It is undisputed that Avalos and Clark engaged in union activity and were known to the Respondent to be union supporters. The Respondent's animus is demonstrated by the multiple other violations found herein.[14]

We further find that the Respondent failed to prove that it would have disciplined Avalos and Clark even absent their union activity. With regard to Avalos' and Clark's alleged intimidation and harassment of other employees, the Respondent failed to introduce any evidence supporting a reasonable belief that such conduct occurred. With regard to their distribution of literature, although the record is not entirely clear, it appears that Avalos and Clark may have distributed at the nurses' station—an admitted work area—thereby violating the S/D policy. But the Respondent cannot claim that it would have disciplined them for doing so even absent their union activity, because the Respondent conceded in its letter rescinding the discipline that it had not consistently enforced the S/D policy and that, until it did so, Avalos and Clark had "the same right to solicit and distribute for . . . [the Union] as does any employee to solicit and distribute literature for other causes." This concession obviates the need to consider, under *Register-Guard*, whether the Respondent's other instances of nonenforcement of the policy were comparable to union activity.[15] Accordingly, we reverse the judge and find that the warnings to Avalos and Clark violated Section 8(a)(3) and (1).[16]

4. Repromulgation and enforcement of access policy

Since 1985, the Respondent has maintained a written policy forbidding solicitation and the distribution of literature on company property at any time for any purpose by persons not employed by the Respondent. In practice, however, the Respondent has not always enforced that

[12] The Respondent does not contend that the rescission letter met the requirements of *Passavant Memorial Area Hospital*, 237 NLRB 138, 138–139 (1978), for repudiating an unfair labor practice.

[13] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

[14] These violations include the coercive interrogation of an employee regarding her intent to participate in a strike, a threat to retaliate against the same employee if she chose to participate, surveillance of union activity, a discriminatory schedule change, and the coercive statements made to employees Zubal and Moritz (discussed above). Frost's statement to Clark that "it's not what you do, [it's] how people perceive you," further suggests that the alleged rule violations were not the true motive for the discipline. When the asserted reason for discipline fails to withstand scrutiny, the Board may infer that there is another reason—an unlawful one—for the discipline. See, e.g., *Amber Foods, Inc.*, 338 NLRB 712, 715 (2002).

We disagree with our colleague's contention that Frost's statement may indicate a reasonable belief by management that Avalos and Clark engaged in the conduct alleged in the warnings. To the contrary, the statement suggests that even Frost, who issued the discipline, did not believe the alleged conduct had occurred. Moreover, we fail to see any basis on which the judge could find a reasonable belief if we were to remand the case to him, as our colleague proposes. No management representative testified about the warnings, nor did the unnamed employees who (according to the warning letters) complained to management about Avalos' and Clark's activities.

[15] In addition to the concession in the letter, we note that there is no indication in the S/D policy or elsewhere in the record that the Respondent ever attempted to draw a distinction between solicitation and distribution for unions and the types of solicitation and distribution it had routinely permitted. Therefore, any contention that Avalos' and Clark's union activity was not comparable to the activity the Respondent had permitted must fail, as it would be a "post hoc invention." See *Guard Publishing v. NLRB*, 571 F.3d 53, 60 (D.C. Cir. 2009) (the Board erred in holding that the employer could lawfully prohibit solicitations on behalf of an organization while allowing personal solicitations, because the solicitation rule made no such distinction and the employer never relied on such a distinction until after the complaint was filed).

[16] We find it unnecessary to decide whether the warnings independently violated Sec. 8(a)(1), as this additional violation would not materially affect the remedy**.**

policy. In fact, during the period January through August 2007, the Respondent routinely allowed union representatives unrestricted access to its property to conduct union business. Union Representatives Glen Sharp and Dan Lawson, who were not employees of the Respondent, regularly visited nurses in the cafeteria, in break rooms, and at nurses' stations to talk about the Union and distribute union literature. Sharp and Lawson testified that, on those occasions, various nursing supervisors saw them, but neither the supervisors nor any other agent of the Respondent ever told them that they could not enter or remain at those locations.[17]

In December 2006, the Union and the Respondent began negotiations for an initial collective-bargaining agreement. On August 20, 2007, the parties had yet not reached an agreement, and the Union gave the Respondent notice of its intent to strike for 24 hours beginning on August 31. The strike took place as planned, and a second strike occurred on an unspecified date in October.

Meanwhile, the Respondent's conduct with respect to union access changed. Sometime in August, Fremont's director of nursing called security and asked that Union Representatives Sharp and Lawson be removed from the break room in Fremont's ICU.[18] On September 28, security guards working for the Respondent approached Sharp and told him to leave Rideout's ICU break room. In early October, a supervisor told Sharp that he had to leave a hallway outside a visitors' waiting room at Fremont. On October 9, the director of nursing told Lawson that he was not allowed near a Rideout nurses' station. Sometime in October, a security guard working for the Respondent engaged in unlawful surveillance of Lawson in Fremont's public areas, and then followed Lawson outside the building to a car parked several blocks away. In mid-October, Stephen Booth, the Respondent's labor relations manager, sent a memo to employees stating that union representatives may not "go to work areas or to patient care areas except for limited purposes, and even then they must have prior authorization." The memo was followed by a letter from the Respondent's counsel to the Union, affirming Booth's restrictions and notifying the Union that the Respondent was imposing several additional requirements on the Union to gain access at Fremont-Rideout, including "an advance written request, . . . the name of the person for whom access is requested, the specific locations to be accessed, and the specific purpose(s) of the requested access."

The General Counsel and the Union contend that the Respondent began enforcing the access policy in retaliation for the Union's increased efforts to obtain a collective-bargaining agreement, which were protected by the Act. The judge, citing *Register-Guard*, found that even if that was so, there would be no violation unless the General Counsel could prove that "the policy was enforced in a disparate fashion in like circumstances." Finding insufficient evidence of disparate treatment, the judge dismissed the allegation.

We find it unnecessary to reach the judge's application of *Register-Guard,* because we find that the enforcement of the access policy was an unlawful attempt to retaliate against employees' stepped-up union activity leading up to and following the August strike. The Board has long held that an otherwise valid employer rule violates the Act when it is promulgated to interfere with the employees' right to self-organization.[19] It is similarly unlawful, as the Respondent concedes, for an employer to repromulgate a rule that was not previously enforced in retaliation for employees' union or other protected Section 7 activity.[20]

We find that the record warrants such a finding. As shown, between August and October, the Respondent more strictly enforced its access policy and imposed several new requirements for the Union to obtain access. Although the record indicates that one instance of enforcement of the policy may have occurred in early August, the Respondent did not begin consistently enforcing the policy until late September, when security guards ordered Sharp to leave a break room at Rideout. In short, the Respondent's increased enforcement efforts coincided with the strike and other union-sponsored activity at Fremont-Rideout. The Respondent has failed to provide a legitimate explanation for the timing of the change in enforcement, instead simply denying that any change occurred.[21] Accordingly, we reverse the judge and find

[17] The judge credited the testimony of Sharp and Lawson and implicitly rejected the contrary testimony of the Respondent's witnesses, who claimed not to have known about the union representatives' many visits during the first half of 2007.

[18] The judge found that this incident occurred in early August, but the timing is unclear from the testimony. Fremont's director of nursing testified that the incident may have occurred "possibly three to four weeks" before the August 31 strike, but she conceded that she was "not good at dates."

[19] See, e.g., *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004) (an employer violates Sec. 8(a)(1) by promulgating a rule in response to union activity); *Harry M. Stevens Services,* 277 NLRB 276 (1985) (employer's implementation of a rule in response to union activity unlawful).

[20] See, e.g., *Jordan Marsh Stores Corp*., 317 NLRB 460, 462 (1995); *Montgomery Ward & Co*., 198 NLRB 52, 62 (1972).

[21] In its answering brief, the Respondent contends in passing that the mid-October letter and memo were prompted by supervisors' questions concerning the access policy in light of increasing violations of the policy. This contention fails to explain the earlier instances of enforcement that began in September, preceding the letter and memo. With respect to those incidents, the Respondent relies on its contention

that the Respondent's repromulgation and enforcement of the access policy was in response to increased union activity and therefore violated Section 8(a)(1).

The 8(a)(5) Allegations

1. Alleged change in attendance policy

On June 6, Director Chambers and two unit supervisors issued a memo to nurses in the women and children's department at Fremont.[22] The memo described a change in the policy governing nurses who called in sick during their on-call hours. According to the memo, such incidents would no longer be of no consequence, but would, from that day forward, be counted as absences under the attendance and sick leave policy. The Union did not receive notice or an opportunity to bargain over the change.

After the Union learned about the change, it complained to the Respondent that the change could not be implemented without bargaining. In response, the Respondent instructed Chambers not to implement the change announced in the memo, and the prior "no-counting" practice remained in effect. But the judge found nevertheless that the memo was a change to a mandatory subject of bargaining, that it thereby constituted a "per se violation" of Section 8(a)(5) under *NLRB v. Katz,*[23] and that there was no evidence of repudiation of this unlawful change.

The Respondent argues that the memo was never "implemented," thus, there was no material, substantial, and significant change affecting employees' terms and conditions of employment, no violation of the Act, and no need for it to "repudiate" a violation that never occurred. We agree with the Respondent.

Not every unilateral change in employee terms and conditions of employment constitutes a breach of the employer's bargaining obligation. The change must be "a material, substantial, and significant" one, and the General Counsel has the burden to prove this. See, e.g., *Crittenton Hospital*, 342 NLRB 686, 686 (2004). Here, the record does not show that any unit employee was directly affected by the "announced" but never "implemented" change discussed in the June 6 memo. The General Counsel presented no evidence that, after the issuance of the memo, the Respondent counted any nurses' absences in a different way or that it followed the memo in any other respect. In these circumstances, the General Counsel failed to establish a material, substantial, and significant change. We therefore dismiss this complaint allegation.[24]

2. Alleged direct dealing regarding Saturday shifts

The Respondent's postanesthesia care unit (PACU) is staffed on an on-call basis on the weekends, and nurses are called in as needed. On January 7, PACU Manager Sharon Hoey received an email from PACU nurse Valerie Smith, notifying Hoey that Smith could help out with the Saturday, January 19 day shift. Hoey emailed Smith on January 8 and asked if she was available to work the night shift on that Saturday instead. Hoey also added that she was "tossing around the idea of scheduling staff for Saturday day shift" but that she was "not quite sure of this yet." Hoey asked if Smith and another nurse, Trisha, "would have any interest should that decision be made." Hoey asked Smith to "relay this to Trisha," as well. Neither nurse responded to Hoey's inquiry, and Hoey did not pursue the matter further. Hoey had no authority to change the PACU's weekend staffing procedure from on-call to regularly scheduled, and PACU's on-call weekend staffing procedures remained in place. Nonetheless, the judge found that Hoey, by her January 8 email to Smith, had unlawfully bypassed the Union and therefore violated Section 8(a)(5) and (1). We disagree.

In *Renal Care of Buffalo*, 347 NLRB 1284, 1292–1293 (2006), the Board adopted the judge's recommended dismissal of an allegation that the employer's manager

that it had always consistently enforced the policy. As explained above, the credited evidence shows otherwise.

[22] The June 6 memo states:

> During our last Perinatal meeting it was asked by staff if calling in sick for any scheduled on call hours counted towards attendance. [Director] Chambers agreed that since it is scheduled time, any sick self or sick family during scheduled on-call hours should apply to the attendance-record. From this date forward, [the unit supervisors] will be applying any sick calls during on-call hours to occurrences of absences.

[23] 369 U.S. 736 (1962).

[24] Because there was no material, substantial, and significant change and therefore no violation, we need not address the judge's finding that the Respondent failed to repudiate the violation under *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). There is no allegation that Chambers' announcement itself violated Sec. 8(a)(1) of the Act.

The present case is distinguishable from *Wire Products Mfg. Corp.*, 326 NLRB 625, 627 (1998), enfd. mem. 210 F.3d 375 (7th Cir. 2000), in which the Board found that the employer's announcement of its intent to change its profit-sharing plan to an employee stock ownership plan was unlawful "even if the Employer never carried through on its stated intention," because the announcement "conveyed to employees the message that it no longer intended to deal with the Union as their exclusive representative . . . ." Here, unlike in *Wire Products*, the Respondent's ultimate decision not to implement the change was prompted by the Union's objection, and therefore would tend to support rather than undermine the Union's role. Furthermore, because of the nature of the change in *Wire Products*, it would not necessarily have been evident to employees that the announced change was never implemented. Here, employees would have become aware on a day-to-day basis that their on-call sick days were not being counted as absences.

had engaged in direct dealing. The manager had asked employees about pay and benefits and had taken notes concerning their meetings. Applying the *Permanente Medical Group*[25] standard, the judge in *Renal Care* found that the General Counsel had failed to establish that the manager's discussion with bargaining unit employees was for the purpose of establishing or changing wages, hours, and terms and conditions of employment. Inter alia, the judge noted that the manager never mentioned the union or discussed its merits with the employees, had no role or input in the ongoing bargaining negotiations, did not attempt to negotiate with or make promises to the employees, and had no authority to make any changes.

Similarly, we find no direct dealing here. Hoey never mentioned the Union, had no role in the ongoing bargaining, did not attempt to negotiate with or make promises to the employees, and did not have the authority to make the change about which she inquired. We thus dismiss this allegation.

3. Alleged refusal to provide information

On February 4, the Respondent issued a written warning to nurse Glenda Hrones for making allegedly inappropriate statements to a patient's wife sometime in December.[26] On February 29, Union Representative Sharp requested information about this incident. Sharp sought a copy of the Respondent's written report about the matter, including "any witness statements taken and notes relating to the report." Sharp also indicated:

> This information is required in order for CNA to investigate whether Nurse Hrones, a known union supporter, is being unfairly singled out and disciplined in retaliation for her union support.

On March 10, the Respondent informed the Union that the Respondent had no obligation to furnish the requested information as the Union had filed an unfair labor practice charge with the Board over Hrones' discipline. The Respondent took the position that, in light of this charge, the Union's request for the Hrones report was not made for the purpose of seeking to remove her written warning through the Company's internal grievance procedure but to gather information to prosecute the Union's pending unfair labor practice charge.

At the time of its February 29 request, the Union had pending several unfair labor practice charges against the Respondent, including a charge (Case 20–CA–33801) dated February 4 alleging, inter alia, that the Respondent had violated Section 8(a)(1), (3), and (5) by "failing and refusing to provide information necessary and relevant to the [Union's] role as the exclusive representative" and "retaliating against employees who engage in protected activity by various means, including discipline. . . ."[27] The judge found that the Union's request for information did not constitute the type of discovery that falls outside employers' duty to furnish information as an element of their duty to bargain in good faith, and that the Respondent therefore violated Section 8(a)(5) and (1) by refusing the February 29 request. We disagree.

An employer must provide a union with requested information that is necessary for and relevant to the union's duties as the employees' exclusive collective-bargaining representative.[28] It is well established, however, that the Board's procedures do not include pretrial discovery.[29] For that reason, the Board has held that when information is sought that relates to pending 8(a)(3) charges, a refusal to provide that information generally will not violate Section 8(a)(5).[30] Any other rule would, in effect, impose a discovery requirement where none otherwise exists. The judge acknowledged the precedent, but considered the instant case distinguishable on its facts.

We disagree. *WXON-TV*, 289 NLRB 615 (1988), enfd. mem. 876 F.2d 105 (6th Cir. 1989), relied on by the Respondent, is directly on point. In that case, the union submitted a request seeking information pertaining to the employer's termination of unit employees and assignment of unit work to supervisors. On the same day, the union signed an unfair labor practice charge (which it

[25] The Board in *Permanente Medical Group,* 332 NLRB 1143, 1144 (2000), held that in order to prove unlawful direct dealing in violation of Sec. 8(a)(5), the following criteria must be established:

> (1) the employer was communicating directly with union-represented employees;
>
> (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the union's role in bargaining: and
>
> (3) such communication was made without notice to, or to the exclusion of, the union.

[26] Hrones supposedly questioned a patient's wife about the advisability of having him treated at the Respondent's facility instead of elsewhere. According to the Respondent, Hrones' comments were "perceived as demeaning and derogatory to the facility and the staff who work there."

[27] The judge incorrectly stated that "the charge in Case 20–CA–33801 did not allege a violation of Sec. 8(a)(1) or (3) of the Act." The General Counsel makes a similar contention. Both the judge and the General Counsel appear to have misread the plain language of the charge.

[28] *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967); accord: *Shoppers Food Warehouse Corp.*, 315 NLRB 258, 259 (1994).

[29] See, e.g., *Saginaw Control & Engineering, Inc.*, 339 NLRB 541,543–544 (2003) (union is not entitled to the requested information sought to support its 8(a)(3) charges).

[30] *Pepsi-Cola Bottling Co. of Fayetteville*, 315 NLRB 882 (1994), enfd. mem. in part 96 F.3d 1439 (4th Cir. 1996); *Union-Tribune Publishing Co*., 307 NLRB 25, 26 (1992), enfd. 1 F.3d 486 (7th Cir. 1993).

filed the next day) alleging as unlawful the same employer conduct. The employer refused to comply with the union's information request due to the pendency of the unfair labor practice charge. The Board dismissed the portion of the complaint alleging that the employer had violated Section 8(a)(5) and (1) by failing to provide the information. The Board found that the union's information request "was akin to a discovery device pertinent to its pursuit of the unfair labor practice charge rather than to its duties as collective-bargaining representative." Id. at 617–618.

The same reasoning clearly applies here. Sharp indicated his information request was to investigate whether Hrones was "being . . . disciplined" for her union support. The Union's charge in Case 20–CA–33801, filed the day after Hrones' discipline, alleged retaliation by "discipline" for union activities. The record does not indicate that Hrones filed a grievance over the discipline.[31] Furthermore, apart from the information request itself, the record contains no indication that the Union communicated with the Respondent in any bargaining context regarding Hrones' discipline. See *WXON-TV*, supra at 617. Under these circumstances, the Respondent reasonably construed the information request to refer to the unfair labor practice charge. We therefore find that the Respondent's refusal to supply the information did not violate the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified and set forth below, and orders that the Respondent, The Fremont-Rideout Health Group d/b/a Fremont Medical Center and Rideout Memorial Hospital, and The Fremont-Rideout Health Group d/b/a Fremont-Rideout Home Health, Marysville and Yuba City, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Restricting an employee's "talk about the Union" to the break room during her breaktime.

(b) Advising an employee that her supervisor was "to stop all union activities" at the workplace.

(c) Coercively interrogating its employees about their union and other protected concerted activities.

(d) Engaging in unlawful surveillance of its employees' Section 7 activities.

(e) Threatening its employees that they would not be scheduled for work if they engaged in protected concerted activity.

(f) Repromulgating and enforcing its access policy in retaliation for employees' union activities.

(g) Disciplining employees because of their support for and activities on behalf of the California Nurses Association, AFL–CIO (the Union), or any other labor organization.

(h) Refusing to schedule for work its employee Hau Dao because she engaged in protected concerted activity.

(i) Unlawfully changing its employees' working conditions by unilaterally installing surveillance cameras.

(j) Unlawfully transferring the Rideout ICU staff scheduling duties from its unit employees.

(k) In any like or related manner interfering with, restraining, or coercing its 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) Make Hau Dao whole for any loss of earnings and other benefits resulting from its unlawful failure to schedule her on September 1 and 2, 2007, with interest, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure to schedule Hau Dao on the dates indicated above, and, within 3 days thereafter, notify her in writing that this has been done, and that this scheduling matter will not be used against her in any way.

(c) Within 14 days from the date of this Order, if it has not already done so, remove from its files any reference to the unlawful warnings to Heather Avalos and Tami Clark, and, within 3 days thereafter, notify them in writing that this has been done, and that the unlawful warnings will not be used against them in any way.

(d) Before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All full-time and regular part-time and per diem Registered Nurses in positions requiring a Registered Nurse (RN) license and who provide direct patient care and are employed by the Respondent at and out of Fremont Medical Center located at 970 Plumas Street, Yuba City, CA and/or Rideout Memorial Hospital located at 726 Fourth Street, Marysville, CA; excluding all non-professional employees, non-Registered Nurses, Traveler Registered Nurses, Registry Registered Nurses, Care Coordinators (discharge planning), Physician's Assistants (PAs), RN Clinical Systems Analysts, RN Focus Review Medical Records Analysts, ICU Out-

[31] Although Hrones apparently submitted a letter in protest of the discipline, the letter was not offered as evidence, nor is it clear whether it would have been timely under the grievance procedure.

> come Coordinators, RN Education Coordinators, Clinical Nurse Specialists, Infection Control Nurses, RN Midwives, managerial employees, confidential employees, guards and supervisors as defined in the Act.

(e) Remove the unlawfully installed surveillance cameras at its facilities.

(f) Reassign the unlawfully transferred Rideout ICU staff scheduling duties to its unit employees and notify the Union, in writing, that this has been done.

(g) Make its employees Paula Oakes and Susan Osher whole for any losses that they suffered as a result of the Respondent's unlawful transfer of staff scheduling duties, with interest, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

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

(i) Within 14 days after service by the Region, post at its facilities in Marysville and Yuba City, California, copies of the attached notice marked "Appendix."[32] Copies of the notice, on forms provided by the Regional Director for Region 20, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 the Marysville and Yuba City, California facilities at any time since April 2007.

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

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

Dated, Washington, D.C. December 30, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, concurring in part and dissenting in part.

I agree with my colleagues' disposition of the issues with two exceptions. I would not find that the Respondent violated Section 8(a)(3) by disciplining RNs Heather Avalos and Tami Clark on June 8, 2007,[1] nor would I find that the Respondent violated Section 8(a)(1) by allegedly repromulgating and more strictly enforcing its access policy in September and October in response to increased union activity. Factual questions remain as to both issues, which I would remand to the judge for further consideration.

Regarding the alleged unlawful discipline of Avalos and Clark, the Respondent issued essentially identical warnings to them on June 8 that stated in relevant part:

> It has been reported to management that Heather Avalos, on June 5, 2007 [or Tami Clark, on June 7, 2007], has been observed and documented for conducting personal business by soliciting and passing out information and materials and speaking to staff members during working hours in patient areas of Rideout Hospital. Some employees reported your words and actions as threatening and intimidating and [this] must never occur again.

The warnings specified that Avalos and Clark had violated, inter alia, the Respondent's solicitation and distribution policy and also rules 8 and 11 against "[d]iscourteous treatment of the public or other employees" and "[u]se of abusive or provocative language, fighting, agitating against a fight, or attempting bodily injury on the [Respondent's] premises."

[32] 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."

[1] All dates are in 2007.

I agree with my colleagues that the judge erred in dismissing this allegation on the ground that there was "no evidence of union animus," a finding that is not supported by substantial evidence in the record as a whole.[2] However, an issue remains as to whether the Respondent's warnings to Avalos and Clark were justified by a reasonable belief that the employees engaged in the conduct alleged in the warnings. The judge made no factual findings regarding what occurred on June 5 and 7. Accordingly, I would remand this issue to the judge to make findings of fact as to what happened on the days in question and to consider whether the Respondent acted from a reasonable belief that Avalos and Clark violated hospital rules.[3]

As to the alleged repromulgation and stricter enforcement of the Respondent's access policy, the majority asserts that the Respondent only began consistently enforcing the policy in late September and October in response to the Union's increased activities. In my view, however, the record does not establish that the Respondent's enforcement of the policy changed so dramatically that a finding of repromulgation and stricter enforcement is warranted. While the increased union activity began in *late* August, the Respondent's enforcement of its access policy plainly predated that, as evidenced by an *early* August incident involving Fremont's director of nursing and Union Representatives Glen Sharp and Dan Lawson. Given this evidence, I cannot conclude from the other fairly isolated incidents (only one in September and three in October) that the Respondent more strictly enforced its access policy. Accordingly, I would not find a violation on this basis.

However, an issue remains as to why the Respondent changed its access policy in mid-October by setting specific conditions that union officials would have to satisfy in order to gain access to hospital facilities.[4] The Respondent contends in its answering brief that the mid-October letter and memo were prompted not by antiunion animus, but rather by supervisors' questions concerning the access policy in light of *increasing violations of the policy by union agents.* Given this,[5] I would remand to the judge for appropriate findings of fact and conclusions of law on the issue of whether the Respondent's mid-October promulgation of new access requirements violated the Act.

Dated, Washington, D.C. December30, 2011

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

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 restrict an employee's "talk about the Union" to the break room during her breaktime.

WE WILL NOT advise an employee that her supervisor was "to stop all union activities" at the workplace.

[2] Though I agree there was *some* evidence of animus, I question whether that evidence is not mitigated by the fact that the Respondent almost immediately withdrew the warnings temporarily, and then permanently not long thereafter, conduct inconsistent with animus towards Sec. 7 activity. In any event, even assuming arguendo that the General Counsel satisfied his initial *Wright Line* burden, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 19818), cert. denied 455 U.S. 989 (1982), questions remain as to whether the Respondent met its rebuttal burden of showing that it reasonably believed that Avalos and Clark violated hospital policy and disciplined them for that reason.

[3] My colleagues hypothesize that the director of nursing operations' statement to Clark—"it's not what you do, [it's] how people perceive you"—suggests "that the alleged rule violations were not the true motive for the discipline[.]" To the contrary, if management perceptions of Avalos and Clark's conduct established a reasonable belief that they violated the Respondent's rules, that belief, if the reason for the discipline, would suffice to rebut the General Counsel's prima facie case. This is an issue for the judge to consider in the first instance on remand.

[4] The Respondent's imposition of the requirements was not itself unlawful. As the Respondent explained in its October 19 letter to the Union, under *Holyoke Water Power Co.*, 273 NLRB 1369 (1985), enfd. 778 F.2d 49 (1st Cir. 1985), cert. denied 477 U.S. 905 (1986), "[e]ven where access is required, the employer is entitled to impose restrictions on the time and manner of the access."

[5] Cf. *Wild Oats Markets*, 344 NLRB 717, 717 fn. 4 (2005) (evidence established that respondent violated Sec. 8(a)(1) by promulgating a no-solicitation rule where respondent's human resources manager informed store managers at time of posting that respondent was "'trying to keep them [the Union] out[.]'"

WE WILL NOT coercively interrogate our employees about their union and other protected concerted activities.

WE WILL NOT engage in unlawful surveillance of our employees' Section 7 activities.

WE WILL NOT threaten our employees that they would not be scheduled for work if they engaged in protected concerted activity.

WE WILL NOT repromulgate and enforce our access policy in retaliation for employees' union activities.

WE WILL NOT discipline employees because of their support for and activities on behalf of the California Nurses Association, AFL–CIO (the Union), or any other labor organization.

WE WILL NOT refuse to schedule for work our employee Hau Dao because she engaged in protected concerted activity.

WE WILL NOT unlawfully change our employees' working conditions by unilaterally installing surveillance cameras at our facilities.

WE WILL NOT unlawfully transfer the Rideout ICU staff scheduling duties from our unit employees.

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

WE WILL make Hau Dao whole for any loss of earnings and other benefits resulting from our unlawful failure to schedule her on September 1 and 2, 2007, with interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful failure to schedule Hau Dao on the dates indicated above and, WE WILL, within 3 days thereafter, notify her in writing that this has been done, and that this scheduling matter will not be used against her in any way.

WE WILL, within 14 days from the date of this Order, if we have not already done so, remove from our files any reference to the unlawful warnings to Heather Avalos and Tami Clark and, WE WILL, within 3 days thereafter, notify them in writing that this has been done, and that the unlawful warnings will not be used against them in any way.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment, notify and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All full-time and regular part-time and per diem Registered Nurses in positions requiring a Registered Nurse (RN) license and who provide direct patient care and are employed by us at and out of Fremont Medical Center located at 970 Plumas Street, Yuba City, CA and/or Rideout Memorial Hospital located at 726 Fourth Street, Marysville, CA; excluding all non-professional employees, non-Registered Nurses, Traveler Registered Nurses, Registry Registered Nurses, Care Coordinators (discharge planning), Physician's Assistants (PAs), RN Clinical Systems Analysts, RN Focus Review Medical Records Analysts, ICU Outcome Coordinators, RN Education Coordinators, Clinical Nurse Specialists, Infection Control Nurses, RN Midwives, managerial employees, confidential employees, guards and supervisors as defined in the Act.

WE WILL remove the unlawfully installed surveillance cameras at our facilities.

WE WILL reassign the unlawfully transferred Rideout ICU staff scheduling duties to our unit employees and notify the Union, in writing, that this has been done.

WE WILL make our employees Paula Oakes and Susan Osher whole for any losses that they suffered as a result our unlawful transfer of the Rideout ICU staff scheduling duties, with interest.

> THE FREMONT-RIDEOUT HEALTH GROUP D/B/A FREMONT MEDICAL CENTER AND RIDEOUT MEMORIAL HOSPITAL, AND FREMONT-RIDEOUT HEALTH GROUP D/B/A FREMONT RIDEOUT HOME HEALTH

David Reeves, Esq., for the General Counsel.
Laurence R. Arnold, Esq. (Foley and Lardner), of San Francisco, California, for the Respondent.
Pamela Allen, Esq., and Linda Shipley, Esq., California Nurses Association, of Oakland, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Sacramento, California, on August 18–20 and September 9, 2008, based upon the General Counsel's second amended consolidated complaint, as amended,[1] that alleged The Fremont-Rideout Health Group d/b/a Fremont Medical Center and Rideout Memorial Hospital and The Fremont-Rideout Health Group d/b/a Fremont-Rideout Home Health (Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act) by: enforcing a rule prohibiting

[1] At the hearing on August 19, 2008, counsel for the General Counsel moved to amend par. 10 of the complaint to add an allegation alleging that Respondent engaged in surveillance of employees' union activities in October 2007. I initially denied the motion on the ground that it came too late in the proceedings to allow Respondent to prepare for a defense without granting a continuance. After the hearing was continued on August 20, 2008, to take further evidence, counsel for the General Counsel on August 25, 2008, renewed his motion to amend second amended complaint. At the resumed hearing on September 9, 2008, I granted the motion since Respondent now had time to prepare a defense.

nonwork-related solicitations or distributions during working hours in working areas selectively and disparately; by interrogating employees, by threatening employees, by reissuing, enforcing and maintaining a rule prohibiting nonemployees from conducting meetings on Respondent's premises, by engaging in surveillance of employees' union activities; by issuing written discipline to employees Heather Avalos and Tami Clark; by refusing to allow employee Hau Dao to work her scheduled shifts; by changing its attendance and sick leave policies; by removing staff scheduling from bargaining unit employees; by installing surveillance cameras without bargaining with the California Nurses Association (CNA or the Union); by bypassing CNA and dealing directly with bargaining unit employees and, by refusing to furnish information requested by CNA necessary and relevant to CNA's function as exclusive collective-bargaining representative of bargaining unit employees. Respondent timely denied any wrongdoing. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a California nonprofit corporation, with offices and places of business in Marysville and Yuba City, California (Respondent's facilities), has been engaged in the operation of a hospital and medical clinics providing inpatient and outpatient medical care. During the past 12 months, Respondent in conducting its business operations derived gross revenues in excess of $250,000 and purchased and received goods valued in excess of $5000 which originated outside the State of California. 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 and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

Respondent operates hospitals providing acute and outpatient care services. Fremont Medical Center (Fremont) is located in Yuba City, California, and Rideout Memorial Hospital (Rideout) is located in Marysville, California. Gerrilyn Hazlett (Hazlett) is the director of nursing at Fremont; Susan Chambers (Chambers) is Respondent's director of women and children's services; Gerry Allred (Allred) is Respondent's director of perioperative services which includes the post anesthesia care unit (PACU); Angela Martin (Martin) is director of Fremont-Rideout Home Health; Joy Morgan (Morgan) is director of nursing at Respondent's Cancer Center; Liesel Buchner (Buchner) is Respondent's director of critical care services; Patricia Curneil (Curneil) is a unit supervisor on 3 main at Rideout; Angelina DeArte (DeArte) is a unit supervisor on the med-surgical floor at Fremont; Rebecca Rigsby (Rigsby) is a night-shift supervisor in ICU; Kevin Kern (Kern) is Respondent's director of safety and security; and Stephen Booth (Booth) is Respondent's labor relations manager.

Since on or about September 20, 2006, CNA has been the certified collective-bargaining representative of Respondent's full-time, regular part-time, and per diem registered nurses who provide direct patient care at Respondent's Fremont Medical Center and Rideout Memorial Hospital facilities in Yuba City and Marysville, California. Glen Sharp (Sharp) is CNA's labor representative and Dan Lawson (Lawson) is CNA's organizer. The parties have been engaged in collective bargaining for an initial contract since December 2006.

B. The 8(a)(1) and (3) Allegations

1. The April 2007 disparate enforcement of the no-solicitation/no-distribution rule

a. The facts

Complaint paragraph 7(a) alleges that in April 2007 Respondent selectively and disparately enforced a rule prohibiting nonwork-related solicitation and distribution in working areas during working hours by telling employees they were required to go to nonwork areas during nonwork times to discuss the Union.

Since 1985, Respondent has maintained the following rules pertaining to employee solicitation and distribution:[2]

> ***POLICY***
>
> **Employees of FRGH:**
>
> Employees of the FGRH may not solicit during working time for any purpose. "Working Time" is defined in paragraph 3.
>
> Employees of the FRGH may not solicit at any time, for any purpose, in immediate patient care areas, such as patient's rooms, and places where patients receive treatment, such as therapy areas, or in any other area that would cause disruption of health care operations or disturbance of patients, such as corridors in patient treatment areas and rooms used by patients for consultations with physicians or meetings with families or friends.
>
> Employees may not distribute literature during working time for any purpose.
>
> Employees may not distribute literature at any time, for any purpose in working areas. Working areas are all areas in the hospital, except employee lounges and parking areas.
>
> **Working Time:**
>
> Working time includes the working time of both the employee during the soliciting or distributing and the employee whom the soliciting or distributing if directed. Working time does not include break periods, meal periods or any other specified periods during the workday when employees are properly not engaged in performing their work tasks.

Katherine Zubal (Zubal) is an RN on the Three South med-surgical floor at Fremont Medical Center. Zubal's supervisor in 2007 was Karen Bezuidenhout (Bezuidenhout). There is a

[2] GC Exh. 11, p. 3.

break room on the med-surgical floor that RNs use when giving report at shift change. Family and friends regularly meet with RNs in the break room. In April 2007, in a hallway in the med-surgical floor, Zubal had a conversation with Bezuidenhout. Bezuidenhout said that she had heard from Supervisor Angelina DeArte that coworkers said Zubal was talking to them about the Union. Bezuidenhout told Zubal that she preferred Zubal to talk about the union in the break room on her break. Zubal told Bezuidenhout that conversations about the Union had been going on between employees for over a year. Susan Chambers (Chambers) Respondent's director of women and children's services admitted that RNs regularly discussed nonwork subjects during working hours, RNs testified that employees solicited other employees to purchase such items as Christmas cookies, and Rebecca Rigsby (Rigsby) Respondent's night-shift supervisor in ICU admitted that RNs brought information[3] into the hospitals concerning fundraisers for their children's schools or other organizations[4] that the children were involved with and, as noted below, Respondent did not enforce its no-solicitation/no-distribution policy consistently up to June 20, 2007.

b. The analysis

Counsel for the General Counsel does not contend that Respondent's no-solicitation/no-distribution rules are invalid on their face. Rather, counsel for the General Counsel argues that the rule was both disparately enforced in Zubal's case and improperly applied to communication that does not constitute solicitation. Respondent takes the position that Respondent did not disparately enforce its rule with respect to like solicitations.

Section 8(a)(1) of the Act provides that it shall be an unfair labor practice for an employer, "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7[.]"

For over 60 years the Supreme Court[5] and the Board[6] have recognized employee rights to solicit on behalf of a labor organization during nonworktime on an employer's premises. The Board has drawn a distinction between oral solicitation and distribution and has permitted limitation on distribution of literature during working time and in working places.[7] However, for over 45 years it has been held that discriminatory implementation or enforcement of a facially valid no-distribution/no-solicitation rule is unlawful.[8] The Board has traditionally found many types of employer permitted nonjob-related solicitations and distribution in the face of a denial of Section 7 protected solicitation or distribution to constitute discriminatory enforcement of it's no-solicitation/no-distribution rule and thus, evidence of an employer's interference with Section 7 rights.[9] However, in 2007 in *Guard Publishing Co*., 351 NLRB 1110 (2007), a sharply divided Board overturned longstanding precedent and established a new test to determine if an employer has discriminatorily enforced its no-solicitation/no-distribution rule. The Board adopted the test utilized by the United States Court of Appeals for the Seventh Circuit.[10] Thus, in the past where there was evidence that an employer, under its no-solicitation rules, permitted solicitations, use of its bulletin boards, e-mail or copy machines for nonwork-related purposes of any sort but denied solicitation, distribution or the use of those means of communication for Section 7 purposes, the employer was found to have engaged in discriminatory enforcement of its rules, evidence that it had engaged in restraint and coercion of employees Section 7 rights under Section 8(a)(1) of the Act. Rather than applying the traditional test to determine whether there is evidence of restraint or coercion, under the new Board rule an employer is permitted to allow a wide range of nonwork-related employee solicitation or use of employee equipment for solicitation but deny employee use for Section 7 solicitation so as long as it does not discriminate as to like or similar solicitations or distribution of materials. In *Guard Publishing,* Id. at 1122*,* the majority explained:

> For example, an employer clearly would violate the Act if it permitted employees to use e-mail to solicit for one union but not another, or if it permitted solicitation by antiunion employees but not by prounion employees. [Footnote omitted.]) That is, an employer may draw a line between charitable solicitations and non-charitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business related use.

While counsel for the General Counsel argues that the *Guard* rule regarding discriminatory application of no-solicitation/no-distribution rules applies only to e-mail communications, I find no such limitation in the *Board's decision.* Further, counsel for the General Counsel's contention that Zubal's conduct was not proscribed solicitation but discussion about the Union and that Respondent therefore committed an independent violation of Section 8(a)(1) of the Act is not pled in the complaint nor was this allegation litigated at the hearing. Rather, the allegation in paragraph 7(a) is that in April 2007 Respondent selectively and disparately enforced a rule prohibiting non-work-related solicitation and distribution in working areas during working hours by telling employees they were required to go to nonwork areas during nonworktimes to discuss the Union. I will not consider this de facto amendment. *Hi-Tech Cable Corp*., 318 NLRB 280 (1995).

[3] Rigsby claimed that this practice was halted at an unspecified time in 2006, however, as noted below, Respondent admitted that it did not enforce its no-solicitation/no-distribution policy as late as June 20, 2007.

[4] While Rigsby was not specific about the types of organizations their children participated in that RNs solicited on behalf of in addition to schools, it could be assumed that they would be organizations like the Boy Scouts, Girl Scouts, and team sports leagues.

[5] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

[6] *Peyton Packing Co*., 49 NLRB 828 (1943).

[7] *Stoddard-Quirk Mfg. Co*., 138 NLRB 615 (1962).

[8] *Walton Mfg. Co.,* 126 NLRB 697 (1960).

[9] *Sprint/United Mgmt. Co*., 326 NLRB 397 (1998); *E.I Du Pont de Nemours & Co*., 311 NLRB 893 (1993); *Allied Stores Corp*., 308 NLRB 184 (1992); *Champion Int'l Corp*., 303 NLRB 102 (1991).

[10] *Fleming Cos*., 336 NLRB 192 (2001), enfd. denied 349 F.3d 968 (7th Cir. 2003).

Under the traditional Board test, evidence that an employer permitted nonwork-related solicitation or distribution but not union solicitation and distribution would establish discriminatory enforcement of its no-solicitation policy, evidence that the enforcement of the policy was to interfere, restrain, and coerce her in the exercise of her Section 7 rights. Here, there is evidence that nonwork-related solicitations and distributions had been permitted by Respondent as recently as June 2007. However, under the *Guard* test I must now parse out if Respondent permitted like solicitations and distributions such as Zubal's discussions with fellow employees about the Union. While Respondent has permitted employee solicitations and distributions to raise funds for various organizations, including schools and other organizations RN's children participated in, the Board's test now allows Respondent to, " . . . draw a line between charitable solicitations and non-charitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon products), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non-business related use." *Guard Publishing,* Id. at 1122. Since the type of solicitations permitted by Respondent are fund raising for schools and other organizations employee children participate in are somehow different than solicitations for a union, under the *Guard Publishing* theory, counsel for the General Counsel has failed to show that Respondent engaged in like discrimination with respect to solicitation on behalf of other organizations, and I am constrained to conclude that there has been no violation of Section 8(a)(1) as alleged in paragraph 7(a).

2. The June 8, 2007 written discipline of Heather Avalos and Tami Clark

a. The facts

Complaint paragraph 7(b) alleges that the discipline issued to RNs Heather Avalos (Avalos) and Tami Clark (Clark) was an enforcement of the no-distribution/no-solicitation rule in a selective and disparate manner because it prohibited union solicitation and distribution while allowing nonunion solicitation and distribution and paragraphs 11(a) and (c) allege that the written discipline violated Section 8(a)(3) of the Act because Avalos and Clark engaged in union activity.

Avalos and Clark both worked at Respondent's Rideout facility in ICU. Their supervisor is Liesel Buchner. Both Avalos and Clark had engaged in various union activities including helping to organize the Union, acting as an observer at the Board conducted election, being a member of the CNA bargaining committee and speaking to employees about CNA. Both Avalos and Clark had been distributing CNA materials in the break room. On June 8, 2007, both Avalos and Clark received written discipline[11] from Director of Nursing Steve Frost (Frost).

The warnings are identical and provide in pertinent part:

> ***Purpose of Consultation:***
>
> It has been reported to management that Heather Avalos (Tami Clark), on June 5, (June 7) 2007, has been observed and documented for conducting personal business by soliciting and passing out information and materials and speaking to staff members during working hours in patient areas of Rideout Hospital. Some employees reported your words and actions as threatening and intimidating and must never occur again.

The Avalos and Clark warnings were rescinded on June 20, 2007, because the no-solicitation/no-distribution policy had not been enforced. In the letters[12] rescinding the Avalos and Clark warnings it is noted that, ". . . we acknowledge that in the past, enforcement of that policy has been lax, thus the action was not appropriate in these circumstances." The rescission letters added:

> While we certainly would prefer that all of our employees would abide by the policy, this is to advise that, until such time as actions may be taken to enforce the policy in a consistent manner, you have the same right to solicit and distribute for the cause you have chosen, i.e. support of the union, as does any employee to solicit and distribute literature for other causes.

b. The analysis

Counsel for the General Counsel contends that the discipline of Avalos and Clark violated Section 8(a)(1) of the Act as a disparate enforcement of its no-distribution/no-solicitation policy. Respondent argues that there was no discriminatory application of its policy to like solicitation in the discipline of Avalos and Clark.

For the reasons stated above in section 1(b), under the *Guard* test, counsel for the General Counsel has failed to establish, notwithstanding the admitted lack of consistent enforcement of its no-solicitation/no-distribution policy, which Respondent engaged in discrimination with respect to like solicitation or distribution on behalf of other organizations. I conclude that there has been no violation of Section 8(a)(1) as alleged in paragraph 7(b).

Counsel for the General Counsel also contends that the Avalos and Clark discipline violated Section 8(a)(3) of the Act since it was given because the two nurses were engaged in solicitation on behalf of CNA and distribution of CNA materials.

In order to find a violation of Section 8(a)(3) of the Act, the General Counsel has the initial burden of establishing that union activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3) of the Act. The elements required to support such a prima facie violation of Section 8(a)(3) are union activity, employer knowledge of the activity, and a connection between the employer's antiunion animus and the discriminatory conduct. Once the General Counsel has established its prima facie case, the burden shifts to Respondent to show that it would have taken the disciplinary action even in the absence of protected activity. *Wright Line*, 251 NLRB 1083 (1980). In *Friendly Ice*

[11] GC Exhs. 9 and 11.

[12] GC Exhs. 10 and 12.

Cream Corp., 254 NLRB 1206 (1981), Respondent had a long-standing, long dormant no-solicitation rule which it reactivated in the midst of a union organizing campaign. The Board found that the employer's discipline of an employee under the rule, together with the employer's demonstrated antiunion animus, violated Section 8(a)(3) of the Act.

Here, there is no evidence of antiunion animus. Respondent has applied its facially lawful no-solicitation/no-distribution rule in a nondiscriminatory manner, as noted above. Thus, lawful application of its policy cannot form a predicate for employment discrimination on the basis of union membership. Counsel for the General Counsel has failed to establish a prima facie case that Respondent discriminated against Avalos or Clark due to their activities on behalf of CNA.

3. The August 28, 2007 prohibition of employee distribution of CNA materials

a. The facts

Complaint paragraph 7(c) alleges that on about August 28, 2007, Sue Chambers told employees they could not distribute CNA materials in the hospital hallway or discuss CNA while allowing solicitation and distribution of nonunion material.

Roxann Moritz (Moritz) is an IV therapy RN at Fremont Medical Center. On August 29, 2007, Sue Chambers, the director of women's services, spoke with Moritz in the hallway in the postpartum department. Moritz had been giving union literature to RN Kathy Heir in the hallway. Chambers told Moritz that she could not pass out union literature. When Moritz said she could pass out the literature, Chambers said she could not and that she had been told to stop all union activities.[13] Moritz said that in the past employees had passed out forms for selling Christmas cookies in the work areas and routinely discussed nonwork-related subjects during worktime.

b. The analysis

Counsel for the General Counsel argues that Respondent disparately enforced its no-distribution/no-solicitation policy in Moritz' case. Respondent contends there was no discriminatory application of its policy to like solicitation with Moritz.

Having failed to establish discrimination with respect to like solicitation or distribution on behalf of other organizations, I conclude that there has been no violation of Section 8(a)(1) as alleged in paragraph 7(c).

4. The August 24, 2007 Angela Martin interrogation and threat

a. The facts

Complaint paragraph 8(a) alleges that on August 24, 2007, Respondent's director of Fremont-Rideout Home Health, Angela Martin, interrogated employees about whether they would participate in an August 31, 2007 strike.

Complaint paragraph 8(b) alleges that Martin threatened employees that if they did not work on August 31, 2007, they could not work their September 1 and 2, 2007 shifts. Hau Dao (Dao) was a day-shift RN in the Fremont-Rideout Home Health Center. Dao's supervisor was Angela Martin. Martin admitted that she knew Dao was the only RN in the Home Health Center who supported the CNA. Dao's last days in the Home Health Center were scheduled for September 1 and 2, 2007. On August 31, CNA had called for a strike at Respondent's facilities from 6 a.m. on August 31 to 6 a.m. on September 1, 2007, but not at the Cancer Center or the Home Health Care Center whose employees were not represented by CNA.[14] According to Martin, Respondent planned to hire strike replacements for 3 days. Dao was not scheduled to work on August 31. On August 24, 2007, Martin asked Dao if she planned to go on strike on August 31 because if she did Martin would have to find someone to replace Dao for Dao's last 2 days. Dao replied that she was not going on strike and that she was transferring to the Cancer Center. On her day off, August 31, 2007, Dao went in to work and told Martin that she had changed her mind and was going to participate in the strike that day. Martin told Dao that she should have let Martin know and that Dao would be replaced on September 1 and 2.[15]

b. The analysis

In his brief, counsel for the General Counsel states that Martin's interrogation of Dao concerning her strike intentions and threats to replace Dao violated Section 8(a)(1) of the Act. On the other hand, Respondent maintains Martin's questioning of Dao was not coercive and there was no evidence that Martin threatened Dao if she did not report to work on August 31.

Asking employees about their attendance at union meetings has been held to constitute coercive interrogation in violation of Section 8(a)(1) of the Act. *Metropolitan Regional Council*, 352 NLRB 701 (2008); *Nanticoke Homes, Inc*., 261 NLRB 736 (1982). However, questioning open and active union supporters about their union sentiments in the absence of threats or promises does not interfere, coerce, or restrain employee exercise of Section 7 rights in violation of Section 8(a)(1) of the Act. *Rossmore House*, 269 NLRB 1176, 1177 (1984). Unlike the interrogations in *Rossmore House*, the Board has found interrogating employees about their intention to participate in a strike violated Section 8(a)(1) of the Act because it failed to give assurances against reprisals. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1043–1044 (2006).

[13] According to Chambers, she denied saying that she had been directed to stop all union activity and told Moritz that she could discuss union activity while on lunch or break time. It appears inconsistent that Chambers would be enforcing Respondent's no solicitation policy at a time when Respondent had admitted it was not enforcing this policy. I do not credit Chamber's testimony.

[14] GC Exh. 13.

[15] Before the strike according to Martin, she asked Dao if she planned to strike because she wasn't sure what that entailed. Martin claims that on August 31, Dao volunteered that she was going on strike and would not be working the weekend. Martin's version of events is not credible. She knew the strike was not directed at the Home Health Center as the CNA did not represent those nurses. She knew further that the strike was for only 1 day, Friday, August 31, Dao's day off. It is not credible that Dao would have said she was not working her shifts on September 1 and 2 because of the strike. Moreover, Respondent's reliance on Howard's testimony is misplaced as I specifically ruled that it could not come in for substantive purposes as it was hearsay.

Here, after interrogating Dao about her intentions concerning the upcoming strike, Martin made no assurances that there would be no reprisals against Dao if she went on strike. Moreover, Martin threatened Dao that if she engaged in Section 7 activity she would not be scheduled. Accordingly, I find both the interrogation of Dao concerning her strike intentions and the threat not to schedule Dao for engaging in the 1-day strike was coercive and violated Section 8(a)(1) of the Act.

5. The refusal to allow RN Hau Dao to work her shifts

a. The facts

Paragraph 11(b) of the complaint alleges that Respondent violated Section 8(a)(3) of the Act when on September 1 and 2, 2007, Respondent refused to allow Dao to work her scheduled shifts because she engaged in union or other concerted activity.

b. The analysis

Counsel for the General Counsel argues that Respondent violated Section 8(a)(3) of the Act by disciplining Dao for engaging in a strike. Respondent contends that Dao notified Martin that she would not be working the weekend.

In order to find a violation of Section 8(a)(3) of the Act, the General Counsel has the initial burden of establishing that union activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3) of the Act. The elements required to support such a prima facie violation of Section 8(a)(3) are union activity, employer knowledge of the activity, and a connection between the employer's antiunion animus and the discriminatory conduct. Once the General Counsel has established its prima facie case, the burden shifts to Respondent to show that it would have taken the disciplinary action even in the absence of protected activity. *Wright Line*, 251 NLRB 1083 (1980).

Here, counsel for the General Counsel has established a prima facie case that Respondent violated Section 8(a)(3) of the Act in refusing to allow Dao to work her shifts. Respondent knew Dao was engaged in union activity on behalf of CNA. It is likewise clear that Respondent announced that Dao could not work her shift if she engaged in a 1-day strike in support of CNA on her day off. Respondent has proffered no justification for not scheduling Dao on September 1 and 2, 2007, particularly when her strike activity took place on her day off.

I find that Respondent violated Section 8(a)(3) of the Act in replacing Dao on September 1 and 2.

6. The rule prohibiting meetings on Respondent's premises

a. The facts

Complaint allegations 9(a)–(c) allege that on September 24, 2007, Respondent reissued a rule at its Rideout Memorial Hospital facility and has enforced the rule in a selective and disparate manner that prohibits nonemployees from conducting meetings on Respondent's premises in order to discourage its employees' union or concerted activity.

Since 1985, Respondent has maintained the following rule[16] pertaining to nonemployee solicitation and distribution:

> ***POLICY***
> **Outsiders:**
> Persons not employed by the health group may not solicit or distribute literature on FRGH property at any time for any purpose.

Glen Sharp, CNA labor representative, commencing in January 2007, regularly visited nurses at Respondent's facilities to answer questions about bargaining and to hand out union literature about bargaining. He often went to break rooms on the floors, to the nurse's station or to the cafeteria. He entered the break rooms via public access areas but in ICU he had to be buzzed in by an employee. Sharp often encountered nursing supervisors on his visits, including supervisors who negotiated with him on the Respondent's bargaining team. Prior to September 2007, no supervisor told Sharp he could not be present in break rooms or nurses' stations.

CNA Organizer Dan Lawson (Lawson) also met with nurses in break rooms on every floor of Respondent's facilities and at nurses' stations. Lawson also entered through public access areas and was observed by nursing supervisors. Before September 2007, no supervisor told Lawson he could not be present in break rooms or nurses' stations. In September 28, 2007, Sharp was in the Rideout ICU break room. Security guards approached Sharp and told him he had to leave the break room.[17]

In October 2007, at the Fremont Medical Center Lawson was with Sharp and CNA Organizer Kevin Baker (Baker) in a hallway just outside the visitors' waiting room in same day surgery when a supervisor told them they were not allowed in patient care areas and would have to leave.

On October 9, 2007,[18] on the 2 central floor of Rideout Memorial Hospital, Director of Nursing Steve Frost (Frost) told Lawson and Baker near the nurse's station that Lawson was not allowed in patient care areas.

On October 16, 2007, Respondent's labor relations manager, Stephen Booth, issued a memo[19] to employees stating in part:

> Union representatives do not have a right under the NLRA or state law to enter the premises and go to work areas or to patient care areas except for limited purposes, and even then they must have prior authorization.

On October 19, 2007, Respondent's counsel sent a letter[20] to Sharp which affirmed Booth's letter. The letter states in pertinent part:

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[16] GC Exh. 11, p. 3.

[17] Buchner stated that the incident in the break room occurred prior to August 31, 2007. However, Sharp recalled that he sent Respondent an e-mail on the date the event occurred, September 28, 2007, protesting his treatment. I credit Sharp's testimony in this regard.

[18] While Lawson testified this occurred in late August 2007, Baker's October 24, 2007 letter to Respondent protesting their exclusion from the nurse's station establishes the date as October 9, 2007. See R. Exh. 27.

[19] GC Exh. 15.

[20] GC Exh. 14.

> As you know, although non-employee union organizers have been permitted to access the main lobbies and cafeteria areas of FRHG facilities, they are not permitted beyond those areas absent advance authorization.

Patricia Curneil, Respondent's supervisor on the Three Main floor at Rideout testified concerning a conversation between a CNA representative and RN Laurie Trent at the nurses' station. Curneil told the CNA representative that he was not supposed to be in patient care areas and could not remain in the patient care area. Curneil said the conversation occurred a few months prior to April 2007. However, Trent testified that the conversation occurred the day before she flew to Chicago to take part in a convention on August 7, 2006, protesting the *Kentucky River* decision. Both CNA Representative Lawson and Trent recalled this date because on August 6, 2006, Lawson had brought flight information to concerning the Chicago trip to Trent at Rideout.[21] Further, Trent testified that she had transferred out of Three Main in mid-January 2007 for a 3-month assignment in CVICU before her transfer to the Two Central floor.

Curneil recalled a second incident when Curneil told a CNA representative to leave the break room a month after the first incident in early 2007. Trent was also present during the second incident but said that it occurred in August 2006 before the NLRB election. In view of the greater specificity of Trent's recollection and its corroboration by independent sources and events, I will credit Trent's testimony.

Joy Morgan, Respondent's director of nursing at the Cancer Center, testified that on September 12, 2007, he saw CNA Representatives Lawson and Sharp in the infusion room of the Cancer Center, speaking with RN Daren Miles. Morgan was advised by Booth that she should direct Lawson and Sharp to leave the infusion room. Initially, Morgan said the event occurred on September 14, 2007, because it was the only day she and Miles worked together but when it was pointed out that September 14 was a Friday and Miles worked only Monday through Thursday, Morgan changed her testimony and said the event occurred on September 12, 2007. However, both Lawson and Sharp testified that they were in Sacramento all day on September 12, 2007, attending a CNA House of Delegates meeting which is conducted every 2 years.[22] Clearly, this event did not occur in September 2007.

In early August 2007, Jeri Hazlett, the Fremont director of nursing, called security to remove Lawson and Sharp from ICU. The record reflects that nonemployees have been permitted to access areas of the Respondent's facilities. Thus, friends and family members of employees have regularly visited employees in break rooms on hospital patient care floors mainly for the purpose of sharing meals. However, no evidence was adduced to show that nonemployees from other organizations were permitted on hospital patient care floors or in break rooms. To the contrary, nonemployee vendors have been denied access to patient care areas.

[21] Lawson's testimony is corroborated by an article from Registered nurse Magazine confirming the conference took place in Chicago in August 2006. CP Exh. 1. I credit Trent's version of events.

[22] Lawson identified the agenda for the House of Delegates Meeting on September 12, 2007. GC Exh. 43.

b. The analysis

Counsel for the General Counsel argues that Respondent repromulgated an unenforced policy that prohibited nonemployees' access to its break rooms and hallways in response to increased union activity and discriminatorily denied CNA representatives access while permitting access to other nonemployees. Respondent contends that it has uniformly maintained a lawful nonemployee no-solicitation/no-distribution policy and did not disparately apply its policy to CNA representatives while permitting like activities by other nonemployees.

The Supreme Court has drawn a distinction between the rights of employees and nonemployees to be present on an employer's property.[23] In *Babcock & Wilcox*, the Court held that an employer could prohibit nonemployee union organizers from distributing literature in its employee parking lot if the union can use other means of communication to contact the employees and the employer does not discriminate against the union by allowing distribution by other nonemployees. Accordingly, the Board up until 2007 has held that an employer that discriminates by allowing access for solicitation or distribution to other groups but not to unions violates the Act.[24] However, under the rationale set forth in *Guard Publishing,* supra, the Board has changed the test for discriminatory enforcement of no-solicitation/no-distribution rules. By analogy, it would appear that the same test should be applied to access policy for nonemployee solicitation and distribution.

Counsel for the General Counsel contends that Respondent repromulgated its unenforced access policy on September 24, 2007, and that it has since disparately enforced that policy toward the CNA.

The record reflects that before at least August 2007, Respondent, with the knowledge of its supervisors, permitted the presence of CNA representatives in break rooms and nurses' stations throughout its hospital facilities. The record reflects that in August or September 2007 Respondent began to enforce its nonemployee access policy toward CNA.

However, even assuming that Respondent began enforcement of its facially valid nonemployee access policy in September 2007 in response to CNA's increased efforts to secure a collective-bargaining agreement, unless counsel for the General Counsel can establish that the policy was enforced in a disparate fashion in like circumstances, there is no violation. Counsel for the General Counsel contends that Respondent's non enforcement of the nonemployee access policy with respect to family members and friends of nurses is the type of disparate treatment that constitutes a violation of Section 8(a)(1) of the Act.

Based upon the above discussion of the *Guard Publishing* test, however, I conclude that the evidence of disparate treatment of access permitted by Respondent of family members and friends of employees is not sufficiently like the denial of access to CNA representatives to constitute discrimination that demonstrates interference, restraint or coercion of employees in

[23] *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105 (1956); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

[24] *Big Y Foods*, 315 NLRB 1083 (1994).

the exercise of their Section 7 rights. I will dismiss this portion of the complaint.

7. The surveillance of employees' union activity

a. The facts

Paragraph 10(a) of the complaint alleges that on September 24, 2007, Director of Nursing Steve Frost (Frost) and Director of Security Kevin Kern (Kern) engaged in surveillance of employees' union activity and paragraph 10(b) of the complaint, as amended, alleges that in October 2007 Respondent's security guards engaged in surveillance of employees' union activity.

On September 24, 2007, CNA Labor Representative Glen Sharp and Organizer Lawson were in the Rideout Memorial Hospital Cafeteria meeting with nurses. During the meetings, Respondent's director of nursing, Frost, and Director of Security Kern were also in the cafeteria for 1-1/2 hours about 20 feet from the table where Sharp was seated.[25] During this time, Frost came up to Sharp and asked for a flyer. According to Kern, he was present for only about 20 minutes and his view of Sharp and Lawson was obstructed by a pillar. While Kern testified that he and Frost left the cafeteria after about 20 minutes, this does not exclude the possibility that Frost returned. This is consistent with Sharp's testimony that Frost may have left and returned a few times but was present for most of the time Sharp and Lawson were present. There is no evidence that Kern or Frost did not regularly use the cafeteria.

In October 2007, CNA Organizer Lawson was in the Fremont Medical Center cafeteria to meet with nurses. After Lawson entered the cafeteria he noticed a security guard from Comprehensive Security, Respondent's security contractor, enter and sit about 5 feet away. When Lawson went to the bathroom, the guard followed him there and then back to the cafeteria. When Lawson left the cafeteria the guard followed him several blocks from the hospital to where Lawson had parked his car and said to Lawson, "Oh, you are from the Bay Area."

b. The analysis

Counsel for the General Counsel takes the position that Frost, Kern, and the Respondent's security guard, engaged in unlawful surveillance of employees' union activities. To the contrary, Respondent contends that neither Frost and Kern's conduct nor the security guard's conduct constitute surveillance.

An employer that observes open, employees' union activities in a public area of an employers' facility does not necessarily engage in unlawful coercive surveillance. *Aladdin Gaming, LLC*, 345 NLRB 585 (2005). In *Aladdin,* the Board found that supervisors who engaged in observations of employees for 2 minutes then interrupted an employee meeting in a dining room used by employees and supervisors did not engage in unlawful surveillance. However, surveillance of employee Section 7 activity that is out of the ordinary may be coercive. *Wilshire Plaza Hotel*, 353 NLRB 304 (2008). In *Wilshire Plaza*, the Board found that unlawful surveillance depends on the specific circumstances in the case, including the nature and duration of the employer's observations. Factors the Board considers, "include the duration of the observation, the manager's distance from employees while observing them, and whether this was an isolated incident or the employer engaged in other coercive conduct during its observation." *Aladdin Gaming*, supra at fn. 2. In *Wilshire Plaza* the employer's supervisors followed union representatives throughout the facility and photographed them speaking with employees.

In the September 24, 2007 incident, Frost was in a cafeteria frequented by both managers and employees for about 90 minutes and approached the CNA representatives' table briefly to obtain a flyer. Frost was about 20 feet from the union agents' table. While, the duration of Frost's presence was somewhat lengthy for a lunch period, there is no evidence that his presence was in any other way coercive. He approached the union representatives only long enough to receive a flyer and he was seated at some distance from them behind a pillar. I find under all the circumstances that Kern and Frost's presence in the cafeteria was not out of the ordinary. I will dismiss this allegation of the complaint.

In the October incident, there is evidence that the security guard sat at a table 5 feet from Lawson and proceeded to follow Lawson wherever he went, including the bathroom and outside the facility all the way to Lawson's car. There is no dispute that the guard was an agent hired by Respondent. Moreover, the guard's close proximity while Lawson was meeting with employees together with the guard following Lawson both in and outside the facility is conduct that is clearly out of the ordinary and coercive surveillance of employees' right to engage in Section 7 activity in violation of Section 8(a)(1) of the Act.

C. The 8(a)(5) Allegations

1. The attendance and sick leave policy changes

a. The facts

Complaint paragraph 13(a) alleges that on June 6, 2007, Respondent changed its attendance and sick leave policies at its Fremont Medical Center facility so calling in sick for any scheduled on-call hours would count towards attendance.

On June 6, 2007, Respondent issued a memo to nurses in the women's and children's department.[26] The memo provides:

> During our last Perinatal meeting it was asked by staff if calling in sick for any scheduled on call hours counted towards attendance. Sue Chambers agreed that since it is scheduled time, any sick self or sick family during scheduled on-call hours should apply to the attendance-record. From this date forward, Jona and I will be applying any sick calls during on-call hours to occurrences of absences.
>
> Respectfully,

[25] There was some conflict concerning how close Kern and Frost sat to Lawson and Sharp. Sharp testified Kern and Frost sat 20 feet away while Lawson testified they were 5 feet away. When confronted with his affidavit that said Kern and Frost were seated 12 feet away, Lawson said he could not recall where they were seated. Given this conflict in Lawson's testimony, I credit the testimony of Sharp.

[26] GC Exh. 3.

Sheryl H. Lawrie, RNC (Unit Supervisor for Nursery/NICU)

Jona Engel-Blank, RNC (Unit Supervisor for Labor & Delivery)

Sue Chambers, RNC (Director of Women's and Children's Services)

CNA was not given notice or an opportunity to bargain about this change. While there is no evidence that this policy was implemented, there is likewise no evidence it was rescinded.

b. The analysis

Counsel for the General Counsel argues that the June 6 memo to nurses constitutes an unlawful unilateral change in terms and conditions of employment. Respondent posits that since this policy was never enforced, no change occurred.

It is undisputed that the June 6, 2007 memo dealt with a mandatory subject of bargaining, attendance and sick leave policy. There is likewise no dispute that CNA was neither notified nor given an opportunity to bargain before Respondent announced this change in policy. While Respondent contends that there is no violation here since the changes have not been implemented, neither is there evidence that Respondent has notified the effected employees that the policy has been rescinded. A unilateral change in a mandatory subject of bargaining is a per se violation of the Act. *NLRB v. Katz*, 369 U.S. 736 (1962). Absent evidence that Respondent immediately repudiated this unilateral change in terms and conditions of bargaining unit employees, Respondent has violated Section 8(a)(5) of the Act. *Passavant Memorial Hospital*, 237 NLRB 138 (1978).

2. Staff scheduling

a. The facts

Complaint paragraph 13(b) alleges that Respondent removed staff scheduling duties from bargaining unit employees.

On December 17, 2007, Respondent by e-mail memo[27] to ICU RNs Paula Oakes and Susan Osher stated that effective January 1, 2008, ICU Night-Shift Supervisor Rebecca Rigsby and Director of Critical Care Services Liesel Buchner would be responsible for the staffing schedules for both the day and night shifts within ICU. Previously, both Oakes and Osher had prepared the staff schedules in ICU. This change was made without notice to or bargaining with CNA.

Oakes prepared the night-shift ICU RN's work schedules for at least 4 years. Oakes' practice in preparing the schedules was to post a tentative schedule 6 weeks in advance for the nurses to sign indicating which days they wanted to work and what days they wanted off. Oakes then took the tentative schedule home and worked on it for 4 to 8 hours for which she was paid by Respondent. In finalizing the schedule Oakes, in order to balance the need for nurses on a particular shift Oakes would talk to individual nurses and negotiate with them to insure a sufficient number of nurses per day. Oakes tried to accommodate nurses' requests for vacations and holidays off and had authority to approve vacation requests and days off by negotiating with nurses in cases of conflicts. Only infrequently was it necessary for Oakes to involve Buchner to resolve scheduling conflicts. Respondent contends that the RNs who work as charge nurses in the Rideout ICU, including Heather Avalos, Tami Clark, Paula Oakes, and Susan Osher are statutory supervisors.

Liesel Buchner is the director of critical care services and supervises the Rideout ICU since November 2006. Prior to that time she was supervisor of Fremont ICU for 6 months, and was a staff nurse in CVICU for a year. She served as a charge nurse in CVICU, in the Fremont ICU and occasionally since becoming director of critical care services. Rebecca Rigsby is night supervisor at Rideout ICU.

The evidence establishes that the ICU charge nurses have no authority to hire, fire, discipline, or transfer employees. Charge nurses have no authority to adjust grievances or reward employees. The focus of the testimony was upon the authority of charge nurses to assign work to other ICU RNs.

The charge nurse on day shift is chosen by Buchner from a pool of eight nurses while Rigsby, when she is not charge nurse 2 nights a week, chooses the night-shift charge nurse from a pool of five nurses. There are usually seven RNs, including the charge nurse on day shift and six RNs, including the charge nurse on night shift. The charge nurse assigns RNs to patients. Nurses work three 12 hours shifts per week, six shifts per pay period. The record reflects that Avalos, Clark, Oakes, and Osher worked less than 50 percent of their shifts as charge nurse.

The Rideout ICU has 12 beds and California State law requires that the ratio of patients to nurses be no more than 2 to 1. Each ICU patient is assigned an acuity number based upon the severity of the patient's symptoms and the concomitant care the nurse must provide. For patients whose acuity exceeds 90 the attending nurse can have no other patients.

Avalos, who has been a charge nurse for 6 years and Clark who has been a charge nurse for 15 years, both testified that 15 minutes prior to their shift as charge nurse they meet with the night-shift charge nurse to get a report on the patients, including their acuity and diagnosis. In making nursing assignments, they first consider if the day-shift nurse had the patient the previous day and if so assigns the nurse to that patient to facilitate continuity of care. They also consider the patient acuity number because if a patient has an acuity number over 90 there is a mandated one-to-one relationship with the nurse assigned. Two patients with acuity numbers under 90 are assigned to remaining nurses. They also try to assign nurses to patients located close to each other to facilitate ease of care. Since all ICU RNs are qualified to perform nursing care, neither Avalos nor Clark considers the relative skills of each RN in assigning patients. When a new patient comes to the floor they assign the first nurse who is available since the acuity of the new patient is not usually known until the end of the shift.

Buchner testified that she acts as charge nurse occasionally and contends that she considers the relative experience of the RNs when assigning nurses to patients. In addition, she considers the RN's productivity and the acuity numbers of patients when making assignments and midshift reassignments. Rigsby also considered continuity of care when making assignments, reviewing which nurse had a patient on the previous shift. Both Buchner and Rigsby consider the acuity numbers of patients

[27] GC Exh. 4.

together with nurses' skills and expertise when making assignments. However, neither Buchner nor Rigsby gave concrete examples of nurses they considered more or less skilled or productive. Neither did they relate examples of how they have in the past matched patients' needs with the skills of specific nurses on their shifts.

I found the testimony of Avalos and Clark to be more inherently believable than that of Buchner and Rigsby. Both Avalos and Clark gave specific examples of how they assigned nurses to patients while Buchner and Rigsby gave vague hypotheticals of what factors they considered. In testifying concerning making nursing assignments, Rigsby could not even remember the name of a nurse she alleged had made an error with a patient drip the week before she testified and Rigsby contradicted Buchner as to whether charge nurses had authority to call in nurses. Given the contradictions, lack of specific memory and generality concerning charge nurse's duties in assigning nurses to patients, I do not credit the testimony of Buchner or Rigsby.

b. The analysis

It is counsel for the General Counsel's position that by removing the scheduling duties from employee RNs Oakes and Osher it made an unlawful unilateral change in terms and conditions of employment. Respondent counters that it was privileged to remove the scheduling duties from Oakes and Osher because they were supervisory duties and because Oakes and Osher are statutory supervisors. Respondent argues that part-time Charge Nurses Oakes and Osher assigned work. There is no contention that Oakes and Osher responsibly direct employees.

A supervisor is defined in Section 2(11) of the Act as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In *Oakwood Healthcare, Inc*., 348 NLRB 686, 687 (2006), the Board held that charge nurses may be supervisors where they use independent judgment in assigning work to other employees that involves the exercise of authority that is more than routine or clerical in nature. The burden is on the employer who asserts supervisory status to prove use of independent judgment in assigning work. In assessing whether a charge nurse exercises independent judgment in assigning work the Board said:

> [W]e find that a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement. [footnote omitted.] Thus, for example, a decision to staff a shift with a certain number of nurses would not involve independent judgment if it is determined by a fixed nurse-to-patient ratio. Similarly, if the registered nurse weighs the individualized condition and needs of a patient against the skills or special training of available nursing personnel, the nurse's assignment involves the exercise of independent judgment . . . if the assignment is made solely on the basis of equalizing workloads, then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data.[28]

Here, there are two overriding factors that make the ICU unique in terms of nursing skills. First, there is no dispute that all ICU nurses are qualified to care for any patient. Thus, all ICU nurses are required by Respondent to be regularly certified in various skills. According to Avalos and Clark all ICU RNs are equally skilled. In this regard, it is particularly significant that neither Buchner nor Rigsby identified particular ICU nurses who had more skills than others and Avalos and Clark testified they would assign any patient to any ICU RN. Avalos, Clark, and even Rigsby assigned primarily based upon continuity of patients the RN had on her previous shift. Second, there is a state mandated ratio of nurses to patients based upon severity of the patient's condition, assessed by acuity score. If a patient has an acuity score over 90 that patient is the nurse's only assignment. All other nurses may be assigned no more than two patients. Factors other than nurses' skills also determine patient assignment including the location of the patients in ICU. Thus, Avalos and Clark assign nurses to patients whose beds are close together.

Based upon the above facts, it does not appear that the ICU charge nurses exercise independent judgment in the assignment of patients to RNs but rather assignments are based on patient ratios, acuity numbers, proximity of patient beds, and continuity of care factors that are routine and clerical in nature. I conclude that the ICU charge nurses are not supervisors within the meaning of the Act.

Having found that the ICU charge nurses are not supervisors, it follows that the scheduling duties that Oakes and Osher performed was bargaining unit work. The transfer of bargaining unit work is a mandatory subject of bargaining and by transferring this work to nonunit employees without providing CNA an opportunity to bargain violated Section 8(a)(5) of the Act. *In re Summa Health Systems, Inc*., 330 NLRB 1379, 1388 (2000); *Pine Brook Care Center, Inc*., 322 NLRB 740 (1996).

3. Surveillance cameras

a. The facts

Complaint paragraph 13(c) alleges that in April 2008 Respondent installed a hidden surveillance camera in the wound care office/break room at Rideout Memorial Hospital and complaint paragraph 13(d) alleges that on May 19, 2008, Respondent installed a hidden surveillance camera in the PACU/OR break room at Rideout Memorial Hospital. By stipulation[29] the parties agreed that in April 2008 Respondent installed a hidden surveillance camera in the wound care business office and on May 19, 2008, Respondent installed a hidden surveillance camera in the PACU/OR break room without notice to or bargain-

[28] *Oakwood Healthcare, Inc*., 348 NLRB 686, 693 (2006).
[29] GC Exh. 2.

ing with the CNA and that both rooms are used by bargaining unit nurses. The cameras were removed within 3 to 4 days.

b. The analysis

It is counsel for the General Counsel's contention that the installation of the surveillance cameras was an unlawful unilateral change in terms and conditions of employment. Respondent avers that the camera's installation was harmless.

The Board has held that the installation of hidden surveillance camera in work and break areas is a mandatory subject of bargaining. An employer who installs surveillance cameras without bargaining with the union violates Section 8(a)(5) of the Act. *Anheuser Busch, Inc*., 342 NLRB 560 (2004); *Trailmobile Trailer, LLC,* 343 NLRB 95, 97–98 (2004). Respondent's installation of hidden surveillance cameras in the wound care business office and in the PACU/OR break room without notice to or bargaining with the CNA violated Section 8(a)(5) of the Act.

4. Bypassing the Union

a. The facts

Complaint paragraph 15 alleges that Respondent bypassed CNA on January 8, 2008, and dealt directly with bargaining unit employees by soliciting their interest in having Saturday shifts staffed as regular shifts rather than on-call shifts. The parties stipulated[30] that on January 8, 2008, Respondent's supervisor, Sharon Hoey, sent an e-mail[31] to bargaining unit RN Valerie Smith soliciting her interest and the interest of RN Trisha in making Saturday a scheduled shift rather than an on-call shift. Respondent did not notify or give CNA an opportunity to bargain about this proposed change.

b. The analysis

Counsel for the General Counsel argues that the Hoey memo was an unlawful unilateral change in terms and conditions of employment while Respondent replies that Hoey had no authority to make the changes and no changes were made. The essence of direct dealing with employees is the effect it may have in eroding the Union's position as the exclusive collective-bargaining representative. *SPE Utility Contractors, LLC,* 352 NLRB 787 (2008); *Modern Merchandizing, Inc.,* 284 NLRB 1377, 1379 (1987). *East Tennessee Baptist Hospital,* 304 NLRB 872 (1991), is clearly distinguishable from the facts of this case since the change took place during the term of a contract which gave the employer the right to make shift changes.

In this case Hoey, who Respondent admits was a supervisor, made direct appeals to bargaining unit employees concerning a mandatory subject of bargaining. It is precisely this type of conduct that has the potential for eroding CNA's position as the exclusive collective-bargaining representative of the effected nurses. I find that in bypassing CNA, Respondent violated Section 8(a)(5) of the Act.

[30] Ibid.
[31] GC Exh. 5.

5. The information request

a. The facts

Complaint paragraph 16 alleges that since February 29, 2008, Respondent has refused to furnish CNA with information that is necessary and relevant to its performance as the exclusive collective-bargaining representative of unit employees.

On February 4, 2008, Respondent issued bargaining unit RN Glenda Hrones (Hrones) a written warning dated December 21, 2008.[32] On February 5, 2008, CNA filed an unfair labor practice charge in Case 20–CA–33801[33] alleging, inter alia, that Respondent violated Section 8(a)(5) of the Act by refusing to furnish it with information necessary and relevant to the Union's role as collective-bargaining representative. Respondent has an internal grievance procedure[34] that provides a grievance may be filed within 5 working days of the day on which the grievance arises.[35] Respondent's written warning to Hrones indicates neither that she had a right to file an internal grievance nor the time in which it must be filed. At some time prior to February 19, 2007, Hrones filed a protest of her warning that Booth did not consider a grievance.

On February 29, 2008, CNA Labor Representative Sharp made an information request[36] to Respondent's labor relations manager, Stephen Booth. The information request was made in the context of a written discipline given to bargaining unit RN Glenda Hrones (Hrones) for unsatisfactory performance, discourteous treatment of the public or other employees, indiscriminate gossip, criticism, or spreading of rumors, unauthorized discussion of patients or their conditions. Sharp requested a copy of a report that Hrones had questioned a patient as to why she was having her husband cared for in Respondent's facilities. Sharp asked if the report was not written for information as to the source of the report, when it was received and all documentation relating to the report, including witness' statements and notes.

On February 29, 2008, Board Agent Max Peterson faxed a letter to counsel for Respondent Laurence Arnold, that requested the Respondent's position concerning the allegations in unfair labor practice charge Case 20–CA–33801, including the allegation that Respondent had failed to provide information concerning the Hrones discipline.

On March 10, 2008, counsel for Respondent, Laurence Arnold replied to Sharp's information request.[37] In his letter, Arnold stated that written statements from employees did not have to be turned over to the Union, that since Hrones had not filed an internal grievance with Respondent, CNA had no need for the information, and since CNA had filed an unfair labor practice charge with the Board over Hrones discipline, Respondent had no obligation to furnish the information.

[32] R. Exh. 22. The warning date is in error and should have read December 21, 2007.
[33] GC Exh. 1(bb).
[34] R. Exh. 23.
[35] Booth admitted that he had authority to settle an employee's internal grievance if it were filed outside the 5- day window.
[36] GC Exh. 7.
[37] GC Exh. 8.

b. The analysis

It is counsel for the General Counsel's position that Respondent was under an obligation to furnish CNA with information relevant to the Hrones discipline since the information was relevant to the Union's duties in representing bargaining unit employees. Respondent counters that it had no duty to furnish the information since the CNA intended to use it in an unfair labor practice investigation and since Hrones had not filed an internal grievance.

It is axiomatic that a union is entitled to information that is necessary and relevant to its duties as exclusive collective-bargaining representative. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967). The employer's duty to furnish necessary and relevant information extends to grievance initiation or processing *Postal Service*, 337 NLRB 820 (2002).

However, the Board has also made clear that Board procedures do not encompass prehearing discovery. *Union-Tribune Publishing Co.,* 307 NLRB 25 (1992). Thus, even if material sought by a union would have been producible for collective bargaining or other representational purposes, it is not producible as a substitute for discovery. *Unbelievable, Inc*., 318 NLRB 857 (1995).

Here, at the time CNA made its request for information in the Hrones discipline case, it had already filed an unfair labor practice charge alleging that Respondent had refused to furnish information it had requested in conjunction with the Hrones discipline. However, unlike the cases cited by Respondent, the charge in Case 20–CA–33801 did not allege a violation of Section 8(a)(1) or (3) of the Act. Thus, the information request would not constitute the type of discovery prohibited by the Board in *Saginaw Control & Engineering, Inc*., 339 NLRB 541, 544 (2003). This is so since the information CNA requested would not aid counsel for the General Counsel in establishing the elements of a violation of Section 8(a)(5) for refusing to furnish the information.

Having found the information request does not constitute prohibited discovery, it is necessary to address Respondent's defense that there was no grievance filed by Hrones or CNA. This argument must fail for two reasons. Hrones rebuttal must be considered as a timely grievance, particularly in view of the fact that her discipline neither notified her that she had a right to file an internal grievance nor did it warn her that she had 5 days to file the grievance, and Booth admitted that he had authority to adjust grievances even after the time for filing an internal grievance had passed. Given the fact that an internal grievance procedure was available to Hrones, CNA was entitled to the requested information in order to satisfy its duties as Hrones collective-bargaining representative.

In refusing to furnish CNA the requested information, Respondent violated Section 8(a)(5) of the Act.

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

CONCLUSIONS OF LAW

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

2. The Charging Party is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by engaging in the following acts and conduct:

(a) Interrogating employees about union and other protected concerted activities.

(b) Engaging in surveillance of employees' Section 7 activities.

(c) Threatening employees with that they would not be scheduled if they engaged in protected concerted activity.

4. Respondent violated Section 8(a)(1) and (3) of the Act by refusing to schedule Hau Dao for her shifts on September 1 and 2, 2007, for engaging in protected activity.

5. Respondent violated Section 8(a)(1) and (5) of the Act by:

(a) Refusing to bargain with the Union concerning attendance and sick leave policy.

(b) Refusing to bargain with the Union concerning the installation of surveillance cameras.

(c) Refusing to bargain with the Union concerning the removal of staff scheduling duties from bargaining unit employees.

(d) Refusing to provide the Union with information.

(e) By passing the Union and dealing directly with bargaining unit employees concerning shift scheduling.

6. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

7. The Respondents did not otherwise violate the Act as alleged in the second amended consolidated complaint, as amended, and the remaining complaint allegations will be dismissed.

REMEDY

Having found that the Respondents violated the Act as set forth above, I shall order that it cease and desist there from and post remedial Board notices addressing the violations found.

The Respondents having discriminatorily failed to schedule an employee, they must make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of the failure to schedule to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended[38]

ORDER

The Respondent Fremont-Rideout Health Group d/b/a Fremont Medical Center and Rideout Memorial Hospital and The Fremont-Rideout Health Group d/b/a Fremont-Rideout Home Health, its officers, agents, successors, and assigns, shall

[38] 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 shall be waived for all purposes.

1. Cease and desist from

(a) Interrogating employees about union and other protected-concerted activities.

(b) Engaging in surveillance of employees' Section 7 activities.

(c) Threatening employees with that they would not be scheduled if they engaged in protected-concerted activity.

(d) Refusing to schedule Hau Dao for engaging in protected activity.

(e) Refusing to bargain in good faith with the California Nurses Association as the collective-bargaining agent of the employees in the following unit:

> All full-time and regular part-time and per diem Registered Nurses in positions requiring a Registered Nurse (RN) license and who provide direct patient care and are employed by Respondent at and out of Fremont Medical Center located at 970 Plumas Street, Yuba City, CA and/or Rideout Memorial Hospital located at 726 Fourth Street, Marysville, CA; excluding all non-professional employees, non-Registered Nurses, Traveler Registered Nurses, Registry Registered Nurses, Care Coordinators (discharge planning), Physician's Assistants (PAs), RN Clinical Systems Analysts, RN Focus Review Medical Records Analysts, ICU Outcome Coordinators, RN Education Coordinators, Clinical Nurse Specialists, Infection Control Nurses, RN Midwives, managerial employees, confidential employees, guards and supervisors as defined in the Act.

(f) Changing the terms and conditions of employment of employees in the above unit without notice to or bargaining with the Union by installing surveillance cameras, changing attendance and sick leave policy, and by removing staff scheduling duties from bargaining unit employees.

(g) Refusing to provide the Union with requested information.

(h) By passing the Union and dealing directly with bargaining unit employees concerning shift scheduling.

(i) 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) Make whole Hau Dao, for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

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

(c) Upon request, meet and bargain at reasonable times and places with California Nurses Association, as the exclusive collective-bargaining representative of the employees in the above-mentioned unit.

(d) If requested by can, rescind any changes made in bargaining unit employees' terms and conditions of employment, noted above, and reduce to writing and sign any agreement reached with the Union concerning these terms and conditions of employment.

(e) Within 14 days after service by the Region, post at its 970 Plumas Street, Yuba City, California, and its 726 Fourth Street, Marysville, California facilities copies of the attached notice marked "Appendix."[39] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event the Respondents have gone out of business or closed any of the facilities involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since June 2007.

(f) 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 Respondents have taken to comply.

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

Dated, January 29, 2009.

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 employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

After a trial at which we appeared, argued and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has directed us to post this notice to employees in both English and Spanish and to abide by its terms.

Accordingly, we give our employees the following assurances:

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

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT fail to schedule you for you regularly scheduled shifts because you engage in union or other protected-concerted activities.

WE WILL NOT interrogate you about your union and other protected-concerted activities.

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

WE WILL NOT threaten you with removing you from your regularly scheduled shifts if you engage in protected-concerted activity.

WE WILL NOT make changes to your terms and conditions of employment without prior notice to the Union in order to permit the Union to bargain with us about those changes.

WE WILL NOT deal directly with bargaining unit employees.

WE WILL NOT refuse to furnish information requested by the Union that is relevant and necessary to the Union's performance of its duties as your collective-bargaining representative.

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

WE WILL make whole Hau Dao for any loss of wages and benefits, with interest, that she suffered as a result of our failure to schedule her.

WE WILL remove from our files any reference to the unlawful refusal to schedule Hau Dao and WE WILL NOT make reference to the refusal to schedule Hao Dao in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker and we will not use the permanently removed material against you.

WE WILL upon request from the Union rescind any changes we made in your terms and conditions of employment after March 2005, including the changes to sick leave and attendance policy, assignment of scheduling duties to ICU charge nurses and installation of surveillance cameras.

FREMONT-RIDEOUT HEALTH GROUP D/B/A FREMONT MEDICAL CENTER AND RIDEOUT MEMORIAL HOSPITAL AND THE FREMONT- RIDEOUT HEALTH GROUP D/B/A FREMONT-RIDEOUT HOME HEALTH