

299 Lincoln Street, Inc , a wholly owned subsidiary of Broad Reach Health Services, Inc and Lincoln Employees Union, Division of U S W A , AFL-CIO-CLC Cases 1-CA-23214, 1-CA-23287, 1-CA-23341, 1-CA-23371, 1-CA-23444, 1-CA-23498, and 1-RC-18602

December 30, 1988

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
JOHANSEN, CRACRAFT, AND HIGGINS

On December 11, 1986, Administrative Law Judge Claude R Wolfe issued the attached decision The General Counsel and the Respondent each filed exceptions and supporting briefs, and the Respondent filed a reply brief to the General Counsel's exceptions ¹

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and

¹ The Respondent has moved to strike the General Counsel's exceptions on the ground that they fail to meet the specificity requirements of Sec 102 46(b) of the Board's Rules and Regulations Although the General Counsel's exceptions do not conform in all particulars with Sec 102 46 they are not so deficient as to warrant striking them here Furthermore the Respondent has not shown prejudice as a result of the deficiency Accordingly the Respondent's motion is denied

We also deny the General Counsel's motion to strike the Respondent's reply brief on various grounds as lacking in merit

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

³ We find in this case that it is unnecessary to decide whether the Respondent's charge nurses are supervisors within the meaning of the Act Thus while we adopt the judge's finding that the Respondent violated Sec 8(a)(3) and (1) of the Act by discharging Sharon Mangini we place no reliance on the judge's conclusion that the knowledge by Charge Nurse Norma Gould of the employees' union activities was attributable to the Respondent We find rather that the Respondent knew of Mangini's union activities based on the evidence that two management officials had seen her handing out union cards in the Respondent's parking lot the day before her discharge Regarding Mangini's discharge we also disregard the judge's reliance in rejecting the Respondent's argument that Mangini had been insubordinate on evidence that Charge Nurse Mary Lee Frantantonio had given Mangini permission to post the notice announcing an employee bowling party on the Respondent's bulletin board We find it unnecessary to rely on evidence of permission because we conclude that the Respondent had no policy prohibiting Mangini from posting this notice and that in any event the record clearly establishes that the Respondent's defense was a pretext to conceal the fact that Mangini was discharged because of her union activities We further find it unnecessary to pass on the allegation that Charge Nurse Gould threatened an employee with plant closure because the violation is cumulative of other violations found

In adopting the judge's finding that Sandra Bergeron was not a member of the bargaining unit on September 23 when the Union demanded recognition we rely on the cases cited in fn 10 of the judge's opinion which stand for the proposition that for the purpose of determining who is to be counted in a unit on the day a union demands recognition on the basis of authorization cards employees who have been hired but who have not started working will not be counted *Riviera Manor Nursing Home* 200 NLRB 333 (1972) on which the Respondent relies is not to the contrary The employees whose status was questioned

conclusions³ as modified and to adopt the recommended Order as modified ⁴

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by promulgating and maintaining an overly broad no-access rule in order to discourage employee union activity, by preparing warning notices to employees Adelaida Mora and Maria Aleman for the purpose of causing their discharges because they were union supporters, and by discharging employee Sharon Mangini and by suspending and discharging employees Mora and Aleman to discourage employees' union activities Additionally, the judge concluded that the Respondent violated Section 8(a)(1) of the Act by the following conduct (1) its overly broad no-solicitation and no access rules, (2) statements in its campaign literature informing employees that continued financial investment in the facility where they worked would not be forthcoming if employees voted in the Union, (3) Supervisor Jane Gibree's threat to employees that the Respondent's owner would "sell" or transfer" the facility if they selected the Union to represent them, (4) Supervisor Francis Rogers' threat to employees that it would be difficult for them to obtain employment elsewhere if they voted in the Union, (5) Owner William Dobson's implied threat during a campaign speech to the unit employees to sell, close, or change the business if the Union won, (6) Dobson's promise to employees of better wages and working conditions if they rejected the Union, (7) Administrator Paul Lemay's conduct in interrogating employees and creating the impression that their union activities were under surveillance, and (8) Supervisor Norman Landry's statement to an employee suggesting that she quit if she supported the Union ⁵ We adopt these findings of the judge

in that case were undisputably working in the unit on the day the union made its bargaining demand and the only question was whether their cards were valid if signed prior to the date they began working

Although the General Counsel has excepted to the judge's failure to find that the Respondent's food service supervisor Mark Stanikmas unlawfully interrogated employee Keith Carlson in mid September 1985 we also find it unnecessary to pass on that allegation because the violation would be cumulative in this case

⁴ In accordance with our decision in *New Horizons for the Retarded* 283 NLRB 1173 (1987) interest on and after January 1 1987 shall be computed at the short term Federal rate for the underpayment of taxes as set out in the 1986 amendment to 26 U S C § 6621 Interest on amounts accrued prior to January 1 1987 (the effective date of the 1986 amendment to 26 U S C § 6621) shall be computed in accordance with *Florida Steel Corp* 231 NLRB 651 (1977)

The judge inadvertently failed to provide for a cease and desist order Because the widespread misconduct engaged in by the Respondent clearly demonstrates a general disregard for [its] employees' fundamental statutory rights we shall issue a broad cease and desist order See *Hickmott Foods* 242 NLRB 1357 (1979) We shall modify the judge's notice accordingly

⁵ Member Cracraft disagrees with her colleagues' adoption of the judge's finding of a violation of Sec 8(a)(1) based on Landry's alleged

Continued

For reasons more fully discussed below, we also agree with the judge that the Respondent's unfair labor practices have made the holding of a free and fair second election unlikely, if not impossible, and that, therefore, the issuance of a bargaining Order is warranted in this case.⁶ Accordingly, we further affirm the judge's finding that the Respondent violated Section 8(a)(5) by refusing to bargain with the Union as of September 23, 1985, when the Union possessed a card majority and demanded recognition.⁷

Finally, the General Counsel has excepted, *inter alia*, to the judge's failure to find additional 8(a)(1) and (3) violations. As discussed below, we find merit to two of these exceptions pertaining to certain 8(a)(1) allegations.

During the election campaign, the Respondent either distributed to employees or posted on its bulletin board the following document:

QUESTION *How can the Union being here hurt us?*

ANSWER Lots of ways Here's nine

1 *It hurts* to pay them so much *money* every year

2 *It hurts* to have to *answer to the union steward* for everything you do

3 *It hurts* to try to understand and live by all the *union work rules*

4 *It hurts* to belong to a group that is *divided hostile militant, and aggressive most of the time*

5 *It hurts* to go on strike and lose pay, medical insurance and perhaps even your job

6 *It hurts* to see your company *lose its viability* due to the constant costs of having a union, and then to see our jobs lost or sold to people who might have no growth plans and simply *milk* the facility

7 *It hurts* to see *patients leave* for our non-union competitors because customers don't want to be caught in the middle of the *slow-downs strikes job actions or other games unions play*

8 *It hurts* to see something that was just getting turned around get *smothered* by the *deadly steel grip* of factory union—management collective bargaining

9 *It hurts* to always be in *doubt about the future*

Give yourself a chance

Give Lincoln a chance

Vote NO

The judge found that this document constituted legitimate campaign propaganda because the nine enumerated answers, when viewed in light of the question posed, merely were "statements of possibilities not probabilities," that unionization would be adverse to the employees' interests. Contrary to the judge, we conclude that the Respondent violated Section 8(a)(1) by this document.

The question of the propriety of the above-quoted document must be resolved in light of the principles set out in *Gissel*, supra at footnote 5. There, the Supreme Court established certain standards for determining whether an employer's statements about the effects of unionization are permissible. The Court stated in pertinent part that

an employer is free to communicate to employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit."⁸

In determining whether a statement constitutes an unlawful threat, the Court differentiated communications of previously made plant closure decisions and "carefully phrased" predictions predicated "on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control" from statements suggesting that the employer might take actions in response to unionization not demonstrably based on "economic necessities." Statements of the latter kind would be deemed threats of retaliation.

In this case, the plain language of the Respondent's document, particularly in paragraphs 6 through 9 above, clearly informs the unit employees that their jobs could be "lost," "sold," or "smothered by the deadly steel grip of factory union-management collective bargaining." However, in referring to the correlation between possible economic consequences of unionization and the closing of its business, the Respondent's predictions are not accompanied by any objective facts that would tend to establish any substantial likelihood of their occurrence. Thus, the Respondent's statements crossed the line between informing employees of potential adverse consequences of unionization and threatening that these consequences would occur in

statement to an employee that if she supported the Union she should quit. Testimony supporting this allegation was given in response to questioning of the witness by the judge as to another incident. Under these circumstances where this statement was neither alleged in the complaint nor amended to the complaint at the hearing she would not find the Respondent was on notice of the alleged violation nor that the matter was fully litigated.

⁶ *NLRB v Gissel Packing Co*, 395 U.S. 575 (1969).

⁷ In this regard we specifically affirm the judge's determinations regarding the validity of those authorization cards to which the Respondent has filed exceptions here.

⁸ 395 U.S. at 618.

retaliation for their having selected the Union to represent them. The threat is particularly plain where, as here, the Respondent has made various threats of plant closure and has warned employees that unionization might reduce its future investment in the facility where they worked. Accordingly, we find that the Respondent violated Section 8(a)(1) of the Act by distributing this campaign literature to its employees.⁹

Although the judge did not specifically address this additional complaint allegation, we agree with the General Counsel that the Respondent also engaged in unlawful conduct when its owner, William Dobson, admittedly stated in his November 18, 1985 speech to employees that they would "at least be subject to a very lengthy period of frozen wages and benefits" if the Union was voted in. Because the Respondent would be obliged, on the Union's demonstration of its majority in the election, to maintain in effect its current wage and benefit policies until negotiations resulted in an agreement on its change or an impasse, Dobson's statement to employees that wages and benefits would be frozen constituted a threat to deprive employees of benefits to which they otherwise would be entitled because they chose union representation. Accordingly, we find that this threat further violated Section 8(a)(1) of the Act.¹⁰

Finally, in determining whether a bargaining order is appropriate to remedy the Respondent's misconduct here, we apply the test set out in *Gissel*, supra at footnote 5. In that case, the Court identified two categories of cases in which a bargaining order would be appropriate. The first involves "exceptional cases" marked by unfair labor practices that are so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects with the result that a fair election is rendered impossible. The second category involves "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." The Supreme Court stated that in the latter situation a bargaining order should issue where the Board finds that "the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." Id at 613-615.

In the present case, the judge failed to place the Respondent's conduct into one category or the

other. We believe that the Respondent's unfair labor practices fall into at least the second category.

When the organizing campaign commenced, the Respondent immediately embarked on an antiunion campaign designed to discourage its employees from supporting the Union by discharging Sharon Mangini and instituting an over-broad no access rule on September 20, 1985, and thereafter engaged in numerous violations of the Act in an effort to fulfill this objective. In sum, as the judge found, the Respondent violated Section 8(a)(3) by discharging one employee and suspending and discharging two others, by issuing discriminatory warning notices, and by promulgating and maintaining an overly broad no-access rule, and violated Section 8(a)(1) by threatening to close, sell, or change its business if the employees selected the Union, by engaging in coercive interrogation and surveillance of its employees' union activities, by promising employees improved wages and working conditions if they rejected union representation, by maintaining overly broad no solicitation and no access rules, by suggesting that employees quit if they intended to support the Union, and by telling employees they would have difficulty obtaining employment elsewhere if they selected the Union as their bargaining representative. We have additionally found that the Respondent violated Section 8(a)(1) in other instances when it threatened employees with "a very lengthy period of frozen wages and benefits" and when it distributed certain campaign literature.

We emphasize that some of the unfair labor practices described above were committed by the Respondent's highest level supervisors, including its owner and its administrator. The positions these persons held clearly served to reinforce and emphasize in the minds of employees the seriousness of the threats. It also is highly significant that many of the violations were of an extremely serious nature. In this case, the judge found that the Respondent's owner made a "not too subtle threat to stop trying to resuscitate Lincoln, let it fail, and either go out of business or change it" if the Union won collective bargaining rights. The campaign literature that the Respondent distributed to its employees contained additional violations. The widespread exposure of the unit employees to this conduct clearly magnified the coercive impact of the violations on the voters. More importantly, the Board and the various courts long ago determined that a threat to close a facility because of union activity is among the most serious forms of interfer-

⁹ Chairman Stephens would rely only on pars. 6 and 7 of the posted document in finding a threat in violation of Sec. 8(a)(1).

¹⁰ See *Alpha Cellulose Corp.* 265 NLRB 177-178 (1982).

ence with protected employee rights,¹¹ and the Supreme Court has stated that this is among the most effective means of destroying election conditions for a longer period of time than any other unfair labor practices.¹² We further emphasize that the Respondent's conduct in suspending and discharging employees because of their union activities constitutes violations that have long been classified as misconduct going "to the very heart of the Act."¹³

We conclude that the possibility of erasing the effects of the Respondent's unfair labor practices and of conducting a fair election by the use of traditional remedies is slight. Requiring the Respondent simply to refrain from such conduct will not eradicate the lingering effects of the violations. Correspondingly, an election would not reliably reflect genuine, uncoerced employee sentiment. Given the swiftness with which the Respondent reacted to the organizing effort, the likelihood of the Respondent engaging in further illegal conduct is clearly present. We conclude that the employees' representation desires expressed here through authorization cards would, on balance, be better protected by our issuance of a bargaining order than by traditional remedies. Although the Respondent claims that there has been substantial turnover in its work force and management since the unlawful conduct occurred,¹⁴ in light of the circumstances of this case, particularly the seriousness of the violations and their impact on the entire bargaining unit, to withhold a bargaining order here would reward the Respondent for its own wrongdoing.¹⁵ Accordingly, we adopt the judge's recommended Order, as modified below, and require the Respondent to bargain with the Union as the duly designated representative in the appropriate unit. We therefore shall set aside the election held in Case 1-RC-18602, order the petition dismissed, and issue a bargaining order.

¹¹ See e.g. *Textile Workers v Darlington Mfg Co* 380 U.S. 263 (1965) *Irv's Market* 179 NLRB 832 (1969) enf'd 434 F.2d 1051 (6th Cir 1970).

¹² See e.g. *NLRB v Gissel Packing Co* supra at fn 5.

¹³ *NLRB v Entwistle Mfg Co* 120 F.2d 532-536 (4th Cir 1941).

¹⁴ In its motion to reopen the record the Respondent seeks to introduce evidence regarding employee and management turnover. We deny the Respondent's motion.

We shall leave to the compliance stage of this proceeding the Respondent's additional proffer in its motion that the Respondent has ceased operations at the facility where the unit employees are employed and that another corporation which is totally independent of the Respondent is presently operating the facility. At that time if the question is raised the propriety of extending the *Gissel* order to any successor of this Respondent could be considered.

Without passing on whether she would consider turnover or changed circumstances relevant to a determination of whether a *Gissel* bargaining order should be issued, Member Cracraft concurs in her colleagues' conclusion that a *Gissel* bargaining order is warranted.

¹⁵ See e.g. *Koons Ford* 282 NLRB 506 at fn 18 (1986) enf'd mem 833 F.2d 310 (4th Cir 1987).

The General Counsel has requested that a broad visitatorial clause be granted in this case. In *Cherokee Marine Terminal*, 287 NLRB 1080 (1988), the Board denied the General Counsel's request to have broad visitatorial clauses routinely included in the Board's remedial orders and held that the Board would, "continue to grant visitatorial rights, on a case by case basis, when the equities demonstrate a likelihood that a respondent will fail to cooperate or otherwise attempt to evade compliance" (Id at 1083, fn omitted). Thus, we declined to grant a broad visitatorial clause in that case but noted that we would be willing to make this additional means of obtaining information available to the General Counsel, "in cases in which it appears possible that the respondent may not cooperate in providing relevant evidence unless given specific, sanction-backed directions to do so" (Id at fn 14). Because we do not believe that the General Counsel has established the conditions as set out in *Cherokee Marine Terminal* to support such a remedy here, we decline to grant the broad visitatorial clause. However, nothing in *Cherokee Marine Terminal* forecloses the Board from issuing narrow remedial visitatorial provisions tailored to the facts of a particular case where warranted. The Board has broad discretion in determining remedial provisions, and in this case we believe a narrow visitatorial clause is warranted.¹⁶

The Respondent asserts in its motion to reopen the record that it has ceased operations at the Lincoln Street facility and that it is no longer the employer of the employees there. The Respondent's contentions in its motion indicate that there may be numerous issues at the compliance stage of this proceeding that were unforeseen at the time this case was litigated and that will clearly be relevant to a determination of how and by whom compliance with the Board's Order is to be effected. For this reason, we are issuing a visitatorial clause limited to the information relevant to the Respondent's claim that it has ceased operations and that another corporation is now operating the facility. Thus, the identity and circumstances of the employer or employers of the unit employees can be determined at the time of compliance. Accordingly, we shall amend the Order to include the following as paragraph 2(g):

Preserve and, on request, make available to the Board or its agents for examination and copying, all correspondence, legal documents, and any other records relating to the Respondent's claims that (1) it has ceased operations at the

¹⁶ See e.g. *Smyth Mfg Co* 277 NLRB 680 (1985).

Lincoln Street facility involved in this proceeding and is no longer an employer of the employees working there within the meaning of the Act, (2) that another corporation, totally independent of the Respondent and having no common ownership, control, direction, or officers, and having no obligations to the Respondent in connection with its labor relations or employment policies or practices, is operating the Lincoln Street facility, and (3) that none of the individuals who may have committed unfair labor practices in this case, nor any officers, agents, or employees of the Respondent, are employed or engaged in any capacity at the Lincoln Street facility

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, 299 Lincoln Street, Inc., a wholly owned subsidiary of Broad Reach Health Services, Inc., Worcester, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified

1 Insert the following as new paragraphs 1(l), 1(m), and 1(n)

“(l) Threatening employees with a lengthy period of frozen wages and benefits if they selected the Union as their bargaining representative

“(m) Threatening employees with job loss or other retaliation if they selected the Union as their bargaining representative

“(n) In any other manner interfering with restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act”

2 Insert the following as paragraph 2(g), and reletter subsequent paragraphs accordingly

“(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all correspondence, legal documents, and any other records relating to the Respondent’s claims that (1) it has ceased operations at the Lincoln Street facility involved in this proceeding and is no longer an employer of the employees working there within the meaning of the Act, (2) that another corporation, totally independent of the Respondent and having no common ownership, control, direction, or officers, and having no obligations to the Respondent in connection with its labor relations or employment policies or practices, is operating the Lincoln Street facility, and (3) that none of the individuals who may have committed unfair labor practices in this case, nor any officers, agents, or employees of the Respondent, are em-

ployed or engaged in any capacity at the Lincoln Street facility

3 Substitute the attached notice for that of the administrative law judge

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found here

IT IS FURTHER ORDERED that the election in Case 1-RC-18602 be set aside, and that the petition in Case 1-RC-18602 be dismissed

MEMBER JOHANSEN, dissenting in part

I agree with the substantive findings my colleagues have made in this case. However, contrary to the majority, I would not grant a visitatorial clause of any kind in this case. In *Cherokee Marine Terminal*, 287 NLRB 1080 (1988), the Board decided against the routine inclusion of visitatorial clauses in its decisions as the General Counsel had sought. The Board concluded, rather, that it would continue to grant visitatorial rights, on a case-by-case basis, ‘when the equities demonstrate a likelihood that a respondent will fail to cooperate or otherwise attempt to evade compliance.’ (Id. at 1083, fn. omitted.) Although the Respondent in the present case claims in its motion to reopen the record that it has ceased operations at the Lincoln Street facility where the unfair labor practices occurred, I do not find that this proffer establishes that the Respondent will fail to cooperate with the Board, nor does it establish the necessary ‘likelihood that the Respondent will attempt to evade compliance’ with the Board’s Order. (See *Cherokee Marine*, *ibid.*) Accordingly, I would deny the General Counsel’s request for a visitatorial clause and I do not join my colleagues in the clause they enter here.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
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 the National Labor Relations Act and has ordered us to post and abide by this notice

WE WILL NOT discourage membership in Lincoln Employees Union, Division of U S W A, AFL-CIO-CLC or any other labor organization, by discharging, suspending, or preparing warning notices to any of our employees or in any other manner discriminating against them in regard to their tenure of employment or any term of condition of employment

WE WILL NOT promulgate, maintain, or enforce any rule, regulation, or other prohibition which forbids off-duty employees access to our nonpatient care areas, and WE WILL NOT promulgate, maintain, or enforce any rule, regulation, or other prohibition that forbids solicitation or distribution of literature on behalf of a union by our employees on their own time in nonworking areas or other areas where such conduct would not adversely affect patient care

WE WILL NOT tell employees it will be difficult for them to secure other employment if they select a union to represent them

WE WILL NOT conduct ourselves in such a manner as to create an impression that we are engaged in surveillance of employee union activities

WE WILL NOT coercively question you about your union support or activities

WE WILL NOT suggest that you quit if you are going to vote for a union

WE WILL NOT promise employees better wages and benefits in exchange for their abstention from voting for a union in a representation election

WE WILL NOT threaten to close, sell, or change our business operations if employees select a union to represent them

WE WILL NOT refuse to recognize and bargain collectively with Lincoln Employees Union, Division of U S W A, AFL-CIO-CLC concerning terms and conditions of employment in the bargaining unit

WE WILL NOT threaten our employees with a lengthy period of frozen wages and benefits if they select the Union as their bargaining representative

WE WILL NOT threaten our employees with jobs loss or other retaliation if they select the Union as their bargaining representative

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

WE WILL, on request, bargain collectively with Lincoln Employees Union, Division of U S W A , AFL-CIO-CLC as the exclusive bargaining representative of all the employees in the bargaining unit described below with respect to rates of pay, rates, hours of employment, and other conditions of employment, and, if an understanding is reached, embody that understanding in a written, signed agreement The bargaining unit is

All full time and regular part-time nurses aides, housekeeping employees, food service employees, maintenance employees, laundry employees, and team leaders employed by the Employer at its 299 Lincoln Street, Inc facility in Worcester, Massachusetts, excluding all office clerical employees, Registered Nurses,

Licensed Practical Nurses, professional employees, temporary help agency employees, guards and supervisors as defined in the Act

WE WILL offer Sharon Mangini, Maria Aleman, and Adelaida Mora immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings suffered by reason of our discrimination against them with interest

WE WILL remove from the records of Sharon Mangini, Maria Aleman, and Adelaida Mora any reference to their discharge, any reference to the suspension of Maria Aleman and Adelaida Mora on November 7, 1985, and all warning notices prepared for Maria Aleman and Adelaida Mora on and after October 22, 1985, and notify them in writing that this has been done and that the evidence of these unlawful discharges, suspensions, and warning notices will not be used as a basis for any future disciplinary action against them

WE WILL rescind the rule in our personnel manual that prohibits solicitation of any kind or the sale or distribution of material without our approval

WE WILL rescind our September 20, 1985 rule denying our employees access to our facility during their nonscheduled worktime

299 LINCOLN STREET, INC, A
WHOLLY OWNED SUBSIDIARY OF
BROAD REACH HEALTH SERVICES,
INC

Ronald S Cohen and Joseph F Griffin Esqs for the
General Counsel

Richard D Hayes and JoAnn Davis Esq for the Re
spondent

Michael J Yoffee Union Organizer

DECISION

STATEMENT OF THE CASE

CLAUDE R WOLFE Administrative Law Judge This consolidated proceeding was litigated before me at Boston and Worcester Massachusetts on 12 13 14, and 15 May and 9, 10, and 11 June 1986 pursuant to complaints duly issued by the General Counsel in the unfair labor practice proceedings and a 28 January 1986 Order of the National Labor Relations Board (the Board) directing a hearing in Case 1-RC-18602 on certain objections filed by the Union to the conduct of the election and conduct affecting the results of the election The unfair labor practice complaints and the objections proceeding were thereafter consolidated for hearing The consolidated complaint as amended alleges numerous independent violations of Section 8(a)(1) of the National

Labor Relations Act (the Act) discriminatory treatment and discharge of Maria Aleman Sharon Mangini and Adelaida¹ Mora in violation of Section 8(a)(3) and (1) of the Act discriminatory treatment and discharge of Stella Lukasek in violation of Section 8(a)(4) and (1) of the Act and a refusal to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act The objections to election are based on conduct alleged as unfair labor practices

Respondent denies the unfair labor practice allegations and the allegations of objectionable conduct raised in Case 1-RC-18602

On the entire record including the testimonial demeanor of the witnesses and after considering the post trial briefs of the parties I make the following findings and conclusions²

I JURISDICTION

299 Lincoln Street Inc a wholly owned subsidiary of Broad Reach Health Services Inc (Respondent)³ is a health care institution operating a nursing home providing medical and professional care services for the aged in Worcester Massachusetts During the 12 month period ending September 24 1985 Respondent derived gross revenues in excess of \$100 000 from the conduct of this business and purchased and received at its Worcester nursing home products goods and materials valued in excess of \$50 000 directly from points outside the Commonwealth of Massachusetts Respondent is now and has been at all times material an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act

II LABOR ORGANIZATION

The Union is now and has been at all times material a labor organization within the meaning of Section 2(5) of the Act

III SUPERVISORS AND AGENTS

The complaint alleges Respondent admits and I find that the following named persons occupied the positions in Respondent's employ set forth after their names and were statutory supervisors and agents of Respondent within the meaning of the Act at all times material

Kathryn Connors	Vice President
William Dobson	Owner
Jane Gibree	Supervisor
Norman Landry	Supervisor
Ann Lavallee	Staff Development

Mel Law	Coordinator
Paul Lemay	Maintenance Supervisor
Francis Rogers	Administrator
Mark Stanikmas	Supervisor
Chris Zorn	Food Service Supervisor
Joseph Rizzo	Director of Nurses
	Assistant Administrator

The General Counsel alleges that Norma Gould and Mary Lee Fratantonio are supervisors Respondent denies that they are

Gould and Fratantonio were charge nurses during the period encompassing the alleged unfair labor practices According to Paul Lemay Respondent's administrator since May 1985 he was told by others that Gould was a supervisor until her job title was changed to charge nurse on December 1984 Neither Gould nor Fratantonio were Respondent's employees at the time of the hearing and neither testified

Lemay testified that from September 1985 to the present charge nurses have had and performed the responsibilities reflected in their written job description as follows

- Attends staff meetings
- Attends inservices
- Attends weekly team conference (Wednesday 9 a m)
- Consults with RPT OTR Speech Dietary Social Services and Activity Director as needed
- Admits and discharges patients
- Rounds with Doctors—assist with examination
- Reviews all monthly physician orders and makes appropriate corrections on Pharmacy update
- Calls medication orders to Pharmacy
- Prepared to cover shift if Medication Nurse not available
- Summaries weekly on L II and L III monthly on L E & W
- Rounds on all patients every two hours
- Assist in more complicated nursing procedures
- Makes out all accident reports involving patients
- Notifies Doctors and family immediately of any accident involving patient
- Staff assignments
- Supervision and instruction of staff
- Staff evaluation of work performance
- Monitor documentation—I & O s S/A restraints positioning ambulation B/B training etc
- Reports Log Book Daily Report
- Give/receive reports at change of shift
- Overall responsibility of unit environment—patient rooms tub rooms utility rooms linen closet etc

Lemay further testified that Gould was the charge nurse responsible for assigning the work load to her people on that particular shift and that one of the reasons for discharging employee Matter on 18 September was a refusal of a work assignment from Gould When writing a memorandum on 18 September so reflecting Lemay first referred to Gould as Matter's supervisor

¹ The official record at various places refers to a Harry Leider This should be Adelaida and refers to Mora

² The conclusions of fact are based on the credible portions of testimony of the participants and the documentary evidence received In those instances where conflicts in testimony arose I have considered the reasonable probabilities the convincing character of the testimony and the comparative demeanor of opposing witnesses Testimony that might appear to conflict with my findings of fact has been examined and rejected as less credible than that on which I have relied I have credited parts of witnesses' testimony while not crediting other parts This is neither unusual nor improper *NLRB v Universal Camera Corp* 179 F 2d 749 (2d Cir 1950) vacated on other grounds 340 U S 474 (1951)

³ Respondent's name appears as amended at hearing

but then altered it to read charge nurse. That the refusal of Gould's work assignment was given as a reason for discharge illustrates that Respondent had delegated authority to her to make such assignments and considered they should be obeyed by employees. In September Respondent also issued an addendum to the job description for senior nurses aide also referred to as team leader which reads as follows in relevant part:

A senior Nurse Aide or team leader must have a certificate for nurses aide class and worked one year as a nurse's aide. They are chosen by Charge Nurse and Director of Nurses. Senior Nurses Aides will be evaluated twice yearly by their immediate supervisor. These evaluations are submitted to the Director of Nurses who then makes the decision as to whether each Senior Aide keeps her position or returns to status of experienced aide. This will include a cut in pay.

A promotion to senior nurses aide is accompanied by a wage increase. A fair reading of the addendum indicates the immediate supervisor referred to is the charge nurse. This conclusion is consistent with the listing of Staff evaluation of work performance as one of the responsibilities of the charge nurse. Respondent's job description for medication nurses set forth that they are to communicate staff problems and recommendations to charge nurse. I conclude that medication nurses are members of the staff whose work performance is evaluated by the charge nurse.

In addition to the evidence of supervisory status flowing from company documents supplemented by Lemay's testimony, Yoffee and nurses aides Sharon Mangini, Joan Perez and Delia Rodriguez credibly testified that their respective charge nurses Gould and Fratantonio assigned them work and scheduled their lunchbreaks and coffeebreaks. Respondent's personnel manual which it distributes to all employees clearly states: Coffee breaks are assigned by the employee's supervisor and must be rotated so that the staff lounge is available to everyone during coffee breaks and there is no break in patient care. Charge nurses thus do what Respondent considers supervisor's work when they assign coffeebreaks and the organization of the break sequence to comply with the rotation requirement must require some reasonable modicum of independent judgment in deciding the timing of each employee's break. There is no evidence of any preset routine for determining to whom and when a break should be given or if any need for the charge nurse to consult with superiors before preparing the break schedule.

Finally, William A. Dobson, the president, chief executive and owner of Broad Reach Health Services, Inc. of which 299 Lincoln Street, Inc. is a wholly owned subsidiary unequivocally testified: Charge nurses are supervisors.⁴ I agree. The charge nurses have the authority and are required to evaluate the performance of other employees. These evaluations have considerable weight, notably in the case of senior nurses aides who are evalu-

ated twice yearly and whose retention of senior aide status and pay depends in great part on the charge nurse's evaluation. There is no persuasive evidence that the director of nurses relies on anything other than the evaluation in rendering a final decision of retention or demotion. The Board has held that the vesting of authority in charge nurses to evaluate employees and thereby to reward and promote them⁵ or to effectively recommend their termination, retention⁶ or placement on probation⁷ warrants a finding that they are statutory supervisors. These holdings are applicable to the instant case where I find the charge nurses by their evaluations effectively recommend the treatment to be accorded employees including retention of status and wages and demotion and loss of wages. I therefore find and conclude Charge Nurses Gould and Fratantonio were at all times material to this proceeding supervisors of the Respondent within the meaning of Section 2(11) of the Act and Respondent's agents within the meaning of Section 2(13) of the Act. This conclusion of supervisory and agency status is further supported by credible evidence that Respondent has vested charge nurses with independent authority to supervise, instruct and assign work to employees and to choose with the director of nurses which nurses aides will and which will not become senior nurses aides at a higher wage. The language of Respondent's September addendum on senior nurses aides strongly implies that the charge nurse has an effective part in determining on the basis of his or her independent judgment whether a nurses aide will secure senior status and pay.

IV ALLEGED UNFAIR LABOR PRACTICES IN VIOLATION OF SECTION 8(A)(4), (3) AND (1)

A. Background and Context

Michael J. Yoffee was employed by Respondent as a nurses aide on 22 July 1985.⁸ Yoffee was at the time and has continued to be a paid organizer for the Union. He received pay from the Union for his services throughout the time he was working for and being paid by Respondent. He obtained employment with Respondent for the specific purpose of persuading employees to select the Union as their collective bargaining representative. To this end he conducted meetings with employees at a Chinese restaurant on 1 August and at the union office in Worcester on 22 August and 3 and 11 September. It appears that these meetings had from three to five of Respondent's employees who composed the union organizing committee in attendance including Sharon Mangini who attended all four meetings. There is no evidence Respondent was aware of these conferences. In addition to conducting the meetings, Yoffee signed a union authorization card on 20 August and secured signed cards from a number of Respondent's employees on dates rang-

⁴ *Albany Medical Center Hospital*, 273 NLRB 485 (1984).

⁵ *Pine Manor Nursing Center*, 270 NLRB 1008 (1984).

⁷ *Wedge Wood Health Care*, 267 NLRB 525 (1983).

⁸ All dates are 1985 unless otherwise specified.

⁴ Official Record of Proceedings, vol. 2, p. 132, L. 9.

ing from 3 to 23 September Other such cards were procured by employees and returned to Yoffee⁹

Sharon Mangini, who had solicited employees to sign union authorization cards in Respondent's parking lot on 19 September, was discharged on 20 September

On 23 September, Yoffee met with Paul J Lemay administrator of the nursing home, told Lemay he was organizing for the Union, and asked Lemay to recognize the Union as the employees representative Lemay refused Yoffee then resigned his employment with Respondent, but worked until 3 p m on 24 September Lemay advised Kathryn Connors, vice president of Broad Reach Health Services, of Yoffee's visit That same day Yoffee sent Respondent a letter stating the Union's majority status and reiterating the Union's request for recognition The parties stipulated the letter was received on 24 September, and Lemay testified that the mail arrives at his office about noon

On 24 September, the Union filed a petition with the Board in Case 1-RC-18602 seeking a representation election among certain of Respondent's employees Respondent and the Union executed a Stipulation for Certification upon Consent Election on 11 October which was approved by the Board's Regional Director on 17 October Pursuant to the stipulation an election was held on 20 November in the patient's dining room at Respondent's facility from 6 30 to 7 30 a m and from 2 30 to 3 30 p m among the employees in an appropriate collective bargaining unit who were employed during the payroll period ending 12 October and on the day of the election The appropriate collective bargaining unit is

All full time and regular part time nurses aides housekeeping employees food service employees maintenance employees laundry employees and team leaders employed by the Employer at its 299 Lincoln Street Inc facility in Worcester, Massachusetts excluding all office clerical employees Registered Nurses Licensed Practical Nurses professional employees temporary help agency employees, guards and supervisors as defined in the Act

The tally of ballots cast in the election shows 31 ballots cast for the Union, 32 against and 2 challenged The challenged voters were Keith Carlson and Sharon Mangini The Union filed timely objections to the election The Board, in its Order of 28 January 1986, adopted the Regional Director's determination that Carlson was not an eligible voter, Mangini's ballot was therefore not determinative of the results of the election and a hearing should be conducted on the Union's objections The objections thereafter came before me as part of this consolidated proceeding

Between petition and election Respondent issued several warnings to Maria Aleman and Adelaida Mora, and

⁹ The cards are single purpose documents which apart from the spaces provided for the signer's name address work status date and signature contain only the following language I hereby authorize the Lincoln Employees Union—Division of USWA to represent me in collective bargaining at the top of the card and a statement at the bottom reading This is *not* an application for membership

discharged them on 7 November After the election Respondent issued warnings to Stella Lukasek a cook, in December and again in January 1986, and discharged her on 8 January 1986

B The Union's Majority Status

Respondent and the General Counsel agree there were 79 named employees in the appropriate unit on 23 and 24 September 1985 The General Counsel would also include Michael Yoffee Respondent would exclude Yoffee Sandra Bergeron Barbara Carpenter, Alberto Gonzalez, Anna Webster, and Stella Lukasek would all be included in the unit by Respondent, and excluded by the General Counsel

Sandra Bergeron was hired on 23 September but did not start to work until 3 01 p m on 24 September The Board has held in other instances where the demand for recognition succeeded the hire of an employee but preceded the employee's actual start/work date that the employee was not a member of the bargaining unit on the demand date¹⁰ I therefore conclude that Bergeron was not a member of the bargaining unit on 23 September but became one on 24 September

On his own testimony Michael Yoffee had no desire for or expectation of continued employment by Respondent after he had fulfilled his duty as a paid union organizer and launched an organizational campaign culminating in a demand for recognition and a petition for election His only reason for securing employment with Respondent was to organize for the Union from within the workforce In short his employment for Respondent was undertaken as an incident of his primary job as a union organizer, was designed to end on the completion of his union assignment and was therefore temporary Where employment is solely for the purpose of union organizing *and temporary in nature* the individual so employed should not be included in the bargaining unit even though he or she otherwise enjoys the protection afforded employees by the Act¹¹ I therefore agree with Respondent that Yoffee should be excluded from the unit and the authorization card he signed should not be counted toward the Union's majority status

Alberto Gonzalez was according to Respondent's timecards, an employee who worked 12 1/2 hours during the pay period ending 21 September had no timecard for the pay period ending 28 September, and was terminated 30 September His total employment was 4 hours on Monday 16 September 4 hours on Tuesday, 17 September and 4 1/2 hours on Friday, 20 September Respondent denominates him a maintenance employee No other evidence concerning his employment status was proffered or adduced On this record I can only conclude that Gonzalez was an hourly employee commencing 16 September and was terminated 30 September There is

¹⁰ *Western Drug* 231 NLRB 890 891 (1977) enf denied on other grounds 600 F 2d 1324 (9th Cir 1979) *WCAR Inc* 203 NLRB 1235 1243 (1973) *Maidsville Coal Co* 257 NLRB 1106 1109 fn 4 (1981) *Magnesium Casting Co* 250 NLRB 692 705 (1980) enf'd 668 F 2d 13 19 (1st Cir 1981)

¹¹ *Dee Knitting Mills* 214 NLRB 1041 (1974) *Anthony Forest Products Co* 231 NLRB 976 977 (1977) *Oak Apparel* 218 NLRB 701 (1975)

no evidence regarding what his job was other than Respondent's listing him as a maintenance employee on the roster of unit employees prepared by Respondent and placed in evidence as General Counsel's Exhibit 2 by agreement of the parties, but reserving their respective positions on certain listed employees, among them Gonzalez. Similarly, there is no reason shown for his apparent failure to work between 20 September and his 30 September termination. There are many possibilities, e.g., layoff, sickness or injury, or casual employment, any of which, if established, would clarify his status, but none have been shown to be the case. All we really have here is evidence that Gonzalez was an employee for a time. There is no evidence he ceased to be an employee until 30 September. Respondent calls him a maintenance employee. Maintenance employees are specifically included in the stipulated unit. Although the quantity and quality of the evidence with respect to Gonzalez leaves much to be desired, it is sufficient, I believe, to constitute a prima facie case for the proposition that Gonzalez was a member of the bargaining unit on 23 and 24 September. The General Counsel contends Gonzalez was not but offers no persuasive evidence to rebut the prima facie case for unit inclusion. Accordingly, I find that Gonzalez was a unit member on 23 and 24 September.

Section 2(11) defines a supervisor as one who has authority 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 the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment*.¹² The burden of proving supervisory status rests on the party asserting that such status exists.¹³ The General Counsel has not met that burden with respect to Stella Lukasek, Barbara Carpenter, Anna Webster, or Joanne Kerswell. No one contends Kerswell was in the unit on 23 or 24 September, but the General Counsel alleges that she, as well as the other three cooks, was a statutory supervisor at relevant times.

Respondent's job description for cooks reads as follows:

DUTIES AND RESPONSIBILITIES

- 1 Must prepare breakfast and dinner meals
- 2 Carry out suggested standards in patients meal service
- 3 Enforce and carry out proper sanitation in the kitchen at all times, and report sanitation problems to the food service supervisor
- 4 Store and correctly label all leftovers and fresh foods to be refrigerated
- 5 Clean stove and other preparation areas after each meal
- 6 Check menu ahead to make sure leftovers are used whenever possible
- 7 Check refrigerators to be sure leftovers are used whenever possible

8 Train any new employee hired to cook in the proper technique of preparing food and using equipment

9 Report any menu or personnel problems to the food service supervisor

The cooks have no authority to hire, transfer, lay off, recall, promote, discharge, or adjust employee grievances or effectively recommend such action. At issue is whether they can suspend, assign discipline, or responsibly direct other employees or effectively recommend such action, all on the basis of their independent judgment. There is nothing in their job description indicating they have such authority. The job description for the dietary aides who work with the cook on each shift does, however, show the aides' immediate supervisor to be the food service supervisor or, in his or her absence, the cook. On the other hand, the written defined job duties for a dietary aide on the 7 a.m. to 3:30 p.m. shift sets forth, among other duties irrelevant to the issue of the cook's status, that the aide is to check with the food service supervisor at shift's end and then go home. The only mention of the cook in this document is that the aide at 11 a.m., is to help the cook remove plates from heaters and stack them beside the steamtable.

During the month of September, Barbara Carpenter conducted the orientation of new employees Rigney and Madore. On the form entitled *Check List for Orientation* for each of these employees, Carpenter is shown at the top as the Instructor, and signed the forms in the space entitled Supervisor. The only other signature space is for the employee. The form reflects that the orientation covers routine familiarization with Respondent's operation facilities and general rules. There is no evidence the employees were told Carpenter was a supervisor. It is well settled that the mere denomination of an employee as a "supervisor" does not make him or her a statutory supervisor,¹⁴ and the evidence does not show that this orientation function was either regular or frequent. Without more, all that can be deduced from this activity of Carpenter was that she routinely instructed some employees regarding the items listed on the form. This conduct fits none of the criteria determinative of supervisory status, and certainly does not involve the use of independent judgment. Moreover, Paul J. Lemay, Respondent's administrator, credibly testified that orientation of new employees may be conducted by any longtime employee, not necessarily a supervisor.

Relying on Lukasek's testimony, the General Counsel points out that she recommended employees for raises and they later got them. There is, however, no other evidence indicating that her recommendation was relied on in granting the raises. Accordingly, I cannot and do not find that her recommendations were 'effective recommendations' of the type contemplated in Section 2(11) of the Act.

¹⁴ *Bowne of Houston* supra *Marukyo USA Inc* 268 NLRB 1102 (1984). *Columbia Engineers International* 249 NLRB 1023 (1980). Similarly, the mere fact that Assistant Administrator Rizzo referred to Lukasek as a cook supervisor at an unemployment hearing after her discharge does not of itself make her a supervisor.

¹² Emphasis added.

¹³ *Bowne of Houston* 280 NLRB 1222, 1223 (1986).

The cook on each shift works with two or three dietary aides. When the food service supervisor is on the job it is highly unlikely that the cook performs any supervisory functions because the presence of two supervisors for two or three employees presents an obviously unrealistic ratio. It is what happens when the food service supervisor is not working that must be considered. Mark Stanikmas was the food service supervisor during the events before me. He did not work on weekends or from 5 to 7 a.m. or 9 a.m. during the workweek, and was not always in the kitchen at other times. In his absence, the cook on duty was in charge of the kitchen. Stanikmas testified that the cook on the night shift told the dietary aides every evening what job each would do that shift. The dietary aides on the 7 a.m. to 3:30 p.m. shift had specific duties to perform in accordance with the following schedule, and it is probable the other shifts had similar schedules.

DEFINED JOB DUTIES

7 AM—3 30 PM DIETARY AIDE

- 7 00 Serve Breakfast
 - 7 45 Clean and put away breakfast pots and pans
 - 8 15 Scrape dishes and work "Dirty Side" of dishwasher
 - 9 30 Take trash out and reline trash containers
 - 9 45 Sweep the entire floor
 - 10 00 Mop up any spills on the kitchen floor
 - 10 15 Coffee break
 - 10 30 Bag roll and butter
 - 11 00 Help cook remove plates from heaters and stack beside steamtable
 - 11 15 Serve Lunch
 - 11 50 Wipe down service line
 - 12 00 Lunch break
 - 12 30 Work "Dirty Side" of dishwasher
 - 1 00 Catch and help scrape dishes
Set up trays with placemats and napkins
 - 1 30 Take trash out and reline trash containers
 - 1 45 Sweep and mop entire floor
 - 2 45 Place plate covers on the food trucks
 - 3 00 Check cleaning list for daily assignment
 - 3 30 Check with Food Service Supervisor and go home
- **** Changes may be made as needed ****

Exactly what variation in these scheduled duties might be affected by the cook's job assignments is not clear, but that the cook is in the absence of the food service supervisor, in complete charge of the kitchen and does make work assignments to the dietary aides at the beginning of the shift, and change those assignments during the shift as the need arises is apparent from the testimony of Lemay, Stanikmas, Lukasek, and Keith Carlson, a former dietary aide. According to Stanikmas, all cooks had equal authority. Lemay testified that all cooks had the same duties.

According to Lemay, the cook has no authority to discipline when the food services supervisor is on the premises but in the absence of the food services supervisor has the right to send a disruptive employee home until

that employee can meet with the food services supervisor for proper handling of discipline. In the case of being late to work or taking too long a break, the cook, says Lemay, lets the offending employee work but notifies the food services supervisor. Director of Food Services Norman Landry's testimony supports that of Lemay as does that of Assistant Administrator Joseph Rizzo. Stanikmas testified, and Lukasek agrees that he gave the cooks instruction to issue warnings to employees if a problem arose in his absence, and he would decide on his return whether to place the warning in the employee's personnel file. Lukasek credibly testified that Stanikmas instructed her in mid-September to discipline dietary aides Mora and Aleman, and to call him on the phone if she could not handle it. She also reports that, in October and November, he told her to call him on the phone if a problem with employees arose and then write the incident down for his review on the following Monday when he would take any necessary action. He also told her that if she did not want to write a report on the incident she should tell them to punch out and go home.

In accord with Stanikmas' instruction, and after calling him at home, Joanne Kerswell, a cook, prepared a first warning notice listing absence, conduct, attitude, lack of courtesy, and lack of cooperation for employee Chris Evers on 28 December. She wrote the following on the warning notice:

Suspension until [sic] conference with FSS in regards to not calling in on 12/28/85. Lack of cooperation, poor attitude when we called him at his home. Feel that his other job means more to him. Chris does not seem to know the responsibility [sic] that he took when he accepted employment in a health care facility.

It is the responsibility of a cook to try to contact someone to come to work if not enough people show up. This is not something that frequently occurs but did in this instance. The conduct of Kerswell in preparing the warning, suspending Evers, and calling Stanikmas accords with the instructions that Lukasek acknowledges she and other cooks received from Stanikmas.

Reviewing the evidence regarding the status of cooks, I first note that the ratio of supervisors to employees is probative, but not in itself determinative of supervisory status, or lack of it.¹⁵ Second, the orientation of new employees has not been shown to be a solely supervisory function, and plainly involves no use of independent judgment by the individual conducting the orientation. Third, there is no evidence that other than a higher wage the cook receives any benefits not available to rank and file employees.

Regarding assignment and reassignment of dietary aides during the work shift, their worktime is closely scheduled, almost to the minute. Any deviation therefrom is, I am convinced, dictated by the need to perform a particular duty necessary to the preparation of the menu for that shift at a particular time. There is no evidence that the dietary aides were required to perform

¹⁵ *Washington Post Co.* 254 NLRB 168, 193 (1981).

any duties other than those outlined in their work description. The cook's responsibilities are to see that the menu is properly and timely prepared and that other routine duties in the kitchen are properly carried out. There is no showing the cook has any discretion to vary the prescribed menu for patients or to add to or detract from the duties of the dietary aides. All the cook does is move the aides from one task to another as the work requires at any particular time. The work needed determines the assignment. The dietary aides are familiar with their regular duties and require neither instruction nor close supervision while performing them. That the cook may have them either alter the order in which they perform them, or add additional duties necessary to successful completion of the overall mission of the kitchen only indicates that the cook essentially functions as a lead person charged with seeing the necessary work determined by the preset menu and standing work instructions is timely and efficiently done. This does not constitute the responsible direction or assignment of employees using independent judgment.¹⁶

Turning to the cook's duty of preparing reports of poor work performance and disruptive conduct, and, if necessary, sending an employee home, there is no significant element of independent judgment involved. The cooks were acting in conformity with Stanikmas specific instructions. Lukasek received a warning for not writing up employee misconduct. A clearer demonstration of lack of discretion is difficult to imagine.¹⁷ The authority to decide what, if any, discipline is necessary resides in Stanikmas.

Every action that the evidence shows the cooks were required to take relative to observing and writing up incidents and even, in the case of Evers, suspending employees was routine compliance with express instructions from Stanikmas and allowed the cooks little discretionary leeway. That a cook may have elected to ignore certain offenses that the instructions would require her to record simply means that the cook refused to follow supervisory orders and therefore became herself¹⁸ a candidate for discipline.

After considering and reconsidering all the relevant evidence I am persuaded that the cooks have none of the authorities enumerated in Section 2(11) of the Act and are therefore not statutory supervisors. Accordingly I agree with Respondent and find that Stella Lukasek, Barbara Carpenter and Anna Webster were members of the appropriate unit on 23 and 24 September.

Adding Alberto Gonzalez, Barbara Carpenter, Stella Lukasek and Anna Webster to the 79 employees the parties have agreed on, there were 83 employees in the bargaining unit on 23 September, and there were 84 on 24 September when Sandra Bergeron became a unit member. The General Counsel entered 42 signed authorization cards into evidence. Respondent specifically challenges the cards bearing the names of Denise Gauvin,

Michael O Connor, Catherine Flaherty, Sara Flores, and Elba Herrera. With respect to Flaherty, Gauvin, and O Connor, Respondent contends that their cards are in valid authorizations because the solicitor Steven Flaherty, testified that he advised these three card signers that the purpose was to help Michael Yoffee get an election. The testimony of Steven Flaherty relied on by Respondent reads as follows:

MR HAYES: Okay. Did she [Gauvin] sign that in your presence?

THE WITNESS: No, she did not.

MR HAYES: But, she returned it directly to you?

THE WITNESS: Yes, she did.

MR HAYES: Had you asked her to sign the card?

THE WITNESS: I had informed her to fill it out and return it to me.

MR HAYES: In that context did you ask her to sign it?

THE WITNESS:

MR HAYES: Did you say anything to her about an election?

THE WITNESS: I just told her that was what Mike had to know to get—you know, to see if it was worth his efforts to get a union into Lincoln.

MR HAYES: Mike being?

THE WITNESS: Mike Yoffee.

MR HAYES: And what did you say, if anything, to your wife when you gave her the card?

THE WITNESS: More or less the same thing. I had met this guy at Lincoln—meaning Mike Yoffee, and that he was interested in starting a union at Lincoln Nursing Home.

MR HAYES: And, Mike O Connor?

THE WITNESS: The same thing.

Q [By Mr Griffin]: And when you gave the cards to each individual—General Counsel's 16 through 18—what did you say to each and everyone of them?

A: Well, I told them that it was Mike Yoffee's interest to get a union in, and that if they had any real questions to ask they had to talk to Mr Yoffee.

Q: In any of your conversations with any of these individuals, did you use the term election?

A: Yes, I told them that this would help Mike Yoffee to get an election in to Lincoln. It would show him that there was an interest of—you know, enough interest of getting—you know, an election going.

Flaherty later testified in relevant part as follows:

Q [Mr Yoffee]: Steve, what did you exactly say when you gave Cathy Flaherty the card?

A: I told her that I met you and that you were looking to see if it was worth your efforts to get a union into the nursing home and that if she wanted a union there that she would have to sign the card and give it back to me.

¹⁶ See e.g. *Plessey Materials Corp.* 263 NLRB 1392, 1395-1396 (1982); *Big T Food Store* 200 NLRB 409, 412 (1972); *Bowne of Houston* supra.

¹⁷ Whether the warning was discriminatorily issued as the complaint alleges has no effect on the obvious fact that the warning for not following Stanikmas instructions is evidence of no discretion.

¹⁸ All Respondent's cooks are female.

Q Now then—we are only talking about when you asked Cathy Flaherty to sign a card Okay?

A Yes

Q That is what we are talking about Did you say are you sure that you said anything about an election when you asked Cathy Flaherty to sign a card?

A I don't really recall about saying—you now, about the election I—you know, I might have

Q You say you do not recall—

A But I don't—

Q You do not recall—

A But I don't—

Q You do not recall—

JUDGE WOLFE Wait a minute now Let him finish

MR YOFFEE I am sorry

A (Witness, resuming) No, I just don't recall saying anything about an election It was—you know, I was telling people to see if he—you know, if it was worth your efforts to see—you know, to get a union into Lincoln, and if they would support a union, sign a card

Denise Brown (nee Gauvin) testified that she signed a card to join the union on 16 September after reading it, and that Flaherty said nothing to her about an election but just asked if she was interested in the Union According to Michael O'Connor, he signed an authorization card at Steven Flaherty's request on 12 September and Flaherty just talked about better pay you know pay for your uniforms and stuff like that it benefits every body and Flaherty said nothing about an election

The applicable rule is set forth in *NLRB v Gissel Packing Co* 395 U.S. 575 (1969), and is briefly summarized at pages 606 and 607 as follows

[W]e think it sufficient to point out that employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election We cannot agree that employees as a rule are too unsophisticated to be bound by what they sign unless expressly told that their act of signing represents something else

The Board has pointed out with the approval of the Supreme Court in *Gissel*¹⁹ that the controlling factor in cases such as the one before me is whether or not the totality of circumstances surrounding the card solicitation is such as to add up to an assurance to the card signer that his card will be used for no purpose other than to help get an election.²⁰ The cards signed by

these three employees are unambiguous authorizations for the Union to represent them The major question raised is whether Flaherty uttered the magic word election, and in what context he did if he did His testimony is somewhat confused and contradictory on the point, caused in part, I believe, by the fact three different lawyers interrogated him about it I got the distinct impression that Flaherty was honestly confused about whether he had said anything about an election There was no indication in his manner that he was trying to conceal or fabricate facts Brown (Gauvin) and O'Connor testified Flaherty said nothing to them about an election when he solicited them to sign union authorization cards Both were believable witnesses and are credited Brown says she signed to join the Union, and O'Connor says he signed for better pay and benefits Both intended to and did authorize the Union to represent them The evidence will not support a conclusion that these three card signers were directly or indirectly advised the cards would only be used to secure an election or did not mean the signer was authorizing the Union to represent him or her The three signed single purpose authorization cards are free from ambiguity and even if Flaherty did tell the signers that it would help Yoffee get an election in at Lincoln, this is not a ground for invalidating the cards *J P Stevens & Co* 244 NLRB 407 441 (1979) The cards are valid designations of the Union as the signers collective bargaining representative and should and will be counted in determining whether the Union attained a majority on 23 and/or 24 September

Respondent challenges the validity of the cards of Sara Flores and Elba Herrera Both are Spanish speaking employees In the case of Flores Respondent asserts the card bearing her name is invalid because the signature has not been authenticated Flores delivered the completed card to Yoffee but he did not see her fill it out or sign it In the absence of any evidence the signature is not that of Flores or is a forgery or that Yoffee's recital of how when, and from whom he received the card is false I find the card has been properly authenticated and should be counted *Photo Drive Up*, 267 NLRB 329 363 (1983) *J P Stevens & Co* 247 NLRB 420 490 (1980)

Regarding Herrera's card Respondent argues

Nor is the card of Elba Herrera valid it appearing that Elba Herrera does not understand English and there being no testimony except of a hearsay nature demonstrating that the employee understood the meaning of the card *Maximum Precision Metal Products*, 236 NLRB [1417] (1978) In addition Respondent was unable to test the validity of this card because Elba Herrera's daughter, the only person involved with this solicitation who read and spoke Spanish did not testify While the card may be admissible as a document Mr Yoffee received it is not lawfully authenticated *J P Stevens & Co* 244 NLRB [407] (1979)

Yoffee gave uncontroverted testimony, which I credit that he gave Elba Herrera a typed Spanish translation of a union leaflet with authorization card attached which (1) listed benefits to be gained by forming a union and

¹⁹ *Gissel* supra at 607

²⁰ *Levi Strauss & Co* 172 NLRB 732 733 at fn 7 (1968)

(2) solicited the reader to sign a union authorization card. Moreover, Herrera's daughter, Maria, acted as translator in reading the leaflet to her in Spanish, translating the card for her conveying Yoffee's message that the reason Elba Herrera was being asked to sign a card was to have a union at the nursing home, and in relaying Elba Herrera's reply to Yoffee that she understood why she was signing the card. She signed the card and returned it to Yoffee on 10 September. The General Counsel has shown that Elba Herrera signed a card designating the Union as her collective bargaining representative. On its face it appears valid. Respondent adduced no evidence that Elba Herrera was misled or did not understand what she was signing. Respondent's contention that the testimony showing Elba Herrera understood what the card meant is hearsay has little weight because the Board has the discretion to entertain hearsay²¹ and it is settled law that unobjected to hearsay is admissible and has probative value.²² The evidence preponderates in favor of a conclusion that Elba Herrera signed an authorization card on 10 September with knowledge that by so doing she was authorizing the Union to be her collective bargaining representative. I therefore find the card is a valid designation of the Union as her representative.

The remainder of the signed authorization cards were authenticated either by the testimony of the person signing or credible testimony of other witnesses who saw the cards being signed and/or received the signed card from the signer. These and the cards of Denise Gauvin, Michael O'Connor, Catherine Flaherty, Sara Flores, and Elba Herrera total 42, all signed on or before 23 September. A majority of the 83 unit employees on 23 September had therefore signed valid authorization cards for the Union by that date and the Union enjoyed majority status until Bergeron started to work on 24 September. Accordingly, I conclude and find that Yoffee's request, on behalf of the Union for recognition on 23 September was supported by a majority of the unit employees. I further conclude and find that the written request for recognition received by Respondent at about noon on 24 September was supported by the same majority inasmuch as Bergeron did not start to work and therefore become a unit member until 3:01 p.m. on 24 September.

C Knowledge of Union Activity

The General Counsel offers the testimony of employees Joan Perez, Steven Flaherty, and Keith Carlson as evidence that Respondent knew of the union activity prior to the issuance of the no access rule. Perez testified that during the week before the discharge of Sharon Mangini on 20 September she was talking to Charge Nurse Norma Gould about the Union and Gould said she had heard it was trying to get in. Gould then asked Perez if she had anything to do with it. After first denying she did, Perez said she had. Gould advised her that she had been told a couple of girls were involved and that Gould knew Yoffee was the head of it. Gould did

not testify. Inasmuch as I detected nothing questionable in her demeanor and her testimony is uncontroverted, Perez is credited on this conversation. Perez's admission of involvement coupled with Gould's knowledge that Sharon Mangini was Perez's roommate supports a suspicion that Mangini was one of the couple of girls referred to by Gould. That Respondent believed Perez and Mangini would likely be together in endeavors either commenced is evident from Connors' testimony below.

According to Flaherty, he heard Brenda Matier tell Gould before Matier's employment terminated on 18 September that she did not have to be harassed because she knew nothing about a union. Gould made no reply. Flaherty's uncontroverted testimony is credited.²³

Carlson testified that a day or two after an 11 September union meeting he was present when Mark Stanikmas, the food service supervisor, told Stella Lukasek the Union was trying to get in and that would be bad news for them. Lukasek made no response. Stanikmas then asked Carlson if he knew anything about the Union, and commented he must know something. Carlson replied he knew nothing. Lukasek did not testify regarding this conversation, although testifying at length on other matters. Stanikmas' version is that after Lemay sent letters to the employees advising the Union was trying to organize, he talked to Lukasek and Carlson. The conversation began with Lukasek asking his opinion. He replied that he was not for the Union but it was not his decision. He then asked Carlson if he had received his letter. Carlson said he had. To which Stanikmas commented that he had just heard it²⁴ had been going on for months, and asked if anybody knew what was going on. Both said they did not. Stanikmas explains that this conversation took place just after Norman Landry had told him why Maria Aleman and Adelaida Mora could not receive a raise and just after Respondent's counsel advised a department head meeting that the campaign had been going on for months. There is no company literature related to the union campaign before Yoffee's demand and Respondent decided not to give Aleman and Mora a raise a day or two after 23 September when Yoffee made his oral demand for recognition. Stanikmas is therefore asserting that the conversation with Carlson and Lukasek occurred on or about 24 or 25 September. The mere fact that Respondent's attorney may have opined after Yoffee's demand that the campaign had been going on for months without more impresses me as no more than speculation and does not establish knowledge by the Respondent of the campaign prior to Yoffee's recognition demand. There was little to choose between the testimonial demeanor of Carlson and Stanikmas on the matter. The evidence relating to the time of the incident does not preponderate in the General Counsel's favor and therefore does not show employer knowledge of union activity prior to 23 September.

²³ Respondent's motion to strike Flaherty's testimony as hearsay is denied. Flaherty testified to what he heard and it has probative weight because Matier's statement at the least alerted Gould to the possibility of a union presence.

²⁴ I construe it to mean the Union's organizing efforts.

²¹ *RJR Communications*, 248 NLRB 920, 921 (1980).

²² *NLRB v. Operating Engineers Local 12*, 413 F.2d 705, 707 (9th Cir. 1969); *Alvin J. Bari & Co.*, 236 NLRB 242 (1978).

The General Counsel's suggestion that Yoffee's union meetings prounion discussions and card solicitation at the facility while he was on duty, as well as his off duty visits to the premises to talk to employees about the Union constituted conduct that Respondent should have been aware of is not impressive even though Gould's characterization of Yoffee as the head of it shows Respondent was *in fact* aware of Yoffee's conduct.

The testimony of Kathryn Connors, Respondent's vice president, that she called Dobson at Chatham Massachusetts, on 23 September when Lemay told her of Yoffee's recognition demand is not credited. When telephone company records showed no calls from the nursing home to Chatham on 23 September Respondent recalled Connors as a witness. She then again insisted that she called Dobson that day but then testified that she really could not say that she possibly knew where he was on 23 September and that he possibly could have been in Westfield or Worcester that day. On cross examination, Connors testified that she could not say whether she called Chatham that day but probably might have and now does not recall if she earlier testified she had called Chatham. She adds that she is really not concerned where she called on 23 September. The fluctuations in testimony after her first and certain relation of a call to Dobson at Chatham on 23 September were so evasive and contrary to her earlier testimony that her entire testimony on the matter is incredible and will not support a finding that Connors first became aware of the Union's presence on 23 September. On the other hand, this testimony does not show she was aware of the Union prior to that date. In short her affirmative testimony is not credited but the infirmities in the testimony raise only a suspicion of prior knowledge.

Respondent's reasons for the discharge of Sharon Mangini on 20 September which is discussed in greater detail later in this decision are pretexts. The discharge occurred the day after she solicited support for the Union in Respondent's parking lot within the sight of Lemay and Director of Nursing Chris Zorn. Respondent has not shown Mangini would have been discharged in the absence of union activity. Respondent clearly opposes unionization of its employees. The strength of that opposition is revealed in Connors' remark in response to a question posed at an employee dinner on 19 November about why Respondent did not bargain with the Union that she did not negotiate with skunks. These facts give rise to a reasonable inference that Respondent on 19 September knew of Mangini's union activity.²⁵ This inference plus the credible testimony of Perez and Flaherty showing that Respondent's supervisor and agent Gould knew of union activity prior to 20 September and at least as early as 18 September warrants a finding that Respondent knew on 18 September that there was employee union activity afoot.

D Allegations of Interference Restraint and Coercion

The complaint with its abundant amendments alleges many violations of the Act. An examination of the allegations in the light of the credible evidence adduced re-

veals a generous mixture of valid and invalid contentions. The General Counsel generally contends there is a grand pattern to Respondent's conduct. Perhaps so but to discern what if any pattern exists one must first determine which allegation is valid and which is not. Accordingly what follows is an effort to sort out the melange presented by the complaint in a manner consistent with the evidence relating to each allegation.

1 The no solicitation rule

The following rule appears in Respondent's personnel manual which is distributed to employees. The rule has been in effect since March 1985 and was still in effect during the hearing in 1986.

Solicitations of any kind or the sale or distribution of material, etc other than specifically approved by the institution is prohibited.

The General Counsel and Respondent agree and I find the rule is too broad and presumptively invalid because it is an absolute prohibition of employee solicitation and/or distribution at all times and places.²⁶ Respondent argues however, that the defect in the rule was cured by the following question and answer in a document distributed by the Respondent to all employees during the Union's organizational campaign.

Q *What is the Lincoln policy on Union activity and discussion at the Home?*

A *The Company encourages discussion among employees whether staff or administration, on these matters. Such discussion should be avoided while on duty unless okayed by a licensed nurse or supervisor. At times when you are on break in a normal break area you are of course free to do as you wish in this regard.*

I do not agree with Respondent that this handout clarified the rule in the manual. It does not disavow the manual rule nor does it in any way modify or refer to the rule's prohibition of distribution. As the General Counsel points out all the distributed question and answer does is create an ambiguity which must be resolved against its creator.²⁷

Contrary to Respondent *East Bay Newspapers*²⁸ is not applicable. In that case the employer constructed a rule presumptively lawful under *Essex International*²⁹ which became unlawful when the Board adopted a new standard in *TRW*³⁰. East Bay then posted a new rule in accord with *TRW*. The old rule was presumptively valid when promulgated and the employer promptly clarified its rule to comport with the new standard in *TRW*. Respondent before me neither promulgated a new rule nor unambiguously clarified its existing rule.

²⁶ *Mesa Vista Hospital* 280 NLRB 298 (1986) *Our Way Inc* 268 NLRB 394 (1983)

²⁷ See e.g. *J C Penney Co* 266 NLRB 1223 (1983) and cases cited

²⁸ 263 NLRB 566 (1982)

²⁹ 211 NLRB 749 (1974)

³⁰ *TRW Bearings Division* 257 NLRB 442 (1981)

²⁵ Compare *Yaohan of California* 280 NLRB 268 (1986)

which continued in the personnel manual with at least the time of hearing

The presumption of invalidity has not been rebutted. The maintenance of the rule on and after 24 March 1985 interfered with restrained, and coerced employees in the exercise of the rights guaranteed them in Section 7 of the Act and violated Section 8(a)(1) of the Act³¹

2 The no access rule

Respondent implemented the following rule on 20 September and on that date posted it on an employee bulletin board and attached a copy to all employee timecards

IN ORDER TO PREVENT DISRUPTIONS IN THE OPERATION OF THE NURSING HOME, INTERFERENCE WITH RESIDENT CARE, AND INCONVENIENCE TO OUR RESIDENTS THE FOLLOWING RULE APPLIES TO VISITING DURING NON SCHEDULED WORKING HOURS

LINCOLN NURSING HOME DISCOURAGES THE USE OF ITS PREMISES DURING NON SCHEDULED WORK HOURS ANY EMPLOYEE FOUND ON THE PREMISES DURING HIS/HER NON SCHEDULED WORK TIME SHALL BE CAUSE FOR IMMEDIATE TERMINATION OF HIS/HER EMPLOYMENT

The complaint alleges the rule was promulgated and thereafter maintained in order to discourage union and protected concerted activity by Respondent's employees. Respondent contends that the rule is lawful under *GTE Lenkurt*³² and *Tri County Medical Center*³³ and is at most a de minimis matter requiring no remedy.

The Board in *Continental Bus Systems*³⁴ expressed the applicable rule of law in the following terms

In order to effectuate the policies of the Act a no access rule is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas (2) is clearly disseminated to all employees and (3) applies to off duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Except when justified by business reasons, a rule which denies off duty employees entry to parking lots, gates and other nonworking areas will be found invalid.

Respondent argues that its rule obviously does not apply to non patient areas such as the parking lot but applies to patient care areas. It is true that reading the second paragraph in context of the first as one must,³⁵ can result in a reasonable conclusion that the references to disruption in the facility's operation interference with resident care, and inconvenience to residents implies that

the rule is intended to bar visits within the home, not its surrounding premises. On the other hand one could equally reasonably conclude that exclusion from the premises refers to the parking lot and other nonresident care areas within and without the building including for instance the public coffeeshop. Where two reasonable interpretations may be drawn from the same document an ambiguity obviously exists. As above noted ambiguities are resolved against the promulgator of such a rule. The rule is invalid and violative of Section 8(a)(1) of the Act because it does not clearly limit access solely to patient care or other working areas as Respondent claims.

Respondent denies the promulgation of the rule was unlawfully motivated, and affirmatively asserts it had no knowledge of union activity on 20 September. Neither the denial nor the affirmative assertion is supported by the evidence. The organizational campaign had been going on for about 2 months when the rule issued. There was no prior no access rule. The Board has held that an employer change of policy coinciding with employee union activity warrants an inference of discriminatory motivation.³⁶ Knowledge of union activity prior to the issuance of the rule has been found, and the reasons advanced for the rule are not convincing.

Respondent contends that the no access rule was implemented because patients complained that two employees, one of them an off duty employee of Medical Resources, were kissing in the facility, and boyfriends congregated in the coffeeshop waiting to take employees home when their shift ended. Julie Stowell former personnel coordinator for Medical Resources which furnishes temporary nurses and nurses aides to nursing homes, testified that on or about 7 July she received a call from Chris Zorn who told her that Medical Resource employees Polasack and Shannon were hanging around together and kissing during working hours. Zorn asked that they not be scheduled on the same shift. In early August Zorn called and advised Stowell that even though not on the same shift Polasack was now coming in and visiting Shannon during his shift. Stowell talked to Polasack about the matter. Polasack left Medical Resources employment on 12 August. Zorn next called Stowell on 20 or 21 September and advised that 22 September would be Shannon's last day to work at Respondent's nursing home because he was making advances to Sharon Army. Shannon was not again referred to Respondent for work. There were no other complaints from Zorn or other Respondent officials. Stowell appeared to be a neutral witness with no particular interest in the outcome. She was straightforward and believable and impressed me as a confident and honest witness testifying truthfully to the best of her recollection. Her testimony is credited.

Zorn's expressed concerns had nothing to do with Respondent's employees except to the extent Shannon may have bothered nurses aide Army at her work. Lemay confirms that he had no reports prior to 20 September that Respondent's employees were entering the facility on off duty time that led to the no access rule. He relates

³¹ *J C Penney Co supra*

³² 204 NLRB 921 (1973)

³³ 222 NLRB 1089 (1976)

³⁴ 229 NLRB 1262 (1977)

³⁵ *Arch Beverage Corp* 140 NLRB 1385 (1963)

³⁶ *Hudson Oxygen Therapy Sales Co* 264 NLRB 61 72 (1982)

that Zorn told him on Tuesday or Wednesday before 20 September that some boyfriends had been waiting in the coffeeshop to take their girlfriends home and that this had been going on for a long time. According to Lemay, the kissing incident and the practice of waiting for girlfriends in the coffeeshop, which he first learned of a couple of days before 20 September, caused him to decide to have a no access rule.

According to Kathryn Connors, Respondent's vice president, Respondent's president Dobson instructed her a week or two prior to 20 September to have a no access rule prepared. She then, also a week or two before its publication, instructed Lemay to do it. Connors further avers reasons for the rule were nonemployee boyfriends waiting for their girlfriends who were pool employees provided by temporary employee suppliers and employees coming into the public coffeeshop during their off hours.

I agree with the General Counsel that the rule does not remedy the problems Respondent refers to. The kissing by Shannon and Polasack, the conduct of Shannon toward Army, boyfriends waiting to take their girlfriends home, all involve nonemployees with the exception that some of the girlfriends being picked up may have been Respondent's employees. Those being picked up clearly were leaving work and therefore not in violation of the rule. In short, Respondent's employees were guilty of no conduct so far as this record shows warranting the rule, and any problems caused by nonemployees would be unaffected by the rule. Moreover, Connors and Lemay gave inconsistent testimony regarding the reasons for the rule and when the need for a rule became evident. Respondent has demonstrated no logical or believable business reason for the no access rule. The reasons advanced are so threadbare as to warrant an adverse inference that the real reason is an unlawful one. This conclusion is reinforced by the timing of the rule within 2 or 3 days after the evidence shows it was aware of union activity. The General Counsel has shown union activity, knowledge of it by the Employer and a rule without reason coinciding with that activity. Respondent has not rebutted the prima facie case resulting from this evidence. Accordingly, the General Counsel has shown by a preponderance of the evidence that the no access rule was promulgated, published and maintained in violation of Section 8(a)(3) and (1) of the Act because its purpose was to discourage employee union activity.

3 Respondent's campaign literature

The complaint alleges Respondent by leaflet of 18 October threatened its employees with loss of work and no wage and benefit increases if the Union became their representative. The leaflet reads as follows:

QUESTIONS AND ANSWERS

Q Isn't it a fact that Lincoln is unwilling to pay union wages and that's the only reason Lincoln doesn't want the Union?

A NO. In order to get good workers, we compete against some health care organizations that are unionized and pay union wages. Please compare our

wages with other health care employers in the area—both union and non union. Lincoln pays as much as or better than, many union places. Don't let anyone fool you: unions have plenty of members who are making less money than you are. Unions also have lots of people on layoffs.

We are not afraid to pay you more money. We do as well as we can, and that's at least as good as anyone else. Bringing a union in here won't change what we can afford to pay. All it will do is take 2% off the top of your pay for the union.

Q Then what's the real Company concern?

A Unions cost Nursing Homes a lot of money in other ways. Union work rules and job classifications that strangle patient care and slow down performance so that our costs are raised up—forcing our prices up—and we lose clients.

The fact—pure and simple—is that if the home loses money it makes it impossible to improve wages and benefits and maintain a satisfied employee work force.

I don't think you'll be well advised to spend over \$200 per year in dues and other costs to hire a Steelworkers Union agent to negotiate for you. All you get for that money is union discipline, union rules, union fines, union picket duty, and all the other stuff of a union movement that more and more Americans are leaving each year.

One would have to strain mightily to find a threat in this document. This is nothing more than permissible campaign propaganda easily recognizable as such by the employees.

On 11 November Respondent issued a letter³⁷ which according to the General Counsel, forecasted a future full of continued infighting, confrontation and the real possibility of disaster with this Union. Without the Union Respondent predicated an atmosphere which included a successful home with employees who felt secure that

³⁷ The letter reads in its entirety as follows:

Dear Employee,

You no doubt are as happy as I that this is the last campaign letter. There are just a few things I want to say.

First, make sure you vote. Even if you are not planning to stay long at Lincoln, the American democratic process relies on all of you to make the choice on the merits of the arguments. Second, be fair to Broad Reach and the current management. You've certainly made your concerns known—now should be a time for efforts at healing and reconciliation, not divorce.

Third, be fair to yourselves. Are you doing yourselves a favor by mixing yourselves and this home up with a union that is not competent to make things better?

Please look ahead six months. Lincoln has a future full of continued infighting, confrontation and the real possibility of disaster with this union. Without the union, Lincoln's people can talk and work together—without paying lawyers and others—to achieve what we all want: a successful home providing quality care by employees who feel secure that their employment interests are satisfied.

In your own interest—and in the interest of Lincoln Nursing Home—please Vote next Wednesday.

Sincerely,
LINCOLN NURSING HOME
/s/ Paul J Lemay
Paul J Lemay
Administrator

their employment interests are satisfied. The General Counsel is correct but, in two words, So what? As with the 18 October leaflet, the letter is pure propaganda but no threat or promise. I find nothing in the letter reasonably tending to interfere with or restrain or coerce employees in the exercise of Section 7 rights.

The date is not certain but at some time during the pre-election campaign Respondent's president William A. Dobson issued a document to employees reading as follows:

THE ONLY PROMISES I LL MAKE

One After the election I will permit no harassment or reprisals against employees on the basis of their Union activity.

Two As soon as the law permits it, I will have the problems at Lincoln addressed and recommendations for action completed.

Three As a non union home Lincoln will have equal status with the other non union homes in the Broad Reach family and that will include the continuation of investment of more money into the facility and its employees.

The complaint alleges promises two and three threaten employees with the futility of collective bargaining. The General Counsel's brief addresses only promise three which the General Counsel contends contains an implication that with a union the continued investment referred to would not be forthcoming. I agree and find that promise violated Section 8(a)(1) of the Act. Promise two is not a violation of the Act.

The complaint further alleges:

In an undated leaflet entitled "Twelve ways a union can get into your pocket" and distributed to employees in the nursing home between September 26 and November 20, 1985 Respondent threatened employees with the inevitability of a strike by stating:

Unions start with U. U do the paying. U do the striking. U do the suffering. U do the union's work. U do the picketing. It's U. U! but U don't have to do the above to keep what U have now.

UnionS end with S. S means strike. S means suffering. S means sadness. S means scalawag. S means scandalous. S means sabotage. S means [sic] sacrifice. S means Scuffle. S means Secret—Yes this is the end to uNiOnS.

This allegation is clearly without merit. There is no threat in the quoted language and the leaflet from which it was excerpted is likewise threat free.

During the election campaign Respondent also issued the following questions and answers to employees:

Q What is the Lincoln policy on Union activity and discussion at the Home?

A The Company encourages discussion among employees, whether staff or administration on these matters. Such discussion should be avoided while on duty unless okayed by a licensed nurse or supervisor.

At times when you are on break in a normal break area you are of course free to do as you wish in this regard.

Q Why does the Company encourage discussion?

A Since the consequences of making the Company a Steelworker Shop are fundamental and serious and since you alone can decide, by secret ballot, we hope you will give serious consideration to the decision.

Q Does the company believe that its pro union employees are doing this for non serious reasons? Does the Company believe there are not serious problems at Lincoln?

A Of course not. Obviously there are problems here as there are everywhere. And clearly some of them are very serious. But the problems should be addressed and treated, not made greater by hanging the dead weight of the Steelworkers around the neck of the Lincoln Home that has been improving itself while struggling to remain viable.

Q Why should employees think things will get better if they vote against the union?

A Things have been getting better in some areas. This past year the Company spent hundreds of thousands of dollars improving the facility. There have been substantial increases in wages. There have been changes in benefits designed to give employees more choice in how the available money is spent. The Broad Reach group of homes is growing and if Lincoln remains a viable part of it there should be improvements—and the money to pay for them—in all areas.

Q Why should we believe that since many of us believe that there have been a lot of changes for the worse?

A Broad Reach has a track record at other places that you can examine. A company that isn't interested in running a good home doesn't invest heavily into it as we have done. The Steelworkers have put hundreds of thousands of their members and numerous companies out of business by making the business economically not viable. Broad Reach on the other hand can't succeed unless it runs a good facility with quality patient care provided by competent and dedicated employees. We know the job is not finished and that a lot needs to be done. But the Steelworkers might only hinder it or end it. And one other reason why you should believe the Company is this: you can always bring a union in later and no one knows that better than we do.

QUESTION How can the Union being here hurt us?

ANSWER Lots of ways. Here's nine.

1 It hurts to pay them so much money every year.

2 It hurts to have to answer to the union steward for everything you do.

3 It hurts to try to understand and live by all the union work rules.

4 It hurts to belong to a group that is divided, hostile, militant and aggressive most of the time.

5 It *hurts* to go on strike and lose pay, medical insurance and perhaps even your job

6 It *hurts* to see your company *lose its viability* due to the constant costs of having a union, and then to see your jobs lost or sold to people who might have no growth plans and simply 'milk' the facility

7 It *hurts* to see *patients leave* for our non union competitors because customers don't want to be caught in the middle of the *slowdowns strikes job actions or other games unions play*

8 It *hurts* to see something that was just getting turned around get *smothered* by the *deadly steel grip* of factory union management collective bargaining

9 It *hurts* to always be in *doubt about the future*

Give yourself a chance

Give Lincoln a chance

Vote *NO*

The first four groups of questions and answers contain no element of threat or promise of benefits. The nine enumerated answers, viewed in the light of the question, are statements of possibilities, not probabilities. Respondent seems not to be saying it will do something adverse to employee interests, but is saying these various possibilities exist and may happen. This is legitimate campaign propaganda and not violative of Section 8(a)(1) of the Act.

4 Respondent's 30 April 1986 questionnaire

On 30 April 1986, Administrator Lemay directed the following internal memorandum with appended questionnaire to all employees

[The Memorandum]

As you may know in less than two weeks the Labor Board will hold a hearing on the union initiated charges that various objectionable and unfair conduct took place during the recent election process. It appears that you may be called as a witness to testify at hearing.

Naturally the Company wants to be as prepared for the hearing as possible. So our law firm and particularly Dick Hayes or Jo Ann Davis, would like to meet with you at some agreeable time during the next week or ten days to inquire as to your recollections. You will be entitled to ask anything you wish about your rights and what to expect at the hearing.

You will not be required to meet with the lawyer and if you decline we promise that there will be no reprisals for that decision. But we do hope you'll cooperate. By the way, you can meet with the lawyer and still decline to discuss certain things, if you wish, and you can terminate the interview whenever you wish again, without fear of penalty.

We'd appreciate your answers to the two questions on the enclosed form at this time.

Please give the form to your supervisor or send it back to me. You may keep this letter as your guarantee of fair treatment.

[The Questionnaire]

RETURN TO Mr Lemay

A Have you made a written statement of any kind dealing with your recollections?

Circle One YES NO

B Are you willing to meet with a representative of our law firm to discuss this case?

Circle One YES NO

Print Name Here _____

The General Counsel is correct that although Respondent made the interview with its attorneys voluntary, and guaranteed no reprisals for declining to meet or discuss certain items, Respondent did not advise employees the completion and return of the questionnaire was anything but required, or that reprisals would not be visited on employees failing to return the questionnaire. I also agree with the General Counsel that the reference to a statement could only mean one given to the NLRB. Nonetheless, part A of the questionnaire does not ask the employee to surrender the statement but merely asks if a statement was made. The Board has long held that this question by itself is not coercive,³⁸ and I therefore find it did not violate Section 8(a)(1) of the Act as alleged.

5 Conduct of Mel Law, maintenance supervisor

Donna Hogan gave uncontroverted testimony that, about 3 weeks before 20 November, she asked Mel Law what he thought about the Union Law. Law replied that Dobson Respondent's owner could do a lot of things including closing, selling, or boarding up the facility. Law continued that he was not trying to tell Hogan how to vote and this was just his opinion. He added that he was a union man all his life and just because a union says they will try to get employees more money that does not mean they will credit Hogan. All we have here is a solicitation and receipt of an opinion. Law's comments do not purport to threaten actions by Dobson nor do they constitute a threat by Law. Hogan asked for his opinion and got it. Regarding what Dobson could do Law's comments are pure blue sky speculation bereft of any threatening aspect. The remainder of his statement is obvious personal opinion and noncoercive. Law's statements did not violate Section 8(a)(1) of the Act. Regardless of what Hogan may have believed they meant, the test of Law's comments is whether they had a reasonable tendency in the circumstances to interfere with, restrain or coerce employees in the exercise of statutory rights. I conclude and find they did not.

³⁸ *Bishop & Malco Inc* 159 NLRB 1159 1161 (1966) *Korwall Corp of Indiana* 238 NLRB 88 90 (1978) *Conkle Funeral Home* 266 NLRB 295 301 (1983)

6 Conduct of Jane Gibree, supervisor³⁹

Mary Charbonneau, an employee in Respondent's laundry room, asserts that in mid November during a conversation with Gibree in the presence of employee Kathy Flaherty, who did not testify Gibree was talking about Mr Dobson saying that if he got a union in there, he would just sell the facility, transfer it to something else or sell it' Charbonneau remembers nothing else Gibree said Gibree did not testify Charbonneau had a poor memory, was uncertain, and was overall not an impressive witness Nevertheless Charbonneau's uncontested testimony must be given weight Having weighed it, I am not overly impressed but the evidence is sufficient to warrant a prima facie un rebutted case that Gibree made statements reasonably conveying that Dobson would dispose of the facility if the Union was successful in its organizing This was sufficiently ominous to impress on the listener his or her job would be at hazard if the Union won, and accordingly must be found to have reasonably tended to interfere with, restrain, and coerce employees in violation of Section 8(a)(1) of the Act

Charbonneau did not testify that Gibree told her Dobson would not negotiate with the Union The General Counsel cites Charbonneau's pretrial affidavit as the evidence that Gibree made such a statement Charbonneau's affidavit was entered into evidence by the General Counsel for the purpose of showing the context of an excerpt from the affidavit referring to comments by Francis Rogers which Charbonneau read aloud on cross examination The affidavit was not used on cross examination with regard to Gibree's alleged report of Dobson's statements Accordingly I give no weight to this un cross examined extract from an ex parte document proffered for a reason entirely different from that for which the General Counsel now seeks to use it

7 Conduct of Norma Gould charge nurse

On 20 November Delia Rodriguez⁴⁰ asked Gould if it was true Dobson had said the doors were going to be closed if the Union came in Gould answered yes Whether Dobson made such a statement is immaterial Rodriguez had no way to ascertain the truth of Gould's response, and was entitled to and probably did rely on it Gould's response is imputable to Respondent, and threatened employees with plant closure if they selected the Union to represent them Gould's answer had an obvious tendency to restrain and coerce employees from engaging in union activity and therefore violated Section 8(a)(1) of the Act⁴¹

³⁹ Although Charbonneau refers to this supervisor only as Jane does not know her last name does not know her job duties or whether she is a nurse and after first testifying that Jane said she was a supervisor only believes Jane was a night supervisor because one of the nurses so told her Respondent had no difficulty when writing its posttrial brief in recognizing that the complaint allegation pertained to admitted Supervisor Jane Gibree I agree with Respondent that Charbonneau was referring to Gibree

⁴⁰ Gould did not testify The facts recited rest on the un rebutted and credited testimony of Rodriguez

⁴¹ *Petersburg Mfg Co* 233 NLRB 1236 (1977)

8 Conduct of Francis Rogers, supervisor

Mary Charbonneau credibly testified that⁴² on the evening of 18 November Rogers met with employees in the dining room and told them that if the Union got in Respondent's employees would have a hard time getting work elsewhere because they came from a union shop This does not impress me as very strong stuff, but it is probably fair to conclude Rogers comments would predictably have a dampening effect on prouion ardor and inhibit union activity Accordingly, Roger's statement violated Section 8(a)(1) of the Act

9 Conduct of Ann Lavellee, staff development coordinator, and Chris Zorn, director of nurses

The whole of the General Counsel's evidence in support of the allegations that Lavellee and Zorn "told employees that Respondent would close its doors if the Union got in and told employees that Owner William Dobson had said the doors would be closed if the Union got in and that he'd find other places for the patients, is the following testimony of Nurses Aide Delia Rodriguez in relevant part

Q During the course of the union campaign, did you attend any meetings with Chris Zorn and Ann Lavellee [sic]?

A Yes we did

Q How many meetings?

A Several of them

Q What period of time?

A What do you mean?

Q When did they start having the meetings?

A They started coming up when they found out that the union was trying to come in

Q Do you recall at any of these meeting [sic] what specifically, was said?

A Yes

Q Do you remember which meeting?

A I can't tell you because we had several I can't tell you which

Q Okay What generally was said in any of these meetings?

A Well they talked about the union about how the union—they say they promise and promise and never keep their promises and that the dues and once you leave a union, if Lincoln Nursing Home had a union and you left the place, that you still in the union

Q Did you ask any questions at these meetings?

A Yes, I did

Q What questions did you ask?

A I asked—

MR HAYES Can I ask that the time frame be set?

THE WITNESS I know the meetings were—one was held in the morning, one was in the afternoon and the other was in the morning I can't tell you what times

⁴² Rogers did not testify

Q (Mr Griffin, resuming) At what meeting, first, second or third did you ask a question?

A The first meeting

Q Okay What question did you ask?

A I asked Ann Levellee [sic] what would happen if the union did come in, and the reply was that Dobson could close the doors of the nursing home and I told her what would happen to the patients They said that they would find temporary shelter for them

A Was that the end of the question or conversation or did you follow it up with any questions?

A No

Q At any other meeting did you ask a question?

A At the other meetings, I still asked the same question that I just asked

Q Did they give you the same response?

A Yes they did

According to Lavallee she and Zorn conducted meetings with nurses aides twice a week for about 6 weeks commencing the week of 7 October Attendance was not mandatory She recalls in considerable detail what was said at various meetings, including responses to questions and asserts that it was common at these meetings for someone to report a rumor that Dobson was going to close the doors Lavallee replied to this report/question that it was one of Dobson's options to close the doors if he chose to in the event of a strike or financial difficulty for the Company Employees then asked if Dobson would close the doors and move patients out To which she repeated that if there were strike or financial difficulty Dobson was the owner and had the option to do so as he wished

Lavallee's version is credited because she was more certain detailed and believable in her testimony than Rodriguez In short Lavallee's testimony had the ring of truth an overused but accurate description in this instance This is not a case of Respondent predicating its options on the Union's success⁴³ nor can Lavallee's remarks be fairly interpreted as a prediction of plant closure in response to unionization⁴⁴ Lavallee gave an honest recitation of Respondent's lawful options as spelled out in Supreme Court decisions⁴⁵ It may have been unsettling to employees to learn these options were available to Respondent but the test is not what they thought of Lavallee's statements but whether those statements expressly or implicitly threatened them with plant closure if they selected the Union to represent them The comments of Lavallee were not threatening and did not violate Section 8(a)(1) of the Act

10 Conduct of Food Service Supervisor Mark Stanikmas on 24 or 25 September

I have earlier found in section C of this decision headed *Knowledge of Union Activity*, that Stanikmas asked Carlson and Lukasek on 24 or 25 September, if they

knew anything about the union campaign They both said they did not Stanikmas inquiry seems to have been purely personal curiosity for no unlawful purpose, was general in nature implied no threat, had no coercive thrust and did not violate Section 8(a)(1) of the Act

11 Statements by William Dobson, Respondent's owner

The General Counsel contends that Dobson made statements to employees on 18, 19 and 20 November that threatened them with the futility of collective bargaining The 18 November statements complained of were contained in a speech to employees The parties stipulated to an accurate transcription of the speech Dobson's statements were in general clearly permissible expressions of opinion containing no threat or promise The only questionable comments are contained in the following extract from the speech

Obviously I think the Union will destroy what we built, and will be very detrimental to us providing quality health care for patients Every nursing home experience in the country that has had a union has shown that the facility becomes less financially sound and less of a place to work and less of a place for patients to come and have care and dignity I have to tell you that since we bought Lincoln Nursing Home, whether you realize it or not, Lincoln is the only nursing home of four that we own that is losing money We have lost a tremendous amount of money last year and have had a slight improvement this year I would be very happy to open the books to anybody that thinks that we have any money to burn in this facility We have not made one dime or taken one dime Every amount of money that has been spent here are improvements which to date, for everybody that has not been here since March 1 is almost \$223 000 00 has come from the profits at the other nursing homes and my ability to borrow money from banks Lincoln has not made dime one I can't tell you exactly what will happen if the union comes in because the law doesn't allow me to be specific but I can tell you some options that I would have Lincoln obviously would not be treated like a full fledged member of Broad Reach Health Care Services We would question very much any further investments to improve the facility If Lincoln needs more money than it earns, which it does as of date this year it has needed over \$100 000 00 that was as of June 30 We don't know what it is as of this date We have options that we consider we can consider Obviously, we can sell it Secondly we can close the nursing home Thirdly we can change the type of care and type of business that is carried on in the facility Or do any other number of things with the building that we want that we have an option to do That is not our desire Our desire is to continue improving the nursing home and giving the best patient care possible in the Worcester area

⁴³ Compare *St John's Construction Corp* 258 NLRB 471 476 (1981)

⁴⁴ Compare *Diner's Drive In* 280 NLRB 971 (1986)

⁴⁵ *Textile Workers v Darlington Co* 380 U.S. 263 (1965) *First National Maintenance Corp v NLRB* 452 U.S. 666 (1981) *American Ship Building Co v NLRB* 380 U.S. 300 (1965)

This excerpt delivered a rather ominous message carefully surrounded by permissible statements and couched in terms of possibilities except for the remark that the facility would no longer be treated as an equal member of the parent corporation family of nursing homes. What this portion of the speech says is that the presence of the Union will cause the facility to be less sound financially than it currently is, that it currently is losing money and being supported by income from the other homes that the Union's success would mean that Lincoln would be treated differently than before and would probably not continue to receive funds for facility improvement and if Lincoln continues to be a loser financially the Respondent can sell close or change the business. Although cleverly phrased this collection of comments amounts to a not too subtle threat to stop trying to resuscitate Lincoln, let it fail and either go out of the business or change it if the Union wins collective bargaining rights. This, in my view, violates Section 8(a)(1) of the Act because it is deliberately devised and reasonably calculated to coerce Respondent's employees into withholding their vote from the Union.

On 19 November, the night before the representation election, Respondent gave a dinner replete with door prizes for its employees. Attendance was voluntary. Delia Rodriguez, who was sitting at a table with Joan Perez, testified that Dobson gave a speech which she does not remember. Then she asked Norma Gould why the Company did not negotiate with the Union. Gould then called Kathryn Connors, Respondent's vice president to the table. Connors replied to Rodriguez's question with the comment that (Connors) did not negotiate with skunks. Shortly thereafter, Rodriguez relates Dobson came over and asked Rodriguez and Perez if everything was all right. They answered that it was. Then according to Rodriguez, she asked him if they would get more money if the Union did not get in to which Dobson replied "sooner than the union will." Rodriguez modified her testimony slightly on cross examination to reflect that she asked Dobson if he was going to give them money if the Union did not come in and he said "faster than the union will."

Dobson believes he talked to Rodriguez who asked whether there would be more money if the Union lost the election. He further believes that he told Rodriguez and Perez as he told everyone he talked to at the dinner that Respondent was spending a lot of money on the campaign and the faster we could get the union situation behind them the better off they would all be not only in terms of money but working conditions and so forth. Dobson specifically denies saying that employees would get wage and working condition improvements faster after the union campaign was over.

Perez, whose testimony on this 19 November incident would have been of considerable help in resolving the one on one testimony of the other two participants Dobson and Rodriguez, did not testify about this incident even though testifying at some length on other matters.

Rodriguez was still an employee of Respondent when she testified and was not likely to be intentionally testify

ing falsely against her Employer⁴⁶ but her failure to remember anything Dobson said during the speech other than the remarks she reports does not speak well for the reliability of her memory. Dobson's version is consistent with the content of his speech of 18 November and he also impressed me as a witness not wantonly fabricating. Considering that it is a common thing for a listener to retain a perception of a speaker's meaning rather than a verbatim recollection and that the passage of time in this case 6 months, often has a dimming effect on memory, I believe it most probable that what we have from Dobson is a reasonably accurate relation of what he said to Perez and Rodriguez, and what we have from Rodriguez is her perception of what Dobson meant. Accordingly, I credit Dobson's version as the more likely to be accurate in the circumstances but I further find that telling employees they would be better off in terms of money and working conditions when the union situation is behind them fairly implies an unlawful promise of better wages and working conditions as a reward for avoiding union representation. Such comments by the owner have a reasonable tendency to interfere with and restrain employees in the exercise of their Section 7 rights, and violate Section 8(a)(1) of the Act.

In another one on one confrontation, the General Counsel presents Carol Tubman, employed by Respondent as a licensed practical nurse from October 1985 to December 1985 to testify about Dobson's statements during a meeting held by him with all the nurses on duty on 20 November. Respondent presents Dobson.

Dobson recalled that he heard on the morning of 20 November election day that some nurses⁴⁷ were so concerned about the possibility of union success that they were talking about leaving. He therefore called all the nurses working together at about 3 p.m. in order to allay their fears. Attendance was voluntary. Thus far Dobson's testimony is uncontroverted supported by Tubman's testimony that a stated purpose of the meeting was to allay fears and credited. The two differ on the content of Dobson's comments to the nurses. Dobson denied telling the nurses that if the Union won he would close two floors, get rid of all unlicensed personnel and operate one floor with licensed personnel. He also denied telling anyone the nursing home would close if the Union won the election. The nurses are the only licensed personnel employed by Respondent. When called as an adverse witness by the General Counsel Dobson related that he told the nurses that even if the Union got in and went on strike Respondent had several options it could pursue one of which was to reduce the patient load and handle the patients with the licensed personnel, i.e. the nurses. Called as a witness by Respondent Dobson expanded on his earlier testimony by explaining that he informed the nurses their jobs would not be jeopardized even if the Union won and went on strike because Respondent would reduce its patient census, continue operating with licensed personnel who were not part of the bargaining unit and probably reduce the operation to

⁴⁶ See e.g. *Unarco Industries*, 197 NLRB 489, 491 (1972).

⁴⁷ Nurses were not included in the bargaining unit covered by Case 1-RC-18602.

one unit on the second floor. He denied telling anyone he would close the doors.

Tubman believed that the meeting started about 1 p.m., and testified that Dobson said that if the Union were voted in he would like to fill up a skilled nursing unit on the second floor, ship out the patients in excess of the number that could be served on the second floor, run the second floor with licensed personnel, and lay off the rest of the employees. Tubman insisted that Dobson said he would absolutely not deal with a union. She did not recall Dobson saying anything about a strike. Tubman stated that all she really remembered of the approximately half-hour meeting is that Dobson said he would not deal with a union and would run the second floor with licensed personnel. She explained that what she remembered is clear in her memory because she disagreed with the idea that someone would not deal with a union.

After leaving the meeting, Tubman met Perez and Rodriguez who had already voted. Perez thought the meeting was in the morning. Rodriguez placed it around noon. One or both of them asked Tubman what had gone on in the nurses' meeting. Tubman told them either that Dobson had said Respondent would close down the place if the Union got in (Perez version) or he said if the Union came in that day the doors would be closed (Rodriguez version). Whatever version is accurate the message is the same: a union win in the election would result in closure of the facility. I credit the two that Tubman delivered a message to that effect. Tubman did not testify about this conversation with Perez and Rodriguez which was proffered by the General Counsel as evidence of dissemination to employees of Dobson's statements.

What Tubman told Perez and Rodriguez is an exaggeration of what she testified was said by Dobson. Moreover, her claim of certain recollection of a very small portion of a half-hour exchange is questionable in the light of her professed inability to remember anything else of the meeting which is itself thrown in question by her concession that she was made aware at the meeting that one nurse was concerned enough to consider leaving and she was also aware that a purpose of the meeting was to allay some of the nurses' fears. On the whole, Dobson was the more impressive and believable witness. His testimony is more consistent and in tune with the other written releases and speeches by Respondent. I credit Dobson's testimony and find he did not on 20 November threaten employees with plant closure, futility of bargaining, inevitability of strikes, or anything else unlawful, and did not violate Section 8(a)(1) of the Act.

12 Some conduct of Administrator Paul J. Lemay

Keith Carlson gave uncontroverted and credited testimony that in early October he overheard Lemay tell Stanikmas he's in with the Union. Stanikmas should watch out for him. Lemay did not mention Carlson's name but the two were looking at him during the conversation. The General Counsel alleges that this conduct of Lemay created the impression that Respondent had been engaging in surveillance of union activities and would continue to do so. Absent evidence to the contrary, I am persuaded Lemay was referring to Carlson,

and knew he was listening in. Furthermore, it is settled law that even the unintentional communication to employees of unlawful statements violates the Act.⁴⁸ The Board's test for determining whether an impression of surveillance has been created is whether employees would reasonably conclude from the statement in question that their union activities had been placed under surveillance.⁴⁹ The record does not support a conclusion that Carlson's union activity was open and well known, and Carlson could reasonably conclude from the statements of Lemay that Respondent had been and would be conducting surveillance of his union activities. Accordingly, I find Lemay's statements created an impression of surveillance violative of Section 8(a)(1) of the Act.

Carlson further credibly testified that on 14 October, Lemay several times asked him what he knew about the Union, and added that he knew Carlson was opposed to the Union. The remark that Carlson was known to be anti-union strikes me, in view of Lemay's previous identification of Carlson as a union adherent, as both a rather obvious ploy to lull Carlson into cooperation and to elicit a response reflecting his true sentiments. No legitimate reason, or any colorable reason at all, has been shown by Respondent for Lemay's 14 October statements. The un rebutted evidence supports a finding that Lemay was soliciting an expression of Carlson's sympathies together with information about the Union's organizing campaign. Where the surrounding circumstances include (as here) hostility toward union activities as well as other unfair labor practices, all in the context of a vigorously contested union campaign, unwarranted inquiries into an individual's union sympathies and efforts to discover how a union campaign is progressing⁵⁰ each independently has a reasonable tendency to coerce the interrogated employee in the exercise of his Section 7 rights and therefore violates Section 8(a)(1) of the Act as Respondent did here.

13 The discharge of Sharon Mangini

Sharon Mangini was employed by Respondent as a nurses aide from 4 April until her discharge on 20 September. She and Joan Perez are roommates. On 13 September, in the hospital coffeeshop, Perez handed Anne Lavalley an announcement of a bowling party and asked Lavalley to find out from Connors if it could be posted. The announcement prepared by Brunswick Lincoln Lanes contained a map showing the location of the bowling alley, a form on which those planning to attend could so indicate, and the following introductory language:

YOU'RE INVITED

The Lincoln Nursing Home invites its family of employees and guests to an evening of bowling at Brunswick Lincoln Lanes

⁴⁸ *Painters Local 558 (Forman Ford)* 279 NLRB 150 (1986); *Viele & Sons Inc.* 227 NLRB 1940, 1944 (1977) and cases cited.

⁴⁹ *South Shore Hospital* 229 NLRB 363 (1977).

⁵⁰ *Robins Federal Credit Union* 273 NLRB 1352, 1356 (1985).

This evening of fun will be held on Tues Sept 24, 1985 at 6 30 p m and includes 3 FREE games of bowling, FREE use of bowling shoes, and light refreshments Although attending this party in no way obligates you plans are to form a mixed league

If you plan to attend kindly complete the lower portion of this invitation and return it to Sharon Mangini by Sept 22, 1985

Lavallee delivered the announcement to Connors the same day, and told her that Perez wanted permission to post it on the bulletin board This was late Friday after noon Connors laid the document down told Lavallee that she would get back to her, and left the facility

According to Connors, she returned to her office on 18 September, read the notice saw Mangini's name on it, and called Lemay and told him he should call in Mangini so they could talk to her because she was using the home's name without authority Connors and Lemay agree that Connors called the bowling alley and was told there was no listing for the advertised event Neither Connors nor Lemay was a particularly believable witness on the subject of the reasons for Mangini's discharge Both John Karabatsos, manager of Brunswick Lincoln Lanes, and Shirley Roussin who answers the phone and was on duty from 8 30 a m to 2 30 p m on 18 September, deny receiving any phone calls from Respondent Karabatsos and Roussin were not party to the dispute before me appeared to be testifying candidly, and are credited

On 19 September Mangini asked Charge Nurse Lee Fratantonio⁵¹ whom I have found to be Respondent's supervisor and agent for permission to post the bowling notice on 20 September Mangini asserts she knows of no rule requiring her to get permission Fratantonio said it would be all right Mangini's shift ended at 3 p m Shortly thereafter, Mangini and Perez were in the home's parking lot with Sharon Army Mangini solicited Army to sign a union authorization card, and gave her one While they were talking, Administrator Lemay and Director of Nursing Zorn passed within 10 15 or 20 feet of them depending on which witness is the more accurate and turned and looked at Mangini and company in passing while Mangini was holding an authorization card and an 8 1/2 by 11 inch union leaflet These happenings in the parking lot are drawn from the credited testimony of Mangini Army and Yoffee Mangini was in the lot about 15 or 20 minutes Lemay and Zorn were present only the brief time it took them to pass across the lot

I agree with the General Counsel that the presence of Yoffee and Perez both of whom were known by Respondent to be union activists, and Connors testimony that because Perez and Mangini were roommates what one did I'm sure the other was— (unfinished answer) warrant an inference that Respondent could reasonably conclude Mangini was an activist even if Lemay and Zorn did not observe the card and leaflet which I conclude, in the absence of credible denial that they did

On 20 September Mangini posted the bowling notice on the bulletin board by the timeclock That bulletin board is labeled the employees bulletin board Lavallee reported the posting to Connors Shortly after posting the notice, Mangini was met by Lemay who asked her what the notice was She told him some of the girls wanted to get a bowling league together Lemay testified that he called the bowling alley on 20 September, and was told by an unidentified woman that lanes had been booked for the nursing home and the nursing home would be the ones to pay for it I do not credit Lemay because both Karabatsos and Roussin credibly testified there is no cost to the Employer involved in these affairs, the notice itself lists free bowling, shoes and light refreshments, and Roussin, the only female employee working from 8 30 a m to 4 42 p m on 20 September, received no phone calls regarding the nursing home bowling party

According to Lemay, about 1 30 or 2 p m on 20 September, he recommended to Connors that Mangini be discharged for insubordination and Connors concurred Connors says that what upset her was the idea of an employee thinking she could use the nursing home or its name to sponsor something without permission Lemay says there were various reasons for the discharge, including using the home's name without permission from management and his concern about Respondent's liability for injury at the affair He further states he gave Mangini these reasons when he discharged her about 2 p m or shortly after, and also advised her that he had been told by the bowling alley that the nursing home was paying for the bowling This business of the nursing home paying for bowling was, I find, an untruth constructed by Lemay to mask his real motive Lemay gave Mangini her paycheck and she was gone from the premises by 2 30 p m Respondent's evidence that the decision to discharge Mangini was made between 1 30 and 2 p m the fact that Mangini was discharged and exited the facility before 2 30 p m and the absence of any explanation as to how Mangini's final paycheck was prepared and delivered within a half hour on a regularly scheduled payday raise considerable suspicion in my opinion that the decision was made and the check prepared before Respondent claims they were As Mangini left she noted that her timecard was gone from its place by the timeclock

On Mangini's application that remained in Respondent's files Director of Nursing Zorn wrote, terminated 9/20/85 due to insubordination & misrepresenting the employer Disregard for House Policy A campaign leaflet issued to employees by Respondent relates, Sharon Mangini—was told not to post notices without permission and she did so anyway

There is no rule forbidding posting in the personnel manual distributed to employees Lemay concedes this is accurate and that no permission is required for posting in the coffeeshop He claims, however, that there is a practice although not a rule of asking permission to post by the timeclock Lemay has never been asked for permission to post on the timeclock bulletin board nor has he been present when any employee asked such permission from a supervisor There is no persuasive evidence sup

⁵¹ Fratantonio did not testify and Mangini's uncontroverted testimony is credited Mangini was a believable witness

porting Lemay's claim of a practice of asking for permission. Moreover, Lemay waffled when confronted with the statement in Respondent's leaflet prepared by him and legal counsel relating that Mangini had posted the notice even though told not to post notices without permission. His only comment was "She was not given permission." The problem with this bland comment is that it ignores the fact (1) there is no evidence of a written rule or any instance in which Mangini was personally told not to post without permission and (2) Mangini did in fact seek and receive permission to post from Charge Nurse Fratantonio. Mangini was not insubordinate.

Lemay also testified that he examined Mangini's personnel file in a search for redeeming factors before discharging her, but lo! he found factors in favor of a decision to discharge because she had earlier been removed for abusing patients. I have a notion this is the sort of information he was seeking to construct reasons for the discharge. She had however been rehired by Zorn who entered a notation on Mangini's application that she was a known employee of good quality. There was nothing in the file subsequent to her rehiring indicating Mangini was not a good employee or any other evidence to that effect and Lemay himself told Mangini during the 20 September discharge that she was a good nurses aide. Lemay's claim that Mangini's earlier removal was a factor in favor of discharging her is found to be a makeweight seized on by Lemay to shore up the shaky asserted reasons advanced.

Commenting on Zorn's notes of the reasons for discharge, Lemay had no idea what the disregard for house policy meant, and related that the language on the bowling notice "Lincoln Nursing Home cordially invites [etc]" is both insubordination and misrepresentation. As I found there was no insubordination. The claim of misrepresentation is faintly very faintly arguable but I have difficulty with the concept that it is equivalent to insubordination. Here I am persuaded Lemay was trying to justify something for which he knew not the reason.

Mangini's open union activity on 19 September. Respondent's knowledge of that activity through direct observation. Connor's supposition that Perez a known union adherent, and Mangini would do things together. Respondent's hostility toward the Union, the timing of the discharge the day after the 19 September activity, the absence of misconduct by Mangini during her current employment, and the flimsy pretextual reasons for discharge warranting an inference of unlawful motivation, *Shattuck Denn Mining Corp v NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) amount to a strong prima facie case of discriminatory discharge. Respondent has neither rebutted this evidence nor met its burden of showing Mangini would have been discharged even in the absence of her union activities. *Wright Line*, 251 NLRB 1083 (1980), enf'd 662 F.2d 899 (1st Cir. 1981) cert. denied 455 U.S. 989 (1982) approved in *NLRB v Transportation Management Corp.* 462 U.S. 393 (1983) *Yaohan of California* 280 NLRB 268 (1986).

Accordingly, I conclude Respondent violated Section 8(a)(3) and (1) of the Act by discharging Sharon Mangini in retaliation for her union activities.

14 Warnings to and discharge of Stella Lukasek

Lukasek became Respondent's employee when it took over the operation of the kitchen on or about 28 August 1985. At the same time, Respondent made Mark Stanikmas the food service supervisor at the facility. As such he was Lukasek's direct supervisor. On 2 December, Respondent hired Joseph Rizzo as assistant administrator in charge of several departments including dietary. He was Stanikmas' direct superior.

Lukasek's problems alleged as unfair labor practices began after the discharge of Adelaida Mora and Maria Aleman on 7 November. Lukasek did not support the Union and had let this be known to management. It is not alleged that her misfortunes were part of Respondent's efforts to discourage union activity and there is no evidence that they were. The General Counsel contends that she was subjected to unlawful threats, disciplined, and discharged because Respondent believed she had or would cooperate with the Board in its investigation of the discharges of Aleman and Mora which were the subject of an unfair labor practice charge and resulted in complaint allegations before me. Respondent denies these allegations and argues that Lukasek was discharged for substandard performance as a cook. The case boils down to questions of credibility, Lukasek versus Rizzo, Stanikmas and Landry. Preliminarily, I do not credit Lukasek's claim she had never been counseled or talked to about her work. She testified that Stanikmas thought he knew better than she how the work should be done and her demeanor betrayed an obvious resentment toward Stanikmas' supervision. Moreover, it was clear from her testimony that she considered herself to be better qualified than Stanikmas to run the kitchen. She was warned and was counseled about unsatisfactory performance as Respondent contends.

As earlier noted when he became the food service supervisor Stanikmas issued orders to the cooks to make a written record of employee misconduct in his absence and to report it to him on the phone, after which he would handle it. Lukasek agrees he said this and that he repeatedly told her to do so in connection with misconduct of dishwashers Aleman and Mora, but she did not. She concedes Aleman and Mora engaged in misconduct including fighting in the kitchen which she reported to Stanikmas and was told to write down. Director of Food Service Landry and Stanikmas credibly testified Lukasek made several complaints about the conduct and work performance of Aleman and Mora and requested they be fired. I am persuaded that the reason Stanikmas urged Lukasek to make a written record of the transgressions of Aleman and Mora was her frequent complaints. This instruction was consistent with the policy announced before Respondent knew of any union activity. Although Stanikmas may well have mentioned the pronoun stance of Aleman and Mora to Lukasek I do not credit her bare claim that he directed her to write them up on one occasion because they were for the Union. This testimony was not believable when I heard it and became no more believable when I read it in context with Lukasek's other testimony. The complaint allegation that a refusal to issue warnings to employees in retaliation for their

union activities was an additional reason for Lukasek's discharge is without merit and dismissed.

Lukasek's first warning came on 5 December when she and Barbara Carpenter, another cook, got into a loud argument in the kitchen over who would do what work. It appears that Carpenter told her to go f— herself and Lukasek replied that Carpenter should go play with herself. Lemay directed Stanikmas to issue a written warning to both, which he did. There is no allegation the warnings were unlawfully motivated and the evidence persuades me they were not.

On 12 December a Board agent called Lukasek and requested her version of the discharge of Aleman and Mora. Lukasek declined on the ground she did not want to get involved. According to Lukasek, Stanikmas asked her on or about 13 December if the Board had called her and, after her negative answer, said they would. She mentions two other conversations with Stanikmas in December on the same subject. In one she allegedly told Stanikmas she was going to tell the Board the truth, and Stanikmas replied that she would be in deep trouble if she did. In the other Stanikmas allegedly said she had better say the right thing or she would be fired.

Stanikmas testified that he asked Lukasek, after the Mora/Aleman charges were filed, if she would testify if needed, and that she said she did not want to get involved. This response is consistent with Lukasek's reply to the Board agent's request. His question is not unlawful and he denies making the threats she relates. Stanikmas was incredible on other topics but not this one.

Lukasek also accuses Landry of telling her she had better not go to court for Aleman and Mora. Landry denies giving her any such advice and testifies that Lukasek reported to him that she had been asked by friends of Aleman and Mora to assist them in their case but that she did not want to have anything to do with it. I credit Landry.

I agree with Respondent that it is not likely Stanikmas and Landry would resort to threats in an effort to prevent testimony from Lukasek who was not in favor of a union, appears to have had no great love for Aleman and Mora and had told Respondent as well as a Board agent that she wanted nothing to do with the matter. That she may have told Kerswell a nonsupervisory employee that she would tell the truth is of no significance. Her uncorroborated testimony about the alleged threats was not as believable as that of Stanikmas and Landry. I therefore conclude that the General Counsel has not shown by a preponderance of the credible evidence that Respondent harbored hostility toward Lukasek because she might give or had given testimony in favor of Aleman and Mora. The complaint allegations that Stanikmas and Landry unlawfully threatened or interrogated Lukasek regarding her participation in a Board proceeding are dismissed.

Joseph Rizzo issued a second warning to Lukasek on 3 January 1986 for unsatisfactory work.⁵² This came about

because Lukasek took delivery of five loaves of French bread after the menu had been changed so the bread was not needed. Rizzo told her she should not have accepted the bread because she was the one on duty even though Stanikmas had made the order and it was his responsibility to cancel the order. Rizzo testified that Lukasek had no authority to cancel the order. No one explained the difference, if any, between canceling the order and refusing to take delivery. The bread was valued at \$4.38. Lukasek offered to pay it but Rizzo refused to accept payment from her. Rizzo takes the position that even though bread ordering was not her responsibility she was present (Stanikmas was not) and should not have accepted delivery because the menu had changed. According to Rizzo he issued the warning because he had given her several opportunities over the almost 4 weeks he had been there to change but she still behaved in the same manner that was to be very nice and do what she was told while supervision was present but would revert to her old habits when supervision was not present. The warning signed by Lukasek, relates: "I took it upon myself to accept bread order when you knew the menu was changed because of the holiday. Lukasek did know the menu had been changed, but took the bread and froze it for future use. After giving her the warning, Rizzo held a disciplinary conference with her on 3 January 1986. I credit his testimony that he reviewed what he considered to be her job deficiencies with her, including inability to control the dietary aides (likely in view of her problems with Aleman and Mora), failure to prepare warning notices as directed, several other items, and the French bread incident. Rizzo also reduced her hours at work to 32 for the purported reason that Stanikmas could then work with her and oversee her work. Rizzo prepared a disciplinary conference report setting forth that Lukasek's overall job performance was in question, she had a previous warning on 5 December, and she would be reduced to 32 hours a week until a change was seen in her performance. Rizzo says Lukasek said the cut in hours was all right and she would rather work 32 hours anyway. Lukasek's version is that she said she could live with it. It is not essential that the difference between their reports of her reactions to the cut be resolved.

The final act came on 8 January 1986 when Lukasek was discharged. On the evening of 6 January Lukasek was supposed to roll meatballs for the following morning. When she turned to the task shortly before the end of her shift Lukasek had only 10 pounds of hamburger, presumably ground beef, even though 40 pounds was needed. It was ordered but came up missing. Stanikmas then sent a dietician to seek out some more hamburger. This resulted in an additional 20 pounds but it was frozen. Lukasek was unable to soften the frozen meat before she went off duty, told Stanikmas she had to leave and left without rolling any meatballs. Barbara Carpenter, the breakfast cook, came in on 7 January found no meatballs and needed the help of Kerswell to make them in time. I credit Rizzo that Stanikmas told him Lukasek had been directed to make the 10 pounds into meatballs before she left and I believe Stanikmas had directed her to do so because she does not deny this.

⁵² The events of 3 January 1986 are quite clear regarding what happened but the whys are another thing. As the General Counsel points out there are numerous inconsistencies in the testimony of Rizzo and Stanikmas that suggests someone is inaccurate. Combine this with the not too believable testimony of Lukasek and the problem is apparent.

and, as credibly related by Rizzo, when confronted she told him she did not want to roll 10 pounds because it was a waste of time to do only that much. Rizzo had already decided to discharge Lukasek when he sought her explanation, and he did so. He wrote a third warning reading, "failed to prepare menu items in advance. Preparation for noon meal, Jan 7, 1986 were not completed by the employee as a result additional help was need [sic] that day." Rizzo says he wrote her up because she did not roll the 10 pounds. According to Rizzo, the reasons he terminated her were that she was not following menus, had nonexistent sanitation techniques, and was hoarding food. This last has to do with her custom of preparing food in advance for her next shift and then complaining when some other cook used it in the interim. All of this, plus a reference to discharge after three warnings,⁵³ was not, I am convinced, the whole reason. The real reason, I find, was that Rizzo plainly did not like Lukasek or think she was a good employee and looked hard for a colorable reason to rid himself of her. His revealing plaint that she did whatever she wanted before Respondent took over the kitchen, and continued to do so, tells me that her presence, in the parlance of the street, bugged him, and he was delighted for the chance to remove her. Whether his motives were pure in all respects are not my concern. The only question for me is whether she was terminated for reasons forbidden by the Act. The General Counsel points out, and I agree, that the bread and hamburger incidents by themselves seem rather trivial. Moreover the testimony of Rizzo and Stanikmas is at odds in several respects. It is certainly true that in the proper circumstances an unlawful motive may be inferred from false reasons for discharge⁵⁴ but the circumstances here present notwithstanding the questionable nature of the reasons for warnings, reduction in hours and ultimate discharge, only show a course of action based on reasons questionable to many but not in themselves unlawful. Moreover she was not a union adherent. Respondent knew this and could not reasonably have believed mistreating Lukasek would discourage union activity. It certainly would not want to encourage her to take up union activity. Finally whether the General Counsel could make out a prima facie case of discharge and other discriminatory treatment in violation of Section 8(a)(4) and/or (1) of the Act largely depended on my crediting Lukasek regarding the statements of Landry and Stanikmas relative to her participation in Board proceedings. She is not credited over Landry and Stanikmas. Notwithstanding that one might reasonably question the severity of Respondent's action against Lukasek, and the reasons asserted, the evidence will not support a finding that conduct violated the Act.

15 Maria Aleman and Adelaida Mora

In the early or mid September Aleman and Mora requested a pay raise to \$5 an hour. Stanikmas told them he would try to get them a raise through Landry. On 24 September, Landry advised them that he did not want to

lose them and would inquire into the possibility of a raise. Mora agreed that Landry and Stanikmas told her and Aleman they had to check with Lemay. Landry met with Vice President Connors on 25 September, and the raise was discussed. Connors told him there could be no raises because there was a union campaign in progress and she had been advised by counsel to freeze wages and make no changes. Landry, upset over the prospect of losing two employees, told Lemay that Connors had said there could be no raise because Respondent had received a union petition⁵⁵ and everything was frozen. Lemay agreed this was the case. They met with Aleman and Mora the same day. Lemay relates that he told them Respondent could not give them a raise because it had received the petition and if he gave them a raise this would be received as coercion to vote no, and he would be charged with an unfair labor practice. Landry's version is that Lemay told them through an interpreter, that due to the union organization Respondent could not promise a raise unless they had promised one prior to 23 September. Aleman says the reason given for no raise was that there were going to be problems about a union and the home would not give the raise until the voting took place. The testimony of Lemay, Landry, and Aleman are complementary rather than contradictory, and show that the employees were informed there could be no raise during the union campaign leading to an election for fear of being charged with wrongdoing. Mora testified that Landry said he would give a raise and better benefits after the union drive. I believe that Mora's testimony refers to statements allegedly made at a later meeting.

The complaint alleges that Landry violated Section 8(a)(1) on this September occasion by telling employees Respondent could not give them a promised raise because of the Union and violated Section 8(a)(3) by failing to give Aleman and Mora an increase to \$5 an hour. The Board, in *Centre Engineering*⁵⁶ stated the following controlling principles:

Further it is well settled that in deciding whether to grant benefits while a representation election is pending an employer should act as if no union were in the picture. Thus if an employer withholds wage increases or accrued benefits because of union activities and so advises employees it violates the Act. However, where employees are told expected benefits are to be deferred pending the outcome of an election in order to avoid the appearance of election interference the Board will not find a violation of the Act.

Here there is no withholding of a promised, planned, accrued, or regularly scheduled wage or benefit. Although the employees may have expected a raise that expectation was purely subjective and based on no promise other than that Landry would see if a raise was possible. Landry plainly communicated to Aleman and Mora

⁵³ Respondent's personnel manual provides that an employee may be discharged after three written warnings.

⁵⁴ *Shattuck Denn Mining Corp.* supra

⁵⁵ The representation petition in Case 1-RC-18602 was filed on 24 September.

⁵⁶ 253 NLRB 419, 421 (1980).

that the reason for no raises was the pending election petition and the desire to avoid the appearance of unlawful interference. I therefore find Lemay's statement was not a violation of Section 8(a)(1) of the Act.⁵⁷ The General Counsel's contention that the denial of the pay raise was part and parcel of an unlawfully motivated plan to get rid of Aleman and Mora in violation of Section 8(a)(3) is likewise without merit because there is no evidence Respondent knew of the union sympathies of Aleman and Mora until after the raise was denied and the raise was withheld for a lawful reason.

Commencing the week of 7 October, Respondent held regular meetings with employees during the preelection period. Lemay, Stanikmas, Landry and Lavallee were usually present at meetings with the kitchen staff. The complaint alleges the following:

[8](f) In or about late October, 1985, Respondent, acting through Administrator Paul J. Lemay, Food Service Supervisor Mark Stanikmas, Supervisor Norman Landry, and Staff Development Coordinator Ann Lavallee [sic], in the nursing home

- (1) asked employees if they understood about the Union
- (2) told employees that Respondent had plans for the employees and was going to give them more benefits and a raise if they didn't join the Union but not until after November 25, 1985, and
- (3) asked employees if they were going to sign yes for the Union

There is no evidence in support of (3), and (1) is lawful on its face. The evidence offered in support of allegation (2) is the testimony of Aleman and Mora who attended several meetings, made plain their pronoun statements and quit attending the meetings because of these sympathies. Attendance at the meetings was not mandatory.

The testimony of Aleman and Mora is somewhat confused and suffers from a lack of mutual corroboration. Aleman testified that Lemay promised better benefits without the Union after the voting, including better medical benefits and medical cards. She avers employees were asked if they comprehended what the Union was about and were told the reason for no raises was there were beginning to be problems about a union, and until the voting were to take place they would be giving a raise. Aleman further testified that Lemay called Mora stupid when Mora said she understood.

Mora testifies that Landry said he could not give her a raise because she was going to be a union member and was going to vote for the Union. Landry did, says Mora, promise a raise and a medical card after the union the onset of the union. She continues that when he gave her a leaflet about the voting she put YES on it in big letters and told him that was how she would vote. According to Mora, Landry told her she should get out if she was going to vote for the Union. Her alleged re-

sponse was that she was not going to get out and was not stupid.

According to Stella Lukasek she was at a meeting in mid October where Lemay, with the aid of an interpreter, spoke to the kitchen help. Her testimony on the content of the meeting reads as follows:

Q And what did Mr. Lemay say at this meeting?

A He told us that it wasn't such a good idea that the union would be in there that they just take money out of your pay and they don't give you your money's worth it would be better if we didn't—that he could do better later on for us.

Q Do you recall anything else being said?

A That was about it in a round about way.

Q Was—were Ms. Aleman and Ms. Mora at this meeting?

A Yes.

Q Did they say anything at this meeting that you recall?

A Yes. They said they thought a union would be the finest thing that could get in there because then they wouldn't have to beg for their money, that they didn't get it when they were promised it and that they could go to a person and explain to him how much work they were doing and he would get the money for them.

Keith Carlson only recalls that Lemay said that if it were not for the Union the raises would have been granted.

Turning to Respondent's representatives Stanikmas states that Aleman and Mora attended the first meetings, did not believe Respondent, and quit attending. He avers that at the first two meetings they insisted they should get a raise and Lemay explained why Respondent could not promise or grant a raise. There was no discussion of medical benefits at the meetings. Stanikmas does not recall Landry saying anyone was stupid but does recall that Mora would say she was not stupid. This latter recollection comports with Mora's testimony that she assured management she was not stupid. I do not credit Aleman's claim that Lemay said Mora was stupid. It is quite possible however that Aleman heard Mora say she was not stupid and assumed Lemay had said she was.

Lavallee recalls that Lemay was the primary speaker at these meetings and used an interpreter. According to Lavallee Respondent (presumably Lemay) said that during the union campaign no raises could be given because things had to remain status quo and nothing could be promised to employees. There was some talk about negotiating a contract and that the Union could only negotiate labor packages containing wages and benefits, but could not change company policies. Nothing was said or promised regarding medical cards.

Lemay testifies as follows the purpose of the first meeting with the kitchen employees as a group was to explain that because they would hear things from the Union he wanted them to hear the Company's side. At the second meeting there was discussion of union dues, fines, assessments, and similar costs employees do not

⁵⁷ *Huttig Sash & Door Co.* 263 NLRB 1256 (1982) relied on by the General Counsel is distinguishable because it involved a *promised* wage increase. *Progressive Supermarkets* 259 NLRB 512 (1981) also relied on by the General Counsel is also distinguishable because it involved the postponement of a *regularly scheduled* pay raise.

now have to bear Neither medical benefits or cards were mentioned at any meeting He recalls directing no questions to Aleman or Mora Employees asked many questions about wages and benefits, and were told Respondent could know nothing about them because it was against the law to make any changes during a union campaign unless they were planned ahead Lemay recalls nothing being said about what might happen in that regard after the election

Landry does not speak to the content of the meetings

I do not credit Mora's testimony that Landry told her he could not give her a raise because she was going to be a union member and was going to vote for the Union Mora and Aleman were told *before* they publicly declared their union support⁵⁸ in October that they could not be given a raise It is improbable that Landry would for no apparent reason spontaneously depart from Respondent's true reason and voice an unlawful reason in the midst of a carefully orchestrated preelection campaign

Considering all the testimony on the matter and the comparative testimonial demeanor of the witnesses, I conclude and find that here was a not uncommon occurrence The employees testified to what they believed Respondent's supervisor meant, not what they actually said As the Board has pointed out A respondent is responsible only for the remarks it makes to employees, and not for the impressions that employees may derive from the remarks⁵⁹ I agree with Judge Barban that this does not mean an employer is licensed to interfere with employee rights by using subtlety innuendo or inference,⁶⁰ but Respondent in the instant case did not so interfere when presenting its reason for not granting raises Moreover Respondent did not promise any benefits, raises or otherwise at all for any reason, and did not condition benefits or raises on refraining from joining or assisting the Union

For all the reasons set forth above the evidence does not preponderate in favor of a finding that Respondent violated Section 8(a)(1) of the Act by conduct alleged in paragraph 8(f)(1) (2), and (3) of the complaint

Even though I believe Mora at times testified to her perceptions rather than the actual facts, her claim that Landry told her she should get out if she was going to vote for the Union seemed certain and is credited Landry was aware of her open declaration of union support This may have provoked his comment, but it is well settled that an invitation to quit like that tendered by Landry conveys the message that union support and continued employment are not compatible is coercive and threatening and violates Section 8(a)(1) of the Act⁶¹ The matter was fully litigated and I find Landry's statement did violate Section 8(a)(1)

⁵⁸ There is no evidence Aleman and Mora signed union authorization cards

⁵⁹ *Fidelity Telephone Co* 236 NLRB 166 (1978)

⁶⁰ *EMR Photoelectric* 251 NLRB 1597 1608 fn 29 (1980)

⁶¹ *L A Baker Electric* 265 NLRB 1579 1580 (1982) and cases cited *J & G Wall Baking Co* 272 NLRB 1008 (1984) *NLRB v Steinerfilm* 669 F 2d 845 (1st Cir 1982)

E The Warnings

Respondent wrote warning notices for Aleman on 22 October and 4, 5, and 7 November and for Mora on 22 and 30 October and 5 6 and 7 November The 22 October warnings to both are marked as first warning notices for absence and bear the signature of Stanikmas and the note would not sign Aleman testified that she never saw this document or the warnings of 4 and 7 November, and only saw and signed the one for 5 November that was also marked as a first warning She denied that the writing on the back of this notice stating that she had overstayed her meal period and would be given discipline up to termination if she repeated this conduct was on the warning when she signed it Aleman claims that she signed the warning because Stanikmas, with no interpreter present, represented it to her as something that needed to be signed for a medical card and would cost her \$3 only

Mora conceded she signed the 30 October document marked as a second warning and noted she was absent but had someone call for her, on 25, 28 29 and 30 October Mora says she was told it was for a medical card or insurance, and denies seeing or signing the warnings of 22 October or 5 6 and 7 November The 5 November warning mirrors the notations on both front and back of the warning that date given to Aleman The 22 October and 6 and 7 November are signed by Stanikmas The 7 November warning notices to Aleman and Mora, whose dates on both documents appear to have been altered from 5 November, each note the reasons to be conduct, attitude, lack of courtesy, Threatened another employee, and Terminated They are either notices of discharge or memoranda of the reasons prepared and signed by Stanikmas I credit Aleman and Mora that they never saw them and assuming arguing that they did, further find they could not read them There is no explanation of the alteration in dates and I am not convinced the notices dated 7 November were prepared on that date It is quite possible they were prepared after 7 November as possible support for Respondent's theory of discharge and the backdating was at first erroneous and required correcting Although I suspect this is what happened the evidence is insufficient to warrant so finding The evidence does however warrant a finding that Stanikmas prepared and signed Mora's name to the first warning to her dated 5 November There is no question that he completed the 5 and 6 November warning notices to Mora (Strangely the 6 November notice is not marked as a first second or any other warning) He misspelled Mora's name as Adeledea on the top of both forms He signed the 6 November form as Mark Stanikmas with the note Mora was yelling about warning The 5 November form is signed Adeledea Mora and does not remotely resemble her bona fide signature Adelaida Mora of 30 October but more closely resembles Stanikmas hand writing, especially his rendering of Adeledea Mora at the top of the forms A comparison of this rendering with Mora's purported signature on the 5 November notice reveals sufficient similarities in spelling and hand writing to persuade me that Stanikmas did sign Mora's name to the 5 November warning notice

The accounts of Mora and Aleman regarding the warning notices are credited Stanikmas testimony to the contrary is not credited I conclude the ones they did sign were secured on the basis of a misrepresentation that they were applying for medical insurance and the ones they dispute were never in fact presented to them but were merely placed in Respondent's files whence they came to trial Respondent's knowledge that Mora and Aleman definitely and openly wanted the Union to succeed in its campaign, Respondent's clear hostility to those sympathies, the absence of *any* prior warnings to the two notwithstanding claimed misconduct by them at an earlier time, the misrepresentations employed to secure their signatures the later addition of material to notices, the unexplained changing of dates and what appears to be an attempted copying of Mora's signature to provide evidence she had seen a notice, all persuade me that the warning notices were discriminatory tools designed to eventually eliminate Mora and Aleman from employment at the facility, and thus discourage union membership and activity by Respondent's employees Such conduct violates Section 8(a)(3) and (1) of the Act

F The Discharges

According to Stanikmas he and Landry heard Aleman and Mora shouting in Spanish, and complaining that they deserved a raise and needed more help and blaming the failure of Respondent to take care of these concerns and the withdrawal of permission to take leftover food home on Barbara Carpenter a cook Stanikmas does not speak Spanish In the course of their alleged tirade Aleman and Mora according to Stanikmas threatened to kill Carpenter After 20 minutes of this, and some quieting down by Stanikmas they returned to work At this point says Stanikmas he turned around and saw that Landry had returned to his office Landry testifies that after he heard them voicing their continuing complaint about raises he returned to his office, let Stanikmas handle it heard no threat and did not realize how serious it was until Stanikmas told him about 3 30 p m that Mora and Aleman had threatened to hurt Carpenter Stanikmas says he did not tell Landry what had happened until 2 hours after the incident because he was comforting a frightened Carpenter and further says Landry said he would take care of it the next day when he came in Landry testifies that when Stanikmas reported to him Aleman and Mora had already left, and he did nothing further that day because Connors was not available for consultation

Both Aleman and Mora deny threatening Carpenter with injury Carpenter was not a witness Inasmuch as Landry says he heard no threat Stanikmas claim that Aleman and Mora threatened Carpenter is the only evidence in support of the reason proffered for calling Aleman and Mora in the following day

Stanikmas testimony that he heard Aleman and Mora threaten to kill Carpenter is not credited This testimony is corroborated neither by Carpenter who did not testify nor Landry or anyone else Landry testified that all Stanikmas told him was that Aleman and Mora had threatened Barbara that they were going to hurt her Landry's failure to confront Aleman or Mora with this allegation or prevent them from working in the kitchen

where Carpenter also worked, until about 11 a m the following day by which time the two had been working about 5 hours persuades me that he was not told Carpenter had received a death threat, and that he did not consider her to be in imminent danger The denials of Aleman and Mora that they threatened Carpenter at all are credited

Landry called Aleman and Mora into the kitchen office shortly after 11 a m on 7 November Also present were Stanikmas and Lavallee There was no interpreter present The witnesses disagree on what happened on 7 November

1 Mora's version

Aleman had left the kitchen to seek help because she and Mora had a lot of work Mora then went into Landry's office and told him that she was alone in the kitchen with a lot of work No one else was present during the meeting of the two Landry irritably responded, Oh every hour, every hour Mora complained there should be a third person helping her and Aleman, and again complained that she had not received a pay raise Landry told her he would give her no raise, he was not going to put a third person on and Mora should punch out and leave if she did not want to continue working that way He then asked where Mora came from When she replied she was from Cuba he said people from Cuba were no good He then again told her to punch out and leave if she did not like the fact he was not going to put another employee in the kitchen She said she would not punch out because she was just defending her rights as a worker and he could punch out himself if he wanted but she would not At that point he called her a F—g Black She then said he could not offend her by calling her that He kept telling her to punch out and the police were called Mora denies that she swore

2 Aleman's testimony

She had gone to find carts on which to carry food When she returned Mora was in the office with Landry Lavallee and Stanikmas She heard Landry tell Mora she was fired because Mora had asked for another person to help them at work Aleman was discharged by Lemay with Lavallee Stanikmas, and Landry present Lemay told her to punch out and leave but gave no reason No interpreter was present until after she and Mora were told to punch out and go which she says meant they were fired After she was fired, Luis Serrano came as an interpreter She was then asked by Lavallee and Landry through Serrano whether she was going to hurt Carpenter She denied that she was and denies threatening Carpenter

3 Landry's version

He could not find Serrano who was transporting laundry so he called Aleman and Mora into the office at a little after 11 a m with no interpreter present Stanikmas and Lavallee were present He asked the women if they had threatened Carpenter They did not understand him Lavallee asked if they had wanted to hurt Carpenter

They indicated they did not understand. He decided to suspend them rather than base a decision on poor communications without an interpreter. He told them he would investigate the facts of the previous day from the interpreter who had then been present, and they were suspended, and he asked them to punch out and go home. Mora told him to punch out and to f— himself, repeated it again and added f— you, you punch out. He told her she was fired because she was swearing to him and he would call the police if she did not punch out and go home. She told him to call the police. He did. When a police officer arrived, Mora left through the dining room, screaming as she went.

Serrano came into the office soon after Mora left. He told Landry that Aleman and Mora had tried threatening Carpenter the day before. Landry then asked Serrano to ask Aleman if she wanted to hurt Barbara Carpenter. Serrano spoke to Aleman in Spanish and then told Landry they wanted to hurt Carpenter because they believed she was responsible for them not getting a raise and something about stealing juices. Landry then told Serrano to tell Aleman she was terminated for threatening another employee. There is no testimony from Serrano who apparently was not available.

4 Lavallee's testimony

She and Stanikmas were present when Landry called Aleman and Mora into the office. Landry asked if they were threatening Carpenter. They did not understand. Lavallee asked in English if they wanted to hurt Carpenter. Both started yelling. You're no f—ing good. Landry took Mora outside the door. Aleman stayed in the room with Lavallee. She could hear Mora repeatedly saying f— you to Landry. Then she heard Landry tell Mora to punch out. Mora replied No, you punch out and repeating No f—ing good. Landry then called the police. The police came. She escorted the officer to where Mora was at the timeclock and returned to the office. Enroute she met another policeman with Aleman who said she had also been fired.

When she left Aleman to go to the timeclock, Aleman had not been fired. Aleman and Mora had been suspended by Landry until he could get an interpreter in to straighten the matter out. Lavallee does not believe the women understood Landry. That is when the yelling and screaming started on all sides. Stanikmas was in and out during all these goings on. She did not speak to Aleman or Mora in Spanish on 7 November. Aleman was swearing before Mora left the room but not after.

5 Stanikmas testimony

Landry asked Mora and Aleman if they had threatened to kill Carpenter. They did not understand. Lavallee asked if they had threatened to hurt Carpenter. They agreed they had. Landry said they were suspended and told them to punch out. Mora started swearing, screaming, and yelling. Aleman did not swear.

6 Conclusions

As a preface when Aleman says Lemay fired her I am certain she meant Landry. No one but Stanikmas claims

Aleman and Mora threatened to kill Carpenter, or that Landry asked them if they had. Stanikmas has not been credited on the former and is not credited on the latter. Similarly Stanikmas testimony that the two ladies admitted, in response to Lavallee's question, that they had threatened to hurt Carpenter is supported by neither Lavallee nor Landry and is not credited. Aleman credibly testified that she did not tell Serrano she was going to hurt or was threatening Carpenter. That Serrano may have told Landry she had is hearsay without benefit of supporting testimony from Serrano. Aleman with her limited understanding of English, was disabled from disputing Serrano's translation to Landry.

What happened, I believe is that Stanikmas gave Landry a false report of a threat to hurt, not kill, Carpenter. There is no evidence Landry checked with Carpenter. Had there been a threat either as propounded by Stanikmas or as reported by him to Landry I seriously doubt that Stanikmas would have waited 2 hours to report it. I also doubt that Landry would have let Aleman and Mora work with Carpenter for 5 hours had he believed she was endangered. Moreover, I perceive no reason for suspending Aleman or Mora until an interpreter could be found. Landry well knew Serrano would be available that day. Landry as yet had no proof of misconduct by either and the absence of any perception that Carpenter was in immediate danger demonstrates there was no colorable reason for the suspensions.

Landry says he terminated Aleman for threatening Carpenter. This treatment contrasts sharply with that accorded nurse's aide Cecile Abraham on 22 November when she threatened presumably in English to beat up her team leader. Recognizing a personality conflict between the two Respondent merely transferred Abraham to another floor and warned her she would be terminated for a repeat of such conduct. Abraham was later warned, on 22 April 1986 after 10 days of absences of disciplinary action if the absences were repeated. So far as the record shows she was still an employee at the time of the trial before me. There was a continuing personality conflict between Carpenter, Mora, and Aleman because the latter two disapproved of the former's private life style. How a threat by Aleman or Mora to hurt is more reprehensible than that of Abraham is not explained. The disparity in treatment is glaring. Given this disparity in treatment, the failure to investigate with Carpenter the incredible testimony and tinkering with warning notices by Stanikmas, Respondent's failure to insulate Carpenter from possible harm on the morning of 7 November, the outspoken union advocacy by Aleman and Mora, Respondent's admitted knowledge of that sympathy, Respondent's hostility toward the Union, and Respondent's other unfair labor practices I am persuaded the General Counsel has made out a prima facie case that Aleman was suspended and later discharged because of her union activity. Respondent has neither rebutted this prima facie case nor shown Aleman would have been suspended or fired absent her support of the Union. The General Counsel has proved by a preponderance of the credible evidence her suspension and discharge were un-

lawfully motivated and violated Section 8(a)(3) and (1) of the Act

Mora's discharge is another matter. Her suspension was, I find, unlawful for the same reason as that of Aleman. The General Counsel has also established a prima facie case that she was discriminatorily discharged. Nevertheless, I do not credit her testimony that Landry called her a "F— Black," although, given the language difficulty, she may have believed he had Aleman does not support her on this, and Landry and Lavalley credibly testified that Mora responded to her suspension with repeated vulgar words directed at Landry. Accordingly, the questions raised are whether she would have been fired for using this language if no union drive existed and, if so, was this language provoked by Respondent's unlawful suspension and therefore excusable. It is well settled that an employer may lawfully terminate an employee who engages in conduct for which he or she would have been fired in the absence of union activity even if the employer wants to discharge the employee for union activity and is actively seeking a reason to accomplish that aim,⁶² but it is equally well settled that if an employer by its unlawful conduct provokes an employee into such conduct then that conduct cannot serve to justify the employee's discharge.⁶³ Mora's explosion was the spontaneous and direct result of Landry's announcement of her suspension and his order to punch out and go home. The suspension, and obviously therefore its announcement and effectuation, has been found violative of Section 8(a)(3) and (1) of the Act. This unlawful conduct was the provocation for Mora's unpleasant language which, according to Landry, was his reason for the discharge. Insubordinate though Mora's language may have been, it was caused by Respondent's unlawful suspension and is not a sustainable defense to the General Counsel's prima facie case of discharge. The General Counsel has established by a preponderance of the credible evidence that Mora's discharge, like that of Aleman, violated Section 8(a)(3) of the Act.

V THE OBJECTIONS TO THE ELECTION

At the proceeding before me the Union withdrew several of its objections. Those remaining for determination read as follows:

- 3 The Employer threatened employees with reprimands because of their union activity
- 4 The Employer discharged employees because of union activity
- 5 The Employer otherwise violated the Act and the Board's rules to pre-election conduct

The petition in Case 1-RC-18602 was filed on 24 September 1985. The election was held on 20 November

1985. Matters covered by Objections 4 and 5 have been found to be unfair labor practices occurring during the critical period between petition and election.⁶⁴ Unfair labor practices constitute objectionable pre-election conduct.⁶⁵ Accordingly, Objections 4 and 5 are sustained. Objection 3 is not supported by evidence and is overruled.

VI THE REFUSAL TO BARGAIN

The Union had a card majority in the appropriate collective bargaining unit when it requested recognition on 23 and 24 September. Respondent rejected those requests and thereafter committed serious and pervasive unfair labor practices including the maintenance of unlawful no-solicitation and no-access rules, threats to change disposal of, or sell the facility in the event of union success in the election, conveying an impression of surveillance, coercive interrogation, telling employees it would be difficult for them to get work elsewhere if the Union won the election, advising employees to quit their employment if they were going to support the Union, promising better wages and working conditions if employees abstain from supporting the Union, and discharging Maria Aleman and Adelaida Mora because they were in favor of a union. Respondent's unlawful conduct was designed to discourage employee support for the Union, had a tendency to undermine its established majority status and prevented the holding of a fair election on 20 November 1985.

The various threats to close, sell or change the operation are of a type that the Board has long held to be of the most egregious sort,⁶⁶ as are the discharges of Aleman and Mora.⁶⁷ Unit employees certainly were aware of the discharges of Mora and Aleman as well as that of Mangini. Considering all the unfair labor practices and the unlikely prospect that traditional remedies can sufficiently erase their continuing impact on the electorate, I am persuaded that employee sentiment as reflected by the signed authorization cards will be best protected by a bargaining order in view of the slight possibility that a fair election might be ensured by the use of traditional remedies.⁶⁸ Accordingly, I conclude and find Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union as of 23 September when the Union demanded recognition.⁶⁹ Respondent's unfair labor practices occurring before that date are remedied by the Order.

On the foregoing findings of fact and conclusions drawn therefrom, and on the entire record in this case, I make the following:

CONCLUSIONS OF LAW

- 1 The Respondent, 299 Lincoln Street Inc., a wholly owned subsidiary of Broad Reach Health Services, Inc.,

⁶² *Stoutco Inc.* 218 NLRB 645 (1975); *P. G. Berland Paint City* 199 NLRB 927 (1972); *Klate Holt Co.* 161 NLRB 1606 (1966).

⁶³ *NLRB v. M & B Headwear Co.* 349 F.2d 170, 174 (4th Cir. 1965), consistently followed by the Board. See e.g. *Well Bred Loaf Inc.* 280 NLRB 306 (1986); *Olympic Limousine Service* 278 NLRB 932 (1986); *Vought Corp.* 273 NLRB 1290, 1295 (1984); *Turnbull Cone Baking Co.* 271 NLRB 1320, 1359 (1984); *E. I. du Pont & Co.* 263 NLRB 159, 160 (1982); *Louisiana Council No. 17 AFSCME AFL-CIO* 250 NLRB 880, 886 (1980); *Max Factor & Co.* 239 NLRB 804, 817 (1978).

⁶⁴ *Ideal Electric & Mfg. Co.* 134 NLRB 1275 (1961); *Goodyear Tire & Rubber Co.* 138 NLRB 453 (1962).

⁶⁵ *Dal Tex Optical Co.* 137 NLRB 1782, 1786 (1962).

⁶⁶ *General Stencils* 195 NLRB 1109, 1110 (1972).

⁶⁷ *Well Bred Loaf* supra.

⁶⁸ *NLRB v. Gissel Packing Co.* 395 U.S. 575, 614 (1969).

⁶⁹ *Trading Post* 219 NLRB 298, 301 (1975).

is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act

2 The Union Lincoln Employees Union, Division of U S W A AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act

3 The following unit constitutes a unit appropriate for collective bargaining

All full time and regular part time nurses aides housekeeping employees, food service employees maintenance employees laundry employees and team leaders employed by the Employer at its 299 Lincoln Street, Inc facility in Worcester Massachusetts, excluding all office clerical employees, Registered Nurses, Licensed Practical Nurses, professional employees temporary help agency employees guards and supervisors as defined in the Act

4 Beginning 23 September 1985, and continuing to date, the Union has been the exclusive representative of all the employees within the appropriate unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act

5 By maintaining an overly broad rule against solicitation and distribution Respondent violated Section 8(a)(1) of the Act

6 By promulgating and maintaining an overly broad rule restricting employee access to Respondent's premises during their off duty hours in order to discourage them from engaging in protected union activity Respondent violated Section 8(a)(3) and (1) of the Act

7 By telling employees it would be difficult for them to secure employment elsewhere if they selected the Union as their collective bargaining representative Respondent violated Section 8(a)(1) of the Act

8 By creating the impression that the union activities of employees were under surveillance Respondent violated Section 8(a)(1) of the Act

9 By coercively interrogating an employee about his union sympathies Respondent violated Section 8(a)(1) of the Act

10 By suggesting that employees quit if they were going to vote for the Union Respondent violated Section 8(a)(1) of the Act

11 By promising better wages and working conditions if employees abstained from supporting the Union Respondent violated Section 8(a)(1) of the Act

12 By threatening to close, sell or change its business operations if the employees selected the Union as their representative Respondent violated Section 8(a)(1) of the Act

13 By preparing warning notices to Adelaida Mora and Maria Aleman for the purpose of causing their discharge because they were union supporters, Respondent violated Section 8(a)(3) and (1) of the Act

14 By discharging Sharon Mangini and suspending and discharging Maria Aleman and Adelaida Mora in order to discourage employee union activity Respondent violated Section 8(a)(3) and (1) of the Act

15 By refusing to bargain with the Union as the designated collective bargaining representative of its employees in the appropriate bargaining unit and by engaging

in the above described violations of Section 8(a)(3) and (1) for the purpose of undermining and destroying the Union's majority status Respondent violated Section 8(a)(5) and (1) of the Act

16 The violations of the Act set forth above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act

17 Respondent engaged in objectionable conduct requiring that the election conducted on 20 November 1985 in Case 1-RC-18602 be set aside

18 The violations of the Act found here interfered with the election process, had a tendency to undermine the Union's strength prevented the holding of a fair election, and warrant the issuance of a bargaining order

THE REMEDY

In addition to the usual cease and desist and notice posting requirements, my recommended Order will require Respondent to bargain with the Union, and to offer unconditional reinstatement to Sharon Mangini Maria Aleman, and Adelaida Mora and make them whole for all wages lost by them as a result of their unlawful discharge such backpay to be computed on a quarterly basis with interest to be computed in the manner prescribed in *F W Woolworth Co*, 90 NLRB 289 (1950) and *Florida Steel Corp* 231 NLRB 651 (1977)⁷⁰ Respondent will also be required to remove from its files any reference to the discharge of Sharon Mangini Maria Aleman, and Adelaida Mora and the suspension of Maria Aleman and Adelaida Mora and notify them in writing that this has been done and that evidence of their unlawful discharge and suspension will not be used as a basis for future personnel action against them The General Counsel's request for a visitatorial clause is denied as unnecessary in this case

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷¹

ORDER

The Respondent 299 Lincoln Street Inc a wholly owned subsidiary of Broad Reach Health Services Inc, Worcester Massachusetts its officers, agents successors and assigns shall

1 Cease and desist from

(a) Maintaining or enforcing any rule or other prohibition which forbids solicitation on behalf of a union or distribution of union literature by employees on their own time in nonworking areas or areas not solely devoted to patient care

(b) Promulgating maintaining or enforcing overly broad rules prohibiting employee access to nonpatient care areas of Respondent's premises during his or her off duty hours

⁷⁰ See generally *Isis Plumbing Co* 138 NLRB 716 (1962)

⁷¹ If no exceptions are filed as provided by Sec 102.46 of the Board's Rules and Regulations the findings conclusions and recommended Order shall as provided in Sec 102.48 of the Rules be adopted by the Board and all objections to them shall be deemed waived for all purposes

(c) Telling employees it will be difficult for them to secure employment elsewhere if they select the Union to represent them

(d) Creating the impression that employee union activities are under surveillance

(e) Coercively interrogating employees about their union sympathies

(f) Suggesting that employees quit if they are going to vote for a union

(g) Promising better wages and working conditions if employees abstain from supporting a union

(h) Threatening to close sell or change its business operation if employees select a union to represent them

(i) Preparing warning notices to employees for the purpose of causing their discharge because they support a union

(j) Discouraging membership in the Union or any other labor organization, by discharging employees or otherwise discriminating in any manner concerning their tenure of employment or any term or condition of employment

(k) Refusing to recognize and bargain with the Union as the exclusive bargaining representative of all the employees in the above described appropriate unit

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

(a) Offer to Sharon Mangini, Maria Aleman and Adelaida Mora immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges and make them whole for any loss of earnings suffered by reason of Respondent's unfair labor practices in the manner set forth in the remedy section of this decision

(b) Remove from the records of Sharon Mangini, Maria Aleman and Adelaida Mora any reference to their discharge any reference to the suspension of Maria Aleman and Adelaida Mora, and all warning notices prepared for Maria Aleman and Adelaida Mora on and after 22 October 1985 and notify them in writing that this has been done and that the evidence of their unlawful discharges, suspensions and warning notices will not be used as a basis for any future disciplinary action against them

(c) Rescind its rule in its personnel manual prohibiting solicitations of any kind or the sale or distribution of material unless it is specifically approved by Respondent

(d) Rescind its 20 September 1985 rule denying employees access to Respondent's premises during their nonscheduled worktime

(e) Preserve and on request, make available to the Board or its agents for examination and copying, all pay roll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order

(f) Recognize and, on request bargain collectively with Lincoln Employees Union Division of U S W A , AFL-CIO-CLC as the exclusive collective bargaining representative of the employees of Respondent in the appropriate bargaining unit described below

All full time and regular part time nurses aides housekeeping employees food service employees, maintenance employees laundry employees and team leaders employed by the Employer at its 299 Lincoln Street, Inc facility in Worcester, Massachusetts excluding all office clerical employees Registered Nurses Licensed Practical Nurses, professional employees, temporary help agency employees, guards and supervisors as defined in the Act

(g) Post at its Worcester Massachusetts facility copies of the attached notice marked Appendix 7² Copies of the notice on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered defaced or covered by any other material

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges violations not specifically found

IT IS FURTHER RECOMMENDED that the election held in Case 1-RC-18602 on 20 November 1985 be set aside and Case 1-RC-18602 be dismissed

⁷² 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"