

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HOSPITAL SHARED SERVICES, INC.

and

Case 27-CA-14321
Case 27-CA-14414

INTERNATIONAL GUARDS UNION
OF AMERICA, REGION 6

and

Case 27-CA-14515

TY A. POWELL, An Individual

William J. Daly and Andrea Floyd, Esqs.,
of Denver, Colorado, for the General
Counsel.

John Blakley, of Amarillo, Texas,
for the Charging Party.

Robert J. Janowitz, and Joseph P. Leon, Esqs.,
of Kansas City, Missouri, for the Respondent.

DECISION

Statement of the Case

JAMES L. ROSE, Administrative Law Judge: This matter was tried before me at Grand Junction, Colorado, on several days from October 8 to November 7, 1996,¹ upon the General Counsel's consolidated complaint which alleged that the Respondent engaged in violations of Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.* It is also alleged that the violations were sufficiently serious to require a bargaining order, inasmuch as a majority of employees in an appropriate unit had signed authorization cards designating the Charging Party as their bargaining representative.

The Respondent generally denied that it committed any violations of the Act and affirmatively contends the discharge of Ron Hutchings was for cause, and that some of the authorization cards were solicited by supervisor John Barron.

¹ All dates are in 1996, unless otherwise indicated.

Upon the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I hereby make the following findings of fact, conclusions of law and recommended order:

5

I. JURISDICTION

The Respondent is a corporation with an office and place of business in Grand Junction, Colorado where it provides security services to St. Mary's Hospital. In the course and conduct of its business, the Respondent annually purchases and receives goods and materials valued in excess of \$50,000 directly from points outside the State of Colorado and annually provides services valued in excess of \$50,000 directly to St. May's Hospital, which is an acute care hospital with annual gross revenues in excess of \$250,000. The Respondent admits, and I conclude that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), 2(6) and 2(7) of the Act.

15

II. THE LABOR ORGANIZATION INVOLVED

International Guards Union of America, Region 6 (herein the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

20

III. THE ALLEGED UNFAIR LABOR PRACTICES

25

A. Background Facts.

The Respondent has total of about 1500 employees, about 800 of whom are security guards, with its corporate office in Denver, Colorado. The Respondent provides security services for 30 hospitals in Colorado as a cooperative, meaning that the hospitals have an ownership interest in the Respondent. For about 15 years the Respondent has provided the security for St. Mary's, 24 hours a day, seven days a week, employing, as of January 19, 12 full time and 6 part time employees (including Lieutenant Richard Benefield and Sergeant John Barron).

30

35

In December 1995 the security officers, led by John Barron and Ronald Hutchings, began to organize for the Union. They solicited 11 authorization cards from then current employees between January 11 and 19. The Union then filed a representation petition on February 12.

40

On February 15 the Respondent's President, George Schiel, and its Executive Vice-President for Security, Russ Colling, first met with the employees. They had subsequent meetings on February 16 and 26, March 4 and April 9. During these meetings statements were made which are alleged violative of Section 8(a)(1), to be discussed in detail below. And during this time period, Lieutenant Benefield is also alleged to have made statements violative of the Act.

45

A Stipulated Election Agreement was signed by the parties on February 26, however the election was not held, since the the charges in this matter had been filed.

50

It is alleged that on March 14 the Respondent refused to rehire Ty Powell and on March 15 discharged Hutchings both in violation of Section 8(a)(3) of the Act.

5 Finally, it is alleged that the unfair labor practices were sufficiently serious that they can best be remedied by a bargaining order, and that a majority of employees in an appropriate unit had designated the Union as their bargaining representative.

B. Analysis and Concluding Findings.

1. The Alleged 8(a)(1) Statements.

10 In general, the Respondent argues that the statements made by Schiel and Benefield must be considered in recognition of the employer's right under Section 8(c), which states, in effect, that no expression of views, argument or opinion shall constitute or be evidence of an unfair labor practice, unless such contains a threat of reprisal or promise of benefit. Or, as the Board has said, "The basic test for a violation of Section 8(a)(1) is whether under all the circumstances the employer's conduct reasonably tended to restrain, coerce or interfere with the employees' rights guaranteed by the Act." *Mediplex of Danbury*, 314 NLRB 470, 474 (1994).

20 Thus, each of the statements by Schiel and Benefield must be analyzed by considering "whether, under all the circumstances, (the) (R)espondent's remarks reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed under the Act." *Sunnyside Home Care Project, Inc.*, 308 NLRB 346 n.1 (1992).

a. The Meetings.

30 While the testimony is somewhat vague concerning how many times company officials met with the employees, and exactly what was said, there is a general consensus that there were meetings on February 15 and 16 and three later. And there is a general consensus about the subject matter, if not the exact words spoken. Thus, Schiel and Colling arrived in Grand Junction in the evening of February 15, and along with Benefield met with the four "swing shift" employees (4p.m. to 12m.). Barron testified that Schiel told them that "we had screwed up by not coming to him with our concerns and problems first and by contacting the union. We had painted them into a corner. The hospital was probably going to dissolve our contract. That it was probably too late."

40 Schiel, Colling and Benefield met with all the security officers on February 16. Barron testified that toward the end of the meeting Benefield asked why the employees had not come to him. When Benefield in turn was asked what he would have done if they had, he said "that he would have nipped it in the bud." Benefield went on to say, according to Jason Romero, "how he was upset at John Barron and how he made him a supervisor or a sergeant and that he felt betrayed or stabbed in the back."

45 Barron and Denning testified that on February 15, Schiel told employees that they should have come to Respondent before contacting the Union, which Schiel admitted.

50 Diego Pena testified that Schiel asked if was true they were trying to form a union and he asked "if we could tell him concerns that we had." The employees told him such things as they would like to have a better car, better training and civil insurance coverage.

Pena further testified that Schiel said the hospital was opposed to union. Schiel told them "that the nurses had tried to form a union before and explained what had happened the last time something arised (phonetic) like this at the hospital, that - - That the union was squelched, so to speak; people were fired because of informing. (sic.)"

5

Tim Denning testified that at this meeting it was said that after the meeting the Respondent's officials would meet with hospital officials "to discuss whether -- if HSS still had their contract with the hospital. We were told that St. Mary's could pull the contract within 24 hours as well as HSS could pull the contract within 24 hours."

10

At that meeting there was made available to employees copies of a letter prepared by Schiel which read:

Mr. John Blakely, Jr.
5112 Harvard
Amarillo, TX 79109

15

Dear Mr. Blakely;

20

Please withdraw my signature to be represented by the International Guards Union of America, Local #65.

Sincerely,

25

Schiel next met with the employees on February 26. Barron testified that Schiel stated that Barron and Shawn (Shaun Howell) had been singled out has having a lot of weight with the other employees, that they did not get much recognition and that there would be something in the company newsletter. Schiel also said "that he felt that he could be the best one for communication between us and the hospital, and that if a union was in that it would stop; the communication would stop."

30

Hutchings testified that Schiel said at this meeting that the hospital could end the contract in 30 days, but he was going to try to keep the hospital officials from doing so. "He told us that he was, you know, looking into our concerns, and that he was going to try to keep our jobs with St. Mary's, but if that we got a union in there, that St. Mary's would basically let us go because they were worried about a strike."

35

Hutchings also testified about a meeting with Schiel on March 4. "Mr. Schiel said that he was there to listen to our concerns and to basically take them to St. Mary's and see what he could do about getting them taken care of. He asked us what our concerns was." Hutchings testified that he and others stated several concerns they had. Finally Schiel "said that there were basically three things that St. Mary's could do, and if we voted a union in -- number one, they could terminate our contract in 90 days and go with someone else who was cheaper and pay their guys minimum wage, that we would just be out jobs, or that they could keep us on there as a union shop, but that St. Mary's didn't really want a union shop in there because they were worried about a strike."

40

45

The Respondent's evidence concerning these meetings is the testimony of Schiel. Colling did not testify and Counsel's examination of Benefield was limited to the subject of Hutchings discharge.

50

Schiel confirmed that he received the representation petition on February 12 and made arrangements for a trip to Grand Junction later that week. He and Colling arrived on the evening of February 15 and then met with the swing shift employees. They met with the rest of the security officers the next day.

5

Schiel stated that he started the February 15 meeting by saying “I regretted that the employees had not come to me first.” He had a lengthy discussion with employees about some of their concerns. And they talked about the election and “if there were demands that were significant by the union and if we responded to those demands, we could end up with an increase in our cost structure, and we would have to decide if we were able to work within that cost structure or pass it on to the hospital.” He told employees that if “we felt we had to increase our costs, we’d have to go to the hospital, ask for an increase, and the hospital would have to make a business decision, and at that time if the hospital did not want to have increased costs because they were outside their budget or whatever else, they could cancel our contract and do that immediately.”

10

15

One employee, who was opposed to the Union, asked if anything could be done for those who had signed cards. Schiel testified, “I told him that earlier that morning I had drafted a one-sentence letter that I would make available for anybody that wanted to voluntarily, and anonymously use it, but that I emphasized that I didn’t think it would do any good, and we left some copies on the table and some copies in the security office.” Schiel testified that this question had also been asked the night before, which prompted his preparing the letter.

20

On February 26 Schiel returned to Grand Junction, because a representation case hearing had been scheduled, and again met with the employees. He told them the Respondent would cooperate with the Union; he again invited discussion with the employees; and, he again told them how the Respondent was a membership corporation and went through the same scenario concerning passing on costs, should the Respondent agree with the Union to wage increases; and he again talked about the hand-billing of the hospital by another union the previous summer.

25

30

Schiel returned and had small meetings with employees on March 3 and 4 in order “to get a little better read on Mr. Benefield. I had heard in the previous meetings people talking about lack of responsiveness, lack of training, some other things and I wanted to try to get a little better read -- on that and get it done in small groups, to the extent I could.” And finally, he wanted to make sure the employees understood how the security program was structured on a cost basis.

35

The allegations of unlawful conduct by Schiel at the meetings are contained in paragraphs 5(a), (b), (c), (g) (h), (j), (k), (m), and (n).²

40

The facts set forth in paragraph 5(a) – that employees should have come to the Respondent before contacting the Union – is supported by the testimony, including that of Schiel. While this statement does not include a threat of reprisal or promise of benefit, during the course of the meeting threats were made. A similar comment in similar circumstances was made in *Crown Cork & Seal Company, Inc.*, 308 NLRB 445 (1992), and found to be unlawful,

45

²There is no evidence concerning the allegation in paragraph 5(o), nor did Counsel for the General Counsel make reference to this allegation in their brief. Accordingly, I will recommend it be dismissed.

50

though such was not included in the Board's remedial order or notice. I therefore conclude that the allegation in paragraph has been sustained.

5 In the meeting of February 16, when asked what he would have done if he had known about the employees' interest in the Union, Benefield said, "I would have nipped it in the bud." I disagree with Counsel for the Respondent that such is benign phraseology. I conclude there is an implicit threat in such a statement and that in context, the Respondent violated Section 8(a)(1) as alleged in paragraph 5(b). The remaining part of Benefield's statement, that he felt betrayed by Barron, tends to give immediacy to the implied threat, but does not, as alleged in 10 paragraph 5(c) does not seem, in itself, to imply a threat or a promise. Thus I shall recommend that paragraph be dismissed.

15 At the first general meeting of employees on February 16, an anti-union employee asked how those who had signed cards could get them back and Schiel said that he had prepared a letter to send to the Union. The Respondent argues that this was simply a ministerial act on Schiel's part and was not an attempt to solicit employees to retract their cards, citing *Poly Ultra Plastics*, 231 NLRB 787 (1977). I reject this argument. Unlike the case cited, here Schiel in fact prepared the letter, had copies of it to hand out at the meeting and to be 20 available in the security office. At the time there was no effort by employees who had signed cards to revoke them. Schiel's act was much more than minimal support for employees to renounce the Union and was violative of Section 8(a)(1) as alleged in paragraph 5(g). *Chelsea Homes, Inc.*, 298 NLRB 813 (1990).

25 In paragraph 5(h) it is alleged that Schiel told employees that by signing and withdrawing support from the Union, "he could buy them some time and maybe save their jobs." The credible testimony from the General Counsel's witnesses is that Schiel made no such comment when presenting the letters. Thus I conclude that the allegation in this paragraph is not factually supported; however, that does not take away from violation found concerning Schiel's soliciting employees to sign and send the letters. This allegation neither significantly 30 adds nor detracts from the essential violation.

35 The allegation of threatened discharge in paragraph 5(j), as to Schiel, appears based on his overall statements to employees at the February 15 and 16 meetings. Counsel for the General Counsel argue that his reference to employees being fired by the hospital when another union attempted to organize hospital employees and that the hospital was worried about a strike implied a threat of job loss. Especially this is so in the context of Schiel also suggesting that the Respondent might lose its contract with the hospital. I agree with Counsel for the General Counsel that in context, Schiel's statements would reasonably be construed by employees that their jobs were at risk for having engaged in union activity. *Mediplex of 40 Danbury*, 314 NLRB 470 (1994). Schiel's statement that the hospital might cancel the Respondent's contract, without offering any supporting objective facts, was not a reasonable prediction of events beyond his control. It was a threat of job loss. *Crown Cork & Seal Company, Inc.*, *supra*.

45 In paragraph 5(k) it is alleged that Schiel told employees he could negotiate for them better than the Union. Hutchings testified that Schiel made a statement to this effect on February 16. Schiel denied making such a statement. I tend to credit Schiel's denial. Further, the statement, as relayed by Hutchings, makes no sense. The employees through the Union would deal with the Respondent, not the hospital. I conclude that the allegation in paragraph 50 5(k) has not been sustained as a separate violation of the Act.

On March 4 Schiel is alleged to have solicited employee grievances (paragraph 5(m)) and promised to rectify them (paragraph 5(n)). Schiel testified that at the March 4 meeting, as well as the earlier ones, he sought to discover the employees' concerns. The employee witnesses all testified that Schiel asked about their concerns and they told him. Though as an abstract proposition the expressed willingness of a company to listen to employee concerns may not violate the Act, in a context such as here, solicitation does. Schiel was attempting to dissuade employees from their fledgling organizational campaign and did so in part by asking about their concerns, which necessarily implied that they would be corrected. Such violates Section 8(a)(1). *Bakerfield Memorial Hospital*, 315 NLRB 596 (1994).

Though some of the detail plead by the General Counsel I conclude either did not occur or was not violative of the Act, overall I conclude that Schiel undertook to interfere with the employees' right to organize by threats of job loss, solicitation of grievances with implied promises of benefits and attempting to aid them in renouncing the Union.

b. The Additional Statements of Benefield.

Apart from the meetings, Benefield is alleged to made certain statements to employees and others in violation of Section 8(a)(1). Although Benefield testified about the facts leading to Hutchings' discharge, he was pointedly not questioned about any of the 8(a)(1) allegations. These findings are therefore based on the undenied, and generally credible testimony of the General Counsel's witnesses.

On the morning of February 16, when Hutchings reported for work he had a brief discussion with Benefield. Hutchings testified that Benefield said, "you know what you guys are doing is ignorant. And I said, Oh? And he said, Yes. We're probably all going to lose our jobs because of this." Similarly, Romero testified that he talked to Benefield that morning and Benefield said, "You know that we all screwed up, meaning all the security officers by going to the union, and that we were all going to lose our jobs, that we had all cut our own throats because, you know, we were all going to get fired." These are clear threats of discharge for employees having engaged in protected activity and are clearly violative of Section 8(a)(1).

Romero testified that Benefield went on to say that if he had known of the union activity he would have "nipped it in the bud" and that he felt betrayed by Barron. And, toward the end, Benefield told Romero that that if he lost he job because of the union "if he sees any of us out on the street, he's going to settle it with us." Although such a statement is very contingent, it no doubt conveys the message of a physical threat to employees for engaging in protected activity and is thereby violative of Section 8(a)(1).

About February 14 or 15 Tim Denying was informed that he would be hired by the hospital and he gave the Respondent two weeks' notice. He talked to Benefield about continuing as a security officer on a part-time basis. Benefield said he would have to check. Later Benefield told Denning "that George Schiel was considering keeping me on part-time if I helped bust the union," to which Denning responded, "Fine." However, nothing more came of this. In any event, such a statement by Benefield is a promise of benefit to an employee to engage in anti-union activity and is therefore violative of Section 8(a)(1).

Shaun Howell testified that during this period, though the date was unspecified, Benefield told him that "we were going to wind up having our contract canceled because of the union." Benefield also said, when Howell indicated that he was going to have to get a second job, "if everything had been left alone, we wouldn't be looking for new jobs." And just before the

scheduled vote, Benefield asked Howell “if I’d be voting for or against the union.” By these statements Benefield clearly engaged in unlawful interrogation and made threats of job loss as a result of employees having engaged in protected activity.

5 In paragraph 5(l) it is alleged that Benefield told an individual not in employ of the Respondent that the Respondent was going to offer each employee a \$1 per hour wage increase to keep them from voting for the Union. Duane Kent so testified. While I find this statement occurred in substance as testified to by Kent, I do not believe that the Respondent thereby violated the Act. Kent was not at the time an employee of the Respondent, nor had he
10 been for more than two years. Their conversation took place at a bar, and not on or near the hospital. There is simply no nexus between what Benefield said and any employee.

15 On morning after Denning went to work for the hospital, he saw Benefield and stopped to say hello. Benefield “just looked at me and said, I heard you snitched me off, you son of a bitch.” This is alleged to have been violative of Section 8(a)(1). I disagree. Denning was not an employee, and in any event, there is really no implied threat or promise in this statement.

20 Nevertheless, the established pattern of conduct by Benefield during the organizational campaign demonstrates interference with employees engaging in protected activity by threats and promises of benefits. Through Benefield, the Respondent engaged in the violations of Section 8(a)(1) alleged in paragraph 5, although I will recommend dismissal of paragraphs 5(l) and (p).

25 **2. The Alleged 8(a)(3) Violations.**

a. Ronald Hutchings.

30 Hutchings had worked for the Respondent about one year and was generally considered a good employee, such that before these events Benefield had expressed the intention to promote him to sergeant. He was also instrumental in bringing about the organizational campaign for the Union. He, along with Barron, solicited employees and passed out cards. He was discharged on March 15. Schiel made the discharge decision, which was communicated to Hutchings by Benefield. Since Benefield was unable to reach Hutchings, he left a message on
35 Hutchings’ answering machine giving the following reasons, according to Benefield’s testimony: “Inappropriate possession of a master key while off duty, being in a locked area with a female hospital employee and, also, lying to me. He lied to me about the previous day.”

40 The General Counsel argues that the asserted reasons for discharging Hutchings are shifting and dubious. Therefore, I should infer that the true reason was his active part in soliciting authorization cards. The Respondent argues that it had cause to discharge Hutchings, as it had previously other employees who engaged in similar conduct. I agree with the Respondent. Even if the timing of Hutchings’ discharge with his union activity make out a prima facie case of discrimination, I believe he would have been discharged in the absence of such activity. Thus I conclude that the Respondent met its burden under *Wright Line, a Division*
45 *of Wright Line, Inc.*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981).

The three reasons given for discharging Hutchings all relate to the Respondent’s reasonably founded conclusion that he had been having an affair with a female hospital employee.

50 Thus on March 13 Hutchings came to the hospital while off duty and asked a fellow employee who was on duty for the master keys. His asserted purpose for needing the keys

was to put a document Kathy Standeford's office – the woman whom the Respondent later learned he had been spending a great deal of time with during duty hours. However, Hutchings also testified that the reason he was at the hospital while off duty was to finish his shift report, which should have been turned in the day before. What this has to do with his request and use of master keys is not explained.

In any event, Hutchings did get the mater keys and use them to enter a hospital office, without authorization. The Respondent has discharged other employees for the unauthorized use of master keys. Eventhough the other incidents involved different circumstances, it is nevertheless difficult to imply an unlawful motive from this reason.

The next day Hutchings asked and received permission to leave work for a "rehab" appointment at 9:00a.m. When at 9:15 Benefield did not see Hutchings' radio in the security office, he called to find out where Hutchings was. Hutchings replied that he was in the Medical Office Building and said his appointment was not until 9:30. Benefield went to the MOB and found Hutchings with Standeford.

Romaro testified that from about December 1995 he had observed Hutchings and Standeford spending time together. Hutchings "would perform his duties at times, but most of the time, he was socializing with her." "Talking, hugging, kissing, holding hands." One time in early February he found them a stairwell of the MOB. Hutchings asked him not to tell anyone and he did not. I credit Romaro, and note that he was called a witness by the General Counsel after Hutchings. Hutchings did deny the stairwell incident in examination before Romaro testified. I discredit this denial. Hutchings was not recalled to rebut Romaro's other assertions, which include detail not necessary for this decision.

Romaro testified that he finally "was just getting fed up with doing everything on the day shift" and he told Benefield about Hutchings and Standeford. According to Romaro this was the day before Hutchings was discharged.

Benefield testified, also credibly, that on March 14 as Romaro was reporting for work Benefield told him of the master keys incident. Romaro then asked Benefield to step outside and relayed to him that "Ron and Kathy Standeford had been having an affair at the hospital for the last two months and that he was tired of it because it left him to cover all the calls" Romaro also told Benefield the location of their meeting place on the fifth floor of the MOB.

Although Hutchings admitted that he was in an empty office with Standeford on March 15, he contends that he was there to comfort Standeford whose father was in the hospital with a heart condition. Though credible as to other matters, Hutchings testimony about the events the two days before his dischrge is not. But even if this is true, the circumstances under which Benefield found them, along with the other evidence of Hutchings behavior, are sufficient to justify the belief that Hutchings was engaging in activity for which he should be discharged. The fact that one engages in union activity does not give him immunity from discipline or discharge for cause. I conclude that the credible evidence preponderates in favor of finding that Hutchings was discharged for cause and not because of his activity on behalf of the Union. I shall recommend that paragraph 6(a) be dismissed.

b. The Failure to Rehire Ty Powell.

Ty Powell worked for the Respondent from February 27 to November 18, 1995, at which time he resigned for a job at the St. Mary's Hospital lab. However, by February he was having

5 some difficulty with coemployees and decided to seek a return to work for the Respondent. He talked to Benefield who “said there wouldn’t be any problems, that he would hire me back at any time when I was ready. He wouldn’t guarantee me how many hours he could give me or how many days, but he said he’d be glad to have me back.” Powell also told Benefield that he would be starting a law enforcement training course in June or July. Benefield said that would be no problem, that he would be able work Powell’s hours around school.

10 On March 14 Powell made the decision to give notice to the hospital but he wanted to check again with Benefield to make sure he had a job with the Respondent. He talked to Benefield that day and Benefield “told me that he could not rehire me at that time due to the fact that he had just learned that the security officers were trying to start a union and that, since I was part of the original discussion in the union, he could not rehire me because he’d just be rehiring another vote for the union, and that he was taking it personally and felt that I was part of that and part of going behind his back to start this union.” In fact Powell had been part of the union discussions before he resigned.

20 Benefield went on to say that an election had been scheduled for March 28 “and that after the election went through, he would see where it went after that.” Powell testified that he subsequently talked to Benefield a couple times, and got the same answer – “that he still couldn’t rehire me due -- until after the election for the union.” Another time, Benefield said that he had talked to George Speliotis (an assistant director of security) who “said the same thing, that he could not rehire me because they’d be hiring in another vote for the union, and that we’d just have to wait and see.”

25 The testimony of Powell is credible and was undenied by Benefield. Thus it is clear that Powell was not rehired in March because of his earlier activity on behalf of the Union, and because of the union activity in general. Further, records of the Respondent show that jobs were available from and after March 14. Ronnie McDonald was hired on March 22 and Benjamin Mantz was hired on April 9.

30 The Respondent argues that Powell’s claim of asking for a job does not make sense, since he would be leaving a full time job for an entry level part-time job with the Respondent. And, had he been hired Powell would not have been eligible to vote since the payroll cutoff date was February 17.

35 Neither of these points address Powell’s testimony of his conversations with Benefield, who was called as a witness by the Respondent but was not interrogated about this event. Thus the overwhelming credible evidence is that Powell applied for employment and was turned down for reasons violative of Section 8(a)(3) of the Act. I shall recommend an appropriate remedial order.

40 IV. Remedy

45 The General Counsel argues that the Union had been designated by a majority of employees in an appropriate bargaining unit at the time the Respondent embarked on its campaign of unfair labor practices. Therefore, the remedy should include a bargaining order, citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

50

It is alleged that the following is an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b):

5 All employees of Respondent performing security services at St. Mary's Hospital in Grand Junction, Colorado; excluding all other employees and supervisors as defined in the Act.

10 This defines a traditional guard unit, the appropriateness of which the Respondent stipulated in the representation case. Accordingly I find that such defines the appropriate unit here.

15 Including Barron, but excluding Benefield, as of January 19 there were 17 employees in the unit, of whom 11 had signed authorization cards. Thus a clear majority had designated the Union as their bargaining representative.

20 The Respondent argues, however, that this majority was tainted because at least three of the cards were solicited by Barron, whom the Respondent maintains was a supervisor within the meaning of the Act. The Respondent argues that the bargaining unit would be 16, of whom only seven signed valid cards. Therefore the Union did not have an uncoerced majority and a bargaining order would not be an appropriate remedy, even if some unfair labor practices occurred.

25 Barron was hired as a security officer on July 29, 1993. On July 10, 1995, he was promoted to Assistant Facilities Security Supervisor, given the rank of sergeant and an increase in hourly wages from \$6.90 to \$7.35. The Respondent argues that he has been a supervisor within the meaning of Section 2(11) of the Act in that he has, and has exercised, the power to responsibly direct employees, adjust their grievances and reward or discipline them.

30 I disagree. While Barron's competence was recognized with a promotion, the evidence is too thin to conclude that he was given actual supervisory status. He is a relatively long-term employee whom others look to for some guidance. But this does not mean he has the power of a supervisor. He was and remains a security guard. He works the swing shift (4p.m. to 12m.) along with three others, but he does not direct them, nor does it appear he exercises independent judgment in telling the others what to do and how to do it. The guard jobs are fairly autonomous, with the basic instructions being given in training, and special instructions by Benefield in the "pass it on log."

40 The Respondent notes that on August 3, 1995, after Benefield had made a written report criticizing the behavior of James Davidson, Barron wrote a reprimand to be placed in Davidson's personal file. Barron explained that he wrote the warning instead of Benefield, because Benefield had been the object of Davidson's conduct and he did so at Benefield's request. And he wrote a reprimand to Robert Leisten for having 11 pieces of nonwork related material, noting that Benefield had warned Leisten about this in the past. I do not believe these two incidents involved the exercise of independent judgment.

45 Barron also wrote two letters in which he indicated he had some kind of managerial status – one to a construction company and another on behalf of a fellow guard thanking a family of a patient who had written commending the guard. While such letters may be some indicia of status, neither prove that in fact Barron had supervisory authority over other employees.

50

The Respondent also contends that one week-end when Barron was off duty, he was called to the hospital because Davidson and Powell had a conflict involving a horse-play incident. Barron came as requested and talked to them. Such, I conclude, does not amount to adjusting grievances. A senior, respected employees was asked by other employees to help defuse a problem. While this is the kind of thing supervisors do, that Barron was called on one time does not cloak him with supervisory authority.

The Respondent also notes secondary indicia of supervisory status, such as the view of other employees. He certainly was considered by others to have senior status, and some witnesses thought of him as their "boss." And he too considered he had senior status. He was, after all, a sergeant. However, he wore a blue shirt, as did the other employees, whereas Benefield wore a white shirt. Barron was paid \$.45 more than the highest paid other employee (about 6.5%) whereas Benefield was paid \$3.00 more (about 43.4%).

The Respondent notes that if Barron is not a supervisor, then the ratio of supervisors to employees would be 17 to 1, which is very high. Whereas, if he is a supervisor, then the ratio would be a more realistic 8 to 1. Although ratio is a significant consideration, particularly in the industrial setting, where production employees are actually directed in their work, it is not of much importance here. There simply is not a significant amount of direct supervision of security officers. Thus, whether there is one supervisor to 17 employees or eight would not make much difference. Further, since the Respondent's operation called for 24 hour a day, seven day a week manning, and since Benefield and Barron each work 40 hours a week, there are 88 hours a week when neither is present. At these times, the security officers have no superior on duty, yet manage to do their jobs with no apparent difficulty. If at these times something really serious happens, then a more senior person is called, and that could be Barron. But there is only one reported incident of something like this happening.

On balance, I conclude that Barron was a senior employee whose direction of other employees involved routine decisions and not independent judgment. Thus he is not a supervisor as defined in the Act. *E.g., S.D.I. Operating Partners, L.P., Harding Glass Division*, 321 NLRB No. 24 (1996). Therefore, he would be included in the bargaining unit and the cards he solicited should be counted.

The Board has many times considered whether an employer's unfair labor practices fell within category two of *Gissel* – the "less extraordinary" cases but of sufficient severity that dissipating their effects through traditional remedies is unlikely. The Board has sometimes found the unfair labor practices not so serious as to warrant a bargaining order. *E.g. EMR Photoelectric, a Division of Sangamo Weston, Inc.*, 273 NLRB 256 (1984).

However, where violations are serious, then a bargaining order is warranted if a majority of employees in an appropriate unit had designated a representative. And the Board has long held that "the threat of job loss (i.e., discharge, layoff, and plant closure) because of union activity is among the most flagrant kind of interference with Section 7 rights and is more likely to destroy election conditions, and to do so for a longer period of time, than other unfair labor practices. *J.L.J. Inc. d/b/a Sheraton Hotel Waterbury*, 312 NLRB 304, 305 (1993).

I conclude that the threats here were of such severity. Benefield made direct threats of job loss to several employees and impliedly threatened retribution by stating that if he had known of the union activity he would have "nipped it in the bud."

More insidiously, and I believe more seriously, were the repeated statements by Schiel that the hospital would cancel its contract with the Respondent. He warned, without offering any factual support, that a wage increase would have to be passed on and accepted by the hospital, but it might not do so. If not, the hospital would cancel its contract with the Respondent. He also told employees how the hospital had treated an organizational campaign the year previously and how the hospital was afraid of strikes. In short, he made the hospital the “heavy” implying that if the employees chose the Union, he would be powerless to stop the hospital from ceasing to do business with the Respondent. This was a clear threat of job loss over which the Respondent would have no control.

The effects of this kind of threat I conclude would be long lasting and could not easily be remedied by traditional means. I conclude that a bargaining order in this case is appropriate.

Accordingly, I shall recommend that Respondent cease and desist from committing the unfair labor practices found and take certain affirmative action designed to effectuate the policies of the Act, including making whole Ty Powell for any losses he suffered from March 14 until June 19, when he was offered a job, pursuant to the formula set forth in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also recommend that the Respondent recognize and bargain with the Union as the duly designated representative of employees in an appropriate unit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Hospital Shared Services, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening job loss and other reprisals should employees engage in union or other protected, concerted activity.

(b) Attempting to help employees withdraw their authorization cards.

(c) Soliciting grievances from employees and impliedly promising to rectify them.

(d) Promising benefits to job applicants if they would work against union activity.

³If 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.

(e) Interrogating employees about how they intended to vote in the representation election.

5

(f) Refusing to hire a job applicant because of his and other employees' union activity.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.⁴

10

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

15

(a) Make Ty Powell whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in accordance with the formula set forth in the Remedy Section, above.

20

(b) On request, recognize and bargain with the Union as the exclusive representative of employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement, the certification year to begin when the Respondent recognizes the Union and begins to bargain in good faith. The appropriate unit within the meaning of Section 9(c) is:

25

All employees of the Employer performing security services at St. Mary's Hospital in Grand Junction, Colorado; BUT EXCLUDING supervisors as defined in the Act and all other employees.

30

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying all payroll records, social security payments records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

35

(d) Within 14 days after service by the Region, post at its facility in Grand Junction, Colorado, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 27, 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.

40

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

45

⁴ While serious, it does not appear that these are unfair labor practices warrant a broad remedial order. *Crown Cork & Seal Company, Inc., supra.*

50

⁵ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(f) The complaint allegations not specifically found are dismissed.

5

Dated, Washington, D.C.
February 13, 1997

10

James L. Rose
Administrative Law Judge

15

20

25

30

35

40

45

50

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten our employees with loss of jobs or other reprisals should they engage in union or other activity protected by Section 7 of the Act.

WE WILL NOT aid our employees in withdrawing their union authorization cards.

WE WILL NOT solicit grievances from our employees and promise to rectify them in order to discourage union or other protected activity.

WE WILL NOT promise benefits to job applicants in order for them to work against employees union or other protected activity.

WE WILL NOT interrogate our employees concerning their union or other protected activity.

WE WILL NOT refuse to hire applicants for employment because of their and other employees union or other protected activity.

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

WE WILL make whole Ty Powell for any loss of benefits he may have suffered as a result of our discriminatory refusal to hire him, with interest.

WE WILL on request recognize and bargain with International Guards Union of America, Region 6, as the duly designated and exclusive representative of our employees for purposes of collective bargaining in an appropriate bargaining unit, and we will embody any agreement reached in a written, signed contract.

Hospital Shared Services, Inc.

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 600 17th Street, 3d Floor, South Tower, Denver, Colorado 80202-5433, Telephone 303-884-3554.