

Saint John's Health Center and California Nurses' Association National Nurses Organizing Committee. Cases 31–CA–029005 and 31–CA–029315

December 30, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER
AND HAYES

On June 16, 2010, Administrative Law Judge John J. McCarrick issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party and the Acting General Counsel filed answering briefs. The Charging Party and the Acting General Counsel filed cross-exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt in part, as modified below, and reverse in part the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified and set forth in full below.²

Saint John's Health Center (the Respondent) is an acute care hospital located in Santa Monica, California. Since 2008, the California Nurses Association/National Nurses Organizing Committee (Charging Party or Union) has been engaged in an organizing campaign to represent the Respondent's registered nurses (RNs).

I. BAN ON UNION RIBBON

In November 2008, union organizers gave RNs ribbons stating, "Saint John's RNs for Safe Patient Care." On November 7, 2008, Steven Sharrer, Saint John's vice president of human resources, emailed the Respondent's nursing directors and asked them to inform employees who were wearing the ribbons that they "may not wear them in immediate patient care areas." Sharrer explained that he banned the ribbons because he was concerned that the ribbons were "detrimental and disruptive to patient care." On November 20 or 21, 2008, the director of labor and delivery, Irena Zuanic, told four RNs that they were

not allowed to wear the ribbons in immediate patient care areas. She also told them that they would be written up for insubordination if they continued to wear the ribbons.

Before and after the ban in November 2008, the Respondent allowed RNs to wear a variety of insignia on their uniforms including union buttons and political buttons. Employees were permitted to wear union buttons in immediate patient care areas, including one stating, "Respect and Dignity," and another stating, "Saint John's Nurses—the Heart of Healthcare." In addition, the Respondent issued a ribbon to RNs that said "Saint John's mission is patient safe care." The Respondent permitted employees to wear this ribbon in all areas of the hospital including immediate patient care areas.

The judge found that the ban, which was limited to immediate patient care areas, was presumptively valid, but found nevertheless that the Respondent violated Section 8(a)(1) of the Act because the ban was discriminatorily enforced. The Acting General Counsel and Charging Party except to the judge's finding that the ban was presumptively valid. The Respondent excepts to the judge's finding that the ban was discriminatorily enforced in violation of Section 8(a)(1). We agree that the judge erred by finding that the Respondent's ban was presumptively valid, and we therefore do not reach the judge's alternative finding that the ban was discriminatorily enforced.

It is well established that employees have a protected right to wear union insignia at work in the absence of "special circumstances." See *London Memorial Hospital*, 238 NLRB 704, 708 (1978); *Ohio Masonic Home*, 205 NLRB 357 (1973), *enfd.* 511 F.2d 27 (5th Cir. 1975); see also *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). In healthcare facilities, however, restrictions on wearing insignia in immediate patient care areas are presumptively valid, while restrictions on insignia in other areas of a hospital are presumptively invalid. *Casa San Miguel*, 320 NLRB 534, 540 (1995); see also *NLRB v. Baptist Hospital*, 442 U.S. 773, 781 (1979). Here, the judge found that the ban on union insignia was presumptively valid because the Respondent banned the ribbons only in immediate patient care areas. The judge also found that the absence of evidence regarding patient complaints or inquiry into patient disruption was insufficient to overcome the presumption of validity. We disagree.

The Board, with court approval, has created a presumption that protects an employer from liability if the employer bans solicitation or the wearing of insignia in immediate patient care areas. *NLRB v. Baptist Hospital*, *supra*. The basis of the presumption is that such solicitations or insignia "might be unsettling to patients—particularly those who are seriously ill and thus need

¹ There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by: (1) interrogating employees about their union or other protected concerted activities; (2) threatening employees with discipline for engaging in union or other protected concerted activities; (3) threatening to call police on employees and have employees arrested for engaging in union or other protected concerted activities; and (4) creating the impression that employees' union activities were under surveillance.

² We have modified the recommended Order and notice to conform to the violations found and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

quiet and peace of mind.” *St. John’s Hospital*, 222 NLRB 1150, 1150 (1972). Although this presumption protects a healthcare facility’s ban on all nonofficial insignia in immediate patient care areas, it does not protect a selective ban on only certain union insignia.³ In the latter type of case, the burden is on the hospital to show that the selective ban is “necessary to avoid disruption of health-care operations or disturbance of patients.” *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978).⁴ Thus, for example, in *Casa San Miguel*, 320 NLRB 534, 540 (1995), the judge, in a decision adopted by the Board, applied the presumption to dismiss a charge based on a nursing facility’s order that a nurse remove a uniform bearing a union message in patient care areas after finding that there was no “contention or evidence that while prohibiting its employees from wearing uniforms with a pronoun emblem or message printed on the front of the uniform, Respondent permitted the employees to wear uniforms on which other kinds of emblems or messages were printed.”⁵ See also *Mt. Clemens Medical Center*, 335 NLRB 48 (2001).⁶ Here, the Respondent

banned the Union’s ribbon stating, “Saint John’s RNs for Safe Patient Care,” but allowed employees to wear a hospital endorsed ribbon that was almost identical to the one issued by the Union. In addition, the Respondent allowed other union insignia and political buttons to be worn throughout the hospital including in immediate patient care areas. Having allowed other types of insignia to be worn in immediate patient care areas, the Respondent may not now rely on the protection of the presumption of validity applicable to an across-the-board ban to justify its selective ban of only the specific union insignia at issue. Under the circumstances presented here, we find that the Respondent’s ban on the Union’s ribbon is not protected by the presumption of validity.⁷

We turn now to whether the Respondent nevertheless was justified in banning the union ribbon because of special circumstances. The Board will find special circumstances in a healthcare setting where the restriction is “necessary to avoid disruption of health-care operations or disturbance of patients.” *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978). The Respondent argues that the ban was necessary because the ribbon was part of a larger campaign by the Union to show that patient care at the Hospital is not safe. The Respondent argues that it is permitted to ban any insignia that it reasonably believes may disturb patients. The Respondent, however, presented no evidence to support a reasonable belief that the ban was necessary to “avoid disruption of health-care operations or disturbance of patients.” The Respondent’s justification is based on the Union’s campaign, but the Respondent presented no evidence that patients were aware of the campaign such that the ribbon was likely to disturb patients or otherwise disrupt healthcare operations. The Respondent’s asserted justification is further weakened by the fact that the Respondent itself distributed a virtually identical ribbon and allowed nurses to wear it in immediate patient care areas. There is nothing in the record that indicates that patients would be any more concerned about the quality of patient care after seeing the Union’s ribbon that said, “Saint John’s RN’s for safe patient care,” than they would be by the Respondent’s ribbon that said, “Saint John’s mission is patient safe

³ The dissent suggests that an employer is privileged to ban union insignia in patient care areas while allowing all other insignia, both official and unofficial. However, the dissent’s citation to *Baptist Hospital*, 442 U.S. 773 (1979), *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), and *St. John’s Hospital*, 222 NLRB 1150 (1976), to support this analysis is misplaced because, in each of the cited cases, the Board found that a rule banning all solicitation in patient care areas was presumptively valid. The dissent’s extension of the jurisprudence to grant a presumption of validity to an employer who bans only union insignia in patient care areas is not only contrary to the case law, it is contrary to the purposes of the Act. Contrary to the dissent’s suggestion, nothing in our holding indicates that such a “broader restriction of Section 7 activity is presumptively lawful.”

⁴ The dissent suggests that all union insignia are potentially disruptive, but then takes the position that a hospital may selectively ban only certain union insignia because the “narrower restriction focusing on one or more insignia deemed to have a particularly disruptive potential” serves the same purpose as a general ban. The flaw in the analysis is that here, because the Respondent allows other insignia in patient care areas, including other union insignia, the Respondent’s ban on the union button at issue is not entitled to the presumption of validity. The Respondent has conceded by its action that not all union insignia are potentially disruptive and thus, even under the dissent’s view of the law, that it must justify the specific ban at issue. That is, without the presumption, the Respondent must show that banning the particular button was “necessary to avoid disruption of health-care operations or disturbance of patients.”

⁵ The dissent correctly points out that in *Casa San Miguel*, the judge and the Board upheld the ban. But the case is nevertheless instructive because the holding was premised on the finding that, unlike in this case, the ban extended to all unofficial insignia.

⁶ The judge and our dissenting colleague dismiss *Mt. Clemens* on the grounds that the decision’s application of the special circumstances test to immediate patient care areas is unnecessary dicta. We disagree. After finding that the hospital’s ban on union buttons was overly broad because it applied outside immediate patient care areas, the judge in *Mt. Clemens* found that the hospital’s ban violated Sec. 8(a)(1) even as

applied to union buttons *inside immediate patient care areas*. In doing so, the judge found that the ban was not presumptively valid because the hospital allowed employees to wear other insignia in immediate patient care areas and that the hospital failed to show special circumstances. *Id.* at 50. The Board adopted the judge’s finding that the ban was invalid as applied to immediate patient care areas. *Id.* at 48 fn. 2.

⁷ Contrary to the dissent’s suggestion, nothing in our holding prevents a hospital from imposing a categorical ban on unofficial insignia in patient care areas despite previously allowing such insignia, so long as the ban is not imposed in response to protected activity. But that is not what is at issue here.

care.”⁸ We see no difference between the two messages as they would be perceived by a patient.⁹ Accordingly, we find that the Respondent has not presented evidence sufficient to show that special circumstances justified the ban on the Union’s ribbon, and thus, the Respondent violated Section 8(a)(1).¹⁰

II. OFF-DUTY EMPLOYEE ACCESS RULE

The judge found that the Respondent violated Section 8(a)(1) of the Act by promulgating an off-duty employee access policy without clearly disseminating the policy to all employees and by enforcing the invalid policy against two employees. The Charging Party excepts to the judge’s failure to find that the off-duty access policy also

⁸ The dissent would find that the Respondent met its burden to show that special circumstances existed. In support, the dissent argues that the banned button *demanded* safe patient care while the Respondent’s button merely proclaimed that safe patient care was the mission of the hospital. In fact, no such demand was made on the banned button and no such difference existed. Similarly, the dissent repeatedly argues that the banned button was “critical of patient care” while the Respondent’s button sent the opposite message. However, nothing in the language on the two buttons supports that distinction and the Respondent presented no evidence to support an argument that patients would make such a distinction. In fact, the language on the two buttons was nearly identical.

⁹ In *Sacred Heart Medical Center*, 347 NLRB 531, 534 (2006), a majority of the Board deferred to the hospital administrators’ judgment that a proscribed message was more likely to disturb patients than a permitted message, but the Ninth Circuit reversed on the grounds that the deference accorded the administrators’ judgment in the absence of any evidence of adverse effects was inconsistent with prior Board precedent holding that “special circumstances justifying a restriction on union insignia must be established by substantial evidence in the record.” *Washington State Nurses Assn. v. NLRB*, 526 F.3d 577, 583 (9th Cir. 2008). While *Sacred Heart* is thus of questionable continued viability, it is nevertheless distinguishable here because in *Sacred Heart* the Board concluded that the “respondent has reasonably determined that one union button is distinguishable from another and is not as likely to disturb patients or their families.” 347 NLRB at 534. Here, where the proscribed ribbon read, “Saint John’s RNs for Safe Patient Care” and the permitted ribbon read “Saint John’s mission is patient safe care,” contrary to our dissenting colleague, we conclude that the distinction is not reasonable, but more akin to the examples of unreasonable distinctions described in footnote 12 of the *Sacred Heart* decision, for example, “prohibiting yellow union ribbon while allowing red and green ribbons not related to union.” *Id.* at 533 fn. 12 (citing *Holiday Park Hospital*, 262 NLRB 278, 279 (1982)). Permitting a ribbon so similar to the proscribed ribbon here simply belies Respondent’s concern about patient care and thus undermines the special circumstances it claims justify the challenged proscription.

¹⁰ Having found that the ban was not presumptively valid and that the Respondent did not show special circumstances to justify its ban, we do not reach the judge’s alternative finding that the ban was discriminatorily enforced.

We do, however, adopt the judge’s finding that supervisor Zuanic’s November 20, 2008 threat to enforce the rule violates Sec. 8(a)(1).

violated the Act because it did not apply to off-duty employees’ access for all purposes.¹¹

The Respondent had a policy, effective June 2003, that addressed employee solicitation and distribution, but did not address off-duty access. The Respondent also had a handbook that stated, “[t]he access of employees to the interior of Saint John’s premises and to working areas of the exterior of the premise while not on duty shall be permitted only for the purpose of visiting a patient.” In January 2009, the Respondent revised its solicitation and distribution policy. The new policy, Solicitation and Distribution Policy 830.08, states:

Off-duty employees are not allowed access to the interior of the Health Center’s building or to other working areas at the Health Center. Off-duty employees are permitted access to the cafeteria and are also permitted access to the building to attend Health center sponsored events, such as retirement parties and baby showers. Employees are expected to arrive at their work area at or shortly before the beginning of their scheduled shift, and are expected to leave their work area promptly after completing their shift.

The above policy was posted on the Respondent’s shared intranet at some point in May 2009 and was emailed to employees on May 21, 2009. In March 2009, Vice President for Human Resources Sharrer told a hospital security supervisor that off-duty employees should not be in the hospital. Historically, off-duty employees were permitted on the premises for a variety of reasons, including collecting personal belongings, picking up items ordered from other nurses, checking the schedule, attending baby showers and birthday parties, and visiting with friends and coworkers. On May 14, the new access policy was enforced against off-duty employees who were on the premises to campaign for the Union. On May 15, the policy was enforced against an employee who was on the premises to retrieve his wallet. There is no evidence that, prior to May 14, 2009, any employees were told that they could not be in the hospital if they were off duty.

In *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976), the Board established that an employer’s rule barring off-duty employees from access to its facility is valid only if it:

¹¹ No exceptions were filed to the judge’s findings that the Respondent’s no-access policy violated Sec. 8(a)(1) because it was not properly disseminated and that the Respondent also violated Sec. 8(a)(1) by enforcing the policy against off-duty employees on May 14 and 15, 2009.

(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.

222 NLRB at 1089. See also *TeleTech Holdings, Inc.*, 333 NLRB 402, 404 (2001); *Nashville Plastic Products*, 313 NLRB 462, 463 (1993); *Fairfax Hospital*, 310 NLRB 299, 308–309 (1993), enfd. mem. 14 F.3d 594 (4th Cir. 1993), cert. denied 512 U.S. 1205 (1994).

The judge found that Solicitation and Distribution Policy 830.08 met the first prong of *Tri-County* because it was limited to the interior of the hospital and other working areas. The judge found, however, that the policy did not meet prong two because it was not clearly disseminated until May 21—after it was enforced against two employees. The judge did not reach the issue of whether the policy also violated the prong three of *Tri-County*. Therefore, the judge's order did not require the Respondent to rescind the policy but merely required the Respondent not to enforce the policy without providing notice to the employees. The Charging Party argues that the rule violates prong three because it does not prohibit access for all purposes.

We find merit in the Charging Party's exception. The law governing employees' off-duty access to their employer's property is grounded in the Supreme Court's landmark decision in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). There, the Court upheld the Board's ruling that the employer's rule prohibiting solicitation in the plant at any time "entirely deprived [employees] of their normal right to 'full freedom of association' in the plant on their own time, the very time and place uniquely appropriate and almost solely available to them therefor."¹² The Court recognized that "time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property."¹³ A rule prohibiting

solicitation "outside of working hours, although on company property," the Court held, is therefore presumptively unlawful absent "special circumstances [that] make the rule necessary in order to maintain production or discipline."¹⁴ Subsequently, applying *Republic Aviation in Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), the Court noted that "the plant is a particularly appropriate place for the distribution of § 7 material, because it 'is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.'"¹⁵

The test that the Board adopted in *Tri-County* regarding employees' off-duty access to their employer's property follows from the principles set forth in *Republic Aviation* and *Eastex*.¹⁶ Given the centrality of employees' right to communicate with their fellow employees at their workplace on their own time and the "particularly appropriate" nature of the workplace for exercising that right, a rule prohibiting employees from being present at their workplace on their own time clearly trenches on their exercise of that fundamental right.¹⁷ On the other hand, the employer has a private property interest in controlling access to its premises; it is the Board's job to weigh this interest against the employees' Section 7 right "and to seek a proper accommodation between the two."¹⁸ The three requirements of the *Tri-County* test effectuate the Board's duty to accommodate these competing interests in keeping with the principles of *Republic Aviation*. The first requirement for a no-off-duty-access rule to be valid—that the rule limit access solely

itself an unfair labor practice." *Id.* at 362. There is no allegation in the instant case that the Respondent engaged in antiunion solicitation, nor is such employer conduct an element of the *Tri-County* standard.

¹⁴ *Id.* at 803–804 fn. 10 (quoting *Peyton Packing Co.*, 49 NLRB at 843–844).

¹⁵ *Id.* at 574, quoting *Gale Products*, 142 NLRB 1246, 1249 (1963).

¹⁶ See *ITT Industries v. NLRB*, 413 F.3d 64, 68 (D.C. Cir. 2005) ("The NLRB's *Tri-County* balancing test followed from *Republic Aviation*.").

¹⁷ Prohibiting employees from remaining on the premises obviously limits their ability to communicate with their coworkers. Furthermore, as Members Fanning and Jenkins observed in *GTE Lenkurt, Inc.*, 204 NLRB 921, 923 (1973), "it compartmentalizes the employees in each shift and completely isolates them from their fellow employees on other shifts." Accordingly, they concluded, such a rule "is destructive of the Employees' protected right to promote self-organization." *Id.* While the above views were written in partial dissent in *GTE Lenkurt*, they were followed by the majority in *Bulova Watch Co.*, 208 NLRB 798, 798 fn. 2 (1974), which was in turn relied on by the Board in fashioning the *Tri-County* standard. See *Tri-County*, 222 NLRB at 1089; *ITT Industries v. NLRB*, 413 F.3d at 68.

¹⁸ *Hudgens v. NLRB*, 424 U.S. 507, 521 (1976) (quoting *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972)).

¹² *Id.* at 801 fn. 6 (internal quotation marks omitted).

¹³ *Id.* at 803 fn. 10 (quoting *Peyton Packing Co.*, 49 NLRB 828, 843 (1943)). Arguing that the principles of *Republic Aviation* do not apply to the instant case, our dissenting colleague states that the Court "did not resolve the access rights of off-duty employees," but rather the rights of "on-duty employees." That statement is obviously inconsistent with the words of the Court itself that are quoted in the accompanying text.

By contrast, the dissent's reliance on *NLRB v. Steelworkers (Nu Tone, Inc.)*, 357 U.S. 357 (1958), is indeed misplaced. The "very narrow and almost abstract question" in *Nu Tone* was whether, "when the employer himself engages in anti-union solicitation that if engaged in by employees would constitute a violation of the rule[,] his enforcement of an otherwise valid no-solicitation rule against the employees is

to “the interior of the plant and other working areas”—reflects the distinction established in *Republic Aviation* for no-distribution rules, recognizing the employer’s higher interest in controlling employee activity in working areas because of its foreseeable effect on production. The second requirement—that the rule be “clearly disseminated to all employees”—aptly measures both the strength of the employer’s legitimate interest and the neutrality of the rule using the employer’s own conduct as a gauge: if the rule is not sufficiently important to the employer for it to announce it clearly, and to all employees, the employer’s interest will not outweigh the employee’s interest in exercising their Section 7 rights. The third requirement—that the rule apply to off-duty employees seeking access “for any purpose”—similarly tests the strength and neutrality of the employer’s legitimate interest: if off-duty employee access is not sufficiently prejudicial to “production or discipline” to warrant, in the employer’s judgment, a uniform ban, neither does it warrant the infringement of a fundamental statutory right.¹⁹ It is this third prong of the *Tri-County* test that the Respondent’s rule fails even after the May 21 dissemination.

The Respondent’s policy generally prohibits off-duty employees’ access to most of the interior of the Health Center’s building. However, it makes an exception to that general prohibition by permitting access “to attend Health center sponsored events, such as retirement parties and baby showers.” Thus, discussing self-organization or terms and conditions of employment are among the purposes for which the Respondent’s policy does not allow access.²⁰ Indeed, on May 14, 2009, the Respondent enforced its no-access policy against off-duty employees who were on the premises to campaign for the Union. The Respondent’s policy thus clearly fails the third prong of the *Tri-County* test, as it does not uniformly prohibit access by off-duty employees seeking entry to the property for any purpose. Most egregiously, the exception is not a narrow one that might arguably be viewed as justified by “special circumstances”—rather, it

¹⁹ In addition to the three-part test for validity of a no off-duty access rule, the Board in *Tri-County* promulgated a different standard regarding employer rules limiting access to outdoor areas. This aspect of *Tri-County* is not at issue here.

²⁰ Accordingly, the principal point upon which the dissent rests is incorrect: “First,” the dissent asserts, “the Respondent’s off-duty access rule does not prohibit off-duty access for the purpose of discussing self-organization or terms and conditions of employment.” In fact, the rule prohibits off-duty access for all purposes except those specified in the rule; the exceptions, of course, do not include Sec. 7 activity. Moreover, the Respondent itself applied the rule to prohibit discussing self-organization when it ejected from the building off-duty employees who were distributing union literature in a nonworking area.

applies to any and all events sponsored by the Respondent.²¹ In effect, the Respondent is telling its employees, you may not enter the premises after your shift except when we say you can. Such a rule is not consistent with *Tri-County*.²² Consequently, we find that the Respond-

²¹ The cases cited in the dissent are inapposite for this and other reasons. *Hammary Mfg. Corp.*, 265 NLRB 57 (1982), presented the question whether a no-solicitation rule was unlawful because it contained a “sole exception” for the annual United Way campaign. The Board ruled that it was not, but found a violation based on disparate application of the rule. *Id.*; *Hammary Mfg. Corp.*, 258 NLRB 1319 (1981). The differences between *Hammary* and the instant case are obvious and dispositive. First, *Hammary* did not involve a no-access rule; unlike in the case we decide today, employees were not being barred from the “place uniquely appropriate and almost solely available to them [for self-organizational activity].” *Republic Aviation*, 324 U.S. at 801 fn. 6 (internal quotation marks omitted). Second, the rule in *Hammary* applied to employees only “during actual working time.” 258 NLRB at 1320. It did not apply to off-duty employees as did the Respondent’s rule, so, unlike the Respondent, the employer in *Hammary* acted well within its privilege under *Republic Aviation* to regulate its employees’ on-duty conduct. See *Our Way*, 268 NLRB 394 (1983). Third, the narrow, extremely specific exception in *Hammary* could not be more different than the present exception, in which the Respondent confers upon itself broad, standardless discretion to suspend application of the rule for any event that the Respondent sees fit to sponsor. See *Lucile Salter Packard Children’s Hospital v. NLRB*, 97 F.3d 583, 590–591 (D.C. Cir. 1996) (rejecting exemption from no-solicitation rule for goods and services deemed by the employer to be “a ‘benefit’ for its employees,” because “[t]o allow such a subjective criterion to govern access would eviscerate section 8(a)(1)’s purpose of preventing discriminatory treatment of unions”).

The dissent’s citation of *Flagstaff Medical Center*, 357 NLRB No. 65 (2011), is likewise off the mark. In that case the Board upheld the dismissal of an allegation that prohibiting an employee from engaging in union solicitation in the kitchen was unlawful because the employee had previously been permitted to solicit for the United Way. The judge ruled that “the employer may permit such charitable solicitations on an ad hoc basis without negating an otherwise legitimate exclusionary rule.” *Id.*, slip op. at 27. Again, the cited case involved a no-solicitation rule, not a no-access rule, and involved a specific, narrow exception. More significantly, it involved an ad hoc exception to the rule—an instance of nonenforcement of the rule—and not an exception contained in the rule itself. This distinction, which underlies the ruling in *Flagstaff*, is crucial: ad hoc exceptions made by the employer in its enforcement of an otherwise valid rule may support a finding of discriminatory enforcement, but an exception contained in the rule itself goes to the facial validity of the rule. The dissent fails to address this distinction by incorrectly describing today’s holding as “an ‘all or nothing approach’ under which such rules are invalid if the employer has ever allowed any exception to them for any occasional purpose unrelated to Section 7 activity.” Contrary to the dissent, this case involves not an ad hoc exception made for an “occasional purpose,” but a broad, all-encompassing exemption contained in the rule itself.

²² *Tri-County*, which has been the law concerning no-access rules for over 35 years, states the third requirement in clear and unequivocal language: the rule must apply to off-duty employees “for any purpose.” 222 NLRB at 1089 (emphasis supplied). Contrary to the dissent, the succeeding phrase, “and not just to those employees engaging in union activity,” cannot be read as limiting or modifying the clear meaning of those three words, nor has the dissent cited any case in which *Tri-County* has been applied to permit an exemption resembling in any way

ent's off-duty employee access rule violates Section 8(a)(1) for the additional reason that it does not uniformly prohibit access to off-duty employees seeking entry to the property for any purpose.

ORDER

The National Labor Relations Board orders that the Respondent, Saint John's Health Center, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Interrogating its employees about their union and other protected concerted activities.
 - (b) Threatening employees with discipline for engaging in union or other protected concerted activities.
 - (c) Threatening employees with calling the police and having them arrested for engaging in union or other protected concerted activities.
 - (d) Creating the impression that the employees' union activities were under surveillance.
 - (e) Prohibiting employees from wearing union ribbons in immediate patient care areas that state, "Saint John's RNs for Safe Patient Care."
 - (f) Promulgating, maintaining, and enforcing a rule which limits off-duty employee access to nonworking areas of its facility without providing adequate notice of the rule to employees.
 - (g) Promulgating, maintaining, and enforcing a rule which limits off-duty employee access to nonworking areas of its facility for some purposes while permitting access to off-duty employees for other purposes.
 - (h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
 - (a) Cease prohibiting employees from wearing union ribbons in immediate patient care areas that state, "Saint John's RNs for Safe Patient Care."
 - (b) Cease giving force and effect to a rule which limits employees' access to its facility without providing adequate notice of the rule to employees.
 - (c) Rescind Solicitation and Distribution Policy 830.08 to the extent that it permits access to the Respondent's facility to off-duty employees for certain purposes while barring access to off-duty employees for other purposes.
 - (d) Within 14 days after service by the Region, post at its facilities in Los Angeles, California, copies of the

the one contained in the Respondent's rule. As explained above, the *Tri-County* standard is soundly based in the fundamental policies of the Act, and today's decision is a straightforward application of this longstanding rule to the facts before us.

attached notice marked "Appendix."²³ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent in the position employed by the Respondent at any time since October 7, 2008.

(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.

(f) Substitute the attached notice for that of the administrative law judge.

MEMBER HAYES, dissenting in part.

The Respondent, Saint John's Health Center, reasonably tried to protect its patients from becoming enmeshed in a union organizing campaign by banning employees in immediate patient care areas from wearing a particular union ribbon attacking the safety of its patient care. Taking the peculiar view that, absent proof of discriminatory enforcement, a broader restriction of Section 7 activity is presumptively lawful, but a narrower restriction is not, my colleagues find this ban to be unlawful. My colleagues also invalidate the Respondent's rule limiting off-duty employee access to the hospital, even though the rule provides for unrestricted access to the employee cafeteria for any purpose, obviously including Section 7 activity. In finding that unfair labor practice, the majority takes an "all or nothing approach" under which such rules are invalid if the employer has ever allowed any exception to them for any occasional purpose unrelated

²³ 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."

to Section 7 activity. Because these rulings unnecessarily upset the careful balance struck by the Supreme Court between employee organizing rights and a health care employer's legitimate patient care concerns, I respectfully dissent.¹

A. *The Respondent's Ribbon Ban Was Lawful*

Facts

During a 2008 organizing campaign, union organizers gave the Respondent's registered nurses ribbons stating "Saint John's RNs for Safe Patient Care." It is undisputed that the ribbons were intended to criticize the safety of patient care—particularly the hospital's alleged noncompliance with a California law on nurse-to-patient staffing ratios. There is no evidence that the Respondent had ever permitted employees to wear insignia critical of patient care in immediate patient care areas. The Respondent, however, had allowed RNs to wear other union buttons and insignia, political buttons, and hospital-issued buttons in various parts of the hospital, including immediate patient care areas. One hospital-issued button promoting the safety of the hospital's care read "Saint John's mission is patient safe care."

On November 7, 2008, the Respondent's vice president for human resources Steven Sharrer instructed supervisors that they should not permit the "Saint John's RNs for Safe Patient Care" ribbons to be worn in immediate patient care areas, but that the ribbons could be worn in all other hospital areas. Sharrer explained that the ban limited to immediate patient care areas was necessary because the ribbon "may be detrimental and disruptive to patient care." On or around November 20 or 21, 2008, Respondent's director of women's health services Irena Zuanic instructed several RNs not to wear the same ribbons in immediate patient care areas and advised them that they would receive written warnings for insubordination if they persisted.

Analysis

The judge dismissed the complaint's allegation that the "Saint John's RNs for Safe Patient Care" ribbon ban violated Section 8(a)(1) of the Act on its face. He found the ban to be presumptively lawful under controlling Supreme Court and Board precedent because it was limited to immediate patient care areas. However, the judge did find that the Respondent violated Section 8(a)(1) by disparately enforcing the ribbon ban, in that the Respondent had permitted other buttons and union insignia that he

¹ I agree with the majority's adoption of the judge's findings of violations to which there are no exceptions.

regarded as being of a "similar character" to the prohibited "Saint John's RNs for Safe Patient Care" ribbon.²

The majority does not reach the judge's disparate enforcement finding. Instead, my colleagues first conclude, contrary to the judge, that the narrow restriction on wearing the potentially disturbing "Saint John's RNs for Safe Patient Care" ribbon was presumptively invalid, even though it was limited to immediate patient care areas, because the Respondent allowed other insignia, including union insignia, to be worn in those areas. Characterizing the prohibition of the Union's ribbon as "selective," the majority holds that a rule either forbids all insignia in immediate patient care areas or it is not presumptively valid. Then, finding that no "special circumstances" justified this "selective" ban, my colleagues find the ban itself violated Section 8(a)(1) of the Act.

Contrary to the majority, I would find that a "special circumstances" test, imposing on the Respondent the burden to justify its ban, does not apply here. I would adopt the judge's finding that the "Saint John's RNs for Safe Patient Care" ribbon ban in patient care areas was presumptively valid and that the General Counsel failed to rebut the presumption. As discussed below, that presumption applies to restrictions on union insignia in immediate patient care areas and has not previously been defined as applicable only to absolute bans of such insignia. A finding that the rule was merely "selective" is no substitute for a finding of disparate enforcement, which cannot be made on this record. Because there was no disparate enforcement here, I would also reverse the judge's finding of an 8(a)(1) violation on that basis.

The Board and the courts have long recognized that "the primary function of a hospital is patient care and . . . a tranquil atmosphere is essential to the carrying out of that function." *St. John's Hospital*, 222 NLRB 1150 (1976), enf. granted in part and denied in part 557 F.2d 1368 (10th Cir. 1977). Thus, "the special characteristics of hospitals justify a rule [on the wearing of union insignia or union messages] different from that which the Board generally applies to other employers." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 494 (1978). As the Supreme Court has emphasized:

Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family—irrespective of whether that patient and that family are

² Although this theory of violation was not alleged in the complaint, the Respondent does not except to the judge's consideration of it.

labor or management oriented—need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one reminding of the tensions of the marketplace in addition to the tensions of the sick bed.

NLRB v. Baptist Hospital, 442 U.S. 773, 783 fn. 12 (1979).

Thus, the Board has determined that, in healthcare facilities, restrictions on the wearing of union-related buttons and insignia are presumptively valid in immediate patient care areas. *Sacred Heart Medical Center*, 347 NLRB 531 (2006), reversed on other grounds *Washington State Nurses Assn. v. NLRB*, 526 F.3d 577 (9th Cir. 2008). There is no requirement that such restrictions be justified by showing specific special circumstances on a case-by-case basis. That requirement applies only outside immediate patient care areas, where such restrictions are presumptively invalid and an employer must show that the restriction is “necessary to avoid disruption of health care operations or disturbance of patients.” See *id.*; *Beth Israel*, supra, 437 U.S. at 507.

Restrictions on organizing activity in immediate patient care areas are presumptively valid because “[s]olicitation at any time in those areas might be unsettling to the patients.” *St. John’s Hospital*, supra. The Supreme Court has held that this presumption is necessary to insure that patient care is not disrupted in the Act’s balancing of the employees’ right of self-organization and the employer’s right to maintain discipline and control of its property. *Baptist Hospital*, supra, 442 U.S. at 778–782; *Beth Israel*, supra, 437 U.S. at 491–493. A presumptively valid rule is lawful “in the absence of evidence that it was adopted for a discriminatory purpose.” *Peyton Packing Co.*, 49 NLRB 828, 843 (1943), *enfd.* 142 F.2d 1009 (5th Cir. 1944), *cert. denied* 323 U.S. 730 (1944).

Applying these principles, it is clear that the Respondent’s prohibition of the “Saint John’s RNs for Safe Patient Care” ribbon was presumptively lawful. The Respondent is unquestionably a healthcare facility, and the disputed prohibition expressly applied only to “immediate patient care areas.” As the Board and the courts have consistently recognized, organizing activity “at any time” in such areas poses an unacceptable risk to patient care. See, e.g., *St. John’s Hospital*, supra. There is also no evidence that the ban was adopted for a discriminatory purpose. To the contrary, the Respondent allowed many other insignia, including union insignia, to be worn in all areas of the hospital.³ Given this undisputed fact, any

³ Accordingly, there is no merit to the majority’s implication that the Respondent banned “union insignia in patient care areas while allowing all other insignia, both official and unofficial,” and I express no view on whether such a ban would be lawful. Instead, the Respondent al-

lowed all union insignia, except one, as well as other personal insignia. The majority fails to give proper weight to this critical fact.

contention that the Respondent banned the “Saint John’s RNs for Safe Patient Care” ribbon because of its union origins is untenable. *Sacred Heart*, supra at 533. Rather, the ban was enforced, as the Respondent explained, because the ribbons “may be detrimental and disruptive to patient care.” As the Board stated in *Sacred Heart*, “[T]he mere fact that an employer has not previously forbidden union insignia does not foreclose that employer from ever imposing restrictions on buttons, particularly where, as here, that insignia is potentially disruptive.” 347 NLRB at 534.

Further, regardless of whether they were Union-issued or not, none of the other buttons, insignia or other messages that the Respondent permitted were critical of patient care safety. That made them fundamentally different in character from the ribbon that was banned. *Sacred Heart*, supra at 533 (ribbons and buttons that “speak[] primarily to [patient] safety” are different in kind from those that do not). Indeed, the majority does not find that the Respondent’s ban was discriminatory. Instead, my colleagues rely solely on the “selective” nature of the ban in order to shift the burden of proving the ban’s validity to the Respondent, in contravention of the well-established evidentiary presumptions governing this situation. The fact that a health care employer permits the wearing of some insignia in patient care areas, even when it has a general right to prohibit all such insignia, does not mean that a narrower restriction focusing on one or more insignia deemed to have particularly disruptive potential is not just as presumptively valid because it serves the same prophylactic purpose as a general ban.⁴ The burden remains on the General Counsel to rebut the presumption with proof of discriminatory purpose.

Contrary to the majority, neither *Casa San Miguel*, 320 NLRB 534 (1995), nor *Mt. Clemens General Hospital*, 335 NLRB 48 (2001), *enfd.* 328 F.3d 837 (6th Cir. 2003), supports their position. In *Casa San Miguel*, the Board adopted the decision of the judge who found that an instruction to a nurse to stop wearing a uniform to which she had added a pronoun message was a presumptively valid instruction in immediate patient care areas. The judge so held on the sole basis that “the Act

⁴ Thus, the Respondent’s past allowance of other union insignia is not a concession, as the majority argues, that all union insignia are not potentially disruptive. The purpose of the presumptive validity principle is to protect patients by allowing hospitals to presume that any union insignia in immediate patient care areas may be potentially disruptive. In this case, the Respondent reasonably concluded that the first union ribbon critical of patient care that it confronted was potentially disruptive. That judgment was well within the purpose of the presumption.

does not prohibit Respondent from refusing to allow its employees to wear such a uniform during those periods of time they work in patient care areas.” 320 NLRB at 540. The judge separately found the uniform ban lawful as to nonpatient care areas as well, concluding that “special circumstances” supported the ban there because it would be impractical for employees to change uniforms when entering and leaving patient care areas.⁵ Contrary to the majority’s interpretation, nothing in the Board’s decision remotely suggests that the hospital’s past practice was relevant to the separate issue of the ban’s presumptive validity in immediate patient care areas. In fact, the separate treatment of the ban in immediate patient care areas and in other hospital areas demonstrates that it was not.⁶ As such, far from supporting my colleagues’ views, *Casa San Miguel* establishes that the ban at issue here was lawful.

The Board’s decision in *Mt. Clemens General Hospital*, supra, also does not support the majority’s position. The ban on the union button in that case, unlike this case, applied to all areas of the hospital not just patient care areas. Thus, under controlling Board law, the ban was invalid in all areas of the hospital including patient care areas⁷ and there was no need for the judge to conduct a separate inquiry into the ban’s application in patient care areas. The hospital in *Mt. Clemens* also conceded that it had previously allowed “controversial” buttons. In contrast, the Respondent had not previously done so and the ribbon in this case was the first message critical of patient care that the Respondent had confronted.

The majority’s position is further unreasonable from a patient care standpoint. The presumptive validity principle rests on the Board’s determination that union insignia in immediate patient care areas “at any time” might be unsettling to patients. See *St. John’s*, supra at 1150. Viewing the matter from the patient’s perspective, as the Supreme Court has instructed,⁸ the “St. John’s RNs for

Safe Patient Care” ribbon was just as intrusive to patients as it would have been if other insignia had not been allowed in the past. Indeed, it is highly unlikely that a given patient would be aware of the hospital’s past practice on insignia. The Board’s presumptions in this area are valid only insofar as there is “a sound factual connection between the proved and inferred facts.” *Baptist Hospital*, 442 U.S. at 787 (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)). It is hard to see how the majority’s interpretation of the presumption satisfies this test.

The majority’s presumptive validity standard is practically unworkable as well. Instead of giving the parties certainty as to what may be prohibited in immediate patient care areas, the majority’s proposed standard turns on the hospital’s past practice. If any kind of insignia have ever been allowed at any time no matter how long ago, then any restriction on any union insignia, no matter how offensive, is presumptively unlawful and the employer must show special circumstances.⁹ That is not the law. As the Board stated in *Sacred Heart*, “[T]he mere fact that an employer has not previously forbidden union insignia does not foreclose that employer from ever imposing restrictions on buttons, particularly where, as here, that insignia is potentially disruptive.” 347 NLRB at 534.¹⁰

B. The Limited Exceptions In Respondent’s Off-Duty Access Rule Did Not Render The Rule Invalid

Facts

In January 2009,¹¹ the Respondent issued a policy prohibiting off-duty employee access to the hospital building interior, with two exceptions. One exception allowed off-duty employees access to the cafeteria, with no apparent limitation on Section 7 activity in that location. The other exception permitted off-duty employees access to the hospital “to attend Health [C]enter sponsored

⁵ In support of the ban’s validity, the judge also noted there was no evidence that the hospital had refused to allow employees to wear union buttons on their uniforms or had permitted employees to wear uniforms with other emblems or messages. 320 NLRB at 540. Consequently, and contrary to the majority, the judge could not have concluded that the ban would have to prohibit all buttons, insignia, emblems, or other messages, “unofficial” or otherwise, in order to be valid.

⁶ Moreover, the Board found that the immediate patient care area ban in *Casa San Miguel* was presumptively valid even though it was “selectively” enforced: the nurse had worn the uniform in question one day a week for a year before it was prohibited.

⁷ *Medical Center of Beaver County, Inc.*, 266 NLRB 429, 430 (1983). I do not necessarily agree with the proposition that an overly broad rule is invalid as to all areas of the hospital—an issue that is not presented here.

⁸ *Baptist Hospital*, 442 U.S. at 782–784.

⁹ The majority asserts that their holding would not prevent a categorical ban on “unofficial insignia” even if a hospital previously had allowed such insignia in immediate patient care areas, “so long as the ban is not imposed in response to protected activity.” But that is the inevitable practical import of the majority’s holding all the same.

¹⁰ Even applying the majority’s standard, the Respondent established special circumstances. As noted above, by demanding “Safe Patient Care,” the ribbons implicitly sent the message that existing care was not safe. *Sacred Heart*, supra at 532 (such inherently disturbing claims likely to upset tranquil atmosphere necessary for successful patient care). In contrast, the Respondent’s button proclaiming that “patient safe care” was its mission sent the opposite message. Its allowance of this and other innocuous insignia thus further supports a finding of special circumstances. *Sacred Heart*, supra; *Casa San Miguel*, supra (same). And, because other union insignia were allowed, the limited ban imposed by the Respondent here would not tend to interfere with, restrain, or coerce employees in the exercise of their Sec. 7 rights. Id.

¹¹ All dates hereafter are in 2009.

events, such as retirement parties and baby showers.” The Respondent posted the policy on the shared intranet in May and emailed it to the employees on May 21. On May 14, the Respondent enforced the rule against two off-duty employees who were returning to the hospital to campaign for the Union. On May 15, the Respondent enforced the rule against an employee when he returned to the hospital to retrieve his wallet.

Analysis

The three-prong test in *Tri-County Medical Center*, 222 NLRB 1089 (1976), governs the legality of off-duty employee access rules.¹² An off-duty employee access ban 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.” *Id.*

It is undisputed that, absent adequate dissemination, the Respondent’s off-duty access rule violated the second prong of the *Tri-County* test until May 21. The Respondent does not except to the judge’s finding on that basis that its May 14 and 15 prohibitions of entry pursuant to the rule were unlawful. However, the majority seizes upon minimal argument in the Charging Party’s exceptions to find that, even after clear dissemination, the rule violated the third *Tri-County* prong as well and must therefore be rescinded.¹³ As with the ribbon ban, the majority faults the Respondent for allowing an exception to the rule—in this case for access to “Hospital [C]enter sponsored events, such as retirement parties and baby showers.”¹⁴ Citing *Republic Aviation Corp. v. NLRB*, *supra*, my colleagues contend that only a “uniform ban” on all off-duty access is lawful. Terming the exception “egregious[,]” the majority finds the rule does not allow access for the purpose of “discussing self-organization or terms and conditions of employment,” and in effect tells employees “you may not enter the premises after your shift except when we say you can.” With all due respect, the majority’s construction of the rule is egregious, not the rule itself.

¹² I express no opinion whether I agree entirely with the *Tri-County* test or its underlying rationale, but I agree to apply it as extant law in this case.

¹³ The Acting General Counsel did not urge that position to the Board. And, although the Union’s exceptions challenged the rule’s facial validity, its brief barely mentioned that argument and it never provided any citations to supporting authority. The Acting General Counsel did not join in these exceptions. My colleagues thus have chosen to rule at length on an issue that was neither addressed by the judge nor analyzed in any depth by the excepting party.

¹⁴ The majority does not contend that allowing unlimited access to the cafeteria for any purpose renders the rule unlawful.

First, contrary to my colleagues, the Respondent’s off-duty access rule does not prohibit off-duty access for the purpose of discussing self organization or terms and conditions of employment. Instead, the rule by its plain terms allows unfettered access to the cafeteria and does not expressly or implicitly preclude such access for the purpose of engaging in Section 7 activity. Thus, although the Respondent could lawfully have prohibited off-duty employees from engaging in such activity anywhere in the interior of its facility, it did not do so. This is conclusive evidence that the rule does not discriminate against union activity. Indeed, the Supreme Court has observed that a hospital cafeteria is especially conducive to discussing self organization or terms and conditions of employment and that it is a “natural gathering” place for off-duty employees to discuss union matters with their colleagues. See *Beth Israel*, *supra* at 505 (availability of one part of a healthcare facility for organizing activity may be a factor “required to be considered” in evaluating restrictions in other areas of the same facility).

Nor would employees reasonably read the exception for “Health [C]enter sponsored events, such as retirement parties and baby showers” as establishing an arbitrary denial of access “except when we say you can.” Rather, a reasonable employee would understand this as a limited exception that in no way discriminates against union activity. It is well settled that in determining whether an employer rule is unlawful, the Board must give the rule a reasonable reading. See, e.g., *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–648 (2004). To that end, the Board must refrain from reading particular phrases in isolation or presuming improper interference with employee rights. *Id.* at 646. The majority’s reading of the Respondent’s off-duty access rule cannot be reconciled with these principles.

Moreover, nothing in *Tri-County* mandates that off-duty access rules prohibit all access at all times, regardless of the circumstances, in order to pass legal muster. No precedent supports the majority’s interpretation. For my colleagues to suggest that an off-duty access rule which allows off-duty employees routine access to the cafeteria for Section 7 activity must nevertheless forbid off-duty employees from entering the hospital for occasional “retirement parties and baby showers” in order to be lawful defies common sense. My colleagues reach this result by effectively ignoring the second part of *Tri-County*’s third prong, which requires that an off-duty access rule apply “to off-duty employees seeking access to the plant for any purpose *and not just to those employ-*

ees engaging in union activity.” (Emphasis added.)¹⁵ Read as a whole, this standard embodies the familiar principle that rules are invalid if they discriminate against union activity. *Peyton Packing Co.*, supra. As shown above, the Respondent’s rule does not discriminate.

Contrary to the majority, *Republic Aviation* does not support its position. The Supreme Court, in that case, did not resolve the access rights of off-duty employees but instead held that an employer may not rely on its property rights to forbid on-duty employees from engaging in union-related activities on their own nonworking time, i.e., during breaks and meal periods. *Id.* at 801–803 and fns. 6–9.¹⁶ That holding provides no support for the majority’s view that only a “uniform” prohibition of off-duty access will pass muster. To the contrary, the Supreme Court has plainly rejected the “all or nothing” standard the majority espouses. In *NLRB v. Steelworkers (NuTone)*, 357 U.S. 357 (1958), the Supreme Court ruled that an employer’s right to control its property allows it to impose—but not itself abide by—time, place, and manner restrictions on employees’ workplace organizing. Likewise, the Board has repeatedly held that employers may permit charitable solicitations on an ad hoc basis without negating an otherwise legitimate exclusionary rule. *Flagstaff Medical Center*, 357 NLRB No. 65, slip op. at 27 (2011) (employer lawfully barred employee from kitchen for union activity despite having allowed employee access for United Way solicitation); *Hammary Mfg. Corp.*, 265 NLRB 57 (1982). In *Hammary*, the Board specifically rejected the “all or nothing” approach the majority espouses, correctly recognizing that such a per se standard does not “adequately or reasonably strike[] the proper balance” between the employer’s interests in maintaining production and discipline and employees’ Section 7 rights to engage in solicitation.¹⁷ *Id.* at fn. 4. Unlike my colleagues, I would adhere to these

¹⁵ The majority asserts that the words in the second part of the third *Tri-County* prong do not limit or modify the words in the first part. But my colleagues never say what those words do mean. Their analysis, unlike mine, would give that portion of the Board’s standard no meaning at all.

¹⁶ The Court quoted language from the Board’s *Peyton Packing* opinion to the effect that time outside working hours, whether before or after work, “is an employee’s time to use as he wishes, without unreasonable restraint.” Insofar as this language addresses access by off-duty employees, it was irrelevant to the issue presented and decided in *Republic Aviation*. And, in any event, nothing in the Court’s opinion, or in *Peyton Packing* for that matter, indicates that rules regarding off-duty access are unlawful if they include exceptions like those present here.

¹⁷ The majority attempts to distinguish this precedent on its specific facts, but fails to properly acknowledge the broader principle it establishes, namely that the Act does not require that bans on solicitation or insignia be “all or nothing” propositions.

principles and find that the Respondent’s no-access rule did not violate the third prong of the *Tri-County* test.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union
- Choose representatives to bargain on your behalf with your employer
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. More particularly:

WE WILL NOT threaten you with discipline for wearing ribbons that state, “Saint John’s RNs for Safe Patient Care.”

WE WILL NOT ask you questions about your union support or activities or the union support and activities of other employees.

WE WILL NOT threaten you with calling the police or with arrest for trespass because you engaged in union or other protected concerted activities.

WE WILL NOT create the impression that we are spying on your union activities.

WE WILL NOT prohibit you from wearing union ribbons in immediate patient care areas that state, “Saint John’s RNs for Safe Patient Care.”

WE WILL NOT promulgate, maintain or enforce a rule which limits your access to our facilities without giving you adequate notice of the creation of the rule and without permitting access to off-duty employees who seek access for certain purposes while barring access to off-duty employees who seek access for other purposes.

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

WE WILL rescind our prohibition against employees wearing union ribbons that state, “Saint John’s RNs for Safe Patient Care.”

WE WILL provide you adequate notice before enforcing new rules limiting your access to the facility.

WE WILL rescind Solicitation and Distribution Policy 830.08 to the extent that it permits access to the plant to

off-duty employees who seek access for certain purposes while barring access to the plant to off-duty employees who seek access for other purposes.

SAINT JOHN'S HEALTH CENTER

Katherine Mankin, Esq., for the General Counsel.

Robert Kane, Esq. (Stradling Yocca Carlson & Rauth), of Newport Beach, California, on behalf of Respondent.

Marcie Berman, Esq., of Los Angeles, California, on behalf of the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Los Angeles, California, on March 8 and 9, 2010, upon the order consolidating cases and consolidated complaint (complaint), issued on November 30, 2009, by the Regional Director for Region 31.

The complaint alleges that Saint John's Health Center (Respondent) violated Section 8(a)(1) of the Act by interrogating employees about their union activities, by prohibiting employees from wearing ribbons reading "St. John's RNs for Safe Patient Care" in immediate patient care areas, by threatening employees with discipline for wearing the ribbons, by promulgating and maintaining a rule limiting off-duty employee access to discourage employees' from engaging in protected activities, by selectively and discriminatorily enforcing the access rule to discourage employees from engaging in protected activities, by creating the impression that employees protected activities were under surveillance, and by threatening employees with arrest because employees engaged in protected activities. In its answer, as amended, Respondent admitted many of the operative allegations of the complaint but denied it had violated the Act.

FINDINGS OF FACT

Upon the entire record,¹ including the briefs from the General Counsel,² Charging Party, and Respondent, I make the following findings of fact.

I. JURISDICTION

Respondent admitted it is a California corporation with an office and place of business located in Santa Monica, California, where it is engaged in the operation of an acute care hospital. Annually, Respondent in the course of its business operations derived gross revenues in excess of \$250,000 and purchased and received at its facility goods valued in excess of \$50,000 directly from points outside the State of California.

Based upon the above, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

¹ On September 30, 2009, counsel for the General Counsel filed a motion to correct the record. Good cause having been shown and no opposition filed, the motion is granted.

² On October 14, 2009, counsel for the General Counsel filed and errata to posthearing brief. As the errata corrects a clerical error and there is no opposition, I accept the errata.

II. LABOR ORGANIZATION

Respondent admitted and I find that the California Nurses Association/ National Nurses Organizing Committee (Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

This case involves an organizing campaign that was conducted by the Union at Respondent's facility among its RNs in 2008, Respondent's enforcement of a no access rule, Respondent's enforcement of a rule prohibiting wearing paraphernalia in patient care areas, and Respondent's threats to have employees arrested for violating its no access rules. Respondent contends, inter alia, that wearing the ribbon was disparaging to Respondent.

By May 2008, a petition³ to certify the Union as the representative of Respondent's Registered Nurses (RNs) was being circulated among Respondent's employees. Approximately 235 to 240 RNs signed the petition. RN Lori Hammond (Hammond), RN Zhila Morrissi (Morrissi), RN Jack Cline (Cline), and RN Lizabeth Wade (Wade) were among the nurses who helped circulate the petition and deliver the petition to the CEO of the hospital, Lou Lazatin (Lazatin). The petition was presented to Respondent on or about October 1, 2008. The petition included a cover letter⁴ and included the following statement:

Enclosed are Saint John's RNs' signatures on a petition calling for *compliance with California safe staffing laws and regulations*, for fair compensation that will enable our hospital to attract and retain quality registered nurses, and for ending all expenditures on antiunion consultants.

2. The alleged interrogations

a. *Interrogations by Trudi Hemmons*

Approximately the second week of October 2008, Nurse Manager Trudi Hemmons (Hemmons), an admitted 2(11) supervisor, discussed the petition with 5 to 6 RNs in her Unit. The discussions took place at a nursing station in the Medical Surgery Unit during a change in shift. As the RNs were sitting at the nursing station, Hemmons went from person to person, addressing 1 to 2 RNs at a time. Hemmons asked all the RNs why they had signed the Petition. None of the RNs responded except for RN Cline. During the discussions, Hemmons said, "we don't need a third party representation at Saint John's"⁵ and continued to refer to the Union as a third party. RN Cline responded to Hemmons by stating that "the union wasn't a third party [and] that the nurses at Saint John's would make up the union."⁶ The RNs' testimony was credible and uncontroverted. I will credit their testimony.

³ GC Exh. 2.

⁴ R. Exh. 6.

⁵ Tr. at pp. 199, 201.

⁶ Id.

2. Interrogations by Janice Frost

Between approximately October 7 and 15, 2008, Janice Frost (Frost) Respondent's interim director of in-patient oncology initiated conversations about the petition with RN Morrissi, RN Ann Chan (Chan), RN Colleen O'Grady (O'Grady), RN Lynn Larson (Larson), RN Steven Weisbaum (Weisbaum), and RN Sunny SunSheil Choy (Choy). The parties stipulated that Frost was a supervisor of Respondent within the meaning of Section 2(11) and/or an agent of Respondent within the meaning of Section 2(13).⁷ Each of the conversations, besides RN Choy's, took place at the nurses' station in the Oncology Unit. The conversation with RN Choy took place in Frost's office. During the conversations, Frost asked the RNs questions about their signatures on the petition, including whether they knew that the petition would be presented to Respondent's administration and why they thought Respondent's nurses needed a union. Frost did not assure the RN's that their participation was voluntary or that there would be no repercussions or reprisals.

With regard to Frost's November 2008 conversations about the petition with RNs Morrissi and Chan, the following also occurred: Frost told both of them that some nurses felt pressure to sign the petition. Morrissi asked Frost, "What do you mean they felt pressure?" Frost indicated that the nurses did not know what they had signed. Morrissi responded, "I didn't put [a] gun to anyone's head to sign this paper. I asked them to read it carefully." Frost then approached RN Chan and said "Ann, do you know why you signed the paper?" Chan appeared angry and responded, "What?" Chan then told Janice that she didn't sign the petition. At this point, Frost started looking through the petition to find Chan's name. Morrissi indicated that Chan did not sign the petition and that she did not even bother approaching Chan because she knew she was anti-union. Chan again stated she did not sign the petition.⁸ At the time of the conversations, no unfair labor practices had been filed by the Union against Respondent. At the time of the conversations, Frost was not seeking to verify a union's claimed majority status or to investigate facts related to issues raised in a complaint. I credit the RNs' un rebutted testimony.

3. The ribbon

In early November 2008, union organizers gave RNs at Respondent a white ribbon, stating "Saint John's RNs for Safe Patient Care" (ribbon).⁹ The ribbon was distributed to other RNs employed by Respondent. For approximately 2 weeks, RNs wore the ribbon throughout Respondent's facilities, including patients' rooms. The ribbons were worn as an expression of union solidarity, as well as a concern about Respondent's noncompliance with a staffing law dealing with nurse-patient ratios.

The RNs' uncontradicted and credited testimony indicated that neither patients nor persons visiting patients commented or asked questions about the ribbon. The RNs' un rebutted testimony established also that none of their supervisors or manag-

ers asked them about whether patients and persons visiting patients had commented or asked about the ribbon.

On November 7, 2008, Respondent's vice president of human resources, Steven Sharrer (Sharrer), an admitted 2(11) supervisor, emailed¹⁰ Respondent's supervisors and told them that employees could not wear the ribbon in "immediate patient care areas." In his email, Sharrer defined "immediate patient care areas" as "patient rooms, treatment rooms, surgery, etc." Sharrer indicated that employees could, however, wear the ribbon in, "the hallways, break rooms or other areas that are not immediate patient care areas." Sharrer explained that the rationale for prohibiting the ribbon in immediate patient care areas was that it was "detrimental and disruptive to patient care." Sharrer testified that the only investigation Respondent undertook was to determine what departments the ribbon was being worn in. According to Sharrer, he assumed that if a nurse was wearing the ribbon in the department, they would wear it wherever they went.¹¹

On approximately November 20 or 21, 2008, Respondent's director of women's health services, Irena Zuanic (Zuanic), an admitted 2(11) supervisor, spoke with RN Hammond, RN Melinda Bishop (Bishop), RN Martina Munoz-Friedman (Munoz-Friedman), and RN Christina Craig (Craig) in the conference room of the Labor and Delivery Unit. During the discussion, Zuanic instructed the RNs that they were not to wear the ribbon in immediate patient care areas and that if they continued to wear the ribbon they would be written up for insubordination.

The RNs have worn a variety of other insignias on their uniforms in immediate patient care areas from 2008 to 2010. Organ donor badges, cancer awareness bracelets, diabetes, and cancer ribbons, political buttons supporting Obama, religious symbols, and badges, and St. John's issued buttons that said "Saint John's mission is patient safe care" and "Just Ask," were among the insignias worn at Respondent's facilities. Union insignias were also worn in immediate patient care areas, including CNA badge lanyards and CNA buttons that said "Respect and Dignity" and "Saint John's Nurses—the Heart of Healthcare." Respondent took no action against RN's for wearing buttons or insignias except for the ribbon at issue.

4. Off-Duty access and surveillance

a. Written policies regarding off-duty access

Respondent had a policy, effective June 2003 that dealt with solicitation and distribution (the old policy).¹² The old policy did not address employee off-duty access.

Respondent also maintained a handbook which was distributed until approximately August 2005 (handbook).¹³ The handbook was never rescinded. The handbook states the following:

¹⁰ GC Exh. 7.

¹¹ At the time he issued the email, Sharrer incorrectly thought the ribbon said: "Saint John's RNs for Safer Patient Care."

¹² GC Exh. 9.

¹³ GC Exh. 10, p. 42.

⁷ GC Exh. 3.

⁸ Tr. at pp. 103–106.

⁹ GC Exh. 6.

The access of employees to the interior of Saint John's premises and to working areas of the exterior of the premises while not on duty shall be permitted only for the purpose of visiting a patient.

Up until August 2005, handbooks were handed out to employees and signed by employees during the new hire process. RNs Wade and Cline signed employee acknowledgement forms,¹⁴ indicating receipt of the handbook. Sharrer was unaware of the existence of the handbook and any written rule with respect to off-duty access until January 2010, when he complied with the subpoena in this matter. Before January 2010, Mr. Sharrer believed that Respondent's off-duty access rule was a matter of practice.

Respondent's current solicitation and distribution policy 830.08 (current policy) became effective January 1, 2009.¹⁵ The current policy states the following:

Off-duty employees are not allowed access to the interior of the Health Center's buildings or to other working areas at the Health Center. Off-duty employees are permitted access to the cafeteria and are also permitted access to the building to attend Health center sponsored events, such as retirement parties and baby showers. Employees are expected to arrive at their work area at or shortly before the beginning of their scheduled shift, and are expected to leave their work area promptly after completing their shift.

Sharrer said that the current policy was revised in January 2009 to reflect what Respondent's practices were at that time. In determining Respondent's practices regarding off-duty access, Sharrer consulted the nursing director and various clinical directors. The policy was eventually posted on Respondent's shared intranet and could be first accessed by employees at some point in May 2009.

In March 2009, Sharrer spoke with Kevin Litzenberger, Respondent's security supervisor and told him that off-duty employees should not be in the hospital.

b. History and workplace culture regarding off-duty access

The evidence disclosed that RNs have gone to the interior of the hospital while off-duty many times throughout their employment at Saint John's. Some of the off-duty visits included collecting personal belongings, picking up items ordered from other nurses and staff, checking the schedule, requesting vacation, attending baby showers and birthday parties, attending personal or family Dr. appointments and procedures, and simply visiting with friends and coworkers. The RNs often would come into the hospital while off-duty and end up working a shift. Charge nurses, supervisors, and managers observed RNs on numerous occasions in the hospital while off-duty and RNs were never told that they couldn't be in the hospital until after May 15, 2009.

¹⁴ R. Exhs. 3 and 4.

¹⁵ GC Exh. 8.

c. May 14, 2009 incident¹⁶

At approximately 9:30 p.m. on May 14, 2009, RNs Wade and Cline went to the nurses' lounge in the Post-Coronary Care Unit to talk with other nurses about CNA and distribute CNA literature. The nurses' lounge is considered a nonworking area. Wade was off-duty and was wearing street clothes and her hospital badge.¹⁷ Cline was also off duty but still had on his uniform, as well as his hospital badge.¹⁸ After approximately 20 minutes, Charge Nurse "Louis" came in and asked Wade and Cline what they were doing. Wade and Cline introduced themselves, identified themselves as being from Labor and Delivery, and explained that they were campaigning for CNA.

At approximately 10 p.m. on May 14, 2009, house supervisor, Ann DeBello (DeBello) called Sharrer and told him that two "union organizers" were speaking to staff in the employee lounge. Sharrer claimed he was under the assumption that the union organizers were nonemployees and that it was not until after the incident that he learned that the union organizers were employees. Sharrer instructed the house supervisor to tell security to go to the lounge and tell the union organizers to leave. Sharrer also instructed the house supervisor to tell security that if the individuals refused to leave, security should call the police.

A few minutes later, two security guards responded to the incident. Standing outside of the doorway to the nurses' lounge, security guard "Bert" asked RNs Wade and Cline what they were doing. Wade and Cline identified themselves as hospital nurses and explained that they were campaigning for CNA, that they were allowed to be there, and that they weren't disrupting patient care. Another nurse who was present in the lounge got up and shut the door on the security guards. After a few minutes, the door was opened and security guard "Bert" insisted that they leave the premises. Wade and Cline then left the nurses' lounge. As they were passing the nurses' station, Wade told the security guards that what the guards were doing was wrong and that it was harassment and intimidation. Security guard "Bert" instructed her that she could be arrested by the police and charged with trespassing if they did not comply. Wade and Cline then left the immediate area and there was no disruption in the care of the Unit. The security guards then followed Wade and Cline to the elevators.

d. May 15, 2009 incident

At approximately 9 a.m. on May 15, 2009, RN Cline went to the hospital with Eric Schmidt (Schmidt) to retrieve Cline's wallet. Cline was off duty and was wearing street clothes and his hospital badge. Schmidt was not an employee and was

¹⁶ Wade and Cline's testimony was not contradicted. Their testimony was detailed, consistent, and credible. I will credit their testimony.

¹⁷ RN Wade testified that her current hospital badge has a CNA lanyard attached to it and that she has been wearing it for approximately 1 year prior to the hearing—i.e. prior to May 14, 2009. However, after being shown her Board affidavit, RN Wade admitted that she may have received the CNA lanyard after May 14, 2009. This minor discrepancy does not otherwise affect Wade's credibility.

¹⁸ While RN Cline testified that his current hospital badge has a CNA lanyard attached to it, he indicated that he has only been wearing the CNA lanyard for approximately 6 months—i.e. post May 14, 2009.

wearing street clothes. As Cline was walking through the south entrance of Saint John's, a security guard¹⁹ yelled, "Stop, Jack." The guard also told him, "No union business." Cline responded, "I'm here to get my wallet. I have no intention of [f] doing union business."²⁰ The guard insisted that he stop. Cline explained that he was an employee and that he could proceed. The security guard yelled to another security guard and told the guard, "Follow Jack up there."²¹ At this point, Cline and his friend went to the Medical/Surgical Unit to retrieve Cline's wallet from the break room. During this period, the security guard followed Cline throughout the hospital. As Cline passed the nurses' station, he told the guard, "I'm a Saint John's employee. You shouldn't be following us around the hospital."²² Cline and Schmidt then left the hospital facilities.

*e. Post-May 15, 2009 notifications*²³

Employees were not notified about the existence of an updated policy regarding off-duty access until after May 15, 2009. Sometime in the last 2 weeks of May 2009, Manager Zuanic held an impromptu staff meeting at the nurses' station in the Labor and Delivery Unit. RNs Hammond, Wade, Christafuli, and Chavez were present at the meeting. At the meeting, Zuanic said she wanted to discuss a policy regarding off-duty access to the hospital and indicated that the policy had been in effect since January 2009. Zuanic told the RNs that they were forbidden to come into the Unit while off duty and explained that they were only allowed in the hospital 6 minutes before a shift and 6 minutes after a shift. Zuanic told the RNs that there were limited situations when they could still come into the Unit while off duty including staff meetings, a new baby, or to bring a cake for an occasion. Zuanic showed Hammond and Wade a copy of the policy dated January 2009. Zuanic also indicated that the policy could be found on the intranet.²⁴ Following the

¹⁹ RN Cline testified that he thought the security guard's name was "Lee." It is somewhat unclear, however, whether the security guard Cline thought he saw was in fact security guard "Lee King," or was another security guard named "Hobson." Cline described "Lee" as an African American with a goatee. He also described him as a "little overweight." Sharrer testified that there was a security guard at Saint John's named "Lee King." Sharrer described "Lee King" as an "African American, probably 5'8" to 5'10," slightly overweight, meaning he has a pot belly." Sharrer also noted that Lee King had been known to have a goatee. However, Sharrer indicated that "Lee King" was not scheduled to work on May 15, 2009. Sharrer testified that "Hobson" was the only African American security guard scheduled to work on May 15, 2009. Sharrer described Hobson as an African American, 5'8" to 5'10," who had a goatee at times, but was "not slightly overweight." I do not find this discrepancy to affect Clines' otherwise uncontested and credible testimony. The Respondent's ADR Report for May 15, 2009, does not reflect the incident with Cline and Schmidt. GC Exh. 13. However, I find those reports unreliable since they do not reflect whether the hours reported refer to May 14 or 15, 2009.

²⁰ Tr. at p. 216.

²¹ Id.

²² Tr. at p. 218.

²³ The RNs' testimony concerning this was not contradicted or rebutted. Their testimony was detailed and given in an honest and forthright manner. I will credit their testimony.

²⁴ The intranet can be accessed at a computer terminal at Respondent's facilities. RN Hammond indicated that she cannot access the

meeting, the policy was posted in the team room and in the break room in the Unit. Hammond and Wade testified that they had never seen the policy before. Hammond said that the RNs were concerned about this sudden change in policy and cited examples to Zuanic when they had previously come into the hospital while off duty and that they were never told that they couldn't be in the Unit. Zuanic responded by stating that the policy had always been in place and that it was the employees' responsibility to know Respondent's policies and procedures.

Approximately May 21, 2009, RN Cline received an email from Respondent regarding Respondent's solicitation and distribution policy. Prior to this email, Cline had not received any other emails concerning Respondent's policies.

B. The Analysis

1. The Hemmonds' interrogation

In complaint paragraph 6 it is alleged that in late September 2008,²⁵ Hemmonds interrogated employees about their support for the Union and about a petition relating to the Union or wages, hours, or working conditions.

In *Westwood Healthcare Center*, 330 NLRB 935 (2000), the Board discussed the test to determine whether interrogation is unlawful under Section 8(a)(1) of the Act. In *Westwood*, the Board applied the totality of the circumstances test adopted in *Rossmore House*, 269 NLRB 1176 (1984). The Board said it would look at five factors to determine whether the questioning of an employee constitutes an unlawful interrogation:

- (1) The background, i.e., is there a history of employer hostility and discrimination?
- (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
- (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
- (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
- (5) Truthfulness of the reply.²⁶

The Board added:

In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.²⁷

intranet from her home. Hammond also indicated that while it is possible to access the intranet while on duty, it is difficult due to patient assignments.

²⁵ While the complaint alleges that the Hemmonds' interrogation took place in September 2008, the record reflects the interrogations occurred in October 2008. Since the matter was fully litigated, I will consider the conduct which occurred in October 2008 as supporting the allegations contained in complaint par. 6. *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995).

²⁶ *Westwood*, at p. 939.

²⁷ Id. at p. 940.

In this case there is evidence through its letter to employees²⁸ that Respondent was opposed to its employees' organizing activities. Hemmond's interrogations must be measured in this context. Hemmond was a high-level supervisor in charge of two departments. The information solicited by Hemmonds went directly to the heart of identifying and discouraging employees' protected-concerted activity. Hemmonds demonstrated Respondent's hostility toward the Union and she interrogated the RNs one by one. Most did not venture a reply.

I find that Hemmond's interrogation was calculated to coerce employees so that they would feel restrained from engaging in Section 7 activities. In view of the Frost interrogations discussed below, this was not an isolated incident. I conclude that Respondent violated Section 8(a)(1) of the Act as alleged in complaint paragraph 6.

2. The Frost interrogation

Complaint paragraph 7 alleges that on about October 7, 2008,²⁹ Frost interrogated employees about their support for a petition relating to the Union or wages, hours, or working conditions.

The evidence reflects that Frost, Respondent's Interim Director of In-Patient Oncology, a high-level supervisor, interrogated at least 6 RNs about their participation in a union petition. As noted above, this interrogation occurred in the context of anti-union statements by Respondent's high-level managers and supervisors. The effect of such interrogations about fundamental employee union and protected-concerted activity could have no purpose other than to discourage those activities particularly in view of the fact that Frost did not assure the RN's that their participation was voluntary or that there would be no repercussions or reprisals for their participation and in view of the fact that no unfair labor practices or election petition had been filed which might have justified some investigation into the Union's majority status or into the basis of unfair labor practice charges. I conclude that Frost's interrogation of employees violated Section 8(a)(1) of the Act as alleged in complaint paragraph 7.

3. The policy prohibiting employees from wearing ribbons in immediate patient care areas

Complaint paragraph 8 alleges that since about November 7, 2008, Respondent has prohibited employees from wearing ribbons stating "Saint John's RNs for Safe Patient Care" in immediate patient care areas.

Counsel for the General Counsel contends that Respondent's prohibition on wearing the ribbons in immediate patient care areas is not valid since the evidence demonstrates that the ribbons had no adverse effect on patients or health care operations. To the contrary, Respondent argues that its ribbon policy is presumptively valid.

²⁸ GC Exhs. 15 and 16.

²⁹ The evidence adduced at the hearing reflects that Frost engaged in similar interrogations of several employees on dates between October 7, 2008, and November 2008. Since the matter was fully litigated, I will consider the conduct which occurred in October and November 2008 as supporting the allegations contained in complaint paragraph 7. *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995).

After Congress passed the 1974 Health Care Act granting the Board jurisdiction over hospitals, the Board adopted a dual standard for employee solicitation in hospital facilities in *St. John's Hospital & School of Nursing, Inc.*, 222 NLRB 1150 (1976). The Supreme Court cited *St. John's Hospital* with approval in *NLRB v. Beth Israel Hospital*, 437 U.S. 483 (1978). The Board's dual test, as approved by the Supreme Court, permits a hospital to prohibit solicitation in nonworktime in immediate patient care areas. However, such prohibitions in areas other than immediate patient care areas are invalid absent a showing of disruption to patient care or health care operations if solicitation were permitted in those areas. In *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979), the Supreme court concluded that the hospital had established special circumstances that validated the applicability of its no-solicitation rule to areas outside immediate patient care areas including patient ward corridors and waiting areas but not to other areas of the hospital.

In subsequent cases the Board has had occasion to review hospital no solicitation rules that prohibited employee solicitation in areas other than immediate patient care areas. In *George J. London Memorial Hospital*, 238 NLRB 704, 708 (1978), the Board affirmed it does not prohibit rules forbidding organizational activity in operating rooms, patients' rooms, and patients' lounges but a rule proscribing solicitation in all areas is improperly overbroad. The Board again restated this principle in *Casa San Miquel*, 320 NLRB 534, 540 (1995), where the Board stated:

[E]mployees have the right to wear union insignia even while at work. A hospital's prohibition of the wearing of insignia, however, on working and even on nonworking time in immediate patient care areas is presumptively valid. Outside immediate patient care areas, and outside other areas where the hospital establishes an adverse effect on patient care, employees retain the right to wear union insignia while working. An employer may further restrict the right by demonstrating "special circumstances."

In *Mt. Clemens General Hospital*, 335 NLRB 48, 50 (2001), the Board adopted the rationale of the ALJ who found that the hospital's requirement that employees remove union insignia from their uniforms in all areas of the hospital was overbroad. While recognizing the general rule that, "Respondent's prohibition of wearing the FOT button in hospital patient care areas, under Board precedent, such a position is normally presumptively valid," the administrative law judge concluded that the rule was invalid because:

First, the Respondent did not prohibit the wearing of any other insignia or union buttons in all areas of the hospital including patient care areas. . . . Second, while Respondent Vice President of Medical Affairs Dr. Michael Tonie testified that the wearing of the FOT button in patient care areas of the hospital could cause possible disruptions, he never put his reasons for such speculation in writing. Likewise, he did not know of any complaints from patients or their families that the wearing of the FOT button was disruptive or caused a dialogue to take place with the RN's. Moreover, Dr. Tonie admitted that no hospital administrator made an official report that the wearing

of the FOT button caused any disruption or interfered with patient care or safety. . . . Third, Horde admitted that the wearing of the FOT button did not cause a work stoppage or sit-down strike and she did not have any evidence that the RN's discussed the FOT button with patients. Likewise, she acknowledged that the Respondent did not conduct a survey or make any inquiries of patients or their families that the wearing of the FOT button interfered with patient care or safety.

Recently in *Sacred Heart Medical Center*, 347 NLRB 531, 531-532 (2006), rev. and remanded 526 F.3d 577 (9th Cir. 2008), the Board restated its hospital solicitation rules in a case where the hospital prohibited the wearing of a union button reading "RN's Demand Safe Staffing" in those parts of the hospital where employees might encounter patients or their families. The Board stated once again:

In healthcare facilities, restrictions on the wearing of union-related buttons are presumptively valid in immediate patient care areas. *Casa San Miquel*, 320 NLRB 534, 540 (1995). Outside immediate patient care areas, such restrictions are presumptively invalid. *Id.* An employer may rebut the presumption of invalidity, however, by showing "special circumstances," i.e., that the restriction is "necessary to avoid disruption of health care operations or disturbance of patients." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978).

In *Sacred Heart Medical Center* the Board concluded that the rule was valid since, "Respondent has rebutted the presumption of invalidity by showing "special circumstances" that justify the restriction." The Circuit Court reversed the Board and concluded that the evidence did not establish special circumstances sufficient to overcome the presumption of invalidity of the rule outside immediate patient care areas.

In the instant case there is no dispute that Respondent's rule prohibited RNs from wearing the "Saint John's RNs for Safe Patient Care" ribbon only in immediate patient care areas that included patient rooms, treatment rooms, and surgery but they were permitted to be worn in the hallways, break rooms, or other areas that are not immediate patient care areas. Here counsel for the General Counsel argues that the Board's "special circumstances" test should apply to rebut the presumption of the validity of no-solicitation rules limited to immediate patient care areas. Contrary to General Counsel's assertion in its brief, nothing in *Sacred Heart Medical Center*, suggests that the "special circumstances" test may be applied to rebut the validity of rules limited to immediate patient care areas. The Board in *Sacred Heart Medical Center* limited its finding to a no-solicitation rule that applied outside immediate patient care areas and was thus subject to a rebuttable presumption. While the Board in *Mt. Clemens General Hospital*, supra, seems to have adopted the Administrative law judge's rationale that the "special circumstances" rule applied to immediate patient care areas, this finding was dicta, since the issue before the ALJ was whether the rule was invalid because it applied beyond immediate patient care areas. I conclude that the rule prohibiting RNs from wearing the "Saint John's RNs for Safe Patient Care" ribbon only in immediate patient care areas was presumptively valid. Moreover, the absence of complaints from patients or their families about the ribbons or the lack of inquiry by Re-

spondent into whether the ribbons disturbed patients or their families is insufficient to overcome the presumption of the rule's validity. *Sacred Heart Medical Center*, 347 NLRB 531, 531-532 (2006), rev. and remanded 526 F.3d 577 (9th Cir. 2008). I will dismiss this allegation.

There is no allegation in the complaint that the ribbon rule was disparately enforced. However at the hearing, contrary to Respondent's assertion that there is no evidence of disparate enforcement, counsel for the General Counsel adduced evidence, including evidence from Respondent's vice president for human resources Sharrer, that Respondent permitted RNs to wear a wide variety of ribbons and other insignia in immediate patient care areas of the hospital without restriction. I find the issue of disparate enforcement of the ribbon rule was both fully litigated and is closely related to an extant complaint allegation. *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995).

The record is replete with instances in which Respondent has permitted its RNs to wear insignia in immediate patient care areas from 2008-2010 including organ donor badges, cancer awareness bracelets, diabetes and cancer ribbons, political buttons supporting Obama, religious symbols and badges, and St. John's issued buttons that said "Saint John's mission is patient safe care" and "Just Ask." Union insignias were also worn in immediate patient care areas, including CNA badge lanyards and CNA buttons that said "Respect and Dignity" and "Saint John's Nurses—the Heart of Healthcare."

In *Register-Guard*, 351 NLRB 1110 (2007), a majority of Chairman Battista and Members Kirsanow and Schaumber with Members Liebman and Walsh dissenting reversed a long line of Board cases dealing with discriminatory enforcement of work rules. Citing two 7th Circuit decisions³⁰ the Board adopted a new standard for determining if an employer's discriminatory enforcement of work rules violates Section 8(a)(1) of the Act. The Board held it would no longer be sufficient to show that an employer merely disparately enforced its rules but it must be shown that,

. . . unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status, and we shall apply this view in the present case and in future cases."³¹

In an attempt to define what constitutes similar activities the Board elaborated:

For example, an employer clearly would violate the Act if it permitted employees to use e-mail to solicit for one union but not another, or if it permitted solicitation by antiunion employees but not by prounion employees. In either case, the employer has drawn a line between permitted and prohibited activities on Section 7 grounds. However, nothing in the Act prohibits an employer from drawing lines on a non-Section 7 basis. That is, an employer may draw a line between charitable solicitations and noncharitable solicitations, between solicitations of a personal nature (e.g., a car for sale) and solicitations for the commercial sale of a product (e.g., Avon prod-

³⁰ 349 F.3d 968 (7th Cir. 2003), and 49 F.3d 317 (7th Cir. 1995).

³¹ 351 NLRB at p. 1118.

ucts), between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and non business-related use.³²

Even under a *Register-Guard* analysis of the ribbon policy, Respondent has engaged in disparate treatment of activities or communications of a similar character because of their union or other Section 7 protected status. Thus, Respondent has permitted RNs to wear St. John's issued buttons that said "Saint John's mission is patient safe care" and CNA badge lanyards and CNA buttons that said "Respect and Dignity" and "Saint John's Nurses—the Heart of Healthcare." Clearly, the ribbon represented a working condition, staffing ratios, that RNs made part of their organizing campaign. Respondent's promulgation of the ribbon rule was motivated by RN's protected concerted activity and was a discriminatory application of a no-solicitation rule in violation of Section 8(a)(1) of the Act.

4. The enforcement of the rule regarding the wearing of ribbons

Complaint paragraph 9 alleges that on about November 14, 2008, Zuanic threatened employees with discipline if they wore ribbons in immediate patient care areas.

Having concluded that the Respondent has applied the ribbon rule in a disparate fashion in violation of Section 8(a)(1) of the Act, it follows that Zuanic's November 20, 2008 threat to enforce the rule also violates Section 8(a)(1) of the Act as alleged in paragraph 9 of the complaint.

5. The promulgation of new access rules

Complaint paragraphs 10(a) and (b) allege that in about March 2009 Respondent promulgated and maintained a rule limiting access of off-duty employees to the hospital to discourage its employees from engaging in protected concerted activity.

Counsel for the General Counsel contends that *Tri-County Medical Center, Inc.*, 222 NLRB 1089 (1976), controls this case and that Respondent enforced its access policy in a discriminatory fashion. Respondent contends that its access policy meets the *Tri County* test. Respondent also takes the position that there is no disparate treatment of activities or communications of a similar character because of their union or other Section 7 protected status under *Register-Guard*.

In *Tri County* the Board held that a rule denying off-duty employees access to the employer's premises 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. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside non-working areas will be found invalid.

In this case Respondent maintained a handbook that states the following:

The access of employees to the interior of Saint John's premises and to working areas of the exterior of the premises while not on duty shall be permitted only for the purpose of visiting a patient.

Respondent had a policy, effective June 2003 that dealt with solicitation and distribution (the old policy). However, the old policy did not address employee off-duty access.

Respondent's current Solicitation and Distribution Policy 830.08 became effective January 1, 2009. The current policy limits off-duty employees' access to the interior of the Health Center's buildings or to other working areas at the Health Center but allows access to the cafeteria and access to the building to attend Health Center sponsored events, such as retirement parties and baby showers.

Respondent's new access policy meets the first prong of the *Tri County* test in that it limits access solely with respect to the interior of the plant and other working areas. However *Tri County* also requires that an employer's access policy is clearly disseminated to all employees. While the new access policy became effective January 1, 2009, it was not effectively disseminated to employees until after May 15, 2009. No posting of the new access policy and no oral communication of the new policy was disseminated to employees at least until May 15, 2009. It was not until May 21, 2009, that RN Cline received an email from Respondent regarding Respondent's new solicitation and distribution policy. While the employer at some point placed the new policy on its intranet, RNs could not access Respondent's intranet from home. Given their busy patient care responsibilities, expecting RN's to access the intranet from work computers and then surf the intranet to find a new access policy is neither realistic nor effective communication of the policy to them. I find that prior to May 21, 2009, Respondent did not fulfill its *Tri County* obligations and that until that point its implementation and enforcement of the access rule violated Section 8(a)(1) of the Act.

6. The enforcement of the new access rules

Complaint paragraph 10(c) alleges that on May 14, 2009, DeBello and two security guards enforced the new access rule selectively and disparately against employees who support the Union or engage in protected concerted activity.

Complaint paragraph 10(d) alleges that on May 15, 2009, Respondent's security guards enforced the new access rule selectively and disparately against employees who support the Union or engage in protected concerted activity.

General Counsel contends that Respondent's security guards were acting as Respondent's agents when they engaged in enforcement of the access rule, created an impression employees' activities were under surveillance, and threatened employees with calling the police and arrest.

It must first be determined if Respondent's security guards acted as its agents in enforcing the new access policy, in engaging in surveillance, and in threatening to call police and have RNs arrested for trespass.

The Board has held that an employer may be liable for unfair labor practices committed by security guards acting in their official capacity. *Opryland Hotel*, 323 NLRB 723 fn. 3 (1997);

³² Id. at p. 1118.

Bakersfield Memorial Hospital, 315 NLRB 596 (1994); *Southern Maryland Hospital Center*, 293 NLRB 1209 (1989).

The guards in this case were acting under the direct authority of Respondent's vice president for human resources in carrying out Respondent's access policy on May 14 and 15, 2009. As such their actions are attributable to Respondent.

Since I have found the new access policy did not meet the *Tri County* test for validity until after May 21, 2009, any enforcement of the rule during this period also violated Section 8(a)(1) of the Act.

Thus, the removal of Cline and Wade from the hospital on May 14 and the removal of Wade from the hospital on May 15, 2009, pursuant to the invalid access policy violated Section 8(a)(1) of the Act as alleged in the complaint.

7. Impression of surveillance

Complaint paragraphs 11 and 13 allege that on May 14 and 15, 2009, Respondent's security guards created the impression that employees' union activities were under surveillance.

In *Promedica Health Systems, Inc.*, 343 NLRB 1351, 1352 (2004), the Board reaffirmed long held Board law that an employer who creates the impression employees' protected/concerted activities are under surveillance violates Section 8(a)(1) of the Act.

The Board's test for determining if an employer has created an impression of surveillance is:

... whether the employee would reasonably assume from the statement in question that his union activities had been placed under surveillance [citation omitted]. *U.S. Coachworks, Inc.*, 334 NLRB 955, 958 (2001).

In this case on May 14, 2009, two security guards were called to the nurses' lounge, a nonworking area, where RNs Wade and Cline were engaged in union activities on behalf of CNA. The guards stood in the door of the nurses' lounge and remained there after the door was closed. After a period of time the door was opened and the guards were still there and insisted that they leave the premises. RN Wade and RN Cline then left the nurses' lounge.

On May 15, 2009, RN Cline went to the hospital with Eric Schmidt to retrieve Cline's wallet. Cline was off duty. As Cline was walking through the south entrance of Saint John's, a security guard yelled, "Stop, Jack." The guard also told him, "No union business." RN Cline responded, "I'm here to get my wallet. I have no intention of [f] doing union business." The security guard yelled to another security guard and told the guard, "Follow Jack up there." During this period, the security guard followed Cline throughout the hospital.

I find in both instances the guards created the impression or actually engaged in surveillance of employees' union activities in violation of Section 8(a)(1) of the Act as alleged in the complaint. Clearly, on May 14 Cline and Wade were engaged in union activity and the guards' continued presence immediately outside the nurses' lounge would have led them to reasonably assume their protected activities were under surveillance. It has already been established that Respondent's new no access policy did not meet the *Tri County* test. Thus, there was no

legitimate reason for the guards to be present to enforce this policy.

On May 15, while Cline was not at the hospital to engage in union activity the guard's statement to Cline, "Stop, Jack. No union business," would have led to a reasonable suspicion that Respondent thought Cline was engaged in union activity and following Cline throughout the hospital would have further led to the impression that his protected activities were under surveillance particularly in view of the lack of notice to employees of a new no access policy.

8. Threats to call the police

Complaint paragraph 12 alleges that on May 14, 2009, Respondent's security guards threatened employees with calling the police and having them arrested for trespassing because they support the Union or engage in protected-concerted activity.

The Board has held that threats to call police in the context of an invalid no solicitation policy violate Section 8(a)(1) of the Act. *Labor Ready, Inc.*, 327 NLRB 1055, 1057-1058 (1999).

On May 14, 2009, Security guard "Bert" instructed RNs Wade and Cline that they could be arrested by the police and charged with trespassing if they did not leave the hospital. As noted above, there was no legitimate reason for the guards to be present to enforce Respondent's new access policy since it did not meet the *Tri County* standard. Similarly, the guards had no legitimate basis to threaten Wade and Cline with arrest by the police for trespass if they did not leave the hospital. I find that the guards' threat to call the police and have Cline and Wade arrested for trespassing violated Section 8(a)(1) of the Act as alleged.

CONCLUSIONS OF LAW

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

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

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

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

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

(b) Threatening employees with discipline for engaging in union or other protected concerted activities.

(c) Threatening employees with calling the police and having them arrested for engaging in union or other protected concerted activities.

(d) Creating the impression that employees' union activities were under surveillance.

(e) Discriminatorily maintaining and enforcing a no-solicitation rule prohibiting employees from wearing ribbons that stated "Saint John's RNs for Safe Patient Care."

(f) Promulgating, maintaining, and enforcing a rule which limits employees' access to its facility without providing adequate notice of the rule to employees.

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

THE REMEDY

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

[Recommended Order omitted from publication.]