

Carl H. Neuman d/b/a Sarah Neuman Nursing Home¹ and Local 144, Hotel, Hospital, Nursing Home and Allied Health Services Union, Service Employees International Union, AFL-CIO. Cases 2-CA-18214, 2-RC-19052, and 2-RC-19053

16 May 1984

DECISION, ORDER, AND DIRECTION
OF SECOND ELECTIONS

BY MEMBERS ZIMMERMAN, HUNTER, AND
DENNIS

On 3 September 1982 Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel, the Charging Party, and the Respondent filed exceptions and supporting briefs, and the Respondent filed an answering brief to the General Counsel's and the Charging Party's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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

¹ The caption has been amended to reflect the correct names of the Respondent and its owner.

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

We agree with the judge's finding that the authorization cards directly solicited by Supervisor Holder cannot be counted for the purposes of determining the Union's majority status in the service and maintenance unit. As more fully discussed in his decision, the judge, relying on *A.T.I. Warehouse*, 169 NLRB 580 (1968), and other similar cases, noted that the Board has long refused to count cards directly solicited by supervisors and that this line of cases has not been overruled. In so finding, the judge rejected the General Counsel's and the Charging Party's contention, based on *El Rancho Market*, 235 NLRB 468 (1978), *Kut Rate Kid*, 246 NLRB 106 (1979), and *Industry Products*, 251 NLRB 1380 (1980), that the proper standard to be applied both in instances of direct solicitation of authorization cards by supervisors and in instances of general support or encouragement of a union by supervisors is whether it has affirmatively been established either that the supervisor's activity implied to the employees that the employer favored the union or that there is cause to believe that employees were coercively induced to sign cards out of fear of supervisory retaliation. In this regard, the judge correctly pointed out that in *El Rancho* and *Kut Rate* the Board did not count the cards directly solicited by supervisors. Furthermore, we note, as did the judge, that, although the Board in *Industry Products* referred to that standard in a case involving direct solicitation, it did so in dicta inasmuch as the Board adopted the administrative law judge's finding that the card solicitor was not a supervisor.

In the absence of a union majority Member Hunter would not issue a bargaining order for the reasons expressed in his concurring and dissenting opinion in *Conair Corp.*, 261 NLRB 1189, 1198 (1982).

In agreeing with the judge that a bargaining order is not warranted, Member Dennis relies solely on the Union's failure to obtain a card majority and does not pass on any other aspect of the judge's rationale.

ommendations,³ and conclusions⁴ as modified and to adopt the recommended Order as modified.⁵

The judge found, and we agree, that the Respondent violated Section 8(a)(1) of the Act by announcing in May 1981 that employees would receive a wage increase in July 1981 and by actually granting the wage increase on 1 July 1981 during the pendency of objections. The Charging Party excepts to the judge's failure, inter alia, to find an additional violation in the announcement, concurrently with the announcement of the July 1981 increase, of a wage increase to be effective 1 January 1982. We find merit in the Charging Party's exception.

As more fully detailed in his decision, the judge, in concluding that the May 1981 announcement and subsequent granting of an increase in July was unlawful, found that the Respondent decided to grant the 1 July increase after it became aware of the Union's organizing campaign. He further found that the Respondent had granted a wage increase in January 1981 and that the Respondent had no intention of granting a second 1981 increase prior to learning of the Union's organizing campaign. He additionally noted that Administrator Leffler did not promise a wage increase when he announced in late April that the Respondent would conduct a new wage survey, and that the preparation of wage

³ In Cases 2-RC-19052 and 2-RC-19053 the parties stipulated to the appropriateness of the units involved in this health care facility. Member Hunter accepts the parties' stipulations. See *Hillcrest Health Care Center*, 267 NLRB 173 fn. 1 (1983).

The judge recommended that the elections be set aside based on Objection 4, which alleged as objectionable conduct that Administrator Keevens threatened to discharge employees who engaged in protected activity. The judge also found that the threat by Keevens violated Sec. 8(a)(1) of the Act. In adopting the judge's recommendation to set aside the elections, we additionally rely on the Respondent's other 8(a)(1) conduct during the critical period involving the creation of the impression of surveillance, coercive interrogation, and the prohibition of passing out union buttons in the cafeteria on nonworking time.

⁴ The judge concluded, and we agree, that the Respondent's threat by Keevens to discharge employees who urged other employees to vote for or support the Union violated Sec. 8(a)(1) of the Act. We find, however, that his reliance on *Bil-Mar Foods of Ohio*, 255 NLRB 1254 (1981), is misplaced. Thus, the Respondent in the present case, unlike the employer in *Bil-Mar*, expressly threatened to discharge employees engaged in protected activity as soon as he learned their identities.

Member Hunter, in joining the finding of this violation, notes that in his dissent in *Clifton Plastics*, 262 NLRB 1329 (1982), he indicated he would overrule *Bil-Mar*. However, he finds the present case distinguishable from *Clifton Plastics*, because here Keevens' statement contained a direct threat of discharge for engaging in protected activity and her remarks were made in the context of other unlawful conduct.

Member Dennis finds it unnecessary to decide whether *Bil-Mar* was correctly decided as she agrees it is inapposite.

We adopt the judge's conclusion that the Respondent violated Sec. 8(a)(1) of the Act by creating the impression of surveillance through the remarks of Dr. Neuman, its owner, at a meeting with employees 16 June 1981. In so doing, we rely on the undisputed testimony of employee Fairweather that Dr. Neuman said, "[W]ell, you were all at the meeting Sunday, and when the Union man spoke, you all said yeah, yeah, yeah."

⁵ We shall modify the posting paragraph of the Order to include the appropriate language.

surveys in the past had not automatically resulted in wage increases. Finally, he found that the granting of the July 1981 increase was not in conformity with the Respondent's past practice. Based on these facts, the judge concluded that the announcement and subsequent granting of the 1 July 1981 wage increase violated Section 8(a)(1) of the Act. However, he found no violation with respect to the complaint allegation that the announcement of the 1 January 1982 wage increase was unlawful, because the record shows that wage increases were generally granted in that month.

We conclude that the announcement in May 1981 of the 1 January 1982 increase violated Section 8(a)(1) of the Act for reasons similar to those relied on by the judge to support his conclusion that the concurrent announcement of the 1 July 1981 increase was unlawful. In so doing, we additionally note that, although the Respondent generally granted a wage increase in January of each year, it did not invariably do so. Furthermore, it is clear, based on the undisputed testimony of Leffler, that wage increases, if any, become effective 2 months after the completion of a wage survey. Therefore, the Respondent's announcement of the January 1982 wage increase in May 1981, some 7-1/2 months prior to its effective date and unsupported by any interim wage survey, was a dramatic departure from the Respondent's past practice. Such a dramatic departure can only have been an attempt to induce employees to withhold their support from the Union.⁶

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Carl H. Neuman d/b/a Sarah Neuman Nursing Home, Mamaroneck, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(a):

"(a) Post at its place of business in Mamaroneck, New York, copies of the attached notice marked 'Appendix.'⁴⁷ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily

posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material."

IT IS FURTHER ORDERED that the elections in Cases 2-RC-19052 and 2-RC-19053 are set aside and that the cases are remanded to the Regional Director to conduct new elections when he deems the circumstances permit the free choice of bargaining representatives.

[Direction of Second Elections omitted from publication.]

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. These consolidated cases were heard by me on 15 days during the months of November 1981 through February 1982.

Petitions for elections in Cases 2-RC-19052 and 2-RC-19053 were filed by the Union on May 21, 1981. The petition in Case 2-RC-19052 involved a unit of service and maintenance employees and the petition in Case 2-RC-19053 involved a unit of licensed practical nurses. In connection with the representation cases, Stipulations for Certification Upon Consent Elections were approved by the Acting Regional Director for Region 2 in each of the aforesaid cases on June 1, 1981. On June 18, 1981, separate secret-ballot elections were held in the respective units. The tally of ballots in Case 2-RC-19052 showed that, of approximately 180 eligible voters, 71 voted for the Union, 93 voted against the Union, and the ballots of 2 voters were challenged. The tally of ballots issued in Case 2-RC-19053 showed that, of approximately 25 eligible voters, 7 cast ballots for the Union, and 17 cast ballots against the Union. There were no challenged ballots in this election.

On June 24, 1981, the Union filed timely objections to both elections which read as follows:

1. On or about June 6, 1981, the Employer, on its own time and property, held a meeting of its employees in the housekeeping department at which it threatened job loss and closure of the Nursing Home if Local 144 won the elections.
2. On or about June 7, 1981, the Employer promised its employees that it would institute a pension and profit sharing plan and a grievance system covering them.
3. On or about June 10, 1981, the Employer discharged its employee, Arnold Yearwood, solely because of his membership in and activities on behalf of Local 144.
4. On or about June 11, 1981, and on various other dates prior to the elections, the Employer held meetings of its employees on its own time and property at which it threatened to discharge employees for engaging in activities on behalf of Local 144.

⁶ Member Dennis concurs in the finding of 8(a)(1) violations with regard to the announcements and grant of wage increases, but she finds it unnecessary to rely on the judge's rationale that the Respondent's conduct was presumptively unlawful. In her view, the record evidence supports a finding of unlawful motivation.

5. On or about June 11, 1981, the Employer distributed a letter which, *inter alia*, falsely stated that Local 144 was involved in a strike at the New Paltz Nursing Home in New Paltz, New York.

6. From on or about June 17, 1981, the Employer kept the Union activities of its employees under surveillance.

7. On or about June 17, 1981, the Employer posted a notice containing half truths about Peter Ottley, President of Local 144, to which the Union did not have adequate time to respond.

By virtue of the above and other acts and conduct, the Employer had materially interfered with the elections, and the elections should therefore be set aside.

On September 14, 1981, the Regional Director for Region 2 ordered that a hearing be held on the aforesaid objections inasmuch as many of the allegations therein were similar to and encompassed allegations set forth in the unfair labor practice complaint which had previously been issued. At the trial, the Union withdrew its Objection 6.

The alleged unfair labor practices were initiated by a charge filed by the Union on July 14, 1981, in Case 2-CA-18214. Thereafter, on August 31, 1981, the Regional Director for Region 2 issued a complaint which was consolidated with the representation cases. In pertinent part, the allegations of the complaint, as amended, are as follows:

1. That in late March or early April 1981, Respondent by Alice Pisani, interrogated an employee (Marvo Holder), regarding her and other employees' membership in, activities and sympathies for the Union.

2. That in mid-April, the Respondent by Joan Laquidara interrogated employees regarding their union membership, activities and sympathies.

3. That in early May, 1981, Ms. Laquidara threatened employees with discharge if they engaged in a strike in support of the Union.

4. That on or about May 21, 1981, Respondent by Anthony Parlato, interrogated an employee (Arnold Yearwood), about his membership or support for the Union, and that he also promised him pay raises and threatened him with discharge and the loss of such pay raises if he joined, assisted or supported the Union.

5. That on May 29, the Respondent discharged Arnold Yearwood because of his membership in and activities on behalf of the Union.

6. That on or about June 5, 1981, the Respondent by Ms. Pisani, directed its employee Marvo Holder to speak adversely about the Union to other employees, directed her not to discuss the Union in a favorable light with employees, and urged and encouraged her to support Respondent's illegal anti-union campaign.

7. That in early June 1981, the Respondent by Mr. Leffler, threatened employees with discharge and with the loss of benefits if they selected the Union as their bargaining representative. Also, it is

alleged that at the meeting involved, Mr. Leffler created the impression that the Respondent was engaged in the surveillance of union meetings.

8. That on or about June 11, 1981, the Respondent by Mariane Keevins:

(a) Threatened employees with discharge if they discussed the Union amongst themselves, and threatened employees with the loss of employment if they engaged in a strike in support of the Union.

(b) Promised wage increases effective on July 1, 1981 and January 1, 1982, and also promised a Pension Plan in 1982, in order to discourage employees from selecting the Union.

(c) Promised to continue their \$15,000 life insurance policy if the employees did not select the Union as their representative.

(d) Threatened employees with the loss of the promised wage increase (paragraph b, above), if they joined, supported or assisted the Union.

9. That during the week of June 11 to June 18, 1981, the Respondent by Barbara Mills interrogated an employee concerning the Union.

10. That on or about June 15, Respondent by Mrs. Pearlman directed an employee not to distribute union literature at the facility.

11. That on or about June 16, 1981, the Respondent by Dr. Carl Neuman:

(a) Promised employees a new Pension Plan in order to discourage them from joining or supporting the Union.

(b) Threatened employees with the loss of the aforesaid Pension Plan and the loss of a Profit Sharing plan if the Union won the elections.

12. That on July 10, 1981, the Respondent discharged Marvo Holder because of her membership in and support for the Union.

The General Counsel also contends that, notwithstanding the outcome of the election in the service and maintenance unit (Case 2-RC-19052), the Union had obtained authorization cards from a majority of the employees in the unit. He contends that the Respondent's conduct as alleged above made a fair and free election impossible, and that the Respondent should therefore be ordered to bargain with the Union as the exclusive collective-bargaining representative of the employees in that unit.

For its part, the Respondent essentially denies the allegations set forth above. With respect to Holder, the Respondent asserts (1) that she was a supervisor within the definition of Section 2(11) of the Act, and (2) that she was discharged for cause. As to Yearwood, the Respondent asserts that he was discharged basically because of his failure to keep the Nursing Home's doors closed during the night, a responsibility he had as a security employee. With respect to the General Counsel's request for a bargaining order, the Respondent contends, in addition to denying the alleged misconduct, that the Union did not represent a majority of the employees, as many of the Union's authorization cards were obtained through

the solicitations of Marvo Holder and Weston Graham, both of whom are contended to be supervisors.

Based on the entire record herein, including my observation of the demeanor of the witnesses, and after reviewing the briefs submitted to me, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a sole proprietorship which operates a nursing home facility in Mamaroneck, New York. It is undisputed that annually the Respondent derives gross revenues in excess of \$500,000 and that it purchases and causes to be delivered directly to it products valued in excess of \$50,000 from points located outside the State of New York. It therefore is concluded that the Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act and a health related facility within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The parties agree, and I find, that Local 144, Hotel, Hospital, Nursing Home and Allied Health Services Union, Service Employees International Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

A. Background

It appears from the record that there have been three prior elections involving various labor organizations at Sarah Neuman Nursing Home since 1971.

It also appears that employees of the Company again began talking amongst themselves about unionizing the facility sometime in mid-March or early April 1981. Thereafter, on April 17, 1981, a meeting was held at the home of an employee, Mary Robinson, which was attended by Edward Bragg, a vice president and organizer of the Union. Also in attendance were other employees, including Mona Baptiste, Merle Lambert, Pearl Brown, Nellie Cromwell, and Gloria Simister. At the meeting, a committee of employees was selected to solicit union authorization cards from other employees.¹

Thereafter, in April and May 1981, signed authorization cards were obtained from employees in both units, and the representation petitions were filed on May 21, 1981. Among the solicitors were Marvo Holder and Weston Graham, both of whom held the titles of food service supervisors. If it is concluded that these two employees were supervisors within the meaning of the Act, a serious question would be raised as to whether a majority of the employees in the service and maintenance unit had voluntarily manifested their support for the Union by signing union cards.

With respect to the unit in question, the parties stipulated that as of May 21, 1981, the service and maintenance

unit consisted of 178 individuals whose names are listed on the *Norris-Thermador* list used for the election in Case 2-RC-19052. They disagree, however, as the eligibility of five individuals who held the job title of food service supervisor, these being Marvo Holder, Weston Graham, Edith Davis, Cynthia Morgan, and Linda Graham. As to these people, the Respondent asserts that they were not eligible because of their supervisory status, whereas the General Counsel asserts that they should be included in the service and maintenance unit as employees.

B. Events in April 1981

Preliminary to further discussion and to set a framework for this decision, it seems to me that apart from individual or small group conversations there were five sets of meetings which are relevant to this case. In this respect, it is noted that since the Respondent employs in excess of 300 people, and has employees working around the clock on various shifts, when management wishes to hold meetings with its employees, it does so by setting up a series of meetings over a 1- or 2-day period, and conducts them at various times of the day so that all employees can be reached. Although there is some degree of confusion as to when each set of meetings took place and as to what took place at each (no doubt due to the passage of time between the events and the trial), it nevertheless appears that there were five relevant sets of meetings as follows. The first set of meetings was held by Mariane Keevins about April 14 or 15, 1981. The second set of meetings was held by Leffler and Keevins about April 23 and 24, 1981. The third set of meetings was held by Keevins and Leffler about May 14 or 15. The fourth set of meetings was held by Keevins and Leffler about June 11, 1981. The final set of meetings was held by Dr. Neuman, along with Keevins and Leffler on June 16, 1981.

It appears that around April 14 or 15, 1981, and before any union representatives had met with employees, Mariane Keevins, the administrator, held a series of meetings with employees of the nursing department relating to medical insurance problems reported to her by Barbara Mills, the nursing director. The meetings were held separately by shift and job category so that the nonprofessional staff met separately from the professional staff.

With respect to these meetings, the General Counsel presented one witness who testified as to what was said at the meeting that Keevins held with the nurses aides who worked on the 3 to 11 p.m. shift. On direct examination, Eudora Marshall testified that among the employees present at this meeting were Mona Baptiste, Christine Carter, Nellie Cromwell, Gloria Simister, Marian Wedderburn, Anne Wedderburn, and Sybil Davidson. Marshall testified that Keevins stated that she had worked at New Rochelle Hospital which had a union and that unions were no good. Keevins allegedly asked the employees what they wanted and said that she "would help us get it." She is further alleged to have said that, "if there's anything with the Union, then we can't come to her—we can't come to management anymore." According to Marshall, Keevins stated that she was going to see

¹ The Union's authorization cards are entitled, "Application for Membership." They state: "I hereby apply for membership and authorize Local 144, SEIU, AFL-CIO, to represent me in collective bargaining negotiations on wages, hours and working conditions."

about the profit-sharing plan² and that she was going to get us more help on the floor. Marshall asserts that, during this meeting, an employee, Meyers, complained about her prior transfer from the physical therapy department and expressed her desire to have a union. Also, Marshall testified that Wedderburn complained about adverse patient comments being placed in her personnel folder and that she too expressed a desire to have a union. According to Marshall, Keevins offered to show Wedderburn her personnel folder and asked Meyers if she wanted to transfer back to the physical therapy department. (Meyers declined.) On cross-examination, Marshall testified that meetings of this nature were not uncommon at the Nursing Home and that Keevins opened the meeting by asking if anyone had questions. She testified that employees then raised a variety of matters, including problems with reimbursement under the medical insurance plan and a problem arising from the fact that the emergency room at New Rochelle Hospital did not always accept the insurance card. She also indicated that the subject of racial discrimination was raised at the meeting.

With respect to the meeting described above, Keevins testified that the basic problem discussed was reimbursement under the medical insurance plan and the assertion by some employees that the emergency room at New Rochelle Hospital refused to accept the medical insurance card. She stated that a complaint was also raised about the types of materials that found their way into personnel folders and that Wedderburn expressed her anger about the transfer described above. Keevins testified that some of the employees raised the contention that some of the professional staff treated them in a racially discriminatory manner and that Christine Carter questioned the extent of job security, giving as an example the prior discharge of two employees earlier in the year (Maria Yearwood and Christine Watts). Keevins stated that, during the meeting, Magnolia Meyers asserted that the employees needed a union and that Keevins stated that she disagreed in view of the good communications between the staff and management. According to Keevins, there was no further talk about unions during this or any of the other meetings held on that day, and she stated that she was not aware of any union organizing activities being carried out at that time. Keevins also stated that this group of meetings upset her very much, particularly the assertions by the staff concerning racial prejudice. According to Keevins, one of the employees at the 3 to 11 p.m. meeting said that the salaries being paid were not comparable to other nursing homes and that she responded by saying that this was a surprise because the wage increases that had been granted on January 1, 1981, were given after a wage study which had been done in October 1980.

Although the General Counsel called other witnesses who also attended the above-described meeting, he did not question them about what took place on that occasion. For example, he called, as witnesses, Christine Carter, Mona Baptiste, Sybil Davidson, and Gloria Si-

² At this time, the employees were already covered by a profit-sharing plan which had been instituted in January 1979.

mister. Yet he did not seek their corroboration of Marshall's testimony. Thus, although the testimony of Marshall was presented no doubt to establish both knowledge of union activity as early as mid-April and union animus on the part of Keevins, the General Counsel was content to have his evidence relating to this meeting go uncorroborated.³ Based on this factor, and also on demeanor grounds, I shall credit Keevins' account.

Subsequent to the meetings held by Keevins in mid-April, she instructed her assistant, Margaret Kalschad, to call back some of the nursing homes originally called in the wage survey conducted in October 1980. Kalschad was instructed to see if there were any changes. Also, Keevins notified her superior, Leffler, as to the aforesaid meetings and he arranged to come down and speak with the employees during the last week of April. During the meetings held by Leffler (about April 23 or 24), he assured the employees that the medical insurance problems were being worked on and would be taken care of. Additionally, in response to questions by employees regarding wages, he promised to conduct another wage survey and report back to them.

The General Counsel also asserts that an incident involving Marvo Holder occurred in April 1980. In this regard, Holder testified that sometime in either late March or early April (not more specific) Alice Pisani⁴ told her in private that "I heard the employees are trying to get Local 144 in here." Holder stated that Pisani asked her how she felt about the Union, to which Holder said that "the Union has its advantages and its disadvantages." Holder asserted that Pisani asked what the advantages were and asked if Holder had heard any of the employees say anything. According to Holder, she replied that she had not heard anything.

As to the substance of the above conversation, nothing contained therein would be unlawful if Holder is concluded to be a supervisor. It also is noted that its alleged timing seems highly improbable in view of the fact that the Union had not as yet been in contact with the employees. Therefore, assuming that the substance of the conversation is to be credited, it seems probable that it could not have occurred until after April 17, 1981, when the Union's representatives first met with the employees. As such, I do not feel that I can rely on this incident to rebut Pisani's assertion that it was not until early May 1981 that she first learned of the Union's organizational activities.

The General Counsel also cites an alleged interrogation of Bernard Romulus by Joan Laquidara as occurring in late April. In this respect, Romulus testified⁵ that sometime in late April Laquidara, the head of the housekeeping department, called him into her office where she said that she had heard that everybody was talking about

³ I should note that I was particularly impressed by the demeanor of Christine Carter and was tempted to call her as my own witness on this subject. However, I did not do so given the length of the trial and my feeling that it is more advisable to allow each side's counsel to present the witnesses they wanted me to hear.

⁴ Alice Pisani is the head of the dietary department.

⁵ Romulus, who is Haitian, began his testimony in English. However, when it became difficult for me to understand him, I directed the General Counsel to obtain an interpreter.

the Union. He stated that she asked him if he had heard about the Union, if he had signed a union card, and if anybody had given him a card. According to Romulus, he told her that he heard about the Union but that he neither had signed a card nor had been given a card. Laquidara denied any such conversation with Romulus and she stated that she first became aware of union activity in early May when some of the employees in her department (such as Martha Slade, Martha Brown, Helen Street, and Ann Capuso) came to her and told her of organizational activities by Local 144.

Also, in April 1981, the Company put into place a formal grievance committee, which consisted of certain supervisory people plus elected employee representatives who were designated to hear and make recommendations relative to employee grievances such as discharges and discipline. The record reveals that this formal committee was a change from the more informal open meetings that had been held in the past at which employees were entitled to air their problems. It also was established that discussions preparatory to the establishment of this grievance committee commenced in early or mid-April and that it was formerly established at a meeting of the department heads held on April 21, 1981. Initially, Marvo Holder was one of the people who was elected by the employees in the dietary department to be on the committee, but she resigned on May 4, 1981. In connection with the establishment of this committee, Keavins testified that the discharges of Maria Yearwood and Christine Watts earlier in the year had created a good deal of heat and that this formal grievance committee was created to provide a suitable forum for those kinds of problems. It does not appear that the grievance committee was established in response to the Union's organizational campaign, as the evidence does not indicate that the Employer was, as yet, aware of that campaign. (As noted above, the first meeting between union representatives and employees occurred at an employee's house on April 17, 1981.)

C. An Incident Involving Bernard Romulus and Joan Laquidara in May 1981

Bernard Romulus is employed in the housekeeping department as a porter and is supervised, along with about 30 other employees, by Joan Laquidara. According to Romulus, in the beginning of May 1981, Laquidara called him into her office along with Jean Claude Louis, Angela Simpson, and Joseph Dorreliand. He stated that Laquidara said that the reason she called the meeting was because she had heard from Angela Simpson that Romulus, Dorreliand, and Louis "were trying to bring the Union in the Nursing Home." He stated that Dorreliand answered by saying that he had heard that Simpson had reported to Laquidara that he and Romulus were trying to bring the Union into the department. Romulus also stated that Laquidara said: "If someone wants the union, you will fire yourself and go work for the union. If you don't want the union, you will stay at the job." According to Romulus, Laquidara said that she had a surprise for the department and that, because the employees did not have enough work to do, that was why they were talking about unions. He stated that she did

not say what the surprise was. Finally, Romulus asserted that, during this conversation, Laquidara said that if the Union was voted in, and if there was a strike, everyone who went on the picket line would be fired and that she had a new group to replace them. (It is noted, however, that the election petitions were not filed until May 21, 1981, and therefore sometime after this conversation.)

Laquidara's account of this meeting is quite different. She testified that, sometime in mid-May, employee Angela Simpson came to her in tears and expressed her concern that Romulus and Dorreliand were saying that she was reporting their union activities to Laquidara. She testified that as this was not true she called a meeting with Romulus, Dorreliand, Simpson, and Jean Claude Louis to clear the air of this accusation. She stated that, at the meeting, Simpson repeated her assertion that she was being accused of being a spy and that Laquidara told the group that they should not spread rumors around. According to Laquidara, Dorreliand and Louis said they were sorry, but Romulus remained silent. She stated that during the meeting she asked the employees if there were any other problems, to which Romulus said that the talk about the Union was related to a concern for job security. She stated that she told the group that she did not understand why they would be concerned about job security and that there were no problems in her department. She also stated that she asked Romulus if he personally felt insecure in his job and that he said no. Finally, Laquidara denied the alleged threats of discharge asserted by Romulus.

Joseph Dorreliand was called as a witness by the Respondent and his testimony tended to corroborate the version of the meeting described by Laquidara.⁶ In essence, he stated that he had heard rumors to the effect that Angela Simpson was a spy for the Company and that she was reporting Dorreliand's and Romulus's union activities to Laquidara. He stated that when he confronted Simpson about this she became upset and went to see Laquidara. According to Dorreliand, shortly thereafter, he, Romulus, and Jean Claude Louis, along with Simpson, were called to Laquidara's office where this subject was discussed. He stated that at the meeting Simpson said that there were rumors that she was giving gossip to Laquidara and that she wanted to clear up the matter. He further stated that Laquidara asked who told them that Simpson was talking to her. Dorreliand stated that he replied that there were rumors to that effect and that Laquidara said she did not have much time and did not know anything about such rumors. He also stated that Laquidara said that "instead of standing and talking, why don't you keep yourselves busy." According to Dorre-

⁶ It is noted that Dorreliand had originally been subpoenaed by the General Counsel, but had indicated his unwillingness to testify. Dorreliand acknowledged that he did not want to get involved in the case and that he was unwilling to testify for the General Counsel. He testified that he changed his mind about testifying and agreed to do so on behalf of the Respondent when the Respondent's representatives told him that his unwillingness to testify could be viewed as being adverse to the Company. Dorreliand is not a citizen of the United States and is in this country on a green card. This does not mean, however, that he would be subject to deportation in the event that he lost his job.

liand, Laquidara did not say anything about a surprise, and did not make any threats of discharge.

In connection with the above, it seems to me, based on all the circumstances and also on demeanor considerations, that Laquidara's account of this meeting is the more plausible version. It therefore appears that the meeting was basically called at Simpson's request to stop rumors that Simpson was being used by Laquidara as an informant. It is concluded in this respect that the General Counsel has not proven, by a preponderance of the evidence, that Laquidara threatened to discharge employees who engaged in union activities or threatened discharge if employees engaged in a strike.

D. The Meetings held by Edward Leffler in Mid-May 1981

The record shows that about May 13 and 14, and before the representation petitions were filed, Leffler, accompanied by Keevins, held another series of meetings with the employees. Among other things, Leffler told the employees that they would receive wage increases and that a pension plan would soon be instituted. As to wages, he announced that as a result of the wage survey just completed it had been found that wages at Sarah Neuman had fallen behind and that on July 1, 1981, the employees would get a \$20-per-week increase and that another \$15-per-week increase would be given on January 1, 1982.

Leffler testified that it is the Company's policy to pay wages at a competitive level with other similar facilities in its geographic area. To that end, the Company regularly conducts wage surveys, either once or twice a year, to determine area standards. In October 1980, a wage survey was conducted which led to the wage increases given to the Respondent's employees on January 1, 1981. However, it is clear from the record that the January 1, 1981 wage increase was the only wage increase originally contemplated for that year.

As noted above, during the series of meetings that Keevins held in mid-April and at the other set of meetings conducted by Leffler in late April, some of the employees had expressed the opinion that wages were no longer competitive. After the first set of meetings, Keevins instructed her assistant Kalschad to call back to some of the nursing homes originally contacted in the October 1980 survey. When Leffler heard the same complaints about wages, he told the employees that another wage survey would be made and the results would be reported to them. It does not appear, however, that he concomitantly promised to grant additional wage increases if the new survey confirmed the employees' opinion that wages were no longer competitive. It is also noted that Leffler testified that in past years, even if a survey was made, this did not automatically result in wage increases for the Respondent's employees.

According to Kalschad, she was told by Keevins, in late April, to make a new survey which she did over a period from about April 20 to early May. She stated that Keevins told her to expand on the number of nursing homes to contact and to include facilities in northern

Westchester and the Bronx.⁷ Like the survey done in October 1980, the new survey sought information relative to the entry level wages for different classifications of employees. Both surveys also requested information as to what if any union represented the employees. However, unlike the October survey, the new survey also requested information as to the level of dues and initiation fees required at nursing homes having union contracts.

It appears that Kalschad completed her survey some time during the first week of May 1981 and that Keevins and Leffler shortly thereafter decided to grant the further wages increases in 1981, as described above. Although that decision was made and announced before the Union filed the representation petitions herein, it is clear that the decision was made *after* both Keevins and Leffler had become aware that Local 144 was involved in an organizational campaign. Thus, as stated by Keevins, she had been told by Laquidara in early May that organizational activity was going on, a report which she took seriously in light of the unrest previously expressed to her by the employees during the April meetings.

With respect to the pension plan announcement, a certain amount of background is necessary. According to Leffler, a profit-sharing plan was developed through an outside company (Benefit Systems), and implemented in January 1979. He stated that soon after the profit-sharing plan was installed he told the employees that a pension plan would be the next step in the benefit package. Leffler and Peter Wise (president of Benefit Systems) testified that in the autumn of 1980 the latter was given authority to go ahead with the development of a pension plan. Such an undertaking, according to Wise, was far more complicated and time consuming than the development of the profit-sharing plan because of the actuarial work required and the governmental regulations imposed on pension plans. That such a step was undertaken is confirmed by a series of letters to and from Wise dated in September 1980.

In any event, apart from the fact that the evidence establishes that work to implement a pension plan was initiated in the fall of 1980, the testimony of the General Counsel's witnesses indicates that they were told of the impending pension plan before April 1981 and therefore before any activity by Local 144. For example, Eudora Marshall acknowledged that Leffler had told the employees at meetings in 1980 that a pension plan would be given. Similarly, Gloria Fairweather testified that a pension plan was mentioned by the Company before Local 144 began organizing. Accordingly, it is clear that the promise of a pension plan as made by Leffler at these meetings in mid-May was not a new promise, but was simply a reiteration of a promise already made.

E. The Discharge of Arnold Yearwood

Arnold Yearwood was employed by the Respondent as a security-maintenance employee from about September 29, 1980, to May 29, 1981. His supervisor was Anthony Parlatore, who is the director of plant operations. Year-

⁷ Leffler testified that, during his meetings in April, some employees were making comparisons to wages paid in those areas.

wood worked on the evening shift from 4 p.m. to 12 midnight, and the person who relieved him, from midnight to 8 a.m., was Ben Martin.

Yearwood is the brother of Eudora Marshall and the nephew of Marvo Holder, two of the union activists. He is also related to other persons who have worked at the Respondent at one time or another, including Maria Yearwood, who was discharged in the winter of 1981, and Oneil Yearwood, who was promoted to an office position from the dietary department. Arnold Yearwood signed a union card on April 25, 1981, but otherwise did not engage in any other union activities. While denying any knowledge of Yearwood's union affiliation, Parlature conceded that in the last week of April 1981 he was told by his assistant Lopez that employees of the Company were signing union cards. The parties are in agreement that because of his security functions Arnold Yearwood would not have been an eligible voter in the election, even had he remained employed.

Apart from some maintenance and carpentry work that he did when called upon, Yearwood's basic function was to station himself at the front entrance during his shift and to make rounds to ensure that the various doors were locked. The main entrance is kept locked after 8 p.m. and, if people have to come or leave, he opens the door for them and relocks the door thereafter. The receiving door is also locked after 7 p.m., after the dietary department places its refuse outside. In connection with his duties, a set of keys is shared by the people who do this function, and they are passed from shift to shift as the relief man comes on duty. Ben Martin's job, from midnight to 8 a.m., is essentially the same. According to Parlature, he had received no significant criticism of Yearwood's work prior to May 21, and he considered Yearwood to be a satisfactory employee up to that point.

On May 21, 1981, the person having the keys during the afternoon left the facility with the keys before Yearwood came on duty. As a result, Yearwood called Parlature at home, and the latter came down to the facility and gave Yearwood another set of keys, including keys for the front door and the receiving door. What Yearwood did thereafter during that night is the subject of some dispute.

According to Yearwood, and confirmed by Parlature, he was given a carpentry job to do that evening, namely, building some steps for a van. Yearwood also stated that during the evening a carpet cleaning company came and that he opened the receiving door so that they could bring their hoses inside. Although he appeared to hedge on this, Yearwood acknowledged that he may have left the receiving door open after the carpet cleaning people had left. He maintained, however, that if he did leave the door open it was not intentional on his part, and that this could have happened because he was so busy that night.

According to Ben Martin, when he arrived shortly before midnight, he saw that the key was in the lock of the front door and so he let himself in.⁸ He also testified

that, as he entered, he saw Yearwood sitting by the doors of the dining room watching television. Martin testified that he then went downstairs to punch in and, as he was making his rounds downstairs, he discovered that the receiving door was propped open with a barrel. According to Martin, when he went upstairs, he spoke with the night nursing supervisor Gloria Weber and told her that the receiving door was open. At this point, he stated that they both went downstairs to look at the door and after returning upstairs Weber asked Yearwood about the door. According to Martin, Yearwood then asked him if he had reported the open door to Weber and when he answered affirmatively Yearwood started cursing at him. Among other things, Martin asserted that Yearwood called him an "Uncle Tom," suggested that he go back to Liberia, and further suggested that they both step outside. According to Martin, after his confrontation with Yearwood, he returned downstairs, obtained a key from the dietary supervisor's office, and locked the door.

Yearwood conceded that he understood that it was his responsibility to make certain that the doors to the facility were locked during the evening. He also acknowledged, as noted above, that he may have left the receiving door open that night. As to his conversation with Martin, Yearwood testified that when he saw Martin talking with Weber he told Martin that he did not have to tell Weber about the door being open, as he was just about to tell Martin and/or Weber that it was unlocked. Yearwood denied that he threatened Martin, or that he suggested that Martin go back to Liberia. Curiously, whereas Yearwood indicated that he was not sure if he left the door open, his statement to Martin that he was just about to tell either him or Weber that the door was unlocked is clearly an acknowledgement that he was, in fact, aware that the door was open. Moreover, if he knew that the door was open, why did not he lock it?

Ben Martin testified that on the next morning (May 22) he called Parlature to relate the incident above, and was told by the latter that as Parlature would not be in until Tuesday, May 26, he would speak to Martin on that day. In the meantime, Weber wrote up a report of the incident which is dated May 22 and which was transmitted to Parlature.⁹ Weber's report stated:

Last night when Ben Martin, security, came on duty, I questioned him about whether or not the delivery door was locked, in view of the fact that the maintenance keys were not in the building. Ben usually checks that door after he punches in. He found the door open.

Mr. Yearwood came upstairs from punching out and I started to ask him about the door when he started to get very argumentative and loud with Ben stating "I was going to tell her about the door but you had to complain to her."

The argument was loud enough to bring some of the staff to within range to observe the commotion.

⁸ The key apparently belonged to Gloria Weber, the nursing supervisor on duty that night.

⁹ Weber was not called as a witness in this proceeding. Thus, the account set forth in her report is not taken for the truth of the matters asserted therein.

Ben stated that he doesn't receive a security report from Mr. Yearwood when he comes on duty. Mr. Yearwood apparently was going to report the open door to me.

Ben found a key in dietary to lock the door. Perhaps if Mr. Yearwood had known about the key, and I'm assuming he did not, angry words need not have been exchanged. The door probably would have been locked.¹⁰

On Tuesday, May 26, Martin reported the events of May 21 to Parlatore, who wrote them down and had a typewritten report prepared for Martin's signature. Martin's written report states:

On May 21, 1981, when I came on duty at 11:55, I found the front door to the Nursing Home unlocked and keys in the door. The Security Guard, Mr. Yearwood, was in the patient dining room facing the T.V. set. I went downstairs to the time clock. After punching in, I went to the rear receiving door as is my custom. I found this door wide open, being held by a barrel. I went upstairs and told Mrs. Weber, the Night Supervisor, that I had found the receiving door open. During this time, Mr. Yearwood came upstairs. Mrs. Weber told him about the open receiving door. At this time he accused me of telling Mrs. Weber about the door. He started to be abusive by calling me an "Uncle Tom," that he did not need this job. I did. He said that Sarah Neuman can kick me out any time they want. I said to him "If you don't need a job what are you doing here?" Mr. Yearwood said, "Come outside and I'll bust you."

According to Parlatore, with the reports of Martin and Weber in hand, he decided on Wednesday, May 27, to discharge Yearwood. He stated that on the following day, May 28, he asked Yearwood to report to his office before clocking in, and read to him a termination report which he had prepared. This states:

On May 21 at 11:50 p.m. the on-coming security guard, Ben Martin, found the following conditions:

1. The front door to the Nursing Home was unlocked and keys were in the door.
2. Mr. Yearwood, the security guard on duty, was at his post in the lobby.
3. The Receiving door to the exterior was unlocked and propped open.
4. When Mr. Martin reported these conditions to Mr. Yearwood and the Nursing Supervisors, Mr. Yearwood became very abusive and threatened Mr. Martin with bodily harm.

For violating the Nursing Home Safety Rules and for endangering the welfare of the staff and patients and for verbal abuse of fellow employees, I

am terminating Mr. Yearwood's employment as of 4:00 p.m. Thurs., May 28, 1981.

According to Parlatore, when he read the accusations to Yearwood, the latter gave confused and contradictory answers. He stated that Yearwood would not sign the report and that he had his assistant Jack Lopez sign as a witness. Parlatore stated that toward the end of the conversation Yearwood stated that the carpet cleaning people had used the receiving door that night, a matter unknown to Parlatore. He asserted that he then told Yearwood that he would check the matter further, and get back to him the following day with his decision. According to Parlatore, he then asked Laquidara to check with the carpet cleaning company to find out when they arrived, what door they used, and when they left. He stated that, when he was told by Laquidara that the carpet cleaners had left about 10:30 p.m. and that they asserted that they had notified Yearwood that they were leaving, he decided to reaffirm his decision to discharge Yearwood. Yearwood was so notified on Friday, May 29.

Yearwood testified that on some unspecified date between the incident on May 21 and his exit interview on May 28 he had a conversation with Parlatore in the latter's office. Yearwood asserted that, during this conversation, Parlatore told him that Yearwood was going to get a raise soon and another raise in January 1982. He stated that Parlatore said that the Union was coming in, that he was told that Yearwood was a supporter of the Union, and that, if he found out that this was so, Yearwood would be fired immediately and thereby lose his benefits and salary increases. According to Yearwood, after Parlatore made this threat, he volunteered to Parlatore that he was, in fact, a supporter of the Union. Needless to say, Parlatore denied that he ever had any such conversation with Yearwood, and I am inclined to credit his denial. In this respect, I was impressed with Parlatore's demeanor as compared to Yearwood's and the latter's account of this conversation defies common sense unless Yearwood is uncommonly naive. Thus, by the latter's account, I am asked to believe that, after being told by Parlatore that he was suspected of being a union supporter and being threatened with discharge on that account, Yearwood volunteered that he was, in fact, a supporter of the Union. Such a transaction, as related by Yearwood, is not what one might expect from a reasonable person and I therefore have a great deal of difficulty in believing that it could have occurred.

Following Yearwood's discharge, he filed a grievance pursuant to the newly established grievance procedure and it was heard by the committee. Yearwood's grievance was denied.

F. The Meetings Held About June 11, 1981

It appears from the record that a series of meetings were held about June 11 where Keevins and Leffler spoke to the employees on the various shifts. Although the General Counsel in his brief asserts that Dr. Neuman conducted a number of meetings on this date, the evidence as a whole suggests that he did not talk to the em-

¹⁰ Subsequent to this report, Weber supplemented it on June 5, 1981, and stated, inter alia: "In a previous documentation regarding a verbal confrontation between Mr. Yearwood and Mr. Martin, a comment by Mr. Yearwood to Mr. Martin was omitted. Mr. Yearwood who I feel was unreasonably angry at Mr. Martin told Mr. Martin that he should go back to Africa where he belonged."

ployees until June 16, 2 days before the election. In this respect, Dr. Neuman testified that the only date that he came to talk to the employees was on June 16. Also, Gloria Fairweather, one of the General Counsel's witnesses, testified that Dr. Neuman addressed the employees at a meeting on June 16, whereas the meeting on June 11 was conducted by Keevins and Leffler.

Also, Bernard Romulus testified that he attended a meeting of the housekeeping employees about June 13 or 14 where Keevins and Leffler spoke. However, it is my opinion that the meeting he described either was part of the series of meetings held on June 11 or that he mixed together into one meeting certain things that were said at the June 11 meeting with other things that were said at the June 16 meeting and at earlier meetings in May.

Rosetta Reed, an LPN, testified that, at the meeting of her group of employees on June 11, Keevins said that she was aware that the Union was trying to get in. Reed stated that Keevins said that she had heard that someone had been talking to patients' families and that, "if I so much as hear of anybody harassing the patients, the families, the employees or anybody, that person will be terminated, union or no union." According to Reed, Keevins then talked about a strike at another nursing home, saying that the strikers had been replaced. She also stated that Leffler said that "the Union would not give us anything that we weren't already getting from then at Sarah Neuman." Reed went on to testify that Leffler further stated that he felt that the Nursing Home had been loyal to the employees and that he was "mad as hell because we were disloyal to the nursing home."

Gloria Fairweather similarly testified that, at the meeting she attended on June 11, Keevins, after talking about the date and time of the upcoming election, said that she "just wanted us all to know that if she heard of anyone harassing the other employees about the Union, they will be fired."

Keevins essentially conceded that she made the comments ascribed to her by Fairweather and Reed. In this respect, she testified that at the June 11 meetings she made reference to complaints that had come to her from patients' families and employees. Such complaints as related by Keevins were that (1) employees were being harassed with regard to their leanings in terms of the election, and (2) patients and their families were being brought into the situation. She testified, for example, that one of the families had complained that employees were going through the corridors singing songs such as "We shall overcome." She also testified that she told the employees that information about harassment had come to her attention and that, if it did not cease immediately, and if she found out who was engaged in this type of harassment, either to other employees or to patients and their families, those employees would be terminated. When asked to explain what she construed as harassment of employees, Keevins testified that this would encompass telling employees to make sure they voted for the Union. As to the statement ascribed to Leffler about loyalty, Keevins testified that, although she could not recollect Leffler's exact words, he did indicate at one of the June 11 meetings that he felt that the Company had been loyal to its employees, that it had nothing to be ashamed

of, and that it had done everything in its power to remain competitive. Leffler, for his part, did not specifically deny Reed's testimony as to the "loyalty" issue. He did state that he did tell the employees that their salaries and benefits at Sarah Neuman were competitive and that the Company strived for a working environment that the employees would enjoy. He also testified that, when he heard that patients and their families were being involved in the campaign, this was "terribly disappointing to me."

Bernard Romulus testified without any corroboration that, during the meeting held with his department's employees, Leffler stated that although he was not saying whether he wanted the employees to vote for a union, "if you don't like your job, vote for the Union." Romulus further testified that Leffler said that if the Union got in and if there was a strike any employees who picketed would not come back and that the Company had a group ready to replace them. According to Romulus, one of the laundry room employees asked if an employee who had worked for 9 or 10 years would lose all his or her benefits and Leffler responded by saying yes because, if the Union was voted in, everything would start anew. At this point in his testimony, Romulus could not recall anything else. However, when asked if Keevins spoke, he asserted that either she or Leffler talked about the raises described previously. Following this bit of testimony, Romulus' memory again failed him until asked if anything was said about pensions. He thereupon testified that the employees were told that they would be getting a pension plan starting in 1982. Once again Romulus could not recall anymore of the meeting until asked if anything was said about life insurance, at which point he testified that the employees were told that, if the Union was voted in, the life insurance they had would be reduced from \$15,000 coverage to \$10,000 coverage.¹¹

In relation to the uncorroborated claim by Romulus that Leffler stated that the employees would lose their current benefits if the Union was voted in, Leffler testified that in May he responded to an employee question regarding the profit-sharing plan by relating, in substance, the language of the trust indenture which states:

The term employees shall not include any person who is covered under a collective bargaining agreement if there is evidence that retirement benefits were the subject of good faith bargaining between the representative of such person and the employer, unless the collective bargaining agreement provides for the inclusion of such person under the plan.¹²

¹¹ For some time prior to the meeting, the Company had provided a \$15,000 life insurance plan to its employees. In his pretrial affidavit, Romulus stated that Keevins said that the "Employer was going to give a \$13,000 life insurance policy, but if the Union got in, we will be getting \$10,000 Life Insurance. At present we have \$13,000 in Life Insurance."

¹² The employees are given a pamphlet describing the profit-sharing plan, which states:

The only employees not eligible for participation are those covered under a collective bargaining agreement with which there is evidence that retirement benefits were subject to good faith bargaining between the representative of such employee and the employer.

With respect to Romulus' assertion that Leffler stated that if there was a strike the strikers would not come back, Leffler credibly testified that during a meeting he responded to a question about strikes by saying that in the event of a strike, which would only come about after the Union had won the election and if bargaining had failed to reach an agreement, the Company would continue to operate and would do so by replacing the strikers. He stated that he explained that in the event of a strike the employees would be asked to come to work, and that, at the conclusion of a strike, the Company would rehire the strikers as jobs became available.

Insofar as the testimony of Romulus refers to the promises of a pension plan and wage increases, this already had been discussed with employees at a previous time and is referred to at other sections of this decision. With respect to his testimony that Leffler, in effect, threatened employees with discharge if they voted for the Union, this is not credited as it was totally without corroboration. Also, it is my opinion that Romulus had substantial difficulty remembering the events which he was called on to relate, a matter which may be attributed, in part, to the fact that English is not his original language. Similarly, I do not credit his uncorroborated assertions that the Company would lower the life insurance coverage from \$15,000 to \$10,000 or that it threatened employees with the loss of their current benefits if the Union was voted in.

G. The June 16 Meeting

There is no dispute that on June 16, 2 days before the election, Dr. Neuman, the Respondent's owner, addressed the employees at various times during the day concerning the upcoming election. In connection with the above, Gloria Fairweather testified that Dr. Neuman, at her group meeting, told the employees that the pension plan, previously discussed by Leffler, would go into effect in January 1982. She also testified that Dr. Neuman said that he was the 100-percent owner of the Nursing Home, that he was not going to allow a union to come in and run it, and that he was going to win the election if he had to "crawl." According to Fairweather, Dr. Neuman asked if anyone had anything to say and when the group was silent he said that, when the employees went to a union meeting, they all said, "Yeah, yeah, yeah."

Dr. Neuman's testimony was, in essence, that he described the current conditions of employment in a favorable light. He also stated that he spoke of the profit-sharing plan in existence and told the employees that under the terms of the plan its continuation would be the subject of collective bargaining. He further stated that when an employee asked what would happen in the event of a strike he responded by saying that if the Union won the election the Union and the Company were supposed to bargain collectively with each other, and that the Nursing Home would not close under any circumstances. Dr. Neuman denied that he made any threats or that he said he would crawl to win the election. He did not deny, however, Fairweather's assertion that he said that when the employees went to a union meeting they all said, "Yeah, yeah, yeah."

H. Miscellaneous 8(a)(1) Allegations

According to Rosetta Reed, at some point after the June 11 meeting, but before the election, she was in the cafeteria speaking to another nurse when Barbara Mills, the nursing director, came over and asked her what she had heard about the Union. Reed responded by saying that nobody was talking. Mills was not called by the Respondent to deny Reed's testimony.

Christine Carter testified that about June 17 she had some union buttons in her pocketbook which she intended to distribute to employees in the cafeteria during a break. She testified that, as she was entering the cafeteria, one of the matrons asked for something and that when she opened her pocketbook some of the union buttons fell out. She stated that thereafter, when she gave a button to one of the employees, Mrs. Pearlman caught her eye and said, "No, no, no." According to Carter, she told Pearlman that she was not on company time, whereupon Pearlman told her that she was nevertheless on company property. Carter stated that, when she apologized to Pearlman, the latter said, "You're not creating a problem, you're a nice person," but that, if she had anything about the Union, Carter could put it up on the employee bulletin board. Pearlman did not testify in this proceeding.

I. The Discharge of Marvo Holder

Marvo Holder (Nee Ambrose) began her employment with Respondent in July 1973 and during her tenure with the Company she held the title of food service supervisor. She became involved with the Union through her sister Eudora Marshall and attended the first meeting held between union representatives and employees at Mary Robinson's home on April 17, 1981. Thereafter, she signed a union authorization card on April 20 and she directly solicited 10 or 11 other employees in her department to sign such cards during the period from April 29 to May 3.

As noted above, Holder asserts that, some time in April, Alice Pisani told her that she had heard that the employees were trying to get Local 144 in here, and that she asked Holder how she felt about the Union. Holder testified that during this conversation she told Pisani that the Union had its advantages and disadvantages, to which Pisani asked, "[W]ell, what are the advantages?" Holder asserts that during this conversation Pisani asked her if she heard the employees say anything, a question which Holder answered in the negative.

Holder testified that in June she overheard a conversation between the receptionist Jody Meharg and Mildred Pearlman, wherein Meharg said that Holder was a union ringleader. At a supervisor's meeting held on the first Tuesday of June (June 2), at which Pisani told the supervisors that they would not be eligible to vote in the forthcoming election, Holder complained about the comment made to Pearlman by Meharg and also asserted that the discharge of her brother Arnold Yearwood was unfair. As to Yearwood, Pisani told Holder that it was her understanding that he had been discharged because he left the doors open at night. As to the comment by Meharg to Pearlman, Pisani suggested that a meeting be

held with Keevins, Holder, Meharg, Pearlman, and herself. In this respect, Pisani testified that she understood Holder to be complaining about Meharg spreading false rumors to the effect that Holder was a union organizer. Shortly thereafter, a meeting was held in Keevins' office where Meharg admitted making the comment. According to all concerned, Keevins reprimanded Meharg and Pearlman for spreading idle gossip and that she also told Holder that she should not conduct herself in such a manner to give rise to such talk. In this respect, Keevins testified, "I told Mrs. Holder that she had as much responsibility—she was a supervisor in the facility—she had as much responsibility for her behavior as everyone else, and that she had to be accountable for her actions and for what she said. And that she could really not blame people for saying things if indeed she really said them." According to Pisani, she felt that the meeting served to clear the air and vindicate Holder of the rumor.

According to Holder, about June 5, she had another conversation with Pisani which started over a discussion involving a change in Holder's schedule.¹³ She states that Pisani told her, "you have a bad attitude, you and your family." Holder also states that, later during the day, Pisani told her, "Marvo, I was sent to talk to you. We are in a mess, a big mess here and you have to help us clean it up." According to Holder, when she asked what that meant, Pisani said it was with the Union and that she said, "I see you have the influence on these employees here and I see how they talk to you. The employees are going to come to you for your opinion about the Union. When the employees come to you for your opinion, what are you going to tell them?" Holder states that she told Pisani, "I am not going to tell them bad, and I am not going to tell them good." According to Holder, Pisani replied, "You have to tell them bad things about the Union." Holder states that when she asked what kinds of bad things, Pisani said, "You can't find anything bad to say about the Union? You have to tell them there is no Union that sends your children to college; tell them about the Shalom Nursing Home in Mount Vernon, how they are on strike; tell them about the Union dues they have to pay; tell them they are Mafia."¹⁴ According to Holder, at the end of the conversation, Pisani said that, if Holder could not say anything bad about the Union, then she should not make her feelings known to others and that she should not discuss any union business at the facility.

The election was held on June 18 and Holder cast one of the challenged ballots. According to Keevins, when Holder came in to vote at the election, she was "shocked" by this inasmuch as she considered Holder to be a supervisor and therefore not eligible to vote. Putting

¹³ According to Pisani, Holder, because she had a catering business which kept her busy on weekends, had a habit of asking the other supervisors to change their schedules with her. Pisani testified that this caused a certain degree of resentment to Holder by the other supervisors.

¹⁴ As part of the Company's election campaign, it sent to the employees a copy of a newspaper article dated August 30, 1973, which reported that Peter Ottley, president of Local 144, had been indicated by a Federal grand jury for embezzlement of union funds. The leaflet went on to say that although Ottley had been convicted by a jury the conviction had been reversed because of a legal technicality.

one and one together, Keevins states that when she saw Holder voting she realized that Holder was pronoun.

According to Holder, on the day following the election (Friday, June 19), Pisani approached her and told her to write up a disciplinary report on Tony Barksdale. Holder states that she refused, telling Pisani that she had not observed the incident and that she was not the supervisor on duty at the time. Holder testified that Pisani told her to write up Barksdale anyway, saying that she was not going to tolerate employees with bad attitudes. According to Holder, after this incident, Pisani ignored her and on July 10 asked her to resign. When Holder refused to resign, she was fired.

According to Pisani, Holder's attitude toward her job and to Pisani changed after Arnold Yearwood was discharged and that it was Holder who ignored her and not the other way around. As to the Barksdale incident, Pisani testified that it occurred on Friday, July 3, and not on Friday, June 19, as asserted by Holder. She states that Holder was the supervisor on duty when Barksdale came into the kitchen, slammed down a milk case, and began shouting about not getting the milk at the right time. Pisani states that she saw Holder speaking with Barksdale and that, when Barksdale left, she told Holder that she hoped that Holder would write him up. (According to Pisani, Barksdale had been a problem employee who had received disciplinary warnings from other food service supervisors.)¹⁵

According to Pisani, on the following Tuesday, July 7, she asked Holder where the Barksdale writeup was and was told by Holder that she was not supposed to write him up because he was not on her shift. (In fact, it was stipulated that Barksdale and Holder worked on the same shift in the nursing home on Friday, June 19, and Friday, July 3.) Pisani testified that she told Holder that Holder was present when the incident occurred and that it was Holder's responsibility to give Barksdale a disciplinary warning. She states that Holder said that she did not like writing people up because they could get fired. According to Pisani she replied that Holder was correct, but this was part of her job. She states that Holder stated that from now on she would write up everybody, and said that, "anybody moves something, I'm writing them up." Pisani asserts that as a result of this incident she decided to discharge Holder. In this respect, Pisani testified that she had earlier come to the opinion that, while Holder was a good employee in certain respects, she was not willing to and did not carry out her supervisory functions, especially insofar as discipline was concerned. Indeed, Pisani credibly testified that at Holder's last evaluation, in April 1981, she reminded Holder that it was part of her responsibility to exercise discipline and to issue disciplinary writeups when appropriate.¹⁶ Thus, ac-

¹⁵ For example, Holder states that Barksdale's name was mentioned at supervisory meetings where other food service supervisors expressed complaints about his attitude and work.

¹⁶ The April evaluation which was countersigned by Holder on April 4, 1981, states, *inter alia*: "As a supervisor, on occasion has not followed through on disciplinary functions, re writeups." Holder asserts that she has never issued any disciplinary warnings to employees and it is asserted that, by not having done so, this is evidence that she was not a supervisor.

ording to Pisani, when she directly witnessed an incident where Holder was present, and where Holder refused to issue a disciplinary warning to Barksdale, she decided that Holder could not remain employed by the Respondent.

In his brief, the General Counsel seems to suggest that the entire Barksdale incident never occurred. Thus, he does not simply assert that it was a pretext for discharging Holder, but he asserts that it is a total fabrication. Yet no one called Barksdale as a witness to shed light on the events and I am therefore left to choose between the versions of Holder and Pisani. The problem with Pisani's account is that whereas she says that she wrote up the incident on Wednesday, July 7 (including conversations with Holder on July 7), her report is dated July 6.¹⁷ As to this discrepancy, Pisani could only offer the explanation that she probably misdated the document. The problem with Holder's account is that according to her version, when Pisani asked her to write up Barksdale, she told Pisani not merely that she did not witness his behavior, but also that she was not the supervisor on duty at the time. However, in view of the stipulation that Holder and Barksdale were on the same shift, at the nursing home on both Friday, June 19, and Friday, July 3, Holder's assertion to Pisani cannot be true.

On July 9, Pisani wrote up a termination report. This was handed to Holder on July 10, when Holder refused to resign. Although Holder testified that she did not read the report, it stated:

To: M. Holder Food Service Supervisor
From: A Pisani RD Food Service Director
Re: Termination

This is to inform you of termination from Food Service Supervisor position effective July 10, 1981. The specific causes for termination are noted below:

You allowed personal and family problems to affect your attitude toward your position as Food Service Supervisor. For example a number of your relatives were terminated (Maria & Arnold Yearwood). Your anger concerning these and other incidents have cause you to be unresponsive to the dietary staff therefore causing flagrant malfeasance of your duties as a supervisor.

You have had constant difficulty with fellow supervisors in formulating supervisory schedules. You have unfairly expected other supervisors to accommodate you and your scheduling. You have failed to take appropriate action during an employee's insubordination. You have been counseled on your inability to deal with disciplinary matters on your yearly evaluation. This type of behavior is unacceptable and you are no longer fit to be employed in a position of authority at Sarah Neuman Nursing Home.

¹⁷ R. Exh. 34.

J. The Supervisory Status of Marvo Holder and the Other Food Service Supervisors

From a functional point of view the Respondent is divided into two facilities: (1) a 90-bed pavillion housing ambulatory patients; and (2) a 188-bed nursing home, housing patients with more serious medical conditions. The Respondent's dietary department services both facilities and food which is cooked in the nursing home's kitchen is served there and also transported to the pavillion for service. The department has approximately 45 persons consisting of a diet technician, cooks, food service workers, and food service supervisors. The director of the department is Alice Pisani and her assistant is Mrs. Alvarez. In relation to the service of food to the Respondent's residents, it is noted that, unlike a hotel or restaurant, many of the patients have dietary restrictions prescribed by doctors, and it is important that the patients not be given food which will aggravate their medical conditions.¹⁸ It is established that one of the functions of a food service supervisor is to make sure that the food served to particular patients does not contravene the diet prescriptions for those patients.¹⁹

Pisani testified that the food service supervisors are responsible, on their respective shifts, for assigning the food service workers to their particular job duties and that they may change assignments where, for example, a waitress is having difficulty with a particular patient, or vice versa. She states that they are responsible for overseeing and directing the food service workers in maintaining sanitary conditions in the dining rooms and the refrigerator, that they schedule and assign employees to work overtime when needed, that they call in off-duty employees to fill in for those who are absent, and that they are given the responsibility to purchase, on a daily basis, such foods as milk, bread, and produce.²⁰ Pisani further testified that the food service supervisors have been specifically authorized and directed by her to issue verbal and written disciplinary warnings,²¹ to send home, with loss of pay, insubordinate employees, to orient and monitor new employees, and to make recommendations regarding the hire, evaluation, and retention of employees.²² In the latter regard, she testified that su-

¹⁸ For example, diabetic patients are monitored so that their sugar intake is not excessive. Also patients with high blood pressure are given salt free diets.

¹⁹ When a food service worker, such as Rico Jones, is promoted to a food service supervisor, one of the conditions of the job is that he must take a 90-hour college level course which covers nutrition, food preparation, and management skills. This course leads to a state-approved certification.

²⁰ Holder concedes that a part of her job was to order food. She asserts, however, that this was a routine function, and that she used a previously prepared schedule for ordering food.

²¹ In corroboration, the Respondent introduced into evidence a group of written disciplinary warnings issued to employees by food service supervisors.

²² With respect to hiring, Pisani testified that, although she tries to have a food service supervisor sit in when an employee is interviewed, it is not necessary for that person to participate in the interview or in the hiring decision. Holder acknowledges that she had referred a number of people to the Company and that they have been hired. She testified, however, and the Respondent seems to agree, that it is not unusual for rank-and-file employees to recommend their relatives and friends for hiring.

persory meetings are held on a weekly basis, where the supervisors discuss, inter alia, the performance and problems of the food service workers.

Reco Jones, a witness called by the Respondent, was employed as a food service worker from November 1979 until his promotion to a food service supervisor in June 1981. He testified that as a food service worker, he was directed in his job duties by food service supervisors, that he needed their permission in order to change his daily job assignments, his work shift, or if he wanted to leave the building during his shift. Jones states that he had been called at home by the supervisors, including Holder, to come to work when others were absent, and that on other occasions he has been asked to work overtime by such supervisors. He further testified that as a food service worker he had received a written warning from a food service supervisor, and one dated July 8, 1979, was received in evidence.

In his capacity as a food service supervisor, Jones testified that, during his training period, Pisani instructed him as to the circumstances and procedure for issuing disciplinary "write ups" to employees, and that she told him that he had the authority to send someone home for the day as a disciplinary measure. He testified that in his supervisory capacity, he often makes arrangements with the other food service supervisors to juggle employees between the nursing home and the pavillion when employees are absent, stating that this frequently occurs on weekends when absenteeism is high and when Pisani and Alvarez are not present.

Both Jones and Pisani assert, and Holder concedes, that the food service supervisors attend supervisory meetings where they discuss, inter alia, the work performance, habits, and disciplinary problems of employees.²³ While Holder asserts that these meetings were held infrequently, the credible testimony of Pisani and Jones was that they were held on each Tuesday.

Holder's testimony was that she primarily worked at the pavillion (although conceding that she worked at least 1 or 2 days a week at the nursing home), that her direction of work was routine, and that she did not exercise any disciplinary functions vis-a-vis the employees. Indeed, her testimony was in essence that she merely dished out the food which was then served by the waitresses, and that she helped clean up the area when service was completed. At one point, when asked if she had the ability to recommend disciplinary measures, Holder evasively answered that she had never recommended that any person be fired. At another point, when asked if she had even been told that she was authorized to issue written warnings, she answered that she could not remember.

It is clear from the record that Holder, as opposed to the other food service supervisors, never did issue any warnings to employees. It also is evident that this failure was viewed with some concern by Pisani who credibly testified that, although Holder was a good employee in

²³ For example, Holder conceded that at various of these meetings Mr. Barksdale's work performance was discussed. She testified that a number of other supervisors expressed their displeasure with his work and attitude.

certain other respects, she would not carry out her responsibilities in this area. Thus, in her last evaluation of Holder in April 1981, Pisani wrote that Holder had not followed through on disciplinary functions.

Also noted is that although the food service supervisors are hourly paid they receive a higher hourly rate of pay than the food service workers.²⁴ Additionally, they share an office which is not accessible to the other employees.

Section 2(11) of the Act defines a supervisor as:

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

Section 2(11) of the Act is to be read disjunctively and it has been held that the possession of any one of the powers listed is sufficient to place an individual within the supervisory class. *NLRB v. Metropolitan Life Insurance Co.*, 405 F.2d 1169, 1173 (2d Cir. 1968); *Gurabo Lace Mills*, 249 NLRB 658 (1980).

In determining supervisory status, the Board is neither bound by an employee's job title nor by his her job description. In *Greenpark Care Center*, 231 NLRB 753, 755 (1977), the Board stated, "the existence of a job description will not preclude analysis of the facts as to whether the employee actually *can or does* exercise the authority therein described." (Emphasis added.) Also, where an individual chooses not to exercise authority which is within his or her discretion, it is the possession of power, rather than its exercise, which is crucial. *NLRB v. Harmon Industries*, 565 F.2d 1047, 1049 (8th Cir. 1977); *NLRB v. Metropolitan Life*, supra.

With respect to the scope of authority possessed by food service supervisors, I credit the testimony of Pisani and Jones. In this regard, they indicate that the food service supervisors, as a class, possessed the authority to independently mete out discipline by issuing verbal and written warnings and by sending employees home from work. The fact that Holder never exercised this authority does not negate its existence.

Moreover, it is my conclusion that the food service supervisors, including Holder, attended weekly supervisory meetings where they discussed and evaluated their subordinates, that they assigned and responsibly directed the work of others, that they authorized overtime, that they made daily adjustments in employee schedules, that they called in off-duty employees when needed, that they permitted employees to leave early, that they purchased food, and that they used independent judgment as to the foregoing. Given these conclusions, coupled with my earlier finding that these individuals were authorized to

²⁴ As of July 5, 1981, the starting rate for a food service supervisor was \$6.32 an hour and the starting rate for a food service worker was \$5.89 per hour.

and did issue disciplinary warnings to employees, it is my opinion that the entire group, including Holder, were supervisors within the meaning of Section 2(11) of the Act.²⁵

IV. THE UNION'S OBJECTION

To the extent not already fully discussed above, the Union alleged in its objections to the election: (1) that the Employer distributed a letter which falsely stated that Local 144 was involved in a strike at New Paltz Nursing Home; and (2) that the Employer posted a notice containing half truths about Peter Ottley, president of Local 144, to which the Union did not have an adequate time to respond.

As to item one, the record shows that, on June 11, the Respondent issued a letter to its employees which stated:

Dear Employee:

We believe the Union is making promises that they are unable to keep. Have they produced any written guarantee of the promises they are making to you? We believe they are leading you down the road to destruction. Are they promising you what they promised the employees at Shalom, Eden Park, New Paltz and Concourse Nursing Home?

Here are the facts:

Shalom Nursing Home, Mt. Vernon, New York—144 called a strike and we have been told 100 out of 140 employees were replaced. Shalom Nursing Home at this time is operating without a union.

Eden Park Nursing Home, Poughkeepsie, New York—144 called a strike. The nursing home replaced all those employees who did not come to work. The nursing home is currently operating without a union.

New Paltz Nursing Home, New Paltz, New York—eight weeks ago 144 called a strike and the nursing home replaced all employees who did not come to work. The nursing home is currently operating without a union.

Concourse Nursing Home, Bronx, New York—144 called a strike in May. The nursing home replaced all those employees who did not come to work. The nursing home is currently operating without a union.

In this the kind of financial security the union is promising you?

We understand that the union is telling you that if they were to call a strike at Sarah Neuman, the facility would not be able to operate. As in the four cases mentioned above, we guarantee this nursing home would continue to operate.

Don't be misled by false information. The information given above is correct. Check for yourselves.

Vote NO on June 18th.

Thereafter, on June 17, the Respondent retracted that portion of its June 11 letter relating to the New Paltz Nursing Home. The June 17 letter stated:

We wish to apologize regarding certain information sent to you in a letter dated June 11, 1981. The statement in that letter that 144 called a strike at New Paltz Nursing Home was based on information which we have now learned was erroneous.

Local 200 SEIU, AFL-CIO not Local 144 SEIU, AFL-CIO is the union at New Paltz Nursing Home. BOTH LOCALS BELONG TO SEIU (Service Employees International Union).

YOU WILL NOTE HOWEVER THAT THE UNION HAS NOT DENIED ANY OF OUR STATEMENTS OF FACT REGARDING THE OTHER NURSING HOMES.

Prior to the election, the Company posted a notice which contained a copy of a newspaper article, dated August 30, 1979, which described the indictment of Peter Ottley, president of the Union. The heading on the notice read, "Is this the type of Individual you want to represent you." It also contained the following statement:

Mr. Ottley, President of 144 was indicted and convicted by a jury. The conviction was reversed on a technicality. The following is an actual excerpt from the court's decision on Mr. Ottley's case:

Because the jury's consideration of criminal intent was unduly circumscribed, we must reverse Ottley's conviction on the two automobile counts. *We do not, however, find the evidence insufficient to support a guilty verdict from a properly instructed jury.*

V. ANALYSIS

A. The Promises of Wage Increases and a Pension Plan. Also, the Establishment of a Formal Grievance Procedure

The complaint alleges that about June 11, 1981, the Respondent at a meeting with its employees promised wage increases effective on July 1, 1981, and January 1, 1982, and that it also promised them a pension plan. In its Objection 2, the Union alleges that about June 7, 1981, the Employer promised its employees that it would institute a pension and profit-sharing plan, and a grievance system.

With respect to the promised wage increase, the evidence establishes that this was announced in May 1981 and not in June as alleged in the complaint. The evidence further establishes that this promise was made in response to employees who complained, in late April, that the Company was not paying competitive wages. When the Company received such complaints, it promised to and did conduct a new wage survey in late April. It also was shown that the promise to conduct the new wage survey was made before the Company's representa-

²⁵ See for example *ITT Corp.*, 249 NLRB 441, 442 (1980); *Jewish Hospital of Cincinnati*, 223 NLRB 614, 622-623 (1976); *Mental Health Center of Boulder County*, 222 NLRB 901, 904 (1976); *Wing Memorial Hospital Assn.*, 217 NLRB 1015 (1975); *North Dade Hospital*, 210 NLRB 588, 592 (1974); *Berton Kirshner, Inc.*, 209 NLRB 1081 (1974).

tives had any knowledge of the Union's organizing campaign which did not actually commence until April 17, 1981. Although it appears that the decision to grant wage increases and their announcement occurred *before* Local 144 filed its representation petitions, it also appears that the decision was made *after* the Respondent had become aware that the Union was attempting to organize its employees. The record indicates that, although the Respondent had a general policy of paying wages which were competitive with other similar institutions within its geographic area, its last survey made in October 1980 resulted in wage increases given in January 1981, which were intended and budgeted as the only wage increases to be granted during 1981. Also, at the meetings in April, where Leffler promised to make a new survey, the evidence indicates that he did not promise a concomitant wage increase in the event that the survey showed that one was warranted. In this latter respect, Leffler testified that, in the past, wage increases did not automatically follow a wage survey.

In *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964), the Supreme Court held that the granting of benefits during the pendency of a representation petition is *prima facie* evidence of unlawful interference. The Court pointed out that:

[T]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

Accordingly, absent affirmative proof of some legitimate business reason for the timing of a bestowal of a benefit, ordinarily through evidence that it either conforms to a past practice or had been planned prior to the employees' union activity, the granting of such a benefit would violate Section 8(a)(1) of the Act. *Starbright Furniture Corp.*, 226 NLRB 507, 510 (1976); *Gould, Inc.*, 221 NLRB 899, 906 (1975); *Pace Oldsmobile*, 256 NLRB 1001 (1981).²⁶

While there is little doubt that a presumption of illegality will attach to an unexplained wage increase granted after a representation petition had been filed, a more difficult question is presented when the announcement of such an increase comes about before a petition is filed,

²⁶ *Pace Oldsmobile* was affirmed in part, but remanded in other respects by the Second Circuit Court of Appeals. 681 F.2d 99 (2d Cir. 1982). In *Wintex Knitting Mills*, 216 NLRB 1058 (1975) the Board stated:

It is well established that the announcement of a wage increase during the pendency of a representation petition for the purpose of stifling an organizational campaign constitutes unlawful interference and coercion.

An employer's legal duty in deciding whether to grant benefits while a representation petition is pending is to determine that question precisely as if a union were not in the picture. An employer's granting a wage increase during a union campaign "raises a strong presumption" of illegality. In the absence of evidence demonstrating that the timing of the announcement of changes in benefits was governed by factors other than the pendency of the election, the Board will regard interference with employee freedom of choice as the motivating factor. The burden of establishing a justifiable motive remains with the Employer.

but after a company becomes aware of the union activity. Nevertheless, in a recent case, *Leisure Time Tours*, 258 NLRB 986, 994 (1981), the Board adopted the decision of an administrative law judge who stated:

Respondent, on the other hand, contends that General Counsel has not established a *prima facie* case of unlawful motivation, and notes no evidence was presented that Respondent was aware of the filing of the petition when it granted the increase.

I agree with Respondent that the grievance does not establish that [the Employer] was aware of the filing of the petition when it announced its wage increase, and I do not infer that Respondent was so aware. However, contrary to Respondent's position, the inquiry does not end there.

There is a presumption of the illegality of a wage increase granted by an employer where it occurs after the employer acquires knowledge of the union campaign, even when a petition has not yet been filed. In circumstances where, as here, the timing of the wage increase coincides with the origination of union activity, absent an affirmative showing of some legitimate business reason for the timing, it is not unreasonable to draw the inference of improper motivation.

I have previously concluded that the Respondent decided to grant wage increases effective on July 1, 1981, and January 1, 1982, after it had become aware of Local 144's organizing campaign. As I have also concluded that prior to that decision the Company had not intended to grant any other wage increases during 1981 (having granted a previous increase in January 1981, pursuant to the October 1980 wage survey), it is my opinion that the wage increase promise at issue was neither in conformity with a pattern of past increases nor was it planned prior to the Company's awareness of the Union's organizing campaign. While it might be argued that Leffler implicitly promised a wage increase when he promised, in late April, to conduct a new wage survey, the fact is that he made no such promise and his testimony indicates that the preparation of wage surveys do not automatically translate into wage increases. It therefore is concluded that by announcing, in May 1981, that the employees would be receiving a wage increase in July 1981, the Respondent violated Section 8(a)(1) of the Act. Also, as the wage increase was actually granted on July 1, 1981, during the pendency of the objections, it is concluded that the granting of such wages increase similarly violated Section 8(a)(1) of the Act. *Raley's, Inc.*, 236 NLRB 971 (1978), *enfd.* 587 F.2d 984 (9th Cir. 1979); *Tipton Electric Co.*, 242 NLRB 202 (1979).²⁷ However, as the announcement occurred prior to the filing of the representation petitions, it may not be used to invalidate the elections. *Ideal Electric Co.*, 134 NLRB 1275 (1961).

The allegation regarding the pension plan announcement is, however, a different matter. As noted above, the

²⁷ However, I do not conclude that the granting of a wage increase in January 1982 was violative of the Act, as the evidence shows that other wage increases have generally been granted during that month.

Company, after having established its profit-sharing plan in 1979, intended to establish a pension benefit. To that end, the Respondent retained a consulting firm, Benefit Systems, and authorized that company, in September 1980, to go ahead with the design and promulgation of a pension plan. Although the complaint and the Union's Objection 2 allege that the Company announced in June 1981, that a pension plan would be granted, the evidence from both the Respondent's witnesses and the General Counsel's witnesses establishes that the employees were notified of the pension plan well before any union activity. Thus, when the Company, during the election campaign, reminded the employees that a pension plan was going to be granted, this was not a promise of a new benefit, but rather a reiteration of a promise already made before Local 144 entered on the scene. Therefore, as it was shown that the decision to grant a pension plan was made in September 1980 and that it was announced before any union activities, it is concluded that when the Employer reminded the employees of this previously made promise it did not violate the Act. Similarly, I cannot find that the Company violated the Act, or interfered with the election in relation to the establishment of the profit-sharing plan or the creation of the grievance committee, as both of these were established before it had any knowledge of union activity.

B. The Alleged Threats by the Respondent about June 11, 1981

The parties agree that at a series of meetings held on June 11, 1981, Keevins told at least 40 employees (in both the service and maintenance and LRN units) that she had heard complaints from patients' families and employees about harrassment, and that if she caught any employees harrassing patients, or patients' families, or other employees about the Union, such employees would be terminated immediately. When asked by me to explain what she meant by harrassment, Keevins stated that this would encompass such things as humming or singing songs in the corridors such as, "We shall overcome," and telling other employees to make sure they voted for the Union.

In *Bil-Mar Foods of Ohio*, 255 NLRB 1254 (1981), the employer, in a letter to its employees, made the following statement:

If you are harrassed, coerced, pressured or threatened in any way by union agents or pushers, either at work or at home, please let me, your supervisor, or Gladys know immediately. You do not have to tolerate it and we will see that it is stopped.

In that case, the Board held that the foregoing statement was grounds for setting aside an election and that it constituted interference under Section 8(a)(1) of the Act. The Board concluded that the statement "had the potential dual effect of encouraging employees to report to Respondent the identity of union card solicitors who in any way approach employees in a manner subjectively offensive to the solicited employees, and of correspondingly discouraging card solicitors in their protected organizational activities."

Based on the rationale of *Bil-Mar Foods*, supra, it seems to me that Keevins' statement would similarly violate the Act. In this case, Keevins told employees, inter alia, that, if they went around "harrassing" other employees about the Union, they would be subject to discharge. At the meetings where she made this statement (attended by about 40 employees), she did not define what she meant by harrassment and did not specify in what areas or at what times employees could or could not solicit other employees about the Union. Therefore, whereas employees were told that harrassment of other employees regarding the Union would be a dischargeable offense, the type of prohibited harrassment was left so open-ended that the employees could reasonably have interpreted her statement as meaning that they were prohibited from engaging in *any* type of protected activity at any time or at any location. Indeed, pursuant to the definition of harrassment offered by Keevins at the trial, it seems clear that her own definition would encompass protected union activity. It therefore is concluded that this statement by Keevins on June 11 constituted a violation of Section 8(a)(1) of the Act. For the same reason it also is recommended that the Union's Objection 4 be sustained.

As to the assertions by Bernard Romulus regarding the meeting he attended about the same time, I do not believe that the evidence is sufficient to warrant the conclusion that the Respondent violated the Act. In this respect, Romulus testified, without corroboration, that at a meeting held with his department about June 13 or 14 Leffler threatened to terminate all current benefits if the Union won the election, and that he told the employees that the \$15,000 life insurance coverage would be reduced to \$10,000 if the Union was voted in. In short, I do not credit Romulus' account of this meeting, not only because the General Counsel did not produce a single corroboratory witness, but also based on Romulus' demeanor.²⁸

C. Other Alleged 8(a)(1) Conduct²⁹

The General Counsel proposes that the Respondent violated the Act when, at a meeting with employees, Dr. Neuman stated, inter alia, that he would not allow the Union to come in and run the Company and that he would "crawl" to win the election. He further argues that during the same meeting Dr. Neuman created the impression of surveillance when, after receiving silence to his inquiry as to whether they had anything to say, he told the employees that they said, "yeah, yeah, yeah" when the union's representatives spoke to them at a union meeting.

As to the first statment, the General Counsel, relying on *Airport Express*, 239 NLRB 543, 548 (1978), and *D & H Mfg. Co.*, 239 NLRB 393, 404 (1978), asserts that the Respondent "clearly imparted to the employees . . . that it would be futile for them to vote for the Union." I dis-

²⁸ It is noted that both Leffler and Dr. Neuman did tell employees that the selection of the Union might effect their profit-sharing plan. This will be discussed in a later section of this decision.

²⁹ The 8(a)(1) allegations concerning Marvo Holder and Arnold Yearwood will be discussed in the section dealing with their discharges.

agree, as it is my opinion that the cases cited by the General Counsel are distinguishable and do not support his theory of violation. In both cases, it was found that the employers made statements, not present here, to the effect that they would not negotiate or sign contracts with the respective unions. Thus, in *Airport Express*, the employer told employees that "I will not negotiate a contract, I will not sign a contract. We do not need a union here at Airport Express. And I don't want anybody to tell me how to run my business." In *D & H Mfg. Co.* it was concluded that the employer told his employees that "he would not sign a union contract; that he would fight [the] Union 'no matter how much it costs; that his legal counsel had told him [the] Union could be "stalled" prospectively throughout 12 months of negotiations; and that he [Willis] would not have a union within his shop."

As to the allegation that the Respondent created the impression of surveillance, the Board in *South Shore Hospital*, 229 NLRB 363 (1977), stated that, "in determining whether a respondent created an impression of surveillance, the test applied by the Board is whether employees would reasonably assume from the statement in question that their union activities had been placed under surveillance."³⁰ In the instant case, Dr. Neuman's statement could reasonably be interpreted not merely as indicating his general awareness of the employees' union activities, but more specifically that he was aware of when union meetings were held, who attended, and what was said at those meetings. Therefore, although his comment may superficially appear to be relatively innocuous, it nevertheless is concluded that his statement could reasonably be construed as indicating that the employees' union activities had been placed under surveillance.³¹

Although not referred to in the General Counsel's brief, the evidence in this case reveals that at the June 16 meetings, and at earlier meetings, both Leffler and Dr. Neuman indicated to employees that the selection of a union might impact on the existing profit-sharing plan. In this regard, the evidence as a whole suggests that they summarized to the employees the eligibility requirements set forth in the trust indenture which states:

The term employees shall not include any person who is covered under a collective bargaining agreement if there is evidence that retirement benefits were the subject of good faith bargaining between the representative of such person and the employer, unless the collective bargaining agreement provides for the inclusion of such person under the plan.³²

³⁰ In *South Shore Hospital* the Board rejected the administrative law judge's conclusion that the respondent had unlawfully created the impression of surveillance based on a statement to the effect that there was talk of having a union all over the hospital. The Board noted that the statement indicated, at most, that the Respondent was aware of the interest in unionization by some of the employees.

³¹ *University of the Pacific*, 206 NLRB 606 (1973); *Federal Pacific Electric Co.*, 195 NLRB 609, 612 (1972).

³² This may be the genesis of Romulus' testimony to the effect that the Respondent told employees that their current benefits would be lost if the Union was voted in.

In *Melville Confections v. NLRB*, 327 F.2d 689 (7th Cir. 1964), the court enforced a Board order holding that the maintenance of a profit-sharing plan which conditioned participation on nonunion representation violated the Act. The plan in *Melville* defined an eligible employee as "a regular full-time employee of the Company not represented by a union designated as the bargaining agent." The Board and the court concluded that the provision was a per se violation of the Act since it served to automatically exclude from participation any group of employees who chose union representation. Similarly, in *Channel Master Corp.*, 148 NLRB 1343 (1964), the Board held that an employer violated Section 8(a)(1) and (3) of the Act by maintaining a profit-sharing plan, which explicitly excluded from its coverage any employee "whose compensation, hours of work, or conditions of employment are determined by collective bargaining with a recognized bargaining agent." Also, in *Dura Corp.*, 156 NLRB 285 (1966), enfd. 380 F.2d 970 (6th Cir. 1967), the Board found an 8(a)(1) and (3) violation where a profit-sharing plan was restricted to "any salaried employee who is not a member of a collective bargaining unit recognized by [the] Employer." The Board required the employer to cease enforcing the exclusionary provision of the plan, but the Order stated that it should not "be construed as precluding the right of either party to require bargaining at an appropriate time concerning the termination, modification, or amendment of the profit sharing plan . . . or the substitution of another therefor."

The vice of such plans appears to be that such exclusionary clauses, by their terms, automatically eliminate current benefits on the selection of a union representative, and do not contemplate or allow for their continuation pending negotiations. *Tappan Co.*, 228 NLRB 1389 (1977); *Rangair Corp.*, 157 NLRB 682 (1966). Thus, in *Motor Wheel Corp.*, 180 NLRB 354 (1969), the Board, while finding that the eligibility requirements of certain plans violated the Act,³³ also stated that "we further assume, arguendo, that if the Employer's pension plan has specifically provided for such conditional continuation following selection of a bargaining agent, no violation would have occurred."³⁴

It is my opinion that in the instant case the profit-sharing plan is not violative of the Act. In this respect, the language of the trust indenture, although not elegantly worded, indicates that the selection of a union would not automatically terminate the employees' profit-sharing benefits. It also seems apparent that the plan contemplates the continued existence of such benefits during the

³³ The plans in *Motor Wheel Corp.*, supra, conditioned participation on the fact that the employee was "not represented by a collective bargaining representative."

³⁴ However, where a plan precludes continued participation by represented employees, except where the union agrees to waive its right to bargain over the plan, this too would violate the Act. *Bendix-Westinghouse Automotive Co.*, 185 NLRB 375, 377 (1970). In *Bendix*, the trial examiner stated:

While represented employees are not "automatically" disqualified in the sense that they are forever foreclosed from participation, it is nonetheless true that they—unlike unrepresented employees—can remain or become eligible only by paying the price of giving up the statutory right to bargain about the subject matter of the plan.

pendency of collective bargaining, while allowing the parties, pursuant to negotiations, to substitute different retirement benefits or to continue the existing profit-sharing plan.

The General Counsel further alleges that the Respondent by Barbara Mills unlawfully interrogated Rosetta Reed on one occasion between June 11 and 18 and that the Respondent by Pearlman prevented Christine Carter from passing out union buttons in the cafeteria on non-working time. In both instances the testimony of the General Counsel's witnesses stood unrefuted, and it is my conclusion that each incident constitutes a separate violation of Section 8(a)(1) of the Act.³⁵

I do not, however, agree with the General Counsel's assertion of illegal conduct as to the alleged interrogations and threats by Joan Laquidera to Bernard Romulus et al. I have indicated above my belief that Romulus was not a reliable witness, whose testimony on these points was largely uncorroborated. Accordingly, it is recommended that these allegations be dismissed.

D. The Discharges of Marvo Holder and Arnold Yearwood

Having found that Marvo Holder was a supervisor within the meaning of Section 2(11) of the Act, it therefore follows that the alleged interrogation of her by Pisani in April 1981 did not violate the Act. Nor can I conclude that the other statements made to her by Pisani in June would be violative of the Act. As a supervisor, it clearly would be within the proper realm of management to ask Holder to convince other employees to vote against the Union, provided, however, that such requests did not encompass instructions to engage in illegal conduct. Thus, it is my conclusion that when Pisani allegedly asked Holder to say bad things about the Union,³⁶ or to refrain from discussing the Union at all, this request would hardly rise to the level of asking Holder to violate the provisions of the Act.

Because of my conclusion that Holder was a supervisor, and because it is not found that her discharge was motivated by her refusal to commit any unfair labor practices, it is my ultimate conclusion that Holder's discharge on July 10, 1981, did not violate the Act. In *Parker Robb Chevrolet*, 262 NLRB 402 (1982), the Board overruled *Brothers Three Cabinets*, 268 NLRB 828 (1980), where it had previously held that the discharge of a supervisor would violate the Act if it was found that the respondent had acted "as part of its overall plan to discourage its employees' support for the Union." Thus, in *Parker Robb Chevrolet*, supra, the Board stated:

In the final analysis, the instant case, and indeed all supervisory discharge cases, may be resolved by

³⁵ In *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), and *NLRB v. Baylor University Medical Center*, 439 NLRB 299 (1978), the Supreme Court held that prohibitions of distributions and solicitations in nonpatient care areas, such as lounges and cafeterias, would be unlawful, unless there is a showing that disruption of patient care would necessarily result therefrom.

³⁶ As noted above, Holder alleges that Pisani told her to tell employees that no union sends employees' children to college, that the employees at another nursing home were on strike, that employees paid dues to unions, and that "they are Mafia."

this analysis: The discharge of supervisors is unlawful when it interferes with the rights of employees to exercise their rights under Section 7 of the Act, as when they give testimony adverse to their employer's interest of when they refuse to commit unfair labor practices. The discharge of supervisors as a result of their participation in union or concerted activity either by themselves or when allied with rank-and-file employees—is *not* unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act.

With respect to Arnold Yearwood, it is initially noted that apart from signing a union authorization card (and being related to Marvo Holder and Eudora Marshall) the evidence does not disclose that he was an active supporter of the Union. Indeed because of his security duties and the fact that he was only present at the facility from 4 p.m. to midnight, his contact with other employees was minimal. There is also no credible evidence that the Respondent was aware of his activities for Local 144. In this respect I do not credit Yearwood's testimony to the effect that Parlatore told him on some unspecified date after May 21 that he had been told of Yearwood's union support, and that he would discharge and take other reprisals against Yearwood if Parlatore confirmed that fact.

On the other hand, the evidence establishes to my satisfaction that, despite Yearwood's responsibility to secure the doors at night, he nevertheless left the receiving door open on the night of May 21, 1981. I also credit the testimony of Ben Martin to the effect that when confronted about the open door Yearwood verbally abused Martin in front of the night supervisor. Therefore, in view of the above, it is my opinion that Yearwood's discharge was not motivated because of his support for the Union.

VI. THE OBJECTIONS

It is my conclusion, noted above, that, after the petitions were filed and before the election, the Respondent by Marianne Keevins, at meetings with employees in both units, on June 11, 1981, threatened them with discharge if they engaged in the protected activity of soliciting other employees to join or vote for Local 144. Having found that this conduct violated Section 8(a)(1) of the Act, it also is my opinion that Objection 4 should be sustained. As it is my conclusion that this conduct, by itself, is sufficient to upset the laboratory conditions for Board-conducted elections, it is recommended that both elections be set aside. *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962).

VII. THE REQUEST FOR A BARGAINING ORDER

The General Counsel contends that a bargaining order should be granted in the service and maintenance unit, even though a majority of the employees in that unit did not vote for Local 144.

The Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), distinguished between three categories of cases insofar as the propriety of granting bargaining orders. The first category involves the "exceptional" cases where "outrageous" and "pervasive" unfair labor

practices are committed. The second category concerns "less pervasive practices" that have a tendency to undermine majority strength and impede the election process. In this category of cases, the Court concluded that a bargaining order would be appropriate to remedy an employer's unlawful conduct making a fair election unlikely where at some point, the Union had majority support amongst the employees. The third category of cases concerns those in which minor or less intensive unfair labor practices have been committed, having a "minimal impact" on an election. In this last category, the Court held that a bargaining order is inappropriate to remedy the violations committed even if the union enjoyed majority support.

In cases where an election has been held, a necessary precondition to the granting of a bargaining order is that the election be set aside because of conduct interfering with the conduct of the election. *Irving Air Chute Co.*, 149 NLRB 627 (1964), *Great Atlantic & Pacific Tea Co.*, 230 NLRB 766 (1977). In the instant case, this precondition has been met because I have sustained Objection 4.

Also, except in category I cases,³⁷ a second precondition to the granting of a bargaining order is that, at some appropriate time, a majority of the unit employees must have demonstrated their support for the Union. This normally is shown through evidence that a majority of such employees have executed union authorization cards. Thus, while the Court in *NLRB v. Gissel Packing Co.* noted that sentiment for a union as expressed by signed authorization cards is not the most reliable test of a union's majority support, the Court also noted that where a union's loss at the polls may be attributable to serious employer misconduct, the election results will be an even less reliable means of determining whether the employees desire union representation.³⁸

The present case is clearly not one which would fall into the category I type of "exceptional" cases described by the Court in *NLRB v. Gissel Packing Co.*, *supra*. In fact, even with the violations found, it would be somewhat questionable as to whether this would be a category II type of case.³⁹

In the present case it is my conclusion that, even if this were considered to be a category II case, the request for a bargaining order must be denied. In this respect, it is my opinion that it has not been established that the Union had obtained voluntarily signed authorization

cards from a majority of the employees in the appropriate bargaining unit.

The parties herein stipulated that the names appearing on the *Norris Thermador* eligibility list should be considered as those persons who were part of the service and maintenance bargaining unit. Excluding the 5 food service supervisors, who are found to be statutory supervisors, there would therefore be 179 individuals within this unit. Accordingly, the Union would need 90 valid and authenticated authorization cards in order to establish its majority status.

Exclusive of the card signed by Arnold Yearwood,⁴⁰ the General Counsel offered 104 cards into evidence. Of these it is my opinion that 88 cards have been identified with sufficient certainty so as to be counted toward the Union's claimed majority status.⁴¹

Initially, it is noted that because I have concluded that the food service supervisors are supervisors within the meaning of the Act, they therefore would not be included in the bargaining unit. As such, I shall not count the authorization cards signed by Marvo Holder and Weston Graham.

The General Counsel initially offered the authorization card of Evester Smith through a comparison with an authenticated exemplar. However, as the signature on the card did not match the exemplar, it was rejected by me at that time. Thereafter, Sibel Davidson testified that she gave a card to Smith who signed it in her presence. Nevertheless, as it is clear to me that Smith's signature on the card is so completely different from that on the authenticated exemplar, I cannot credit Davidson's testimony in this respect, and I shall not count this card. (Evester Smith did not testify.)

A card purportedly signed by Angela Deka was initially offered and rejected through a comparison of the card with an authenticated exemplar. It subsequently was reoffered through the testimony of Bernard Romulus who testified that he saw Deka sign the card. However, because the handwriting on the card is significantly different from the exemplar and because Deka's name is spelled differently on each, it is my opinion that the evidence is insufficient to establish this card's authenticity. This conclusion is further buttressed because of my general doubts as to Romulus' reliability as a witness and because Deka was not called to testify. I therefore shall not count this card.

The General Counsel also proffered a card allegedly signed by Mattie Halley. When initially offered through a comparison with an exemplar, it was my opinion that the difference in handwriting was a sufficient reason to reject the card under Rule 901.⁴² Later, Romulus testi-

³⁷ Recently, the Board in *Conair Corp.*, 261 NLRB 1189 (1982), held that it would issue a bargaining order, notwithstanding the union's minority status, in exceptional circumstances where "neither our traditional not even out extraordinary access and notice remedies can effectively dissipate the lingering effects of Respondent's massive and unrelenting coercive conduct."

³⁸ There is, of course, no practical procedure available for the trier of fact to truly ascertain the desires of the employees or to scientifically determine whether, and to what extent, an employer's unlawful conduct adversely influenced voting behavior. In the context of litigation I cannot, for example, conduct a confidential survey of all the voters in order to ask them whether they were influenced by the Employer's unlawful conduct as opposed to those aspects of its campaign which were legal, and whether their desire for union representation was more accurately reflected by their vote in the election or by the signing of union cards.

³⁹ See for example the opinion of the Second Circuit Court of Appeals in *NLRB v. Pace Oldsmobile*, *supra*, 681 F.2d 99, and *J. J. Newbury Co. v. NLRB*, 645 F.2d 148, 153 (2d Cir. 1981.)

⁴⁰ It was agreed that Arnold Yearwood, whose name did not appear on the voter eligibility list, should not be in the unit because of his security functions.

⁴¹ These would be the cards of individuals where the cards were either identified by the card signer, by a card solicitor, or through a comparison by me of the proffered card with an authenticated exemplar pursuant to Rule 901 of the Federal Rules of Evidence. In some cases, cards were authenticated by a number of the above means.

⁴² Unlike the cards of Evester Smith and Angela Deka, the card of Mattie Halley does not suffer from the same degree of dissimilarity to the exemplar.

fied that he gave a blank card to Angela Deka so that she could solicit a signature from Mattie Halley. He then testified that a card with Halley's signature was returned to him by Deka. Based on this testimony, the General Counsel did not reoffer Halley's card, and he did not attempt to prove the card's authenticity either through Halley or any other witness. As there was no competent evidence to establish the authenticity of this card, I shall not count it.

I also shall not count a card purportedly signed by Susan Marsella. This card was offered only through a comparison with an authenticated exemplar and it was my opinion that the handwriting was sufficiently dissimilar so as to cast doubt as to its authenticity. As the General Counsel did not seek to authenticate the card either through the testimony of Marsella or any other competent witness, I shall not count this card.

According to Marvo Holder, during the period from April 29 to May 3 she directly solicited cards from the following employees in her department: Anthony Barksdale, Viola Intervallo, Kathy Nelson, Shaila Philip, Rudolph Lyew, Clementine Reece, Leola Kent, Dean Bailey, Robert Melley, and Weston Graham.⁴³ Also, Rico Jones credibly testified that he signed a card at Marvo Holder's house which was solicited by her.

Historically, the Board has refused to count cards for the purpose of determining majority status in refusal-to-bargain cases, where those cards have been directly solicited by supervisors. Thus, in *A.T.I. Warehouse, Inc.*, 169 NLRB 580 (1968), the Board stated:

Like the Trial Examiner, we find that Gauthier was a supervisor and that hence the cards solicited by him could not be counted toward the Union's majority when it requested recognition on November 16. It is well settled that cards obtained with the direct and open assistance of a supervisor are invalid for such purpose.⁴⁴

By contrast, where supervisors do not directly solicit authorization cards, such cards have been counted in circumstances where, for example, a supervisor has merely expressed his general support for union membership or has attended union meetings where employees signed such cards. For example, in *Scotts IGA Foodliner*, 223 NLRB 394, 410 (1976), the administrative law judge stated:

While the Board's rule appears to be one invalidating cards directly solicited by supervisors, it will not, in the usual case disqualify other cards not so solicited, despite considerable support and encour-

agement given to a union by supervisors and made known to employees.

Also, in *Brown & Connolly, Inc.*, 237 NLRB 271, 273 (1978), the administrative law judge, in an opinion adopted by the Board, held that a supervisor's presence at a meeting was not sufficient to invalidate cards signed at that meeting, even though he spoke in favor of the Union. The administrative law judge noted, however, that the supervisor in question did not solicit any of the signatures.⁴⁴ Similarly, in *Pantex Towing Corp.*, 258 NLRB 837, 845-846 (1981), the administrative law judge stated:

Finally, I conclude there is no merit to Respondent's argument of tainted cards. Although Denton was present during the time employees signed cards . . . there is no allegation or proof that he either solicited employees to sign union authorization cards, or that the employees were coercively induced to designate the Union as bargaining representative through fear of supervisory retaliation and it is equally clear that his mere presence during the card signing even together with his card signing is no basis to conclude that the employees lost their right to designate the Union as their representative.

The General Counsel and the Charging Party argue that, even if Holder is found to be a supervisor, the cards she solicited should nevertheless be counted. They cite for this proposition *Industry Products Co.*, 251 NLRB 1380 (1980); *Kut Rate Kid & Shop Kwik*, 245 NLRB 106 (1979); and *El Rancho Market*, 235 NLRB 468, 473 (1978).

In *El Rancho Market*, supra, the Board rejected the contention that the store manager's participation in the union's campaign tainted "most" of the authorization cards. It stated that "at a minimum it must be affirmatively established either that the supervisor's activity was such as to have implied to employees that their employer favored the Union or that there is cause for believing that employees were coercively induced to sign authorization cards because of fear of supervisory retaliation." The Board then went on to conclude that there were 17 employees in the unit and that 14 employees had signed authorization cards, of which the 3 solicited by the supervisor would not be counted.

In *Sourdough Sales Inc.*, supra, the Board, without counting the cards solicited by a low-level supervisor, concluded that the union had achieved majority status despite the supervisor's expressed "general approval" of the union to employees. The Board also noted that the employer's general manager had made known his "distaste for unions in advance of the advent of union activity here."

In *Industry Products Co.*, supra, the cards solicited by a Ms. Taylor were counted toward the union's majority status despite the company's assertion that she was a supervisor. However, the Board adopted the administrative

⁴³ As noted above the card signed by Weston Graham is not being counted because of his supervisory status.

⁴⁴ See also *NLRB v. WKR-TV Inc.*, 470 F.2d 1302, 1312, 1315 (5th Cir. 1973); *NLRB v. American Cable Systems*, 414 F.2d 661, 664 (5th Cir. 1969); *NLRB v. Hawthorne Aviation*, 405 F.2d 428, 430 (10th Cir. 1969); *NLRB v. Hecks Inc.*, 385 F.2d 317, 322 (4th Cir. 1967).

It also is noted that the Board has held that a company violates Sec. 8(a)(2) of the Act when it voluntarily recognizes and bargains with a union whose majority status is dependent on cards solicited by supervisors. *Tribulani's Detective Agency*, 233 NLRB 1121 (1977); *Yonkers Hamilton Sanitarium Inc.*, 214 NLRB 668, 677 (1974).

⁴⁴ See also *Independent Sprinkler & Fire Protection Co.*, 220 NLRB 941, 963 (1975); *D. V. Copying Inc.*, 240 NLRB 1275, 1287 (1979); *F. C. F. Papers Inc.*, 211 NLRB 657, 668 (1974).

law judge's conclusion that Taylor was not, in fact, a supervisor. Therefore, the language at footnote 2 of the Board's decision must be viewed as dicta as it is not necessary to the result of the case.⁴⁶

There is, therefore, a long line of Board and court precedent indicating that when a supervisor directly solicits union cards, those cards may not be counted toward the Union's majority status in cases where a bargaining order is being sought. It is not my belief that the Board, in *Industry Products Co.*, intended to overrule this line of precedent and it therefore is concluded that the 10 cards directly solicited by Marvo Holder may not be counted.

Having concluded that the cards of Marvo Holder, Weston Graham, Evester Smith, Angela Deka, Mattie Halley, Susan Marsella, plus the cards directly solicited by Marvo Holder cannot be counted, the Union had obtained 88 cards, 2 short of majority status. It also is concluded that the Respondent's contemporaneous unfair labor practices were not so egregious as to warrant a bargaining order in the absence of a showing of majority support for the Union.

CONCLUSIONS OF LAW

1. Respondent Carl H. Neuman d/b/a Sarah Neuman Nursing Home is, and has been at all times material herein, a employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health related facility within the meaning of Section 2(14) of the Act.

2. Local 144, Hotel, Hospital, Nursing Home and Allied Health Services Union, Service Employees International Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By promising and granting wage increases in order to induce employees to withhold their support for the Union, the Respondent has violated Section 8(a)(1) of the Act.

4. By threatening the discharge of employees who urge other employees to vote for or support the Union, the Respondent has violated Section 8(a)(1) of the Act.

5. By interrogating employees about their union activities and sympathies, the Respondent has violated Section 8(a)(1) of the Act.

6. By preventing employees from distributing union buttons in the employee cafeteria during their nonworking time, the Respondent has violated Section 8(a)(1) of the Act.

7. By giving the impression that its employees' union activities were kept under surveillance, Respondent has violated Section 8(a)(1) of the Act.

⁴⁶ At fn. 2 of *Industry Products Co.*, supra, the Board stated:

[E]ven if we were to find that Taylor had been a supervisor at the time of her discharge, we find no merit to Respondent's contention that authorization cards solicited by Taylor were tainted and void and could [not] be utilized in establishing majority support for the Union. The record contains no affirmative evidence indicating that any employee signed a union card because Taylor's involvement in organizational activities misled any employee into believing that Respondent favored the Union or coercively induced any employee to sign a union card through a fear of supervisory retaliation from Taylor. *Sourdough Sales, Inc. d/b/a Kut Rate Kid and Shop Kwik*, 246 NLRB 106 (1979), and cases cited therein.

8. In Cases 2-RC-19052 and 2-RC-19053 the Respondent engaged in objectionable conduct as alleged in Objection 4 and accordingly the elections should be set aside.

9. Except to the extent heretofore found, the other allegations of the complaint are dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommendation⁴⁷

ORDER

The Respondent, Carl H. Neuman d/b/a Sarah R. Neuman Nursing Home, Manaroneck, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union support or sympathies.

(b) Preventing employees from distributing union buttons or other union materials in the employee cafeteria or other nonpatient care areas during their nonworking time.

(c) Threatening employees with discharge because of their union activities or other protected concerted activities.

(d) Promising or granting wage increases for the purpose of inducing employees to withhold their support for the Union.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights to self-organization, to form, join, and assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities.

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

(a) Post at its place of business in New Rochelle, New York, copies of the attached notice marked "Appendix."⁴⁸ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 2 in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

⁴⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴⁸ If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

IT IS FURTHER ORDERED that the petitions in Cases 2-RC-19052 and 2-RC-19053 be remanded to the Regional Director for Region 2, so that the elections may be set aside and rerun elections be held.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The Act gives employees the following rights.

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

WE WILL NOT interrogate our employees concerning their activities or support for Local 144, Hotel, Hospital, Nursing Home and Allied Health Services Union, Service Employees International Union, AFL-CIO or any other labor organization.

WE WILL NOT prevent our employees from distributing union buttons or other union materials in the employee cafeteria or in other nonpatient areas during their non-working time.

WE WILL NOT give the impression that we are surveilling the union activities of our employees.

WE WILL NOT threaten employees with discharge because of their union activities or other protected concerted activities.

WE WILL NOT promise or grant wage increases for the purpose of inducing our employees to withhold their support for the Union or any other labor organization.

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

CARL A. NEUMAN D/B/A SARAH NEUMAN
NURSING HOME