

Davies Medical Center and Hospital & Health Care Workers Union Local No. 250, Service Employees International Union, AFL-CIO. Case 20-CA-22559

May 31, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

One of the unfair labor practice issues presented in this case is whether the Respondent's president, Greg Monardo, violated Section 8(a)(1) of the Act by questioning employee Richard Dorn about the circulation of union authorization cards.¹ The judge found that Monardo did not engage in unlawful interrogation, and the General Counsel has filed exceptions to this finding.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions,³ except that, as discussed below, we find merit in the General Counsel's exceptions to the judge's failure to find that Monardo violated Section 8(a)(1) by interrogating employee Dorn.⁴

According to Dorn's credited version of the incident in dispute, Monardo summoned him to the president's office in April 1989. As chief shop steward, Dorn discussed union-related matters with Monardo two or three times a year. In this instance, Greg Monardo said, "I heard that there were cards going around from the Union." Dorn admitted this activity. Monardo then asked how many cards were signed. Dorn said that he did not know, except for the card he had signed. Monardo requested that cards not be circulated during "hospital time." Monardo testified that he had received complaints about the circulation of union authorization cards during working time, in contravention of the Respondent's valid no-solicitation rule.

¹ On June 5, 1990, Administrative Law Judge Joan Weider issued the attached decision. The Respondent filed exceptions and a supporting brief.

The General Counsel filed limited cross-exceptions and an answering brief. The Charging Party filed an answering brief. The Respondent filed an answering brief to the cross-exceptions.

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

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 resolutions with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ In affirming the judge's conclusion that the Respondent failed to exercise reasonable diligence so as to reply timely to the Union's January 19, 1989 information request, we note that the Respondent has not contested the relevance of any of the information requested.

⁴ Given this finding that the Respondent coercively interrogated employee Dorn, Member Devaney finds it unnecessary to pass on the allegations that the Respondent also violated Sec. 8(a)(1) by coercively interrogating employee Evans because finding the additional violations would essentially be cumulative and would not materially affect the Order.

The judge found that Monardo's conversation with Dorn about the circulation of union cards was not unlawfully coercive. She based this finding on evidence that the two had previously discussed union matters, Monardo's inquiry related to the Respondent's valid no-solicitation policy, and his specific question about the number of card signings "could readily be interpreted as an attempt to determine the extent of the violations" of this policy.

Contrary to the judge, we find that Monardo's inquiries were coercive. They occurred in the context of other unfair labor practices which are fully described in the judge's decision. These unlawful activities included interrogation of another employee by Monardo and his father⁵ and the participation of the Respondent's supervisors and employee agents in soliciting employees to decertify the Union. Furthermore, Monardo's expressed concern with enforcing a valid no-solicitation rule did not require the particularly intrusive question about how many union cards had been signed. Finally, we note that the Respondent had permitted and assisted solicitation *during working time* of employee signatures on a decertification petition. In these circumstances, we find that it would reasonably appear to Dorn that the Respondent's president sought to discover whether the Union was having any success in a last minute effort to counteract the unlawful decertification campaign and that Monardo further sought to chill the prounion effort. Based on the foregoing, we find that Monardo interrogated Dorn in violation of Section 8(a)(1).⁶

ORDER

The National Labor Relations Board orders that the Respondent, Davies Medical Center, San Francisco, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union membership, activities, or support.

(b) Urging, encouraging, and soliciting employees to sign a petition to decertify Hospital & Health Care Workers Union Local No. 250, Service Employees

⁵ Member Devaney does not rely on this conduct in finding that the Respondent coercively interrogated Dorn.

⁶ We shall modify the judge's recommended Order language to encompass this additional unlawful interrogation. We shall also add remedial provisions relating to the Respondent's unlawful conduct with respect to the bargaining information requested by the Union. Although the complaint allegation concerned the Respondent's failure to supply the information in a timely and diligent manner, the fact is that the information was never supplied because the Respondent unlawfully withdrew recognition. In these circumstances, we shall affirmatively order the Respondent to supply the requested information. Finally, we note that the judge provided in her recommended Order for make-whole relief in the event that the Respondent made any unilateral changes after its unlawful withdrawal of recognition. The complaint, however, did not allege unilateral changes, the issue was not litigated, and the judge made no unilateral change finding. Consequently, there is no basis for the make-whole remedy, and we shall not include it in our Order.

International Union, AFL-CIO, as their exclusive collective-bargaining representative.

(c) Withdrawing recognition from, or refusing to bargain collectively with, the Union as the exclusive representative of all the employees in the following unit, which is appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part-time employees, including short-hour and casual employees covered under the terms of Respondent's bargaining proposal implemented on or about April 1, 1988, excluding all other employees, guards and supervisors as defined in the Act.

(d) Refusing to furnish, in a timely and reasonably diligent manner, information requested by the Union that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

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

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

(a) Recognize and bargain with the Union as the exclusive representative of the employees in the unit described above.

(b) On request, provide the Union with relevant bargaining information which it previously requested in a January 19, 1989 letter.

(c) Post at its facility and place of business in San Francisco, California, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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.

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

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate our employees about their union membership, activities, or support.

WE WILL NOT urge, encourage, and solicit our employees to file a petition to decertify the Union, and/or coercively solicit our employees' signatures to such a petition.

WE WILL NOT withdraw recognition from, or refuse to bargain collectively with, Hospital & Health Care Workers Union Local No. 250, Service Employees International Union, AFL-CIO, as the representative of our employees in the appropriate unit described as follows:

All full time and regular part-time employees, including short-hour and casual employees covered under the terms of our bargaining proposal implemented on or about April 1, 1988, excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to furnish, in a timely and reasonably diligent manner, information requested by the Union that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

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

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of the employees in the above-described unit concerning terms and conditions of the employment and, if an understanding is reached, embody the understanding in a signed agreement.

⁷ 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."

WE WILL, on request, provide the Union with relevant bargaining information which it previously requested in a January 19, 1989 letter.

DAVIES MEDICAL CENTER

David F. Sargent, Esq., for the General Counsel.
Gerald R. Lucey, Esq. and *Gabriela E. Georgi, Esq. (Corbett & Kane)*, of Emeryville, California, for the Respondent.
Vincent Harrington, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. This case was tried in San Francisco, California, on January 16 and 17, 1990.¹ The charge was timely filed on March 24, 1989, by Hospital & Health Care Workers Union Local No. 250, Service Employees International Union, AFL-CIO (the Union). This charge resulted in the issuance of a complaint on May 4, 1989, which was amended at hearing, alleging that Davies Medical Center² (Respondent or the Company) violated Section 8(a)(1) and (5) of the National Labor Relations Act.

Specifically, the complaint alleges Davies Medical Center, violated Section 8(a)(1) of the Act by unlawfully encouraging its employees to sign a petition seeking the decertification of the Union and by unlawfully interrogating its employees. The complaint also claims Respondent violated Section 8(a)(5) and (1) of the Act by failing to furnish the Union with relevant information and by its unlawful withdrawal of recognition of the Union as the exclusive collective-bargaining representative of its employees.

The Respondent, in its answer to the complaint, conceded, *inter alia*, that it meets one of the Board's jurisdictional standards,³ but denies committing any unfair labor practices. Respondent also admits, and I find, the Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

On the entire record, including my observation of the witnesses, and after careful consideration of the posttrial briefs, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Most of the background facts are undisputed. Respondent is an acute care hospital licensed for 356 beds with between 800 to 900 employees represented by 4 unions. Respondent admits that at all material times the following individuals are supervisors within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act: Greg Monardo, president; George Monardo, Greg's father,

vice chairman; Kathleen Kane, vice president of human resources; Dr. Isabel Walsh, chief house physician; Bob Bailey, director, housekeeping and laundry departments; and Ethel Hendy, assistant director, dietary department.

Respondent and the Union have had a long term collective-bargaining relationship of about 52 years.⁴ In 1987 there was a decertification election which the Union won by a vote of 82 to 33. The Union was certified as the unit's exclusive collective-bargaining representative on October 27, 1987. On April 30, 1987, the last negotiated collective-bargaining agreement expired; negotiations for a successor agreement were unsuccessful,⁵ and the Company unilaterally implemented an agreement effective April 1, 1988.

From about December 1986 until December 1988, the Union was under the trusteeship of the International. After a union election, a complete change in supervisory positions of the Union occurred. There was no evidence that such trusteeship or change in local leadership in December 1988, adversely affected the operations of the Union or caused member disaffection. Also, in 1988 the Union twice gave Respondent strike notices. There is no claim the Union called a strike at Respondent or that these notices or other union actions caused disaffection with the Union among its members employed at Respondent.

B. Request for Information and Bargaining

On January 19, 1989, the Union sent Respondent a certified letter requesting amendment of the contract effective April 30, 1989. In contemplation of resumed negotiations, the Union appended to this letter to Respondent a request for information. The requested information included, for each actively employed bargaining unit employee, their name, classification, date of hire, seniority date, birth date, department, status: such as regular full time, shift, health plan coverage, race or ethnic group, sex, home telephone number and address, and social security number. Also requested were: the total bargaining unit hours in 1987 and 1988 for vacation, sick leave, holidays, and education leave; total costs to Respondent in 1987 and 1988 for certain named trust funds; the current job description for each bargaining unit classification; information concerning all health and retirement plans offered employees in the unit; copies of any personnel handbook given employees; and copies of written personnel rules, regulations, policies, or procedures currently in effect. The letter ended with the following:

Thank you for your anticipated cooperation. You may deal directly with a representative of Local 250 with respect to the presentation of this information at a mutually convenient time and place.

Lawrence Corbett, who has negotiated between 250 to 300 collective-bargaining agreements with the Union, testified, without refutation, that in late 1975, the Union started to re-

⁴ Respondent admits and I find the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act:

All full time and regular part-time employees, including short-hour and casual employees covered under the terms of Respondent's bargaining proposal implemented on or about April 1, 1988, excluding all other employees, guards and supervisors as defined in the Act.

⁵ The negotiations failed because the parties could not agree on the inclusion of a union-security clause and the terms and conditions of the health plan.

¹ All dates are in 1989 unless otherwise stated.

² This heading reflects the name of Respondent as modified at the hearing.

³ Based on this admission, I find Respondent is an employer within the meaning of Sec. 2(2) of the Act, engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act.

quest information along with its reopener letters and it has continued this practice, with modification of the information requested, such as the information requested in their January 19 letter. Corbett claims he never supplied the requested information prior to the commencement of negotiations. He indicated the request for information was usually addressed at the first negotiation session. The last time he negotiated with the Union on behalf of Respondent was in 1983 or 1984. He was aware there was a substantial change in the direction of the management of the Union in 1988. There was no testimony by the attorney currently representing Respondent concerning the January 19 request for information, including their understanding of any impact of past practices upon the timely provision of the requested information. Respondent never questioned the relevance of the requested information.

On April 5, 1989, Respondent notified the Union effective May 1, 1989, the date the unilaterally implemented agreement expired, they would no longer recognize the Union. This letter also advised the Union that Respondent had received a petition signed by a majority of the employees in the bargaining unit expressing their desire to no longer be represented by Local 250. In response to this letter, the Union, by Lead Field Representative Ralph Cornejo, asked to see a copy of the petition because the Union has "a good faith doubt as to the validity of the petition."

Cornejo was assigned by the Union in mid-March 1989 as the business agent to service the collective-bargaining agreement with Respondent. After familiarizing himself with the files and consulting with a field representative, Cornejo determined the Union needed the information requested in the January 19 letter in preparation for negotiations. For example, the race or ethnicity of employees was sought to determine if certain groups were disproportionately present and if so, the Union could submit proposals to rectify the situation. Similarly, all the information sought was to assist the Union in determining whether or not certain negotiating positions should be taken and if traditional viewpoints needed to be altered.⁶ I find the information the Union requested in the January 19 letter was clearly relevant to its duties as the collective-bargaining representative of the employees in the above-described unit.

Cornejo admitted the Union for a number of years had been requesting information similar to that sought in the January 19 letter and over the years the requests were attached to the opening letter. Cornejo also admitted the Union made no further request for information after January 19, until after it received Respondent's withdrawal of recognition letter of April 5.⁷

Respondent, by its attorney, replied to the Union's requests for information by letter dated April 18, 1989. This letter informs the Union that Respondent is refusing to bargain for a new agreement as requested in the Union's Janu-

⁶Another example of the need for the information for bargaining is the request for job descriptions. As Cornejo explained:

In the hospital division, especially, job descriptions are constantly changing. Employees' duties are getting more specialized. Duties are added to employees. And oftentimes proposals are coming forward from employees that address the issue of adjustments for special expertise or the more difficulty of the job that's involved. And that would assist us in determining whether or not those wage adjustments are valid.

⁷Cornejo testified the Union wanted to negotiate forcefully and ensure Respondent provided the requested information, but there is no evidence these wants were related to Respondent.

ary 19 letter because, as they previously informed the Union, "a majority of employees have filed petitions with the Hospital stating they no longer wish to be represented by Local 250." By the same letter, Respondent refused to provide the Union a copy of the petition because: "Several employees have expressed fear of retaliation if Local 250 were to see their signatures on such a petition. We have no legal obligation to turn this petition over to you."

By letter dated May 8, 1989, the Union demanded bargaining for a new agreement. This demand was repeated by the Union in a letter dated June 14, 1989. I conclude the record amply supports a finding the Union made timely, unequivocal demands to bargain.

C. The Decertification Petition

The General Counsel and the Union assert Respondent violated Section 8(a)(1) of the Act by soliciting employees to repudiate their support for the Union. Respondent claims it did not solicit employees to withdraw their support from the Union.

Evelia Tijerino, a kitchen worker supervised by Hendy, testified, during February Hendy told her she wanted her to see Bob Bailey. Hendy took her to the laundry in the basement and asked an employee, Elizabeth Santos, for Bailey. Bailey had to be called, and when he arrived Santos told Tijerino, "They want me to talk to you about a union." At that juncture, Bailey said to Hendy, "Come on, let's go. She's going to talk to her. . . . She's got to talk to her." After Bailey and Hendy left, Santos spoke to Tijerino in Spanish. Santos said:

. . . the people from the department had signed a piece of paper because they don't want to be in the union anymore because they pay and pay and the union doesn't do anything for them. And she was telling me about some people that she said she knew and they have problems and the union didn't do anything for them.

So then I said, "Well, if the union doesn't do anything for you, I don't know why they're so anxious for you to get out of it."

Santos also told her "they just want me to tell you this."

Tijerino had never met Santos before and had never previously spoken to her about the Union. Tijerino had never previously spoken to Hendy about the Union and she had not previously met or spoken to Bailey. Tijerino asked Santos who Bailey was and was told he was in charge of the laundry. She was absent from her job for about 30 minutes, having gotten lost on the way back to the kitchen from the laundry area. Tijerino mentioned this conversation with Santos to a coworker, Marie Perez,⁸ that day or the next day.

Later in the month of February, Hendy told Tijerino and an employee named Regina they were "to go and see Betty today," she said, "and it's important to go and see Betty."⁹ Following Hendy's instruction, Tijerino tried to call on Llerias, who works in the payroll office, but she could not

⁸Tijerino told Perez, Hendy "wanted me to go and see Bob, and I went over there, and they spoke to me about a union." Tijerino was unsure of Maria's last name.

⁹The record clearly demonstrates the employee Hendy sent Tijerino to see was Betty Llerias, and I so find.

find the office. The following day, Hendy inquired if she had seen Lerias, and Tijerino replied she tried but was unable to find her, she could not locate her office. Hendy again told her she wanted her to go to see Lerias. Tijerino found the payroll office but Lerias was not there, so Tijerino returned to work. Hendy asked if she talked to Lerias and Tijerino explained she was not there, she probably had the wrong office. Hendy then told Tijerino she would take her to see Lerias. Hendy escorted Tijerino to the payroll office but Lerias was not there so she told Tijerino “I want you to go back and see her after your break or before your break.” Hendy never told Tijerino why she wanted her to see Lerias.

Pursuant to instructions, Tijerino returned to the payroll office while on break.¹⁰ Tijerino then testified:

I asked for Betty and she said she was Betty, and she said—and at the same time she picked up a piece of paper and she showed it to me. She said, “I want to talk to you about the union.” And she said, “I know they have talked to you before,¹¹ and if you want”—and she told me that if I want to be out of the union, I had to sign the piece of paper. And she said that a lot of people had signed because they don’t want to be in the union anymore. . . .

And she said, “If we have enough signatures, we can take the union out of the hospital.”

I told her I was confused. I didn’t know what to say, I said, but I don’t—what I don’t understand is if the union doesn’t do anything for us, why do they want us to get out of the union?

And she said that you just pay and pay and they don’t do anything for you. And she said, “Well, think about it. We’re not forcing you.” But she said if I decide to sign, to come back and ask her. And she said, “Don’t tell anybody about this.”

There was a man working in the payroll office who then told Tijerino “if I go back and she wasn’t there, if I—he could ask me—he said to ask him about the piece of paper again.” Tijerino then returned to work and Hendy asked if she had talked to Lerias. When Tijerino said yes, Hendy replied, “Okay.” That was the first time Tijerino spoke to Lerias.

Hendy also escorted Felix Ramirez to the payroll office to see Lerias. Hendy was his supervisor. Hendy called him into her office and:

So she told me the hospital right now has a problem with the union. I said, “Oh, I see. So what do you need from me?” “I show you something.” And then she opened the door from her offices and we went to the—another office, and she showed me two girls that was in the offices. Two persons was in the offices.

¹⁰The two previous visits Tijerino made to the payroll office looking for Lerias pursuant to Hendy’s instructions were during working time, not during a break. There was no evidence Respondent permitted employees to visit other employees during worktime or breaks, such as Santos and Lerias. On the contrary, Respondent had an admittedly valid no-solicitation rule which included solicitation for antiunion petitions.

¹¹Lerias did not specifically refute Tijerino’s testimony she made reference to others having spoken to her.

After having his memory refreshed by reference to his affidavit, he testified Hendy also “told me if you want in the union, you don’t have to sign. If you don’t want in the union, you’ll have to sign. That’s what she says.”¹²

Ramirez exhibited difficulty in recalling the events. Initially, he claimed he did not complain to anyone about being pressured to join the Union, and then he admitted he mentioned to both Hendy and his brother-in-law, who also works at the hospital, that he was being pressured to join the Union. Also, on cross-examination, he admitted Hendy said: “The hospital has a union, but if you don’t want the union you can go to this office. But if you want the union, you don’t have to go to the office.”

Ramirez had difficulty recalling the name of the woman he saw in the office but he was able to describe her. He initially called the woman Aurora in his affidavit, but shortly before testifying, inquired and learned her first name was Betty. Lerias readily admitted calling Ramirez down to the payroll office and asking him to sign the petition.

Initially, Ramirez testified Lerias said: “All you have to do is sign here.” Lerias showed him a piece of paper the color of a yellow legal pad. Ramirez replied, “Why do I have to sign that paper?” “Because,” she says—she says, “Because many people sign here.” “What do you mean ‘many people?’” I say, “What do you mean ‘many people?’” “That’s for people who don’t want a union. Only you have to write in this space.” I say, “I can’t sign.” After his memory was again refreshed by resort to his affidavit, Ramirez testified Lerias said:

“You have to sign this paper.” I say, “Why do I have to sign this paper?” [Lerias replied] “If people don’t want the union.”

Ramirez never had a previous occasion to go to the payroll office. After his discussion with Lerias, Ramirez returned to his work in the kitchen. He did not have any conversation with Hendy concerning the petition. He claims, if Hendy had not asked, he would not have gone to the payroll office. Hendy never inquired whether he signed any documents in the payroll office.

Lerias, a payroll specialist, learned of the petition in the ladies lounge during a break. She regularly took her breaks in the lounge with other Filipinos who discussed the Union, particularly Aurora Arangcon and Loretta De Guzman. Most of these Filipinos worked in housekeeping. As previously noted, Bailey is the supervisor in housekeeping. There were no members of management present during these breaks. According to Lerias, Arangcon gave her the petition to keep in the payroll office so that the employees who work the night shift can have access to the petition because Arangcon finished her shift at 4 p.m. and the night shift starts at 4:30 p.m. Lerias has the same working hours as Arangcon, 8 a.m. to 4 p.m. She did not explain how her keeping a copy of the petition facilitated night-shift employees signing the document. There is no corroborative or other evidence this arrangement made the petition available to the night shift.

¹²The fact Lerias informed Ramirez and Tijerino they did not have to sign the petitions did not mitigate the coercive nature of the violation. Ramirez and Tijerino were told to see Lerias by their supervisor and were not clearly assured their refusals to sign the petition would not result in retribution.

Lerias kept the petition in an interoffice envelope at the bottom of her in basket. It was left there until one of the employees soliciting signatures, usually Arangcon, needed it, and she would come, get the petition and then return it later. On about five occasions, employees would come to her office and ask to sign the petition. Lerias admitted calling Hendy twice asking to have Tijerino and Ramirez released to come to her office. She claims she did not tell Hendy why she wanted to see these employees; she often had to call supervisors and request employees come to her office for work-related matters. She admitted to requesting one other employee be released by their supervisors during the workday so they could come to her office to be asked to sign the decertification petition. Lerias did not reveal how she knew who to call to the office to solicit signatures for the petition.

Lerias also claims she did not tell her supervisor or anyone in personnel what she was doing with the decertification petition. Lerias frequently leaves her office to go to the administration office to check signatures and to human resources, which is in the personnel department, to duplicate material or check on some work-related matters. She admitted to soliciting her assistant to help in obtaining signatures on the petition in the event an employee in the unit came to their office seeking to sign the petition. Lerias was not in the bargaining unit represented by the Union. She is not represented by any bargaining agent. She failed to explain her active involvement in soliciting signatures of unit members, but her actions clearly exceeded her described role of acting as a mere repository for the petitions to provide easy access to late-shift employees.

Lerias claims when Ramirez came to the office: "I told him that I heard that he wished to sign the petition. And, so, I showed him the list, that if he doesn't want to join the Union, he can sign it. If he doesn't want to sign it, fine. No one is going to force him." The women in the lounge told her Ramirez wanted to sign the petition. She believes he signed. Lerias did not divulge the source of her information Ramirez¹³ wished to sign the petition but the only employee of Respondent who was shown on the record to have previously spoken to him about continued union representation was Hendy.

Lerias also telephoned Hendy to send Tijerino to the payroll office to see if she would sign the decertification petition, having heard from someone in the lounge that she might want to sign. She told Tijerino:

. . . that I heard that she wished to—not to join the Union. And that I heard that she wanted to sign. So, I showed her the list. And she said that she'll think about And that I told her—I also told her that she's not forced. It's up to her to sign or not, even if she doesn't want to join the Union and she doesn't want to sign. It's up to her.

Q. Okay. Did she say anything else to you?

A. She just said that she'll think about it.

The testimony of Lerias, on the one hand, and the testimony of Tijerino and Ramirez, on the other, appear to be in conflict. I find the conflicts are superficial, but based on atti-

¹³Lerias could not recall who told her Ramirez and Tijerino might want to sign the decertification petition.

tude and demeanor, I credit Tijerino and Ramirez where there are contradictions. Tijerino and Ramirez testified in an open manner, they appeared plausible and convincing, they gave their evidence in a straightforward manner without any indication of dissembling. Lerias, in contrast, appeared to hesitate when she seemed to perceive her response to a question may have an adverse effect on Respondent's cause. She did not appear to be giving full responses to all questions on cross-examination and, on occasion, she had to be prompted to respond. Her testimony contained inconsistencies, such as that previously noted concerning her role as more than mere custodian of the petition. I find it is more than mere coincidence that two employees supervised by Hendy were called by Lerias to her office after Hendy and others spoke to them about the desirability of decertification of the Union. These antiunion activities, fostered at least in part by Hendy and Bailey, predominantly occurring during working time, in contravention of Respondent's no-solicitation rule, amplified the appearance such activities were favored and promoted by Respondent, increasing the coercive nature of these actions.

Tijerino and Ramirez spoke English as a second language. However they exhibited the ability to understand the questions asked them in English and to respond clearly in English. Hendy, Santos, and Bailey did not testify. Accordingly, Tijerino's and Ramirez' testimony about their statements are unrefuted. Tijerino and Ramirez are current employees and gave their testimony adverse to Respondent at considerable risk of economic reprisal. This risk creates a circumstance where their testimony was contrary to their best interest and therefore not likely to be false. *Georgia Rug Mill*, 131 NLRB 1304, 1305 (1961), modified on other grounds 308 F.2d 89 (5th Cir. 1962). Moreover, there was no explanation for the failure of Hendy and Bailey, admitted supervisors, to testify. Accordingly, an adverse inference should be drawn by Respondent's failure to call these supervisors, and I infer that if Bailey and Hendy testified, their statement would not have supported Respondent's defense. *Greg Construction Co.*, 277 NLRB 1411, 1419 (1985); *Earle Industries*, 260 NLRB 1128, 1144 (1982); *Pur O Sil, Inc.*, 211 NLRB 333, 337 (1974).¹⁴ Cf. *International Automated Machines*, 285 NLRB 1122, 1123 (1987); citing 2 Wigmore, *Evidence* § 286 (2d ed. 1949); McCormick, *Evidence* § 272 (3d ed. 1984). However, even absent an adverse inference, I conclude the testimony of Tijerino and Ramirez should be credited and warrant a finding of a violation of the Act.

I find Hendy and Bailey were actively involved in assisting Santos and Lerias in their efforts to foster employee dissatisfaction with the Union. I further find that Hendy actively assisted Lerias in soliciting signatures to the decertification petition in bringing Tijerino to Santos and Lerias and trying

¹⁴As found in *Pur O Sil, Inc.*, 211 NLRB at 337 (1974):

An additional cogent reason for crediting the versions of the General Counsel's witnesses is the Respondent's failure to call other witness . . . all of whom played roles of special significance with respect to important issues in this proceeding. The failure of the Respondent to produce these three material witnesses at the trial to corroborate the testimony of other Respondent witnesses renders their versions of what occurred dubious, and also warrants drawing an adverse inference that if these absent witnesses had been produced their testimony would not have been favorable to the Respondent. [*Interstate Circuit v. U.S.*, 306 U.S. 208, 225, 226; *NLRB v. Wallack & Schwalm Co.*, 198 F.2d 477, 483 (3d Cir. 1952); *Concord Supplies & Equipment Corp.*, 110 NLRB 1873 (1979).]

to convince Ramirez to be antiunion immediately prior to sending him to see Lerias. The timing of these supervisors' activities buttress my decision to not credit Lerias' testimony that Hendy did not know why she wanted to see Tijerino and Ramirez. Also, Hendy sent Tijerino to see Lerias and Hendy did not tell Tijerino and Ramirez Lerias called and requested to see them. This lack of corroboration of Lerias' story, co-joined with my finding Lerias is not a credible witness, leads me to conclude Hendy's and Bailey's otherwise unexplained behavior to be actions taken in furtherance of the antiunion petitions. I find it is highly improbable Hendy would make antiunion statements to Ramirez and bring Tijerino to Bailey and Santos shortly before Lerias is informed by unidentified individuals that these two unit members might want to sign on antiunion petition. Accordingly, I find, based on demeanor and probabilities, Hendy and Bailey actively engaged in soliciting employees to sign the decertification petition in concert with other employees, such as Lerias.

Richard Dorn is a current employee of Respondent and chief shop steward for housekeeping, storeroom, and central supply departments. As chief shop steward he determined the antiunion petition he heard about would not fortuitously be shown him so he decided to see if he could get one of the petition's advocates to show it to him.¹⁵ He also wanted to ascertain if management was involved in the petitioning process. According to Dorn, around April 21 or 22, 1989, he saw De Guzman making a bed while he was working and mentioned to her he heard there was a petition circulating and asked to see it. De Guzman asked, "What petition," denied any knowledge of a petition, and then she left the room. De Guzman returned with Arangcon who said "that she heard that I wanted to sign the petition. I said 'yes, I want to sign the petition.'"

Arangcon laughed and left the room. A few minutes later, Arangcon returned with Isabel Walsh. According to Dorn:

Walsh approached me and said, "Richard, I heard I got the big fish." And I asked her, "What do you mean you got the big fish?" And she said, "Well, I heard you wanted to sign the petition." I said, "Let me see the petition."

So she patted her side, which is a lab coat that she had—I think it was the left side—and she said, "I have the petition right here." Then I said, "Well, let me see the petition, because I want to read what I'm signing." And then she sort of hesitated and she said, "No, I don't think I can trust you." And then she sort of laughed and that was the end of it, the conversation.

Walsh did not testify and her absence was unexplained. Under the extant circumstances, I draw the adverse inference that if Walsh testified, her testimony would be unfavorable to Respondent. *Greg Construction Co.*, supra; *Pur O Sil*,

¹⁵Dorn did not recall stating in his affidavit he thought it was a group of Filipino employees circulating the petition and wanted to see who signed it. He did not initially recall the statement. I do not find this selective lapse of recall sufficient grounds to discredit his otherwise credible unrefuted testimony. His attitude and demeanor, after making allowance for his interest, was plausible and convincing. He candidly admitted what he stated in his affidavit and did not engage in dissimulation to explain away any inconsistencies.

Inc., supra.¹⁶ Even if an adverse inference is not drawn due to the failure of Walsh to testify, based on the unrefuted and believable evidence of Dorn,¹⁷ I find Walsh at the least indicated to Dorn that she had the antiunion petition in her pocket.

Although Dorn did not see the petition, Walsh, by patting her pocket while referring to the petition, clearly indicated to Dorn she was currently in possession of the document during the decertification campaign. However, there is no evidence that Walsh, while indicating she was in possession of the decertification petition, actually was involved, directly or otherwise, in soliciting signatures or assisting the campaign in any other manner. Walsh's mere indication of possession of a copy of the petition fails to warrant the finding of a violation of the Act and this allegation of the complaint should be dismissed.

Elana Quilala, a current employee in the laundry department, withdrew from membership in 1989. Quilala also sent a letter to Respondent informing them of her withdrawal from the Union. The letter was directed to Respondent's director of human resources, Kane. Kane asked to see Quilala to confirm she sent the withdrawal letter to the Union and if Quilala knew it would result in stopping union dues being withdrawn from her paycheck. After making such a confirmation in Kane's office, Quilala got up to leave when she saw the decertification petition and inquired about its significance. According to Quilala, the conversation continued as follows:

I asked Ms. Kane, "What is this?" And she said, "Petition for people who don't want to get a percentage çsic in the union any more."¹⁸ And I asked, "Why? Why do you have this?" And she said, "We want to have a record of the names of people who want to withdraw from the union any more."

Q. And did Ms. Kane say anything else after that to you?

A. Ms. Kane said to sign my name if I no longer wanted a percentage in the union. And so I did volunteer myself to sign my name below the names above. Well, I was no longer a union person.

Q. After you signed your name, did you have more conversation with Katheryn çsic Kane or did you leave at that point?

A. Yes, I did. She told me I could go back to work now, sir.

That was the only time Quilala was in Kane's office during her employment at the hospital. Quilala described the petition as having names but could not recall if the names were followed by a date; she did put the date she signed after her

¹⁶I also note Loretta De Guzman and Aurora Arangcon, two of the principal employees circulating the antiunion petition, did not appear and testify. Their absences were also unexplained but do not warrant the drawing of an adverse inference.

¹⁷Based on Dorn's demeanor, which was straightforward and convincing, as well as Dorn's position as a current employee, who testified against his employer at personal economic risk, his testimony is credited.

¹⁸On cross-examination Quilala asserted Kane said the petition is "for people who don't no longer want to be represented by the union." The term "percentage" in her direct testimony could be a mistake in transcription or a malapropism. The record will not support a finding that Quilala did not understand any terms being used or the significance of the conversation.

name. She also testified the first name on the petition was Dorn's as well as four other names.

Kane¹⁹ testified and asserted on or about January 3, she called Quilala to her office to insure the withdrawal letter was sent to the Union before she stopped having her union dues taken out of Quilala's paycheck. Kane denied having a decertification petition on her desk and/or asking Quilala to sign such a petition. The petitions do have dates next to the signatures and there is no petition with Dorn's name at the top or elsewhere on the document. The petition Quilala signed had only one name above hers, Richard Prouty, and hers is the only undated signature on the document.

The signatures above and below Quilala's were dated March 8, 1989. Quilala testified she was called to Kane's office in mid-January, which I find probable since her withdrawal letter is dated December 26, 1988. Based on the contradictions in her testimony and the probability she was in Kane's office in January, as she testified, more than a month before she apparently signed the petition, I conclude the General Counsel failed to prove by a preponderance of the credible evidence that Kane solicited Quilala's signature on a decertification petition. Accordingly, I conclude this allegation of the complaint should be dismissed.

Kane was presented with the petition on or about April 4, 1989, and, following Respondent's counsel's instructions, checked the signatures on the petition with exemplars in the signatories personnel files after insuring the signatories were in the Local 250 unit from the computerized payroll list. Kane found exemplars for all signatories to the petition. She also counted the number of the employees she identified in the unit to determine if a majority signed the petition. The list is all employees in the classifications represented by the Union by department number. The payroll list is prepared by an outside contractor and updated monthly. There is no evidence concerning the parameters used to identify employees as members of the unit. There is no basis to determine the record was a contemporaneous list of the appropriate unit on or about April 4 or 5, 1989. The date the list was prepared or other evidence it accurately reflected the members of the unit were not facts placed in evidence.

Kane testified she checked each signature against the payroll list but was unsure of at least one name on the petition. No handwriting exemplars were presented at hearing. There are employees on the list that did not work during the payroll period covered by the list. The most recent certification in 1987 established a unit which required oncall or casual employees to work a specified number of hours to be eligible to vote and hence to be eligible to be included in the unit for the purposes of establishing if a majority of employees in the unit signed the antiunion petition. The Charging Party avers the consent election agreement in Case 20-RD-1993²⁰

¹⁹ Kane ceased her employment with Respondent in July 1989.

²⁰ The unit described in Case 20-RD-1993 is as follows:

All full-time and regular part-time employees, all short hour employees as defined in the collective bargaining agreement and all on-call employees who worked a minimum of 32 hours in any pay period beginning June 29, 1987 and ending August 9, 1987, including housekeeping department employees, laundry department employees, storekeepers, groundsmen, parking attendants, head dishwashers, dishwashers, pot washers, fountain attendants, pantry (vegetable/salad) employees, kitchen helpers, physical therapy aids, surgical aides, central supply aides, nurse attendants, senior licensed vocational nurses, licensed vocational nurses, surgical technicians, orthopedic technicians and psychiatric technicians employed by the Employer at its San Francisco, California, facility, ex-

governs, overriding the unit description in the collective-bargaining agreement. As previously found, the unit described in the collective-bargaining agreement is appropriate within the meaning of Section 9(b) of the Act.

In checking whether petition signatories were members of the unit, Kane did not make any effort to determine if those employees who worked zero hours during the payroll period had ever worked any hours or were otherwise properly included in the unit. Kane did not know if the payroll list included anyone on a leave of absence during that payroll period or were otherwise absent; she did not go through the personnel records to determine if any signatories were on a leave of absence, on vacation, or otherwise excused from work or ineligible to vote.

Kane determined the bargaining unit had 119 employees of which 63 signed the petition. Kane did not know the specific payroll period reflected on the payroll list and admitted there was employee turnover each month. The first five signatures on the petition were dated January 25, 1989, and almost all the signatures were dated January, February, or March while the employee list was not requested until April for an unstated payroll period.

Respondent's attorney, by letter dated April 5, 1989, advised effective May 1, 1989, it will no longer recognize the Union as the employees' collective-bargaining representative based on the petition. By letter dated April 12, 1989, the Union requested Respondent let them see a copy of the petition because they have "a good faith doubt as to the validity of the petition." By a second letter, also dated April 12, 1989, the Union repeated its request for bargaining and information. On April 18, 1989, Respondent's attorney refused to commence negotiations based on the petition and, as previously noted, refused to provide the Union with a copy of the petition because:

Several employees have expressed fear of retaliation if Local 250 were to see their signatures on such a petition. We have no legal obligation to turn this petition over to you, and we will not turn it over to you. We will, of course, make the petition available to an appropriate government official or a mutually agreed upon third party if necessary, if it is understood that each signature on the petition will remain confidential and that under no circumstances will the names of those who have signed, or have not signed, be revealed to Local 2509 by the government official or the impartial third party.

D. Alleged Unlawful Interrogation

Carl Evans, a current employee, testified that in January 1989, while he was waiting to punch out, and as Greg Monardo was leaving the building, Greg Monardo said: "Good evening, Carl, how are you?" I said, "Fine." And he says, "Are you still a member of Local 250?" I say, "Yes, I am." He said, "Okay, I was just wondering."

Greg Monardo frequently spoke to Evans and on this occasion, smiled when he inquired about Evans' union affiliation.

cluding engineers, registered nurses, professional employees, dieticians, cooks, laboratory technicians, x-ray technicians, office clerical employees, administrative secretaries, guards and supervisors as defined in the Act.

This was the only conversation where Greg Monardo spoke to him about the Union.

Greg Monardo had no recollection of this conversation, he usually chats with Evans two to three times a month about sporting events and food. He unequivocally denies asking Evans if he was still a member of the Union.

Evans also claimed he had a conversation with George Monardo 2 weeks or more after the conversation with Greg Monardo. Evans was unsure about the date, and gave a different date in his affidavit which was dated April 1989. He claimed his affidavit was in error, that he believed he had the conversation with George Monardo in mid-February. According to Evans, as he was getting off an elevator, George Monardo was walking by and as they walked together, the following conversation occurred:

He [George Monardo] says, "Good evening, how are you doing, young man?" I say, "Fine. Yourself?" And he asked me, he said, "Are you still a member of Local 250?" I said, "Yes, I am." He said, "Do you pay \$19?" I said, "Yes, I do. If you'd like to check, you're welcome to do so." He said, "No, I was just wondering. You could do something else with your \$19."

This was the first time in Evans' 9-year employment at Respondent that George Monardo asked him a question about the Union. Evans had talked to only one employee, Gasper Rockamora, about the Union prior to this conversation with George Monardo. On cross-examination, Evans also admitted to speaking to Arangcon in April, as mentioned in his affidavit, about the petition. Rockamora mentioned the petition being circulated by Arangcon and Evans asked her if he could see the petition; Arangcon just smiled and walked away without responding to his request. Evans claims his affidavit is incorrect about the time this conversation with Arangcon occurred.

George Monardo denies asking Evans if he is a member of the Union and/or whether is paying \$19 per month in union dues. He admits speaking to Evans about two to three times a month about casual matters not related to work but had no independent recollection of any of these conversations. Admittedly, George Monardo knew an antiunion petition was being circulated before he spoke with Evans in March.

I find Greg and George Monardo made the statements Evans attributed to them based principally on demeanor. Evans appeared more convincing. Further, he readily admitted when he could not recall facts and when his affidavit was in error due to his lack of understanding. He testified without guise or guile. In contrast, George Monardo engaged in surmise and he did not appear to be responding to the questions fully regardless of the consequences. Greg Monardo testified in a conclusory manner, at times not responding to questions and volunteering information rather than testifying in a straightforward manner. Accordingly, I credit Evans' testimony where it conflicts with the Monardos.

Dorn testified that in April 1989, Greg Monardo asked him to come to his office. When he arrived at the office, the following conversation occurred:

He told me to sit down and he asked me how I was doing. I said I was doing fine. And he asked me a question about how was the military, how was work.

And then he—after we had that talk—he asked me, he said, "I heard that there were cards going around from the union." And I said, "Yes, there were." And he asked me how many. He asked me how many that were signed. And I told him I didn't know. I knew one was signed, because I signed it.

Dorn also readily admitted Greg Monardo requested that the cards not be circulated during "hospital time." At the time of this conversation, there were union certification cards circulating around Respondent's facility. This was not the first time Greg Monardo called Dorn to his office to discuss union activities, he does so two to three times a year.

Greg Monardo admitted he called Dorn to his office and claimed he told him he was free to leave before anything was discussed, he was there voluntarily. He denies inquiring how many cards had been signed. Greg Monardo previously asked Dorn to come to his office to discuss union matters such as the Union's plan to speak at a planning commission meeting in a manner adverse to the best interests of the medical center. Admittedly, Greg Monardo knew authorization cards were being passed around the facility at the time he held the conversation with Dorn in his office. Bailey was one source of this rumor and Aurora Arangcon was the other. He also heard a rumor, he believes from Bailey, that there was a decertification petition being circulated in the medical center. Arangcon and one or more housekeepers, whose names Greg Monardo could not recall, complained the authorization cards were being circulated during work hours. Respondent had a policy prohibiting solicitations during work hours, including the solicitation of the decertification petition.²¹ For the previously stated reasons, I credit Dorn's²² testimony and conclude Greg Monardo asked him how many authorization cards had been signed.

II. ANALYSIS AND CONCLUSIONS

A. Asserted Failure to Provide Relevant Information

Most of the facts concerning this allegation are uncontroverted. The general criteria in right to information cases were described in *Mobil Exploration & Production*, 295 NLRB 1179, 1180 (1989):

It is well settled that an employer has a statutory duty to provide a union, upon request, with relevant information the union needs for the proper performance of its duties as a collective bargaining representative. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). In determining whether an employer is obligated to supply particular information, the question is only whether there is a "probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NLRB v. Acme Industrial Co.*, supra at 437. As the Supreme Court stated, the disclosure obligation is measured by a liberal "discovery-type stand-

²¹ There is no evidence Greg Monardo knew of the circulation of the decertification petition during work hours, but he did know of its circulation in January or February 1989.

²² Dorn testified in an open and candid manner with a marked absence of device in his appearance.

ard,” not a trial-type standard, of relevance. *Ibid.* Where the requested information deals with information pertaining to employees in the unit which goes to the core of the employer-employee relationship, said information is “presumptively relevant.” *Shell Development Co. v. NLRB*, 441 F.2d 880 (9th Cir. 1971). Where the information is presumptively relevant, the employer has the burden of proving lack of relevance. *Prudential Insurance Co.*, 412 F.2d 77 (2d Cir. 1969). “But where the request is for information with respect to matters occurring outside the unit, the standard is somewhat narrowed . . . and relevance is required to be somewhat more precise. . . . The obligation is not unlimited. Thus, where the information is plainly irrelevant to any dispute there is no duty to provide it.” *Ohio Power Co.*, 216 NLRB 987, 991 (1975); *Doubarn Sheet Metal*, 243 NLRB 821, 823 (1979). Thus, where the requested information deals with matters outside the bargaining unit, the union must establish the relevancy and necessity of its request for information. *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863 (9th Cir. 1977).

I find that the information sought by the Union concerns employees it represents and does enjoy the presumption of relevancy. *Gunn & Briggs, Inc.*, 267 NLRB 944, 947 (1983); *NLRB v. United Technologies Corp.*, 789 F.2d 121 (2d Cir. 1986), *enfg.* 274 NLRB 609 (1985), and 274 NLRB 1069 (1985).

Respondent argues it has no obligation to provide the requested information on several grounds. Initially, Respondent argues it did not refuse to provide the requested information until after it withdrew recognition from the Union; prior to that time it never informed the Union it would not supply the information. Another argument is, the parties’ longstanding practice of Respondent waiting until the first negotiating session to determine which items were of import to the Union before providing any requested information amounts to a waiver, at least until the first bargaining session.

Usually, the employer has an obligation to bargain in good faith by making a reasonably diligent effort to provide or obtain the requested information. *John S. Swift Co.*, 124 NLRB 394 (1959), *enfd.* in part and denied in part 277 F.2d 641 (7th Cir. 1960), where the court held:

And from a review of the record it is apparent that although the company had not expressly refused to furnish the information on the health and welfare benefits costs there was substantial evidence to support the Board’s finding that the company “made no reasonably diligent effort to obtain it.”

Analogously, I find Respondent’s failure to expressly refuse to furnish the information, standing alone, is not exculpatory and its obligation to furnish the information remains unless the Union waived its right to the information prior to the commencement of bargaining. “National labor policy disfavors waiver of statutory rights by a union and thus a union’s intention to waive a right must be clear before a waiver can succeed.” *C&P Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982).

Respondent claims the Union, by its past conduct of not requiring production of information requested for collective

bargaining until the first bargaining session since late 1975, when they commenced requesting information in their reopener letters and thereby waived its right to have the information provided prior to the first bargaining session. There was no evidence adduced concerning whether the question of when information sought by the Union in its reopener letters should be produced by Respondent was ever expressly discussed during negotiations. According to Corbett:

Q. What has happened at the first negotiating session, Mr. Corbett, that—when the issue of information is discussed?

A. In some instances, the union has asked for information at the first session. In some instances, it has not.

The employers have usually supplied the information requested within a reasonable period of time, provided that the employer ascertain and advise the union that indeed the information was related to the negotiations and to the proposals.

There is no evidence the Union and Respondent discussed when relevant requested information would be provided in the event there were no collective-bargaining negotiations forthcoming or under any other exigencies.

The Board, where a claimed waiver is based on bargaining history and is not incorporated in the collective-bargaining agreement, as here, requires the matter be “fully discussed” and “consciously explored.” *Bunker Hill Co.*, 208 NLRB 27 (1973); *New York Mirror*, 151 NLRB 834 (1965). As stated in *Elizabethtown Water Co.*, 234 NLRB 318, 320 (1978):

The Board has declined to find that a party to a contract has waived its rights to bargain concerning mandatory subjects of bargaining simply because it failed to mention the subject; instead, the Board requires “a conscious relinquishment by the union, clearly intended and expressed.” [*Perkins Machine Co.*, 141 NLRB 98, 102 (1963).]

The Board has affirmed this position in its recent decision in *Johnson-Bateman Co.*, 295 NLRB 180, 184–185 (1989), as follows:

It is well settled that the waiver of a statutory right will not be inferred from general contractual provisions; rather, such waivers must be clear and unmistakable. [*Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).] Accordingly, the Board had repeatedly held that generally worded management rights clauses or “zipper” clauses will not be construed as waivers of statutory bargaining rights. [*Suffolk Child Development Center*, *supra*, 277 NLRB 1345, 1350 (1985); *Kansas National Education Assn.*, 275 NLRB 638, 639 (1985).] Cf. *Rockkford Manor Care Facility*, 279 NLRB 1170 (1986). In *Suffolk Child Development Center*, for example, the Board found that the management-rights clause did not constitute a waiver by the union of its right to bargain about changes in medical benefits, because there was not specific reference in that clause to employee medical benefits or other terms of employment. Likewise, in *Kansas National Education Assn.*, at 639, the Board found that language in the management-rights clause reserving to management “the right to

carry out the ordinary and customary functions of management and adopt policies . . . and practices in furtherance thereof” did not constitute a waiver by the union of its right to bargain about employee transfer arrangements. More specifically, the Board found “[t]he provision is at best vague and as such insufficient to meet the standard of a ‘clear and unmistakable waiver.’”

Waiver of a statutory right may be evidenced by bargaining history, but the Board requires the matter at issue to have been fully discussed and consciously explored during negotiations and the union to have consciously yielded or clearly and unmistakably waived its interest in the matter. [*Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982).] [Emphasis added.]

Although the Union did not require production of information in prior situations before the first negotiating sessions, it has not been shown to have entered an understanding that information will never be produced before the first negotiating session. I find the evidence does not establish the Union clearly relinquished and therefore waived its statutory right to the reasonably diligent production of relevant information. Respondent’s failure to produce the information in a reasonably diligent manner is a violation of Section 8(a)(5) and (1) of the Act.

B. Alleged Unlawful Interrogations

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.”²³ The test whether interrogations by employers are violative of the Act is if “under all of the circumstances the interrogation reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act.” *Rossmore House*, 269 NLRB 1176 (1984), *enfd. sub nom. Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). *Rossmore House*, partially reversed *PPG Industries*, 251 NLRB 1146 (1980), which held questions concerning union sympathies, even when addressed to open and active union supporters in the absence of threats of promises, are inherently coercive.

The Board, in *Rossmore House*, overruled “PPG and similar cases to the extent they find that an employer’s questioning open and active union supporters about their union sentiments, in the absence of threats or promises, necessarily interferes with, restrains, or coerces employees in violation of Section 8(a)(1) of the Act.” Instead, the Board will now consider the background, the identity of the questioner, the nature of the information sought, and the location and method of interrogation. *Id.* at fn. 20. As counsel for the General Counsel notes, an employee’s status as an open and active union supporter does not grant employers a license to ask questions which under all the circumstances are coercive. Citing *Atlantic Forest Products*, 282 NLRB 855 (1987);

Phillips Industries, 295 NLRB 717 (1989). The employee’s status is just one factor to be considered.

Having found Greg Monardo asked Evans, in a hallway near the hospital’s housekeeping department, if he is still a member of the Union; the totality of the circumstances of this questioning must be examined to determine if it was coercive. There is no evidence any other employees were present. Greg Monardo is president of Respondent. There is no evidence Evans was an open and active union supporter. The atmosphere as demonstrated by the circulation of an antiunion petition by some employees, as found below, with the assistance and connivance of admitted supervisors exhibited management disfavor of the Union and its advocates. The inquiry was not contextually made in a friendly and/or joking atmosphere. The Employer presented no valid purpose for questioning Evans and did not assure him that no reprisals would be taken against him. The questioning did not serve a legitimate purpose and none was conveyed to Evans. The conversation was of a nature which would render the questions of union affiliation and dues payments coercive. The subject was introduced by Greg Monardo and he did not explain the basis for the inquiry, increasing the coercive impact of the query. Accordingly, I find under these circumstances, Greg Monardo’s questioning of Evans constituted unlawful interrogation under Section 8(a)(1) of the Act. *Fiber Glass Systems*, 298 NLRB 504 (1990).

About 2 weeks later, George Monardo, Greg’s father and Respondent’s vice chairman of the board of directors, asked Evans if he was still a member of the Union and paying \$19, which is the amount of union dues. This conversation also occurred in a hallway and was not contextually raised by anything Evans said to George Monardo. The raising of the issue of Evans’ union membership by a high management official of an employee who was not shown to be open and active union supporter, about 2 weeks after his son made a similar inquiry, is under these circumstances, coercive interrogation in violation of Section 8(a)(1) of the Act. As previously noted, Respondent did not have a valid purpose for the questionings. See *Fiber Glass Systems*, *id.*, and *Liquitane Corp.*, 298 NLRB 292 (1990).

I find Respondent did not unlawfully interrogate Dorn who was the chief shop steward. Dorn previously had conversations with Greg Monardo in his office concerning union activities based on his position as chief union steward, and there was no aspect of the unusual to create coercion in this case. Dorn admitted Greg Monardo inquired if union authorization cards were being circulated in a manner that contravene Respondent’s no-solicitation rule. There is no claim Respondent’s no-solicitation rule is unlawful. Further, Dorn knew his presence in the office was voluntary and, based on past practice and statements made during the conversation, related to his position of chief shop steward. Dorn testified Greg Monardo asked “how many cards there were” and asked that they not be passed around during hospital time. Greg Monardo’s question concerning the number of cards could readily be interpreted as an attempt to determine the extent of the violations of Respondent’s valid no-solicitation policy. The context of this question was not sufficiently detailed to warrant the conclusion it was unrelated to the number of violations of the no-solicitation rule or other valid basis for inquiry. The General Counsel has not demonstrated in the circumstances presented that the conversation rose to

²³ Sec. 7 of the Act provides, as here pertinent:

Employees shall have the right to self-organization, to form, join, or 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, and shall also have the right to refrain from any or all of such activities

the level of reasonably tending to restrain, coerce, or interfere with the rights guaranteed by the Act. Accordingly, I conclude this allegation of the complaint should be dismissed.

Counsel for the General Counsel and the Charging Party aver Respondent also violated the Act by disparate application of the no-solicitation policy inasmuch as its supervisors and/or agents solicited signatures of employees during worktime. The complaint did not contain this allegation and I find the issue was not fully and fairly tried since Respondent never had notice of this alleged violation and failed to present evidence concerning the matter. Further, the General Counsel has failed to make a prima facie case. The no-solicitation rule was not introduced into evidence and the only means a violation can be found is by inference and innuendo as well as Greg Monardo's testimony supervisors and line employees were also subject to the rule. The failure to introduce into evidence the substance of the rule and other evidence of its application, disparately or otherwise, cojoined with the failure to put Respondent on notice such as amendment to the complaint was contemplated, requires me to find this matter was not fully and fairly tried. *Champ Corp.*, 291 NLRB 803 (1988).

C. The Antiunion Petition

The General Counsel and the Charging Party argue Respondent violated Section 8(a)(1) of the Act by supervisors and/or agents being involved in soliciting employees to sign the decertification petition. I have found above that Bailey and Hendy were involved in the circulation of the decertification petition. The General Counsel and the Charging Party argue Elizabeth Santos and Betty Lerias are agents of Respondent within the meaning of Section 2(13) of the Act. An agent within the meaning of Section 2(2) and (13) of the Act is defined in *American Door Co.*, 181 NLRB 37, 41 (1970), as an employee who, under all the circumstances, the other employees could reasonably believe was reflecting company policy, and speaking and acting for management.

The employer is liable for unfair labor practices committed by an employee who acts as an agent of the employer. *Machinists Local 35 v. NLRB*, 311 U.S. 72, 80-81 (1940). In determining employer culpability for the act of an agent, the question of ratification or authorization of the specific acts is not determinative, *id.*, rather, the rules of Agency, including the rules of apparent authority, are applicable. *NLRB v. Bel-Air Mart, Inc.*, 497 F.2d 322, 324 (4th Cir. 1974); *NLRB v. Johnson Sheet Metal, Inc.*, 442 F.2d 1056, 1060 (10th Cir. 1971).

I find under the circumstances present in this proceeding that both Santos and Lerias are agents as defined in Section 2(2) and (13) of the Act. It is unrefuted Hendy escorted Tijerino to her meeting with Bailey, an admitted supervisor, and that both supervisors Hendy and Bailey directed Tijerino to talk with Santos. Thereafter, Hendy directed both Tijerino and Ramirez to see Lerias for the purpose of Lerias soliciting their signatures to the decertification petition. Lerias and Santos were clearly acting in roles, professedly as agents for admitted supervisors, in relations with employees arising from and in apparent accordance with the instructions of supervisors Hendy and Bailey. *Travelers Insurance Co. v. Morrow*, 645 F.2d 41, 45 (10th Cir. 1981); *Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 566 fn. 5 (1982).

As the Ninth Circuit Court of Appeals stated in *NLRB v. Donkin's Inn*, 532 F.2d 138, 141 (1976):

The principal's manifestations giving rise to apparent authority may consist of direct statements to the third person, directions to the agent to tell something to the third person, or the granting of permission to the agent to perform acts under circumstances which create in him reputation of authority in the area which the agent acts.

Hendy, an uncontroverted supervisor and the direct supervisor of Tijerino and Ramirez, repeatedly directed Tijerino and Ramirez to see Lerias after campaigning for decertification of the Union by bringing Tijerino to Santos and directly discussing decertifying the Union with Ramirez and then escorting him to Lerias' office. Tijerino and Ramirez were not told Lerias was just a coworker without any supervisory or other authority. They were sent to her office as part of an official work request from their supervisor, Hendy. There is no evidence they knew who Lerias was or her function either on the job or in relation to the antiunion petition. I find the solicitation of their signatures on the antiunion petition under these circumstances coercive.

Tijerino, after being escorted to Santos by Hendy and having both Hendy and Supervisor Bailey instruct her to talk with Santos about the Union, was told the Union did not "do anything for you." This antiunion statement was then followed by Hendy's repeated requests Tijerino see Lerias. I find the Employer, through Hendy and Bailey, placed Tijerino and Ramirez in the position where they, as rank-and-file employees, could reasonably believe Santos and Lerias spoke on behalf of management and that Santos and Lerias were vested with apparent authority to act as the Employer's agents. Thus, the actions of Santos and Lerias are attributable to the Employer. *Helena Laboratories v. NLRB*, 557 F.2d 1183, 1187 (5th Cir. 1977); *NLRB v. Solboro Knitting Mills*, 572 F.2d 936, 941 (2d Cir. 1978); *NLRB v. Broyhill Co.*, 514 F.2d 655, 657 (8th Cir. 1975).

The uncontroverted facts require the decision Hendy and Bailey were working with Santos and Lerias in a campaign to decertify the Union. There was no other explanation offered for the coincidence of Tijerino speaking to Santos and Lerias about the antiunion campaign immediately after supervisors directed her to these employees. I conclude that under all the circumstances, the employees could reasonably believe that Santos and Lerias were reflecting employer policy, and speaking and acting for management when they were associated with the decertification petitions.

This finding is buttressed by the similar incident concerning Ramirez being brought to Lerias shortly after Hendy gave him an antiunion lecture. The solicitation of Tijerino and Ramirez to sign the decertification petition cannot be characterized as mere chance or a casual isolated incident reflecting isolated action by Lerias and Santos. The nature of the incidents require a conclusion that Respondent's supervisors Bailey and Hendy were actively involved in persuading employees to support the decertification effort and assisted in the solicitation of employees' signatures on the petition.

I find that under all the circumstances, the acts of Respondent and its agents were coercive, indicating it disfavors

union representation and wanted employees to support its position by signing the petitions, in violation of Section 8(a)(1) of the Act. *Community Cash Stores*, 238 NLRB 265 (1978); *Sherwood Diversified Services*, 288 NLRB 341 (1988); *Dentech Corp.*, 294 NLRB 924 (1989); *St. Mary's Medical Center*, 297 NLRB 421 (1989). See also *Einhorn Enterprises*, 279 NLRB 576 (1986).

The complaint also alleges Respondent's chief house physician Walsh circulated the decertification petition. I have previously found that the record fails to support a finding Walsh committed this violation of the Act and this allegation of the complaint should be dismissed.

D. Respondent's Alleged Unlawful Withdrawal of Recognition

Respondent withdrew recognition from the Union on April 5, 1989, effective May 1, 1989. Respondent contends this withdrawal is appropriate based on the employee petitions raising a good-faith doubt the Union represented a majority of the employees in the unit. The General Counsel argues the record does not establish Respondent had a reasonable good-faith belief the Union no longer represented a majority of the employees. Initially, the General Counsel asserts recognition was withdrawn in the face of unremedied unfair labor practices, i.e., the unlawful interrogations, its promotion of the circulation of decertification petition, including the involvement of supervisors in the soliciting of signatures, and its failure to furnish the Union with relevant information. Also alleged is the failure of Respondent to clearly demonstrate a majority of the represented employees signed the decertification petitions.

The legal standard in considering the defense of a good-faith doubt of continued union majority was stated in *Hospital Employees District 1199P v. NLRB*, 864 F.2d 1096, 1101-1102 (3d Cir. 1989), as follows:

A union chosen by an appropriate bargaining unit is presumed to have the continued support of the majority of its members. See *Fall River Dyeing*, 107 S.Ct. at 2233; *NLRB v. Burns International Security Service, Inc.*, 406 U.S. 272, 279 n. 3 (1972) . . . The purpose behind this presumption is to promote stability in the collective bargaining relationship and hence industrial peace. See *Fall River Dyeing*, 107 S.Ct. at 2233. "Where an employer remains the same, a Board certification carries with it an almost conclusive presumption that the majority representative status of the union continues for a reasonable time, usually a year. After this period, there is a rebuttable presumption on majority representation." *Burns*, 406 U.S. at 279 n. 3 (citations omitted). After the initial year, the question of whether the presumption of majority support has been rebutted is recast in terms of whether the employer "has reasonable, good faith grounds for believing that the union has lost its majority status" after a collective bargaining agreement has expired. *International Association of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770, 772 (3d Cir.), cert. denied, 109 S.Ct. 222 (1988).

In order to show good faith doubt, the employer must produce evidence probative of a change in employee sentiment. This is a difficult burden to meet. For

example, the fact that an employee has crossed a picket line is not evidence that the employee has abandoned the union. *NLRB v. Frick Co.*, 423 F.2d 1327, 1333-34 (3d Cir. 1970). Similarly, we have declined to accept testimony proffered by an employer's representative based on his subjective conclusions about change in sentiment. *Toltec Metals, Inc. v. NLRB*, 490 F.2d 1122, 1125 (3d Cir. 1974). In sum, for an employer "[t]o meet this burden 'requires more than an employer's mere mention of [its good faith doubt] and more than proof of the employer's subjective frame of mind.' What is required is a 'rational basis in fact.'" *Toltec*, 490 F.2d at 1125 (bracketed statement in original) (quoting *NLRB v. Risk Equipment Co.*, 407 F.2d 1098, 1101 (4th Cir. 1969)); see also *Frick*, 423 F.2d at 1331.

Another criterion to the professing of a good-faith doubt of the union's majority status is that this claim must be raised in a context free of illegal antiunion activities or conduct by the employer "aimed at causing disaffection from the union." *Celanese Corp. of America*, 95 NLRB 664, 673 (1951). I have already found that in January 1989 and continuing to date, Respondent unlawfully materially affected its employees by failing to provide the Union with information reasonably necessary to its performance as collective bargaining representative, in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act. I have also found several violations of Section 8(a)(1) of the Act, including unlawful interrogation and unlawful participation of supervisors and agents in the decertification campaign, the very basis upon which Respondent claims it holds a good-faith doubt of the Union's continuing status as the representative of a majority of the employees in the unit.

Respondent argues the petition should be considered a valid representation of employee sentiment for there was "no more than minimal employer involvement in the petition"; citing *Eastern States Optical Co.*, 275 NLRB 371 (1985). I find this argument unpersuasive and without merit. The Board in *Eastern States*, found the only employer involvement was assistance in drafting the verbiage of the petition after and pursuant to an employee's request. The Board specifically held it was undisputed the Employer "played no role in obtaining the . . . signatures." *Id.* at 371. In the instant proceeding I have found Respondent, through its supervisors and agents, assisted in obtaining signatures during worktime when there was a valid no-solicitation rule in place and thus interfered with its employees' Section 7 rights. Thus I find Respondent is precluded from relying on the petition as grounds for withdrawing recognition of the Union. Respondent's action in these circumstances were sufficient to taint the entire solicitation of signatures on the antiunion petition. *Dow Chemical Co.*, 217 NLRB 376 (1975); *Sherwood Diversified Services*, supra; *Alexander Linn Hospital Assn.*, 288 NLRB 103 (1988). Accordingly, I conclude that Respondent's withdrawal of recognition violated Section 8(a)(5) and (1) of the Act.

The Charging Party argues, assuming arguendo, the decertification petition was not tainted by unfair labor practices, it failed to establish a loss of majority. Specifically, the Charging Party avers Kane, and thus Respondent, failed to establish and substantiate the claim the bargaining unit contained 119 persons of whom 63 signed the decertification pe-

tion. In support of this argument, the Charging Party notes there are a number of employees on the payroll list relied upon by Kane in checking whether signatories of the petition were in fact employees that were not shown to have worked during the period represented by the payroll readout Kane obtained from a contractor who prepared the document. There is no evidence records were checked to discover if these employees had worked since the first signature was obtained on the petition around January 25, 1989. All she did was examine the exemplars of the signatures of the employees, she made no effort to speak to any signatories to verify they signed the petition. Kane could not state which payroll period the list represented. The Charging Party contends 10 of the signatories to the petition may be casual employees possibly not entitled to inclusion in the unit.

Since the applicability of the payroll list to the determination of the employees included in the unit during the appropriate time the decertification petition was circulated and signed, the Charging Party argues the payroll list should not be considered. In sum, the Charging Party avers Respondent failed to demonstrate the signatories to the decertification petitions were members of the unit certified as appropriate by the Board in October 1987 and did not establish the signatories were qualified for inclusion in the bargaining unit. Considering the above conclusion the decertification petition was tainted by the involvement of supervisors and agents in the solicitation of signatures, I find it unnecessary to address this contention of the Charging Party.²⁴

CONCLUSIONS OF LAW

1. The Respondent, Davies Medical Center, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Hospital & Health Care Workers Union Local No. 250, Service Employees International Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material the Union has been the exclusive collective-bargaining representative within the meaning of Section 9(a) of the Act for the following appropriate unit:

All full time and regular part time employees covered under the terms of Respondent's bargaining proposal implemented on or about May 1, 1988, excluding all other employees, guards and supervisors as defined in the Act.

4. At all times material herein, the Union has been the exclusive collective-bargaining representative of all of the employees in the unit found appropriate in Conclusion of Law 3 for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

²⁴If it is found the petition was not tainted by the involvement of supervisors and agents in the solicitation process, I would find that Respondent failed to clearly establish it held a reasonably based good-faith doubt of union majority. *Colonna's Shipyards*, 293 NLRB 136 (1989).

5. By coercively interrogating employees about their union membership and the amount of their union dues, Respondent violated Section 8(a)(1) of the Act.

6. By supervisors and agents encouraging, and coercively soliciting its employees to sign a petition to decertify the Union, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. By failing and refusing to furnish the Union with certain information requested by it, Respondent has engaged in an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act.

8. By withdrawing and withholding recognition of the Union and the exclusive representative of its employees in the above specified unit, Respondent has refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

9. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

10. Respondent has not otherwise violated the Act.

THE REMEDY

Having found Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and take certain affirmative actions designed to effectuate the policies of the Act.

Having found Respondent has refused to meet and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act, it will be ordered to cease and desist therefrom and, on request, to bargain collectively in good faith with the Union as the exclusive representative of all the employees in the appropriate unit, and in the event an understanding is reached, to embody such understanding in a signed agreement. See *Winn-Dixie Stores*, 243 NLRB 972 (1979); *Alsey Refractories Co.*, 215 NLRB 785 (1974). In addition, Respondent should maintain in effect the terms and conditions of employment specified in the now-expired collective-bargaining agreement unless and until the Respondent and the Union agree otherwise, or until the parties bargain to a legitimate impasse.

To the extent Respondent has changed the terms and conditions of employment in effect under the old agreement to the economic detriment of employees, Respondent is required to make whole the employees for any losses they suffered as a consequence of its unlawful unilateral changes and withdrawal of recognition.

In the event any backpay is due, the computation of backpay shall be in the manner provided by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), together with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), except that any interest accrued prior to January 1, 1987, shall be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[Recommended Order omitted from publication.]