

East Tennessee Baptist Hospital and Office & Professional Employees International Union, Local 268. Cases 10-CA-23887, 10-CA-24302, 10-CA-24413, and 10-CA-24508

August 27, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On June 4, 1990, Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief.

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 brief and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified and to adopt the recommended Order as modified.²

1. We agree with the judge that the Respondent violated the Act by refusing to furnish the wage and attendance information the Union requested. By agreeing to article 19.2(b) in the 1988-1989 contract as it relates to wage increases and article 19 in the 1989-1991 contract as it relates to personnel matters, the Respondent obligated itself to provide the requested information to allow the Union to verify the Respondent's compliance with the contracts.

The Respondent claimed that it attempted to accommodate the Union's request for wage information by offering to permit, at the Union's expense, a "mutually agreeable independent certified public accountant" (CPA) to examine the Respondent's payroll records to determine whether unit employees received the same percentage wage increase as nonbargaining unit employees received in July 1988. We do not believe the Respondent's offer was a reasonable attempt to accommodate the Union's request for wage information.

¹The 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.

In agreeing with the judge that the Respondent violated Sec. 8(a)(3) by refusing to grant Sharon Rimmer's request to transfer to a 12-hour shift because she failed to solicit the Union to withdraw the unfair labor practice charges, we emphasize the following. The Respondent violated Sec. 8(a)(1) by telling Rimmer her request would be granted if she solicited the Union to withdraw the unfair labor practice charges. In addition, we note that about the same time the Respondent refused Rimmer's request, it honored two other requests for shift transfers and a request for the retention of a 12-hour shift. Although these requests were made earlier in time than Rimmer's request, they were nonetheless implemented at a time when the Respondent claimed it could not honor Rimmer's request because of pending unfair labor practice charges.

²The judge inadvertently failed to include a make-whole remedy for the Respondent's failure to grant Rimmer's request for a shift transfer. The judge also inadvertently failed to include a bargaining provision in the notice. We shall correct these errors.

The Respondent's obligation to provide the information arises from the contractual commitment to grant unit and nonunit employees the same wage increase. The contract contains no restrictions on the Union's entitlement to verify that the increases were equivalent. Thus, the parties' contract provides the Respondent no grounds on which to insist on such a restriction. Further, by suggesting that the CPA be mutually acceptable, the Respondent retains veto power over who the Union's agent in examining the books will be. Such a limitation is unreasonable, for to accede to it would be to allow the Respondent ultimate control over a matter ostensibly relinquished by contract. Finally, the Respondent has not shown that the wage information the Union seeks is so complex that it requires the analytical services of a CPA to interpret.

2. The judge found that the Respondent violated Section 8(a)(5) of the Act by conducting a survey among unit employees. We do not agree.

In the spring of 1989, the Respondent experienced considerable staffing problems in the operating room. Merry Anne Pierson, director of surgical services and supervisor of operating room personnel, testified that eight employees left the operating room staff between April and June 1989 due to problems associated with the shift schedule. Pierson decided to conduct a survey among operating room personnel to solicit their opinions on how to solve the staffing problem.

The Union was not notified that the Respondent intended to conduct a survey. Pierson believed that "it was within our right to, as management, to determine what shifts we needed to staff our department so that we could provide patient care." Pierson relied on the contract's article 15, section 15.1, which states as follows:

Permanent changes in shifts and hours of employment may be made as necessary to provide adequate patient care. Such changes are first made on a voluntary basis within the affected departments Changes in shifts and hours of employment shall be made only for legitimate, non-discriminatory reasons and shall not be made for the purpose of harassing any employee. In the event the hospital determines that massive changes in shifts or hours of employment are necessary, it will notify the Union of the changes before instituting the same and meet with the Union upon request to discuss the impact of the changes upon affected employees.

The Respondent did not implement the proposed staffing plan it developed as a result of the June 1989 survey. Pierson testified that the new staffing pattern, had it been put into effect, would have been on a voluntary basis and would have involved only 10 employees on 2 shifts.

The judge found that the focus of the survey involved hours of work, a mandatory subject of bargaining. The judge also found that the Respondent routinely notified the Union of planned employee surveys and bargained about the surveys when the Union requested. The judge concluded that the Respondent violated the Act “by dealing directly with unit employees” in conducting the survey. We do not agree.

There is no dispute that, prior to the time the survey was conducted among the operating room employees, the Respondent had experienced serious difficulties in staffing the shifts in that department. Pierson’s testimony establishes that the provision of adequate patient care was of major concern. The contract gives the Respondent the right to make shift changes “as necessary to provide adequate patient care.” Any proposed changes in the shift schedule would have been on a voluntary basis, in accordance with the contract. The employee survey was designed to collect information to enable the Respondent to determine if the operating room employees wanted to make changes in their schedules on a nonmandatory basis.³

Finally, the employee survey was conducted during the term of a contract. No contract negotiations were pending or contemplated.⁴

Considering all the circumstances, especially that the contract gave the Respondent the right to make shift changes as necessary to provide patient care and that the survey was conducted during the contract term and no negotiations were contemplated, we find that the Respondent did not violate the Act by conducting a survey among operating room employees.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the judge’s Conclusion of Law 6.

“6. The Respondent, by failing and refusing to furnish the Union information requested by it which is necessary and relevant to the Union’s performance of its function as the exclusive collective-bargaining representative of the employees in the bargaining unit, violated Section 8(a)(5) and (1) of the Act.”

³Cf. *United Technologies Corp.*, 274 NLRB 1069, 1071 (1985) (survey not unlawful where purpose was to determine whether personnel policies and benefits programs were being communicated to new hires).

⁴Cf. *Obie Pacific*, 196 NLRB 458 (1972), where survey found unlawful, as it was conducted to determine employee support for union’s bargaining position. *NLRB v. Wallkill Valley General Hospital*, 866 F.2d 632, 636 (3d Cir. 1989), enfg. *Alexander Linn Hospital Assn.*, 288 NLRB 103 (1988), relied on by the judge, is also distinguishable. There the survey sought employee preferences as to certain employee benefits proposals previously addressed directly in collective bargaining and at a time when there was a possibility of renewed bargaining over the same issues. Here, to the contrary, the subject matter of the survey was totally unrelated to any ongoing or upcoming negotiations. Further, the Respondent has shown, unlike the respondent in *Alexander Linn*, a compelling need to ascertain employee views relevant to exercising a management right explicitly granted by the collective-bargaining agreement.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, East Tennessee Baptist Hospital, Knoxville, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(b) and reletter the subsequent paragraphs.

2. Substitute the following for paragraph 2(b).

“(b) On request, transfer Sharon Rimmer to the 12-hour shift and, if necessary, make her whole for any loss of earnings or benefits she may have sustained as a result of the Respondent’s unlawful conduct. Any loss of earnings or benefits shall be determined with interest computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).”

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

MEMBER OVIATT, concurring in part and dissenting in part.

I concur with my colleagues’ resolution of the issues in this case except with regard to the Union’s demand for wage information regarding nonrepresented employees.

In August 1988, the Union requested certain information including “(1) James, job titles and rates of pay *before* the July 1988 wage increase for *all* EPBH non-bargaining unit employees.” The Respondent answered that it did not believe the hospital was obligated to provide the information requested concerning non-bargaining unit employees. Six weeks later the Union “clarified” its request by indicating that it demanded rates of pay for nonunit employees both *before* and *after* the July 1988 across-the-board 5-percent market wage increase. The asserted basis for this request was article XIX of the parties’ collective-bargaining agreement which provided in pertinent part:

Effective July 4, 1988, each employee shall receive a market wage rate equal to the percentage market wage adjustment (not including special market wage adjustments) that non-bargaining unit employees will receive in July, 1988; or an amount equal to the difference between the employee’s existing wage rate and the new maximum rate for the job classification, whichever is less.

The Respondent replied that the nonbargaining unit employee wage rates requested were confidential both from the standpoint of the employees involved and the hospital and therefore respectfully declined to provide that specific information. In light of article XIX, however, the Respondent agreed to permit access by a CPA to the relevant payroll records for the purpose of

enabling the accountant to determine whether the market wage adjustment (not including special market wage adjustments) percentage increases received by unit and nonunit employees were the same. It continued, "we believe this suggestion fully accommodates any legitimate interest you have in the matter."

The Union insisted that it was entitled to the information in the form requested. Union Business Representative Pope, who made the request, testified at the hearing that even if an accountant checked the wages, "that was not sufficient." He testified that he still needed the right to go out and independently verify any kind of wage information; "for example . . . I needed the names and the other information so that I could verify it."

My colleagues conclude that by agreeing to article XIX in the contract relating to wage increases, the Respondent obligated itself to provide the information requested by the Union in the form requested by the Union. I disagree.

There is no dispute here that the Union has a right to assurance that the 5-percent market wage increase has been evenly applied as provided in article XIX of the contract. But that is *all* that the Union is entitled to. Article XIX cannot reasonably be interpreted to grant the Union the right to an unlimited fishing expedition, or to require the Respondent to furnish the Union with unlimited information as to the names, job titles, and rates of pay of *all nonunit* employees of the hospital in the form demanded by the Union. To say that the Union has a legitimate interest in verifying that the contractual requirement regarding the market wage increase has been complied with clearly does not include the right to garner confidential information regarding employees that the Union does not represent and which just as clearly is not required for the Union to ascertain whether the 5-percent increase was in fact the same. To conclude, as the majority apparently does, that agreement to a clause providing that market wage increases will be equivalent is the same as *also* agreeing that the Respondent will provide the Union with confidential information about nonunit employees is to rewrite the parties' contract.

The Union here has shown no legitimate need for any information other than verification that the contract clause had been complied with. It ignored the Respondent's reply that its request was overbroad except to expand the scope of its request. It also rejected the Respondent's proposed offer to accommodate the Union's right to police the contract clause in light of the confidentiality of information concerning employees that the Union did not represent¹ But when those

¹My colleagues assert that the Respondent's suggestion that the CPA be mutually acceptable was an unreasonable limitation. To the contrary, I deem it eminently prudent. Indeed, even the Union raised no objection on that ground.

aspects had been raised by the Respondent, the burden shifted to *the Union* to propose an accommodation which would enable it to verify compliance, while at the same time meeting the concerns raised by the Respondent.² The Union's explanation was that even if an accountant checked the wages, Pope still "needed the names and the other information so that I could verify it." That simply is not sufficient to demonstrate a *necessity* for the Union to be given all the information it wants in the form that it wants it concerning nonbargaining unit employees.³

In sum, the Union has utterly failed to demonstrate the requisite necessity for the requested information as to nonunit employees, and it failed to modify its request to accommodate the limited right to information that it *did* have with the concerns of overbreadth and confidentiality raised by the Respondent. Accordingly, I would dismiss this allegation of the complaint and I dissent from my colleagues failure to do so.

²Indeed, the Union not only failed to meet its burden of proposing a means of reconciling its demand with the confidentiality problem as to nonunit employees, it explicitly rejected any such accommodation. Thus, in response to the Respondent's November 8, 1988 letter, Union Representative Pope continued to insist that he "needed the names and the other information so that" he could verify it independently and, even if an accountant checked the wages, the Union "still needed" the *right* to go out and *independently* verify any kind of wage information. Such a statement does not indicate any effort to accommodate the Employer's confidentiality needs.

³The Judge stated that the Respondent's willingness to let a CPA examine the payroll records to determine whether the market wage adjustments percentage increases were the same for unit and nonunit employees was "inconsistent" with its prior claim of confidentiality. That is more reminiscent of Alice in Wonderland than appropriate legal analysis.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT refuse to bargain collectively with Office & Professional Employees International Union, Local 268, as the exclusive bargaining representative of our employees in the following appropriate unit, by refusing to furnish the Union requested wage informa-

tion and attendance information in accord with its requests on and after August 19, 1988, and October 12, 1989:

All licensed practical nurses and technical employees, employed by Respondent at its Knoxville, Tennessee hospital including computerized tomograph, registered technologist; staff radiology technologist and clinical instructor; nuclear medicine technologist; radiation therapy technologist; special procedures technologist; non-registered staff technologist; registered staff technologist; licensed practical nurse, level II, nursing service; licensed practical nurse, level I, nursing service; licensed practical nurse, level I, recovery room; operating room technician; certified lab assistant; certified respiratory therapist; respiratory therapy technician; respiratory therapy technician, level I, pulmonary laboratory technician; bloodbank technician; histopathology technician; medical laboratory technician; licensed practical nurse, emergency room; cyto technologist; physical therapy assistant; laboratory assistant heart center; cardiovascular technician I; respiratory, intensive care, therapist; but excluding office clerical workers; guards; professional employees; supervisor as defined in the Act and all other employees.

WE WILL NOT promise our employees that we will grant requests to transfer them to a 12-hour shift in order to encourage them to solicit the Union to withdraw its unfair labor practice charges.

WE WILL NOT refuse to transfer our employees to a 12-hour shift on their request because they failed to solicit the Union to withdraw its unfair labor practice charges.

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, on request, recognize and bargain with the Union by furnishing the Union information regarding the wages and attendance of nonunit employees to enable the Union to determine whether we are in compliance with our collective-bargaining agreement with the Union.

WE WILL, on request, transfer employee Sharon Rimmer to a 12-hour, 3-day-a-week shift and make her whole, with interest, for any loss of earnings or benefits she may have sustained by our failure to transfer her.

EAST TENNESSEE BAPTIST HOSPITAL

Frank F. Rox, Jr., Esq., for the General Counsel.

E. H. Rayson, Esq., of Knoxville, Tennessee, for the Respondent.

DECISION

STATEMENT OF THE CASE

J. PARGEN ROBERTSON, Administrative Law Judge. This case was heard in Knoxville, Tennessee, on February 7, 1990.

The complaint alleges that Respondent engaged in conduct violative of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (Act).

Respondent admitted the commerce allegations of the complaint. Respondent in its answer to second amended consolidated complaint admitted that it is engaged in the business of operating a hospital in Knoxville, Tennessee. During the past calendar year, Respondent received gross revenues in excess of \$250,000 from services rendered at its Knoxville hospital and it purchased and received at that facility, goods valued in excess of \$100,000 directly from suppliers located outside Tennessee. Respondent admitted that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent, in its answer, admitted that the Charging Party (Union) is, and has been at material times, a labor organization within the meaning of Section 2(5) of the Act. Respondent admitted that on February 28, 1979, the Union was certified as the exclusive collective-bargaining representative of its employees in the following appropriate bargaining unit:

All licensed practical nurses and technical employees, employed by Respondent at its Knoxville, Tennessee hospital including computerized tomograph, registered technologist; staff radiologic technologist and clinical instructor; nuclear medicine technologist; radiation therapy technologist; special procedures technologist; non-registered staff technologist; registered staff technologist; licensed practical nurse, level II, nursing service; licensed practical nurse, level I, nursing service; licensed practical nurse, level I, recovery room; operating room technician; certified lab assistant; certified respiratory therapist; respiratory therapy technician; respiratory therapy technician, level I, pulmonary laboratory technician; bloodbank technician; histopathology technician; medical laboratory technician; licensed practical nurse, emergency room; cyto technologist; physical therapy assistant; laboratory assistant heart center; cardiovascular technician I; respiratory, intensive care, therapist; but excluding office clerical workers; guards; professional employees; supervisor as defined in the Act and all other employees.

Respondent and the Union engaged in collective bargaining and entered into collective-bargaining agreements. The most recent of those collective-bargaining agreements provided that it is effective until the end of the day on June 30, 1991.

I. RECORD EVIDENCE

A. *The Complaint Alleges that Respondent Violated the Act by Refusing to Furnish Relevant Information Requested by the Union*

1. Information regarding wages

On August 19, 1988, the Union wrote Respondent and requested,

(2) Please include as a separate listing any increase in shift bonus, increases for overtime payments, week-end differentials or any other economic gain for non-bargaining unit employees which became effective on or about July 1988, and the effective date for such changes.

(3) Copies of any and all correspondence presented to the ETBH Board of Directors, or the appropriate authority, recommending the July 1988 economic package, pertaining to both bargaining unit and nonbargaining unit employees. Also please provide copies of any and all correspondence from the appropriate authority which pertains to the recommendations or approval of such authority in the granting of economic gains for the nonbargaining unit and the bargaining unit.

Respondent replied by September 9, 1988 letter including the following,

We do not believe that the hospital is obligated to provide you with the information you requested concerning nonbargaining unit employees or that we are obligated to provide you with documents that come to the attention of the Board or any written responses from the Board thereon.

On October 27, 1988, the Union wrote the Respondent and acknowledged receipt of the names, addresses and phone numbers of some employees but complained that 41 percent of the listed employees did not have phone numbers listed and that incorrect addresses were listed for some employees. The letter continued,

The union also renews the request for information on the non-bargaining unit employees as requested in a letter to you dated August 19, 1988 (copy attached). Article XIX. section 19.2 states that bargaining unit employees are to receive "a market wage adjustment based on a percentage of the employees' existing wage rate equal to the percentage market wage adjustment that nonbargaining unit employees will receive in July 1988. . . ." The information requested in the August 19 letter is necessary for the union to determine whether or not the labor agreement has been violated.

The Union's business agent, Phillip Pope, testified as to why the Union wanted the nonbargaining unit information,

Well, there had been a history here of the nonbargaining unit employees receiving "greater" wage increases than the bargaining unit. And in the 1988 negotiations it was agreed between the parties and written into our contract that the wage increases given to the

nonbargaining unit would be the same as what they were giving to the bargaining unit. And the employees in the bargaining unit, we were given wage information on what their before and after wages were to assure compliance with the contract. However, we had no way to know whether or not the nonbargaining unit received more or less than what had been agreed to in the contract. So, in order to ensure compliance of the contract we needed the nonbargaining unit wages to make sure that the Baptist Hospital had lived up to our agreement.

On November 8, 1988, Respondent wrote the Union,

This is in reply to your letter of October 27.

. . . .
You also request the names, job-titles and the before and after July 1, 1988, wage rates of non-unit employees so that you may ascertain whether Article XIX of the agreement has been violated. The employee wage rates you request are confidential both from the standpoint of the employees involved and the Hospital. We, therefore, respectfully decline to provide that specific information to you. In light of Article XIX, however, we will agree to permit, at your expense, a mutually acceptable independent certified public accountant to have access to our relevant payroll records for the purpose of enabling the accountant to determine whether the market wage adjustment (not including special market wage adjustments) percentage increases unit employees received were the same as that non-unit employees received. We believe this suggestion fully accommodates any legitimate interest you have in the matter. If this meets with you approval, please let me know and we can arrange for a time and also agree upon guidelines the accountant is to follow.

Article XIX of the collective-bargaining agreement between Respondent and the Union in October 1988, is entitled "Wage Rates." Relevant provisions under that article, at 19.2(b), include the following,

effective July 4, 1988, each employee shall receive a market wage rate equal to the percentage market wage adjustment (not including special market wage adjustments) that non-bargaining unit employees will receive in July, 1988; or an amount equal to the difference between the employee's existing wage rate and the new maximum rate for the job classification, whichever is less.

Phillip Pope of the Union testified that he talked with Respondent's agent, Human Resources Vice President Daniel Standley, about Standley's November 8 letter suggesting that the Union hire a CPA to examine Respondent's pay records for nonbargaining unit employees:

I told Mr. Standley that wasn't acceptable. I told him it wasn't acceptable primarily for two reasons. Number one, our Local Union couldn't afford something like that, in my opinion, because we had been running at deficit.

Number two, even if an accountant checked the wages, then the Union still needed the right to go out and independently verify any kind of wage information. For example . . . I needed the names and the other information so that I could verify it.

And Mr. Standley's response was, "This is all we're going to do."

Phillip Pope testified that Respondent never asked the Union to sign a confidentiality agreement regarding wage information for nonbargaining unit employees.

Pope testified that the Union has never been provided with the requested information on nonunit employees.

On cross-examination Pope admitted that no nonunit employee told him that the nonunit employees had received greater wage increases than unit employees.

In July 1988 brochures were given to all employees, both unit and nonunit employees, which announced a general wage increase of 5 percent:

1. Effective July 4, 1988, all employees will be awarded a market wage increase of 5%. This increase will be added to the employees' current base amount regardless of position in the wage range. Thus, for employees at the top of the 1987 wage range, the 5% will be added to your base and a new maximum of the wage range will be established. **THIS CHANGE APPLIES TO THIS TRANSITION WAGE INCREASE ONLY.** For employees at the maximum of the wage range, after July 4, 1988, lump sum bonus merit increases will be given as in the past.

2. During the period July 1, 1988, to June 30, 1989, employees will be eligible for AN ADDITIONAL proportioned Pay for Performance merit increase on their service date.

Daniel Standley testified that the above brochure as well as the 5-percent market wage increase, was applicable to both unit and nonunit employees.

2. Information regarding attendance

On October 12, 1989, the Union wrote Respondent regarding several grievances. In that letter the Union discussed grievances regarding employee absenteeism. The letter included the following:

In addition to the above requested information, please provide the union with copies of all attendance records for all bargaining unit and nonbargaining unit employees from June 1, 1988, up to and including the week before supplying the information to the union. This information should reflect an employee's attendance and whether or not the employee was scheduled to work the day of absence. Also please provide copies of suspension and discharge records for nonbargaining unit personnel. Additionally, please provide the *absolute* policy which governs the number of days of absence which requires warnings, written reprimands or suspensions and exactly how is this absentee policy explained to employees.

On October 24, 1989, Respondent answered the Union's October 12 letter (in part):

With regard to your broad information request, we decline to provide you with the attendance records of nonbargaining unit employees: We regard this request as being excessively burdensome and out of line with any legitimate need or interest of the Union. It may be that the records of some non-unit employees in a department where unit employees also work are relevant, particularly those with poor attendance. It may also be that the attendance records of certain bargaining unit employees may be relevant. In any event, I suggest that we meet to explore an accommodation of our respective interests.

You have been provided with copies of all policies on this subject but in the event they have been misplaced, Policies 951-08-01 and 951-09-01 are enclosed. I refer you also to the management's right provisions of our agreement.

Pope testified that he talked with Standley in early November after receiving the above letter:

and in his letter dated October 24th he said it was a burdensome request. I offered to Mr. Standley to come into the Hospital myself, on my time, and review the records to keep them from having to go to any type of burdensome duplicating purposes. . . . Mr. Standley said that was not acceptable.

Phillip Pope testified that the Union needed the absenteeism information he requested to check compliance with a provision in their collective-bargaining agreement with Respondent that provided

"that all personnel policies which affect non-bargaining unit people will affect the bargaining unit people on the same and equal basis. The absentee policy of Baptist Hospital is not addressed in our contract. Or, it is not modified. So, the same policy on attendance would be the same for bargaining unit as it was for non-bargaining unit."

So, in order to see if the Hospital was in fact applying the policy equally between the bargaining unit people and the non-bargaining unit people, I needed the employees' attendance records.

According to Pope, the Union has not received any of the requested absenteeism records on nonbargaining unit employees.

Pope admitted on cross-examination that he had been told by Respondent (Standley) that Standley wanted to go to a structured absentee policy because different departments in the hospital had been applying the attendance policy in an inconsistent fashion.

Phillip Pope also admitted on cross that Standley told him that he would supply the absenteeism records for any nonunit employee specifically named by the Union. Pope replied that he had no access to the nonunit employees and could not name any particular employee that may illustrate disparity in application of the absenteeism rules.

Daniel Standley testified that following a request from Pope regarding unit personnel, he discovered his assistant had handled suspensions of some employees for absenteeism, but that Respondent had failed to notify the Union of those

suspensions as required by the contract. Upon further discussion Standley agreed that Respondent would not contend that any grievance that may be filed by the Union over those suspensions, was untimely. After that incident the Union made their request for information on nonunit employees. Standley testified about conversations he had with Pope regarding that request,

I had told (Pope) that we would be willing to provide that information on the bargaining unit employees. That was a fairly good sized job in and of itself. Because these attendance records, the period of time that he was asking for, I think, was June of '88 through that present time. And the way our attendance records are structured is that they are on an eight and a half by eleven page. The first six months of a year is on one side of the page and the second six months of the year is on another side of the page. These records are maintained by the department directors. So, it is a decentralized system that we have. They are not centrally located in the Human Resources Department.

. . . .
. . . I communicated to Mr. Pope that we would be willing to provide the attendance records on any specific non-unit employee that they felt had worse attendance records and they wanted to look at. . . .

In my mind, with sixty some different departments and the number of employees that were involved, if we were to have one employee do it. Or, if you were to combine all the times of the department employees to put this together probably would have been over a weeks work for one person.

However, Standley admitted that Respondent may not have applied the absenteeism policy uniformly throughout the hospital:

I knew that there were inconsistencies in the way it was being applied from department to the other. I didn't, in all cases, know of the particulars involved and I had communicated that to Mr. Pope in some of these conversations. That I would prefer and would have liked to have seen a more specific policy that would communicate specific expectations to the employees and specific expectations to the managers as to how we proceeded and what our policy would be on absenteeism and attendance. . . . We published (a structured absenteeism policy that calls for a specific discipline after so many incidents) in December and it went into effect on January 1 of 1990.

Phillip Pope, in rebuttal testimony disputing testimony of Daniel Standley, testified that he suggested to Standley on two occasions that he would personally come to Respondent's facility and go over nonunit employees attendance records in order to relieve Respondent of any burden. Standley denied his requests.

B. The Complaint Alleges that Respondent Violated the Act by Conducting an Employee Survey Among Unit Employees Without Notifying the Union

The parties agreed by stipulation that Respondent conducted an employee survey among virtually all non-supervisory employees in the operating room department in late June 1989, and that those surveyed employees included approximately 34 bargaining unit employees. The parties further agreed that the results of the employee survey were published to bargaining unit employees on July 20, 1989.

Director of Surgical Services Merry Anne Pierson testified that at the time of the survey there were 84 nonsupervisory employees in the operating room department including 50 nonunit and 34 bargaining unit employees.

That survey supplied to operating room employees read:

PLEASE FILL OUT THIS SURVEY AND SIGN! WE ARE VERY INTERESTED IN YOUR OPINION

DO YOU THINK 3-11 SHOULD WORK WEEKENDS?
YES NO

DO YOU THINK 11-7 SHOULD WORK WEEKENDS?
YES NO

DO YOU THINK WE SHOULD STAFF WEEKENDS WITH 12 HOUR PEOPLE FRI., SAT., AND SUN.? YES NO

DO YOU THINK 3-11 AND 11-7 SHOULD ROTATE HOLIDAYS? YES NO

DO YOU THINK WE SHOULD HAVE A PERMANENT 3-11 AND 11-7 SHIFT DURING THE WEEK? YES NO

WOULD YOU BE WILLING TO COVER WEEKEND OFF SHIFTS SO WE COULD HAVE PERMANENT 3-11 AND 11-7 SHIFTS IF THAT MEANT NOT INCREASING WEEKEND ROTATIONS? YES NO

SIGNATURE _____

ALL UNSIGNED FORMS WILL BE DISCARDED!

Respondent distributed the following survey results to operating room unit employees:

OPERATING ROOM SURVEY RESULTS

There were thirty one respondents to the survey and the following are the results:

1. 99% stated that we should have 12 hours shift coverage for Friday Saturday, and Sunday.
2. 70% stated 3-11 & 11-7 shifts should rotate holidays.
3. 94% stated we should have permanent 3-11 & 11-7 shifts.
4. 71% stated 11-7 should not work weekends.
5. 50% stated that 3-11 should not work weekends.
6. 52% stated that they would work off shifts on their assigned weekend to work if needed.

Director of Surgical Services Merry Anne Pierson testified as to the "circumstances that resulted in this survey:"

There were a number of suggestions made from the staff that there had to be a way to solve the problem

with (staffing and keeping staffed) the 3:00 to 11:00 shift and the unhappiness that people had from working on that shift and having to rotate off. As a result of that we wanted to hear if they had any better suggestions at it than we did.

Phillip Pope testified that Respondent did not notify the Union before they conducted the above survey.

The parties stipulated regarding a decertification petition filed regarding unit employees. A decertification petition was filed on March 28, 1989. That petition was dismissed but was reinstated on May 4, 1989. The petition was blocked on August 4, 1989, and is being held in abeyance pending resolution of unfair labor practice charges.

Daniel Standley testified that Respondent has conducted other surveys including a survey in the cafeteria during the fall, 1989, when the Union was not notified of the survey. Standley did admit that the Union was advised of plans for an employee attitude survey in February 1989, and that, because of Union objections, that survey did not include unit employees.

In rebuttal testimony Phillip Pope testified that he was notified of the cafeteria survey by Daniel Standley and that Standley sent him a copy of the survey.

C. The Complaint Alleges that Respondent Promised an Employee a 12-hour Shift if that Employee Would Solicit the Union to Withdraw Unfair Labor Practices Charges and that Respondent has Illegally Refused to Transfer Employee Sharon Rimmer to a 12-hour Weekend Shift

Surgical Technician Sharon Rimmer testified that in the fall, 1989, she asked Respondent if she could go on a 12-hour shift. About a week later she had a conversation about her request with Director of Surgical Services Merry Anne Pierson.

(Ms. Pierson) said that she had heard that I was going to take that position (the 12 hour shift), but I couldn't have it right then because there was a grievance filed by the Union against the Hospital. When they got that resolved, then I could have it.

Some time later Rimmer again talked about the 12-hour shift with Pierson:

I just asked her if she had heard anything else about my job yet. And she said, no, that it would be a while.

And I said, "Well, I had been looking at the Union contract and it looked like from what it said that as far as it didn't interfere with anybody else's hours and things, that I could have the shift."

And she said, "Well, the Hospital attorney told me not to fill anymore of the positions until this other problem is resolved."

I said, "Well, Mr. Pope said that as far as the unit is concerned, that I could have the job. It would be any problems with the Union and he would even write a letter stating that it was okay for me to take it."

. . . .

And she said, "Well, if you can get the Union attorney to drop the charges against the Hospital, then you can have that position."

On cross-examination Rimmer testified that two unit employees went on 12-hour shifts because in part, of their attending school. According to Rimmer, one employee, Carolyn Allan, was placed on a 12-hour shift some 2 years before February 7, 1990 (the date of this hearing).

Rimmer testified that Pierson did not know whether Rimmer was in the Union or not.

Rimmer testified that she has not been given the 12-hour shift position.

Operating Room Technician Sherrill Bishop testified she overheard a conversation between Rimmer and Pierson. Bishop testified:

I remember Ms. Rimmer asking (Pierson) about the (twelve-hour shift). And then I just remember what Ms. Pierson stated to her. Which was, if you can get the Union to rescind their charges against the Hospital, then I can give you your shift.

Director of Surgical Services Merry Anne Pierson admitted having at least two conversations with Sharon Rimmer. Pierson denied telling Rimmer that she could get the 12-hour shift if she could get Pope to drop his charge. Pierson testified:

Sharon stopped me in the lounge one day and said that Mr. Pope had said that she could go to that shift. I told her that I was still under advisement from Mr. Standley and the lawyers that I was not to move anyone else to the shifts until some resolution had occurred.

Pierson testified that a plan which may have involved a reduction in force was being considered at that time which would drastically change

the number of people available to us during the week. We reduced by approximately ten fulltime equivalent positions. And because of that and because the biggest bulk of our procedures are done Monday through Friday 7:00 to 3:30, or 7:00 to 5:30, there was no way I was going to implement or move another person to a weekend twelve-hour shift. I needed to have them available during Monday through Friday staffing.

Pierson testified that she was unable to tell employees about the consideration toward reduction in force at the time of her conversations with Rimmer about the 12-hour shift.

That reduction in force came about on November 6, 1989. No members of the bargaining unit were actually eliminated because of the reduction in force.

Pierson said that until a recent special situation (apparently regarding employee Kathy Burns, see below), she has not placed anyone on a 12-hour shift since her conversations with Rimmer and that as people came off the 12-hour shift, they were not replaced.

Director of Human Resources (formerly Vice President of Human Resources) Daniel Standley testified that after the Union filed a charge regarding the operating room department survey, he told Director of Surgical Services Merry Anne Pierson that "it would probably be best if we didn't move anyone else to that twelve-hour shift."

Business Agent Phillip Pope testified that he talked to Human Resources Vice President Standley about a complaint

that employee Sharon Rimmer had asked for a 12-hour shift but, among other things, Rimmer had been told by her supervisor that she could not have the 12-hour shift because the Union had filed unfair labor practice charges. Pope argued to Standley that two other employees had been given 12-hour shifts.

Pope testified that Standley replied that Respondent did not deny that Rimmer had not been awarded a 12-hour shift. Standley admitted to Pope that Rimmer's supervisor, Merry Anne Pierson, told Rimmer there had been a charge filed and that Respondent's attorney had advised Respondent not to make any more 12-hour shift appointments at that time. Standley denied that Merry Anne Pierson told Rimmer that she would get the 12-hour shift if she could get the Union to withdraw the charges.

On cross-examination Pope denied that Standley said anything to him about Respondent developing a plan of reorganization. Pope testified:

The only thing that Mr. Standley said in connection with that, Mr. Rayson, was the fact that their attorney had advised them not to make anymore changes as far as putting people on the twelve-hour shift. And that Merry Anne Pierson was accurate when she made that statement to Ms. Rimmer. That was the only conversation about twelve-hour shift between Mr. Standley and myself. That you had advised them, I assume that you were their attorney, not to make any more changes.

Daniel Standley testified in accord with Pope's testimony regarding their two conversations about Rimmer's quest for the 12-hour shift. However, in addition to what Pope recalled, Standley recalled that he told Pope about a possible reorganization. Standley testified that he told Pope

that we were not going to be making any more changes on the twelve-hour shift, because of the unfair labor practice pending. But also, because—I said I was not at liberty to go into any details at that time. And not all of the plans were formalized at that time, but that our top management was already considering and in the process of looking at a reorganization. Mr. Pope asked me if that would affect staffing? I said, "Yes."

He said, "Does that mean that there is going to be a layoff?"

I said, "Well, again, I'm not really in a position to go into any details at this time, but that would not be beyond the realm of possibility. That I would share with him the information that was relevant to the bargaining unit at a point in time in which that was firmed up.

Pope's cross-examination continued on the question of whether any other employees have been placed on 12-hour shifts:

Q. Do you know of anyone, or has it been reported to you that any employee since mid-September, who has been put on the twelve-hour shift?

A. Yes, there have been, as of two weeks ago. . . . I understand that within the last couple of weeks one of the original two that was filled when this survey was implemented, or portions of it were implemented, one

of those two people, I understand, left the employe of the hospital and the Hospital put another bargaining unit person on one of those shifts. . . . I think the name (of the employee that was placed on the 12 hour shift two weeks ago) is Kathy Burns.

They (Respondent) are using employees, staggering their days off during the week and they are still covering the position as called for in the survey, they just aren't covering the position in the same procedure.

Q. Do you have any objection to that?

A. Well, I think in the beginning, Mr. Rayson, and other instances where Baptist Hospital wanted to make massive changes it called the Union in, we've sat down, we've discussed it. We had feedback from the employees that we represent about the impact it would have on their personal lives. And this thing goes deep, because the majority of our membership are female who have other obligations outside of work. I'm not saying that the men don't either, but primarily in the South women have a hell of a lot of obligations outside of work. And our employees also receive what we call a weekend shift bonus.

We were bypassed in this particular case. Yes, I feel like we should have had some input into it.

The parties entered into the following agreement:

(Testimony that employee Kathy Burns was placed on a twelve-hour shift some two weeks before this hearing) is correct.

A child of Ms. Burns, still in school, attempted suicide and Ms. Burns requested to be put on this shift (12-hour day, three days a week), in order that she could more closely attend her child during the week. The Hospital agreed for that sole reason to place her on that shift, period. The placement is temporary and will conclude at the end of the school year.

Director of Surgical Services Merry Anne Pierson testified that there are currently three daily shifts in the operating room department plus some "individuals working some ten-hour shifts and two individuals working a twelve-hour shift."

II. CREDITABILITY DETERMINATIONS

A. *The Complaint Alleges that Respondent Violated the Act by Refusing to Furnish Relevant Information Requested by the Union*

1. Information regarding wages

In most areas the evidence regarding this allegation is not in dispute. There is no dispute regarding the letters (e.g., the Union's letters dated August 19 and October 27, 1988, and Respondent's letters dated September 9 and November 8, 1988).

Nor is there dispute as to the reasons given by Phillip Pope as to why the Union wanted the nonbargaining unit employees' wage information.

There is no dispute regarding the provisions of the collective-bargaining agreement, the brochure distributed to employees in July 1988, or that Respondent awarded both unit

and nonunit employees a July 1988 market wage increase of 5 percent.

Moreover, there was general agreement between Pope and Standley regarding their conversations over the nonunit employees' wage records. I found both Standley and Pope to be generally truthful. However, as shown below, I find that Standley exaggerated testimony regarding Respondent's decision to deny a transfer to employee Sharon Rimmer. Due to that determination and my determination that Pope testified truthfully throughout the hearing, I shall credit the testimony of Pope and, to the extent it conflicts with Pope's testimony, I discredit the testimony of Daniel Standley.

2. Information regarding attendance

There was general agreement as to the evidence regarding the Union's request for records involving attendance and absenteeism among nonunit employees. There was no dispute as to the letters from the Union and Respondent.

There was general agreement as to what was said in conversations between Phillip Pope and Daniel Standley. There was disagreement between Pope and Standley regarding whether Pope volunteered to Standley that Pope would be willing to come to Respondent's facility and go over the nonunit employees attendance records.

As shown above, I credit the testimony of Pope, and to the extent of conflict with Pope, I discredit the testimony of Standley.

B. The Complaint Alleges that Respondent Violated the Act by Conducting an Employee Survey Among Unit Employees Without Notifying the Union

There was no dispute in the evidence regarding the operating room survey.

There was a dispute between Pope and Standley regarding whether the Union was advised of the cafeteria survey in the fall of 1989. In view of my credibility findings throughout this decision, I credit the testimony of Pope, and, to the extent there is a dispute, I discredit Standley.

C. The Complaint Alleges that Respondent Promised an Employee a 12-hour Shift if that Employee Would Solicit the Union to Withdraw Unfair Labor Practices Charges and that Respondent has Illegally Refused to Transfer Employee Sharon Rimmer to a 12-hour Weekend Shift

As shown above, both Merry Anne Pierson and Daniel Standley testified about two factors which influenced Respondent's decision to not transfer anymore employees to the 12 hour shift. One of those two alleged factors created several credibility conflicts.

That factor involved the reorganization considerations by Respondent. There was a conflict between Phillip Pope of the Union and Daniel Standley as to whether Standley told Pope about the reorganization discussions when they discussed the Rimmer complaint on September 20.

In consideration of the full record I am convinced that Pope testified truthfully regarding his September 20 conversation with Standley. In agreement with Pope, I find that Standley did not tell Pope that possible reorganization was also considered in deciding to deny Rimmer's request to transfer to the 12-hour shift. I make that decision, in part,

because of confusion between Standley and Director of Surgical Services Merry Anne Pierson, as to the status of the reorganization discussions on September 20.

Both Pierson and Standley agreed that reorganization talks played a part in the decision to deny Rimmer her requested transfer to a 12-hour shift. However, Pierson's testimony as to her reasons for denying the 12-hour shift to Rimmer, went beyond a simple explanation that Respondent was considering reorganization which may have impacted on operating room personnel.

Pierson testified that a plan which may involve a reduction in force was being considered at that time which would drastically change

the number of people available to us during the week. We reduced by approximately ten fulltime equivalent positions. And because of that and because the biggest bulk of our procedures are done Monday through Friday 7:00 to 3:30, or 7:00 to 5:30, there was no way I was going to implement or move another person to a weekend twelve-hour shift. I needed to have them available during Monday through Friday staffing.

Pierson testified that she was unable to tell employees about the consideration toward reduction in force at the time of her conversations with Rimmer about the 12-hour shift.

That reduction in force came about on November 6, 1989. Daniel Standley was able to specifically recall the date on which Phillip Pope phoned him about Rimmer being denied her request to transfer to the 12-hour shift. Standley recalled that phone conversation occurred on September 20, 1989.

On cross-examination Standley was asked when did Respondent first start identifying employees and job classifications which would be laid off in November:

Okay. That would have been in late September, early October. We didn't get down to specific employees until much closer to November.

Standley testified about what he told Pope regarding Rimmer's effort to transfer to the 12-hour shift,

that we were not going to be making any more changes on the twelve-hour shift, because of the unfair labor practice pending. But also, because—I said I was not at liberty to go into any details at that time. And not all of the plans were formalized at that time, but that our top management was already considering and in the process of looking at a reorganization. Mr. Pope asked me if that would affect staffing? I said, "Yes."

He said, "Does that mean that there is going to be a layoff?"

I said, "Well, again, I'm not really in a position to go into any details at this time, but that would not be beyond the realm of possibility. That I would share with him the information that was relevant to the bargaining unit at a point in time in which that was firmed up.

. . . .

I felt that I ought mention something to Mr. Pope to try to give some perspective to why we weren't going to be following through on some of the things that we had talked about. But certainly I was not at liberty and

since there were no employees in the organization that were involved in this re-organization conceptionalization below the department director level. And even though I mentioned some things to Mr. Pope about it, it was not something that we wanted to have be common knowledge. So, I asked Mr. Pope to, you know, please keep that in confidence.

As mentioned above, Pope disputes the above testimony. However, at this point I am concerned with a comparison of the testimony of Standley and that of Merry Anne Pierson. Standley's testimony shows that the reorganization discussions caused concern as to where those talks may lead as to staffing. However, according to Pierson, the talks had already progressed to the point of her knowing that she had a staffing problem on weekdays which prevented her from considering transferring Rimmer to the weekend 12-hour shift regardless of the status of the unfair labor practice charge.

When the above testimony of Pierson is compared with that of Standley, it is apparent that those two had different recollections of the status of the reorganization plans at the time Sharon Rimmer asked to be placed on the 12-hour shift. Pierson recalled that reorganization plans had progressed to the point of her realizing that she would have a shortfall on the weekday work force. Because of that information, according to her testimony, she would not have placed Rimmer on the 12-hour schedule regardless of the pending unfair labor practice charge, for the simple reason that she could not afford to lose someone from her weekday team. Standley, on the other hand, recalled that reorganization discussions were such that they may have developed to the point of affecting staffing and he wanted Pope to be aware of that possibility. Standley's testimony revealed that reorganization talks had not progressed beyond the point of revealing there may be a staffing problem down the road.

Daniel Standley was able to pinpoint his first conversation with Pope regarding Rimmer's complaint, as occurring on September 20, 1989. In view of Standley's testimony in that regard, it is apparent that Pierson's conversations with Rimmer concerning Rimmer's request to transfer to the 12-hour shift, occurred before September 20, 1989.

In view of the fact that Pierson made the decision regarding Rimmer's request before September 20, the fact that the reorganization was not implemented until November 6, and especially in view of Standley's testimony regarding the status of the reorganization talks on September 20, it is apparent that specific staffing levels including reductions as to available weekday jobs, had not occurred on September 20.

I am convinced that Pierson exaggerated the impact the reorganization discussions had had on weekday staffing at the time of Rimmer's request for a transfer. In an effort to establish an additional motive for denying Rimmer transfer to the 12-hour shift, Pierson was not content to rest on a simple statement that the considered reorganization may have affected staffing and for that additional reason she was cautious about transferring anyone to a 12-hour shift. Instead Pierson accelerated the decisional time table on reorganization in order to assert a more substantial reason for denying the requested transfer.

The testimony of Standley convinces me that, at the very most, the reorganization discussions had progressed only to the point of revealing a possible staffing problem down the

road. Pierson, on the other hand, testified that because of those reorganization discussions, she knew that she could not afford to transfer anyone off the weekday shifts.

As stated above, I am also convinced that Standley did not testify truthfully regarding his September 20 conversation with Pope. Although I do not dispute that reorganization discussions may have occurred during September and October 1989, I have strong doubts about the testimony of Standley and Pierson that reorganization impacted on the decision to deny Rimmer's request to transfer. Standley and Pierson demonstrated confusion as to exactly how those talks influenced the decision to deny Rimmer's transfer. I am convinced that Standley exaggerated the importance of the reorganization discussions by falsely stating that he told Pope the discussions were an additional reason why Rimmer's request was denied. As found above, Pierson exaggerated the impact of the reorganization discussions on Rimmer's transfer beyond Standley's recollection (see above).

I credit the testimony of Sharon Rimmer and Sherrill Bishop. Both Rimmer and Bishop are employees of Respondent. Although Rimmer may have had something to gain regarding her desire to work the 12-hour shift, Bishop had nothing to gain. Both risked the displeasure of their employer by testifying against Respondent. I was impressed with the demeanor of both Rimmer and Bishop. In most respects Rimmer was corroborated by the testimony of Merry Anne Pierson. The one area of dispute between Rimmer and Pierson, was Rimmer's contention and Pierson's denial, that Pierson told Rimmer that Rimmer would get the 12-hour shift if she could persuade the Union to drop their unfair labor practice charge. As to that disputed area, Sherrill Bishop corroborated Rimmer.

III. FINDINGS OF FACT

A. *The Complaint Alleges that Respondent Violated the Act by Refusing to Furnish Relevant Information Requested by the Union*

1. Information regarding wages

Beginning on August 19, 1988, the Union requested wage information regarding both unit and nonunit employees. From September 9 Respondent has refused to supply the Union with requested wage information regarding nonunit employees.

The parties' collective-bargaining agreement in effect in 1988, required Respondent to grant the same percentage market wage adjustment to unit employees that it granted to nonunit employees in July 1988.

Respondent offered to permit an acceptable CPA to examine its nonunit employees pay records provided the Union pay the CPA. The Union declined that offer.

There is no evidence showing that Respondent failed to comply with the collective-bargaining agreement requirement that it grant unit and nonunit employees the same percentage market wage adjustment in July 1988.

2. Information regarding attendance

The credited evidence shows that the Union wrote Respondent on October 12, 1989, and requested attendance records for all unit and nonunit employees. Respondent has, since its letter of October 24, 1988, denied the Union's re-

quest regarding nonunit employees on the grounds that such production would be burdensome.

The Union offered to come to Respondent's facility and examine the requested records there in an effort to avoid being burdensome.

The evidence shows, without dispute, that Respondent has an obligation under the collective-bargaining agreement to treat unit and nonunit employees without discrimination in applying its attendance and absentee policy.

Daniel Standley admitted to the Union there were inconsistencies in the way Respondent's absenteeism policy was applied between departments.

Effective on January 1, 1990, Respondent implemented a structured absenteeism policy applicable to all departments.

B. The Complaint Alleges that Respondent Violated the Act by Conducting an Employee Survey Among Unit Employees Without Notifying the Union

The undisputed evidence shows that Respondent conducted a survey as shown above, among unit and nonunit employees in the operating room department in late June 1989. The results of that survey were published by Respondent to unit and nonunit operating room department employees on July 20, 1989. The Union was not notified and permitted to bargain about the survey.

The credited evidence shows that on other occasions Respondent has notified the Union and permitted the Union to bargain regarding employee surveys.

C. The Complaint Alleges that Respondent Promised an Employee a 12-hour Shift if that Employee Would Solicit the Union to Withdraw Unfair Labor Practices Charges and that Respondent has Illegally Refused to Transfer Employee Sharon Rimmer to a 12-hour Weekend Shift

The credited evidence shows that Director of Surgical Services Merry Anne Pierson told employee Sharon Rimmer that Rimmer could not transfer to the 12-hour shift because of an unfair labor practice charge filed by the Union and that Rimmer could be transferred if she could get the Union to withdraw that charge.

IV. LEGAL CONCLUSIONS

A. The Complaint Alleges that Respondent Violated the Act by Refusing to Furnish Relevant Information Requested by the Union

The Respondent, in its brief, raises four points in defense of these allegations. Respondent argues that General Counsel failed to prove relevancy, that the records included confidential information, that the Union's request was burdensome (which included Respondent's contention that the Union failed to propose alternative accommodations) and that the hospital's responses to the Union were adequate.

As to relevancy:

It is settled that an employer is obligated to furnish information requested by its employees' collective-bargaining agent which is relevant and necessary to the Union's bargaining responsibilities under the terms of a collective-bargaining agreement. *Kendall College of Art*, 292 NLRB 1065 (1989); *George Koch & Sons*, 295 NLRB 695 (1989).

As to information regarding unit employees there is a presumption that the information is relevant to the Union's bargaining obligation. When the information requested of an employer is about employees or operations other than those represented by the Union it is necessary for the General Counsel to prove relevancy. However, the standard for relevancy is the same whether relevancy is presumed or proved by specific evidence. That standard is a liberal discovery-type standard. *Ibid*.

In a dissent Board Chairman Stephens wrote,

The Respondent has submitted all other items of information requested by the Union, but refuses to furnish the names and addresses of employees, arguing that this information is not relevant to the Union's duties and responsibilities as the exclusive bargaining representative of the employees in the unit. As the information sought here pertains to employees and operations other than those represented by the Union, the Union has the burden of establishing the relevance of the information. (*Ohio Power Co.*, 216 NLRB 987, 991 (1975), *enfd.* 531 F.2d 1381 (6th Cir. 1976). The Union has failed to meet that burden.

As the judge notes, at the hearing the Union never answered the question why the Union needs the names and addresses of these employees and in its brief to the judge, it states only that, as its collective-bargaining agreement with the Respondent may be applicable to the H & K and E & M employees, a list of their names and addresses would be "helpful." Although the standard of relevance to be applied here is a liberal one, the Union still bears the burden of demonstrating "the reasonable and probable relevance of the requested information." *Southern Nevada Builders Assn.*, 274 NLRB 350, 351 (1985). *Blue Diamond Co.*, 295 NLRB 1007 (1989).

The Board majority in *Blue Diamond* found,

there is sufficient showing of relevance to warrant the conclusion that the Respondent has an obligation to furnish the names of E & M Express, Inc. (E & M) and H & K Equipment Company, Inc. (H & K) employees. As the judge found, there is "an objective factual basis for the Union to believe that bargaining unit work was being performed by employees of E & M and H & K, that H & K and E & M together with Respondent might constitute a single employer, and that the assignment of subcontracting of loads to their drivers violated both the recognition clause of the agreement and the subcontracting clause." *Id.* at 1011. That objective factual basis makes the Union's request here a legitimate one and clearly not, as urged by our dissenting colleague, a fishing expedition. . . .

Thus, the Union's request for information is merely part of an investigatory process through which it determines whether or not there exists a basis for a grievance against the Respondent. . . . *Blue Diamond Co.*, *supra*.

Here, unlike the situation in *Blue Diamond Co.*, the Union did provide reasons why it needed the information sought from Respondent. As to the attendance records Phillip Pope testified that the Union needed the absenteeism information he requested to check compliance with a provision in their collective-bargaining agreement.

Respondent did not dispute that it has a contractual obligation to treat unit and nonunit employees alike. Respondent, in its brief, cited the 1989–1991 collective-bargaining agreement, Article XIX—Preservation of Benefits:

All personnel policies and benefits which pertain to all other employees, which the Hospital may change from time to time, shall pertain on an equal basis to all employees governed by this Agreement, except where such subjects have been addressed or modified in this Agreement in which case, this provision shall be inapplicable.

Regarding the wage information sought on nonunit employees—the Union’s business agent, Phillip Pope, testified as to why the Union wanted the nonbargaining unit information:

Well, there had been a history here of the non-bargaining unit employees receiving “greater” wage increases than the bargaining unit. And in the 1988 negotiations it was agreed between the parties and written into our contract that the wage increases given to the non-bargaining unit would be the same as what they were giving to the bargaining unit. And the employees in the bargaining unit, we were given wage information on what their before and after wages were to assure compliance with the contract.

However, we had no way to know whether or not the nonbargaining unit received more or less than what had been agreed to in the contract. So, in order to ensure compliance of the contract we needed the non-bargaining unit wages to make sure that the Baptist Hospital had lived up to our agreement.

Article XIX of the collective-bargaining agreement between Respondent and the Union in October 1988 is entitled “Wage Rates.” Relevant provisions under that article, at 19.2(b), include the following,

effective July 4, 1988, each employee shall receive a market wage rate equal to the percentage market wage adjustment (not including special market wage adjustments) that nonbargaining unit employees will receive in July 1988; or an amount equal to the difference between the employee’s existing wage rate and the new maximum rate for the job classification, whichever is less.

In the instant matter the disputed requests for information involve nonunit employee records. However, unlike the situation in other cases involving records of nonunit employees, there are specific provisions within the applicable collective-bargaining agreements which deal with the matters at issue here. As shown above, there are provisions requiring Respondent to treat unit employees in the same manner as nonunit employees in many areas including the areas of pay and attendance.

In light of the specific provisions of the collective-bargaining agreements, there is a question as to General Counsel’s burden and the issue of presumptions. As shown above, when the issue involves records of unit employees, there is a presumption that the records are relevant to the Union’s bargaining responsibilities. Although the instant contest involves nonunit employees, the presumption may also apply in view of the fact that the collective-bargaining agreements provide the manner in which nonunit employees are treated vis-a-vis unit employees.

However, in view of my findings below, that question regarding presumption, is of no moment. I find that the record includes evidence which illustrates that the requested records are relevant to Union’s bargaining responsibilities. I make that finding in large part, because of the specific collective-bargaining contract provisions requiring equal treatment between unit and nonunit employees. The contract’s provisions provide a legitimate grounds for the Union’s inquiry. The Union is entitled to information which would enable it to examine whether the contract is being obeyed. Only by knowledge as to how Respondent is treating nonunit employees may the Union oversee compliance with those contract provisions requiring equal treatment for unit employees.

I find that General Counsel proved that the records sought by the Union are relevant and material to the Union’s obligations as exclusive collective-bargaining representatives of the unit employees.

As to the question of confidentiality:

Respondent did not seek to accommodate its bargaining obligation with regard to confidentiality of records. For example, Respondent did not seek to have the Union agree to keep records confidential. In a similar situation the Board held,

In affirming the judge’s 8(a)(5) and (1) findings based on the Respondents’ refusal to provide relevant information requested by the Union, we find no merit in the Respondents’ contention that their refusal was justified because some of the requested information was confidential. The Respondents raised confidentiality concerns for the first time at the hearing, and at no time complied with the duty to come forward with some offer to accommodate its concerns with its bargaining obligation. See *Oil Workers Local 6–418 v. NLRB*, 711 F.2d 348, 363 (D.C. Cir. 1983); *Tritac Corp.*, 286 NLRB 522 (1987). At no time has the Union indicated that it would not consider such an accommodation, and it implicitly showed a willingness to do so in its information request by providing for the exclusion of arguably confidential contract sales figures from a relevant document requested. *Maben Energy Corp.*, 295 NLRB 149 fn. 1 (1989).

Although Respondent did raise the question of confidentiality in one of its letters to the Union (see above), Respondent subsequently took an inconsistent position regarding confidentiality. In that regard Respondent expressed a willingness to permit a CPA to examine its records despite its concern over confidentiality. Respondent did not explain why it was willing to have a CPA examine its records but would not permit the Union to do so. Additionally, as shown above, Respondent did not ask the Union for any assurances that the

Union would respect confidentiality not did it ask the Union to sign a confidentiality agreement.

I find that the Respondent has failed to prove that confidential records could not receive adequate protection. Phillip Pope testified that he would agree to assure Respondent that he would protect confidential records. There was no showing that Pope's assurances would be inadequate. In fact, Respondent's Director of Human Resources Daniel Standley testified that he has asked Pope to keep several matters confidential and there was no showing that Pope has ever failed to keep the confidences requested by Standley. I recommend that Respondent's defense in that regard be overruled.

As to the claim that the Union's request was burdensome:

As shown above, I credited evidence showing that the Union offered to come to the Hospital and examine the records. Respondent failed to show how that alternative proposal would cause hardship on the Hospital.

In view of Phillip Pope's suggestion that he would examine the records at the Hospital, if the Respondent agreed, I find that the record evidence does not support the Respondent's claim that the Union's request was unduly burdensome.

As to the claim that Respondent adequately replied to the Union's request, I disagree. What the Respondent points to in this regard is its response that it would agree to having the Union provide a mutually agreed upon CPA examine the records at the Union's expense.

Respondent did not show how an examination by a CPA would relieve it of the inconveniences complained about above. For example there was no showing how the CPA would affect the claim of Respondent regarding relevancy, burdensomeness or confidentiality.

The relevancy claim would remain the same regardless of the CPA question. As to burdensomeness, there was no showing that it would be less burdensome for Respondent to provide for the CPA to examine the records than for Phillip Pope to examine those same records. As to confidentiality, Respondent made no showing that its records would retain greater confidential protection under a CPA than under examination by Pope especially in view of the fact that Respondent never asked Pope if he would be willing to give assurances of confidentiality.

I am unable to find that Respondent's alternative proposal would accomplish anything. On the other hand, it is undisputed that that proposal would be a costly one to the Union. Respondent did not rebut Phillip Pope's contentions that a CPA would be expensive and that the Union could not afford that expense.

In view of the above, I find that Respondent's response to the Union to the effect that it would agree to the Union providing a mutually agreeable CPA to examine the records at the Union's expense, was not sufficient. See *Tama Meat Packing Corp.*, 291 NLRB 657 (1988).

B. The Complaint Alleges that Respondent Violated the Act by Conducting an Employee Survey Among Unit Employees Without Notifying the Union

As to this issue Respondent argues that the management rights provisions of the applicable collective-bargaining agreement enables it to make shift changes and for that reason, the survey is not illegal.

Regardless of the merits of Respondent's argument, the issue here is not one of alleged unilateral changes (i.e.,

whether, as Respondent argues, the right to unilaterally make shift changes), but one of alleged direct dealing with employees (i.e., questioning unit employees by use of the employee survey).

If the allegation involved a contention that Respondent illegally changed working hours for operating room department employees then Respondent's argument referencing the management-rights provisions of the collective-bargaining agreement would be entitled to more consideration. However, the complaint makes no such allegation. Instead the complaint alleges that Respondent engaged in direct dealing with unit employees over matters which should have been submitted to the collective-bargaining representative of the employees. There is nothing in the management-rights provisions which entitle Respondent to bypass the Union and deal directly with employees regarding mandatory subjects of bargaining.

The credited evidence shows that Respondent conducted an employee survey among operating room department employees which included both unit and nonunit employees, without notice to the Union. At that time, in late June 1989, there existed a collective-bargaining agreement between the Union and Respondent even though a decertification petition was filed on March 28, 1989, and dismissed but reinstated on May 4, 1989. Since August 4, 1989, that decertification petition has been held in abeyance pending the outcome of unfair labor practice proceedings.

In *Laminated Products*, 294 NLRB 816 (1989), the Board upheld a finding that an employer violated Section 8(a)(5) and (1) by conducting an employee survey among unit employees which "reflects a deliberate undertaking (1) to deal directly with employees on matters . . . which properly should have been addressed to the collective-bargaining representative . . ."

In a case similar to this case, *NLRB. v. Wallkill Valley General Hospital*, 866 F.2d 632 (3d Cir. 1989), the court granted enforcement to a Board Order finding that an employee survey constituted direct dealing with employees in violation of Section 8(a)(5). There, as here, the survey inquired into matters which may have been involved in contract negotiations, and the survey was conducted during the existence of a collective-bargaining agreement while a decertification petition was pending but was being held in abeyance.

Here, the credited evidence shows that it was Respondent's practice to routinely notify the Union of planned employee surveys and to engage in bargaining whenever requested by the Union. There was no evidence showing that the Union had ever been bypassed regarding employee surveys before the filing of the decertification petition on March 28, 1989.

The survey at issue deals with working conditions (i.e., hours of work) which is a mandatory subject of collective bargaining to the extent it involves unit employees. Here, of course, unit employees, as well as nonunit employees, were involved in the survey.

I find that the record supports the allegations that Respondent's action in conducting the survey circumvented the Union in matters within the scope of the Union's responsibility, and constitute a violation of the Act by dealing directly with unit employees.

C. The Complaint Alleges that Respondent Promised an Employee a 12-hour Shift if that Employee Would Solicit the Union to Withdraw Unfair Labor Practices Charges and that Respondent has Illegally Refused to Transfer Employee Sharon Rimmer to a 12-hour Weekend Shift

It is settled law that an employer may not discriminate against its employees because a Union initiates proceedings before the Board. Nor may an employer coerce its employees into interfering with Board proceedings initiated by the employees collective-bargaining representative.

Here the credited evidence illustrated that Respondent's agent Merry Anne Pierson told Sharon Rimmer that she was being denied the opportunity to transfer to the 12-hour shift because the Union had filed unfair labor practice charges over the survey conducted by Respondent among operating room employees (see above).

Even if we assume for the sake of argument, that an employer may take some actions in order to stop possible illegal activity or to protect itself from the possible detrimental effects of unfair labor practices (e.g., such as steps to cut off a potential back pay award), it would be necessary to consider whether the employer's action had a reasonable nexus to those possibilities. Here, there does not appear to be such a nexus. There was no showing by Respondent that it was reasonable for it to change its policy of permitting employees to transfer to its 12-hour 3-day shift in an effort to either cure possible unfair labor practices alleged in a charge, or to cut off any liability that may flow from the Union's unfair labor practice charge regarding the operating room employees survey.

When Merry Anne Pierson mentioned the Union's grievance (charge) she was referring to the Union's August 21, 1989, unfair labor practice charge regarding the operating room department survey (10-CA-24302). That survey questioned employees about how they felt about certain working hours and if they would prefer certain changes in those hours. However, that particular charge did not allege that Respondent was engaged in any unlawful activity by permitting employees to transfer to different shifts. Charge 10-CA-24302 alleges:

Since on or about February 1989, the employer has engaged in individual bargaining and has bypassed the collective-bargaining agent in matters pertaining to wages, hours, and other terms and conditions of employment.

It was not until October 5, 1989, well after Merry Anne Pierson told Rimmer that she could not transfer because of the Union's unfair labor practice charge, that the Union filed a charge (10-CA-24413) which included an allegation that "since September 15, 1989, the employer has implemented the work schedule" etc. That charge was, in fact, referring to Merry Anne Pierson's conversation with Rimmer.

Therefore, there was no logical connection between the charge by the Union and the action of Respondent around September 15, 1989, in telling its employee that it would discontinue allowing employees to transfer to the 12-hour shift.

In view of the above, there does not appear to be any logical business justification behind Respondent's action in

changing the transfer policy regarding the 12-hour 3-day shifts.

By the comments by Pierson regarding Respondent's motive for changing the policy and denying Rimmer the opportunity to transfer to the 12-hour 3-day-a-week shift, Respondent informed it employee that she was being denied benefits because of the Union filing charges.

Pierson went further. She promised Rimmer that Respondent would permit transfer if Rimmer persuaded the Union to drop its unfair labor practice charge regarding the operating room department survey.

Section 8(a)(3) of the Act prohibits an employer from discriminating against its employees in regard to "any term or condition of employment to encourage or discourage membership in any labor organization."

Section 8(a)(1) of the Act prohibits an employer from interfering, restraining or coercing employees in the exercise of protected activities.

By promising to grant Rimmer's request to transfer in order to have the Union drop its charge over the survey, Respondent took action which both discouraged Rimmer from supporting the Union and which interfered, restrained, and coerced her because the Union was engaged in actions in furtherance of its duties as the employees' collective-bargaining agent.

In view of the evidence proving that Respondent engaged in other activity violative of sections of the Act, I find that General Counsel has proven antiunion animus.

I find that General Counsel has proved a Section 8(a)(1) and (3) violation by Respondent refusing to transfer Rimmer to the 12-hour shift unless she persuaded the Union to drop its unfair labor practice charge regarding the operating room survey.

CONCLUSIONS OF LAW

1. East Tennessee Baptist Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Office & Professional Employees International Union, Local 268 is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union has been at times material herein the exclusive representative for the purposes of collective bargaining of the following employees:

All licensed practical nurses and technical employees, employed by Respondent at its Knoxville, Tennessee hospital including computerized tomograph, registered technologist; staff radiology technologist and clinical instructor; nuclear medicine technologist; radiation therapy technologist; special procedures technologist; non-registered staff technologist; registered staff technologist; licensed practical nurse, level II, nursing service; licensed practical nurse, level I, nursing service; licensed practical nurse, level I, recovery room; operating room technician; certified lab assistant; certified respiratory therapist; respiratory therapy technician; respiratory therapy technician, level I, pulmonary laboratory technician; bloodbank technician; histopathology technician; medical laboratory technician; licensed practical nurse, emergency room; cyto technologist; physical therapy assistant; laboratory assistant heart center; car-

diovascular technician I; respiratory, intensive care, therapist; but excluding office clerical workers; guards; professional employees; supervisor as defined in the Act and all other employees.

4. Respondent, by promising its employee a 12-hour shift if the employee would solicit the Union to withdraw unfair labor practice charges, violated Section 8(a)(1) of the Act.

5. Respondent, by refusing to allow employee Sharon Rimmer to transfer to a 12-hour weekend shift because she failed to solicit the Union to withdraw unfair labor practice charges, violated Section 8(a)(3) and (1) of the Act.

6. Respondent, by failing and refusing to furnish the Union information requested by the Union which is necessary and relevant to the Union's performance of its function as the exclusive collective-bargaining representative of the employees in the above described bargaining unit and by unilaterally engaging in direct bargaining with its bargaining unit employees by conducting an employee survey among unit employees without notice and bargaining with the Union, violated Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

ORDER

The Respondent, East Tennessee Baptist Hospital, Knoxville, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Office & Professional Employees International Union, Local 268 as the exclusive bargaining representative of the employees in the following appropriate unit, by refusing to furnish the Union information it requested regarding nonunit employees' wage information on and after August 19, 1988, and by refusing to furnish the Union information it requested regarding nonunit employees attendance information on and after October 12, 1989:

All licensed practical nurses and technical employees, employed by Respondent at its Knoxville, Tennessee hospital including computerized tomograph, registered technologist; staff radiologic technologist and clinical instructor; nuclear medicine technologist; radiation ther-

apy technologist; special procedures technologist; non-registered staff technologist; registered staff technologist; licensed practical nurse, level II, nursing service; licensed practical nurse, level I, nursing service; licensed practical nurse, level I, recovery room; operating room technician; certified lab assistant; certified respiratory therapist; respiratory therapy technician; respiratory therapy technician, level I, pulmonary laboratory technician; bloodbank technician; histopathology technician; medical laboratory technician; licensed practical nurse, emergency room; cyto technologist; physical therapy assistant; laboratory assistant heart center; cardiovascular technician I; respiratory, intensive care, therapist; but excluding office clerical workers; guards; professional employees; supervisor as defined in the Act and all other employees.

(b) Dealing directly with bargaining unit employees by conducting employee surveys about matters which properly should be addressed to the employees' collective-bargaining representative.

(c) Promising its employees transfers at their request to a 12-hour, 3-day-a-week shift provided the employees successfully solicit the Union to drop unfair labor practice charges.

(d) Refusing to transfer its employees to a 12-hour shift at their request unless the employees persuade Union to drop unfair labor practice charges.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of 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 in good faith with Office & Professional Employees International Union, Local 268, regarding terms and conditions of employment of unit employees by furnishing the Union information regarding wages and attendance of nonunit employees upon request by the Union.

(b) On request, transfer Sharon Rimmer to the 12-hour shift.

(c) Post at its facility in Knoxville, Tennessee, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 10, 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.

¹If 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.

²If 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."