

Bakersfield Memorial Hospital and Michael Capps and Hospital and Service Employees Union, Local 399. Cases 31-CA-18210, 31-CA-18400, and 31-CA-18218

November 27, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On May 22, 1991, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent and the General Counsel filed exceptions and briefs, and the Respondent filed a brief in response to the General Counsel's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified herein.

The judge found, inter alia, that the Respondent's discipline of employee Judy Curtis on April 11, 1991, violated Section 8(a)(3) and (1) of the Act. The Respondent's exception to this finding focuses on Curtis' expression of reluctance to instruct strike-replacement nurses, which the Respondent argues was unprotected. We reject the argument. We find that Curtis' stated reluctance to instruct strike replacements cannot reasonably be separated from her contemporaneous statement of the reason for her reluctance: her frustration with the replacements' comments about the strike and the striking nurses with whom Curtis sympathized. We agree with the judge's findings that the discipline resulted from Curtis' expressions of sympathy for the striking employees and lack of sympathy for strike replacements, and that there was no failure by Curtis to do any assigned task or any suggestion by her that she would not do any assigned task.

Moreover, even if we were to consider Curtis' statement of reluctance separately from her protected statements, we would still find a violation under a *Wright Line*, 251 NLRB 1083 (1980), analysis. In this case, the General Counsel showed that the Respondent moved to discipline Curtis immediately after her protected statements of frustration with the replacements' comments about the strikers, with whom Curtis sympathized. This was sufficient to establish a prima facie case, i.e., sufficient to support the inference that the protected conduct was a motivating factor in the Respondent's decision to discipline Curtis. Notwithstanding the General Counsel's showing, the Respondent offered no evidence that it had ever prohibited employees from expressing reluctance, or had disciplined

employees for voicing a reluctance to cooperate in the past. We appreciate the Respondent's arguments that a hospital critical-care unit, like the one to which Curtis was assigned, requires a high degree of employee flexibility and cooperation. An employer under the Act may impose whatever employee standards of conduct its business requires. It must do so, however, without discrimination on the basis of union activity.

ORDER

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

Insert the following as paragraph 2(d) and reletter the subsequent paragraphs.

“(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.”

David J. Dolloff, Esq., for the General Counsel.

Gary F. Overstreet, Esq. and *David M. Lester, Esq.* (*Musick, Peeler & Garrett*), of Los Angeles, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this case in trial on February 27 and 28, 1991, at Bakersfield, California. Timely posthearing briefs by the General Counsel and Respondent were filed on April 4, 1991. The matter arose as follows:

On April 17, 1990, Michael Capps, an individual, filed a charge docketed as Case 31-CA-18210 against Bakersfield Memorial Hospital (Respondent or the Hospital). On April 19, 1990, the Hospital and Service Employees Union, Local 399 (the Union) filed a charge against Respondent docketed as Case 31-CA-18218 and amended that charge on April 20, 1990. On June 28, 1990, the Regional Director for Region 31 of the National Labor Relations Board (Board) issued an order consolidating cases, consolidated complaint and notice of hearing respecting these two cases. On August 16, 1990, Capps filed a second charge against Respondent docketed as Case 31-CA-18400. On November 19, 1990, the Regional Director issued an order further consolidating cases, second consolidated amended complaint and notice of hearing.

The consolidated complaint alleges and Respondent's answer admits that Respondent issued Capps written warnings on April 9 and August 9, 1990, gave Judy Curtis a written warning on April 11, 1990, and discharged Curtis on April 16, 1990. The complaint further alleges and Respondent's answer denies that Respondent took these actions because of Capps and Curtis joined or assisted the Union or engaged in

other protected concerted activities for the purposes of collective bargaining or other mutual aid or protection in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to call, examine, and cross-examine witnesses, to argue orally, and to file posthearing briefs.

On the entire record, including briefs from the General Counsel and Respondent, and from my observation of the witnesses and their demeanor, I make the following¹

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent has been a State of California corporation with an office and principal place of business in Bakersfield, California, where it is engaged in the business of operating a hospital. During the 12 months preceding the issuance of the complaint here, a representative period, in the course and conduct of its business operations, Respondent purchased and caused to be transferred and delivered to its Bakersfield, California facility goods and materials valued in excess of \$50,000 directly from sources outside the State. Further during the same period Respondent derived gross revenues in excess of \$250,000 from its business operations.

The complaint alleges, the answer admits, and, based on the above, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent operates a hospital in Bakersfield, California, which employs some 1200 employees of whom approximately 275 are registered nurses. The registered nurses were organized by the California Nurses Association which was subsequently certified as those employees' exclusive representative for collective bargaining. Thereafter negotiations ensued which culminated in a strike and picketing beginning on April 9, 1990, and continuing for some months. Non-professional employees had experienced an apparently unsuccessful organizing campaign in the mid-1970s. The Union commenced a new organizing campaign directed toward non-professional employees in August 1989 which continued well into 1990 but did not result in recognition.

¹ As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings here are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

I construe Respondent's fn. 4 at p. 4 of its brief to be a motion to correct transcript. I grant the motion.

B. Events

The events concerning alleged discriminatees Michael Capps and Judy Curtis may be separately addressed.

1. Michael Capps

Michael Capps has worked at the Hospital for some 17 years as a porter or dishwasher in the dietary department. At relevant times he was supervised by David Medina. Over Medina was Food Service Manager Richard Burke. Burke in turn reported to Herman Ruddell.

Capps was a longtime and well-known supporter of the Union and advocate of organization at the Hospital. Capps' public leadership role in organizing campaigns, including the one underway in April 1990 by the Union of the nonprofessional employees, and in supporting the California Nurses Association organization campaign and subsequent strike at the Hospital were known to employees and Hospital management.

a. The April 1990 events

On April 6, 1990, at approximately 10:30 a.m., employees Maria Garza and Maggie Ensey from the Hospital's medical records department entered the food service department to retrieve their lunches from the refrigerator located there. Each was on a 15-minute break at the time. What next occurred is disputed.

Garza testified that she and Ensey were talking to other kitchen employees while in route with their sack lunches when Capps spoke to them. At the time Garza testified Capps was at a sink some 20 feet away washing pans with a hose in his hand. She recalled that Capps told the collective group to "watch your backs." Capps continued, making reference to literature issued by an antiunion group, and in Garza's recollection called the two "scabs" to which they responded "how can you be a scab if you're not even in a union?" The two then departed the area and the conversation ended.

Ensey testified that as the two women entered the kitchen area she observed Capps washing a large pot holding the pot in one hand and a hose in the other. Ensey's version of events generally corroborates Garza save that she further recalled telling Capps that "since he was working he shouldn't be talking about Union stuff."

Capps testified that at a little past 10:30 a.m. he was leaving his area, i.e., the pots and pans area in the cooking section of the dietary department, to commence his lunchbreak when he encountered Ensey and Garza. The two were in Capps' view opposed to union organization and Capps' efforts in that regard. Capps testified he felt the two had maligned union supporters and this fact underlay their exchange.

Ensey and Garza reported to management the events in contest. Their supervisor, Carol Damian, contacted Richard Burke, the food services manager and the ranking dietary department supervisor. Herman Ruddell, Burke's supervisor, became involved. The two women were asked to commit their version of events to writing which they did. They submitted a signed statement which stated in part:

[W]e then started to walk out of the kitchen with our lunch bag. As we were passing Mr. Capps, *as he was*

working, with a water hose in one hand and a large pot in the other hand.

. . . .

I was so upset that he was harassing us about Union stuff while working, that I said, "Excuse me, aren't you working? Don't you know you're not supposed to talk about Union stuff unless you are on break?" We then walked out of the kitchen.

Both Maria and I fell [sic] that Mr. Capps has no right harassing us about Union affairs, just because we don't share the same feelings about Union 399. We especially feel that he should not be harassing us during work time.

Having received the statement quoted in part above, Ruddell directed Burke to discipline Capps.

Burke met with Capps on April 9, 1990. Capps testified that Burke met with him and the Union's organizing committee members Donna Marshall and Jeanette Houston. Capps testified that Burke told him that he

was caught in the cross-fire, and that the administration had [given] me another warning, and he had to deal with it, but he realized there were two sides to it, and he wished to hear my side.

Capps testified he described the events as he experienced them to Burke and received from Burke a prepared "Employee Memorandum" form with the box "counseling memo" checked. The memo noted:

STATE SUBJECT

Solicitation/harassment during working time

SPECIFY SUPPORTING DETAIL

On Friday, April 6, 1990, at approximately 10:30 AM, you verbally harassed two employees from another department regarding their antiunion feelings.

This is to advise you that you may not talk to other employees regarding union activities on their or your work time.

If a repeat of this incident occurs, you will be given a written warning.

Burke testified that he met with Capps alone respecting this incident. He recalled that Capps told him that he had not started the conversation, rather, had responded to the women. Burke explained to Capps that he had to give Capps the counseling memo because the event had caused disruption in both departments. Capps refused to sign the form and the matter ended.

b. *The August events*

In early August 1990, Capps communicated to Burke his belief that employee Mary Dahlberg was spying on prounion employees on behalf of management. Burke soon learned that Capps was telling other dietary employees that Dahlberg was an antiunion spy. Later Dahlberg came to Burke upset over the allegations and denying she was a spy. Burke referred Dahlberg to his immediate supervisor Ruddell. A few minutes later he was summoned to a meeting of Dahlberg and Ruddell. Ruddell suggested Burke coordinate with the

Hospital labor relations director and "write [Capps] up" for his accusations against Dahlberg for being an informer for management.

Burke met with Capps in the early afternoon of August 9, 1990, in Burke's office along with three members of the Union's organizing committee. Capps testified that Burke simply told Capps that Dahlberg has gone to management and that the administration has sent him a warning memo and told him to discuss it with Capps. Capps testified he told his side of the events. In essence his position was that in fact Dahlberg was a spy for management and that he had a right to speak the truth. He refused to sign the form. The typed form, dated August 9, 1990, and marked "WARNING MEMO," stated in part with the "employee comment" portion entered in handwriting:

STATE SUBJECT

Verbal Employee Harassment

SPECIFY SUPPORTING DETAIL

It has been reported by several employees that you made derogatory statements regarding the Department Secretary, Mary Dahlberg. These statements upset these employees, and affected their job performance.

If another similar incident occurs, you may be terminated without further notice.

EMPLOYEE COMMENT

I have the right to free speech and the truth

2. *Judy Curtis*

Judy Curtis has been employed at the Hospital for approximately 1-1/2 years prior to her discharge on August 16, 1990. She had initially been employed as a nurses aide and held that position for a little over a year. Thereafter she worked as a unit secretary or float unit secretary. Employees holding this position are assigned to hospital units in a recordkeeping function. The float position involves assignment to various units on an as-needed or rotating basis as opposed to permanent assignment to a particular unit.

Float unit secretaries worked under the supervision of Barbara Weller, the assistant director of nursing for medical surgical services. Permanent unit secretaries were supervised by the head nurse of the particular hospital unit to which they were permanently assigned. Weller normally worked the 7 a.m. to 3 p.m. shift while Curtis normally worked the 3 to 11:30 p.m. shift. Curtis was therefore also supervised by the supervisors on other shifts and by the head nurse of the particular unit she was working.

Curtis was active in supporting the Union's organizing drive. She was a member of the Union's organizing committee, passed out authorization cards, and wore various union buttons at work evincing support for the Union and California Nurses Association, the labor organization which represented the Hospital's registered nurses.

a. *April 9, 10, and 11, 1990 events*

April 9, 1990, was the first day of the registered nurses' strike at the Hospital. Although the record is not replete with detail, a picket line was in place, television news coverage was underway, and news broadcasts were heard on the pa-

tients' television sets. The Hospital was attempting to continue operations in part through the utilization of nurses registry employees or "traveling nurses" to fill the places of striking nurses. These new nurses in turn were seeking to master the duties and protocols of the Hospital in these somewhat unusual circumstances.

In this context Curtis started her shift at 3 p.m. on April 9, 1990, assigned to the Hospital's third-floor intensive care unit. Curtis testified that the strike was a topic of conversation among the strike replacement nursing staff with the new nurses who had crossed the picket line being less sympathetic to the strike and the picketing nurses' union activities than Curtis favored. Curtis testified that she told the nursing employees that "we were not supposed to discuss Union activities on the job."²

Curtis testified that about 7 p.m. she was approached by Laura Nickerson, the head nurse of the third floor intensive care and the cardiac care units. Nickerson asked Curtis to help the strike replacement nurses learn how to use the Hospital's computer. Curtis responded that she "would rather not do it, but if I had to, I would do it." Nickerson asked Curtis, in Curtis' recollection, why she "was upset and did it have anything to do with the Union?" Curtis responded that it did and that she was tired of hearing the replacement nurses' comments about the Union.

Nickerson testified that on the evening of April 9, 1990, she was instructing all "p.m." secretaries on her units to make an effort to ensure that the new nurses understood how to operate the computer. Nickerson spoke to Curtis in due course. Nickerson testified:

I introduced myself. And when I started to explain to her what my intentions were for the Unit Secretary that night, she replied, "Well, I'll help them only if I have to." And I was kind of surprised.

And I said, "Oh, is there a problem with that instruction?"

And she said, "Well, you know, we all have our opinions."

And then it dawned on me. And I said, "Well, that's understandable, but I really need you to work with these nurses, go out of your way to help them so we can take good care of the patients tonight."

And the conversation basically ended with, "I will if I have to."

Nickerson testified that she then "turned around and got on the phone" to Cindy Lavers, the assistant director of nursing nights, seeking Curtis' removal from the unit. Lavers works a 7 a.m. to 7 p.m. shift. Lavers testified that she got a telephone call from Nickerson who "wanted us to go up and talk with Judy [Curtis] to find out if there—you know, what was going on and what the problem was."

Lavers and Chuck Meyers, the nursing office head nurse, went to Curtis' worksite soon thereafter and had a conversation with her in the report room next to the nurses' station. Curtis testified that Lavers told her that she had "refused to

do my job." Curtis disputed that asserting she had "just stated that I would rather not do it." Meyers then, in Curtis' recollection, told Curtis she "wanted to tell me how the Union worked and how management would work." Curtis demurred asserting she already knew how the Union worked and that she was for the Union. Meyers, in Curtis' recollection, suggested she would "get caught between Union and management over job duties with their arguments."

Curtis also recalled that in this conversation she was told "that my attitude toward the traveling nurses made them feel uncomfortable and that my wearing the Union button made them feel uncomfortable."³ Curtis responded that she believed in what she was doing and the Union. She complained that the nurses had been "commenting for four hours about the strike and the Union, and I told her I was tired of it." Curtis testified that Lavers responded: "[I]f it relieved the stress of the traveling nurses, it was okay for them to discuss it." The conversation then ended, Curtis finished her shift and went home.

Lavers testified that in their meeting with Curtis, they initially told her that they had received a complaint that she was not being cooperative with some of the nurses in the unit and asked Curtis if this was true. Lavers recalled Curtis responded:

[Y]es, that she was just tired of hearing all the nurses talk about the picketers and the Union activity and everything that was going on.

One of the supervisors asked Curtis if she had a problem with that. She responded, in Lavers' recollection, that she did because her husband was in a union and supported a union and she supported the Union as well. The supervisors told Curtis she was entitled to her opinion. Lavers recalled they told Curtis: "We realize [the traveling nurses] are talking about their feelings and trying to express what they're going through." They confirmed however that the nurses were not speaking directly to Curtis but rather simply within her hearing.

The supervisors stated that there had been a problem with a nurse making a request of Curtis that she had answered the nurse with the statement that she would attend to the matter when she had time. Lavers testified she concluded by telling Curtis:

[M]y concern was that she be a little bit more responsible to these nurses, who are new in the unit, and because she was there with the computer, that she was asked by her Head Nurse to assist them when needed, and that's what we wanted her to do.

And she said, "Well, if I have to, I will."

The meeting then ended. Lavers testified that neither she nor Meyers mentioned Curtis' union button in this conversation. She also denied telling Curtis that "it was all right for the travelers to talk about Unions during working time."

Chuck Meyers, nursing office head nurse, whose shift commences at 7 p.m., testified he joined Lavers in meeting

² As noted, *supra*, it appears Respondent maintained a no-solicitation policy which included proscription of discussion of unionization. Curtis testified, "We were not supposed to discuss it on the job. They told us we would be fired if we discussed the Union on the job."

³ Curtis testified that on April 9 she wore a button with the word, "Scab" printed on it surrounded by a red circle with a diagonal slash through it denoting the universal symbol of prohibition of the encircled image.

with Curtis about Nickerson's complaint. Meyers initially described the conversation as follows:

I asked what the problem was, and there was indication that she was upset about the travelers and them talking about the people out front [on the picket line], and mentioned the—I said—told her that I'd heard that she did not want to enter some orders, and she says, "It wasn't that I didn't want to." She says, "I told them I would enter them if I—when I got time."

And I says, "Are you entering the orders in the computer?"

And she says, "If I have to, I will."

And I said, "Yes, you have to," and that I did not want this to continue on like this with the hard feelings between them, that I did not want the patient care compromised with the orders not being properly or timely [entered].

Meyers testified that he and Lavers determined not to remove Curtis that evening, as he put it: "We talked, and she said she would work with them. So we left it at that." Meyers specifically denied mentioning Curtis' union button or telling Curtis that the travelers did not have to follow the Hospital's rules regarding solicitation.

Barbara Weller, assistant director of nursing and the primary supervisor of the float unit secretaries, testified that she had had occasion to discuss performance problems with Curtis on April 5, 1990, after receiving complaints from Meyers and Lavers. Weller received complaints about Curtis from Meyers and Lavers and a note from Nickerson⁴ concerning the April 9, 1990 events the following day.

Weller called Curtis at her home on April 10, 1990. Curtis testified Weller asked her to resign her job, which Curtis refused to do. Curtis recalled Weller

said I made the traveling nurses feel uncomfortable and that she didn't feel I was doing my job properly and that I was wearing those Union buttons.

Weller testified that she told Curtis they had previously talked about other units not wanting her to come back and that the critical care unit now did not want her back because of her "behaviors and her attitude." She concluded by telling Curtis that if she did not want to be a unit secretary and "had to be forced into it, I then—I would accept her resignation as a Unit Secretary." She told Curtis that if she received any more complaints, Curtis would be immediately terminated. Weller specifically denied ever telling Curtis that Curtis made the traveling nurses feel uncomfortable or even mentioning Curtis' union buttons.

The following day Weller and Curtis met. Each recalled the meeting as a reiteration of the earlier phone call. Weller issued a "warning memo" to Curtis referring to "Specific complaints . . . from previous afternoon (anecdotal note attached)." The attachment was the Nickerson memo noted supra. The warning concluded:

Behaviors are creating problem for nursing staff. Resignation will be accepted immediately or immediate dismissal if a complaint is received.

Curtis signed the warning with the notation "under duress."

b. *The April 13, 1990 and subsequent events*

Curtis commenced work at 3 p.m. on Friday, April 13, 1990, assigned to the fifth floor unit. Soon thereafter she was reassigned to the first east unit. She testified that she went to lunch in normal fashion at 6 p.m. notifying the nurses "on the floor" that she was doing so. She met her friend, fellow employee Anna Beam, in the Hospital cafeteria. At 6:30 p.m. Curtis initially went to the fifth floor unit to see if she had duties to perform there. After approximately 5 minutes she left that unit to return to the first-east unit—a journey of 7 to 8 minutes. Beam corroborated Curtis' testimony.

Weller testified that on the morning of Saturday, April 14, 1990, she received a telephone complaint about Curtis from three nurses. Weller testified she was told that Curtis was "not helpful," that she had been missing from the unit for 45 minutes without notifying the nurses that she was leaving and that she had failed to enter a physician's orders for a patient into the computer. Weller checked the statement about the missing order entry personally and confirmed its correctness.

Weller determined to terminate Curtis. She obtained the approval of Hospital labor relations staff and notified Curtis of her termination by telephone call to Curtis at her home before the start of her workday on Monday, April 16, 1990. Curtis testified that Weller told her in this call that she was fired and gave the reasons. Curtis tried to explain the lunch duration events but Weller simply said she was not interested inasmuch as she had already warned Curtis that if she was written up again for any reason she would be fired immediately.

Weller prepared a discharge memorandum which, although never shown to Curtis, was placed in the Hospital's personnel records. The memorandum noted the discharge followed complaints from staff of inadequate performance and earlier warning memos. The memorandum listed the April 13, 1990, "RN complaints" as: (1) a 45-minute dinner break taken without notifying the unit nursing staff, (2) a failure to enter a physician's order into the computer, (3) a failure to check patient charts before going off shift, and (4) "Behavior toward RN's abrupt and not helpful."

C. *Analysis and Conclusions*

1. *The parties' arguments*

The General Counsel's theory of a violation as argued on brief is that Respondent issued warnings to Capps and Curtis and discharged Curtis in retaliation for their union activities. The General Counsel further argues that Respondent's asserted reasons for its actions are pretext or, in the alternative, are insufficient to overcome the burden of proof Respondent bears after the General Counsel has established a prima facie case under *Wright Line*, 251 NLRB 1083 (1980).

Respondent denies the assertions of the General Counsel and in a brief addressed exclusively to the facts argues that each warning and the discharge were issued in response to the employees' conduct as Respondent's agents testified and

⁴Nickerson's letter characterized her conversation with Curtis on April 9 very similarly to her testimony set forth supra. It specifically noted that Curtis' problems were "about the union."

were undertaken independent of the two employees' protected concerted or union activities or sympathies and not for improper reasons.

The allegations respecting the two individuals may be separately addressed.

2. Michael Capps

a. *The April 9, 1990 warning*

I have considered the record as a whole and in particular the testimony of the agents of Respondent and the dispute participants respecting the April 9, 1990 events and warning. I find that Respondent issued the warning because, as set forth in the warning itself quoted supra, it believed Capps was discussing the Union with other employees while he was working.

I further find, crediting Garza and Ensey over Capps, that in fact Capps was working at the time of the conversation. I reach this determination because the two women convinced me that they were not lying respecting their recollections and the "pot in one hand hose in the other" recollection was too specific to be simply a mistakenly recalled detail. Capps' demeanor was inferior to that of Garza and Ensey respecting this aspect of the testimony.

Although not in evidence, the parties and indeed the witnesses acted as if there had been a valid no-solicitation rule in place at the Hospital at relevant times which prohibited discussion of union matters while working. The General Counsel in his management of the litigation also assumed this. Thus, for the purpose of this allegation I shall also assume a facially valid no-solicitation rule was in place. Certainly no per se violation theory was advanced respecting this warning. Further, I find that the General Counsel has not established on this record that Respondent selectively applied its no-solicitation rule in a manner which would not allow its application to Capps in April 1990. Having found that Capps acted in violation of this rule and that the Hospital issued the April 9, 1990 warning to him for that reason, I find that Respondent has not in so doing violated the Act. Accordingly, I further find that the General Counsel has not sustained this element of the complaint which shall be dismissed.

b. *The August 9, 1990 warning*

Rejecting the General Counsel's primary contention, I find that Respondent issued Capps the August 9, 1990 warning because it believed Capps had told other employees that he believed employee Dahlberg was a "spy" for management informing on employees' union activities. Thus I find that the Hospital's asserted reason for issuing the warning to Capps was the true reason.⁵ I also reject, however, the argument of Respondent that its actions in issuing the warning were entirely independent of any consideration of Capps'

⁵ I further find that in fact Capps had told employees that Dahlberg was an antiunion informer or "spy." I also find however that Capps believed that Dahlberg was a spy when he made these allegations to other employees and that the allegations were not made maliciously. There is no evidence to support a contrary conclusion. I specifically make no findings whatsoever respecting the truth or falsity of these statements. Thus, I make no findings as to whether Dahlberg was spying on or informing management about the union activities of Hospital employees.

union or other protected concerted activities. This is so because the very statement that Respondent believed that Capps made to employees, i.e., that another employee was an informer or spy providing information to Hospital's management about employees' union activities, may itself be considered a union activity. Unfortunately, no party argued or briefed this issue despite my expressions of hope at the end of the hearing that they would do so on brief.

The Board in *Somerset Shirt & Pajama Co.*, 232 NLRB 1103 (1977), then Chairman Murphy, finding it unnecessary to pass on the question, held that the right of one employee to warn other employees of spies or informers in their ranks is protected by Section 7 of the Act. In so ruling the Board adopted the findings of Administrative Law Judge William F. Jacobs that an employee, Zimmers, was wrongly discharged for suspicion of accusing certain employees of informing on union adherents. Judge Jacobs stated at 1109-1110:

I also find that terminating Zimmers because she was suspected of accusing [other employees] Smith and Dickey of informing on union adherents is similarly violative of Section 8(a)(3) and (1) of the Act. For it has been my experience that in the vast majority of organizing campaigns where a plant the size of Somerset Shirt & Pajama Company is involved [120-130 employees], the employees will split their allegiances, some in favor of union representation, some against. When this occurs it is not infrequent that those employees who are against union representation equate their attitudes to loyalty to management. Likewise, those in favor of union representation often consider those employees who are not in sympathy with their case to be promanagement and therefore likely to report their activities to management. In such cases, the union adherents among the employees will seek to avoid contacting suspected promanagement personnel and will frequently warn each other to stay away from those employees for fear of being reported. This scene is repeated over and over in one organizing campaign after another and must therefore be considered part and parcel of the organizing scene. As such, the right of one employee to warn another that a third is an informer or suspected informer must be protected the same as his right to solicit signatures or propagandize in favor of the union cause.

Somerset is hardly a radical notion because the concept of the "company spy" traces its history to the very beginnings of the Act and the earliest Board decisions. Employee resistance to and opinions about believed spies are perhaps some of the most venerable examples of employee conduct undertaken for mutual aid and support. Statements of an employee to others based on a good-faith belief that another is an informer are therefore clearly protected activity under traditional Board analysis.

Having found that Respondent issued a warning to Capps because it believed he was accusing an employee of being an informer to management of other employees' union activities and having found that such activities by an employee are protected concerted and union activities, it follows that Respondent's actions violated Section 8(a)(1) and (3) of the Act. Accordingly, I find the General Counsel has sustained this allegation of the complaint.

3. Judy Curtis

a. *The April 11, 1990 warning*

Respondent established that early on in Curtis' career she had been counseled that she must be "more receptive to the needs of co-workers" and that she needed "[t]o realize that the RN is the manager of the unit, to accept her direction with proper action and follow-through." Respondent further established that Weller had received complaints respecting Curtis' failure to assist a fellow employee to enter orders into the computer a few days before the events in controversy and has met with Curtis on that matter. Respondent also established that patient care in the critical care units is all the name implies and that patient care required teamwork and cooperation on the part of every staff member—particularly at the time of stress and confusion which existed on the first day of the strike when the units were operating with many new nurses.

Respondent argues from this predicate that the April 11 warning and the supervisory investigations that preceded it all were directed entirely to patient care and were free from consideration of Curtis' protected or union activities. The General Counsel argues to the contrary that the asserted reasons for the warning were but pretext offered to cloak the true reason for the actions, i.e., Curtis' union activities and sympathies.

As in the Capps warning discussed above, I find the General Counsel has not sustained his "pretext" theory. I find that the warning resulted not from Curtis' union activities prior to April 9 or her wearing of a union button. Again, however I find the questions posed by the evidence more subtle than either the General Counsel or Respondent argue. This is so because the actions of Curtis which precipitated the events contained at the very least an aspect of protected concerted or union activity. In my view the April 9 events and the warning following must be examined to determine if Curtis was warned because of her conversation with Nickerson or for other reasons. If her conversation with Nickerson was the reason for her warning, then this conversation must be analyzed in context to determine if an employer may warn an employee for the statements made by Curtis on that occasion.

Respondent offered various evidence suggesting that Curtis simply failed to and refused throughout her April 9, 1990 shift to help others and that this was the reason for the warning as much as her statements to Nickerson. I do not believe the record supports such a finding. No direct evidence received for the truth of the matter supports this argument. Although some indirect evidence such as the hearsay statements attributed to Nickerson by Lavers that Lavers had never gotten the help she needed that evening exists, I found it both unconvincing standing alone and overwhelmed by the fact that the Nickerson-Curtis conversation initiated the entire process. Further this conversation was reduced to writing by Nickerson and that writing was reviewed by Weller and incorporated by reference by her in the warning issued Curtis. Nickerson's testimony and her recitation of events as set forth in the memorandum she prepared make it clear that Nickerson was not displeased with Curtis when they initially met. Indeed Nickerson testified that she did not know Curtis and was speaking to her at the time as she had spoken to other employees that day to engender a spirit of cooperation.

Nickerson by her own testimony reacted to Curtis' statements in the conversation by immediately calling higher supervision to have Curtis removed from the unit. Thereafter she memorialized the conversation with Curtis and sent it to Weller to support her complaints against Curtis. Weller in turn relied on and incorporated the Nickerson recitation in Curtis' warning.

There is little dispute respecting what happened between Nickerson and Curtis. Nickerson did not know Curtis nor have any experience with her at that time. Nickerson solicited Curtis' enthusiastic assistance in what was clearly a difficult time. Curtis replied with statements expressing her unhappiness with the registered nurses and a stated reluctance to help them because of her view that the nurses crossing the picket line were criticizing her friends, the striking nurses. Nickerson responded with a reiteration of Curtis' need to cooperate. Curtis' response captured her mood and her intentions: "I will, if I have to." The record is clear that this was the statement that displeased Nickerson and initiated the process resulting in the warning issued by Weller. I specifically find that Respondent's warning was a consequence of this statement.

Based on the above and the entire record as a whole, I find that Curtis received her warning because of her exchange with Nickerson as described above. Respondent's warning must therefore stand or fall, in my view, on the right of an employer in such circumstances to discipline an employee for making the statements made by Curtis on that occasion. It is therefore appropriate to turn to that conversation.

Curtis' statements to Nickerson contained without question a statement of sympathy with and support for the striking employees and a statement of unhappiness that the replacement employees were being allowed to talk about matters which were prohibited to prounion employees under the Hospital's no-solicitation rule. There is little doubt that such statements of opinion and alliance by an employee are conduct falling within the Board's doctrines respecting union and concerted activities. One may not be punished for expressions of prostriker sympathy or hostility to strike replacements made to a supervisor.

Curtis also said she was reluctant to assist the strike replacement nurses. Was this statement improper conduct which allows employer discipline especially where, as here, the work or cooperation which is the subject of the expression of reluctance is of the highest possible importance? This is the critical question respecting this allegation. There may be no question that health care employers such as the Hospital are to be given wide discretion in taking action they perceive necessary to insure the highest possible standard of health care. This is particularly true here in the unusual circumstances that presented themselves at the Hospital on April 9, 1990.

Although I believe that the Hospital would not improperly have taken action against Curtis for any refusal to do her assigned duties or indeed for any statement that she could not do her duties on that occasion, I do not believe that Curtis made such statements. I find rather that Curtis did not refuse to do her assigned duties nor suggest she could not do them in the circumstances. Rather I find Curtis limited her statements to ones of reluctance and/or willingness to perform "only if she had to." Respondent's supervisors responded to Curtis that she did in fact "have to" perform. Thus, there

was never a threat or statement supporting a reasonable belief by any agent of the Hospital that Curtis would not perform her job functions. Thus I find there was no justification for Respondent's warning.

I reach this conclusion because there is a fundamental distinction between expressions of reluctance to do work and expressions of refusal to do so. Curtis did not refuse to do her job. She explicitly said she would do what was asked of her. Had she refused to perform or, perhaps, expressed doubt that she could perform under the circumstances, a different situation would have been presented. Where an employee says only she "will if I have to," she has not refused to work or suggested she is unable to do the task assigned. Indeed, Curtis was told immediately after her statements of reluctance that she did indeed "have to" help the nurses and did not challenge that instruction or do other than acquiesce. Accordingly, and no matter how important or critical the job, an employer may not punish an employee for failing to do her job based on these remarks. If an employer issues a warning in such a situation it is not punishing an employee's failure to perform as assigned nor is it punishing a threat or promise to perform less than fully. Rather the employer is punishing the employee's motives for the expressions of reluctance. In the instant case the opinions punished were Curtis' statements of sympathy with and support for the striking employees. Punishing an employee for such expressions is a traditional violation of Section 8(a)(1) and (3) of the Act. Respondent has violated the Act in that manner here. Accordingly, I find the General Counsel has sustained this aspect of his complaint.

b. *The April 16, 1990 discharge*

Curtis had an explanation for her apparent long lunch on April 13, 1990, and contended she had notified the unit nursing staff of her departure. She had no confident explanation of the failure to enter a physician's order in the computer or her apparent failure to discover the omission through review and double checking. It is clear however that Weller was unwilling to hear explanations from Curtis and discharged her, as the earlier warning and her remarks to Curtis on April 16 promised, i.e., "immediate dismissal if a complaint is received." It is also true that not all failures to enter a physician's orders have been punished by the Hospital with written warnings or discharges.

The warning of April 11, 1990, having been found invalid and a violation of the Act, supra, it cannot be any part of the Hospital's justification of the April 16, 1990 discharge. The record makes it clear, and I find, that but for the occurrence of the events discussed in subsection a of this section, supra, including the issuance of the warning, the events of April 13, 1990, would not have necessarily resulted in the precipitous discharge of Curtis or indeed any discharge at all. Curtis' discharge then would not have occurred but for the wrongful issuance of the April 11, 1990 warning. Respondent's defense therefore fails under the Board's analysis in *Wright Line*, 251 NLRB 1083 (1980), as argued by the General Counsel, supra. Accordingly, I find the discharge violated Section 8(a)(1) and (3) of the Act as the General Counsel has alleged in his complaint.

The unexplained omissions of Curtis respecting the physician's orders could well have resulted in the Hospital issuing a counseling memo, a written warning or other discipline to

Curtis even if the April 9 events and the Hospital's response to them had never occurred. The question of what action the Hospital would have taken in such a situation is not free from doubt and may not be determined with confidence on this record. This lack of ascertainability results however from Respondent's wrongful conduct as found supra. Thus the uncertainty here has been caused by Respondent's wrongdoing. It is not proper to resolve uncertainty in favor of the party whose wrongdoing created the uncertainty in the first instance. Accordingly, I cannot find that Curtis would have received any specific warning or other discipline as a result of her April 13, 1990 conduct. Therefore I shall not reduce the discharge to some lesser discipline but rather, for the reasons set forth above, shall simply direct that all discipline arising out of the April 13, 1990 events be rescinded and expunged.

D. *Summary*

I have found that Michael Capps received a counseling memo in April 1990 because he discussed union or organizational matters on his working time in violation of a facially unchallenged no-solicitation policy of Respondent. I further found the rule was not applied inconsistently. Respondent's action therefore did not violate the Act. This portion of the complaint shall be dismissed.

I have further found that Capps was issued a warning notice in August 1990 because the Hospital believed he was telling other employees that another employee was spying on union supporters and reporting or informing to Hospital management. The Board finds such employee conduct to be protected concerted and union activity. Accordingly, Respondent's punishment of Capps for engaging in this conduct violates Section 8(a)(1) and (3) of the Act. This aspect of the General Counsel's complaint shall be sustained.

I have further found that Respondent's April 11, 1990 warning memo to Judy Curtis resulted from Curtis' expressions of sympathy for striking employees and lack of sympathy for strike replacement registered nurses and not for her failure to perform any assigned task or because of any suggestion that she would not undertake any assigned task. Expressions of mutual aid and support and sympathy with striking employees are traditional protected concerted and union activities. Punishing an employee for such expressions is a violation of Section 8(a)(1) and (3) of the Act. I find Respondent has so violated the Act here. The General Counsel's complaint in this respect shall be sustained.

I have further found that Respondent's April 16, 1990 discharge of Curtis was inextricably intertwined with and dependent on the improperly issued warning of April 11, 1990. The discharge therefore, like the warning, violates Section 8(a)(1) and (3) of the Act. This portion of the General Counsel's complaint shall be sustained.

REMEDY

Having found the Respondent engaged in certain 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.

I shall recommend that Respondent offer Judy Curtis full and immediate reinstatement to her former position as a float unit secretary. Further Respondent shall be directed to make Curtis whole for any and all loss of earnings and other

rights, benefits and emoluments of employment she may have suffered by reason of Respondent's discrimination against her, with interest. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp.*, 231 NLRB 651 (1977), and *Isis Plumbing Co.*, 138 NLRB 716 (1962).

Respondent shall also be required to withdraw, rescind, and expunge any and all references to Michael Capps' August 1990 warning and Judy Curtis' April 11 warning and April 16, 1990 discharge from its files and notify Curtis and Capps in writing that this has been done and that the warnings and discharge will not be the basis for any adverse action against them in the future. *Sterling Sugars*, 261 NLRB 472 (1982).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (3) of the Act by issuing a warning to Michael Capps in August 1990 because he was telling other employees that he believed another employee was spying on union adherents and reporting to or informing the Employer about those employees' activities.

4. Respondent violated Section 8(a)(3) and (1) of the Act by issuing a warning to Judy Curtis on April 11, 1990, because she expressed sympathy with striking nursing employees and a lack of sympathy with the nursing employees strike replacements.

5. Respondent violated Section 8(a)(3) and (1) of the Act by discharging and refusing to reinstate Judy Curtis in reliance on the improper April 11, 1990 warning found violative of the Act above.

6. Respondent did not otherwise violate the Act as alleged in the complaint.

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, Bakersfield Memorial Hospital, Bakersfield, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing warnings to employees because they tell other employees that certain employees are spying on prounion employees and reporting their activities to Respondent's management.

⁶If 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.

(b) Issuing warnings to employees because they express sympathy with striking employees or a lack of sympathy for strike replacement employees.

(c) Discharging employees in reliance on improperly issued warnings.

(d) In any like or related manner violating the provisions of the National Labor Relations Act.

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

(a) Offer immediate and full reinstatement to employee Judy Curtis to her former position as a float unit secretary.

(b) Make whole employee Curtis for any and all losses incurred as a result of Respondent's unlawful termination of her, with interest, as provided in the remedy section of the decision.

(c) Withdraw, rescind, and expunge from its files any and all reference to the August 1990 warning of Michael Capps and the April 11 warning and the April 16, 1990 discharge of Judy Curtis and notify each of them in writing that this has been done and that the improper warnings and discharge will not be used against either in future personnel actions.

(d) Post at its Bakersfield, California facility copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by other material.

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

⁷If 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."

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.

Included in these rights is the right to inform other employees of your good-faith belief that certain em-

ployees are spying on prounion employees without being disciplined for those expressions by the Hospital

Also included in these rights is the right to express sympathy for striking employees and a lack of sympathy for strike replacement employees without being disciplined for those expressions by the Hospital.

WE WILL NOT issue written warnings to employees who tell other employees that certain employees of the Hospital are spying on union employees and reporting their union activities to Hospital management.

WE WILL NOT issue written warnings to employees who express sympathy with striking employees and/or a lack of sympathy for strike replacement employees.

WE WILL NOT discharge employees in reliance on improper warnings of the type described above.

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 offer immediate reinstatement to float unit secretary Judy Curtis and WE WILL make her whole for any and all losses of wages, benefits, seniority, and any other emoluments of employment she may have lost, with interest, as a result of our improper discharge of her in April 1990.

WE WILL rescind, remove, and expunge the August 1990 warning issued to Michael Capps and the April 11 warning and April 16, 1990 discharge of Judy Curtis and WE WILL notify each of them in writing that this has been done and that the improper warnings and discharge will not be used against them in future personnel actions.

BAKERSFIELD MEMORIAL HOSPITAL