

**Shelby Memorial Hospital Association d/b/a Shelby Memorial Home and Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 279 affiliated with the International Brotherhood of Teamsters, AFL-CIO.**<sup>1</sup> Case 14-CA-21422

April 8, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On January 13, 1992, Administrative Law Judge Robert W. Leiner 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,<sup>2</sup> and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Shelby Memorial Hospital Association d/b/a Shelby Memorial Home, Shelbyville, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> The name of the Charging Party has been changed to reflect the new official name of the International Union.

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

*Michael Jamison, Esq.*, for the General Counsel.  
*Joseph A. Yocum, Esq.*, of Evansville, Indiana, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This matter was heard in St. Louis, Missouri, on October 17, 1991, on the General Counsel's complaint, dated July 3, 1991,<sup>1</sup> which alleges, in substance, that Shelby Memorial Hospital Association d/b/a Shelby Memorial Home (the Respondent), violated Section 8(a)(3) of the National Labor Relations Act, by unlawfully discharging on or about April 24, 1991, and thereafter refusing to reinstate, Michele Yvette Sands, its em-

<sup>1</sup> The underlying unfair labor practice charge was filed and served on Respondent on May 28, 1991, by the Charging Party, the above-captioned Local 279, International Brotherhood of Teamsters.

ployee, because she joined, supported, or assisted Teamsters Local Union No. 279 and because she engaged in concerted activities protected by the National Labor Relations Act. The complaint also alleges that Respondent terminated Sands' employment because she gave testimony under the Act, thereby violating Section 8(a)(1) and (4) of the Act. Respondent's timely answer, served July 16, 1991, admits certain allegations of the complaint, denies other and denies the commission of any unfair labor practice.

At the hearing, all parties were represented by counsel, were given full opportunity to call and examine witnesses, to submit relevant oral and written evidence, and to argue orally on the record. At the close of the hearing, the parties waived final argument and elected to submit posthearing briefs which have been carefully considered.

Upon the entire record, including the briefs, and upon my most particular observation of the demeanor of the witnesses as they testified, I make the following

FINDINGS OF FACT

I. RESPONDENT AS STATUTORY EMPLOYER

Respondent admits, and I find, that at all material times, it has been and is, an Illinois not-for-profit corporation operating a skilled nursing home, having its office and place of business in Shelbyville, Illinois, where it provides in-patient medical and professional care services for the public. During the 12-month period ending June 30, 1991, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$100,000 and, during the same period, purchased and received at its Shelbyville, Illinois facility, products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Illinois. Respondent concedes, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION AS STATUTORY LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find, that at all material times, Teamsters, Chauffeurs, Warehousemen and Helpers Union No. 279, affiliated with International Brotherhood of Teamsters<sup>2</sup> (the Union), has been and is a labor organization within the meaning of Section 2(5) of the Act.<sup>3</sup>

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

In or about late June or early July 1990, Respondent's employees contacted the Union for purposes of gaining union representation. By July 10, 1990, the Union filed a petition with the Board for certification in Case 14-RC-10958. Sands, the alleged discriminatee in the instant case, was a prominent witness on behalf of the Union in Board-conducted hearings of August 2, 1990, in that case. Thereafter,

<sup>2</sup> The name of the Union was changed at its June 1991 convention to International Brotherhood of Teamsters.

<sup>3</sup> Respondent also admits that its administrator, Bill Morgan, and its director of nursing, Florence Glenn, are its supervisors and agents, respectively, within the meaning of Sec. 2(11) and (13) of the Act.

Respondent engaged in various activities in opposition both to the Union and to the employees organizing on its behalf which opposition resulted in the Union's (and Sands) filing numerous unfair labor practice charges (Case 14-CA-20946). Those unfair labor practice charges were consolidated and, again, Sands was a witness prominently identified in supporting the Union's cause following the General Counsel's complaint in a consolidated hearing which took place on April 1 through 3, 1991.<sup>4</sup> Following a Board-conducted election, the Union was certified on November 1, 1990. Respondent, however, filed a request for review of the certification issued by the Regional Director. The request for review was subsequently denied by the Board.

As a result of the consolidated unfair labor practice hearing, Administrative Law Judge John H. West, on July 15, 1991, issued his decision. On December 26, 1991, the Board adopted his decision in its entirety at 305 NLRB 910. He found that Respondent violated Section 8(a)(1) of the Act by various acts of interrogation, threats of discharge, and informing employees of various retaliatory acts, all because of the employees' support for the Union. In addition, Respondent committed various acts in violation of Section 8(a)(1) and (3) of the Act by, *inter alia*, denying previously scheduled pay raises, and by various other acts of retaliation including the discharge and layoff of several employees.

With particular regard to Charging Party Sands, Judge West found that Respondent engaged in various unlawful acts, retaliating against Sands' union activities and her testimony at the Board proceedings. For instance, Sands' undenied testimony discloses that a supervisor unlawfully threatened her, violating Section 8(a)(1) of the Act, in describing to Sands her removal from the normal work schedule and being placed on an "on-call list." In addition, Judge West concluded that Respondent, in violation of Section 8(a)(3), (4), and (1) of the Act, unlawfully removed Sands from its work schedule and failed and refused to return her to her substantially equivalent position until a further date; failed and refused to consider Sands for a full-time position that existed; and thereafter unlawfully laid off Sands and failed and refused to return her to a substantially equivalent position of employment. Judge West ordered appropriate remedies, including immediate and full reinstatement of Sands to the position she held or would have held but for Respondent's unlawful conduct. It also ordered that she be made whole for loss of earnings suffered by virtue of Respondent's unlawful discrimination against her.

Charging Party Sands has a substantial history of employment with Respondent. She was employed as an assistant helper in 1981-1982; as a nurses aide in 1982-1983 when she quit because of pregnancy. She was thereafter rehired but quit in February 1984 because of poor working conditions. In the period commencing 1984, Sands attended school to become a licensed practical nurse (LPN) and was again hired by Respondent as an LPN in September 1987. She worked until April 1988 when she again quit because of pregnancy. Sands returned to employment with Respondent as an LPN in March 1989 and was terminated in April 1991, which ter-

mination is the subject of the present unfair labor practice litigation.

Thus, in March 1989, Sands returned to Respondent's employ, originally on the 3 to 11 p.m. shift, but by the summer of 1989, was on the day shift, working full time from 7 a.m. to 3 p.m., ordinarily 40 hours per week (Tr. 34). By January 1991, Respondent, as Judge West found, was unlawfully discriminating against Sands who was pregnant. She was unlawfully reduced to "on call" status in January 1991. Her last day of actual "call in" work was February 3, 1991. The baby was delivered on March 6, 1991. On April 15, 1991, Sands notified Respondent she had been released by the doctor and was able to work (Tr. 114).

#### B. Charging Party's Conversations With Respondent

##### 1. The February 14, 1991 conversation with Florence Glenn, director of nursing

By February 1991, Sands, more than 8 months pregnant and expecting delivery on or about March 1, 1991, had last been called to work on February 3, 1991 (Tr. 100). She thereafter procured a doctor's note in February 1991 (Exh. 6), because on or about February 5, 1991, Respondent, through its agent Paula Chesser, on February 5, 1991, telephoned Sands, stating that Administrator Bill Morgan, wanted Sands' doctor's note authorizing Sands to work during late pregnancy in February.

By February 14, 1991, as above stated, as a result of Respondent's prior unlawful discrimination against her, Sands was employed merely on an "on-call" basis. To be employed "on call" means that the employee is not employed on a scheduled basis but merely is subject to being called to irregular employment when Respondent has the need for such an employee to work (Tr. 46). On February 14, 1991, Sands had a conversation with Florence Glenn, the new director of nursing. Glenn asked Sands when she was going on maternity leave and when she thereafter would be able to return to work. Sands told her that the baby was due on March 1 but that she had a doctor's note stating that she could work until delivery time (Tr. 47).<sup>5</sup> In any event, Sands told Glenn that she would be off work for about 6 weeks after delivery. Glenn responded that that was "fine, that was what [she] needed to know concerning this" (Tr. 47-48). Glenn said nothing about the submission of a written leave of absence application (Tr. 48). The baby was delivered on March 6 and Sands considered herself to be on maternity leave (Tr. 49).

On April 1, 1991, as above noted, the unfair labor practice hearings before Judge West commenced, with Sands being a witness, called on behalf of the General Counsel, in support of the Union's (and her own) unfair labor practice charges and the General Counsel's consolidated complaint issued thereon. Again, she was also the sole employee seated at the General Counsel's table. During a recess in that proceeding, at counsel table, she had a conversation with a coemployee (Dina Blye) which conversation was thereafter joined by Hospital Administrator Bill Morgan (Tr. 50). In the course of the conversation, Blye asked Sands when she was going

<sup>4</sup>In both the 1990 representation hearings and the 1991 unfair labor practice hearings, Sands was the only employee who sat at the General Counsel's table (Tr. 38, 44).

<sup>5</sup>The doctor's note is dated February 19, 1991 (R. Exh. 6). Therefore, either the date of Sands-Glenn conversation is incorrect or Sands was anticipating getting the note at the time of her conversation with Glenn.

to return to work and Sands answered that she would return in a couple of weeks when released by the doctor. Morgan said nothing about Sands' continued employment with Respondent and, in particular, said nothing about her failure to file a written request for leave of absence or her having "quit" her employment (Tr. 53).

## 2. Conversations and Respondent's actions concerning Sands having "quit"

In January 1991, as a result of Respondent unlawfully placing Sands on an "on call" basis of employment, Sands applied for unemployment compensation. She thereafter ceased applying for, or receiving, unemployment compensation in the period commencing with her delivery of the child in March 1991 and ending with the period when, in April 1991, she was fit for return to work but had not been called to work by Respondent. As a result of her reapplication for unemployment compensation in April 1991, she received written notification on April 24, 1991 (Tr. 56) from the Unemployment Compensation Board that Respondent was contesting her latest claim on the ground that she had quit (Tr. 55). This was the first time that she had seen or heard Respondent using the word "quit."

When she received the letter, she telephoned Administrator Morgan, telling him of Respondent's assertion that she had quit. Morgan told her that Respondent assumed that she had quit because she "didn't fill out the medical leave papers" (Tr. 57). When Sands told him of her February 14 conversation with Nursing Director Florence Glenn and that Glenn had never mentioned the necessity for filling out the leave of absence application, Morgan told her that the requirement was in the employee handbook.<sup>6</sup>

Sands told Morgan that she did not have every page of the handbook memorized and asked Morgan if he had it memorized. He said that he did not (Tr. 57). When she told him that Nursing Director Florence Glenn had said nothing about papers, Morgan said that Glenn should have mentioned it but that she was a new nursing director. Sands said: "So it's okay for her not to know about 'em but it isn't okay for me?" Morgan said, "Well, no. That's not right . . . she should have told [you] about those papers and that . . . everything was worked out" (Tr. 57-58). Sands asked: "So everything's fine, I am still employed?" Morgan responded: "Yes, everything's fine. If Unemployment has any questions, have them call me." Morgan then directed Sands to tele-

<sup>6</sup>Sands was given a copy of Respondent's employee handbook upon her rehiring in August 1989 (R. Exh. 3). Respondent's Employee handbook (R. Exh. 4) contains the following pertinent elements:

At p. 25, regarding "Voluntary Termination":

An employee who vacates his position for 3 days or longer without proper notification from his immediate supervisor shall be considered as having terminated . . . .

At page 28, the Employee Handbook deals specifically with "Leave of Absence without pay":

After continuous employment of at least one year, full-time employees are eligible to request a leave of absence for legitimate cause such as extended illness, further education or maternity leave.

Request for a leave of absence shall be in the form of a request form or letter addressed to the supervisor and submitted at least 30 days in advance of the starting date of the proposed leave . . . .

phone Respondent's head of personnel, Joan Bell (Tr. 58). He told her to tell Bell that everything was fine and that Bell should "notify Chicago [apparently the situs of an organization which oversees Respondent's Workman's Compensation and Unemployment claims]" (Tr. 58).

Sands then telephoned Personnel Director Joan Bell and told her of having received the notice from unemployment that she had quit; that she had then spoken to Administrator Morgan; and that Morgan had told her that everything was "fine" and that Sands was still employed (Tr. 59). When Bell told Sands that in order to return to work she would have to come out to the nursing home and fill out some papers, Sands again telephoned Morgan, telling him what Bell had just said. Morgan said that he didn't know what Bell was talking about; but that Morgan would telephone Bell and then telephone Sands immediately. After a short while, Morgan telephoned Sands and said that there were not any papers for her to fill out but again told her that if the Unemployment Compensation Board had any questions, to call Morgan. Sands then went to unemployment and told them what had occurred. The Unemployment Compensation personnel then telephoned Morgan in Sands' presence. They were unable to reach him at the time (Tr. 60). On April 24, Unemployment Compensation informed Sands that it would resume payments. On or about May 14, still on "on-call" status, Sands again called the nursing home because she just received a letter (Tr. 64) from Unemployment Compensation stating that Respondent was *appealing* its determination that Sands had not voluntarily quit (Tr. 61). Sands telephoned Morgan. Morgan denied knowledge of the event (Tr. 65). After first suggesting that Sands telephone Respondent's Chicago agent with regard to the appeal of the Unemployment Compensation claim, Morgan directed Sands to speak with Respondent's employee, Julia Little, to determine who was doing the scheduling of employees. This occurred because Sands told Morgan that she was available for work. Sands then telephoned Julia Little and told her that she was available for work. Little said that she was confused; that she thought that Sands no longer worked for Respondent (Tr. 66). When Sands said that that was merely a rumor and that she had spoken to Morgan who told her that everything was "fine," Little said that Morgan had just told her that Sands did not work for Respondent any longer (Tr. 66). Sands again telephoned Morgan.

Sands told Morgan: "I think we have a problem here." She reminded Morgan that he had just told her that he did not know anything about the matter of the appeal and Julia Little told her that she had spoken to Morgan who told Little that Sands no longer worked for Respondent (Tr. 66). Morgan said that he did not explain things correctly to her before; that he did not mean to "lead you one way or another, but the bosses at the hospital feel like you quit because you did not fill out the medical leave papers" (Tr. 66). When Sands reminded him of their conversation, especially Sands telling him of her conversation with Florence Glenn on February 14 and the failure of Glenn to speak about the submission of any papers, Morgan again said: "Well, the bosses at the hospital feel like you quit because you didn't fill out the forms." When Sands asked: "You mean Mr. [Daniel] Colby?" Morgan answered "Yes" (Tr. 67). Daniel Colby is the chief executive officer over Morgan (Tr. 69). Thereafter, Sands tried to reach Colby by phone but Colby never re-

turned her phone call (Tr. 70). Respondent, nevertheless, has dropped its appeal of the Unemployment Compensation Board's finding that Sands had *not* voluntarily quit (Tr. 72).

In the meantime, around April 15, Sands had telephoned Respondent and advised clerk Paula Chesser that she had been released by the doctor and was able to work. Chesser said: "Okay" (Tr. 114). No Respondent representative ever asked her to bring any doctor's note identifying the date on which she could return to work (Tr. 115). The record shows that on at least one prior occasion, when Sands left Respondent in order to have a baby, she resigned. Upon resignation, she submitted a written resignation form. Sands testified, without contradiction, that when she left to have the baby in March 1991, she submitted no resignation slip because it was not her intent to resign. Rather, she intended to resume employment after delivery of the baby.

#### *C. Respondent's Testimony*

Respondent's director of personnel, Joan Bell, testified that she could not remember an employee not submitting a leave of absence when the absence was for an extended period of time (Tr. 148), and that employees are considered to have quit if they did not contact the employer within 3 days from the date the doctor released them to return to work or from the date of the leave of absence (Tr. 148). She conceded that although she was present when Sands testified, she could not remember a conversation with her concerning her employment or her leaving employment. She conceded that she may have had such a conversation (Tr. 145). Since she has no recollection, I credit Sands.

Administrator Morgan testified that he had been told that Sands had "voluntarily resigned" (Tr. 182). Morgan could recall only telephone calls in June 1991 with Sands. He could recall nothing prior to June (Tr. 186).<sup>7</sup> Morgan did not recall the substance of his conversations with Sands and, although there was more than one conversation, he did not know how many there were (Tr. 187). After first denying recollection of any conversations with Sands prior to June, he testified that he received a phone call from her that she was ready to return to work (Tr. 189). In particular, he denied having a recollection concerning exactly which of Respondent's agents or supervisors told him that Sands had voluntarily quit (Tr. 190). Such testimony was incredible. The most he could testify to was that somebody in Respondent told [him] that Sands had quit (Tr. 191). He then testified, contradicting his prior testimony, that it was Daniel Colby, the chief executive officer of the hospital (Tr. 191), who told him, i.e., as Sands testified, Morgan said it was the "bosses" who said she quit (Tr. 66-67).

In substance, therefore, Morgan did not deny any of the testimony elicited from Sands.

Nursing Director Glenn, who, as Judge West found, was involved in retaliatory unfair labor practices directed at Sands, testified that Sands had been on leave in February be-

cause of an injury to her tailbone. When, on inquiry, Sands did not respond to a question of when she was returning from that injury, Glenn testified that she assumed that Sands had quit. In fact, however, the injury to Sands' tailbone occurred around Christmas of 1990 and thereafter Sands returned to work with a doctor's certificate (G.C. Exh. 5). The injury to the tailbone had nothing to do with Sands' subsequent absence from work due to pregnancy and delivery of a baby in March 1991.

Glenn further testified that Sands did not thereafter speak to her about a leave of absence; and that when clerk Chesser telephoned Sands to determine whether she was going to return to work, Chesser told Glenn that Sands said that she "couldn't come in," without giving a reason (Tr. 210). Thereafter, Glenn said she again asked Chesser to telephone Sands to determine how long Sands was going to be off. Glenn testified that she needed to know this because it was necessary for proper scheduling (Tr. 211-212). Glenn told Chesser to direct Sands to provide a doctor's note, because of the necessity of scheduling, to say when Sands would return to work (Tr. 212-213). Glenn testified that she had no recollection of whether she herself spoke to Sands directly about returning to work (Tr. 14).

With regard to written request for leaves of absence, the testimony and Respondent's records showed that, on some occasions, Respondent did not regard employees as having "quit" even though the employee did not submit a written leave of absence form (Toothman, no leave of absence request regarding her absence due to surgery in the period November 5, 1990, to January 22, 1991) (Tr. 154; R. Exh. 10). The record also establishes that other employees were not considered to have "quit" for failing to observe the rule requiring that written leaves of absence be submitted 30 days before leave (Lynch, R. Exh. 12; Pitzman, R. Exh. 11; Fisher, R. Exh. 7).

Finally, Glenn testified that although Sands had been employed from time to time for many years by Respondent, Glenn never telephoned Sands directly because she was too "busy" (Tr. 223). She also testified that she never heard that Sands wanted to return to employment (Tr. 224).

#### Discussions and Conclusions

A. With regard to credibility, I observed that Sands was a witness whose very self-interest, apparently, caused her to have specific recollections of specific events. I found her to be a credible witness for the most part, notwithstanding that she may have been mistaken in dating her conversation with Nursing Director Glenn concerning her having a doctor's certificate. On the other hand, I found Administrator Morgan's testimony, clothed in the mystery of the passive voice, even when directed at Sands' testimony, to be half-hearted and unconvincing. It was clear to me, that it was not he, the Administrator of the entire Memorial Home, who believed Sands had quit. As he told Sands, it was the "bosses" who said that. Likewise, Glenn, who participated in unfair labor practices directed at Sands, was an unconvincing witness with a lack of recall on matters involving her and Sands.

In particular, Respondent not only failed to call Chesser, its ward clerk, who actually had spoken with Sands concerning how long Sands would be away and whether Sands desired to return; but also failed to present the chief corporate executive officer, Daniel Colby. It was Colby who, on this

<sup>7</sup>Much of Morgan's testimony was in the passive voice. Although he was warned about the use of that locution which shielded and obscured the party engaged in the action (Tr. 184; 187), he persisted in testifying that he had been *informed* that Sands had resigned and that things were "told to me." Thus, Morgan was particularly interested, it seems to me, in shielding who was telling him various things about Sands.

record, apparently made the “quit” determination and transmitted that determination to Morgan: that Sands’ failure to submit a written leave of absence request led to the *assumption* that Sands had *quit*. Since Respondent’s records are not necessarily consistent with the *assumption*, Colby’s testimony might well not have supported it. His absence was unexplained and I draw an adverse inference from his absence. I was particularly dissatisfied with Glenn’s testimony concerning her conversations or the lack of such conversations with Sands; particularly Sands’ February pregnancy rather than a December injury to her tailbone that caused her to be absent. In my judgment, by February, with Sands 8-1/2 months pregnant, her pregnancy should have been obvious to Glenn as a reason for her future absence. I was also not impressed by Glenn’s failure to telephone Sands at home to determine whether and when she was going to return to employment. In this regard, Judge West found that Glenn had telephoned another employee at home only a month before Glenn had failed to similarly telephone Sands at home. (See Judge West’s decision.)

B. The evidence is undisputed that Respondent resented, in general, the union activities of its employees with regard to the Union’s organizational attempt commencing in December 1990; and, in particular, resented and had animus against Charging Party Sands because of her union activities and because of her testimony in support of the Union at two NLRB proceedings. Judge West’s Decision and the Board’s Order cannot be read otherwise.

C. In view of the above findings with regard to credibility and Respondent’s union animus, I further conclude that the General Counsel presented a prima facie case of Respondent having unlawfully terminated Sands, as alleged, on or about April 24, 1991, when Sands determined from letters from the Unemployment Compensation Commission that Respondent took the position that Sands had quit at that time. In support of that prima facie case, along with Respondent’s concession that it opposed the Union, that it knew that Sands was active on behalf of the Union and because of the uncontroverted evidence that Sands twice testified in these NLRB proceedings, I also conclude that Sands had a conversation, on or about February 14, 1991, with Nursing Supervisor Glenn. In that conversation while Sands had been reduced, unlawfully, to “on call” status, and when she was 8-1/2 months pregnant, Glenn asked Sands when she was going on maternity leave and when she would be able to *return* to work. In that conversation, Sands told her that the baby would be due around March 1, 1991, and that she would be off for 6 weeks thereafter. The necessary inference is that she would return after the 6 weeks. When Respondent thereafter took the position that Sands, by not returning, “quit,” I conclude that in view of the findings of *knowledge*, *animus*, and *timing* (she testified April 1–3 before Judge West and by April 24, Respondent was opposing her compensation claim based on her “quit” that the General Counsel has proved a prima facie case of unlawful discharge: that by using the word “quit,” Respondent had terminated her employment unlawfully.

In further support of the prima facie case, I find that her conversation with Administrator Morgan established that Morgan agreed that Sands’ February 14, 1991 conversation with Nursing Supervisor Glenn formed a sufficient basis for Respondent accepting Sands’ oral request for leave of absence. Thus, when Sands confronted Morgan on the phone,

upon her receipt of the Unemployment Compensation letter on April 24 (Tr. 56), and when she told him about the use of the word “quitting,” Morgan told her that her failure to fill out the form led to the assumption that she had quit (Tr. 57). When Sands thereafter remonstrated with him about her failure to file the papers and Morgan *admitted* that, Glenn, a new nursing director, should have told her about the papers, Morgan admitted that Respondent’s position was not “right” (Tr. 57). He further admitted that Glenn should have told her about the submission of papers and that everything was to be worked out. In addition, in response to Sands questioning him whether everything was “fine” and whether she was “still employed,” Morgan said: “Yes, everything’s fine. If unemployment has any questions, have them call me” (Tr. 58). In Sands’ credited testimony on this point, I find that Morgan reaffirmed that Sands’ failure to submit a written application was to be waived and that she was still to be considered Respondent’s employee. Thus, Respondent has taken inconsistent positions in its defense that she quit, thus undermining that defense, and, in the presence of a prima facie case, supporting an inference of unlawful motive. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 221 (10th Cir. 1964).

#### Respondent’s Defenses

##### D. *The Testimony Discloses No Sands’ “Quit”*

Respondent’s principal defense is that Respondent could lawfully assume that Sands had “quit” because of her failure to submit, under Respondent’s employee handbook rule, a written request for a leave of absence. I have found, immediately above, that in Sands’ conversations with both Nursing Director Glenn and Administrator Morgan, she explicitly described her plan for limited absence and that both Glenn (that’s “fine”) and Morgan (“she [Glenn] should have told [you] about those papers and that was okay . . . everything was worked out . . . yes everything’s fine”) demonstrated that Sands’ failure to submit the written application was not inconsistent with her desire to return as an employee. In short, Sands had provided Glenn with a specific statement as to when she would return with Glenn failing to mention a written leave request; and Morgan told her that she was still a Respondent employee. Therefore, there is no “quit” nor a factual predicate on which an inference of “quit” could rest.

##### E. *Sands’ Failure to Submit a Written Leave of Absence Request Does not Run Afoul of Respondent’s Handbook Rule*

Respondent’s position that it assumed Sands quit admittedly rests on Sands’ failure to observe the Employee Handbook rules: failure to make a written application for a leave of absence and failure to notify Respondent within 3 days of being off work to report that absence. Thus, Respondent’s brief asserts:

Respondent had a handbook in effect that required that employees make written applications for leaves of absence of any length, including maternity leaves; and that if an employee was off-work the employee call Respondent within 3 days of the first date of being off work . . . .

Sands credibly testified, without Administrator Morgan's contradiction, that he repeatedly told her that his "bosses at the hospital feel like you quit because you did not fill out the medical leave papers . . ." (Tr. 66). Again, after telling her that he perhaps did not explain Respondent's position correctly and after again hearing that Sands, on February 14, had heard nothing of an obligation to submit leave papers from Nursing Director Glenn, Morgan again told her: "Well, the bosses at the hospital feel like you quit because you didn't fill out the forms" (Tr. 67).

It thus appears, and I conclude, that the cornerstone of Respondent's assumption that Sands quit was her failure to execute a written "leave of absence without pay" request as it appears in the employee handbook (R. Exh. 4, 28).

The handbook obligation to submit a written request for leave of absence, of course, did not apply to Sands in the period January through April 1991. The text of the rule is:

After continuous employment of at least one year, full-time employees are eligible to request a leave of absence of legitimate cause such as . . . maternity.

The short of the matter, however, is that commencing January 1991, Sands was not a full-time employee. Therefore whether or not she was "eligible" to request a leave of absence, she was certainly under no *obligation* to make such a request because she was not a full-time employee.

Although Nursing Director Glenn had no recollection of whether Sands was a full-time employee or an on-call employee (Tr. 217) at the time that Respondent assumes she quit (in or about April 1991), Judge West found (ALJ decision, slip op. 14-15) that Sands was placed on "on call" status on January 1, 1991; and that up to the time of his hearing (April 1-3, 1991), she worked a total of 6 to 8 days. Judge West's finding is consistent with Sands' uncontradicted and credited testimony at the instant hearing that in the period January through February 1991, she was called to work during her "on call" status no more than six or eight times (Tr. 246).

Thus, insofar as Respondent's defense (an "assumed" quit) is based upon Sands' failure to meet the Handbook obligation to submit a written request for leave without pay, as Morgan's repeated testimony underlines, and as Respondent's brief insists, that defense of "failure to comply" is without basis under Respondent's own rules. For the obligation to submit a written request for leave of absence relates only to "full-time employees" and Sands, in a mere "on call status," was not a full-time employee.

#### F. Respondent's Defense, That it Assumed That Sands Quit, is Otherwise Unsupported by the Facts

(1) Sands testified, and Morgan did not deny, that Sands told him that in her February 14 conversation, Nursing Director Glenn failed to tell her of necessity for submitting papers (Tr. 67). Sands told Morgan that Sands had informed Nursing Director Glenn that she would be off for 6 weeks starting with the delivery of her baby and that Glenn said "fine" and that was all she needed to know. In the General Counsel's cross-examination, Morgan repeatedly attempted to avoid answering the question whether an oral request for leave of absence (which Sands, in substance, described as having made to Nursing Director Glenn on February 14)

would suffice as a lawful request within Respondent's rules (Tr. 199 et. seq.). Ultimately, however, Morgan admitted that an *oral* request for leave of absence would be considered a request for a leave of absence within Respondent's rules (Tr. 201-202). After making that admission, and mindful of Sands' telephone conversation with him describing her February 14 conversation with Nursing Director Glenn, Morgan admitted that he never asked Glenn whether Sands had asked her for a leave of absence or otherwise sought to discover whether she made such a request (Tr. 204). Such Morgan testimony is consistent with his repeated assertions, according to Sands' testimony, that it was Respondent's "bosses" who felt that she had quit because she did not fill out medical leave papers (Tr. 66, 67). In short, by the time of these April 1991 conversations between Sands and Morgan, Morgan knew that Respondent's (Colby's) position was that she had quit and that there was no reason to investigate whether Sands actually had such a conversation with Nursing Director Glenn and whether Sands had given Glenn notice of a request for maternity leave in the February 14 conversation. It was a matter of indifference to Morgan because he knew that Respondent had already decided to terminate Sands' employment by "assuming" that she had quit.

(2) Nursing Director Glenn participated in the earlier unlawful discrimination against Sands, as noted in Judge West's decision. Her testimony in the instant hearing was not impressive, especially her lack of recollection concerning whether Sands was merely "on call" or a full-time employee in the period January through April 1991 (Tr. 217). She testified repeatedly that she told ward clerk Chesser to telephone the absent Sands because she wanted to make sure where Sands would fit in Respondent's *scheduling* of LPNs. She admitted, however, that an employee who was on "call" is not on the schedule (Tr. 232); and that if Sands were on "on call" status, there would be no need to call her for scheduling purposes (Tr. 232). I do not credit her further testimony that even though Sands might be "on call" status, she wanted to know if Sands was going to be able to return to work (Tr. 233). I do not credit Glenn because her testimony openly confused Sands' maternity and pregnancy absence in March 1991 with Sands' late December 1990 injury to her tailbone.

In short, Glenn repeatedly testified that she had Chesser telephone Sands in February or March 1991 because it was necessary to determine Sands' date of return for scheduling purposes. There was no need for such a telephone call in view of the fact that Chesser was on "on call" status and was not part of any scheduling. I was also dissatisfied with Glenn's testimony that she herself did not telephone Sands (to discover whether Sands desired to return after her maternity situation) because she was "too busy." She was not too busy to personally telephone an employee at home concerning her work status, which telephone call occurred on January 4, 1991, a few weeks before Chesser allegedly called Sands (ALJ decision).

(3) As the General Counsel observes, Respondent's assumption that Sands quit constituted disparate treatment compared with other employees who failed to submit a written request for a leave of absence. Thus employee Brenda Toothman was absent for an 8-week period (November 5, 1990 through January 22, 1991) shortly before Sands' absence and failed to submit a leave of absence form for this period (Tr. 154; R. Exh. 10). Yet, Toothman was neither

considered to having “quit” for failing to submit the written request nor was she discharged for failure to meet any such obligation. Similarly, other employees failed to meet the requirements of the employee handbook with regard to the 30-day advance notice requirement.<sup>8</sup> Other employees, as Administrator Morgan admitted, failed to follow the handbook policy of 30 days’ advance notice and were neither terminated nor assumed to have “quit” (Kimberly Smith, Tr. 197–198; Volkman, Tr. 198). Morgan admitted that there were exceptions to the 30-day advance notice policy (Tr. 198–199) but failed to suggest why an exception was not made with regard to longtime employee Sands.

(4) Respondent argued, and submitted evidence to support the position, that many of its employees submitted written requests for leave without pay under various circumstances. Respondent’s brief admits, however, that its procedures relating to written applications for leaves of absence of length were only “generally followed by the employees (R. Br. 2). It seems to me, nevertheless, that Respondent’s argument and the supporting evidence misses the point. The issue is not whether employees often submitted written requests for leave for maternity and other reasons. Rather, the issue is whether any employee was ever discharged or was “assumed” to have “quit” because of a failure to submit such a written request for leave. Respondent produced not a single example of any employee who was ever discharged or was assumed to have “quit” because of a failure to submit a written or, indeed, an oral request for a leave of absence. In short, the precise issue is not whether employees generally submitted written requests for leaves of absence; rather, the issue is whether Respondent ever terminated employees for failure for having failed to do so. There was no proof submitted on this point. The closest the record comes to recognizing this issue was a stipulation entered into by the parties: that from January 1, 1990, to the present time (the time of the instant hearing, October 17, 1991), Respondent has not discharged or considered employees as having quit for failing to submit written requests for leaves of absence (Tr. 10).

(5) Sands was twice prominently seated at the General Counsel’s table and a witness in the representation case and in the April 1–3 unfair labor practice proceedings before Judge West. During the April 1–3 hearings, she spoke with Administrator Morgan. He never suggested to her at that time that Respondent took the position that she had quit as a result of failing to submit a written request for absence. It was only after her testimony that Respondent took the position that she quit, that position first appearing in its April 24 contest of Sands’ application for unemployment compensation benefits. Thus, on this record, it would appear, and I find, that Respondent’s position that she quit was not known to Morgan during the April 1–3 unfair labor practice proceedings but was the position taken thereafter in view of Sands’ prominent role and testimony at those April 1991 proceedings.

Lastly, I conclude that Respondent’s conduct in the instant case, particularly in its assumption (that Sands quit) first made known on or about April 24, 1991, is merely a con-

tinuation of Respondent’s unlawful discrimination against Sands. In the instant case, I have found that the General Counsel proved a prima facie case that Sands’ union activities and her testimony and conduct at Board proceedings was “a motivating factor” in Respondent’s decision to terminate her employment. I further conclude that Respondent has failed to carry its burden, to prove by a preponderance of credible evidence, that it rebutted the prima facie case, *NKC of America*, 291 NLRB 683 (1988), or that it would have taken the same action notwithstanding Sands engaging in union activities and in testifying and appearing at Board proceedings. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 1989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The instant facts demonstrate a continuing serious statutory violation of Section 8(a)(3). I have, of course, relied, in part, on Judge West’s decision and the Board Order above. *Tama Meat Packing Corp. v. NLRB*, 575 F.2d 661 (8th Cir. 1978). Respondent’s defense—failure to submit a written leave request—is simply unpersuasive. *Equitable Gas Co.*, 303 NLRB 925 (1991).

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) 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)(3) of the Act by terminating the employment of Michele Yvette Sands, on or about April 24, 1991, because of her activities on behalf of, her membership in, and her sympathy for Teamsters Local Union No. 279, International Brotherhood of Teamsters, a labor organization, thereby unlawfully discriminating against her by discouraging such membership, support, and activities.

4. Respondent violated Section 8(a)(4) of the Act by terminating the employment of Michele Yvette Sands on or about April 24, 1991, because of her appearance at and the testimony she gave at the NLRB unfair labor practice proceedings of April 1–3, 1991, in Charleston, Illinois.

5. The aforesaid unfair labor practices constitute 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 certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act. I shall recommend to the Board that Respondent be required to offer immediate and full reinstatement to Michele Yvette Sands in all the jobs that she would have held but for Respondent’s unlawful and discriminatory conduct against her as described in the Board Order, 305 NLRB 910, adopting the decision of Judge John H. West, issued in JD–181–91, July 15, 1991, or, if those positions do not exist, to substantially equivalent positions, without prejudice to her seniority and other rights or privileges previously enjoyed. I shall further recommend that Respondent be ordered to make her whole for any loss of earnings and other benefits suffered as a result of Respondent’s unlawful discrimination against her. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90

<sup>8</sup>The employee handbook, p. 28, provides:

Request for leave of absence shall be in the form of a request form or letter addressed to the supervisor and submitted at least 30 days in advance of the starting date of the proposed leave.

NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>9</sup>

#### ORDER

The Respondent, Shelby Memorial Hospital Association d/b/a Shelby Memorial Home, Shelbyville, Illinois, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Discharging, terminating the employment of, or unlawfully discriminating against any employee because the employee engages in activities on behalf of Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 279, affiliated with the International Brotherhood of Teamsters, or any other labor organization, or engages in other concerted activities protected by Section 7 of the Act.

(b) Discharging, terminating the employment of, or otherwise unlawfully discriminating against any employee because the employee appears at or testifies in a proceeding before the National Labor Relations Board or gives testimony pursuant to the provisions of the Act.

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

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

(a) Offer Michele Yvette Sands immediate and full reinstatement to all former positions she would have had but for Respondent's unlawful conduct against her, as specified in the decision of Judge John H. West in his decision JD-181-91, issued July 15, 1991, as adopted by the Board, 305 NLRB 925, and herein, or, if those positions do not exist, to substantially equivalent positions, without prejudice to her seniority or other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits she may have suffered as a result of the unlawful discrimination against her in the manner set forth in the remedy section of this decision.

(b) Remove from its records Respondent's unlawful termination of Michele Yvette Sands, on or about April 24, 1991, and notify her in writing that this has been done and that it will not be used as a basis for future personnel actions against her.

(c) 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.

(d) Post at its Shelbyville, Illinois facility (Shelby Memorial Home) copies of the attached notice marked "Appen-

dix."<sup>10</sup> Copies of the notice, on forms provided by the Regional Director for Region 14, 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.

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

<sup>10</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

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

WE WILL NOT discharge, terminate the employment of, or otherwise unlawfully discriminate against any employee because such employee engages in activities on behalf of Teamsters, Chauffeurs, Warehousemen and Helpers Union No. 279, affiliated with the International Brotherhood of Teamsters, or any other labor organization.

WE WILL NOT discharge, terminate the employment or otherwise unlawfully discriminate against any employee because such employee testifies at an unfair labor practice or other hearing of the National Labor Relations Board or otherwise gives testimony pursuant to the terms of the National Labor Relations Act.

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 Michele Yvette Sands immediate and full reinstatement to all former jobs to which she would have been entitled, as described in the decision of Administrative Law Judge John H. West, JD-181-91, issued July 15, 1991, but for our unlawful discrimination against her, or, if those jobs or positions no longer exist, to substantially equivalent positions, without prejudice to her seniority or other rights or privileges previously enjoyed, and WE WILL make her whole for any loss of earnings and other benefits she may have suffered as the result of our discrimination against her.

WE WILL remove from our files any reference to the April 24, 1991 discharge of Michele Yvette Sands and notify her, in writing, that this has been done and that evidence of this unlawful discharge will not be used against her as a basis for future personnel actions.

SHELBY MEMORIAL HOSPITAL ASSOCIATION  
D/B/A SHELBY MEMORIAL HOME

<sup>9</sup>If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.