

Asociacion Hospital del Maestro, Inc. d/b/a Hospital del Maestro and Union Independiente de Trabajadores del Hospital del Maestro

Union de Trabajadores de la Industria Gastronomic, Local 610, HEREIU, AFL-CIO and Union Independiente de Trabajadores del Hospital del Maestro. Cases 24-CA-7056, 24-CA-7091, 24-RC-7660, 24-RC-7661, and 24-CB-1715

February 27, 1997

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND HIGGINS

On July 14, 1995, Administrative Law Judge Lowell M. Goerlich issued the attached decision. The Respondent Hospital and the General Counsel filed exceptions and supporting briefs, and the General Counsel filed an answering 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 briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified below, and to adopt the recommended Order² as modified and set forth in full below.³

1. At the time of the events at issue here, the Respondent Hospital had collective-bargaining relationships with nine unions, one of which was the Respondent Union in this proceeding, Union de Trabajadores de la Industria Gastronomic, Local 610, HEREIU, AFL-CIO (Respondent Union or Local 610). The Respondent Union represented the Hospital's office and clerical employees.

Jose Esquilin-Pinto (Esquilin) and Jose Jenaro Rivera Vega (Rivera) were employed by the Hospital as accounting clerks and were in the office and clerical unit represented by Local 610. Around July 1994,⁴ Esquilin formed and began to organize on behalf of the Charging Party, Union Independiente de Trabajadores

del Hospital del Maestro (Charging Party). Employee Maria Teresa Jurado Acevedo (Jurado) also was active on behalf of the Charging Party and was a member of its board of directors. The Charging Party filed three different representation petitions, which led to Board-conducted elections in three separate units. Two of those elections are at issue in this proceeding.

We agree with the judge that the Respondent Hospital violated Section 8(a)(3) and (1) of the Act by suspending and discharging employee Jurado and by restricting employee Esquilin's movements around the Hospital in order to interfere with his activities on behalf of the Charging Party. We also adopt the judge's findings that the Hospital violated Section 8(a)(1) by threatening Jurado with discharge because of her union activities and by excluding Esquilin from its cafeteria. In addition, we affirm the judge's finding that the Hospital's refusal to reinstate Esquilin violated Section 8(a)(4) and (1).

2. The judge dismissed the complaint allegations that the Respondent Union violated Section 8(b)(1)(A) and (2) by seeking and causing the discharge of employee Jenaro Rivera Vega (Rivera) and that the Hospital violated Section 8(a)(3) and (1) by discharging Rivera pursuant to Local 610's request. The General Counsel has excepted to these dismissals. We find merit in the General Counsel's exceptions.

The relevant collective-bargaining agreement between Local 610 and the Hospital contained a union-security clause which provided that a unit employee must be "a Union member in good standing as an employment condition." The contract also provided that the Hospital would discharge, at Local 610's request, "any employee who refuses or fails to join the Union as a member in good standing." Rivera did not execute a dues-deduction card and did not otherwise make arrangements for payment of his union dues. At a meeting in 1992, officials of Local 610 asked Rivera to sign a union card. Rivera testified that he refused because he "needed information from the Union." On August 20, 1993, the Respondent Union sent a letter to Rivera stating that he was obligated to become a permanent member of the Respondent Union and that if he did not sign a dues-checkoff authorization card by September 30, 1993, the Respondent Union would request his discharge. On November 9, 1994, the Respondent Union again wrote to Rivera and advised him that it was giving him 10 days to sign the dues-checkoff authorization card or it would request his discharge. Rivera failed to do so, and on November 29, 1994, the Respondent Union requested and obtained Rivera's discharge. Approximately 5 days before his discharge, in a meeting with Local 610 Representative Alago and Hospital Human Resources Director Santiago in the latter's office, Rivera refused to sign the checkoff authorization card and refused to agree to

¹The Respondent Hospital has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

²The General Counsel excepts to the judge's failure to order that the notice be posted in both the English and Spanish languages. Bilingual notices are customary in Region 24, and we shall amend the judge's recommended Order accordingly. *WAPA-TV*, 317 NLRB 1959 (1995).

³We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

⁴All dates hereafter are in 1994, unless otherwise specified.

any payment plan. Santiago testified that he stated to Rivera that "the Union asks you to please sign the little card, and this is over." Rivera refused and said that until he was "oriented, he was not going to sign the card." The record shows that "the card" in question is used both to authorize the checkoff of dues and to apply for membership in the Respondent Union.

In finding that Local 610 lawfully demanded Rivera's discharge and that the Hospital's compliance with this request was lawful, the judge found that Rivera was conversant with his statutory and contractual obligations to pay union dues and that he simply failed to comply. For the reasons set forth below, we disagree with the judge.

It is well established under the Act that "[m]embership as a condition of employment is whittled down to its financial core." *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). Thus, a union violates the Act when it notifies employees that they are required to become full members as a condition of their employment. *Service Employees Local 680 (Leland Stanford Junior University)*, 232 NLRB 326 (1977), enf. 601 F.2d 980 (9th Cir. 1979). It is also firmly established that dues-checkoff authorizations must be made voluntarily and that employees subject to a union-security clause have a Section 7 right to select or reject the checkoff system as the method by which to pay periodic dues to a union. *Electrical Workers IUE Local 601 (Westinghouse Electric Corp.)*, 180 NLRB 1062 (1970). Thus, a union violates the Act when it threatens employees with discharge if they refuse to sign dues-checkoff authorization cards. *Id.*

In our view, *Auto Workers Local #1752 (Schweizer Aircraft)*, 320 NLRB 528 (1995), petition for review denied sub nom. *Williams v. NLRB*, 1996 WL 772803 (2d Cir. 1996), does not compel a contrary ruling. Although *Schweizer* states that "Section 7 of the Act contains no specific rights pertaining to" the "method" of dues payment, the case dealt with revocation of a voluntarily signed checkoff authorization outside the window period for revocation; and it did not purport to overrule cases such as *Electrical Workers IUE Local 601 (Westinghouse Electric Corp.)*, supra, which predicated violations on coerced signing of checkoff authorizations. Moreover, in *Schweizer* no impediments had been placed on the employee's resignation of membership, which had occurred more than 7 months before the attempt to revoke checkoff. In this case, the compulsion to sign the checkoff authorization was part and parcel of the unlawful insistence that Rivera become a full union member, since the card he was required to sign, on pain of discharge, obligated him to both.

In addition, the Board has long held that a union seeking the discharge of an employee pursuant to a union-security clause has a fiduciary duty to deal fairly

with the employee. Thus, under Board law, the union must provide the employee with a statement of the precise amount owed, the period for which dues are owed and the method by which the amount was computed, and give the employee an opportunity to make payment. *Philadelphia Sheraton Corp.*, 136 NLRB 888 (1962), enf. sub nom. *NLRB v. Hotel Employees Local 568*, 320 F.2d 254 (3d Cir. 1963). When a union fails to satisfy these requirements before it seeks the employee's discharge, it violates Section 8(b)(1)(A) and (2) of the Act.⁵

The record reveals that officials of the Respondent Union on several occasions advised Rivera that his failure to execute the dues-checkoff authorization card, which also stated that it was a membership application, would result in his discharge. As discussed above, it is clearly unlawful for a union to require an employee to sign a dues-checkoff authorization card and apply for union membership as a condition of employment. In addition, Local 610 did not fulfill its fiduciary duty to deal fairly with Rivera. Thus, Local 610 did not fully inform Rivera concerning the amount and calculation of his dues obligation. It failed to do so despite Rivera's requests for "orientation." We find that by insisting that Rivera sign a checkoff/membership application card and by failing to inform him concerning his precise financial obligations to the Respondent Union, Local 610 violated Section 8(b)(1)(A).⁶ We further find that by requesting that the Hospital discharge Rivera for his failure to comply with his dues obligation, Local 610 violated Section 8(b)(2).⁷

The Board has held that when an employer has been placed on notice or given sufficient reason to suspect that a union may have failed in its fiduciary duty to inform employees of their financial obligations to the union, that employer has a duty to investigate the circumstances surrounding the request for discharge before honoring it.⁸ As evidenced by the meeting in Human Resources Director Santiago's office, the Hos-

⁵*Laborers Local 334 (Burdco Environmental)*, 303 NLRB 350 (1991); *Western Publishing Co.*, 263 NLRB 1110 (1982).

⁶In light of our finding of a violation on these grounds, we find it unnecessary to pass on the General Counsel's theory of a violation of the Act premised on the Board's decision in *Electrical Workers IUE Local 444 (Paramax Systems)*, 311 NLRB 1031 (1993), enf. denied 41 F.3d 1532 (D.C. Cir. 1994).

⁷Contrary to the judge, we do not find that Rivera's conduct rose to the level of bad faith or a willful or deliberate attempt to avoid his dues obligations. Indeed, as the judge noted, Rivera acknowledged that under the contract he was required to pay union dues, but stated that he first needed information from the Respondent Union. The Respondent Union not only failed to supply him with necessary information but also unlawfully informed him that he was required to become a union member and sign a dues-checkoff authorization card to keep his job. Under these circumstances, it cannot fairly be said that Rivera made "a conscious choice" to avoid his financial obligations. *Western Publishing*, supra at 1113.

⁸*Western Publishing*, supra at 1113; *Conductron Corp.*, 183 NLRB 419, 427-428 (1970).

pital knew the circumstances concerning Local 610's improper discharge request. Furthermore, Santiago admitted that he insisted that Rivera sign the dues-check-off and membership application card on pain of discharge. Thus, we find that by complying with Local 610's request that Rivera be discharged when it knew of the Respondent Union's failure to advise him properly concerning his obligations, the Hospital violated Section 8(a)(3) and (1).

3. The Charging Party's petition in Case 24-RC-7660 covers a unit of service and maintenance employees who are currently represented by a different union, Confederacion Obrera Puertorriquena. As noted by the judge, an election was conducted in Case 24-RC-7660 on September 30. Nine votes were cast for each Union, and there was one determinative challenged ballot. The Charging Party filed objections, which raised the same issues as some of the unfair labor practice allegations. The judge sustained one of the objections based on the unlawful suspension and discharge of employee Jurado. He also found merit to objections based on the unlawful restrictions on Esquilin's movements in the Hospital and on the threat of discharge directed toward Jurado. We agree with the judge's findings that the Employer engaged in objectionable conduct.

The judge, however, did not resolve the issue of the determinative challenged ballot. The Board agent challenged the ballot of Jose Manuel Martinez Moreno (Martinez) on the ground that his name was not on the eligibility list. The Regional Director's report states that the Hospital contends that Martinez is a temporary employee and the Petitioner contends that he is an eligible voter. The Regional Director found that the challenge to Martinez' ballot raised material issues of fact and referred the issue for hearing along with the objections. It is undisputed that no evidence was presented at the hearing concerning Martinez' eligibility.

The party seeking to exclude an individual from voting has the burden of establishing that the individual is ineligible to vote. *Golden Fan Inn*, 281 NLRB 226, 230 fn. 24 (1986). Thus, the burden was on the Hospital to prove that Martinez was ineligible. In the absence of any record evidence concerning Martinez' eligibility, we find that the Hospital has not sustained its burden. Thus, we find that Martinez was an eligible voter and that his determinative challenged ballot should be opened and counted.

Accordingly, we shall modify the judge's recommended Order and direct the Regional Director to open and count Martinez' ballot and issue a revised tally of ballots. We also shall direct the Regional Director to issue a certification of representative in the event the Charging Party receives a majority of the valid ballots cast, and, in the event the Charging Party does not receive a majority of the valid ballots cast, we shall direct him to set the election aside and to

conduct a second election. Thus, we find that even if Martinez' ballot is shown to have been cast for the other Union on the ballot, Confederacion Obrera Puertorriquena, certification of that labor organization is not appropriate because the Employer's objectionable conduct did not affect employee free choice concerning both Unions equally. Rather, the Hospital's objectionable conduct involved actions taken against employees Jurado and Esquilin, who supported and engaged in activities on behalf of the Charging Party. Accordingly, in the situation presented here, where the objectionable conduct interfered with employee free choice regarding the Charging Party, the election must be set aside unless the revised tally of ballots shows that the Charging Party has received the most votes.⁹

4. The judge found that after Esquilin began organizing for the Charging Party, the Hospital took steps to restrict his movements in the facility. On several occasions, Esquilin's supervisor informed him that he could leave his desk only when she authorized him to do so, and that if she was absent, Esquilin had to wait for permission from another supervisor before he could leave his desk. Additionally, a wall between Esquilin's desk and the supervisor's station was removed so that his supervisor could see him. Further, Esquilin's supervisor told him that she had been instructed to inform Management Official Castro of Esquilin's movements throughout the Hospital.

We agree with the judge that these restrictions represented a change in Esquilin's working conditions and that they constituted a violation of Section 8(a)(3) and (1). In so doing, we find that the General Counsel has carried his burden under *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), of proving that Esquilin's conduct on behalf of the Charging Party was a substantial or motivating factor in the restrictions placed on him. We further find that the Respondent Hospital failed to sustain its burden of proving that it would have restricted Esquilin's movements even in the absence of his union activity.

5. The Respondent Hospital discharged Esquilin on November 29, 1994, pursuant to Local 610's request that he be terminated for failure to pay union dues required by the parties' collective-bargaining agreement. On February 1, 1995, Local 610 asked the Hospital to

⁹ See *Concourse Nursing Home*, 230 NLRB 916, 919 (1977), and cases cited there.

The other petition at issue in this proceeding is in Case 24-RC-7661. It covers a unit of clerical employees currently represented by the Respondent Union. As noted by the judge, the election in this unit was conducted on October 28. The tally of ballots shows 47 votes for the incumbent Respondent Union and 27 votes for the Petitioner Charging Party. The Charging Party's objections to the election were withdrawn. The Respondent Union was certified on April 19, 1995. Accordingly, there are no remaining issues for resolution concerning Case 24-RC-7661.

reinstate Esquilin because he had promised to pay the dues owed by him to the Respondent Union. The Hospital, however, refused to reinstate Esquilin solely because Esquilin had filed unfair labor practice charges against it with the Board. We agree with the judge's finding that the Hospital's refusal to reinstate Esquilin pursuant to the Respondent Union's February 1, 1995 request violated Section 8(a)(4).

We also agree with the judge's finding that in February 1995, the Hospital unlawfully denied Esquilin access to the Hospital's cafeteria. In doing so, however, we find it unnecessary to pass on the judge's reliance on *Montgomery Ward & Co.*, 288 NLRB 126, 127 (1988). In light of the finding that Esquilin was unlawfully denied reinstatement on February 17, 1995, we find that as of that date Esquilin was an employee-discriminatee and not a nonemployee union organizer. Accordingly, at the time in February that Esquilin was barred from the cafeteria, he was an employee of the Hospital and entitled to access to the Hospital's public cafeteria on that basis alone.

AMENDED REMEDY

Having found that the Respondents have violated Section 8(a)(3) and (1) and Section 8(b)(1)(A) and (2) of the Act, we shall order that they cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

We shall order that the Respondent Union notify the Respondent Hospital in writing that it has no objection to the employment of Jose Jenaro Rivera Vega and request his full reinstatement and the restoration of his full seniority rights and other rights and privileges as though his employment had never been interrupted. We shall order that the Respondents jointly and severally make Rivera whole, with interest, for any loss of earnings suffered by him as a consequence of the discrimination against him, in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Claremont Resort Hotel & Tennis Club*, 260 NLRB 1088 (1982), with interest calculated in the manner set forth in the judge's recommended remedy. The Respondent Hospital shall be ordered to expunge from its records any reference to the unlawful termination of Rivera and to notify him in writing that this had been done and that the unlawful termination will not be used against him in any way.

ORDER

The National Labor Relations Board orders that

A. Respondent Asociacion Hospital del Maestro, Inc. d/b/a Hospital del Maestro, Hato Rey, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Encouraging membership in Union de Trabajadores de la Industria Gastronomica, Local 610,

HEREIU, AFL-CIO, or any other labor organization, by discharging employees or otherwise discriminating against them in regard to their hire or tenure or any terms and conditions of their employment, in compliance with Local 610's unlawful efforts to enforce an agreement permitted by the proviso to Section 8(a)(3) of the National Labor Relations Act.

(b) Discouraging union or other concerted activities of its employees or their membership in Union Independiente de Trabajadores del Hospital del Maestro, or any other labor organization, by discriminatorily suspending or discharging them.

(c) Unlawfully denying employees access to the hospital cafeteria.

(d) Unlawfully restricting employees' movements in the Hospital because of their union activities.

(e) Unlawfully threatening employees with discharge because of their union activities.

(f) Unlawfully refusing to reinstate employees who file unfair labor practice charges with the National Labor Relations Board.

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

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

(a) Within 14 days from the date of this Order, offer Maria Teresa Jurado Acevedo (Jurado) and Jose Jenaro Rivera Vega (Rivera) full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Make Jurado whole and, jointly and severally with Union de Trabajadores de la Industria Gastronomica, Local 610, HEREIU, AFL-CIO, make Rivera whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Within 14 days from the date of this Order, offer Jose Esquilin-Pinto the job he would have filled had he been lawfully reinstated or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

(e) Make Jose Esquilin-Pinto whole for any loss of earnings and other benefits suffered as a result of the unlawful action taken against him, in the manner set forth in the remedy section of the decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure to reinstate Jose Esquilin-Pinto, and within 3 days thereafter notify the employee in writing that this has been done and that the refusal to reinstate him will not be used against him in any way.

(g) Preserve and, within 14 days of a 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.

(h) Within 14 days after service by the Region, post at its hospital at Hato Rey, San Juan, Puerto Rico, in both the English and Spanish languages, copies of the attached notice marked "Appendix A."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since October 17, 1994.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. Respondent Union de Trabajadores de la Industria Gastronomica, Local 610, HEREIU, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause Asociacion Hospital del Maestro, Inc. d/b/a Hospital del Maestro to discharge or otherwise discriminate against employees for failing to tender initiation fees and periodic dues without informing them of the amount of dues owed, the months for which dues are owed, and the method of calculation, and by failing to provide them with an opportunity for payment after they are properly informed of their obligations, and by requiring that they sign a dues-checkoff and membership application card as a condition of employment.

¹⁰If 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."

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

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

(a) Within 14 days from the date of this Order, advise the above-named Employer and Rivera, in writing, that it withdraws and rescinds its request for Rivera's discharge, and that it has no objection to his reinstatement without any loss of seniority or other rights and privileges previously enjoyed by him.

(b) Within 14 days from the date of this Order, affirmatively request, in writing, that the Employer reinstate Rivera without any loss of seniority or other rights and privileges previously enjoyed by him.

(c) Jointly and severally, with the Employer, make Rivera whole for any loss of pay or other benefits suffered by him as a result of the discrimination against him, with interest, in the manner set forth in the remedy section of this decision.

(d) Within 14 days from the date of this Order, remove from its files, and ask the Employer to remove from the Employer's files, any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that it has done so and that it will not use the discharge against him in any way.

(e) Within 14 days after service by the Region, post at its business office, in both the English and Spanish languages, copies of the attached notice marked "Appendix B."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondent Union's authorized representative, shall be posted by the Respondent Union and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent Union has gone out of business, the Respondent Union shall duplicate and mail, at its own expense, a copy of the notice to all current and former members of the Respondent Union who were members at any time since October 17, 1994.

(f) Within 14 days after service by the Region, forward a sufficient number of signed copies of the notice to the Regional Director for posting by the Employer, if willing, in places where notices to employees are customarily posted.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Union has taken to comply.

¹¹ See fn. 10, above.

DIRECTION

It is directed that, within 14 days from the date of this Decision, Order, and Direction, the challenged ballot of Jose Manuel Martinez Moreno in Case 24-RC-7660 be opened and counted by the Regional Director and that a revised tally of ballots be issued.

IT IS FURTHER DIRECTED that if the revised tally of ballots reveals that Union Independiente de Trabajadores del Hospital del Maestro (the Petitioner) has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. If, however, the revised tally shows that the Petitioner has not received a majority of the ballots cast, the Regional Director shall set aside the election and conduct a new election when he deems the circumstances permit the free choice of a bargaining representative.

APPENDIX A

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.

WE WILL NOT encourage membership in Union de Trabajadores de la Industria Gastronomica, Local 610, HEREIU, AFL-CIO, or any other labor organization, by discharging employees or otherwise discriminating against them in regard to their hire or tenure or any terms or conditions of their employment, in compliance with Local 610's unlawful efforts to enforce an agreement permitted by the proviso to Section 8(a)(3) of the National Labor Relations Act.

WE WILL NOT discourage your union or other concerted activities on behalf of or your membership in Union Independiente de Trabajadores del Hospital del Maestro, or any other labor organization, by discriminatorily suspending or discharging you.

WE WILL NOT unlawfully deny our employees access to the hospital cafeteria.

WE WILL NOT unlawfully restrict your movements in the Hospital because of your union activities.

WE WILL NOT unlawfully threaten you with discharge because of your union activities.

WE WILL NOT unlawfully refuse to reinstate employees who file unfair labor practice charges with the National Labor Relations Board.

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, within 14 days from the date of the Board's Order, offer Maria Teresa Jurado Acevedo and

Jose Jenaro Rivera Vega full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL make whole Maria Teresa Jurado Acevedo and, jointly and severally with Local 610, make whole Jose Jenaro Rivera Vega for any loss of earnings and other benefits suffered as a result of the actions against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, offer Jose Esquilin-Pinto the job he would have filled had he been reinstated or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make whole Jose Esquilin-Pinto for any loss of earnings and other benefits resulting from our failure to reinstate him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the suspension of Maria Teresa Jurado Acevedo, the discharges of Maria Teresa Jurado Acevedo and Jose Jenaro Rivera Vega, and the failure to reinstate Jose Esquilin-Pinto and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the suspension, discharges, and failure to reinstate will not be used against them in any way.

ASOCIACION HOSPITAL DEL MAESTRO,
INC. D/B/A HOSPITAL DEL MAESTRO

APPENDIX B

NOTICE TO MEMBERS
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.

WE WILL NOT cause or attempt to cause Asociacion Hospital del Maestro, Inc. d/b/a Hospital del Maestro to discharge or otherwise discriminate against employees for failing to tender initiation fees and periodic dues without informing them of the amount of dues owed, the months for which dues are owed, and the method of calculation, and by failing to provide them with an opportunity for payment after they are properly informed of their obligations, and by requiring that they sign a dues-checkoff and membership application card as a condition of employment.

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

WE WILL, within 14 days from the date of the Board's Order, advise the Employer, Asociacion Hospital del Maestro, Inc. d/b/a Hospital del Maestro, and Jose Jenaro Rivera Vega, in writing, that we withdraw and rescind our request for Rivera's discharge, and that we have no objection to his reinstatement without any loss of seniority or other rights and privileges previously enjoyed by him.

WE WILL, within 14 days from the date of the Board's Order, affirmatively request, in writing, that the Employer reinstate Rivera without any loss of seniority or other rights and privileges previously enjoyed by him.

WE WILL, jointly and severally with the Employer, make Rivera whole for any loss of pay or other benefits suffered by him as a result of the actions against him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files, and ask the Employer to remove from its files, any reference to the discharge of Jose Jenaro Rivera Vega and WE WILL, within 3 days thereafter, notify him in writing that we have done so and that the discharge will not be used against him in any way.

UNION DE TRABAJADORES DE LA
INDUSTRIA GASTRONOMICA, LOCAL 610,
HEREIU, AFL-CIO

Ismael Rodríguez-Izquierdo and Efrain Rivera Vega, Esqs.,
for the General Counsel.

Claribel Ortíz-Rodríguez and Luis Ricardo Pavia Cabanillas,
Esqs., for the Respondent Hospital.

Luis M. Escribano and Valentín Hernández, Esqs., for the
Respondent Union.

José Esquilín, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

LOWELL M. GOERLICH, Administrative Law Judge. On January 31, 1994, an order consolidating Cases 24-CA-7056, 24-CA-7091, 24-CB-1715, 24-RC-7660, and 24-RC-7661 was issued. The charge in Case 24-CA-7056 filed by Unión Independiente de Trabajadores del Hospital del Maestro (the Charging Party Union) on October 17, 1994, was served on Asociación Hospital del Maestro (the Respondent Hospital) on the same date. The first amended charge filed by the Charging Party Union on October 26, 1994, was served on the Respondent Hospital on the same date. A second amended charge filed by the Charge Party Union on December 19, 1994, was served on the Respondent Hospital on the same date. The charge in Case 24-CB-1715 filed by the Charging Party Union on December 2, 1994, was served on Unión de Trabajadores de la Industria Gastronómica, Local 610, HEREIU, AFL-CIO (the Respondent Union) on December 5, 1994. The amended charge in Case 24-CB-1715 filed by the Charging Party Union on January 13, 1994, was served on

the Respondent Union with the consolidated complaint on February 1, 1995.

In the complaints it was alleged among other things that the Respondent Hospital has discharged employees José Esquilín-Pinto, Jenaro Rivera Vega, and María Teresa Jurado Acevedo in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) and that the Respondent Union had caused the discharge of José Esquilín-Pinto and Jenaro Rivera Vega in violation of Section 8(b)(1)(A) of the Act. Cases 24-RC-7660 and 24-RC-7661 concern objections to election.

Timely answers were filed. The matter was heard on April 4-7 and 10-13, 1995. Each party was afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

On the entire record¹ in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT, CONCLUSIONS, AND REASONS
THEREFOR

I. THE BUSINESS OF THE RESPONDENT HOSPITAL

At all times material, the Respondent, a corporation duly organized under the laws of the Commonwealth of Puerto Rico, has been engaged in the operation of a hospital (the hospital) providing medical and related health services and operates a facility located at Avenida Domenech Final, Hato Rey, San Juan, Puerto Rico.

In the normal course and conduct of its operations described above, the Respondent annually derives gross revenues therefrom in excess of \$250,000 and annually purchases and receives goods and products valued in excess of \$50,000 directly from suppliers located outside the Commonwealth of Puerto Rico.

At all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all material times the Charging Party Union has been a labor organization within the meaning of Section 2(5) of the Act.

At all material times the Respondent Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

First: The Respondent Hospital dealt with nine unions one of which was Unión de Trabajadores de la Industria Gastronómica, Local 610, HEREIU, AFL-CIO (the Respondent Union). The Respondent Union represented employees in the following unit:

¹ The General Counsel's motion submitting translation documents and the Respondent Hospital's motion submitting translation of exhibits are granted and such translations are made a part of the record.

Included: All office and clerical employees including switchboard operators, ward clerks, cashiers and auxiliaries employed by the Employer at the different departments and sections of the hospital.

Excluded: All employees covered by all other collective bargaining agreements, Personnel Department employees, Professional employees, Administrators and Executives, Directors, Secretaries to the Administrator, Secretaries to the Deputy Administrators and Secretaries to the Assistant Administrators, Night Auditor, Comptroller's Secretary, Admission Officer, Head of Purchasing Department, Outpatient's Clinic Supervisor, Comptroller, Accounting Department Director, Patient's Accounts Manager, Assistant Accountant, Accountant, all Drugstore employees not specifically included, Secretary to the Accounting Department Director, Chief Telephone Operator, Diet Department Supervisors, Executive Secretary to the Medical Director, Secretary to the Director of Nurses, Secretary to the Medical Faculty, Information Officer, Secretary to the Chief of the Clinical Laboratory Department, Maintenance Refrigeration Technician, Secretary to the Maintenance Chief, Assistant Chief Maintenance Department, Secretary to the Director of the Pathology Department, Secretary to the Property and Supply Department Head, Secretary to the Chief of the Radiology Department, Secretary to the Operating Room Manager, Social Worker, Secretary to the Purchasing Agent, Dietary Services Secretary, Secretary to the Medical Education Director, Secretary to Chief of Physical Medicine and Rehabilitation, Secretary to the Medical Records Library Administrator, Medical Records Technicians, Secretary to the Housekeeping Department Head, Secretary to the Social Worker Department Head, Secretary to the Utilization Review Committee, Secretary to the Director for the Emergency Department, EDP Manager and his assistant, Drugstore Manager, Drugstore Manager's Secretary, Pharmaceutical Science Students, Medical Requisition Dispatching Supervisor (In-Patient), Clinical and Pathological Laboratory Aides, guards and supervisors as defined in the Act.

In December 19, 1991, the Respondent Union and the Respondent Hospital executed a contract for the unit. The contract contained the following union-security clause.

ARTICLE IV

UNION SHOP

Section 1. Every employee covered by this Collective Bargaining Agreement who is a Union member in good standing on the date of execution of this Agreement, will continue to be a Union member in good standing as an employment condition, for the duration of this Contract.

Section 2. Each employee covered by this Collective Bargaining Agreement who on the date of execution of this Contract is not a Union member in good standing, must join the Union on the thirty first day after the date of execution of this Collective Bargaining Agreement, and will continue to be a Union member in good standing as an employment condition.

Section 3. Every employee covered by this Collective Bargaining Agreement who is hired after the date of execution of this Contract, will join the Union and will continue to be a member in good standing no later than the thirty first day (31st) after his/her employment date, on the thirty first (31st) day after the date of execution of the Collective Bargaining Agreement, whichever of these dates is later.

Section 4. By written request from the Union to the Hospital, the latter binds itself to discharge any employee who refuses or fails to join the Union as a member in good standing, in accordance with the provisions of this Article and the applicable provisions of Law.

Section 5. The union binds itself to compensate and safeguard the Hospital in those cases in which the Hospital is forced to disburse any amount of money for having discharged an employee at the Union's request because he/she failed to pay his/her monthly and/or initiation dues.

Section 6. A Union member in good standing will be a member as this term is defined in the National Labor Relations Act, as amended.

All employees in the unit executed dues-deduction cards except José Esquilín-Pinto (Esquilín), Jenaro Rivera Vega (Rivera), Nida Ramos, Carmen Claudio, and Lourdes Ortiz. Esquilín had at one time been a delegate of the Respondent.

In 1992 all five employees were asked to make arrangements for the payment of dues. All five declined. Thereafter on April 29, 1992, the Respondent Union sent Esquilín a "Last Notice" reminding Esquilín that the Union had been taking steps that you sign the "Union Authorization card" since February. The Respondent received no response. On July 28, 1992, the Union addressed a letter to the Respondent Hospital's human resources director advising him that Esquilín had not paid his dues and the Union would be forced to request his termination. A copy was sent to Esquilín. The Respondent Union received no response. On September 23, 1992, by letter Esquilín was asked to attend a meeting. The Union received no response. On August 20, 1993, a letter was transmitted to Esquilín inviting him to a meeting with the board of directors' committee on September 8, 1993, where "[t]he only issue in the agenda for the aforementioned meeting will be to answer all your questions about the services that the Union offers its members." The Respondent Union received no response. On August 20, 1993, Esquilín was given another last notice. The Respondent Union received no response.

The board of directors' committee met on September 8, 1993, at which Carmen Claudio, Rivera, María Ortiz, and José Esquilín were called. The committee "decided that the union should demand compliance of the Collective Bargaining Agreement from Hospital del Maestro, regarding the refusal of these fellow workers to pay dues." The employees did not appear at the meeting.

On November 9, 1994, the Respondent Union addressed a letter to Esquilín reminding him that in the past he had ignored notices and that he was now being given 10 days to arrange for dues payments or it would request the Employer terminate him.

On November 29, 1994, the Respondent Union requested the termination of Esquilín pursuant to the terms of the con-

tract. The letter noted "On or about November 9, of the present month a letter with return receipt requested was sent to them [Esquilín and Rivera] including the membership application card, the same were received. Also, in November 15, by service of summons, a copy of the letter of November 9, was sent to them." The letters were signed and as of today, they still refuse to sign the "membership application."

On November Esquilín was discharged.² Esquilín stated that he did not pay dues because he was not getting good service, "I repeat again, I wasn't getting full and just representation from my Union that was saying that they were representing me. And the only way that I could get them to pay attention to my claims was doing that. . . ." Esquilín was asked, "Did you believe that you were going to be discharged because you were not paying your dues?" Esquilín answered, "No."

Alago testified that the Respondent had represented Esquilín "in an arbitration case, and here before the National Labor Relations Board."³

The Respondent also had attempted to collect dues from Rivera without success. Rivera testified that he met along with Esquilín, Lourdes Ortiz, and Carmen Claudio at which meeting he was asked to sign a union card. He refused because he "needed information from the Union." Rivera acknowledged that under the contract he was required to pay union dues. On August 20, 1993, the Union sent Rivera a letter indicating that if he did not sign the deduction in authorization by September 30, 1993, it would request his discharge. On November 9, 1994, the Respondent Union wrote Rivera, reminding him that he had in past years received several notices from the Union and that it was giving him 10 days to sign the checkoff or it would request his discharge. On November 29, 1992, the Respondent Union requested that Rivera be discharged; he was discharged on that date.

About 5 days before Rivera was discharged, Esquilín and Rivera were asked to meet with Alago in the office of Human Resources Director José Orlando Santiago Perez (Santiago). Santiago was present. Esquilín did not appear. Rivera refused to pay the dues. According to Santiago he said to Rivera that "the Union asks you to please sign the little card, and this is over." Rivera said, to Alago "do what ever you want. Inform the personnel office, and let him tell me. And that's the end of it." Rivera further said that "until he was not duty oriented, he was not going to sign the card." Rivera had a "negative" attitude toward the Union. Among other things Alago offered Rivera a payment plan. Rivera replied that "he was not going to sign the authorization card for the check-off, nor was he going to accept any payout plan." He said, "take the decision, whatever decision we wanted to take, that he was going to seek counseling." Nida Ramos, Carmen Claudio, and Lourdes Ortiz signed their dues authorization in 1993.

From the foregoing evidence, it would appear that Rivera and Esquilín had been lawfully discharged pursuant to the contract's provisions for nonpayment of dues due the Re-

spondent Union. The General Counsel however claims that the Respondent was motivated by other considerations and offers the following evidence to support such claim.

Second: As noted above Esquilín had been a delegate for the Respondent Union. During all times here he had not withdrawn his membership in the Union; nor had Rivera. They simply refused to pay the union dues although often requested.

Esquilín helped to organize Unión Independiente de Trabajadores del Hospital del Maestro in July 1994. He was its president. As explained by Esquilín, "Well, a group of fellow workers who were not represented by any organization approached me, and they requested from me to help them to get organized, since they were being discriminated against by the Employer." After several meetings the group came to the Board to file a petition for an election. The petition was filed September 8, 1994, for a unit of secretaries and technicians. Marta Roman and María Jurado were also active for the Unión Independiente and were on the board of directors.

An election was held on September 16, 1994, and the Charging Party Union was certified. During the campaign the Respondent Union's representative did not speak to Esquilín about his organizing. However, According to Esquilín, Alago said to him "why wouldn't we join the fellow workers to Local 610, since I already belonged to it." Esquilín along with Jurado and Roman campaigned for the Charging Party Union distributing propaganda at the lobby during the lunchbreak and morning hours. Esquilín testified, "While we would stand at the entrance to the hospital to distribute the propaganda, some administrative officers would always come to observe what we were doing." The persons were Vicente Castro assistant to the vice president, María Mercedes Rivera, and Orlando Santiago. The people were observing about 15 to 30 feet away in the lobby. Jurado also testified that she was observed by the above hospital employees while passing out leaflets. The observers were close to a round column in the lobby. Jurado had distributed leaflets "in the lobby and in the hall where the time cards are located." She passed out leaflets more than 10 times. All management employees did was look at Jurado. They did not interfere with her activity. Castro admitted that he had seen employees passing leaflets. "Just a passing glance, as I was going, I saw them doing it." Santiago also saw the leaflet passing. He did not interfere or warn the employees. "Even though we were aware that they were violating the rules of the hospital, we tolerated it." The hospital had a rule (employees' manual) that such distribution could not be made on hospital premises where the Charging Party Union was distributing.

During the election campaign, the Respondent issued several leaflets urging employees to vote against the Charging Party Union.

Esquilín testified that after he became a proponent of the Charging Party Union his employment conditions changed. He was restricted to his desk and a division (a wall) between his desk and the supervisor's station was removed so that the supervisor could view him. The wall had been there since before 1993 when the supervisor commenced working. Esquilín was given a warning letter dated October 5, 1994, from his supervisor. It was as follows:

² Apparently there were additional letters sent to Esquilín and personal contacts made by Anibal Alago, labor representative for the Respondent Union. In 1994, Alago had offered Esquilín a payment plan. Esquilín responded that he was thinking it over.

³ See 291 NLRB 198 (1988). The Respondent Union had also obtained a vacation of Esquilín's warning letter of October 5, 1994.

Dear Mr. Esquilín Pinto:

On several occasions, I have talked with you about your constant departures from your office without being duly authorized by me.

Today, I left to meet with a SIF* officer at another office and you took advantage of this to go out to carry out other endeavors. While you were in that office one of the administrators saw you in the Pharmacy area.

Once again I inform you that whenever you leave you always have to be authorized by me and if I am not in the office, your duty is to wait until you are authorized. If you continue leaving the office, I will be forced to take more drastic measures.

Cordially,

María E. De Jesús
Supervisor

According to Esquilín his supervisor was told that she was to inform Castro of Esquilín's movements. The supervisor accompanied Esquilín to make photocopies. According to Esquilín, the supervisor asked him to excuse her for she had received orders and would be demoted if she did not carry them out. The orders came from Castro. With the assistance of Respondent Union's representative, Alago, the foregoing letter was withdrawn. Apparently Esquilín had gone to the bathroom. As part of Esquilín's duties he was "constantly moving through the hospital."

After Esquilín filed the first petition for an election, he filed two more petitions for elections. One involved Confederación Obrera Puertorriqueña, incumbent-intervenor. An election was conducted September 30, 1994. Nine voters were cast for each party; one vote was challenged. Objections were filed by the Petitioner which are to be resolved in this proceeding. The other petition for an election involved the Respondent Union incumbent-intervenor. An election was conducted on October 28, 1994. There 27 votes were cast for the Petitioner; 47 votes were cast for the Respondent Union. The Petitioner filed objections. The objections have been withdrawn.

Rivera testified that Esquilín and he worked together in the same office. Rivera knew Esquilín was trying to set up a union. "I used to help him out in different letters that he wanted to send out. And I used to translate for him in English the letters that he gave me in Spanish." Rivera testified that he expressed sympathy for the Union in front of others including his supervisor.

Third: As noted María Teresa Jurado Acevedo was a member of the board of directors of the Charging Union. She also was its secretary-treasurer.

The Charging Party Union was organized by Jurado, Esquilín, Marta Roman, and Iraidá Sánchez in July 1994. On August 8, 1994, Jurado, Esquilín, and Roman appeared at the Board's offices and asked for an election among the secretaries and technicals. They returned on September 18, 1994, and met with a Board representative and the Respondent Hospital's representatives, Santiago, and an attorney to arrange for an election date. The Hospital Respondent did not want medical secretary's to vote.⁴ Later the Respondent

agreed and an election date was agreed on. The Charging Party Union won the election. The election occurred before Jurado was suspended. Jurado distributed leaflets during lunchbreak in the lobby, through the hallways where the timeclocks were and at the entrance to the hospital. Jurado voted in the election.

Prior to her suspension on September 28, 1994, Jurado had been a secretary to the medical faculty. She had left employment of the Respondent Hospital in 1985 and returned in 1991. Her supervisor was Mayra Figueroa.

On September 28, 1994, according to Jurado she asked her supervisor's permission to take her break to do personal work on the computer. She was granted permission. Jurado describes what occurred: "While I was at the computer, Mr. Vicente Castro walked in, and Mrs. María Mercedes Rivera, to the medical faculty office, they went directly and stood behind my chair at the computer to see what was the work I was doing on it." Castro, who saw that the work on the computer was of a personal nature, asked for a printout.

The printout on the computer was a proposal for a collective-bargaining agreement. The printout was given to Castro. It contained six or seven pages. Castro called Santiago. Santiago told Jurado to go to the personnel office. Santiago had asked Jurado whether she was on her break and whether she had permission from her supervisor. Jurado answered "yes." Jurado's supervisor, Mayra Yolanda Figueroa Vazquez, testified that Jurado had asked permission to do personal work on her computer and she had been granted permission. The next day Santiago told Figueroa that Jurado had been suspended and asked her whether she had authorized Jurado to do personal work on the computer. She answered, "Yes."⁵

At the personnel office Esquilín was also present. Jurado was given a letter dated September 28, 1994, as follows:

Dear Ms. Jurado:

Today, during working hours, you were doing personal work not related with the functions that you hold at Hospital del Maestro as well as using the Hospital equipment.

This Institution cannot allow this type of action, which violates the rules and procedures of this Institution. For this reason, we are proceeding to suspend you from employment for an indefinite time, at the end of your work today, to investigate thoroughly this matter and take a final decision.

Cordially,

/s/ Orlando Santiago Perez, Director
Human Resources and Ind. Relations

Castro testified that he walked into Jurado's work area to use a telephone and looked at the computer screen and saw "a letter inviting the employees to this or that." "[T]hey called Mr. Orlando Santiago. He came over, and I ask him,

⁵ Figueroa testified, "When she would ask me permission, I would tell her, if after you finish your work if you don't have anything urgent, any work that is urgent to do, you can do it. It was up to her whether she would wait until she had finished her work, or if she would do it during her breaks."

⁴ Jurado and Roman were medical secretaries.

please, you do whatever have to be done. You take care of it. I left."

Castro testified that six, seven, or eight pages came out of the printer. The printouts were given to Santiago. The printouts, as offered in evidence, concerned proposals for a labor agreement.

In the evening about 7:30 p.m., Castro called "an expert in computers," Dennis J. Zamora, to come to the hospital and check the computers. The expert pointed out that some things had been deleted. "He retrieved a lot of things that had to do with the Union, and papers, and so forth. Also a lot . . . not a lot, a few letters, personal letters, and letters of recommendations and so forth from her and from others." Jurado's machine disclosed a union contract proposal, union leaflets, and some letters.

Santiago testified that Jurado was dismissed "for unduly using equipment and material during working hours." He claimed that Jurado's supervisor had not told him that she had given her permission to do the work. He further testified that the supervisor told him that "she had dis-authorized them to do that type of work. . . . Taken away the authorization she usually gave them to do that type of work." Further testifying, Santiago said, "Mayra [Figueroa] had told me that she had oriented her employees not to do work related to the Union in the office."⁶

Santiago also claimed falsely that Jurado had not told him she had permission from her supervisor to do personal work on the computer during breaks.

According to Santiago, Marta Roman was warned for her conduct.

On October 13, 1994, the Respondent Hospital sent Jurado the following letter:

October 13, 1994

Mrs. María T. Jurado
No. 781 Vinayter Street
Country Club
Rio Piedras, PR 00924

Dear Mrs. Jurado:

Last September 28, 1994, Mr. Vicente Castro, Assistant to the Vice President of the Board of Directors, passed by the Medical Staff area and caught you using the equipment and supplies of the Hospital during working hours, in personal matters unrelated to your functions as Secretary of that Department.

Later on, Mrs. María M. Rivera, Administrator of this Institution, together with Mr. Rafael Rivera, Supervisor of Continued Quality Improvement and I, passed you office and saw the work that you were doing on the computer's screen. We requested you to print the document for us, which exceeded ten (10) pages.

The following day, together with the Computer Center Director and in your presence and your coworkers, we found amazing amount of personal documents that you were working on during working hours in addition to those previously mentioned.

Your action violates the conduct and discipline rules, as well as the procedures of this Institution. In addition,

when we met with the National Labor Relations Officer, prior to the election, you were informed specifically that the Union's propaganda or campaign work had to be carried out during non working hours. Nevertheless, you ignored my observations.

Jurado testified that during the period of time she was passing union leaflets she heard Castro say, "I am going to fire her."

Figueroa testified that it would take over an hour to type the material Castro took off Jurado's computer. She also testified that there were three computers in the office and three secretaries.

The personal printouts taken out of the computers consisted of union contract proposals and union leaflets: "Monograph Submitted as a Partial Requirement of the Spanish 10th Course," "Report Submitted as a Partial Requirement Spanish Course 10B," a statement about finances, "Inauguration of the Temple," and letters. Castro's wife Ruth Plata had worked on a computer. She had done schoolwork for her children and prepared several college papers for her sister. The "Monograph Submitted as a Partial Requirement of the Spanish 10th Course" was apparently authored by Jessenia Vazquez who was Ruth Plata's daughter.

No other employee had been discharged for a like infraction for which Jurado was discharged.

A. The Discharges of Esquilín and Rivera

The administrative law judge in *Associated Transport*, 156 NLRB 335, 348 (1965), stated:

In *Grain Processors' Independent Union, Local No. 1 (Union Starch & Refining Company)*, 87 NLRB 779, 784 [1949], *enfd.* 186 F.2d 1008 [7th Cir. 1951], *cert. denied* 342 U.S. 815 [1951], in reference to Section 8(a)(3) of the Act the Board said ". . . proviso (B) requires a tender of dues and fees . . ." Since on March 3, 1964, the date upon which the union-security clause became applicable to him, James did not tender the appropriate fees required under such clause he lost the protection of proviso (B) in that he did not perform his statutory and contractual obligations. James became vulnerable to discharge under the Respondent Union's union-security agreement with the Respondent Company and his discharge which followed was not in violation of Section 8(a)(3) of the Act. An employer may lawfully accede to a request from a union to discharge an employee "where there exists a valid union security clause" and the "employee has failed to tender the initiation fees and dues properly owing the Union as a consequence of that clause." *The Gabriel Division of the Maremont Corporation*, 153 NLRB 631 [1965]. Thus the Respondent Company did not violate 8(a)(1) or 8(a)(3) of the Act and the Respondent Union did not violate 8(b)(2).

Thus unless the General Counsel can establish that the Respondent Union's request for discharge was unlawful and not protected by the proviso of Section 8(a)(3) of the Act no action for unfair labor practices lies against the Respondent Union or the Respondent Hospital. The General Counsel contends that the action taken against Esquilín and Rivera was because of their activities on behalf of the Charging Party

⁶I consider this testimony of Santiago to be incredible.

Union. Rivera's activities on behalf of the Charging Party were not obvious and were minimal. Esquilín was the spearhead of the Charging Party Union. Although he filed a petition for an election against the Respondent Union of which he was a member however, the Respondent Union visited no reprisals on him. In fact it represented him on several occasions and obtained the withdrawal of the above-mentioned reprimand letter of October 5, 1994, which issued during a period which Esquilín was campaigning against the Respondent Union. While the Respondent Union attempted to collect dues from him and four other employees, it exhibited much patience in this pursuit. The credible record is clear that nothing the Union could have done would have induced either Esquilín or Rivera (not even threats of discharge) to pay dues to the Respondent Union. Both, by their intransigent attitudes (which no union could tolerate and maintain its integrity) brought about their own discharges. They knew they owed dues and were conversant with their statutory and contractual obligations. Indeed they were given many opportunities to fulfill their contractual obligations. All union efforts at compliance were futile. Both Rivera and Esquilín forced the Union to take action or accommodate their insistence on not paying dues and remaining free riders forever.

Charges in regard to the discharges of Esquilín and Rivera are dismissed.

B. The Discharge of María Teresa Jurado Acevedo

As noted above, Jurado was discharged because she was caught putting the Charging Party Union's contractual proposals in her computer.

In *Wright Line*, 251 NLRB 1083 (1980), the Board established the rule that when the General Counsel makes a prima facie case showing sufficient evidence to support the inference that protected conduct was the "motivating factor" in the employer's decision to discharge, the burden shifts to the employer to demonstrate that the discharge would have taken place even in the absence of the protected conduct.

"The elements commonly required to support a prima facie showing of discriminatory motivation under Section 8(a)(3) are union activity, employer knowledge, timing, and employer animus." *Best Plumbing Supply*, 310 NLRB 143 (1993). The General Counsel has met this test.

The General Counsel's prima facie case showing discriminatory motivation is supported by the following credible evidence.⁷

1. The Respondent Hospital opposed the Union of which Jurado was director in the election campaign and opposed her participating in the election unit.

2. Jurado was an active partisan for the Charging Party Union.

3. Jurado was given permission to use her computer for personal matters.

4. It had been a practice for employees to use their computers for personal matters.

5. Printouts on the computers disclosed that other employees were using computers.

⁷ "Under Board precedent, a prima facie case may be established by the record as a whole and is not limited to evidence presented by the General Counsel." "The Board's precedent allows the judge to analyze the prima facie based on all record evidence." *Greco & Haines, Inc.*, 306 NLRB 634 (1992).

6. Castro was heard to say that he would fire Jurado.

7. Jurado was the only employee who had ever been discharged for using her computer for personal matters, although others were known to have been guilty of the same infraction.

By reason of the General Counsel's prima facie case, the burden is with the Respondent Hospital to prove that the discharge would have taken place even in the absence of the protected conduct.⁸

According to the Respondent Hospital Jurado was fired because she was caught using "the equipment and supplies of the Hospital during working hours, in personal matters unrelated to your functions as Secretary of that Department. . . . Your action violates the conduct and discipline rules, as well as the procedures of this Institution." This could have hardly been the case since Jurado had been given permission to use the computer in personal matters during working hours.⁹ Jurado's supervisor said in regard to giving Jurado permission to use the computer. "It was up to her whether she would wait until she had finished her work, or if she would do it during her breaks." Thus since Jurado had been given permission to use her computer for personal matters it is obvious that Jurado could not have been violating a rule. Moreover, other employees were not discharged for the same infraction.¹⁰

Hence the question arises as to why Jurado was singled out for discharge. The obvious answer is that she was discharged because she was a union partisan and was putting union matters in her computer. The Respondent Hospital's reason for her suspension and discharge was pretextuous and the real motive for discharging Jurado was discriminatory. The credible evidence in this case sustains the General Counsel's complaint in this respect by a preponderance of the credible evidence. I am convinced that had Jurado been another employee processing personal work on her computer she would not have been discharged but, since she was a union partisan processing on her computer a union contract proposal, she was precipitately suspended and then fired. *Wright Line*, supra. Her union activities were the clear cause of the Respondent Hospital's action.

I find that the Respondent Hospital by discharging Jurado as here detailed violated Section 8(a)(1) and (3) of the Act.

C. Alleged Surveillance

As noted above Santiago, María Mercedes Rivera, and Castro observed employees passing out Charging Party Union leaflets on hospital property. In *Porta Systems Corp.*, 238 NLRB 192 (1978), the Board said: "[u]nion representatives and employees who choose to engage in their union activities at the Employer's premises should have no cause to complain that management observes them." See also *Hoschton Garment Co.*, 279 NLRB 565, 567 (1986).

⁸ As noted in *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), "An employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity."

⁹ Santiago was not telling the truth when he said he did not know that Jurado was given permission to use the computer during working hours on personal matters.

¹⁰ It is incredible that Castro did not know that his wife was using her computer to produce printouts for her daughter and sister.

In the instant case the Respondent Hospital's observations of union leaflet passing was innocuous; nor did the Respondent Hospital interfere with the Union's leaflet distribution although on hospital property. The Respondent Hospital's observations were not unlawful. See also *St. Mary's Hospital*, 316 NLRB 947 (1995). That part of the consolidated complaint which alleges unlawful surveillance is dismissed.

D. Restrictions Placed on Esquilín

The General Counsel claims that after Esquilín became a Charging Party Union partisan the Respondent Hospital unlawfully restricted his movements in the hospital. As noted above these restrictions occurred. These restrictions were in violation of Section 8(a)(1) and (3) of the Act. *Animal Humane Society*, 287 NLRB 50, 59 (1987).

E. Threat of Discharge

As noted above Castro was heard to say that he was going to fire Jurado. This assertion was not specifically denied. Jurado is credited. This threat to discharge was in violation of Section 8(a)(1) of the Act. *Bronx Metal Polishing Co.*, 268 NLRB 887, 888 (1984). *Pioneer Natural Gas Co.*, 158 NLRB 1067 (1966).

F. Alleged Threat to Close the Hospital

This allegation is dismissed because Esquilín's testimony on this point is not credited.

G. Bonus

Esquilín claimed that the Respondent Hospital did not pay him all the Christmas bonus to which he was entitled. He was paid 2 percent. He claimed 2.5 percent. Santiago told him that since he was no longer an employee of the hospital he was only entitled to 2 percent. Santiago testified that Esquilín was paid according to law and that Esquilín's case was filed for arbitration by the Respondent Union and is pending at the Conciliation & Arbitration Bureau of the Department of Labor being Case A-1252-95. Since the adjudication of Esquilín's bonus claim may call into play the interpretation of a Puerto Rican statute it would appear that it be best to allow the bonus claim to be settled by the Conciliation & Arbitration Bureau of the Department of Labor. The Respondent Hospital has asked that the claim be deferred to arbitration.

H. Denial of Access to Esquilín

In urging his claim that after his discharge, Esquilín was denied access to the hospital the General Counsel cites three incidents. The first around February 20, 1995, when Esquilín visited the hospital to get an appointment at the dispensary. As he was walking out, a security guard of the hospital informed him that Castro had informed him to remove Esquilín from the hospital. The second incident occurred around February 1995. Esquilín met with the board of directors of the Charging Party Union in the cafeteria of the hospital. Esquilín was approached by security guards who said that they had been told to remove him from the hospital. Esquilín left.¹¹ The third incident occurred around February 1995. Esquilín had gone to the X-ray department to get some X-

rays. He was removed by two security guards. Castor told Esquilín that he was in a restricted area and that if he did not leave that they would file criminal charges against him.

While the Respondent Hospital may have lawfully excluded Esquilín from restricted areas of the hospital, it could not deny him access to the cafeteria to confer with employees in respect to union matters as long as he conducted himself in an orderly manner and was not disruptive of the hospital's business. *Montgomery Ward & Co.*, 288 NLRB 126, 127 (1988). The Board said, "To hold otherwise would license a property owner to prohibit a union organizer from utilizing its restaurant solely because the organizer was discussing organizational activities with off-duty employees (who are there in the capacity of restaurant patrons). Such a prohibition, which discriminates on the exclusive basis of the union's organizational activity, flies in the face of the Supreme Court's admonition against discrimination on this basis when determining the propriety of access restrictions."

There is no claim that Esquilín was disorderly nor that the cafeteria was closed to patrons other than employees.

By excluding Esquilín from its cafeteria, under the circumstances detailed above, the Respondent Hospital violated Section 8(a)(1) of the Act.

I. Reinstatement Offer

Some time in December after Esquilín was discharged, he met with Hernández at which time a payment for back dues was discussed. Esquilín sent the following letter to the Respondent Union dated February 17, 1995.

Mr. Hernández:

As you may understand, the only way that I can comply with a payment plan is: that you send a communication to Mr. José O. Santiago, Director of Industrial Relations of Hospital del Maestro, ordering that I be reinstated to my work immediately.

As soon as this occurs, I bind myself to draw up a payment plan of \$50.00 per month until I fully pay out the amount that you allege I owe for representation services.

As you know, without earning any income I cannot comply with the payment plan proposed to me.

I hope you will understand my situation and reconsider my request.

Hoping to receive your reply to this letter, I remain,

Respectfully,

/s/ José Esquilín

Hernández sent the following letter to the Respondent Hospital dated February 1, 1995:

Enclosed is a copy of the letter that Mr. José Esquilín Pinto sent me, which is self explanatory.

In view of this, I request that Mr. Esquilín be reinstated to work, since he has promised to pay the dues owed by him to the Union.

Without any other matter, I cordially bid you goodbye.

/s/ Valentín Hernández
Secretary Treasurer

¹¹ Esquilín's testimony in regard to this incident is credited.

The Respondent Hospital replied by letter dated February 17, 1995:

Dear Mr. Hernández:

I refer to your communication in which you request reinstatement of Mr. José Esquilín. We regret to inform you that the Hospital reiterates its position in not reinstating Mr. Esquilín.

As you know, Mr. Esquilín filed certain unfair labor practices against the Hospital. The charges are directly related to his discharge, which was motivated exclusively by the request made by Union Gastronómica, Local 610 for us to comply with Article Number IV of the previous Collective Bargaining Agreement.

Due to this reason, we are forced to attend a hearing on March 6, 1995, where we must justify, among other things, the discharge of the complainant.

Given the circumstances, we cannot agree to your request.

Cordially,

/s/ Orlando Santiago Perez, Director
Human Res. and Industrial Rel.

The hospital letter makes it abundantly clear that it did not give Esquilín employment because he filed charges against it with the Board. This conduct was in violation of Section 8(a)(4) of the Act. See *National Surface Cleaning v. NLRB*, 54 F.3d 35 (1st Cir. 1995).

IV. OBJECTIONS TO THE ELECTION

CASE 24-RC-7660

The following objections filed by the Regional Director were ordered to be resolved in this proceeding:

2. Discharging María T. Jurado, to discourage union activities and intimidate the workers.

4. The employer engaged in harassment and surveillance while the propaganda was distributed and he was observing who was being given the same, which intimidated workers thus thwarting them to accept it and to be effectively counseled. Some of them declined to take it when they noticed they were under surveillance.

In accordance with my above findings, I sustain Objection 2 and overrule Objection 4.

Having found that the Respondent Hospital engaged in violations of Section 8(a)(1) and (3) of the Act during the critical election campaign period,¹² I find that the Respondent has unlawfully interfered with the employees' exercise of a free choice for or against a bargaining representative. "Conduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammelled choice in an election." *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962); *Concord Furniture Industries*, 241 NLRB 643 (1979); *GTE Automatic Electric*, 196 NLRB 902 (1972).

I further find that, by reason of unlawful interference, the election conducted on September 30, 1994, should be set aside and held for naught. "If an election were won by the

employer through illegal conduct and in violation of law, the Union was wronged and it had a right to have such an election set aside." *NLRB v. Plaskolite, Inc.*, 309 F.2d 788, 790 (6th Cir. 1962).

CONCLUSIONS OF LAW

1. The Respondent Hospital is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction.

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

3. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, the Respondent Hospital has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By unlawfully suspending María Teresa Jurado Acevedo on September 28 and discharging her on October 13, 1994, the Respondent Hospital has engaged in unfair labor practices within meaning of Section 8(a)(1) and (3) of the Act.

5. By unlawfully failing and refusing to hire José Esquilín-Pinto on February 17, 1995, the Respondent Hospital has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (4) of the Act.

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

7. The Respondent Hospital unlawfully interfered with the representation election held on September 30, 1994, and a new election should be conducted.

THE REMEDY

It is recommended that the Respondent cease and desist from its unfair labor practices and take certain affirmative action deemed necessary to effectuate the purposes of the Act.

Having found that the Respondent unlawfully suspended and discharged María Teresa Jurado Acevedo and unlawfully refused to hire José Esquilín-Pinto, it is recommended that the Respondent remedy such unlawful conduct. In accordance with Board policy, it is recommended that the Respondent offer María Teresa Jurado Acevedo immediate and full reinstatement to her former position and offer José Esquilín-Pinto the position he would have received on February 17, 1995, had he been employed without prejudice to their seniority or any rights or privileges previously enjoyed, dismissing, if necessary, any employees hired since to fill the positions, and make them whole for any loss of earnings they may have suffered by reason of the Respondent's acts here detailed, by payment to them of a sum of money equal to the amount they would have earned from the date unlawful action was taken against them to the date of valid offers of reinstatement, less their net interim earnings during such periods, with interest thereon to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

¹² See *Ideal Electric Co.*, 134 NLRB 1275 (1961).