

Nicholas County Health Care Center, Inc. and District 1199, the Health Care and Social Service Union, SEIU, AFL-CIO and Wanda Proctor.
Cases 9-CA-33210-2, 4, 5, 9-CA-33491, 9-CA-33650-1, 2, 3, 9-CA-33681-1, 2, 3, 4, 9-CA-33750, 9-CA-33805, 9-CA-33919-3, and 9-CA-33520

August 9, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN
AND HURTGEN

On September 30, 1997, Administrative Law Judge Richard A. Scully issued the attached decision. The Respondent filed exceptions,¹ a supporting brief, and an answering brief in response to the cross-exceptions. The General Counsel filed cross-exceptions,² a supporting brief, and an answering brief in response to the exceptions.

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

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,³

¹ The Respondent excepts only to the judge's finding that the March 4, 1996 strike was an unfair labor practice strike; his 8(a)(1) findings that the Respondent threatened to fire the strikers; his 8(a)(3) and (1) findings that the Respondent unlawfully refused to reinstate the March 4, 1996 strikers; and his 8(a)(5) and (1) findings that the Respondent unilaterally abandoned the contractual grievance procedure, unlawfully withdrew recognition from the Union, and unilaterally implemented an employee wage increase.

² The General Counsel excepts only to the judge's dismissal of the 8(a)(5) and (1) allegations based on the Respondent's unilateral discontinuation of checking off union dues upon the expiration of the contract.

³ 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We adopt the judge's findings, which are set forth in sec. III,E,1 and 2, of his decision, that the March 4, 1996 strike was an unfair labor practice strike and the Respondent unlawfully refused to reinstate the strikers. Thus, we find it unnecessary to pass on the judge's alternative findings, which are set forth in sec. III,E,3 of his decision, that the Respondent retaliated against the strikers even if the March 4, 1996 strike was an economic strike.

We also adopt the judge's findings, which are set forth in sec. III,F,1 of his decision, that the March 12, 1996 decertification petition was tainted by the Respondent's unfair labor practices. Thus, we find it unnecessary to pass on the judge's alternative findings, which are set forth in the last paragraph of the same section of his decision, that this petition was also tainted because it contained the handwriting of Gene Underwood, the Respondent's administrator and part owner.

Relying on our recent decision in *Hacienda Resort Hotel & Casino*, 331 NLRB No. 89 (2000), we adopt the judge's dismissal of the 8(a)(5) and (1) allegations involving the Respondent's unilateral discontinuation of checking off union dues upon the expiration of the contract.

For the reasons set forth in her joint dissenting opinion with Member Fox in *Hacienda*, supra, Member Liebman would reverse the judge's

and conclusions and to adopt the recommended Order as modified.⁴

We agree, for the reasons fully set forth in *Caterair International*, 322 NLRB 64 (1996), that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful withdrawal of recognition from the Union. We adhere to the view, reaffirmed by the Board in that case, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Id.* at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In the *Vincent* case, the court summarized the court's law as requiring that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' § 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." 209 F.3d 738.

Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the employer's withdrawal of recognition. In contrast, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation.

Moreover, we note that, in addition to unlawfully withdrawing recognition, the Respondent's other unfair labor practices were serious and numerous. These included threatening to terminate and permanently replace employees if they engaged in an unfair labor practice strike; threatening to deny unfair labor practice strikers their rights to be reinstated; failing to fully reinstate unfair labor practice strikers; unlawfully terminating and issuing disci-

dismissal of the alleged 8(a)(5) and (1) discontinuation of dues check-off, and would find that violation.

⁴ We shall modify the judge's recommended Order in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997).

plinary warnings to employees; threatening employees with termination and/or disciplinary action if they discussed the Union while at work; restricting the access of employee union representatives to break areas and to the facility during nonwork time; discontinuing the contractual grievance procedure provisions; unilaterally granting a wage increase; referring to an employee union supporter as a nuisance and saying it would like to get rid of her; telling employees not to discuss the Union or the National Labor Relations Board while at work; coercively interrogating employees about their protected activities and telling them to cease such activities; creating the impression it had surveilled a strike vote and interrogating an employee about her vote; telling an employee not to voice any complaints while at work; offering an employee her choice of a position if she did not participate in the strike; and announcing and enforcing a no-solicitation rule applicable only to the collection of union dues. Although several years have elapsed since these unfair labor practices were committed, many of them were of a continuing nature and would likely have a long-lasting effect.

We further note that, as found by the judge, the March 12, 1996 decertification petition did not reflect employee free choice under Section 7, but rather the effect of the Respondent's most serious prewithdrawal unfair labor practices described above. We find that these additional circumstances further support giving greater weight to the Section 7 rights that were infringed by the Respondent's unlawful withdrawal of recognition.

(2) The affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining or to engage in any other conduct designed to further discourage support for the Union. It also ensures that the Union will not be pressured, by the possibility of a decertification petition, to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(3) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy the Respondent's violations because it would permit a decertification petition to be filed before the Respondent had afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement. Such a result would be particularly unfair in circumstances such as those here, where litigation of the Union's charges took several years and many of the Respondent's unfair labor practices were of a continuing nature and were likely to have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violations in this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Nicholas County Health Care Center, Inc., Richwood, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(i).

"(i) Within 14 days after service by the Region, post at its facility in Richwood, West Virginia, copies of the attached notice marked Appendix.⁴² Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on 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. 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 employees and former employees employed by the Respondent at any time since June 8, 1995."

Donald A. Becher, Esq. and Andrew Lang, Esq., for the General Counsel.

Mark M. Lawson, Esq., of Bristol, Virginia, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. On charges¹ filed by District 1199, The Health Care and Social Service Union, SEIU, AFL-CIO (the Union) and by Wanda Proctor, an individual, the Regional Director for Region 9 of National Labor Relations Board (the Board) issued a consolidated complaint and amended complaints² alleging that Nicholas County Health Care Center, Inc. (the Respondent) had committed certain violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent filed timely answers denying that it had committed any violation of the Act.

A hearing was held in Richwood, West Virginia, on 12 dates between July 23 and October 3, 1996, at which all parties were given a full opportunity to examine and cross-examine wit-

¹ The original charges were filed as follows: Case 9-CA-33210-2 on August 28, 1995; Cases 9-CA-33210-4 & 5 on September 11, 1995; Case 9-CA-33491 on January 9, 1996; Case 9-CA-33520 on January 19, 1996; Cases 9-CA-33650-1, 2, & 3 on February 27, 1996; Cases 9-CA-33681-1, 2, & 3 on March 5, 1996; Case 9-CA-33681-4 on March 7, 1996; Case 9-CA-33750 on March 21, 1996; Case 9-CA-33805 on April 11, 1996; and Case 9-CA-33919-3 on May 29, 1996.

² The original complaint was issued on April 10, 1996, and amended complaints were issued on May 10 and 22, June 21, and July 3, 1996.

nesses and to present other evidence and argument. Briefs submitted on behalf of the General Counsel and the Respondent have been given due consideration. On the entire record, and from my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

At all times material, the Respondent was a corporation engaged in the business of operating a nursing home in Richwood, West Virginia. During the 12-month period preceding April 1996, the Respondent in the conduct of its business operations derived gross revenues in excess of \$100,000 and purchased and received at its Richwood, West Virginia facility goods valued in excess of \$5000 directly from points outside the State of West Virginia. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care facility within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that at all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Since 1986, the Union had been recognized by the Respondent as the collective-bargaining representative of certain of its employees in a unit consisting of:

All full-time and regularly scheduled part-time service and maintenance employees employed by the Employer at its Richwood, West Virginia facility including nurses aides, housekeeping aides, laundry aides, dietary employees and maintenance assistants; but excluding all office clerical employees, all Licensed Practical Nurses, all Registered Nurses and professional employees, all guards, the department heads of nursing, laundry, housekeeping, dietary, activities, social services and maintenance and all other supervisors as defined in the Act.

The most recent of a series of collective-bargaining agreements between the parties covered the period from December 1, 1992, through December 31, 1995. The parties engaged in negotiations for a new contract between December 1995 and February 1996 without reaching an agreement. On March 4, 1996, certain employees represented by the Union engaged in a 1-day strike against the Respondent which was designated as an unfair labor practice strike. The Respondent contends that it was an economic strike and it hired permanent replacements for all of the employees who participated in the strike. By letter dated March 14, 1996, the Respondent withdrew recognition from the Union, based on the assertion that it no longer represented a majority of the employees in the bargaining unit and that the Respondent had a good-faith doubt that it represented a majority of those employees.

B. The 8(a)(3) and (1) Allegations

1. Allegations concerning Eula Carden

Eula Carden began working at the Respondent's facility in October 1988 in the housekeeping and laundry department. After 5 years, she became a certified nursing assistant (CNA) in the nursing department. Carden was a union delegate for sev-

eral years and in 1994 became grievance chairperson. In that position she assisted and counseled employees concerning the filing of grievances and, with the assistance of Union Administrative Organizer Frank Hornick, presented the grievances to management, usually, administrator and part owner of the facility, Gene Underwood.

During the spring of 1995, the Union became concerned over what it felt was an attempt by the Respondent to change some bargaining unit positions from full time to part time, resulting in a reduction in wages, benefits, vacation, and scheduling rights. In May 1995, the Respondent had announced that it was sponsoring an "appreciation dinner" for its CNAs to be held at the facility on June 1. Hornick discussed with Carden and Wanda Proctor, a CNA, who held the highest ranking union position among the unit employees, that of union executive board member, their concerns that the employees felt they were not really appreciated by management and they decided to call for a boycott of the dinner. To inform the employees of this, Carden prepared a mock invitation ridiculing the dinner as a "Brown Nosing Dinner" and characterizing it as an attempt "to bust the Union" and "to fatten you up and take your full time position down to part time." On the afternoon of May 31, 1995, Carden, who was on vacation at the time, went to the facility and passed out copies of the "invitation" to incoming evening-shift workers in the breakroom and to day-shift workers in the area where they were clocking out. She testified that she did not give them to employees until after they had clocked out, but that some may have taken one out of her hand.

While at work on June 8, Carden was told by Underwood to come to his office where Assistant Administrator Pam Dobson was also present. Carden testified that Underwood handed her a copy of the "invitation" and asked if she knew what it was. Before she could answer, Underwood told her not to lie to him and that he had people who said she did. Carden responded that she was not lying, but that he had not given her an opportunity to answer. She told him that she had passed out the "invitations." Underwood asked her how many she had passed out and if Hornick was involved but she did not respond. He also asked for an explanation of the language on the "invitation" and she told him it referred to taking away full-time positions that were needed to get the work done. Carden testified that Underwood was very angry with her and told her to get out of his office. Underwood testified that during the meeting he asked why she had distributed the "invitations," what her purpose was and who was involved. Carden admitted passing them out to employees at the timeclock between shifts, then, "refused to answer any questions at all." He testified that he expressed to Carden his problem with her actions, which he described as "creating a morale situation" and "creating a disciplinary situation."

When Carden arrived for work on June 17 her timecard was missing but she was told by a supervisor to go to work. During her shift, Dobson and Director of Nursing Agnes Carpenter came to her and told her to come to Dobson's office. In the office she was given six employee warning notices accusing her of (1) on May 31, intimidating and coercing other employees from attending the appreciation dinner and distributing material containing false statements and allegations; (2) on May 31, soliciting and distributing unauthorized material to employees while on worktime and in a work area; (3) on May 31, loitering in the facility at an unauthorized time and conducting unauthorized business; (4) on May 31, interference with and purposeful distraction of another employee in performance of his/her

work; (5) on May 31, refusal or inability to support the facility's goals and programs; and (6) on June 5, interfering with an investigation of a possible infraction of a facility policy. After Carden wrote a response to the accusations in each notice and returned them, she was told that she was fired and was given a letter signed by Underwood stating that, "due to continuous violations of policy and procedure," she was terminated, effective June 15, 1995.

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating Carden on June 6, 1995, and Section 8(a)(3) by issuing the six disciplinary warnings to her and terminating her on June 17 because of her support for the Union and having engaged in activity protected by the Act. The Respondent contends that Carden's actions in protesting the appreciation dinner were beyond the bounds of protected activity, violated its rules, and caused dissention and ill-will among employees that it had a right to curtail.

Analysis and Conclusions

In cases where the employer's motivation for a personnel action is in issue, it must be analyzed in accordance with the test outlined by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support the inference that protected activity was a motivating factor in the employer's decision. Once that has been done, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected activity on the part of the employee. The *Wright Line* analysis is required even where the employer's asserted reasons for its actions are pretextual. *Bridgeway Oldsmobile*, 281 NLRB 1246 fn. 2 (1986).

The General Counsel's prima facie case is established by proof of protected activity on the part of the employee, employer knowledge of that activity, and employer animus toward the Union. *W. R. Case & Sons Cutlery Co.*, 307 NLRB 1457, 1463 (1992); and *Associated Milk Producers*, 259 NLRB 1033, 1035 (1982). All of those elements are present here. Carden was a longtime supporter of the Union who had served as a delegate for several years and since 1994 had been the grievance chairperson at the Respondent's facility. In the latter position, she had handled and presented four or five grievances with Underwood usually representing management. The "invitations" which led to Carden's disciplinary warnings and discharge specifically asserted that the Employer was trying to replace full-time positions with part time, an issue the Union had previously raised, and that it was trying to break the Union at the facility. There is ample evidence in the record of the Respondent's animus toward the Union and toward Carden, personally. The numerous violations of Section 8(a)(1) of the Act, found herein, constitute evidence of animus on its part. *Pincus Elevator & Electric Co.*, 308 NLRB 684, 693 (1992). Cleo Sandy, a housekeeping department employee since 1991, testified that during the early part of the summer of 1995, in a conversation she had with Underwood, he told her that "he would get rid of troublemakers as he had in the past." He did not identify anyone by name, but indicated that the "troublemakers" were those who "filed grievances" and "kept stuff stirred up all the time." Underwood testified that he had no recollection of this conversation but did not deny it. I credit the testimony of Sandy, a current employee, who would be unlikely to fabricate such a conversation. See *Stanford Realty Assoc.*, 306 NLRB 1061, 1064 (1992); *K-Mart Corp.*, 268 NLRB 246, 250

(1983); and *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1961). Carden was the Union's grievance chairperson during the year preceding her discharge.

The final question is whether Carden's actions in preparing and distributing the "invitations" are protected by the Act. The purpose of the "invitations" was to urge CNAs in the bargaining unit to boycott the appreciation dinner in order to protest the dissatisfaction that the Union and its officers, Carden and Proctor, felt about what they considered an overall lack of appreciation of the CNAs by the Respondent, as well as its efforts to reduce full-time bargaining unit positions and to undermine the Union.³ These are clearly matters related to the employees' terms and conditions of employment and their rights to "assist labor organizations," protected by Section 7 of the Act. Carden's actions were directly related to mutual aid and protection and were not so outrageous, egregious or disruptive as to lose the protection of the Act. E.g., *Wolkerstorfer Co.*, 305 NLRB 592 fn. 2 (1991); and *Martin Marietta Corp.*, 293 NLRB 719, 725 (1989). Likewise, the fact that she chose to express herself through the literary technique of satire or irony does not render her actions unprotected. *Pontiac Osteopathic Hospital*, 284 NLRB 442, 452 (1987). The decision in *New River Industries v. NLRB*, 945 F.2d 1290 (4th Cir. 1991), cited by the Respondent, is clearly distinguishable. There, the Fourth Circuit held that a satirical letter written by two employees to mock the employer's distribution of free ice cream cones to employees in appreciation for a new contract with a supplier was not protected activity because it was not intended to enlist the support of other employees for the purpose of correcting what they considered an inadequacy in their conditions of employment, but was written solely for the purpose of belittling the company's gesture. The court also noted that the employer's disciplinary decision was not taken in the context of union activity, as there had been none at its plant in about 8 years, and could not have served as a motivating factor in its action. Here, Carden's "invitation" called on bargaining unit employees to stand with the Union, their longtime collective-bargaining representative, by boycotting the appreciation dinner in order to protest actions by the Respondent it perceived as adversely affecting the unit. I find that Carden's actions were protected by the Act and that the General Counsel has established a prima facie case under *Wright Line* concerning these allegations.

I also find that the Respondent has failed to establish that it would have taken the same disciplinary action against Carden in the absence of protected activity on her part. On the contrary, the evidence as a whole shows that that the Respondent's alleged reasons were pretextual and/or that Carden was the victim of disparate treatment. Although then-Director of Nursing Agnes Carpenter, signed and presented all of the disciplinary warnings notices issued to Carden at the time of her discharge, neither she nor Underwood gave any testimony concerning their content. Consequently, there is nothing in the record to explain the conclusions reached in several of the notices or why it was necessary to issue five separate warnings for a single incident on May 31. The first warning notice states that, on that date, Carden was guilty of "intimidating" and "coercing" other employees from attending a facility function and distributing

³ There is nothing in the record to suggest that they did not have a good-faith belief that the Respondent was attempting to do so or that these statements were so reckless or maliciously untrue as to lose the protection of the Act. See *Hertz Corp.*, 316 NLRB 672, 692 (1995); and *Delta Health Center*, 310 NLRB 26, 36 (1993).

material “containing false statements and allegations.” The evidence shows only that Carden handed out her “invitations,” i.e., flyers urging CNAs to boycott the Respondent’s appreciation dinner, to employees in a lounge and near the timeclock. There is no evidence that she said or did anything that was threatening or coercive.⁴ Although the Respondent presented the testimony of a number of CNAs concerning their negative subjective feelings about the “invitation,” including, Kim Wilson who was not given one, none provided any objective evidence of intimidation or coercion on Carden’s part.⁵ There is nothing in the record to establish that anything in the “invitation” constituted a false statement or accusation or was not protected by the Act. Accordingly, I find that there was no basis for this warning and it was a pretext for disciplining Carden.

A second warning notice states that in the same incident Carden violated the Respondent’s policies by solicitation and distribution of unauthorized material to employees in a work area during working time. Although there is no dispute but that the employee handbook contains a provision prohibiting solicitations for any purpose during worktime and in work areas, there is overwhelming evidence establishing that this rule was regularly and routinely ignored and/or violated by employees, supervisors, and other persons without disciplinary action being taken against them before and after the issuance of this warning to Carden. Numerous employees gave credible and uncontradicted testimony about their participating in or witnessing a wide variety of solicitations and sales of food, personal, and commercial items throughout the facility, while on and off the clock, in work and nonwork areas. Often the transactions were conducted at the nurses’ station in the presence of supervisors. Solicitations included invitations to baby showers, a weight-loss pool, raffles, contributions for charities and other purposes, dinners to raise money to aid employees with health or other problems, and collections for flowers for employees who were ill or had a death in the family. Employees and supervisors also sold items such as handicrafts, blankets, dolls, Girl Scout cookies, trick or treat bags, eggs, shirts with school logos on them, Tupperware, and other catalog items. Numerous witnesses testified about employees and supervisors purchasing Avon products from a nonemployee who regularly visited the facility. The Respondent apparently does not dispute that its no solicitation rule was routinely ignored or violated with impunity but attempts to distinguish Carden’s actions as causing “ill-will and resentment” among some employees while the other solicitations and sales activities did not.⁶ As discussed above, Carden’s

actions were protected by the Act and cannot lawfully be singled out for disciplinary action by the Respondent because it or certain of its employees did not like or agree with them. Issuance of the warning under these circumstances constituted unlawful disparate treatment of Carden because she engaged in protected activity. See *Keco Industries*, 306 NLRB 15, 18–19 (1992); and *Thomas Steel Corp.*, 297 NLRB 1025, 1032 (1990).

A third warning notice was issued to Carden because she allegedly violated policies prohibiting loitering at the facility and conducting unauthorized business. The unauthorized business allegation clearly relates to Carden’s engaging in pronoun activity by handing out her “invitations.” As discussed above, this involved activity protected by the Act and cannot lawfully serve as a grounds for disciplinary action against her. As for the alleged violation of its policy against loitering, the evidence establishes that Carden was the victim of unlawful disparate treatment. It is undisputed that Carden distributed her “invitations” while she was on vacation and not working at the facility. The Respondent’s work rules prohibit loitering at the facility when not working. However, as in the case of the solicitation rule, the evidence shows the loitering rule was routinely violated by employees without disciplinary action being taken. Carden credibly testified to having gone to the facility on other occasions when she was not working just to visit with her supervisor and to having been invited by nursing supervisors to stay over after work to attend parties at the facility. She also testified that she observed employee LeAnn Chambers regularly visit the facility, when not working, to talk and smoke cigarettes because she was not allowed to smoke at home. Environmental services employee, Richard Glover, credibly testified that he had observed fellow employee Linda Williams come into the facility when she was not scheduled to work and go to the laundry to converse with other employees and Supervisor Bill Miller. Cleo Sandy testified that Williams came into the facility during nonwork hours on numerous occasions and that she has seen CNA Susan Greene come in on nonwork hours to visit with Williams and other employees, often staying throughout the entire lunchbreak. Williams, who appeared as a witness for the Respondent, confirmed that she has come to the facility during her off-hours to visit a relative, Jean Fisher, who works there, sometimes accompanied by Fisher’s babysitter and daughter, and that she has been there to discuss nonwork-related personal problems with Miller and with Fisher. Sandy testified that Greene regularly came to the facility an hour before her shift began on days when she was scheduled to work. Greene confirmed this in her testimony, saying, she usually

⁴ The evidence shows that in at least two cases, Kim Wilson and Jennifer Bragg, Carden deliberately avoided offering an “invitation” to employees who were not union supporters.

⁵ CNA Tammy Mullins testified that, immediately after being given an “invitation” by Carden, she stopped Underwood in the hallway at the facility to tell him she felt “intimidated” because she had to choose between the Union and the Respondent and it was “too much pressure.” Underwood, however, claimed he first learned about the “invitations” when CNA Nikki Hatcher brought one to his house. In any event, Mullins’ subjective reaction did not deprive Carden’s otherwise lawful activity of the protection of the Act.

⁶ Several times during his testimony Underwood referred to the fact that he was attempting to build harmony and teamwork at the facility and that he considered anything that generated controversy or ill will among the employees interfered with that goal should be prevented. It appears that this only applied to ill will allegedly generated by supporters of the Union. The evidence shows that in March 1996 Supervisor Sharon Amick taped to one of the nurses desks a copy of a newspaper

article concerning the strike by the Union against the Respondent’s facility and other West Virginia nursing homes. The article was accompanied by a photograph that included Charging Party Wanda Proctor, a former union representative at the facility, and contained statements by another Union representative that the facilities were understaffed and that made reference to “horror stories happening inside West Virginia nursing homes.” Amick attached a note saying: “This is the care your union reps. say your residents are getting in this facility. Is this what you want people to think about you and the work you do?” There was evidence that several employees were upset and expressed anger after reading Amick’s posting. Although the Respondent’s management was aware of the posting, no adverse action was taken against Amick over it. Similarly, Underwood was apparently unconcerned about any potential for ill will or divisiveness among employees when, in March 1996, employee Pattie Price came into the facility on her dayoff to seek his assistance in drafting a decertification petition, which was then circulated throughout the facility. See discussion, *infra*.

came to work prior to 2 p.m. for her shift (which started at 3 p.m.) sat down, had a drink, and smoked a cigarette or two before clocking in. She testified that supervisors observed her doing this, but “there has not been a word been said about it.” Former CNA Patty Mullins testified that she has frequently observed Kim Wilson at the facility during her off-hours. Mullins also testified to going to the facility on a nonwork day, herself, to pick up the Girl Scout cookies she had ordered from LPN Melinda Bartlett and hanging around for about 20 minutes until Bartlett returned. She was not told to leave or subjected to any disciplinary action. CNA Wendy Holcomb testified that she visited the facility on several occasions when she was not scheduled to work to visit residents and/or to talk to fellow employees in the breakroom. She was never disciplined for doing so. CNA Patricia Brooks testified that she had visited the facility during nonwork hours to visit her boyfriend, who also worked there, or to talk to other workers and was never told not to do so. CNA Mabel Bailes testified that she has visited the facility when not scheduled to work and has taken grandchildren and her dogs to visit residents and has never been warned or told she could not do so. Apart from the warning to Carden, the only evidence that anyone was ever spoken to by management concerning the loitering rule was that, on September 13, 1995, Wilson was counseled about spending excessive time at the facility during the 11 to 7 p.m. shift when she was not scheduled to work. Counseling is not considered by the Respondent to be disciplinary action.⁷ According to the counseling form, she was sitting at the nurse’s desk while the nurse was supposed to be working, was going through confidential information about residents and the nurse’s communications book concerning resident care. It states that her actions were disruptive to the care of residents by the people who were working. After receiving this counseling, Wilson went to the facility on March 12, 1996, at a time when she was not scheduled to work, in order to sign a petition to decertify the Union after being called at home and told about it, without any action being taken against her. Based on the foregoing, I find that the warning issued to Carden for allegedly loitering at the facility was a pretext and another example of the Respondent’s disparate application of its work rules to punish her for engaging in prounion activities. Except for the fact that it involved such activity, Carden’s visit to the facility for a brief period to pass out her “invitations” was no different than numerous instances of visits by other employees during their off-hours for non-work-related purposes and could not lawfully be the basis for disciplinary action against her.

A fourth warning notice was issued to Carden arising out of the same incident for “interfering with or purposeful distraction of another employee in performance of his/her work duty.” The evidence establishes that Carden handed out her “invitations” in the lounge to employees who were not working and in a hallway near the timeclock to a number of day-shift CNAs as they were clocking out at the end of their shifts. There is no evidence that she interfered with the work of any employee who

was actually working. On the contrary, the Respondent’s witness, Nicki Hatcher, who went to Underwood’s home that day to give him a copy of the “invitation,” testified that her work was not interfered with nor was she threatened in any way. Its witness, Kim Wilson, in response to a question about what work Carden interfered with, testified: “There was no work, we were clocking out.” I find that the stated basis for this warning was a pretext and that the real purpose was to punish Carden for engaging in protected activity.

A fifth warning notice relating to the same incident cites Carden for refusal or inability to support the facility’s goals and programs. Since Carden was engaged in activity protected by the Act, the Respondent could not lawfully punish her for such activity because it disagreed with it or did not like it.

The sixth warning notice issued to Carden states that on June 5, 1995, she interfered with an on-going investigation of a possible infraction of facility policy. This apparently relates to Underwood’s questioning her about the incident on May 31 in his office, which the complaint alleges violated Section 8(a)(1). In determining whether an employer’s interrogation is coercive and violates the Act, all the surrounding circumstances must be taken into consideration. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); and *Rossmore House*, 269 NLRB 1176 (1984). Here, Underwood, the highest ranking official at the facility, angrily interrogated Carden about her activities, her reasons for engaging in such activities and who else was involved. Even if the meeting were considered as offering Carden an opportunity to give her side of the story as to what occurred when she distributed her “invitations,” once Underwood went beyond what she did in the time clock area and started inquiring into her subjective reasons for doing so, demanding to know who else was involved and telling her she had adversely affected morale and had “created a disciplinary situation,” the interrogation was coercive and a violation of Section 8(a)(1). *Medical Center of Ocean County*, 315 NLRB 1150 (1994); and *Dlubak Corp.*, 307 NLRB 1138, 1146 (1992). Since the interrogation was unlawful, Carden could not be disciplined for refusing to participate in it or answer questions concerning her protected activities. Consequently, the disciplinary warning issued to her as a result was also unlawful. *Earle Industries*, 315 NLRB 310, 315 (1994).

I find that the Respondent has failed to establish that it would have terminated Carden in the absence of protected activity on her part. The weakness of an employer’s explanation is a factor to be considered in determining its motivation. *Briarwood Hilton*, 222 NLRB 986 (1976). Here, there is little in the record that gives a straightforward statement of the Respondent’s reason(s) for the termination. The dismissal letter given to Carden states only that she was terminated “due to continuous violations of policy and procedure.” A separation notice, prepared for the Respondent’s files, states only that she was dismissed for “unacceptable conduct.” Although at one point, he testified that it was Carpenter’s decision to terminate Carden, Underwood acknowledged that it he made the decision after conferring with Carpenter, co-owner, Steve Ferguson, and an attorney.⁸ When asked on what his decision was based, Underwood gave an unfocused, rambling response. As best as I could decipher it, he considered Carden’s coming to the facility while

⁷ In its brief, the Respondent asserts that the counselling form issued to Wilson constituted disciplinary action. The credible and uncontradicted testimony of former Union Chapter President Patricia Brooks establishes that when the Union requested that it be given copies of all disciplinary actions, it was informed by then-Director of Nursing Ruby Polk, in the presence of Underwood, that counselling was not disciplinary action but an educational tool to prevent a potential problem from happening. There is no evidence to the contrary.

⁸ According to Carpenter, her only involvement was presenting the writeups and dismissal letter to Carden on a day that Underwood was out of town.

on vacation and passing out the "invitations" urging employees to boycott the Respondent's appreciation dinner constituted "direct defiance of management" which had a negative impact on the facility and its goals. Consequently, he did not feel that Carden "was going to be a productive employee." He also made reference to complaints about Carden's absenteeism and said: "There was a whole list of things and it was a real problem."

I find that Carden was terminated because of the May 31 incident involving the distribution of the "invitations," which the Respondent made an exhaustive effort to catalog in the six disciplinary warnings issued to her in connection with that incident. As has been discussed above, her actions were protected by the Act, not one of the warnings constituted lawful disciplinary action, and all were discriminatorily motivated. The Respondent's reliance on the same incident as grounds for dismissing her is, likewise, unlawful. Underwood's apparent attempt to bolster his position, by implying that Carden's absenteeism and other alleged problems were involved in his decision to terminate her, does just the opposite. While claiming that there were a whole list of things about Carden that were creating "a real problem," he failed to identify anything on that list. As for absenteeism, the record shows that in May 1994 Carden was given disciplinary warnings for having had three absences within a 30-day period during April 1994.⁹ On September 14, 1994, she was given another warning for excessive absenteeism occurring in June 1994.¹⁰ The warning notice states that "any further absence will result in termination." There is no evidence that Carden had any absences after that or that she was the subject of any other disciplinary action prior to June 1995. I find that Underwood's attempt to imply that a nearly year-old instance of absenteeism was an issue causing a problem in June 1995 or was a consideration in her discharge is a pretext and that it had no bearing on his decision to discharge her. I find that the Respondent has failed to establish that it would have issued these disciplinary warnings to Carden and/or discharged her in the absence of protected activity on her part. Accordingly, I find that these actions violated Section 8(a)(3) and (1).

2. Allegations concerning Wanda Proctor

a. *Alleged coercive statements*

Wanda Proctor has been employed by the Respondent as a CNA since 1982. Since the Union became the bargaining representative at the facility in 1986, she has been an active member, serving as a delegate for 4 years, as president of the Union Local for 4 years, and on its executive board for 9 years. She testified that during the year preceding her termination on August 19, 1995, in her capacity as a union representative, she had assisted in processing approximately 20 grievances for employees of the facility. Proctor testified that during May or June 1995, while shopping with her husband, Danny, in a department store in Summersville, West Virginia, she encountered Pam Dobson, who was then the assistant administrator of the facility. Dobson introduced Proctor to her boyfriend, who was also named Danny, by saying, "[T]his is Wanda Proctor, our union nuisance," and said, "[W]e'd like to get rid of her because she causes all the problems at the nursing home." Proctor

responded that although Dobson was joking, she really meant it. Dobson also said that she had gotten up one morning and turned on the television and there was Proctor on "Good Morning America." Proctor said that she and Union Official Teresa Ball had appeared on the program and had expressed the Union's concern about funds being cut for an OSHA program involving the health and safety of nursing home workers. Proctor's husband also testified to meeting Dobson and her boyfriend and hearing Dobson refer to his wife as a union nuisance that they would like to get rid of if they could and as "Miss Good Morning America." The complaint alleges that Dobson's comments about Proctor being a union nuisance that the Employer would like to get rid of were coercive and violated Section 8(a)(1).

Dobson and her boyfriend, Danny Woolums, appeared as witnesses for the Respondent. Dobson testified that she encountered Proctor at the department store in Summersville and they exchanged greetings and discussed the clothing on sale. She introduced Proctor to Woolums as someone who worked at the nursing home and later Proctor's husband came by and was introduced. Woolums testified that while shopping with Dobson they met Proctor in the store and Dobson introduced her as someone from work. They talked about clothing and then Proctor's husband came along and was introduced to them.

Analysis and Conclusions

I credit the testimony of Proctor, which was corroborated by her husband, that Dobson referred to her as "a union nuisance" that they would like to be rid of because of the problems she caused at the nursing home. Although recognizing that Proctor has a financial interest in the outcome of this proceeding, having observed the demeanor of all four witnesses to the incident, I found no reason to doubt the testimony of the Proctors as to what occurred or to believe that they fabricated any part of the conversation.¹¹ Their testimony was mutually corroborative but was not so similar as to suggest collusion.¹² I also believe that, more than a year later, Proctor would be more likely to remember the details of such an incident than would the others, particularly, Woolums, a casual witness to a brief and apparently jocular exchange between Dobson and a person who was a complete stranger to him. Significantly, while they both gave a generalized description of the conversation between Dobson and Proctor, neither Dobson nor Woolums was specifically asked about the allegedly unlawful statements attributed to Dobson by the Proctors. Consequently, the Proctors' credible testimony that those statements were made was not directly contradicted nor did Dobson deny making them.

The remaining question is whether Dobson's comments were coercive and unlawful. The Board considers all of the surrounding circumstances and uses an objective standard in determining whether a statement violates the Act. E.g., *Mediplex of Danbury*, 314 NLRB 470, 471 (1994); *Interstate Truck Parts*, 312 NLRB 661, 663 (1993); and *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992). I find that Dobson's referring to Proctor as a union nuisance who caused problems and saying

¹¹ If Proctor had fabricated Dobson's remarks, it is unlikely that she would attribute them to her in a conversation witnessed by Dobson's boyfriend.

¹² I do not find the fact that in his testimony Danny Proctor said that Dobson made the "nuisance" remark when he was introduced to her rather than when Woolums was introduced casts any significant doubt on the testimony of either of the Proctors.

⁹ According to its employee handbook this could not be the basis of disciplinary action after 12 months.

¹⁰ Carden testified without contradiction that these absences had resulted from her involvement in an automobile accident.

that the Employer would like to get rid of her would cause a reasonable person to believe that her job was in jeopardy because she had engaged in protected activity. See, e.g., *Jay Metals*, 308 NLRB 167 (1992); and *Garrison Valley Center*, 246 NLRB 700, 708–709 (1979). The fact that the statements were made away from the facility and in a somewhat jocular manner did not lessen their coercive effect. It was Dobson who raised the subject of Proctor's union activity for no apparent reason other than to make it clear that the Employer did not approve of it. At the time, Proctor said that she knew it was not really a joke and Dobson made no response. The unlawful effect of a coercive statement is not blunted by the fact that it is accompanied by laughter or made in a humorous way. *Meisner Electric, Inc.*, 316 NLRB 597, 599 (1995); *NLRB v. Intertherm, Inc.*, 596 F.2d 267, 272–273 (8th Cir. 1979). I find that Dobson's comments were coercive and violated Section 8(a)(1).

b. Warnings and discharge

On August 30, 1995, Proctor was issued six disciplinary warnings and was informed that she had been terminated by the Respondent. Three of the warnings involved her alleged harassment and intimidation of a coworker and three concern alleged safety violations, negligence, and abuse of residents during restorative feeding on August 19, 1995. The complaint alleges that these disciplinary actions were discriminatory and violated Section 8(a)(3) and (1).

Proctor testified that on August 19, she was assigned as usual to the restorative feeding program in which approximately 10 residents who have problems eating are taken to the East Wing residents' lounge for their meals and are encouraged and assisted to feed themselves. Marsha Bailey, a CNA who had recently finished LPN training but had not been licensed, was also assigned to the restorative feeding program that day. As they were taking residents to the lounge for breakfast, they encountered CNA's Janet Tinney and Melissa Roach in an apparent argument. Proctor asked Bailey what was going on and she responded that they were talking about a rumor that Roach and Bailey, who had both taken the LPN course, were being paid \$8.50 per hour although they were still working as CNAs. When they got to the dining area, Proctor asked Bailey if the rumor was true. Bailey responded that they were making "nursing wages," which she later admitted to be \$8.50 per hour. Proctor said that was not fair as she had been a CNA for nearly 15 years and was making only \$6.67 per hour for doing the same job as Bailey and Roach. Bailey said that they were only doing the CNA work to help out with short staffing, which would be alleviated in a couple of weeks when a new CNA class would be finished. Later that morning, Proctor took her break in the employees' lounge where Bailey and CNA's Velma Hoover, Clarice Holcomb, and Delores Whittington were present. Proctor asked if they knew that Roach and Bailey were being paid \$8.50 per hour and Hoover responded that it had been going on for at least 2 weeks. Proctor asked Bailey to confirm that she was making \$8.50 per hour. Bailey responded that she had not said that, but only that she was making nursing wages. When Proctor said that it was not fair that Bailey was making \$8.50 for doing the same work as the CNAs, Bailey got up and left the room, leaving behind her drink and snack.

Proctor testified that, during the midday feeding that same day, Bailey left the lounge to take a telephone call at the front desk, leaving Proctor alone with the residents for 5 to 10 minutes. While Bailey was gone, the pay telephone in the lounge rang and Proctor got up to answer it. When she picked up the

receiver, there was nobody on the line. It took her approximately 20 seconds to walk to the phone and back. During her afternoon break, Proctor used the pay telephone to attempt to call union representative Hornick to discuss what she considered to be a violation of the collective-bargaining agreement, but was unable to reach him. During the workday, Proctor injured her shoulder. She reported it to a supervisor and filled out an incident report before leaving the facility. That evening she sought medical assistance at the local hospital. The shoulder was ex-rayed and she was given medication and told to see her personal physician. She was not scheduled to work on Sunday and that evening called the facility to say that she would be unable to work on Monday. On Monday, she took a doctor's excuse and a worker's compensation form to the facility and was told by Carpenter, without elaboration, that she might need to talk to her during the week. On Tuesday morning, Carpenter called and said Proctor had to come to the facility because there was an investigation going on. Proctor said that she was going to contact Hornick and Carpenter said that would not be necessary. Later that day, she received a call from Underwood who said she had to come to the facility because of the investigation. He asked her if she wanted the investigation to be done by the Respondent or the State and Proctor said the State. Underwood responded that he did not want to talk to her then and hung up. On Wednesday, Carpenter called and told her to come to the facility at 10:30 that morning. She arrived at the facility with Hornick. Underwood told them that it was an investigation of abuse and said there was no need for Hornick to be there. When Hornick said that Proctor was entitled to be represented, Underwood said he could not be present and asked if Proctor wanted to talk to them alone. She said she did not want to do so without Hornick and left. Proctor and Hornick went to the local department of human services office to see if any abuse charges had been filed against her and were told there were none pending. She was never subsequently informed of any charges being filed against her or of any investigation. Her CNA license was renewed by that department in December 1995. Proctor received in the mail copies of the six disciplinary warning notices issued by the Respondent and the termination letter, dated August 30, 1995.

Bailey testified that during a morning in August 1995, while they were taking residents to the lounge for restorative feeding, Proctor asked her how much she was making and she responded that it was nobody's business. While they were doing the breakfast feeding, Proctor said that Bailey was making \$8.50 per hour. Bailey denied it and said it was nobody's business what she was making. Proctor said that it was unfair to be making that much while working as a CNA. Bailey responded that it was her decision and her business only. Proctor said that she was going to call Hornick about it and file a grievance. Bailey testified that after the feeding was finished and she was transporting residents to their rooms, she observed Proctor using the telephone in the lounge. Three different times, when she returned to the lounge after transporting a resident, she saw Proctor with her hand on the telephone receiver. She did not hear the telephone ring before she observed Proctor near it. Each time Bailey entered the lounge, Proctor would hang up the receiver and go back to feeding residents. After the third time, Bailey asked Melissa Roach to come and be a witness for her that Proctor was using the telephone. During her morning break, Bailey went to the employees' lounge where Proctor and three others were present. Proctor said that she was making

\$8.50 per hour and she denied it. Proctor said that Bailey had told her she was making \$8.50 per hour, Bailey denied it, got up and left the room. Bailey went to Supervisor Katherine Hamrick and told her she wanted to file a complaint over being harassed. Hamrick told her they needed to talk to Underwood and tried to call him at his home, but he was not there. She had no additional confrontations with Proctor during the day. That evening she called Underwood at his home and reported what had occurred.

Melissa Roach testified that around lunchtime on a day in August 1995, while she was transporting residents from the dining room, Bailey asked her to keep an eye on the residents in restorative feeding while she was transporting some to their rooms. Roach stepped into the lounge and observed Proctor at the pay phone with her hand on the receiver. When Proctor saw Roach, she took her hand off the phone and returned to the residents. She had not heard the phone ring before she observed Proctor near it. Later that afternoon, at the east wing desk, she saw Bailey who was upset and crying. Kathy Hamrick asked her to write down everything she knew about any conversation between Proctor and Bailey and she did so.

LPN Supervisor Katherine Hamrick testified that she was called in to work as a replacement on the morning of Saturday, August 19. Shortly after she arrived, Bailey came to her and said that Proctor had harassed her about her wage rate and that she wanted to file a complaint. Hamrick told her to write down what had happened and not to get into any confrontation with anyone or she would have to send her home. She testified that Roach, who was also present, confirmed that what Bailey had said about Proctor had happened. She told them to write down what had happened, but neither gave her a written statement that day. Hamrick also testified that neither Bailey nor Roach ever reported that Proctor had done anything neglectful or abusive of any resident or said anything about her using the telephone.

Agnes Carpenter testified that she was informed by Hamrick that there had been some harassment and conflict at the facility on the weekend. She spoke to Bailey and Roach and had them write out statements. Bailey alleged that she had been harassed by Proctor in the breakroom and that Proctor had left the restorative feeders while she used the telephone. She also spoke with and obtained written statements from Hoover, Holcomb, and Whittington. She testified that she invited Proctor to come to the facility to give her side of the story, but she never came in to make a statement. She determined that Proctor's actions constituted neglect of patients and she sent a report to the CNA neglect and abuse registry in Charleston. Carpenter testified that she made the decision to discharge Proctor, that she prepared six disciplinary warning notices and composed a letter informing her that she was discharged and mailed them to her.

Underwood testified that after he received a complaint about Proctor from Bailey he instructed Carpenter to investigate the matter. He said that he reviewed the statements that had been given and that he was concerned that they did not have Proctor's side of the story. She was invited to come in and he received a communication from Hornick that he wanted to represent Proctor during "this investigation hearing." After conferring with his counsel, Underwood refused to let Hornick represent her and gave Proctor the option of being interviewed alone or not at all. She chose the latter option. Underwood reviewed the results of the investigation, conferred with an attorney and Ferguson and made the decision to discharge Proctor.

Analysis and Conclusions

I find that the General Counsel has made out a prima facie case under *Wright Line*, supra, that the disciplinary action taken against Proctor was discriminatory. Proctor was the most prominent representative of the Union among the employees at the facility. There is ample evidence of the Respondent's animus toward the Union and toward Proctor, individually, including, Underwood's threat to get rid of the troublemakers who filed grievances and Dobson's statement that the Respondent would like to be rid of Proctor because she was a union nuisance and always causing trouble. In addition, former employee Brenda Triplett credibly testified, without contradiction, that during the summer of 1995 she had a conversation with Underwood in his office in which he commented that he had gotten rid of Eula Carden and that he "needed one more thing to get rid of" Proctor. While the Respondent seeks to dismiss Underwood's statement as merely "gossiping to an outsider about common acquaintances," considering all of the surrounding circumstances, I find it is additional evidence of the Respondent's animus toward Proctor because of her protected activity and that it was seeking an excuse to get rid of her. I also find that the excuses it used a short time later to discharge her, the alleged harassment of Bailey and neglect of residents, were pretexts.

The "evidence" relied on by the Respondent in support of its findings concerning the allegations against Proctor on August 19 came from primarily two sources, Bailey and Roach. Both were recent graduates of an LPN course that they had financed through loans from the Respondent. In August 1995, although they had not yet obtained LPN licenses and were working as CNAs, both were being paid by the Respondent at LPN wage rates, which were substantially more than what even longtime CNAs were being paid.¹³ I find these factors, coupled with the discrepancies in their testimony discussed below, cast serious doubt on their motives and veracity. The above-described testimony of Proctor as to what occurred between her and Bailey that day was credible, was corroborated in large part and was uncontradicted by any credible evidence. I find that the incidents occurred as stated in the testimony of Proctor.

The three disciplinary warnings issued to Proctor relating to Bailey assert that she (1) intimidated and threatened Bailey, (2) interfered with her ability to perform her work, and (3) verbally harassed and made discriminating statements to her. The credible evidence establishes that, after Bailey voluntarily admitted to her that the Respondent was paying her \$8.50 to perform CNA work, Proctor told her that it was unfair and that she was going to file a grievance. Later, in the lounge, when Proctor asked her to confirm that she was making \$8.50 per hour, Bailey denied it, got upset and left the room. There is no evidence that Proctor ever spoke to Bailey in anything other than a conversational tone, that she was in any way rude, loud or boisterous, or that she did any finger pointing or made any other gestures toward her. None of the three CNA's who were present in the employees' lounge that day, Holcomb, Whittington, or Hoover, who appeared as a witness for the Respondent, testified to observing anything about Proctor's conduct or demeanor that was intimidating or abusive. In Hoover's words, Proctor was "calm, but inquisitive" and the conversation lasted no more

¹³ This was apparently through a special arrangement with Underwood since Director of Nursing Carpenter testified that she had no idea what they were being paid.

than one or two minutes. All three gave statements to Carpenter as to what they observed before her decision to terminate Proctor was made. I find that there was no reasonable, objective basis on which Carpenter could have concluded that Proctor had harassed or intimidated Bailey by asking her what she was being paid. Contrary to Bailey's opinion, that it was nobody's business what she was being paid, as a member of the bargaining unit, Proctor had a right to inquire as to whether the Respondent was complying with the contract provisions concerning the CNA's wage rates. As the highest ranking union representative at the facility, it was her responsibility to do so. She was engaged in protected activity when she did so. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); and *Tillford Contractors*, 317 NLRB 68, 69 (1995). There is no evidence that anything in her conduct was so flagrant, violent or extreme as to remove it from the protection of the Act.

There is no evidence that Bailey was in any way impeded or prevented from performing any of her duties on August 19 or that she failed to perform any; consequently, the disciplinary warning purportedly based on that assertion is a pretext. Similarly, there is no evidence of Proctor making any "discriminatory" statements to Bailey. According to Carpenter, the action of Proctor that "threatened" Bailey was her saying that she was going to file a grievance over the fact that the Respondent was paying Bailey more than the contract wage rate for working as a CNA. Proctor's statement of her intent to take action to enforce the collective-bargaining agreement was protected by the Act and could not lawfully be the basis for disciplinary action against her. *NLRB v. City Disposal Systems*, supra. I find that all three disciplinary warnings issued to Proctor arising from her questions and statements to Bailey on August 19 were pretexts, were intended to penalize her for engaging in protected activity, and violated Section 8(a)(3) and (1) of the Act.

The other three disciplinary warnings underlying Proctor's discharge concern her alleged neglect of residents by using the telephone three times during restorative feeding on August 19. These warnings are based solely on the accounts of what occurred given by Bailey and Roach. I find that there are serious questions about their motivation in making these allegations against Proctor. At the time of the alleged incident, both were financially indebted to the Respondent and were being accorded preferential wage treatment by virtue of a special arrangement they had with Underwood. Although she was not a party to or even a witness to any of the conversations between Proctor and Bailey that day, Roach joined Bailey in complaining to supervisor Hamrick about Proctor's conduct. According to the testimony of Hamrick, Roach implied that she was a witness to Proctor's alleged harassment of Bailey and she told both to prepare written statements about what had occurred. Ironically, Proctor's discussion with Bailey about the wage rate she was being paid was little different than that between Janet Tinney and Roach on the same day except that it was apparently less acrimonious than the Tinney/Roach discussion. However, Roach made no complaint about the practically identical conduct of Tinney. Moreover, although Bailey claimed she was so concerned over Proctor's using the telephone during the restorative feeding that she asked Roach to keep an eye on the residents and Roach, too, claimed she saw Proctor neglect them in the same manner, neither said anything about it to Hamrick when they went to her to complain about Proctor or to anyone else even though both were aware of their obligation to report

abuse or neglect of residents, immediately.¹⁴ According to Roach, although she considered Proctor using the phone and not attending to the residents "neglectful," she did not know there was "an issue" about her using the telephone until she had a meeting with Underwood, Carpenter, and Dobson, 3 days later. As for Bailey, despite her alleged concern over Proctor's neglect of the residents, she failed to mention it in the written report she prepared which led to the "investigation" of Proctor. I find all of the foregoing casts substantial doubt on the truth of their allegations against Proctor.

I also find that the discrepancies in their versions of what occurred lead to the conclusion that their story about Proctor using the telephone was untrue. Apart from the absurdity of the scene their story depicts, Proctor continually going to the phone, but each time being unable to complete a call because of the reappearance of Bailey or the appearance of Roach, there is a blatant discrepancy as to when the incident occurred. Bailey claimed it was at the end of the breakfast feeding, apparently, in order to imply that Proctor was calling Hornick about filing a grievance as she had told Bailey during the feeding that she intended to do. Roach, however, in her testimony and in a written statement she prepared for the Respondent, dated August 22, 1995, said, it occurred during the luncheon feeding. Another discrepancy involves how Roach came to observe Proctor at the telephone. She testified that as she was coming down the hallway, Bailey, who was transporting a resident, asked her to watch the remaining residents. After Bailey went by her, she went to the lounge and looked in. However, Bailey claimed that she took Roach to the lounge and together they observed Proctor at the telephone for what, according to her version, would have been a fourth time. Their versions cannot be reconciled. Having observed their demeanor while testifying, much of which involved answers to leading questions by the Respondent's counsel, I did not believe them and I find that the entire incident was a fabrication.

The Respondent's action in disciplining Proctor for engaging in protected activity was clearly unlawful. I also find that the disciplinary action against her based on the fabricated allegations of abuse or neglect of residents was also unlawful. The Board considers an employer's failure to make a meaningful investigation of alleged misconduct or to inform an employee of the allegations against them and to permit them to explain their actions to be significant evidence of discrimination. E.g., *Burger King Corp.*, 279 NLRB 227, 239 (1986); and *Synco Corp.*, 259 NLRB 161, 171-172 (1981). I find that the evidence establishes that the Respondent's "investigation" of Proctor's alleged actions was so deficient as to constitute a sham and that it provides no reasonable basis for taking disciplinary action against her. Although Underwood testified that he recognized that it was important to have Proctor's side of the story before reaching any conclusions, he effectively precluded her from giving it by refusing her request to have union representation at the investigatory interview he scheduled. He gave no reason for doing so other than that he acted on the advice of legal counsel. While the Respondent may have acted in accordance with *NLRB v. Weingarten, Inc.*,¹⁵ by foregoing an interview with Proctor when she insisted on representation, an investigation of

¹⁴ Bailey's failure to say anything to Proctor about her repeatedly neglecting the residents, while it was allegedly occurring, and her failure to mention it in the written statement she prepared for the Respondent indicates it never happened.

¹⁵ 420 U.S. 251 (1975).

the incident which did not include her side of the story was admittedly deficient. Moreover, its conclusion that Proctor was guilty of neglect, based solely on the questionable and contradictory stories of Bailey and Roach, indicates that it was willing to use any excuse to justify terminating her. As noted, although it was Bailey's complaint which led to the "investigation" of Proctor's conduct, her written report makes no mention of the telephone incident. The lack of depth and accuracy of the Respondent's "investigation" is apparent from the conclusions stated in the warning notices prepared by Carpenter and the report she made to the abuse registry. That report identifies Bailey as the complainant, it states that the incident occurred at about noon, and that it involved all of the ten residents in the restorative feeding program. According to Bailey's testimony, the incident happened at breakfast after a number of residents had left the lounge. Carpenter obviously made no effort to get her facts straight to resolve the obvious conflicts between the versions of Bailey and Roach, or to ascertain what really happened.¹⁶ I also find that the Respondent's failure to even discuss with Bailey and Roach that they were required to immediately report the neglect of residents they claimed to have observed, let alone take any disciplinary action against either of them, is further evidence that it never happened.¹⁷ Having concluded that the warnings issued to Proctor were pretexts, I find that the Respondent has not established that it would have disciplined or terminated her in the absence of protected activity on her part and that by doing so it violated Section 8(a)(3) and (1) of the Act.

3. Allegations concerning Mabel Bailes

a. *Interrogation*

Mabel Bailes testified that she has worked for the Respondent as a CNA for over 6 years. She is a member of the Union and has served as a delegate. In January 1996, she made telephone calls to several other employees in the course of which she discussed personal and family matters, but also expressed her concern that if the Union was broken by the Respondent, Underwood could knock down the pay of the CNAs to the minimum wage. She was later called into Underwood's office where Dobson and Sandra Amick were also present. Underwood questioned her about her calls to employees and asked if she had harassed them or threatened their property. Bailes denied harassing or threatening anyone and told him it was none of his business what she did on the telephone at her home. During the conversation, Underwood referred to Proctor and said that while he couldn't do anything about Proctor, who was no longer working there, he would fire Bailes if she continued to make such calls. The complaint alleges that Underwood's interrogation of Bailes was coercive and violated Section 8(a)(1).

Underwood testified that he received an informal complaint from the head of the dietary department that Bailes and Proctor were calling employees at their homes. He spoke to Bailes to make her aware of their concerns and alleviate the problem.

¹⁶ At one point, Bailey testified that she had never talked to Carpenter about the incident.

¹⁷ There is a striking contrast between the Respondent's lack of action against Bailey and Roach and the fact that, in January 1995, it disciplined and suspended for 3 days Supervisor Sandra Amick because she had "messed up" what Underwood apparently considered an opportunity to terminate Proctor.

Analysis and Conclusions

Bailes' testimony about what occurred at this meeting with Underwood was credible and uncontradicted. Amick testified that she had no recollection of the meeting. Dobson confirmed that she was at the meeting and that Underwood talked to Bailes about telephone calls to employees, but nothing in her testimony contradicted that of Bailes as to what was said. Underwood admitted being concerned that Bailes and Proctor were making telephone calls to employees in which they were discussing union matters and that he spoke to Bailes about it. He did not deny interrogating her about the content of the calls or threatening her with being fired if she continued to make them. There is nothing in the record beyond the self-serving testimony of Underwood that Bailes in any way harassed or threatened any other employee on the telephone.¹⁸ Considering all of the surrounding circumstances, I find that Underwood's interrogation of Bailes in his office in the presence of two other supervisors concerning protected activity she engaged in away from the facility on her own time, which included a threat to fire her if she continued such activity, was coercive and violated Section 8(a)(1). E.g., *Mediplex of Wethersfield*, 320 NLRB 510, 513 (1995); and *Yerger Trucking*, 307 NLRB 567, 571 (1992).

b. *Disciplinary warning*

As is discussed in detail below, on March 4, 1996, the Union conducted a 1-day strike at the Respondent's facility and several CNAs were hired as permanent replacements for strikers. Bailes, who worked on the day shift, testified that she did not participate in the strike but took March 4 off due to a family situation and was replaced. She returned to work on March 13. On the morning of April 3, while on a break, she had a conversation in the breakroom with Jennifer Bragg and Velma Hoover, two employees who had not gone out on strike. During the conversation, Bailes said that "the Labor Board had ruled on two things in our favor" and that she thought that "Frank Hornick ought to check into it and see if charges couldn't be filed against the girls who went ahead and worked (during the strike)." Later that morning, she was called to Underwood's office where Dobson was also present. He asked what she was talking about in the breakroom. When she tried to explain Underwood got angry, said she didn't appreciate having her job back and left the office. After he left, Dobson told her to be careful what she talked about, that it was a bad time to talk about the Labor Board or the Union, and that she was a good worker and she didn't want to lose her. At the end of her shift, Bailes was called to meet with Dobson and Carpenter. When she got to the office, she was given a written warning for allegedly making "false statements that threatened employees' job security." Carpenter told her that the writeup was for talking about the Union in the breakroom. The testimony of Jennifer Bragg, who appeared as a witness for the Respondent, essentially corroborates that of Bailes as to what she said in the breakroom that day.¹⁹ Bragg, who was a part-time employee

¹⁸ On the contrary, one of the Respondent's witnesses, Velma Tyler, testified that Bailes had called her and talked about many things, including the Union, that she may have mentioned it to Underwood, but that she did not complain about it and Bailes did not harass her.

¹⁹ Hoover said that Bailes said that "the Union had won," that all of them would be getting their jobs back and that the Union would file suits against those who worked on March 4. I credit the consistent testimony of Bragg and Bailes as to what was actually said.

that got a full-time position by replacing one of the strikers, testified that although Bailes did not say anything about what would happen to replacement workers, she felt intimidated and harassed by what Bailes did say.²⁰ Carpenter testified that she told Bailes that her remarks constituted harassment because that is the way Hoover and Bragg perceived them and that in the future she should not “get on that subject if they are construing it as harassment.” The complaint alleges that Dobson’s telling Bailes not to talk about the Union violated Section 8(a)(1) and that the warning given her as a result of this incident violated Section 8(a)(3). The Respondent contends that it had a bona fide interest in maintaining the morale of its workers and Bailes’ action was contrary to that interest.

Analysis and Conclusions

It is not clear what the Respondent claims Bailes said that constituted a “false statement.” Even if she was technically incorrect in saying that the Board had “ruled” in favor of the Union, apparently, because the Regional Director had determined that the Union’s charge that alleged that the March 4 strike was an unfair labor practice strike had merit, there is no evidence that her statement was made with knowledge that it was false or with reckless disregard of whether it was true or false so as to remove it from the protection of the Act. *Mediplex of Wethersfield*, supra at 513. Likewise, her statement that she felt the Union should look into taking action against members who worked during the strike, advocated its doing something it had a legal right to do. See *NLRB v. Allis Chalmers Mfg. Co.*, 388 U.S. 175 (1967). The fact that other employees may have subjectively considered her remarks to be offensive or intimidating is not controlling. It is well settled that an employer cannot lawfully take disciplinary action to stop subjectively offensive activity without regard to whether that activity is protected by the Act. E.g., *McCarty Foods, Inc.*, 321 NLRB 218 (1996); *Almet, Inc.*; and 305 NLRB 626, 628 (1991). Under the circumstances, Bailes’ statements constituted protected activity. By disciplining her for engaging in such activity, the Respondent violated Section 8(a)(3) and (1). Dobson’s telling Bailes she should not talk about the Union or the Board and implying that doing so would result in her discharge was coercive and violated Section 8(a)(1).²¹

c. The 8(a)(1) allegations

(1) Allegations concerning Jim Mike Ward

Betty Scott testified that in August 1995 she attended a meeting at the facility with seven or eight other employees from several different departments conducted by Jim Mike Ward. Ward introduced himself as a psychologist and asked about any problems the employees might be having. During the course of the meeting, Ward asked about how the Union came to be at the facility and if they were satisfied with it. Scott told him that the employees had contacted the Union about representation and some of the employees expressed their feelings that it didn’t do much for them. He also asked why they needed a union and what it would be like there without a union. Scott responded

²⁰ Underwood claimed that Bragg came to him and complained that Bailes was spreading rumors that Bragg would lose her job. I credit the testimony of Bragg.

²¹ The complaint alleged that this incident occurred on March 13, 1996. I find that the difference in dates is not significant, that the Respondent was not prejudiced thereby, and that the matter was fully litigated.

that, if it were not for the Union, Underwood would get rid of the older workers who were making more money.

Ward testified that he is an ordained minister with counseling experience and has conducted “Quality Circle” meetings at the facility in order to get employees’ ideas about better ways to do things to care for the residents. He has also served as a member of the Respondent’s bargaining team during the most recent contract negotiations. He denied that the subject of the Union was ever discussed at any of the quality circle meetings. He said that he kept no notes of those meetings and had no specific recollection of any of them.

Analysis and Conclusions

I credit the testimony of Scott, who was a credible witness and had a specific recollection of the meeting she testified about, over the general denial of Ward, who said he had no specific recollection of any of the meetings he conducted and was not asked about the remarks attributed to him at the meeting in August 1995. However, after considering all the surrounding circumstances, I find that Ward’s general inquiry to a group of employees concerning how the Union came to be at the facility and how they felt about it was not coercive or threatening and did not constitute a violation of the Act. Scott’s testimony does not really provide any context as to how the subject of the Union came up. It does not appear to have been anything more than an innocuous off-hand inquiry by Ward, who was not directly connected with the facility. There were no supervisors present at the meeting and Ward neither expressed an opinion about the Union nor made any threats or promises. Although the General Counsel argues that this was part of the Respondent’s effort to foment dissatisfaction among the employees, which culminated in the circulation of a decertification petition in March 1996, I find there is nothing to indicate that Ward spoke about or suggested decertification or to connect this meeting or his remarks to the effort which began nearly 6 months later. I shall recommend that this allegation be dismissed.

(2) Meeting in December 1995

In December 1995, while contract negotiations were going on, Underwood held a meeting with employees on the night shift to discuss the negotiations and a rumor going around the facility that, if the Union were not present, the pay of the CNAs was going to be reduced to the minimum wage. Underwood said that the rumor was not true and that he could not do that. During the meeting, CNA Barbara Spencer asked Underwood if he could contract directly with the employees. He said he could not discuss it at that time. After two CNAs, Karen Griffith and Kim Wilson, left the meeting to attend to a resident, Underwood stated that now that a certain person had left the room,²² he could address the question. He said that he could not enter such a contract because the Union represented the employees, but that he could do so if it was not present. He said nothing about getting rid of the Union or that he wanted it gone. The General Counsel contends that, by expressing a willingness to contract directly with the employees, Underwood unlawfully encouraged them to get rid of the Union.

Analysis and Conclusions

Considering all of the circumstances surrounding the meeting, I find that Underwood’s remarks did not violate the Act.

²² An apparent reference to Griffith whom he knew to be a union supporter.

Although Underwood arranged the meeting, the remarks in issue were made in response to a question raised by one of the employees. Several witnesses gave consistent testimony about what was said at the meeting but none of the versions purported to quote Underwood, verbatim. There was general agreement that he stated that he could not contract with the employees because they were represented by the Union. However, although there was testimony that he also stated that he “could” do so if it were not present, he said nothing to indicate or imply that he “would” do so, that he would like to have the opportunity to do so, or that such a contract would be more favorable than one with the Union. I shall recommend that this allegation be dismissed.

(3) Alleged disparate application of no-solicitation rule

After the collective-bargaining agreement expired on December 31, 1995, the Respondent informed the Union that it would no longer deduct and pay over union dues for employees who had signed checkoff authorizations. As a result, union officer, Patricia Brooks, began collecting dues by directly contacting employee-members. In early January 1996, Underwood called Brooks to a meeting in his office. CNA Annabel Justice and Supervisors Kathy Hamrick and Dobson were also present. Among matters discussed was how union dues were to be collected at the facility. Underwood informed Brooks that while he preferred that dues not be collected at the facility, if she were to do so, it had to be done in nonwork areas during nonwork time for all parties involved in the transaction. There is no real dispute about what was said about dues collection. The General Counsel contends that by announcing this policy with respect to the collection of union dues at that time, the Respondent promulgated a new rule directed solely at union activity. The Respondent argues that its restrictions were justified by allegations of union representatives’ harassment of employees over dues collections.

Analysis and Conclusions

As has been discussed above, in the discussion concerning the discharge of Eula Carden, prior to January 1996, the Respondent’s employee handbook contained a provision prohibiting solicitations for any purpose during worktime and in work areas. However, there was overwhelming evidence to establish that this rule was regularly and routinely ignored and/or violated by employees, supervisors and other persons without any disciplinary action being taken. Although in the handbook, the almost universal disregard for its provisions and lack of any enforcement for many years, in effect, rendered the no-solicitation rule a nullity. With the exception of the attempt to enforce the rule against Carden, which I have found to be unlawful, there is no evidence that there was any effort to reestablish or enforce the existing rule at any time prior to January 1996, or thereafter. Accordingly, I find that by announcing a rule directed at and applicable only to the collection of union dues, the Respondent violated Section 8(a)(1) by instituting a new policy “for the purpose of interfering with and restraining employees in the exercise of their Section 7 rights.” *Nashville Plastic Products*, 313 NLRB 462 (1993); and *American Commercial Bank*, 226 NLRB 1130, 1131 (1976).

(4) Alleged isolation of employee union officials

Wendy Holcomb worked for the Respondent as a CNA until she was permanently replaced for participating in the strike at the facility on March 4, 1996. Prior to becoming a CNA, she

had worked in the dietary department and was the union delegate for that department. She testified that, even after she became a CNA, she often took her breaks in the breakroom used by the dietary employees when their breaktimes coincided and that she had never been told that she could not do so. During the first week of February 1996, Holcomb and Patricia Brooks were sent to Underwood’s office, where Carpenter and Dobson were also present. Underwood told Holcomb that he had heard that she was harassing the dietary workers. Holcomb told him that she was the delegate for that area of the facility and had a right to go there and speak to the employees about union matters. Underwood accused her of threatening to have employee Nancy Case fired if she did not pay her union dues. Holcomb was told that she was not to enter the dietary area except to get ice or something needed for the residents and she and Brooks were told not to go into the dietary breakroom at all. They were told that they would be disciplined if they did so. Brooks testified that she had previously visited with dietary employees in their breakroom during break periods without ever being told she could not do so. Underwood also told both that they were not to arrive at the facility more than 15 minutes before the start of their shifts. Holcomb testified that from the time she was first employed, in January 1993, she had always arrived about a half-hour before she clocked in and Brooks testified she usually arrived 45 minutes ahead of time. Nothing had ever previously been said to either about the time they came to work. These findings are based on the consistent, specific, and detailed testimony of Brooks and Holcomb, both of whom were credible and persuasive witnesses. The testimony of Underwood, Carpenter, and Dobson was for the most part not inconsistent with that of Brooks and Holcomb, except that they denied that Brooks and Holcomb were told that they could not go into the dietary break area. Rather, they were told that they could go there if someone asked them to come back to talk to them, but they could not go back there against the wishes of any dietary employee. I find that the evidence establishes that the Respondent imposed restrictions on the access of Brooks and Holcomb to the dietary area and to the facility prior to their shifts solely because of their status as union representatives. The complaint alleges that this violated the Act, while the Respondent contends that its actions were a lawful effort to protect its employees from harassment.

Analysis and Conclusions

Again, the problem with the Respondent’s position on this and many other issues in this case is that it fails to distinguish what it calls “harassment” from activity that is not only lawful but is protected by Section 7 of the Act. In essence, it contends that if any employee subjectively perceives that what a union supporter says or does is objectionable in some way, that constitutes harassment, and the latter can be restricted or prohibited from doing it. Carpenter testified that Underwood told Holcomb that dietary workers had complained that she was “going back there on their break time and harassing them.” Dobson gave similar testimony, while Underwood claimed that he was merely attempting to defuse a “confrontational” situation. In fact, the evidence establishes only that one dietary employee, Nancy Case, had complained to the head of the dietary department, Dottie Davis, about a conversation that she had with Holcomb. Holcomb, in explaining why the employees needed the Union, told Case, hypothetically, that if the Union were not there to represent them and Case’s child got sick and she had to

stay home and take care of her, and the Respondent fired her or wrote her up for being excessively absent, it could do whatever it wanted to do and she would have none to stand up for her. Case testified that, although Holcomb is her aunt and was “nice” to her, she did not like to hear her talking about the Union because it made her “nervous.” So she asked Davis to get Underwood to prohibit Holcomb from talking “about Union stuff” in the dietary breakroom. Although Case testified that she had told Davis “several different times” that talk about the Union made her nervous and she did not want to hear it, there is no evidence that she ever said anything to Holcomb about it or asked her not to talk to her about it. She was apparently too reticent or polite to tell Holcomb that she did not want to discuss the Union. For example, Case described one incident in which she was approached by Union Representative Brooks about signing something. Although it made her “nervous” and she did not want to be there, Case stayed in the breakroom listening to Brooks for 15 or 20 minutes, rather than telling her she was not interested. As she put it: “I was just nervous. I didn’t want her to think I was rude, but I didn’t want to hear about it neither. I [was] just like stuck—just listening.”

I find there is no evidence that Holcomb had done anything to harass Case or any other dietary worker. Since her discussions concerning the Union were protected by the Act, I also find that the Respondent violated Section 8(a)(1) by Underwood’s using Case’s unhappiness over a conversation with Holcomb to pretextually accuse Holcomb of harassing dietary workers. *Peck, Inc.*, 269 NLRB 451, 459 (1984). It further violated Section 8(a)(1) by discriminatorily restricting the access of Holcomb and Brooks to the dietary area, solely because of their status as union representatives.²³ E.g., *Miller Group*, 310 NLRB 1235, 1238 (1993); and *Florida Tile Co.*, 300 NLRB 739, 741 (1990). It also violated Section 8(a)(1) by discriminatorily restricting them from arriving at the facility more than 15 minutes before the start of their shifts. Underwood admitted that this was done because, in his opinion, they were “infringing” on employees’ rights by talking to them about union matters and seeking to collect union dues that the Respondent had ceased withholding.

(5) Alleged supervisory surveillance

The complaint alleges that around the latter part of December 1995, the Respondent created the impression of surveillance and conducted surveillance of employees’ protected activity by means of an increased presence of certain of its supervisors in employee breakrooms. In addition to a break area used by dietary employees, there is a large breakroom in which smoking is allowed and which has a refrigerator and a microwave oven and a smaller nonsmoking breakroom that has some vending machines. There was evidence that Union President Brooks used the smoking breakroom to communicate with employees concerning union business before work and during breaks. Brooks testified that prior to December 1995, supervisors were not in the room very often when she was taking breaks, but that beginning about that time whenever she took a break there, Carpenter and staff development coordinator, Elizabeth Beckett, would be present and would stay there until she left. Brooks

and others testified that Carpenter did not smoke and sometimes appeared to be uncomfortable as she sat fanning herself with a newspaper or asked to have the window opened. Brooks said that the increased presence of supervisors in the room inhibited her and other employees from discussing the Union. Wendy Holcomb testified that on one occasion while in the breakroom she had composed a poem concerning supporting the Union which she had shown only to people in the room and was thereafter questioned about it by Underwood. The General Counsel cites this as evidence of actual surveillance of protected activity. There was a great deal of testimony by witnesses who were supporters of the Union that they noticed an increase in the presence of various supervisors in the breakroom when employees were taking their breaks.

On the other hand, the Respondent presented the testimony of numerous employees that they had noticed no significant change in the number of supervisors or the frequency of their visits to the breakrooms during the period in question. The breakrooms have always been available to and used by supervisors who do not have any break area of their own and the smoking breakroom is the only break area in the building where employees can smoke. Witnesses on both sides testified that, even though they do not smoke, they use the smoking breakroom because it is larger and is used by more people than the nonsmoking room. There was also evidence that use of the smoking breakroom increased during the winter months when employees could not go outside for breaks. Carpenter testified that although she rarely smokes, it does not bother her, that she usually used the smoking breakroom and that her usage did not change. Sandra Amick testified that she has worked at the facility for over 11 years, that she does not smoke, but has used the smoking breakroom for her breaks at times because it has a window and her usage has not changed. Elizabeth Beckett testified that depending on the weather she takes her breaks outside or in the smoking break room and that her usage of the room has not changed. She said that Carpenter is her mother and that they often took their breaks together. She also testified that she has observed no change in the utilization of the smoking breakroom by other supervisors.

Analysis and Conclusions

The testimony of numerous witnesses as to their observations concerning usage of the smoking breakroom by supervisors established nothing conclusively. For every witness who testified that the supervisors’ use of the room had increased as alleged in the complaint, there was another who testified to observing no change in the number of supervisors using it or the frequency of their use. None of the supervisors who appeared as witnesses for the Respondent admitted to any increase in their usage of the room. I find that the testimony of Linda Cogar does not support a finding that supervisors were directed to monitor employees during their breaks, as the General Counsel contends. Cogar is an LPN who had worked at the facility for about 6 years until March 21, 1996, when she resigned. At the time she left, she was a charge nurse on the 3 to 11 p.m. shift who supervised CNAs. Cogar testified that Carpenter had asked her if she would work on one of her days off. She did not specify a date but the testimony of Carpenter establishes it to be a day or two before the strike. Cogar assumed that she was to replace someone who was off, but Carpenter told her she did not want her to do anything but “walk around and watch the girls” and that when they took a break, she was to take a break with them. She did not work a regular shift but

²³ While I credit the testimony of Holcomb and Brooks that Underwood told them they could only enter the dietary area if their work required it, the restriction described by Carpenter—they could only enter if invited and could only discuss the Union if no employee objected—was no less of an infringement on their rights.

was there from about 8 a.m. to 5 p.m. and all of the regularly scheduled LPNs were also working. Carpenter told her she did not want the girls talking about the Union on company time and if she heard them doing so she was to break it up. While she was told to go into the breakroom with the CNAs, she was not told to monitor their conversations in the breakroom or to report back to Carpenter what she observed. Carpenter testified that she asked Cogar to work that day because she “needed beefed up supervision” because of the planned walkout. Carpenter credibly denied telling Cogar that she was to take her breaks with the CNAs. After considering the testimony of Cogar and Carpenter, I find that it while it may establish that Cogar’s presence that day was intended to inhibit employees from talking about union matters while working, it does not establish that supervisors had been directed to monitor employee conversations in the breakroom on that day or any other. On the contrary, the fact she was not directed to do so on that day or at any time before is consistent with a finding that there was no such effort by the supervisors. I find that the General Counsel has failed to establish by a preponderance of the evidence the allegation that the Respondent created the impression of surveillance of protected activity through an increase in the number or frequency of supervisory visits to the breakrooms.

I also find that the allegation concerning actual surveillance, in the case of Wendy Holcomb’s poem, has not been established. As noted, the breakrooms were regularly used by supervisory and nonsupervisory employees alike. The smoking breakroom where union members sometimes conducted business was the only place in the building where smoking was permitted and had often been used by supervisors, even those who did not smoke. When protected activity is conducted in such a public area, to be unlawful, the alleged surveillance must be something other than the result of “fortuitous” circumstances and must involve suspicious behavior or untoward conduct. *Hoyt Water Heater Co.*, 282 NLRB 1348, 1357 (1987); and *Goosen Co.*, 254 NLRB 339, 353 (1981). Here, Holcomb showed or, perhaps, read her poem to people present in the breakroom. From all that appears, it was a spontaneous event and not part of a union meeting. It is entirely possible that this may have been observed by a supervisor who was “fortuitously” taking a break at the time. Under the circumstances, I find that a violation of Section 8(a)(1) has not been established.

(6) Alleged threats to fire strikers

(a) *February 16, 1996*

Linda Wright has been employed at the facility as a CNA for about 8 years. She testified that on February 16, 1996, she and Linda Williams went to the facility to pick up their paychecks. While there, they encountered Underwood. Williams asked him what would happen if there was a strike and they did not show up for work. Underwood responded that they would be fired. Underwood testified that sometime before the union issued the strike notice on February 20, he spoke with Wright and Williams. He said he was asked by Williams if they went on strike was he going to fire them. He said he was not going to fire them and that she had the wrong “terminology.” He went into an explanation of the meaning of “permanently replaced,” including, the fact that employees who were replaced would be put on a preferential recall list.

Analysis and Conclusions

Wright was a credible witness and her version of what occurred and what Underwood actually said is essentially corroborated by Williams, a former member of the union negotiating committee, who did not participate in the strike, later signed the decertification petition, and appeared as a witness for the Respondent. Williams testified that when she asked Underwood if they would be fired if they went on strike, he said yes. Then he turned around and said he would have to check with his lawyers before he could definitely say yes or no. However, in a note about the incident she made about the incident on February 25, 1996, she wrote: “His answer was, ‘yes I will fire you.’” Neither Wright nor Williams mentioned Underwood’s saying anything about or attempting to define “permanently replaced”²⁴ or discussing recall rights or procedures. I credit Wright’s version of the incident over the self-serving testimony of Underwood. As a current employee testifying contrary to her employer’s interest, Wright was unlikely to fabricate such an incident and her testimony was corroborated by the Respondent’s own witness, Williams. I also reject the Respondent’s argument that the incident was de minimus and that any coercive effect of Underwood’s statement was remedied and had no effect on employees. Although there was evidence that the Respondent on a number of occasions advised employees that they would be “permanently replaced” in the event they participated in the strike, there is none that Underwood’s statement to Wright and Williams was ever specifically repudiated.²⁵ The testimony of several employees establishes that before the strike there was more than a little confusion over the meaning of the term “permanently replaced.” There was unlikely to be any confusion over Underwood’s unequivocal, “I will fire you.” I find that such an unrepudiated threat from the highest official at the facility was coercive and interfered with employees’ rights in violation of Section 8(a)(1). E.g., *Caterair International*, 309 NLRB 869, 879 (1992); and *Western Publishing Co.*, 269 NLRB 355, 357–358 (1984).

(b) *Week of February 26, 1996*

Patsy Davis has been employed at the facility as a CNA since April 1989. She testified that during the week before the strike on March 4, 1996, Supervisor Sharon Amick²⁶ came to her work area and asked her if she was going to work on March 4. When Davis said, “[N]o,” Amick told her that “Gene said” she would lose her position if she didn’t. On another occasion that week, they had a similar conversation in which Amick added that she “hated to lose a good care nurse.” During the same week, Underwood came up to her and asked her if she was going to work on March 4. She told him she could not

²⁴ In its brief, the Respondent’s counsel refers to the fact that the General Counsel did not recall Wright or Williams to rebut Underwood’s version of the conversation and implies that an adverse inference should be drawn. They had both fully described the conversation and it was neither necessary nor appropriate to recall them to rebut Underwood’s testimony.

²⁵ Even under Williams’ version of the incident there was no repudiation of the unlawful threat, as there is no evidence that Underwood ever corrected his statement or spoke to them about it after checking with his lawyers. Also, as is discussed below, this was not the only instance in which a supervisor told employees they would be terminated if they went on strike.

²⁶ The complaint allegation concerning these incidents refers to Supervisor “Sharon Richardson.” There is no dispute but that Sharon Amick is the same person.

cross the picket line. He told her she would lose her position if she went on strike. As she was leaving to go home on the last day that she worked before the strike, Underwood again questioned her about whether she was going to work on the day of the strike. She said, “[N]o” and this time in addition to telling her she would lose her position, he also said she would be permanently replaced and put on a callback list.

Amick testified that sometime before the strike she saw Davis crying. She asked her what was wrong and Davis asked if it was true that people were going to be replaced if they did not show up for work. Amick told her as far as she knew that was true. Underwood testified that he “probably” had a conversation with Davis about what would happen to her if she went on strike. He said that he thought she had asked him what would happen to her and that he told her it was his intention to replace those workers who did not come to work the day of the strike.

Analysis and Conclusions

Having observed their demeanor while testifying, I credit the testimony of Davis over that of both Amick and Underwood. She was a credible witness and is a current employee of the Respondent. Amick’s antipathy toward the Union was apparent from her demeanor as a witness, her testimony, and her posting at the facility a note calling attention to a newspaper article containing statements by a union representative she found offensive. Davis admitted to being upset during a conversation with Amick. The Respondent apparently contends that she was upset after reading the letter that it sent to employees informing them that they would be permanently replaced if they went on strike. However, Davis credibly denied that the letter was involved in her conversation with Amick. I find it likely that Davis was upset by Amick’s telling her that she was going to lose her job. In the case of Underwood, he appeared to have no real recollection of the conversations with Davis and testified to what he “probably” said to her. Their versions of what was said in the second conversation Davis described did not differ greatly. However, while Davis said that he again sought her out to ask if she would work on the day of the strike, Underwood implied that it was Davis who had initiated the exchange by asking what would happen to her if she went on strike. This was in response to a leading question from the Respondent’s counsel after Underwood had just finished saying that he had been out on the floor talking to employees in order to get an indication as to whether they were going to work or not. I find that the conversations occurred as described by Davis and establish that on two occasions Amick came to her to inquire if she was going to join the strike. When Davis said that she would, Amick told her flatly that she would lose her job if she did. Her statements violated Section 8(a)(1). Underwood’s statement in their first conversation that she would lose her job if she went on strike was a similar violation. Since the strike was an unfair labor practice strike Underwood’s threat in the second conversation to permanently replace the strikers also violated the Act. E.g., *Capitol Steel & Iron Co.*, 317 NLRB 809, 814 (1995); and *Storer Communications*, 294 NLRB 1056, 1093 (1989).

(c) February 29, 1996

Joy Bragg was employed at the facility from June 1994 until March 1995 as a part-time CNA working the swing shift, covering for other CNAs who were off. She has since moved and now resides in Akron, Ohio. Bragg testified that before the

strike she received a telephone call at home on her day off from Elizabeth Beckett. Beckett asked her if she was going to work during the strike and Bragg said that she didn’t know. Beckett told her that if she did not come to work she would be terminated, but that if she did not strike she could have her pick of any position on any shift that she wanted. Beckett also said that anyone who left the facility or did not show up on the day of the strike would be terminated. Bragg responded that she didn’t think that they could do that since the strike was an unfair labor practice strike. Thereafter, Beckett used the phrase “permanently replaced.” Beckett acknowledged that she had a telephone conversation with Bragg in which she asked if Bragg was going to work on the day of the strike and that she said that she was undecided. Beckett told her that she could be permanently replaced if she didn’t show up for work, but said nothing more.

Analysis and Conclusions

I credit the testimony of Bragg who was a believable and persuasive witness who gave a detailed description of this telephone conversation.²⁷ Beckett’s testimony about the conversation did not purport to describe what transpired other than to say she asked if Bragg was going to work and to assert that she told her only that she could be “permanently replaced.” Beckett was responsible for seeing that the facility was staffed on the day of the strike. She admitted that she contacted swing-shift CNAs to see if they would fill in for those who were not going to work that day, talked to them about the possibility of getting a full-time position and discussed their shift preferences. This is exactly what Bragg described her doing in their telephone conversation. I find that Beckett’s testimony fails to establish what she actually said during the conversation or to effectively contradict Bragg’s credible testimony. Beckett’s telling Bragg that she and other employees would be terminated if they joined the strike violated Section 8(a)(1). Her subsequent reference to their being permanently replaced did not purport to repudiate her earlier statements and, as it was made in the context of the rights of unfair labor practice strikers, it was also incorrect and coercive. I find that the Respondent also coerced and interfered with rights protected by the Act when it joined its illegal threat to terminate strikers with an offer to give Bragg a full-time position and her choice of shifts if she refrained from striking. This constituted an unlawful promise of benefits intended to dissuade her from engaging in protected activity and support for the Union. *Pincus Elevator & Electric Co.*, 308 NLRB 684, 692 (1992).

(d) Letter to employees

On February 26, 1996, the Respondent posted and distributed to employees a letter from Underwood in which he referred to receipt of a notice from the Union about a strike on March 4, 1996. The letter states that all employees are expected to work their scheduled shifts and that “any employee not at work that day may be replaced permanently.” Whether or not the threat of permanent replacement in the letter violated the Act depends on whether or not the strike was an unfair labor practice strike. *Trading Port, Inc.*, 219 NLRB 298, 299 (1975).

²⁷ I find the fact that in describing the conversation in an affidavit taken by a Board agent, Bragg, used the phrase “legal strike” rather than “unfair labor practice strike” does nothing to undermine her credibility. She may have had the terminology wrong, but her point was that, legally, strikers who were unfair labor practice strikers could not be fired.

As is discussed below, I find that the strike was an unfair labor practice. Accordingly, by threatening to permanently replace unfair labor strikers, the Respondent violated Section 8(a)(1). *Capitol Steel & Iron Co.*, supra.

(7) Alleged impression of surveillance and interrogation

Prior to the strike, the Union held a secret-ballot strike vote on February 17, 1996, away from the Respondent's facility at the City Hall in Richwood, West Virginia. Cleo Sandy testified that a couple of days after the strike vote she went to Underwood's office with another employee to attend a quality circle meeting. After they were told that there would be no meeting until later in the day and began to leave, Underwood asked Sandy to remain in the office as he wanted to ask her a question. Ward was also present. Underwood said that he understood that she had voted not to strike. Sandy responded that she had not told anyone whether she had voted yes or no. Underwood said that less than half the people had voted for the strike and Sandy said that everyone had the same opportunity to vote. Underwood testified that he did not recall having a conversation with anyone about the strike vote. Ward was not asked about this incident. The complaint alleges that Underwood's action created the impression that union activity was under surveillance and constituted an unlawful interrogation of Sandy concerning how she voted.

Analysis and Conclusions

As discussed above, I found Sandy who is a current employee to be a credible witness. Underwood's lack of recollection does not contradict her and the Respondent's failure to question its witness Ward about the incident creates the inference that his testimony would not have supported its position. An employer creates an unlawful impression of surveillance by remarks which would reasonably lead employees to assume that their activities were under surveillance or that it has sources of information about their activities. E.g., *Lucky 7 Limousine*, 312 NLRB 770, 771 (1993); and *United Charter Service*, 306 NLRB 150, 151 (1992). By implying to Sandy that it not only knew that she had voted in the secret-ballot strike vote but also knew how she voted, the Respondent violated Section 8(a)(1). E.g., *Capitol EMI Music*, 311 NLRB 997, 1006 (1993); and *Stanford Seed Co.*, 245 NLRB 1064, 1067 (1979). It also by coercively interrogated Sandy in violation of Section 8(a)(1) by telling her this, thereby, attempting to get her to confirm or deny Underwood's assertion that she had voted not to strike. E.g., *D. J. Electrical Contracting*, 303 NLRB 820, 826 (1991); and *Artcraft Iron Co.*, 271 NLRB 829, 833 (1984).

(8) Prohibition against discussing union matters

(a) March 6, 1996

Mary Hammonds is a CNA who participated in the strike but was not replaced because March 4 was her day off. When she went to work on March 6, she met with Underwood who told her he wanted to leave what was going on the outside (a reference to some employees who had been replaced and were standing outside that morning) out there and to take care of the residents. He said he knew she had friends out there and had feelings for them, but she was not to discuss them while working. At about noon, Hammonds was summoned to the office to meet with Underwood, with Supervisors Becky Price and Sandra Amick also present. He referred to their meeting that morning in which she had been told not to discuss union matters and said that two people had told him that she had been "talking

union on the floor." When she denied it, Underwood said that she had been talking about the Union. The conversation in question involved her asking another employee, John Tenney, if he had watched the news on television, a reference to an interview of striking employees that had been on the television news the previous night. She asked him how her conversation was any different than employee Patty Price coming to the timeclock and asking employees who were clocking in if they had watched the same interview on the news. Underwood said that was "different" and Hammonds asked, "[H]ow?" He said, "[I]t just was," got angry and threw a pencil across the desk onto the floor. He told her if he any more about her talking about "anything union," she "would be out there with them." He also told her that "it took a lot of nerve to stand on the picket line and then come back into work." The conversation ended with him telling her, "if you want your job, get your ass out there and get back to work." Underwood admitted to being upset when he spoke to Hammonds and did not deny her testimony.

John Tenney has worked at the facility as a maintenance employee for over 16 years. He is a member of the Union and has served as a delegate. He was not scheduled to work on the day of the strike and was not replaced. On the afternoon March 6, 1996, Tenney was called into the office of his Supervisor Bill Miller. Miller said that there were rumors that Tenney had been "talking shop on the floor," meaning he had been talking about the Union. Tenney denied it and Miller told him if he kept it up he would be written up and that he hated to lose Tenney because he was such a good worker. Tenney said the only conversation he had about the Union was with Mary Hammonds about employee Richard Glover being interviewed about the strike on the television news. Miller testified that he had told Tenney that he could not talk union business on company time or on the floor when he was supposed to be working. He also told him that he could not discuss the Union in the breakroom if any employee present did not want to hear it. The complaint alleges that the statements made to Hammonds and Tenney were coercive and unlawful threats that interfered with protected rights. The Respondent contends that its actions were lawful attempts to insure harmony in the workplace.

Analysis and Conclusions

There is no evidence that employees had ever been prohibited from talking about any topic while working prior to the strike, with the exception of its unlawful attempt to prohibit supporters of the Union from discussing it in the dietary breakroom if any employee objected. Underwood's telling Hammonds not to talk about the Union or anything related to the strike was discriminatory and violated Section 8(a)(1) because "talk on other topics while employees were working was tolerated." *Litton Systems*, 300 NLRB 324, 325 (1990). Accord, *Kenmore Mercy Hospital*, 319 NLRB 345, 346 (1995); and *Industrial Wire Products*, 317 NLRB 190 (1995). Likewise, Miller's telling Tenney he could not talk about the Union while working, violated the Act, as did his saying that, if someone present objected, he could not even discuss it in the breakroom. There is no probative evidence of any "special circumstances" to support the Respondent's self-serving claims that mere discussion of the Union, the strike or any related matter was so disruptive as to justify the ban on statutorily pro-

tected activity it attempted to impose.²⁸ See *DeMuth Electric*, 316 NLRB 935 (1995); and *Capitol EMI Music, Inc.*, supra at 1006.

(b) *March 13, 1996*

On March 13, 1996, CNAs' Joy Bragg, Patty Mullins, and Mabel Bailes were recalled to work after the strike. Underwood met with them in Carpenter's office with Supervisor Nancy Henline also present. He told them that they were not allowed to discuss the Union while they were in the facility and if they were caught doing so they would be fired. The foregoing finding is based on the uncontradicted, credible testimony of Bragg and the consistent and corroborating testimony of Mullins and Bailes. Underwood said that he did not recall the conversation but did not deny that it occurred. Henline said she recalled only some of what was said and did not contradict the testimony of the three CNAs.

Analysis and Conclusions

The Respondent relies on its claims that supporters of the Union engaged in "intimidation and harassment" of other employees which necessitated the restrictions it imposed on discussing union-related matters. However, with the exception of some anecdotal testimony from some employees, most of whom had signed the decertification petition, concerning their subjective feelings about and reactions to the activities of union supporters at the facility, there is a complete failure of proof of anything on their part that could reasonably or objectively be found to constitute misconduct or which was so outrageous, egregious or disruptive as to place them outside the protection of the Act.²⁹ Here again, the prohibition against discussing the Union at the facility at any time, announced by Underwood, was not only overly broad in scope, but was unlawfully focused on union-related matters while permitting the discussion of other topics. I find that Underwood's statements violated Section 8(a)(1). *Litton Systems*, supra.

(c) *March 23, 1996*

Cleo Sandy testified that she was recalled to work after the strike on March 23, 1996. On that day she was called to the office of Assistant Director of Nursing Sandra Amick who told her that she was glad to see her back but that they had to get

²⁸ There is no credible evidence to support Underwood's self-serving testimony that the conversation in question took place in a resident's room. Hammonds credibly testified it took place in a hallway (as did the similar, condoned incident involving Price) and that Underwood refused to tell her who had reported them. In its brief, the Respondent states that "Underwood received a complaint from [Velma] Hoover that Hammonds and Tenney were in one of the resident rooms discussing the Union situation, including the strike." I find nothing in the record to support that statement. Moreover, Hoover was called as a witness by the Respondent but was not asked about this matter, which creates the inference that her testimony would not have supported its position. Sandra Amick testified that it was Supervisor Becky Price who had reported that Hammonds was in a resident's room talking "other than business in front of the resident." Price was not called as a witness and I do not credit Amick's hearsay testimony as to what Price allegedly said as she also claimed that Underwood did not get angry during the meeting with Hammonds, which even he did not deny.

²⁹ The weakness of the Respondent's position is demonstrated by its attempt to rely on hearsay evidence concerning the alleged intimidation of employees by two former employees, Carolyn Phares and Pat Myers, which apparently occurred sometime in 1993. There is no evidence that either was even employed at the facility when any of the matters involved in this proceeding took place.

some things straight. Amick said that if Sandy was in the breakroom "talking union" and some one objected to it, she had to quit talking about it. She also said if someone was "talking company" and Sandy did not want to hear it, she could ask them to stop. Sandy was a credible witness and Amick's testimony does not contradict her. I find that Amick's statements prohibiting only talking about the subject of the Union violated Section 8(a)(1), for the reasons discussed above.

(d) *Last week of March 1996*

Sandy testified that during the last week of March 1996, Underwood called her to the office to speak to her, with Dobson also present. He told Sandy that he was glad she was back at work and that she should consider herself lucky because she was one of the few that would be called back and that he would not let the replacement workers go in order to bring back those who went on strike. He also said that what was in the past should be kept in the past and that he did not "want to hear any whining, bitching or complaining." Underwood said he did not recall having this conversation with Sandy but he "probably" had the same type of conversation he had with other returning strikers. Although he claimed he would not normally have used the terms, "whining, bitching or complaining," he did not deny using them. Dobson was not asked about this meeting and Sandy's credible testimony is uncontradicted.

Analysis and Conclusions

I find that under the circumstances Underwood's telling Sandy he did not want any "whining, bitching or complaining" was overly broad and coercive in violation of Section 8(a)(1). By saying this to a returning striker in the context of delineating what she could or could not do at the facility, he implied that any statements or complaints that the Employer did not approve of would not be allowed, even those that related to her terms and conditions of employment and were protected by the Act.

The General Counsel contends that telling Sandy she was lucky to be one of the few strikers who would be called back and that replacement workers would not be let go in order to reemploy strikers was coercive because it evidenced an intent to deny strikers their rights to be reinstated. After considering all of the surrounding circumstances, I find that Underwood's statement was coercive inasmuch as it implied that Sandy got her job back because of luck and/or the Employer's largesse and not because she had a right to it and that other strikers, even unfair labor practice strikers, would not be reinstated and because it was accompanied by a coercive and unlawful restriction on her right to engage in protected activity.

D. The 8(a)(5) and (1) Allegations

1. Alleged failure to keep contract terms in effect

a. Dues-checkoff provision

The collective-bargaining agreement that expired on December 31, 1995, contained a union-security clause and a checkoff provision whereby the Respondent agreed to deduct union dues and initiation fees from the pay of employees who executed checkoff authorizations and to remit to the Union the amounts withheld. Negotiations for a new contract began on December 5, 1995, but no new agreement has been reached.³⁰ At the negotiating session on December 27, the Union made a request that the contract be extended beyond the expiration date. The

³⁰ There is no contention that the negotiations for a new agreement ever reached an impasse.

Respondent rejected the request and Steve Ferguson informed the Union that upon expiration of the contract, the Respondent would no longer deduct and remit union dues. The Union did not agree to this but, as it had announced, the Respondent stopped collecting and remitting union dues upon expiration of the contract. The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by so doing and that Ferguson's threat to do so violated Section 8(a)(1). The Respondent contends that its obligation to deduct and remit union dues expired with the contract on December 31, 1995.

Analysis and Conclusions

Although the General Counsel has presented an extensive argument as to why the Respondent's discontinuation of checking off union dues should be considered an unlawful unilateral change in the terms and conditions of employment, it is an argument that must be directed to the Board,³¹ inasmuch as it calls for reconsideration of the well-settled rule that "an employer's duty to check off union dues is extinguished upon the expiration of the collective-bargaining agreement which created that duty." *Robbins Door & Sash Co.*, 260 NLRB 659 (1982). Accord; *87-10 51st Avenue Owners Corp.*, 320 NLRB 993 (1996); and *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), remanded 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964). Since the Respondent could lawfully discontinue the checkoff of dues, Ferguson's telling the Union it would do so was not an unlawful threat. I shall recommend that these allegations be dismissed.

b. Grievance and arbitration procedure

The expiring collective-bargaining agreement also contained a grievance and arbitration provision, involving a three-step procedure prior to arbitration. At the same meeting in which Ferguson informed the Union that the Respondent would no longer deduct and remit union dues upon expiration of the contract, he also said that it would not extend the grievance provision beyond expiration. Patricia Brooks testified that at the early January 1996 meeting in which Underwood imposed limitations on how she could collect union dues at the facility, he also told her that since the grievance procedure provisions had expired, the time limits in the contract didn't mean anything. He said that he would not take any grievances, but if there was a problem, he wanted her to discuss it with him. After the early February 1996 meeting in which Underwood restricted the access of Holcomb and Brooks to the dietary area, they went to his office to attempt to file a grievance over those restrictions. After reading the grievance, Underwood asked why there were no contract articles listed and Brooks said that because he had told her the contract had expired, there was no use putting it on the grievance. Underwood asked what the grievance was about and she told him it pertained to his isolating them from the dietary department. He told them that the grievance ought to go in the trash, but then said he would keep it and he put it in a folder. Brooks' credible testimony is corroborated by that of Holcomb. Underwood's testimony about the incident, in which he said he told them that "with the contract expired we were not going through the mechanisms of the grievance pro-

cedure," does not contradict theirs. Ward's testimony, that upon receiving the grievance Underwood said he would place it with other grievances that were waiting to be processed, was simply not believable and I do not credit it. Underwood subsequently made a written response to the grievance addressed to Holcomb and Brooks, dated February 21, 1996, which stated:

As previously stated, we are no longer processing grievances thru [sic] the steps of our expired collective bargaining agreement. As you know, our contract expired Dec. 31, 1995.

However, I am concerned and I am willing to discuss any of our employees concerns, complaints, grievances, or questions that may be voiced. I will be willing to attempt to find a remedy or solution for any of the above.

Therefore, if you would like to discuss further this situation, please make arrangements with me to do so.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) by unilaterally abandoning the contractual grievance procedure. The Respondent contends that there is no evidence that it failed to process any grievance other than that presented by Brooks and Holcomb, which did not reference any contractual right, and that since it had no obligation to arbitrate the grievance, it was not unlawful to refuse to apply the steps of the grievance procedure.

Analysis and Conclusions

The Respondent's contention that the grievance was defective because it did not contain any reference to the contractual provisions involved is not persuasive. Although Underwood asked about it when the grievance was presented, he never suggested that was the reason the grievance would not be processed or that he did not understand or was misled as to on what it was based. The reason this grievance was not processed was because, once the contract had expired, the Respondent stopped accepting grievances and processing them according to the procedure in the contract. I also find that its contention there is no proof that it refused to process grievances has no merit. There is uncontradicted evidence that both Ferguson and Underwood informed representatives of the Union, orally and in writing, that the grievance provision would not be followed once the contract expired. It offered no reason for doing so beyond its contention that the procedure lapsed upon expiration of the contract. The testimony of numerous employees, called as witnesses by the Respondent that they did not attempt to file any grievances was essentially meaningless. It had always been the responsibility of the Union to prepare and present grievances. I find that by telling the Union that the grievance procedure would not be followed and its grievances could "go in the trash," the Respondent repudiated that procedure. Its offer to discuss problems and to attempt to find a solution merely indicates that the grievance procedure was to be unilaterally replaced by a mechanism of its choosing. I find that the Respondent's unilateral abandonment of the contractual grievance procedure after the contract expired violated Section 8(a)(5) and (1). *CBC Industries*, 311 NLRB 123, 128 (1993); and *Indiana & Michigan Electric Co.* 284 NLRB 53, 54-55 (1987). Cf. *Columbia Portland Cement*, 294 NLRB 410 (1989) (while an employer may unilaterally change the grievance procedure through implementation of a proposal after reaching a valid impasse, the grievance procedure of the expired contract remains in effect until that proposal is lawfully implemented).

³¹ It is the duty of an administrative law judge to apply established Board precedent which it or the Supreme Court has not reversed. E.g., *Herbert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979); and *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1965).

E. Issues Related to the March 4, 1996 Strike

1. The nature of the strike

By letter dated February 20, 1996,³² the Union gave notice to the Respondent that bargaining unit employees would engage in a 1-day strike, commencing at 6 a.m. on March 4 and concluding at the start of the dayshift on March 5. The evidence shows that prior to the strike, in addition to the Respondent, the Union was conducting contract negotiations with approximately eight other nursing homes in West Virginia. It was also attempting to get the West Virginia legislature to pass legislation to increase wages and staffing levels at nursing homes in the State. Union Representative Hornick testified that the Union called for a strike at several West Virginia nursing homes on March 4, as part of a coordinated effort in support of its goals. He testified that while the Union proposed the strike, under its bylaws, each individual chapter had to decide by means of a secret-ballot vote whether its members would participate. A secret-ballot vote was conducted at the Richwood City Hall throughout the day on February 17, which resulted in a 37 to 1 vote to strike. Hornick testified that there were also meetings concerning the strike on February 10 and 21. At the meetings, he characterized the strike as an unfair labor practice strike and explained what an unfair labor practice strike involved and what the employees' rights were, as there had been discussions during negotiations concerning the possibility of engaging in an economic strike. He passed out literature stating that the strike was an unfair labor practice strike and answered employees' questions about the strike and the unfair labor practices. In discussing reasons for the strike with employees, he talked about the discharges of Union Representatives Eula Carden and Wanda Proctor, unfair treatment and harassment of union delegates by denying them access to the kitchen area and by pressuring them not to file grievances or to talk about the Union, supervisory surveillance, short staffing, lack of supplies, poor patient care, and health and safety issues, including, a generator that was constantly breaking down. Another meeting was held on March 3, the day before the strike. A flyer that Hornick prepared for distribution to announce that meeting referred to the strike as an unfair labor practice strike and advised employees that they could not be replaced for striking. On March 4, there was picketing outside the facility from about 6 to 6:45 a.m. with signs bearing "Unfair Labor Practice Strike," "Health and Safety," "Patient Care," "Unjust Terminations," and "Unfair Suspensions" on them. After picketing, some strikers went to Charleston to meet with legislators. Picketing resumed that evening. Hornick's testimony about these matters was credible, was corroborated by numerous employee witnesses, and was not contradicted.

The Union had filed a number of unfair labor practice charges against the Respondent prior to the strike. Many employees testified to attending one or more of the union meetings before the strike commenced in which alleged unfair labor practices by the Employer were discussed. At least 12 employees who attended the strike vote meeting testified that in discussing reasons for going on an unfair labor practice strike the discharges of Carden and/or Proctor were discussed. At least five of those employees testified to the Respondent's refusal to follow the contractual grievance procedure being discussed. At least three testified that the restrictions on Union Representatives Brooks and Holcomb from entering the dietary area were

discussed. Many witnesses testified to discussions about supervisors conducting surveillance in the breakroom and the Respondent's refusal to withhold union dues at the meeting. While I have found those allegations did not constitute unfair labor practices, the testimony about those subjects is further evidence that perceived unfair labor practices were discussed as reasons for voting to strike. Underwood testified that he was aware that the Union was asserting that the strike was an unfair labor practice strike no later than March 2. The General Counsel contends that the strike was an unfair labor practice, while the Respondent argues that it was an economic strike.

Analysis and Conclusions

In order to be an unfair labor practice strike, it is not enough that an employer's unfair labor practices and the strike coincide in time, there must be a finding that the employer's unlawful conduct was a contributing cause of the strike. *Tufts Bros. Inc.*, 235 NLRB 808, 810 (1978). However, the employer's unfair labor practice(s) "need not be the sole or even the major or aggravating cause of the strike; it need only be a contributing factor." "The dispositive question is whether the employees, in deciding to go on strike, were motivated *in part* by the unfair labor practices committed by their employer, not whether, without that motivation, the employees might have struck for some other reason." (Emphasis in original.) *Teamsters Local 515 v. NLRB*, 906 F.2d 719, 723 (D.C. Cir. 1990). I find that the Respondent's argument, that the evidence fails to establish that the employees even considered the possibility of engaging in an unfair labor practice strike at the vote on February 17, has no merit. The argument is based primarily on its assertion that the testimony of the many employees who attended the union meetings at which reasons for striking were discussed, particularly, the strike vote meeting, should be disregarded because they went on strike and were permanently replaced and, therefore, have an interest in the outcome. At the same time, it claims that the employees it called as witnesses have no interest in testifying one way or the other about the strike. This, of course, ignores the fact that at least five of those employees were hired as replacements for strikers. While the strikers' interest in the matter is a consideration, I found their mutually corroborative testimony about what was discussed at the meetings believable and persuasive. While most had different recollections of the details of the meetings, their credible testimony as a whole overwhelmingly establishes that the subject of an unfair labor practice strike was considered and discussed extensively, as were the specific unfair labor practice allegations they considered in making their almost unanimous decision to strike.

I found that evidence to be far more probative than the testimony of the employees called by the Respondent, who said they had not heard that it was an unfair labor practice strike. It is obvious why most had not, as they did not support the Union, did not participate in the strike, and did not attend any of the union meetings at which the strike was discussed. The few who did attend a union meeting said nothing to contradict the General Counsel's witnesses. Typical, is the testimony of David Chapman, a housekeeping employee who did not strike and attended one union meeting in February. In answer to a leading question by the Respondent's counsel, he said that while at the meeting he had not heard any reason why employees should strike. On cross-examination, he acknowledged that he felt that "the Union wasn't doing right by me" and that he had heard talk before the strike began that it was an unfair labor practice

³² Hereinafter, all dates are in 1996.

strike. The Respondent's witness, Tammy Mullins, testified that she attended the strike vote meeting. According to Mullins' direct testimony, Hornick said only that "if we wanted better wages and better treatment to vote yes," he "did not say anything about a strike vote," and he did not give any reasons for going on strike. On cross-examination, when asked if that was all Hornick had said while she was at the meeting, she responded, "[T]hat's all he said to me." Mullins did not say how long she was at the meeting or what she may have heard Hornick say to the others present. Her claim that Hornick said to vote yes for better wages and treatment, but said nothing about "a strike vote" is incomprehensible. Cheryl Carr testified that she attended the strike vote meeting, but was there only for "a short period," "long enough to vote," because she had to go somewhere else. While there, she heard Hornick say, "[T]hat if you want better jobs, better benefits to vote yes to strike." This testimony in no way contradicts that of the employees who testified to hearing other reasons for striking discussed. Nancy Case testified to attending a union meeting on March 3 and being present for at least an hour. She testified to hearing Hornick talk for about half the time she was present but could only remember him giving as reasons for striking, "better wages," "benefits," and "rights and dignity for the residents and ourselves as workers." On cross-examination she stated that she had her little girl with her and was chasing after her while Hornick was speaking. She could not be sure if he talked about unfair labor practices or not. She did hear him talk about Wanda Proctor and Eula Carden but could not recall what was said. He may have also mentioned the grievance procedure and union dues but she could not be sure. Susan Greene said she attended one union meeting before the strike, which was not the meeting at which a vote was taken, and heard Hornick give reasons for striking. The only ones she could recall were "dignity, rights and respect." On cross-examination, she testified that before the strike she heard that it was an unfair labor practice strike. None of this testimony purports to establish all that was said at the union meetings preceding the strike or directly contradicts the credible testimony of the General Counsel's witnesses as to what was discussed about the strike at those meetings. I find that the evidence establishes that the Respondent's alleged unfair labor practices were discussed and considered by the employees as reasons for striking prior to their making the decision to engage in the strike.

The fact that the Union designated the strike an unfair labor practice strike is not conclusive. All of the circumstances that pertained at the facility at the time must be considered in determining the nature of the strike. *Trading Port, Inc.*, supra. There is evidence that during negotiations Hornick had discussed the possibility of an economic strike in support of a contract. No contract had been agreed to prior to the strike vote. There is evidence that the strike date of March 4 was chosen in order to coincide with a coordinated effort by the Union to strike other nursing homes in West Virginia and to seek support for favorable legislation in the West Virginia legislature, as part of its on-going campaign for "dignity, rights and respect," thereby, increasing its impact. These factors are also circumstances to be considered, as is the length of time that had elapsed between two of the reasons considered at the strike vote, the discharges of Carden and Proctor. The fact that there may have been other considerations, such as wanting a contract or to support for the Union's "dignity, rights and respect" campaign, is not dispositive. Although the discharges of Carden and

Proctor had occurred 8 and 6 months prior to the strike vote, respectively, Hornick testified that he had not called for a strike to protest their firings before the contract expired because it contained a no-strike clause. I find those firings, which were unlawful and had not been remedied, were not so remote in time as to render them irrelevant, particularly, in light of the unlawful threats and restrictions the Respondent had recently imposed on Brooks and Holcomb, their successors among the union leadership. The evidence also indicates that the Respondent's unlawful repudiation of the contractual grievance procedure was part of their motivation. Considering all of these factors, I find that the employees were motivated at least in part by the Respondent's unfair labor practices when they voted to strike; consequently, the strike was an unfair labor practice strike from its inception.

2. Failure to reinstate unfair labor practice strikers

On the morning of March 5, Hornick and a number of employees, who had participated in the strike, were met in the parking lot by Underwood to whom Hornick delivered a letter containing an unconditional offer to return to work on behalf of all strikers. Underwood told the employees that they had been permanently replaced and no longer had positions at the facility, as he had warned them would happen before the strike. This was confirmed in letters, dated March 5, that Underwood sent to all employees, who did not work as scheduled on the day of the strike, informing them that they had been permanently replaced. Unfair labor practice strikers cannot be permanently replaced and are entitled to immediate and full reinstatement upon making an unconditional offer to return to work. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 fn. 5 (1967); and *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956). By failing to fully reinstate unfair practice strikers to their former positions immediately upon receipt of their unconditional offer to return to work, the Respondent violated Section 8(a)(3) and (1) of the Act. E.g., *Capitol Steel & Iron Co.*, 317 NLRB 809, 814 (1995); and *Walnut Creek Honda*, 316 NLRB 139, 142 (1995).

3. Retaliation against strikers

The complaint also alleges in the alternative that, even in the event the strike was not an unfair labor practice strike, the Respondent's action in replacing and refusing to reinstate employees who participated in the strike was discriminatory and in retaliation for their having engaged in the strike and support for the Union.

Analysis and Conclusions

The law is clear that an employer may lawfully hire permanent replacements for striking employees during the course of an economic strike and is not required to reinstate strikers if its failure to do so is due to legitimate and substantial business justifications. One such recognized justification is where the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). The Board recognizes that an employer has a legal right to replace economic strikers at will and has held that, ordinarily, the employer's motivation for hiring replacements is immaterial, unless there is evidence of "an independent unlawful purpose." *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964). The evidence establishes such a purpose was present here.

I find that the General Counsel has made a prima facie showing under *Wright Line*, supra, that is sufficient to support the inference that the Respondent used their participation in the strike as a means of ridding itself of certain employees who were union supporters and punishing others by recalling them to part time positions or to different shifts. There is ample proof in the record of its animus toward the Union and its supporters, as evidenced by the numerous violations of the Act found herein, including, several just prior to the strike in which Underwood and two other supervisors threatened employees with termination if they went on strike. There is also evidence that the Respondent has made a concerted attempt to undermine support for the Union by unlawfully discharging and otherwise harassing union leaders among its employees. These factors coupled with the evidence showing that the Respondent's alleged replacement of some strikers before their offer to return was in effect a sham, support the inference that the hiring of replacements was the result of an independent unlawful purpose.

The fact that the Respondent was required to meet minimum staffing levels prescribed by the State or that, in the case of an economic strike, it could lawfully replace strikers does not resolve the matter.³³ The issue here is one of motivation and I find the Respondent has not overcome the inference that it was motivated by animus toward the Union. Although the Respondent distributed a notice to employees informing them that anyone not at work on March 4 "may be permanently replaced," the testimony of Underwood and Ferguson shows that before the strike commenced, they had already made a decision to replace everyone who failed to report for work on the day of the strike, regardless of whether or not the replacements were needed or even available to work on March 4. There is no evidence that it considered any other approach even though the statutorily required strike notice it received from the Union stated the strike would last for only 1 day. Underwood admitted that he had enough employees and volunteers available to staff the facility on March 4 that he did not need to call on all of them.³⁴ While the Respondent claims that it did not trust Hornick and could not be sure that the strike would not last longer than 1 day, that might explain why it needed to have a pool of replacements available, but it does not explain why it replaced employees who offered to return to work on March 5 with ones who did not even start working until after that date.

According to the Respondent's records (a series of memos addressed to replacement workers allegedly constituting offers of employment on March 4), Shirley Mullins, previously a part-time employee, was hired on March 4 as a full-time replacement for striker Clarice Holcomb. However, Mullins did not begin to work as a replacement until March 7 and she testified that she was not offered the full-time position until March 5, after the strike had ended and the strikers had offered to return to work. I find that Mullins' case establishes that the Respondent's records concerning when the replacements were hired are unreliable and were probably fabricated. Underwood admitted that the memos were never shown to those to whom they

are purportedly addressed. Although these memos imply that in each case employment was discussed with the replacement worker prior to the strike, and that March 4 was the date of hire, Mullins' testimony shows that is untrue. There is also a memo stating that CNA Ginger Leonhard was hired on March 4 as a replacement for striker Terry White. Leonhard testified she had never seen the memo, had never discussed being a replacement worker before she was hired and had been told that she did not replace anyone. Similarly, Susan Greene, who allegedly replaced Keith Meadows, had never discussed becoming a replacement worker before the strike, did not know she was a replacement, and could not say definitely whether she was offered a full time position on March 4 or 5. I find the evidence shows the claim that these three employees were hired as permanent replacements on March 4, amounts to a sham. The evidence also shows that replacement worker Connie Jervis was hired as a replacement for CNA Delores Whittington. Whittington was among those included in the unconditional offer to return to work on March 5, but not allowed to return because she had allegedly been replaced. Not only did her replacement, Jervis, not begin to work for the Respondent until March 13, the reason was that she was working elsewhere and had to give 2-week notice to her employer. Replacements Joyce Blake and Shonnet Brooks did not begin working until March 6, after the strikers they allegedly replaced had offered to return to work. At least three part-time employees who were offered full-time positions as replacements, Leota Adkins, Tammy Marcum, and Sarah Stowers, did not work on the day of the strike because it was their scheduled day off. Stowers testified that, although she accepted the full-time position she was offered, she could not start work immediately because she was already scheduled to work on her second job with another employer. Generally, it is not necessary for a replacement worker to have actually started work before an offer to return to work is made in order for the striker's position to be considered filled. *Solar Turbines*, 302 NLRB 14 (1991). However, all of these instances show that the Respondent had no real need for the services of the alleged replacements during the 1 day of the strike and support a finding that it was more concerned with cutting off the strikers' rights to their jobs than with staffing the facility.

Also relevant to the question of the Respondent's motivation is the fact that 8 of the 22 replacement workers it allegedly hired were members of a 4-week CNA class being conducted at the facility between February 13 and March 12. According to the class schedule, the students were engaged primarily in classroom and some clinical training until March 1. On March 4, they began a clinical phase called, "activities of daily living (ADL)," in which they were required to perform the tasks they had been studying, under the supervision of their instructor. This lasted until March 12, with the exception of March 8, which was a full-day classroom session. According to the class instructor, Sandra Amick, as of March 4, the students had not completed the course and were not qualified as CNA's at that point. In order to complete the course and become certified, they had to perform their ADL work and pass the certification test. I find it questionable that a certified CNA can be permanently replaced by a noncertified student who has not completed the required training for such a position or that such a person would qualify in meeting the State's staffing requirements. Moreover, to complete their courses, the students had to work the hours of ADL prescribed in the class protocol between March 4 and 12. If there had been no strike, they would

³³ The evidence concerning minimum staffing levels applies only to the facility's nursing staff and aides. Some of the employees who were permanently replaced were environmental services and dietary workers.

³⁴ This was confirmed by Elizabeth Beckett, who was responsible for scheduling the CNAs. She testified that several of those who were hired as replacements for strikers did not work on March 4 because she had sufficient staff and they were not needed.

have worked *in addition* to those they allegedly replaced, not *instead* of them. Between those dates they remained students finishing their required training. They were not converted to fully qualified CNA's, able to serve as permanent replacements, simply because the Respondent designated them as such. But aside from the issue of whether these students were qualified or able to replace certified CNA's, the Respondent has offered no reasonable explanation as to why it would want to have its residents cared for by such persons when the certified and experienced CNA's who had offered to return to work were available. I find this is further evidence that the Respondent was more concerned about removing union supporters than the quality of their replacements.

Considering all of the foregoing evidence, I find that the Respondent has failed to establish that it would have taken the same action in replacing all of the employees who participated in the strike, absent their protected activities and support for the Union, or to overcome the inference that its actions in replacing them was the result of union animus. On the contrary, the evidence shows that it rushed to hire a replacement for each and every employee who went on strike (or otherwise failed to work as scheduled) on March 4 in order to rid its self of those employees without regard to whether a replacement was needed or even available to work before the strike ended.

F. Other 8(a)(5) and (1) Allegations

1. Withdrawal of recognition from the Union

On March 12 employees Pattie Price and Marc Case delivered a petition signed by 49 employees which stated that they no longer wished to be represented by the Union. Based on that petition, by letter dated March 14, the Respondent informed the Union that it was withdrawing recognition from it on the grounds that it no longer represented a majority of the employees in the bargaining unit. The General Counsel contends that the withdrawal of recognition was unlawful because the petition was tainted by the Respondent's unfair labor practices and by supervisory involvement in the initiation and circulation of the petition.

Price testified that when she decided to mount an effort to decertify the Union she informed Underwood of her intention and asked him how to go about it. Underwood referred her to Joseph Lawson, one the Respondent's labor relations consultants. Lawson told her how many signatures she needed to get a decertification election and gave some wording to use. Based on the information Lawson gave her, she prepared a number of cards on which she obtained employees' signatures and submitted them to the Board's Cincinnati Regional Office. On March 10, she was informed by a Board representative that the language on the cards she had submitted would not support a decertification election and suggested some language that would be sufficient. On the following day, which was her day off, Price went to see Underwood at the facility. She told him what had happened and that she had to get all the signatures again and asked him what language she should use. Underwood took the legal pad she had with her and wrote out what appears at the top of the first page of the petition. She took the pad and left the office. In the facility parking lot, she met employee Beverly Russell and discussed the petition, which Russell then signed. Marc Case came along and they discussed the petition. Because it was Price's day off, Case offered to take the pad and get signatures. Case returned the petition to her the following day. Price signed it and they took it to Underwood, told him they

thought they had enough signatures to decertify the Union, and left a copy with him. Marc Case testified that he had assisted Price by passing out to employees some of the decertification cards she had prepared. He subsequently talked to her about the petition which he took and circulated among the employees. At the time he received it from Price in the parking lot, the heading and numbers were on the petition along with one signature. He put in Miller's office, where employees came to sign it, and he left it with another employee to get signatures on the night shift. He returned it to Price the next day and they took it to Underwood.

Underwood was called as a witness by the General Counsel before Price testified. When asked what he knew about the petition, he denied any knowledge or involvement other than a single conversation he had with Price. He said Price came to him, on a date he could not recall, and offered her services "to do a petition," which he refused. He further testified that the first time he ever saw the petition was when Price and Case delivered it to him with the signatures on it. He said that he had heard rumors that a petition was being circulated but that he had never seen it and "honestly thought it was just a rumor." When shown the original petition and asked if it bore his handwriting, he refused to admit that it was his, repeatedly saying that it was possible that it was his because he had "scribbled" out something for Price at her request. When pressed about the handwriting on the petition, Underwood refused to acknowledge that it was his, because he was "not a handwriting expert." He testified that when Price left his office with the pad on which he had written the decertification language for her, he did not know what she intended to do with it. He also at first said he did not know that Price had already submitted a petition to the Board. He later admitted that he had been informed by the Board that a petition had been filed and that he knew from Price that it had been rejected by the Board but continued to insist that he did not know she was going to circulate the petition. Underwood later appeared as a witness for the Respondent after he had heard Price's testimony. In that testimony he acknowledged two conversations with Price about her desire to decertify the Union. In the first he referred her to Lawson and to the Board for information. The second was after the Board representative told her that the petition language was insufficient. When Price told him she wanted to make another attempt at decertification he cautioned her that she could not solicit for the petition in work areas or on company time. At Price's request, he wrote out something on the pad she had, while cautioning her that she had to rewrite in her own handwriting or type it. He also said that, after meeting with Price, he made a particular effort to see if there was any solicitation going on in the building, but saw none.

Analysis and Conclusions

A union enjoys an irrebuttable presumption of majority status for 1 year after its certification and, after the certification year has ended, while a collective-bargaining agreement is in effect. *Belcon, Inc.*, 256 NLRB 1341, 1346 (1981). After the contract expires, it enjoys a rebuttable presumption of continued majority status. The employer remains obligated to bargain with the union unless it can rebut that presumption by establishing (1) that on the date recognition was withdrawn the union did not in fact enjoy majority status, or (2) that its withdrawal of recognition was predicated on an objectively based good-faith doubt as to the union's majority status. E.g., *Suzy Cur-*

tains, Inc., 309 NLRB 1287, 1288 (1992); *Hollaender Mfg. Co.*, 299 NLRB 466, 468 (1990); and *Terrell Machine Co.*, 173 NLRB 1480 (1969). The Respondent has the burden of proof, by a preponderance of the evidence, that it has met that standard. *Rock-Tenn Co.*, 315 NLRB 670, 678 (1994); *Laidlaw Waste Systems*, 307 NLRB 1211 (1992). Although the Respondent's evidence of loss of majority support is a decertification petition with the signatures 49 employees in a unit of 76, the law also requires that the petition arise in a context free of unfair labor practices of the sort likely, under all the circumstances, to affect the union's status, cause employee disaffection, or improperly affect the bargaining relationship. *Lee Lumbar & Bldg. Material Corp.*, 322 NLRB 175, 177 (1996); and *Guerdon Industries*, 218 NLRB 658, 661 (1975). In cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be a causal relationship between the unlawful acts and the ensuing events indicating a loss of support. The Board considers the following factors to be relevant in determining whether such a causal relationship exists: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. *Williams Enterprises*, 312 NLRB 937, 939 (1993); and *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

In the present case, the event, which led to the withdrawal of recognition, the decertification petition, arose within a matter of days after one of the most flagrant of the Respondent's unfair labor practices, its permanent replacement of and refusal to reinstate unfair labor practice strikers. Such a violation of the Act has an obvious detrimental effect on the morale and support for the Union of employees who saw coworkers lose their jobs because they exercised such support. Moreover, the many petition signers who were hired as permanent replacements for the strikers were direct beneficiaries of the Respondent's unlawful actions. Similarly, its unlawful prestrike threats to terminate employees who engaged in the strike and poststrike prohibition on talking about the Union under threat of termination, clearly undermined support for the Union. While the Respondent contends that there was longstanding and continuing disaffection with the Union among the bargaining unit, the evidence shows that when Price began her first effort to decertify the Union in early 1995, she obtained only 25 signatures. On February 17, unit employees voted 37 to 1 to approve the strike called by the Union. Price's second decertification effort, shortly after the most serious unfair labor practices took place, resulted in 49 signatures to decertify the Union. I find there was a direct causal link between these unfair labor practices and employee disaffection from the Union. Other of the Respondent's unlawful acts, while not as far reaching, also served to undermine union support. Its unlawful restrictions on the access of union representatives Brooks and Holcomb to the dietary area and to the facility before work interfered with their ability to communicate with employees about union matters and with Brooks' efforts to collect union dues. Its unlawful unilateral abandonment of the contractual grievance procedure made the Union appear weak and ineffective.

None of the unfair labor practices committed by the Respondent during the period between the expiration of the collective-

bargaining agreement and circulation of the decertification petition had been remedied. Inasmuch as there was a direct causal relationship between these unfair labor practices and the employees' expression of dissatisfaction with the Union through the petition, the Respondent cannot rely on the petition to establish a loss of majority support where its unfair labor practices have contributed to that loss of support.³⁵ I find that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union. E.g., *Detroit Edison Co.*, 310 NLRB 564, 565-566 (1993); and *Guerdon Industries*, supra.

A remaining question is whether the decertification petition was also tainted by supervisory assistance. An employer violates Section 8(a)(1) by actively soliciting, encouraging, promoting, or providing assistance in the initiation, signing or filing of an employee petition to decertify a bargaining representative. E.g., *Central Washington Hospital*, 279 NLRB 60, 64 (1986); and *Placke Toyota, Inc.*, 215 NLRB 395 (1974). However, it will not be considered to have violated the Act where it merely answers questions of employees who have already decided to pursue a decertification effort and/or provides assistance that is strictly ministerial in nature. *Amer-Cal Industries*, 274 NLRB 1046, 1051 (1985).

The demeanor and evasive and dissembling testimony of Underwood about his involvement with the petition, when called as a witness by the General Counsel, was such as to raise considerable suspicion that he was trying to hide something, particularly, when contrasted with his later testimony on behalf of the Respondent. In his first appearance, he first claimed his only involvement with Price consisted of his refusing her offer to try to get the Union decertified. He denied knowing that a petition had been circulated or ever having seen it before Price delivered the signed petition to him. Even when shown the petition (which the evidence as a whole conclusively establishes contains his handwriting) he adamantly refused to admit that it was his handwriting, sparring with counsel about how it was "possible" that it "could" be his.³⁶ He also denied knowing that Price had already mounted a decertification effort or that she intended to make another one. However, the only reason Price went to see him was to tell him that her first effort, which he had been informed about in a letter from the Board, was unsuccessful and she wanted him to give her the wording for a new petition. When he later testified, after having heard Price's testimony about the matter, Underwood was much more expansive, and self-serving. Not only did this testimony appear rehearsed, it also appeared to be fabricated. Notwithstanding the suspicions this raises, I find there is no probative evidence that Underwood initiated or encouraged Price to undertake her decertification efforts or that he provided anything beyond per-

³⁵ The Respondent called as witnesses numerous petition signers who testified, generally, in response to leading questions by its counsel, that they were not asked by a management representative to sign the petition and that management did not do anything that caused them to sign it. Under the circumstances, I find that the unremedied unfair labor practices of the extent and seriousness involved here were likely to have undermined support for the Union and influenced the employees to reject it as their bargaining representative. See *Columbia Portland Cement Co.*, 303 NLRB 880, 882-883 (1991), enf'd. 979 F.2d 460 (6th Cir. 1992).

³⁶ While many people may sometimes encounter difficulty deciphering their own handwriting, few adults would fail to recognize their own handwriting.

missible ministerial assistance.³⁷ However, his testimony about this matter confirms my conclusion that much of his testimony is unworthy of belief.

Despite the foregoing, I find that the decertification petition was tainted because it contained Underwood's handwriting and that it cannot be used to establish that the Union had lost majority support. A decertification petition is tainted when the employer creates a situation where employees would tend to feel peril in refraining from signing the petition. E.g., *Williams Enterprises*, 301 NLRB 167, 173 (1991); and *Indiana Cabinet Co.*, 275 NLRB 1209, 1210 (1985). The evidence shows that the first page of the petition was in the handwriting of Underwood and I find it likely that the signers, many of whom were long-time employees who had worked at the facility throughout Underwood's tenure as administrator, would recognize his handwriting. I also find that seeing Underwood's handwriting on the petition would create the impression that he was responsible for its preparation and circulation, that he would know who had signed it and that, if they did not sign, they did so at their peril. The burden of proof on this issue was the Respondent's. *Rock-Tenn Co.*, supra, *Laidlaw Waste Systems*, supra. While a few employees were asked on cross-examination by counsel for the General Counsel if they recognized the handwriting, and said they did not, most were not asked and it appeared that to me that the Respondent's counsel was avoiding asking the question. I find that, under these circumstances, the Respondent has not established that the petition was untainted by the fact that it contained Underwood's handwriting. By withdrawing recognition on the basis of a tainted decertification petition, the Respondent violated Section 8(a)(5). E.g., *Caterair International*, 309 NLRB 869, 880 (1992); and *American Linen Supply*, 297 NLRB 137, 138 (1989).

2. Unilateral grant of wage increase or bonuses

There is no dispute but that after the Respondent withdrew recognition from the Union, it implemented a wage increase and apparently gave some employees a lump-sum bonus without giving the Union notice or an opportunity to bargain before doing so.³⁸ Although the Respondent had withdrawn recognition before implementing the wage increase, I have found that the withdrawal was unlawful. Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing a wage increase for employees in the bargaining unit. *Caterair International*, supra, *T.L.C. St. Petersburg*, 307 NLRB 605 (1992).

3. Alleged direct dealing with employees

After withdrawing recognition from the Union, the Respondent held a number of meetings with a group of employees from

various departments at the facility. The complaint alleges that through these meetings the Respondent unlawfully dealt directly with employees concerning terms and conditions of employment, thereby bypassing the Union when it remained the employees' statutory bargaining representative. The Respondent denies that the meetings involved "dealing" with the employees and contends that the meetings involved permissible communication between employer and employees.

CNA Wilden Overbaugh previously worked for the Respondent, but had left its employ before the strike. She returned as a replacement for a striker. Overbaugh testified that during the second or third week of May she was approached by Marc Case about attending what she initially thought was a quality circle meeting, dealing with care of the residents. Although there was a quality circle meeting at the facility that day, the meeting she attended was different. It was attended by Underwood and Ferguson and several employees from different departments and/or shifts. She testified that Ferguson began the meeting by saying that it was being held to lay the basis for a new contract and that he wanted to keep it as close to the old one as possible. The meeting was held after the wage increase had been implemented, but the subject of raises was discussed. Ferguson said that he wanted all the CNA's wages to be in a close range but that if he gave them a big raise it would put them in the LPN wage range. He also commented that everything he tried to do about wages had taken a long time because it had to go through the Union. Underwood stated that he could make changes faster if he didn't have to take everything through the Union. She said they were told not to say anything about what went on during the meeting because if it got out the Union would claim they were being bribed. Each employee was asked to get their co-workers opinions on what they wanted to be in the contract. Employee Kim Wilson complained about an unidentified union supporter that had returned to work that she said was harassing her and Underwood said that he could do something about it only if it involved a verbal or physical threat. There was a question raised about whether the facility was for sale. Ferguson said that he was not looking for a buyer but that did not mean he would not sell if the right offer came along. There was also a question about sick days. Another meeting was scheduled to held in June, but she did not attend because she was away.

Marc Case testified that sometime after he had solicited for the decertification petition, he spoke to Underwood about holding a meeting with employees to keep them abreast of what was going on and he agreed. Case spoke to some employees about being on a committee to attend the meeting which was held in April or May. He said that at first they were going to call it a negotiation committee, but did not do so. He said that he did not recall whether he used the term "negotiation" when he spoke to Underwood. He also said he did not recall anything that occurred at the first meeting of the committee but then said that Ferguson did most of the talking and the some problems on the floor may have been discussed. He said there was no mention of a contract at this meeting. Case testified that at a second meeting involving the committee, the biggest part of the meeting involved a discussion about a picketing incident at Ferguson's church. Pattie Price testified that on a date she did not recall Case told her some employees wanted to have a meeting with management and they went to Underwood to see if they could set it up. Although they did not tell him what they hoped to accomplish in the meeting, he agreed to it. She did not recall when the meeting was held but Underwood and Ferguson were pre-

³⁷ Considering all of the circumstances and her testimony as a whole, I find that employee Jeannie Donaldson was probably mistaken when she testified that Underwood was present when she signed the petition. I find the testimony of CNA Bobbie Spencer that, before she clocked in for the night shift, Supervisor Jane Mantz told her to go to the laundry where she would find the petition and to sign it, does not establish supervisory involvement. Mantz was a credible witness and she testified that, at the start of a shift on a date she could not recall, she told Spencer that employee Bertha Cummins had left something for her in the laundry room. Spencer responded that she already knew about it. Mantz testified that she had a suspicion about what was being referred to but that she was not told what it was. I credit her denial.

³⁸ Although Underwood testified that the increase was similar to that in its last (but not necessarily final) contract offer, no bargaining impasse had occurred and the Respondent was not free to act unilaterally.

sent. She also did not remember what was discussed at this meeting except that there was no mention of a contract. She attended a second such meeting and had no recollection of what was discussed except an incident outside Ferguson's church where Hornick was passing out literature. Janet Tinney testified that she attended two or three meetings with management after the strike, but she did not know when they were or how they came about. At the first meeting, she thought that Ferguson said the meeting was not about a contract but to improve the facility and morale. She asked Ferguson if he was going to sell the facility and if he would consider starting a credit union. He said he had no plans to sell and that he would have seen what he could find out about a credit union. He later told her he was still checking on it but that it sounded like a good deal. She said there was no mention of entering into a contract and that Ferguson said they would be going by the old one until everything was settled. At a later meeting, she recalled suggesting that there be dinner to raise morale and that Price asked that she be provided with an assistant. At the last meeting she attended, the employees made a bunch of suggestions but there had been no meeting since and they had not heard back by the time of the hearing. Velma Hoover testified that she was asked to be on a committee of employees to meet monthly with management. She testified that she initially thought it was to talk contract. She attended the first meeting on May 22, at which Ferguson spoke for most of the meeting, telling them what he hoped to accomplish at the facility. Underwood also spoke and the employees offered comments. There was no discussion of a contract but Ferguson did talk about increasing wages and benefits although he did not give any specifics. She said that the employees were to talk to the people in their departments and make a list of what they were concerned about. Linda Williams testified that she attended all of the meetings of employees with management which she said were to discuss problems concerning their working conditions such as work schedules and supply shortages. She did not recall any discussion of a contract and there was no discussion of pay and benefits. She said she had been involved in some contract negotiations and these meetings were not similar. She could not recall if they were to go back to their departments and see what other employees wanted discussed at the meetings. Charlotte Thomas testified she was asked by Case to attend a meeting with management, as a representative of the dietary department, to find out where they stood with respect to the rules they were to go by since the Union was no longer there. Ferguson was asked about selling the facility. There was a question about whether there was going to be a contract set up for them and Underwood responded that they would go by the rules in the old contract. She described it as similar to the Quality Circle meetings she had attended. Ferguson testified that he was told that the employees had a lot of questions and he agreed to meet with them to try to answer their questions. At the meeting, there was no discussion of entering into a contract with the employees. He was asked if he had plans to sell the facility and said there were no plans to do so. They discussed ways to improve the facility and questions were asked about scheduling, pins for years of service and the possibility of starting a credit union and a pension plan. He said that a pension plan was something he would look into in the future but that they were going to implement the same package that was on the table when the old contract expired on January 1. He told them he was not there to bargain with them or to enter a contract and if they were unsure about their status they should look to the existing employee

manual. He attended a second meeting where they discussed the incident outside his church. There were few questions and it lasted only a short time.

Analysis and Conclusions

There is no evidence that the Respondent had any involvement in forming the committee of employees or in selecting its members. While it appears that Case, who formed the committee, may have initially believed it would be a "negotiation" committee, it does not appear that the Respondent shared that belief. I credit the testimony of Ferguson that he made it clear from the outset that he was not going to negotiate a contract. While the accounts of the several employee witnesses who attended one or more meetings differ widely, it appears that the term "contract" was mentioned only in the context of Ferguson's saying they would generally follow the provisions of the expired contract or the Respondent's last contract offer. While I found Overbaugh to be a generally credible witness, given the fact that none of the other witnesses remembered Ferguson saying anything about laying the basis for a new contract and Ferguson's credible testimony to the contrary, I find it likely that she misunderstood what he was saying about that subject.³⁹

The evidence establishes that the employees on the committee discussed with management matters directly relating to the terms and conditions of their employment. However, it does not establish a pattern or practice whereby over a period of time the employees made proposals to which management responded to by word or deed. The committee did not appear to have any definite structure, membership fluctuated and there was no agenda for the meetings. I find that the meetings involved sharing information with the employer and were in the nature of brainstorming sessions in which the committee members put forth questions and/or a whole host of ideas of their own or which they passed on for the employees in their departments. There is no evidence that the committee arrived at any consensus as to what would or would not be passed on to management of in any way limited what individual participants could ask or propose. Under the circumstances, I find these committee meetings did not involve "dealing" with the Respondent on statutory subjects. See *E. I. du Pont & Co.*, 311 NLRB 893, 894-895 (1993). I shall recommend that this allegation be dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Nicholas County Health Care Center, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and a health care facility within the meaning of Section 2(14) of the Act.

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

³⁹ I find nothing to support the Respondent's gratuitous attack on Overbaugh's credibility. As a replacement worker, signer of the decertification petition and current employee, there is no reason to believe she was biased against the Respondent or in favor of the Union. She was not, as the Respondent asserts, evasive and appeared to be attempting to give a true account of what she recalled having occurred, much of which was confirmed by the Respondent's own witnesses. The contrast between her straightforward testimony on this issue and that of the Respondent's witnesses, Davis and Case, the moving forces behind the decertification petition and the committee, respectively, who feigned almost complete lack of memory about these meetings, could not be much sharper. Case, in particular, in response to leading questions from the Respondent's counsel, had a clear memory of what was not said at the meetings, but was generally unable to state in his own words what was discussed.

3. All full-time and regularly scheduled part-time service and maintenance employees employed by the Employer at its Richwood, West Virginia facility including nurses aides, housekeeping aides, laundry aides, dietary employees and maintenance assistants; but excluding all office clerical employees, all Licensed Practical Nurses, all Registered Nurses and professional employees, all guards, the department heads of nursing, laundry, housekeeping, dietary, activities, social services and maintenance and all other supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been the exclusive representative of all employees in the above-described unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment within the meaning of Section 9(a) of the Act.

5. The Respondent violated Section 8(a)(1) of the Act by:

(a) Referring to an employee who supported the Union as a nuisance and saying it would like to get rid of her.

(b) Telling employees not to engage in discussions involving the Union or the Board at its facility.

(c) Coercively interrogating an employee about her union activity.

(d) Coercively interrogating an employee about telephone calls she made from home concerning the Union and attempting to stop her from making similar calls.

(e) Isolating two employees who were representatives of the Union by restricting their access to the dietary break area and to the facility before work.

(f) Threatening employees with termination if they engaged in a strike.

(g) Creating the impression that it had surveilled a strike vote held by the Union and interrogating an employee concerning how she voted.

(h) Telling employees they would be permanently replaced if they engaged in an unfair labor practice strike.

(i) Threatening employees with disciplinary action and/or termination if they discussed the Union while at work.

(j) Telling an employee not to voice any complaints while at work.

(k) Threatening to deny unfair labor practice strikers their rights to be reinstated.

(l) Offering an employee her choice of positions if she did not participate in the strike.

(m) Announcing and enforcing a no-solicitation rule applicable only to the collection of union dues.

6. The Respondent violated Section 8(a)(3) and (1) of the Act by:

(a) Issuing disciplinary warnings to and terminating Eula Carden because of her protected activities and support for the Union.

(b) Issuing disciplinary warnings to and terminating Wanda Proctor because of her protected activities and support for the Union.

(c) Issuing a disciplinary warning to Mabel Bailes because of her protected activities and support for the Union.

(d) Failing and refusing to fully reinstate unfair labor practice strikers to their former positions immediately upon receipt of their unconditional offers to return to work on March 5, 1996.

7. The Respondent violated Section 8(a)(5) and (1) of the Act by:

(a) Failing and refusing to continue in effect the grievance procedure provisions of the collective-bargaining agreement after expiration of that agreement.

(b) Withdrawing recognition from the Union as the collective-bargaining representative of unit employees on March 14, 1996, and thereafter refusing to meet and bargain in good faith with the Union.

(c) Granting a wage increase and/or bonus to employees without first giving the Union notice and the opportunity to bargain.

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

9. The strike engaged in by the Respondent's employees on March 4, 1996, was caused by the Respondent's unfair labor practices and was from its inception an unfair labor practice strike.

REMEDY

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

Having found that the Respondent unlawfully failed and refused to reinstate unfair labor practice strikers upon their unconditional offers to return to work on March 5, 1996, it shall be required to reinstate them immediately to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, discharging if necessary all replacements hired after the March 4, 1996 commencement of the strike. The Respondent shall also be required to make those employees whole for any loss of earnings and other benefits they may have suffered by reason of the refusal to reinstate them, from the date of their offers to return to work. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest, computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that the Respondent discriminatorily terminated employees Eula Carden and Wanda Proctor, it shall be required to offer them immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges and make them whole for any loss of earnings and other benefits they may have suffered by reason of the discrimination against them, in the manner described above.

The Respondent's numerous and flagrant unfair labor practices, involving its highest levels of management, demonstrate a proclivity for violating the Act and a general disregard for its employees' Section 7 rights. Accordingly, I find that a broad cease-and-desist order is appropriate. See *Clark Manor Nursing Home Corp.*, 254 NLRB 455, 459 (1981); and *Hickmont Foods, Inc.*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁰

⁴⁰ 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.

ORDER

The Respondent, Nicholas County Health Care Center, Inc., Richwood, West Virginia, its officers, agents, and assigns, shall

1. Cease and desist from
 - (a) Referring to employees who support the Union as nuisances and telling them it would like to get rid of them.
 - (b) Telling employees not to engage in discussions involving the Union or the Board at its facility.
 - (c) Coercively interrogating employees about their union or other protected activity and telling them to cease such activities.
 - (d) Isolating employees who are representatives of the Union by restricting their access to break areas and/or to the facility before work.
 - (e) Threatening employees with termination if they engage in a strike.
 - (f) Creating the impression that it had surveilled votes held by the Union and interrogating employees concerning how they voted.
 - (g) Telling employees they will be permanently replaced if they engage in an unfair labor practice strike.
 - (h) Threatening employees with disciplinary action and/or termination if they discuss the Union while at work.
 - (i) Telling employees not to voice any complaints while at work.
 - (j) Threatening to deny unfair labor practice strikers their rights to be reinstated.
 - (k) Offering employees their choice of positions or other benefits if they do not participate in a strike.
 - (l) Announcing and enforcing a no-solicitation rule applicable only to the collection of union dues.
 - (m) Issuing disciplinary warnings to and/or terminating employees because they engage in protected activities and/or support for the Union or any other labor organization.
 - (n) Failing and refusing to fully reinstate unfair labor practice strikers to their former positions immediately upon receipt of their unconditional offers to return to work.
 - (o) Failing and refusing to continue in effect the grievance procedure provisions of the collective-bargaining agreement after expiration of that agreement.
 - (p) Withdrawing recognition from the Union as the collective-bargaining representative of unit employees and refusing to meet and bargain in good faith with the Union.
 - (q) Granting a wage increase and/or bonus to employees without first giving the Union notice and the opportunity to bargain.⁴¹
 - (r) In any other 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 Eula Carden and Wanda Proctor full reinstatement to their former jobs or, if those job no longer exists, to a substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

⁴¹ Nothing in this Order shall be construed as requiring the Respondent to withdraw the wage increase and/or bonus granted to any employee in or after March 1996, without a request from the Union. See *Elias Mallouk Realty Corp.*, 265 NLRB 1225 fn. 3 (1982); *Taft Broadcasting Co.*, 264 NLRB 185 fn. 6 (1982).

(b) Make Eula Carden and Wanda Proctor 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, offer Jane Alderman, Mabel Bailes, Vera Bennett, Joy Bragg, Patricia Brooks, Patty Clevenger, Patsy Davis, Connie Dearfield, Margie Dillard, Richard Glover, Karen Griffith, Patricia Groves, June Harris, Clarice Holcomb, Wendy Holcomb, Annabelle Justice, Keith Meadows, Patty Mullins, Bessie Rice, Cleo Sandy, Betty Scott, Mary Vance, Terry White, Delores Whittington, Linda Wright, and Evelyn Young 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 or privileges previously enjoyed.

(d) Make Jane Alderman, Mabel Bailes, Vera Bennett, Joy Bragg, Patricia Brooks, Patty Clevenger, Patsy Davis, Connie Dearfield, Margie Dillard, Richard Glover, Karen Griffith, Patricia Groves, June Harris, Clarice Holcomb, Wendy Holcomb, Annabelle Justice, Keith Meadows, Patty Mullins, Bessie Rice, Cleo Sandy, Betty Scott, Mary Vance, Terry White, Delores Whittington, Linda Wright, and Evelyn Young 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.

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

(f) 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.

(g) Recognize and, on request, bargain in good faith with the Union as the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(h) On request of the Union, reinstate and continue in effect the grievance procedure provisions of the collective-bargaining agreement that expired December 31, 1995.

(i) Within 14 days after service by the Region, post at its facility in Richwood, West Virginia, copies of the attached notice marked "Appendix."⁴² Copies of the notice, on forms provided by the Regional Director for Region 9, 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. In the event that, during the pendency of these proceedings, the

⁴² 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."

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 employees and former employees employed by the Respondent at any time since August 28, 1995.

(j) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT refer to our employees who support the Union as nuisances or tell them we would like to get rid of them.

WE WILL NOT tell our employees not to engage in discussions involving the Union or the Board at the facility.

WE WILL NOT coercively interrogate our employees about their union or other protected activity or tell them to cease such activities.

WE WILL NOT isolate our employees who are representatives of the Union by restricting their access to break areas and/or to the facility before work.

WE WILL NOT threaten our employees with termination if they engage in a strike.

WE WILL NOT create the impression that we have surveilled votes held by the Union or interrogate our employees concerning how they voted.

WE WILL NOT tell our employees they will be permanently replaced if they engage in an unfair labor practice strike.

WE WILL NOT threaten our employees with disciplinary action and/or termination if they discuss the Union while at work.

WE WILL NOT tell our employees not to voice any complaints while at work.

WE WILL NOT threaten to deny unfair labor practice strikers their rights to be reinstated.

WE WILL NOT offer our employees their choice of positions or other benefits if they do not participate in a strike.

WE WILL NOT announce or enforce a no-solicitation rule applicable only to the collection of union dues.

WE WILL NOT issue disciplinary warnings to and/or terminate our employees because they engage in protected activities and/or support for the Union or any other labor organization.

WE WILL NOT fail or refuse to fully reinstate unfair labor practice strikers to their former positions immediately upon receipt of their unconditional offers to return to work.

WE WILL NOT fail or refuse to continue in effect the grievance procedure provisions of the collective-bargaining agreement after expiration of that agreement.

WE WILL NOT withdraw recognition from the Union as the collective-bargaining representative of employees in the appropriate unit or refuse to meet and bargain in good faith with the Union.

WE WILL NOT grant a wage increase and/or bonus to our employees without first giving the Union notice and the opportunity to bargain.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Eula Carden and Wanda Proctor full reinstatement to their former jobs or, if those job no longer exists, to a substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Eula Carden and Wanda Proctor whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest.

WE WILL within 14 days from the date of the Board's Order, offer Jane Alderman, Mabel Bailes, Vera Bennett, Joy Bragg, Patricia Brooks, Patty Clevenger, Patsy Davis, Connie Dearfield, Margie Dillard, Richard Glover, Karen Griffith, Patricia Groves, June Harris, Clarice Holcomb, Wendy Holcomb, Annabelle Justice, Keith Meadows, Patty Mullins, Bessie Rice, Cleo Sandy, Betty Scott, Mary Vance, Terry White, Delores Whittington, Linda Wright, and Evelyn Young 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 or privileges previously enjoyed.

WE WILL make Jane Alderman, Mabel Bailes, Vera Bennett, Joy Bragg, Patricia Brooks, Patty Clevenger, Patsy Davis, Connie Dearfield, Margie Dillard, Richard Glover, Karen Griffith, Patricia Groves, June Harris, Clarice Holcomb, Wendy Holcomb, Annabelle Justice, Keith Meadows, Patty Mullins, Bessie Rice, Cleo Sandy, Betty Scott, Mary Vance, Terry White, Delores Whittington, Linda Wright, and Evelyn Young whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warnings issued to Mabel Bailes, Eula Carden, and Wanda Proctor and the unlawful discharges of Eula Carden and Wanda Proctor, and within 3 days thereafter notify the employees in writing that this has been done and that the warnings and discharges will not be used against them in any way.

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

WE WILL on request of the Union, reinstate and continue in effect the grievance procedure provisions of the collective-bargaining agreement that expired December 31, 1995.

NICHOLAS COUNTY HEALTH CARE CENTER, INC.