NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Sacred Heart Medical Center *and* Washington State Nurses Association. Case 19–CA–29150

June 30, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On March 24, 2005, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions with supporting argument, and the Charging Party filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(1) of the Act by promulgating, maintaining, and enforcing a policy that prohibits its employees from wearing an "RNs Demand Safe Staffing" union button in those parts of the Respondent's medical facility where employees might encounter patients or their families. The Respondent excepts to the judge's finding and contends, among other things, that the restriction on this particular button is justified by special circumstances. We agree. Accordingly, we shall reverse the judge's decision and dismiss the complaint.

I. FACTS

The pertinent facts, largely stipulated to by the parties, are as follows. The Respondent operates an acute care medical center in Spokane, Washington. The Union represents approximately 1200 of the Respondent's nurses. The parties have had a longstanding collective-bargaining relationship dating back at least 20 years.

The nurses have worn a variety of union buttons over the years without any objection on the part of the Respondent. Messages stated on those buttons included "**T**ogether **E**veryone **A**chieves **M**ore—WSNA," "WSNA-SHMC RN's Remember '98," and "Staffing Crisis—Nursing Shortage—Medical Errors—**R**eal Solutio**N**s WSNA."[1]

In the fall of 2003, the parties began negotiating a contract to replace the agreement set to expire in January 2004.[2] Nursing staff levels were among the subjects of bargaining.[3] During the course of negotiations, nurses wore a new button that read "RNs Demand Safe Staffing." In response to this button, the Respondent's nurse managers expressed concern to the Respondent's human resources department over the button's impact on patients and their families.

On February 27, the Respondent issued a memorandum limiting the areas of the hospital in which the "Safe Staffing" button could be worn. The memorandum carefully explained the basis for the prohibition:

> We know that staff have worn a variety of buttons over the years for different purposes, and we have no objection to most messages. This message, however, disparages Sacred Heart by giving the impression that we do not have safe staffing. We cannot permit the wearing of these buttons, because patients and family members may fear that the Medical Center is not able to provide adequate care.
>
> It is difficult for us to understand why nurses would wear these pins at the risk of upsetting their patients, particularly since we have come to agreement with [the Union] at the bargaining table on issues related to staffing and how staff will be involved when staffing issues arise.
>
> To assure that patients do not become alarmed or fearful about patient care at Sacred Heart, effective immediately, it is our expectation that no staff member will wear these buttons in any area on our campus where they may encounter patients or family members.

The Respondent did not discipline any nurse for wearing the "Safe Staffing" button. Several nurses were, however, asked to remove the buttons from their uniforms following the issuance of the memorandum.

II. ANALYSIS

In healthcare facilities, restrictions on the wearing of union-related buttons are presumptively valid in immediate patient care areas. *Casa San Miquel*, 320 NLRB 534, 540 (1995). Outside immediate patient care areas, such restrictions are presumptively invalid. Id. An employer may rebut the presumption of invalidity, however, by showing "special circumstances," i.e., that the restriction is "necessary to avoid disruption of health care operations or disturbance of patients." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978).

Applying these principles here, we agree with the judge that the Respondent's restriction on wearing the

[1] WSNA is an acronym for "Washington State Nurses Association," the Charging Party.

[2] All dates hereafter are 2004 unless otherwise indicated.

[3] The new contract was ratified in May.

"RNs Demand Safe Staffing" button is presumptively invalid because it extended beyond immediate patient care areas to areas where employees might encounter patients or their families. Contrary to the judge, however, we find that the Respondent has rebutted the presumption of invalidity by showing "special circumstances" that justify the restriction.[4]

First, the Respondent established that the message presented by the button is one that would inherently disturb patients. A reasonable person would construe the "Safe Staffing" button as a claim that the Respondent's staffing levels are unsafe.[5] Such a claim is likely to cause unease and worry among patients and their families, and disturb the tranquil hospital atmosphere that is necessary for successful patient care. See *NLRB v. Baptist Hospital*, 442 U.S. 773, 784 (1979) ("'[I]n the context of health-care facilities, the importance of the employer's interest in protecting patients from disturbance cannot be gainsaid.'") (quoting *Beth Israel v. NLRB*, supra, 437 U.S. at 505)).[6]

Thus, contrary to our dissenting colleague, we do not view the message on this button as a "garden-variety union button, with a slogan related to staffing concerns." Rather, in the context of an acute-care medical facility, the button's demand that staffing be made safe sends a clear message to patients that their care is currently in jeopardy. In light of this message, the Respondent took appropriate steps to protect the atmosphere of patient care in the facility, not by banning all buttons, but by narrowly restricting the use of this single button, and only in locations where they might be seen by patients or their families.[7]

Second, the nurses' direct supervisors, who work on the hospital floor and are in a position to gauge patients' reaction to the button, expressed concern over the impact the button may have on patients. This evidence supports a finding of special circumstances. *NLRB v. Baptist Hospital*, supra, 442 U.S. at 782–784.[8]

The judge and our colleague suggest that special circumstances cannot be shown in the absence of evidence of actual disturbance of patients. We disagree. In *NLRB v. Baptist Hospital*, the Supreme Court made clear that evidence of actual disturbance is not required when it held that the hospital demonstrated special circumstances justifying a ban on solicitations in corridors and sitting rooms on patient floors through testimony from its officials that in their opinion such solicitations would disturb patients. Id. at 782–784. The Board's decision in the case makes clear that there was no evidence of actual disturbance. *Baptist Hospital*, 223 NLRB 344, 357 (1976). Nevertheless, the Supreme Court, deferring to the reasoned judgment of health care professionals, found that special circumstances had been established.[9]

---

[4] There are no exceptions to the judge's finding that the button's message "presents a legitimate workplace concern and is protected by Section 7." There are also no exceptions to the judge's finding that the language on the button is not "alleged to be disloyal, recklessly made, maliciously false, vulgar or obscene."

[5] As the Respondent argues in its exceptions, "If the union is informing patients and their families that they are 'demanding safe staffing,' the clear impression left to the patient and/or family member [is] that the level of staffing must not be safe or the union would not be making such demands."

[6] The Court in *NLRB v.Baptist Hospital* quoted favorably Justice Blackmun's "perceptive[]" comments on the importance of maintaining a peaceful and relaxed atmosphere within hospitals:

> Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family—irrespective of whether that patient and that family are labor or management oriented—need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed.

442 U.S. at 783, quoting *Beth Israel*, 437 U.S. at 509 (Blackmun, J., concurring in judgment).

[7] As noted above, the Respondent's memo clearly states that the button is not to be worn by staff members "where they may encounter patients or family members." Thus, contrary to our colleague, the Respondent did not simply ask that nurses remove the button in a "wide and unspecified geographic area." This prohibition is in accord with the Respondent's concern that the button may be disruptive to patients and their families.

[8] Our dissenting colleague notes that no witness testified that the nurses' supervisors expressed these concerns. The record shows that the parties stipulated that, if called, a particular witness would testify that the hospital administration was approached by certain nurse managers expressing their concern as to the impact of the safe staffing button on the patients and their families; and thereby inquired as to how to respond. The parties also agreed that the judge could give that stipulated testimony the weight and relevance that she wished. In her decision, the judge stated that the parties "agreed that Respondent's human resources personnel were approached by certain nurse managers expressing their concern as to the impact of the 'Safe Staffing' button on patients and their families." Although the judge may have overstated the stipulation, no party has excepted to the judge's statement. Accordingly, we shall accept it. See *Custodis-Cottrell, Inc.*, 283 NLRB 585 fn. 2 (1987); *Richard Mellow Electrical Contractors*, 327 NLRB 1112, 1114 fn. 15, 1120 fn. 6 (1999) (having accepted stipulated testimony concerning employer's anti-Sec. 7 animus, judge erred in refusing to rely on it on the grounds that he did not have an opportunity to observe witnesses' demeanor).

[9] Our dissenting colleague asserts that our reliance on *NLRB v. Baptist Hospital* is misguided and misplaced. In the dissent's view, that decision fundamentally concerned the Board's definition of "immediate patient care area." Although one issue in the case was whether corridors and sitting rooms on patient floors were "immediate patient care areas," the Court ultimately did not resolve that issue. For, even if they were not, i.e., even if a presumption of invalidity applied, the evidence rebutted it. Significantly, that evidence consisted of evidence of *poten-*

St. Luke's Hospital, 314 NLRB 434 (1994), cited by the judge, is not to the contrary. In rejecting the respondent's special circumstances defense in *St. Luke's,* the Board relied not only on the absence of evidence of patient complaints, but also on the innocuous "message conveyed by the buttons" ("United to Fight for our Health Plan"). Id. at 435. In the instant case, the message is not innocuous. Unlike *St. Luke's,* the wording on the button is likely to disturb patients and their families.

Further, as the Supreme Court made clear in *NLRB v. Baptist Hospital,* a hospital need not wait for the awful moment when patients or family are disturbed by a button before it may lawfully be restricted. As the Board has previously observed in the retail context, an employer "need not await customer complaint before it takes legitimate action to protect its business." *Nordstrom, Inc.,* 264 NLRB 698, 701 fn. 12 (1982). See also *Pathmark Stores, Inc.,* 342 NLRB 1264 (2004) (upholding grocery store's ban on union insignia with the slogan "Don't Cheat About the Meat!" notwithstanding the absence of evidence that any customer decided not to buy store's meat because of slogan). An employer's interest in preventing disturbance of its patients is certainly no less strong in the healthcare context, where patients' health and welfare is at stake. *NLRB v. Baptist Hospital,* supra.

We also disagree with the judge's and the dissent's conclusion that this case is controlled by *Mt. Clemens General Hospital,* 335 NLRB 48, 50 (2001), enfd. 328 F.3d 837 (6th Cir. 2003). Instead, we find that Mt. Clemens is factually distinguishable. In *Mt. Clemens,* the respondent broadly prohibited employees from wearing a union button with a line drawn through the letters "FOT" in many areas of the hospital, including areas not visited by patients or families.[10] The respondent maintained that it was disruptive for RNs to wear this button because patients might ask questions about the button that would force RNs to enter into a dialogue with them over the reasons why the RNs were upset with the hospital's policy regarding mandatory overtime. In rejecting the respondent's defense, the Board relied on the absence of evidence that the wearing of the button caused such a dialogue to take place, resulted in complaints from patients or their families, or otherwise interfered with patient care or safety in any way.

Mt. Clemens is distinguishable in two important respects. First, in Mt. Clemens, the button's message was cryptic, and the respondent's rationale for banning it rested on a chain of inferences: that patients would ask what "FOT" meant, and that nurses would respond with an explanation that disturbed the patients. Here, by contrast, the "RNs Demand Safe Staffing" button sends a clear message to patients: current staffing levels at the hospital are unsafe, and medical care is thus being compromised. No inferential leap is required in order to conclude that a reasonable patient would be disturbed by this message.

Second, in *Mt. Clemens,* even if patients and their families were able to understand the button's message, they would have discerned that the union-management dispute concerned the RNs' own terms and conditions of employment. The complaint was not that "forced overtime" would harm patients. Rather the complaint was that employees would be forced to do something that they did not wish to do. Here, by contrast, the message on the "RNs Demand Safe Staffing" button relates directly to issues of patient care and hospital safety. Thus, while our colleague would characterize the button in the instant case as similarly relating to working conditions, unlike the button in *Mt. Clemens,* the "RNs Demand Safe Staffing" message speaks primarily to safety and not simply to bargaining over staffing levels.

That the Respondent allowed other buttons to be worn during the relevant time period does not establish the violation. Rather, that fact supports the Respondent. In essence, the Respondent permits the wearing of buttons except where they may jeopardize patient welfare and disrupt the "peaceful and relaxed atmosphere" central to the hospital's mission. *NLRB v. Baptist Hospital,* 442 U.S. at 783, fn. 12. Thus, Respondent's long history of tolerance of more innocuous buttons, including those sponsored by the Union, militates against a finding that the Respondent's limited restriction on one particular button, which trumpets concerns about the safety of the hospital's staffing, was unlawful.[11] Indeed, any claim that the Respondent discriminated against buttons implicating Section 7 activities—or restricted the wearing of this button for that reason—is simply untenable under these circumstances.[12]

This is true even though one of the permitted buttons included the message "Staffing Crisis—Nursing Shortage—Medical Errors." Our dissenting colleague argues that the Respondent undermined its claim (that it restricted the "Safe Staffing" button out of concern for its

tial harm to patients. There was no testimony that there was *actual harm*.

[10] "FOT" was a silent protest against forced overtime.

[11] Member Schaumber also finds that the availability of alternative means supports the position of the Respondent. See *NLRB v. Baptist Hospital,* supra, 442 U.S. at 785 and *Beth Israel Hospital v. NLRB,* supra, 437 U.S. at 505.

[12] Compare *Holladay Park Hospital,* 262 NLRB 278, 279 (1982) (hospital unlawfully prohibited yellow union ribbon while allowing red and green ribbons not related to union); *George J. London Memorial Hospital,* 238 NLRB 704, 709–710 (1978) (hospital unlawfully prohibited union button while allowing buttons that were not union-related).

patients) by allowing this union button, which had a "much more controversial message." We disagree. Both buttons related to the pending negotiations. If the Respondent had targeted the "Safe Staffing" button solely because of that fact, it obviously would have banned both. But the Respondent did not ban both, nor did it seek to undermine the Union, with whom it had a longstanding bargaining relationship, or impose any other restrictions on employee Section 7 activities. When it announced the limitations on the wearing of the "Safe Staffing" button, the Respondent took pains to explain that the justification was concern over patient welfare. On these facts, the limitations imposed by the Respondent would not tend to coerce, restrain, and interfere with employees in the exercise of their Section 7 rights.[13]

This case is thus in stark contrast to *Mt. Clemens*, where the hospital broadly prohibited the wearing of the targeted button in areas of the hospital where patients and families would not be encountered and even removed the buttons from RNs' mailboxes. As noted above, the Respondent did not proscribe the "Safe Staffing" button in areas where patients or their families were not present. Moreover, unlike the hospital in *Mt. Clemens*, it carefully explained to the RNs, in writing, the reasons for the limited restriction it imposed. For these reasons, we cannot agree that employees would conclude that the Respondent was not acting out of concern for its patients from the fact that it limited the wearing of only one of the Union's many buttons.

Moreover, the mere fact that an employer has not previously forbidden union insignia does not foreclose that employer from ever imposing restrictions on buttons, particularly where, as here, that insignia is potentially disruptive. In essence, the Act does not forbid a hospital from concluding that certain insignia are more disruptive than others. The Respondent has reasonably determined that one union button is distinguishable from another and is not as likely to disturb patients or their families. We would not second guess its business judgment or condemn its decision not to broaden its ban to include both buttons. See, e.g., *NLRB v. Columbus Marble Works*, 233 F.2d 406, 413 (5th Cir. 1956) ("[A]s we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision.").

[13] Chairman Battista further observes that it is not for the Board to judge whether the one button or another would cause more concern to a patient. That is a matter for the Respondent to judge. He simply concludes that the Respondent did not discriminate along union lines.

III. CONCLUSION

The Respondent did not violate Section 8(a)(1) of the Act by prohibiting its employees from wearing an "RNs Demand Safe Staffing" button in any part of its facility where patients or their families might be present. The Respondent has rebutted the presumption of invalidity by showing special circumstances that justify the restriction. Therefore, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 30, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

Reversing the judge, the Board today holds that the Respondent established "special circumstances" permitting it to broadly ban the wearing of a garden-variety union button throughout the Respondent's hospital.[1] The majority's decision is flawed in two critical respects. First, the Respondent has not even come close to showing that its "special circumstances" defense is supported by anything other than mere speculation that the button's message would likely disturb patients and their families. Second, the undisputed fact that the Respondent imposed no restrictions whatsoever on the wearing of a second button with a much more controversial message completely undermines its asserted reasons for broadly prohibiting the wearing of the button at issue. Accordingly, on this record, there should be no doubt that the Respondent violated Section 8(a)(1) of the Act.

I.

In a February 27, 2004[2] memorandum, the Respondent adopted a policy prohibiting the wearing of an "RNs Demand Safe Staffing" button "in any area on our campus where [employees] may encounter patients or family members."[3] Nurses had been wearing the button in sup-

[1] As the majority acknowledges, there are no exceptions to the judge's findings that (1) the button presents a legitimate workplace concern and is protected by Sec. 7; and (2) that the button was not alleged to be "disloyal, recklessly made, maliciously false, vulgar or obscene."

[2] All dates are 2004 unless otherwise noted.

[3] While the majority repeatedly asserts that the Respondent's ban was limited in scope, both the express language of the Respondent's

port of the Union's position on staffing issues in contract negotiations with management since the fall of the previous year,[4] and no one had had ever complained about the button. Nevertheless, as justification for the ban, the Respondent's memorandum stated that the button "giv[es] the impression that we do not have safe staffing" and "patients and family members may fear that the Medical Center is not able to provide adequate care." Both before and after the issuance of the February memorandum, the Respondent imposed no restrictions at all on the wearing of a second button with the message, "Staffing Crisis," "Nursing Shortage," and "Medical Errors." In other words, the Respondent allowed the second button to be worn in both patient care and nonpatient care areas.

As the judge and the majority correctly recognize, the Respondent's prohibition on the wearing of the "RNs Demand Safe Staffing" button is presumptively invalid because it extended beyond immediate patient care areas. Contrary to the majority, however, the judge properly concluded that the Respondent failed to rebut the presumption by showing "special circumstances" justifying the ban.

II.

The Board's decision in *Mt. Clemens General Hospital*, 335 NLRB 48 (2001), enfd. 328 F.3d 837 (6th Cir. 2003), cited by the judge, is directly on point. The union button at issue there depicted the letters "FOT" with a line drawn through the center of the button, symbolizing nurses' opposition to the hospital's forced overtime policy. 335 NLRB at 49. The hospital banned the button from all areas of the hospital, asserting that special circumstances justified the restriction because the button "could interfere with the welfare of patients or operations of the Hospital." Id. at 50. In rejecting the respondent's affirmative defense, the Board relied on the judge's dual findings that the respondent (1) did not prohibit the wearing of any other insignia or union buttons in all areas of the hospital, including patient care areas; and (2) failed to introduce any evidence in support of its claim that the wearing of the "FOT" button in patient care areas of the hospital could cause possible disruptions in patient care. Thus, the Board found that the respondent's asserted reason for banning the button was belied both by the respondent's inconsistent enforcement of its own policy, and the absence of any complaints from patients or their families that the wearing of the "FOT" button was disruptive to patient care or had caused a dialogue to take place with the RNs. Id. at 50–51. Enforcing the Board's order, the Sixth Circuit agreed on both counts, noting that the hospital's attempt to justify the ban "depend[s] primarily on speculation about the possible effect of the buttons," and that the hospital's prior policy of allowing nurses to wear union buttons in all areas of the hospital, including buttons that were arguably more controversial than the one at issue, "undercuts the Hospital's contention that wearing the buttons would interfere with patient care." *Mt. Clemens*, 328 F.3d at 847–848.

The *Mt. Clemens* rationale applies with equal if not greater force here. In lieu of presenting credible evidence to support its affirmative defense, the Respondent offers (1) its bald assertion that the text of the message, "RNs Demand Safe Staffing," is inherently disturbing; and (2) sheer speculation that its nurse managers were concerned that the button might cause unease among patients and their families.[5] The Board rejected these types of speculative and conclusory arguments in *Mt. Clemens*, and it should do so again today. Here, although nurses were seen wearing the "RNs Demand Safe Staffing" buttons by patients and their families, *nothing happened*. There was no evidence of reports from patients or questions from family members. Rather, the nurses wore the button for months without incident. This evidence shows that the buttons did not, in fact, disturb patients, their families, or the tranquil atmosphere of the hospital. By contrast, the majority points to absolutely no evidence in support of its conclusion that the button's message is reasonably likely to disturb patients and their families. Simply put, the majority's assumption as to how patients would "likely" interpret the button's message is unfounded.

Furthermore, just as the respondent in *Mt. Clemens* failed to justify its banning of the "FOT" button, while allowing arguably more controversial buttons, the Re-

February memo and nurses' testimony at the hearing support the judge's finding that the prohibition covered a "wide and unspecified geographic area." Indeed, it is undisputed that at no time prior to or after issuing the February memo did the Respondent either orally or in writing clarify where the "RNs Demand Safe Staffing" button could or could not be worn. Nurses were simply asked to remove the buttons from their uniforms.

[4] The majority's characterization of the button as "new" is thus misleading.

[5] Not a single witness testified in support of the Respondent's special circumstances defense. The only "evidence" offered by the Respondent was what the parties termed an "offer of proof" that, if called to the stand, the Respondent's vice president of human resources, Diana Eickhoff, would testify that certain nurse managers "expressed their concern" to hospital administration about the impact of the "RNs Demand Safe Staffing" button on patients and their families. Even accepting the truth of this "stipulated testimony," as the majority does here, it does nothing to advance the Respondent's special circumstances defense. A single vague suggestion that unspecified "concerns" were raised—absent any facts or additional explanation indicating how the button could reasonably tend to disturb patients or their families—is patently insufficient to establish the Respondent's affirmative defense.

spondent here has offered no satisfactory explanation for banning the "RNs Demand Safe Staffing" button, yet allowing the "Staffing Crisis," "Nursing Shortage," and "Medical Errors" button to be worn without restriction. The Respondent's inconsistent policy completely undermines its assertion that the "RNs Demand Safe Staffing" button would likely disturb patients and their families.[6]

In its attempt to factually distinguish *Mt. Clemens*, the majority suggests that patients and their families would be able to discern that the "FOT" button in *Mt. Clemens* concerned a union-management dispute about the RNs' terms and conditions of employment, while they would interpret the "RNs Demand Safe Staffing" button to express a message concerning patient safety, not employees' employment conditions. Their reasoning is unpersuasive. Whether a button protests "forced overtime" or demands "safe staffing," both messages obviously relate to the impact of inadequate staffing levels on the hours RN's are required to work and the conditions they labor under. It is wholly undiscerning for the majority to suggest otherwise. *Mt. Clemens*, 328 F.3d at 844 fn. 6 ("[T]he buttons do demonstrate support for the Union's position that the Hospital should not employ forced overtime *to resolve staffing shortages*.") (emphasis added). See generally *Waters of Orchard Park*, 341 NLRB 642, 644 (2004) (citing with approval *Misericordia Hospital Medical Center*, 246 NLRB 351 (1979), enfd. 623 F.2d 808 (2d Cir. 1980)), for the proposition that "staffing levels and the number of patients to be cared for" are issues "directly related" to nurses' working conditions, and that for nurses "to complain *about their own staffing levels and the impact on patients*" constitutes protected concerted activity.") (emphasis added); *Community Hospital of Roanoke Valley*, 220 NLRB 217, 222 (1975), enfd. 538 F.2d 607 (4th Cir. 1976) (nurse's public comments about hospital understaffing were protected because they expressed dissatisfaction with nurses' conditions of employment). Anyone viewing the "RNs Demand Safe Staffing" button, which bears the union's insignia, would likely identify it for what it really is: a garden-variety union button, with a slogan related to staffing concerns, worn by RNs during the course of labor negotiations with management over the terms and conditions of their employment.

The majority also mischaracterizes *St. Luke's Hospital*, 314 NLRB 434 (1994). There, the Board, reversing the judge, concluded that the Respondent did not prove special circumstances to justify its ban on nurses' wearing of "United to Fight for our Health Plan" buttons and stickers. Id. at 435. To be clear, the Board rejected the respondent's affirmative defense for the same reason it should today: a failure of proof. *St. Luke's* simply does not support the majority's holding that a respondent may prove its affirmative defense of special circumstances on the basis of nothing more than sheer speculation.

III.

In concluding that the Respondent has shown special circumstances to justify its broad ban, the majority has excused the Respondent's failure to meet its burden of proof.[7] While some Board cases suggest that an em-

[6] The majority's discussion of whether the Respondent "discriminated against buttons implicating Section 7 activities" misses the point entirely. The General Counsel is not asserting a claim of discrimination. Rather, the General Counsel is alleging unlawful interference with the employees' fundamental Section 7 right to wear union insignia at work. The Board has long held that "interference, restraint, and coercion" under Sec. 8(a)(1) does not turn on the employer's motive. *Webasto Sunroofs, Inc.*, 342 NRLB 1222, 1223 (2004) ("The basic test for an 8(a)(1) violation is whether the employer engaged in conduct, regardless of intent, which reasonably tends to interfere with the free exercise of employee rights under the Act" (citing *American Freightways Co.*, 124 NLRB 146, 147 (1959)).

Here, there is no question that the nurses engaged in protected conduct by wearing the "RNs Demand Safe Staffing" button and that the Respondent in fact interfered with that conduct by banning the button. The Respondent's only defense is that its actions were justified by special circumstances—namely, the need to protect patients and their families from a disturbing message. The Respondent's history of allowing a button declaring the message, "Staffing Crisis," "Nursing Shortage," and "Medical Errors," is significant not because it reveals a discriminatory motive for banning the button at issue here, but because it is probative of whether the Respondent established its "special circumstances" defense. Although the Respondent bore the burden of proving that defense, it adduced no evidence that allowing such a controversial button in the past had caused disturbances of any kind. It follows, then, that allowing the comparatively innocuous button at issue here would not reasonably tend to disturb patients or their families.

[7] The majority's reliance on *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979), for the proposition that the Respondent has met its burden to show special circumstances is both misguided and misplaced. Fundamentally, the Court's holding in *Baptist Hospital* was not that the employer established special circumstances to justify its broad ban on union solicitation in both patient and non-patient care areas. Rather, the Court determined, contrary to the Board, that the corridors and sitting rooms adjoining or accessible to patients' rooms and treatment rooms were "immediate patient care areas" where solicitation could be banned. Id. at 782–786. The Court agreed with the Board, however, that solicitation in the cafeteria, gift shop, and lobbies on the first floor of the hospital could not lawfully be prohibited because the hospital failed to meet its burden to show that special circumstances justified the ban as to those areas. Id. at 782, 786. Thus, to the extent that the Court relied on the testimony of hospital personnel in *Baptist Hospital*, it was only with respect to the issue of whether the Board had defined "immediate patient care areas" too narrowly, which the Court determined that it had. That same testimony, however, was deemed "*insufficient* to rebut the Board's presumption that the needs of essential patient care do not require the banning of all solicitation" in non-patient care areas. Id. at 786 (emphasis added). In other words, contrary to the majority's interpretation, the *Baptist Hospital* Court expressly found that the hospital *failed* to meet its burden to show special circumstances to justify its sweeping ban on union solicitation. It also bears repeating (see fn. 5, supra) that contrary to the "extensive evidence" introduced by the

ployer need not wait until patients are actually disturbed before taking action, I cannot agree with the majority's willingness to excuse the Respondent from producing at least some credible evidence to support its special circumstances defense.[8] Because our precedent requires us to hold a party to its burden of proof, and to reject affirmative defenses that are so obviously lacking in evidentiary support, I dissent.

Dated, Washington, D.C. June 30, 2006

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

Stephanie Cottrell, Atty., for the General Counsel.
Bruce Bishoff, Atty., of Bend, Oregon, for the Respondent.
Linda Machia, Atty., of Seattle, Washington, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. The issue in this case is whether Respondent Sacred Heart Medical Center violated Section 8(a)(1) of the Act[1] by requesting removal of a button in any areas where patients or patients' families might see the button. The Washington State Nurses Association (the Union) button stated, "RNs Demand Safe Staffing." Respondent allowed other union buttons to be worn throughout the hospital, including patient care areas.

On the entire record,[2] including briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent is a State of Washington corporation which operates an acute care medical facility in Spokane, Washington. During the 12 months preceding issuance of the complaint, Respondent had gross revenue in excess of $250,000 and it purchased and received goods valued in excess of $5000 directly from suppliers located outside the State of Washington. 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 that it is a health care institution within the meaning of Section 2(14) of the Act.

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

Respondent and the Union have maintained a collective-bargaining relationship for at least the past 20 years. Currently there are about 1200 registered nurses in the bargaining unit. The parties' most recent contract expired in January 2004. During bargaining for a successor contract, one of the issues was nursing staff levels. Bargaining commenced in the fall of 2003. A contract was ratified in May 2004.

The parties stipulated that even though union buttons have been worn by nurses throughout the hospital for many years, Respondent had no occasion to request removal of a button until February 27, 2004, when Respondent requested that the button depicted below the "Safe Staffing" button be removed pursuant to the terms of a February 27, 2004 memorandum.

The February 27, 2004 memorandum referred to in the parties' stipulation is as follows:

It has come to our attention that some staff are wearing buttons which say, "RNs Demand Safe Staffing." We know that staff have worn a variety of buttons over the years for different purposes, and we have no objection to most messages. This message, however, disparages Sacred Heart by giving the impression that we do not have safe staffing. We cannot permit the wearing of these buttons, because patients and family members may fear that the Medical Center is not able to provide adequate care.

It is difficult for us to understand why nurses would wear these pins at the risk of upsetting their patients, particularly since we have come to agreement with [the Union] at the bargaining table on issues related to staffing and how staff will be involved when staffing issues arise.

---

respondent in that case, here, the Respondent offered no probative evidence in support of its affirmative defense.

[8] The concept that the party asserting the special circumstances defense is required to come forward with some credible supporting evidence dates back to the Supreme Court's decision in *Beth Israel Hospital v.* NLRB, 437 U.S. 483, 492 (1978). In that case, the Court aptly noted that the effect of the Board's rules in balancing the rights of employees and employers is "to make particular restrictions on employee solicitation and distribution presumptively lawful or unlawful under § 8(a)(1) *subject to the introduction of evidence sufficient to overcome the presumption*." (emphasis added). See also *St. Luke's Hospital*, 314 NLRB 434, 435 (1994) ("Although the judge found that some patients might be upset by the buttons in the manner suggested by the Respondent, the record is devoid of any evidence to support this supposition."); *Mesa Vista Hospital*, 280 NLRB 298, 299 (1986) ("[T]he Respondent must demonstrate an adverse impact on patient care in those areas of the hospital where the [broad] ban applies.").

[1] Sec. 8(a)(1) of the Act provides that an employer may not interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Sec. 7 to, inter alia, form, join, or assist labor organizations and to bargain collectively through representatives of their own choosing.

[2] The charge was filed by the Union on March 2, 2004. Complaint issued on June 30, 2004. Trial was on October 7, 2004, in Spokane, Washington.

To assure that patients do not become alarmed or fearful about patient care at Sacred Heart, effective immediately, it is our expectation that no staff member will wear these buttons in any area on our campus where they may encounter patients or family members.

Other buttons worn by nurses during this same period of time included the following:

WSNA SHMC RNs REMEMBER

98

The parties also agreed that Respondent's human resources personnel were approached by certain nurse managers expressing their concern as to the impact of the "Safe Staffing" button on patients and their families. Finally, the parties agreed that two witnesses who were not called to testify would testify similarly to witnesses who testified; that is, these witnesses would testify that while they were wearing the "Safe Staffing" button, they were not questioned by patients or patients' families about the button.

There is no evidence that any employee was disciplined for wearing the "Safe Staffing" button. Various employees were, however, asked to remove these buttons following issuance of the memorandum.

III. ANALYSIS

Employees have a protected Section 7 right to make public their concerns about their employment relation, including a right to wear union insignia at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). In health care facilities, however, the right to wear union insignia may be limited to nonpatient care areas. In other words, a health care facility may lawfully prohibit union buttons in immediate patient care areas. *NLRB v. Baptist Hospital*, 442 U.S. 773, 781 (1979). Historically, however, Respondent did not seek to limit union insignia in any areas. Prior to February 27, 2004, Respondent allowed union insignia without regard to the distinction between patient care and nonpatient care areas.

Employer prohibitions on hospital employees' right to wear union buttons in nonpatient care areas, which refer to employment concerns, must be justified by evidence that the rule is "necessary to avoid disruption of health care operations or disturbance of patients." *Mt. Clemens General Hospital*, 335 NLRB 48 (2001), quoting *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 507 (1978) (hospitals or other health care institutions may be justified in imposing more stringent prohibitions in order to afford tranquil environment to patients). Additionally, the union button or insignia must be related to an employment concern and not so disloyal, reckless, or maliciously untrue as to lose the Act's protection. *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000), relying on *NLRB v. Electrical Workers UE Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).

General Counsel and the Charging Party argue that this case is controlled by *Mt. Clemens General Hospital*, supra, arguing that Respondent has failed to show "special circumstances" privileging its prohibition. Additionally, they argue that Respondent's prohibition is presumptively invalid because it includes both immediate patient care areas as well as nonpatient care areas. In agreement, I find that Respondent's prohibition of the "Safe Staffing" button in areas other than those devoted to patient care obviously runs afoul of *Beth Israel Hospital*, supra, and its progeny, unless Respondent's prohibition was "necessary to avoid disruption of health care operations or disturbance of patients"[3] or unless the button is not protected by Section 7 of the Act.[4]

Respondent argues that its prohibition is valid because the "Safe Staffing" button would likely disturb patients, citing *Mesa Vista Hospital*, 280 NLRB 298, 298–299 (1986). However, as Respondent concedes, there is no direct evidence that the "Safe Staffing" button actually disturbed patients. Nevertheless, Respondent relies on the logical import of the language of the "Safe Staffing" button, arguing that one might logically deduce from the language "Nurses Demand Safe Staffing" that Respondent's current staffing levels were deemed "unsafe" by its nurses. Such an assertion, in Respondent's view, would likely disturb patients and patients' families because they would reasonably fear that their medical care was unsafe.

[3] *NLRB v. Baptist Hospital*, supra at 781. At fn. 11, the Court stated, "A hospital may overcome the presumption of showing that solicitation is likely either to disrupt patient care or disturb patients."

[4] *Jefferson Standard*, supra, 346 U.S. at 476–477.

Respondent's argument that its prohibition is privileged by "special circumstances" must fail. First, Respondent bears the burden of proving "special circumstances." See, e.g., *Beth Israel Hospital,* supra, 437 U.S. at 507. There is no evidence that any of Respondent's patients were actually disturbed. In the absence of such evidence, Respondent's "special circumstances" argument is unproven. *St. Luke's Hospital,* 314 NLRB 434, 435 (1994) ("special circumstances" argument fails where record devoid of evidence to support supposition that patients might be upset by "United to Fight for our Health Plan" buttons and stickers); cf. *Pathmark Stores,* 342 NLRB 378, 379 (2004) (absence of evidence that slogan actually threatened customer relationship not fatal where slogan "Don't Cheat About the Meat!" reasonably threatened to create concern among customers about being cheated).

Second, Respondent did not limit its prohibition to patient-care areas. Respondent's rule required that the "Safe Staffing" buttons be removed in areas where patients or patients' families might see the buttons. This wide and unspecified geographic area is an overly broad prohibition on Section 7 activity. See, e.g., *Medical Center of Beaver County,* 266 NLRB 429, 430 (1983), relied upon by the Charging Party.

Third, the language on the "Safe Staffing" button did not disparage Respondent's services nor is it alleged to be disloyal, recklessly made, maliciously false, vulgar or obscene. Rather, the somewhat generalized statement, "RNs Demand Safe Staffing," presents a legitimate workplace concern and is protected by Section 7. See, e.g., *St. Luke's Episcopal-Presbyterian Hospitals,* 331 NLRB 761, 762 (2000) (employer violated Sec. 8(a)(1) and (3) by discharging a nurse who gave a TV interview in which she made a statement about inadequate staffing levels of medical teams in her department).

Finally, Respondent did not historically limit union insignia in patient-care areas. Thus, the "special circumstances" analysis applied in many cases where such patient-care area bans are present, is inapplicable here. See, e.g., *Evergreen Nursing Home,* 198 NLRB 775, 779 (1972) (bright yellow union buttons approximately 2 inches square were lawfully prohibited by the nursing home which had long maintained strict rule limiting all-white uniform adornment to name tag and professional affiliation only).

CONCLUSION OF LAW

By promulgating, maintaining and enforcing a policy prohibiting employees from wearing a union button "in any area on our campus where they may encounter patients or family members," the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

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

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Sacred Heart Medical Center, Spokane, Washington, its officers, agents, successors, and assigns, shall cease and desist from promulgating, maintaining, and enforcing a policy prohibiting employees from wearing a union button "in any area on our campus where they may encounter patients or family members" and in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Take the following affirmative action necessary to effectuate the policies of the Act: Rescind the February 27, 2004 memorandum and, within 14 days after service by the Region, post at its facility in Spokane, Washington copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 19, 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 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 February 27, 2004.

Dated: March 24, 2005

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[5] 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.

[6] 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."

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit our employees from wearing the button which states, "RNs Demand Safe Staffing" "in any area on our campus where they may encounter patients or family members."

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

WE WILL rescind the memorandum of February 27, 2004, which requested that you not wear the button which states "RNs Demand Safe Staffing" in any area where you might encounter patients or family members.

SACRED HEART MEDICAL CENTER