

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

SAN RAMON REGIONAL MEDICAL CENTER, INC. dba
SAN RAMON REGIONAL MEDICAL CENTER

and

Cases 32-CA-19917
32-CA-20129

CALIFORNIA NURSES ASSOCIATION

Virginia L. Jordan, Oakland, California,
for the General Counsel.

James A. Bowles and *Richard S. Zuniga* of *Hill, Farrer
and Burrill*, Los Angeles, California, for Respondent

Jane Lawhon and *Karen Sawislak* of *The Law Offices of
James Eggleston*, Oakland, California for the Charging
Party.

DECISION

Statement of the Case

JAMES M. KENNEDY, Administrative Law Judge: This case was tried in Oakland, California on July 7, 8 and 9, 2003 upon a consolidated complaint issued by the Regional Director for Region 32 of the National Labor Relations Board on November 25, 2002.¹ It is based upon unfair labor practice charges originally filed on August 16,² and September 26 by California Nurses Association (CNA, the Union or the Charging Party). The complaint³ alleges that San Ramon Regional Medical Center, Inc. dba San Ramon Regional Medical Center (Respondent) has engaged in certain violations of §8(a)(3) and (1) of the National Labor Relations Act (the Act).

¹ All dates are 2002 unless otherwise indicated.

² The first charge, Case 32-CA-19917, was amended on March 24, 2003.

³ A third case, 32-CA-20036, was severed by the Regional Director prior to the hearing and the caption has been ordered changed to reflect the removal.

Issues

The consolidated complaint ⁴ alleges that Respondent, in countering a union organizing campaign, engaged in a variety of conduct and maintained a rule which supposedly violated §8(a)(1); it also asserts that Respondent unlawfully discharged registered nurse, Lynda Bredleau, and issued a written warning to RN Janet Thomas, both in violation of §8(a)(3) and (1). Respondent denies the conduct and observes that it took immediate steps to reverse Bredleau's discharge, taking appropriate self-remedying steps sufficient to render a Board order unnecessary.

The General Counsel and Respondent have filed briefs which have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

Respondent admits that at material times it has been a California corporation operating an acute care hospital in San Ramon, California and that during the 12 months prior to the issuance of the complaint its gross revenues exceeded \$250,000. It also admits that during the same period it purchased and received goods and materials valued in excess of \$5000 from sources outside the State of California. Accordingly, it admits, and I find, that it is an employer engaged in commerce within the meaning of §2(2), (5) and (6) of the Act. Furthermore, it admits, and I find, that the Union is, and has been, a labor organization within the meaning of §2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. Introduction

Respondent is a subsidiary of Tenet Healthcare Systems, Inc. Tenet operates about 119 hospitals nationwide, including 10 in its Northern Region (Northern California plus one in Nebraska). It has about 40 others elsewhere in California. Largely a surgical facility, Respondent has 123 acute care beds, 12 beds for intensive care, a family birthing center, a 24-hour emergency room and, in a separate building, an ambulatory surgical center. One of the medical-surgical units is known as the Diablo unit. ⁵

The CNA began organizing Respondent's registered nurses in March or April. On August 15 it filed a petition for a representation election with the Board's Regional Office in Oakland seeking a unit of RN's. That same day Respondent discharged Bredleau, reinstating her a short time later. But, within a week it issued a written warning to registered nurse Janet Thomas. Both of these incidents are alleged as violations of §8(a)(3). The election, which the Union won, was conducted on October 9 and 10 and a certification of representative followed in favor of the Charging Party.

Respondent's managerial staff at the time included Diane Lowder, the CEO; Sue Micheletti, the Chief operating officer (COO); Jason Black, the chief nursing officer; Beth Eichenberger, director of the family birthing center; Satveer Dhaliwal, a shift manager for the Diablo medical surgical unit; and Deanna Holm, the ambulatory care coordinator (for the out-

⁴ The operative complaint has been amended in two principal ways: First, paragraph 6(b)(iii) has been withdrawn; Second, additional allegations have been added concerning conduct by supervisor Deanna Holm.

⁵ So-named as an expression of local geography, including nearby Mt. Diablo.

patient surgical center). All are admitted supervisors with the meaning of §2(11) of the Act. In addition, Kathy Bailey-Stahlnecker served as the acting human resources director during the period in question. Although Respondent did not call her as a witness, she is doubtless a §2(13) agent. In addition, the Diablo unit manager was Pam Ranahan, Dhaliwal's immediate superior.

B. The No-Access Rule

The employee handbook sets forth Respondent's rule concerning the rights and limitations of off-duty employees seeking to enter the facility. It states:

NO-ACCESS POLICY

Off-duty employees may access the Hospital only as expressly authorized by this policy. An off-duty employee is any employee who has completed or not yet commenced his/her assigned shift.

An Off-duty employee is not allowed to enter or re-enter the interior of the Hospital or any Hospital work area, except to visit a patient, receive medical treatment, or to conduct hospital-related business. "Hospital related business" is defined as the pursuit of the employee's normal duties or duties as specifically directed by management.

An off-duty employee may have access to non-working, exterior areas of the Hospital, including exterior building entry and exit areas and parking lots.

Any employee who violates this Policy will be subject to disciplinary action up to and including termination.

The complaint challenges this rule as unlawful on its face. Indeed, counsel for the General Counsel has not presented evidence regarding any instances of application or interpretation. She simply asserts that the rule is overbroad as it bars off-duty employees from the facility, thereby prohibiting employees from communicating with one another regarding matters protected by §7. Respondent observes that this rule meets the test established by the Board in *Tri-County Medical Center*, 222 NLRB 1089 (1976), arguing that the case is still good law.⁶ Certainly its test has not been overturned and has been widely accepted.

The *Tri-County* test is: ". . . [S]uch a rule is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid."

Respondent's rule meets the test. It governs only the hospital's interior and interior working areas; has been widely and clearly disseminated, for it is set forth in the employee handbook which is routinely given to all employees; and is not limited to those off-duty employees who wish to engage in union activity; nor does it bar off-duty employees access to areas outside the building(s) such as parking lots, planted areas, walkways and the like. Indeed, it specifically permits such access. Moreover, the limited exceptions allowed by the rule "visit[ing] a patient, receiv[ing] medical treatment, or [] conduct[ing] hospital-related business" are the types of exceptions which the Board has permitted and which do not render it unlawful through an uneven-handedness theory. See the no-access rule in *Southdown Care Center*, 308 NLRB 225, 232 (1992), which allowed off-duty employees to come to a health care facility if they

⁶ It also observes that Administrative Law Judge Lana H. Parke sustained the validity of the rule at a sister Tenet hospital in a case which the Board adopted in the absence of exceptions. *Garfield Medical Center*, Case 21-CA-34307-1, JD(SF)-81-02 (2002).

“ . . . [have] family or friends in the home [to] visit . . . but [they] must follow visitor rules.” There, Administrative Law Judge Richard Judge Linton held: “On its face, [the home’s] limited-access rule complies with the *Tri-County* conditions.”

5 Undeterred by this case law, counsel for the General Counsel argues that *Tri-County*
has been superseded, citing *Hudson Oxygen Therapy Sales Co.*, 264 NLRB 61 (1982), arguing
that if there are non-work areas inside the plant, such as *Hudson’s* lunchroom, then denying off-
duty employees access to those areas (such as Respondent’s break rooms or cafeterias) is
10 discriminatory. However, the case is easily distinguishable and the Board, subsequent to
Hudson, has never so held. Specifically, the General Counsel relies on what in my opinion is an
inconsequential portion of the facts there. Indeed, the rule itself barred access to the lunchroom
and the administrative law judge, accordingly, noted it as a fact. Even so, that portion of the rule
had nothing to do with the rule’s unlawfulness. The rule had been discriminatory from the
15 outset, having been promulgated as a response to union organizing; moreover, it also barred
off-duty employees from the grounds as well as the interior of the plant. Not only was it was
unlawful on discrimination grounds, being promulgated as an antiunion tactic, it never met the
Tri-County test in the first place. The judge’s reference to the lunchroom in *Hudson* is only a
non-dispositive, somewhat tangential, fact having no bearing on the rule of law to be applied
20 either there or in subsequent cases such as this. Indeed, former Chairman Stephens thought
Hudson should be overruled with regard to the lunchroom issue. *TRW Vidar*, 290 NLRB 6
(1988). Moreover, the Board in *TRW Vidar* held the no-access bar to be unlawful as it was
applied to the company cafeteria only because the rule was enforced discriminatorily. It did not
find the rule itself (“No employee will be allowed access to the plant for personal reasons during
25 off hours,”) to be too broad. So far as I can tell, the Board has never cited *Hudson* as support
for off-duty entry to an interior lunchroom as part of a no access rule which complies with *Tri-
County*, supra.

Therefore, treating Respondent’s no-access rule in the abstract, as one must when
determining whether a rule on its face is lawful or unlawful, I find it to meet the requirements of
Tri-County and is therefore lawful on its face. This judgment in no way reflects upon whether
30 Respondent’s application of the rule might be lawful or unlawful in the future. Deciding that
issue would be speculative and, in any event, is not a part of this complaint. Accordingly, the
portion of the complaint alleging the no-access rule as a §8(a)(1) violation will be dismissed.

C. No-Union Talk Admonishment; Lynda Bredleau's Discharge
and Reinstatement; Mailbox Limitations

Lynda Bredleau is a registered nurse. During the period in question, the spring and summer of 2002, she was assigned to the Diablo medical-surgical unit. Her immediate supervisor was Satveer Dhaliwal. At that time Bredleau had worked for Respondent for about 3-½ years. She was active on behalf of the Union, attending CNA organization meetings and soliciting authorization cards. On May 6, Dhaliwal met with Bredleau in an unoccupied patient room to provide her with a copy of her annual appraisal. Their discussion lasted 20-30 minutes. According to Bredleau, Dhaliwal raised an issue not related to the evaluation. Bredleau says Dhaliwal told her that she knew that Bredleau was one of the nurses involved with CNA, and that nurses weren't allowed to discuss it at the nurses station. Bredleau responded that she thought she could, but Dhaliwal said she wasn't to do it any more. Bredleau said she would abide by the instruction. Dhaliwal agrees that she issued the instruction Bredleau described. Her testimony is set forth in the footnote.⁷

The nurses station is a large desk-like affair near the intersection of the two hallways comprising the T-shaped unit. It is the operations center for the ward. Patient call lights are located there and the charge nurse's (Dhaliwal) desk is there, as well as a work area for the unit secretary. The desk area is only a few feet from the nearest patient room. At the station nurses receive physicians' orders and perform the routine task of "charting", i.e., making entries on each patient's medical chart. At that location the nurses regularly talk to each other about patient care, the job assigned to them, and anything else that they choose to. Common non-work discussion subjects are family matters, weekend pastimes, entertainment, politics and the like. All these discussions, both work-related and nonwork-related, occur both while working at tasks and between tasks. They occur at the nurses station, in the hallways, in the rooms and all over the hospital, wherever nurses choose to socialize while simultaneously working. Talking about non-work matters is tolerated whether in non-work areas such as the break rooms or in working areas. There is not even a rule against it, probably because no such rule would be honored, much less enforced. Indeed, many of these conversations occurred in Dhaliwal's presence since her desk was in the center of things. The only thing Dhaliwal interdicted at the nurses station was "solicitation" from outside vendors and, she said, "Girl Scout cookies." Those she routed to the break room.

As noted, on August 15, the Union filed its election petition. The NLRB's Regional Office immediately notified Respondent, apparently by FAX. Simultaneously the CNA issued a pre-prepared flyer announcing the filing to the employees. These flyers had been given to the union activists, including Bredleau the day before. On the morning of August 15, Bredleau posted one of the flyers on one of the three bulletin boards in the break room and put one in the nurses'

⁷ [Witness DHALI WAL] I initiated the conversation regarding the union giving Lynda the indication that she was not to talk about union activities in what time and in what environment.

Q [By Mr. BOWLES] What words did you use to the best of your recollection? What did you say to Lynda Bredleau?

A I basically advised her that it was not appropriate to talk about union in the work area during work hours.

Q Did you talk about -- was anything said about the nursing station?

A That is considered a work area, yes.

Q Did you discuss that with her?

A Yes.

Q What did you say about that?

A It cannot be done at the nursing station.

mail slots located there. Sometime later, she took a break in that room and observed that more flyers had been posted and some were now on the table. In addition, Bredleau had posted a second union flyer showing pay rates at unionized hospitals, intended as a comparison to rates paid by Respondent. On the bottom of the second flyer she wrote “It is illegal for management to remove to remove this.”

Dhaliwal entered the room while Bredleau sat at the table and observed the postings. She took the comparison flyer off the board saying “This is not true.” The she asked Bredleau if she was the one who had posted the flyer announcing the petition’s filing. Bredleau acknowledged that she had done so. Dhaliwal stayed in the room for a few minutes, then left, taking both flyers with her.

About 3 p.m., department manager Pam Ranahan (Dhaliwal’s superior) told Bredleau she had to go to chief nursing officer Jason Black’s office, saying she would accompany Bredleau. Bredleau, fearful, said she didn’t want to go. Ranahan then spoke by phone to someone and shortly thereafter Black came to the unit. All three went into Ranahan’s office. Black, who did not testify, told Bredleau she was discharged for violating then no-solicitation/no-distribution policy, conflating soliciting and distributing with bulletin board posting. He said she would get her paycheck in the mail and asked her to sign the termination slip. The termination slip reflects his confusion. She refused to sign. He then escorted her out, and as he did so, she told some nearby nurses that she had just been fired, and this was the reason they needed a union.

The following day, Friday, August 16, Black called her. He told her that he believed she had misunderstood the no-solicitation/no-distribution policy. He unconditionally offered her job back, saying he hoped she would return the next day, Saturday, August 17. She did not answer immediately telling him she wished to consider the matter. Later she called back, leaving a message on his answer machine. In her message she accepted and, due to scheduling, never missed a day’s work.

Bredleau’s termination slip had been prepared on August 15 and had been signed by Black. It was placed in her personnel jacket. The slip now contains the handwritten note, “retracted”, initialed “KB” by human resources officer Kathy Bailey-Stahlnecker. The modified slip has never been shown to Bredleau.

Upon her return on Saturday, Ranahan (who like Black, did not testify) called Bredleau to say she was glad Bredleau was back and hoped everything would be okay. During her Sunday shift, chief operating officer Sue Micheletti spoke to Bredleau at the Diablo unit saying she was sorry, that the hospital had made a mistake, and she was glad Bredleau was back, also expressing the hope that everything would be okay. Finally, on Monday, Bredleau was called to CEO Diane Lowder’s office where Lowder repeated the apology, saying the discharge had not been a one-man decision, but the buck stopped with her and she took responsibility.

Bredleau was off on Wednesday and Thursday, August, 20-21. When she returned to work on Friday, August 22, she learned a meeting had been scheduled between the nurses and Micheletti and Black. Ranahan told Bredleau that her attendance would not be necessary as Black had already apologized to her. Bredleau told Ranahan that Black had not apologized and she was going to the meeting. Ranahan said she would talk to Black. A short while later Black came to Bredleau, saying he was sorry if she hadn’t realized he was apologizing on the phone, but that he had apologized. Despite his claim that he had apologized, he didn’t repeat it for her then. She, sensitive to Black’s claim, decided to see if he would do so at the meeting.

Bredleau attended the 2 p.m. meeting. It began by Black publicly apologizing for discharging her. From her perspective, this was the first time he had done so. He then left the meeting, saying he thought they would be more comfortable speaking directly with Micheletti. During the meeting Micheletti asserted that management had not been as approachable as it

should have been, and they were narrowing Ranahan's duties to allow her to spend more time with the Diablo unit nurses. She then went on to explain that in management's view a union wasn't necessary and would not be beneficial. Near the meeting's end she spoke of the no-solicitation/no-distribution rule saying CNA flyers could now be placed on the bulletin boards, but not placed in the mailboxes. Micheletti says she explained the CNA could use the bulletin boards because the hospital had not uniformly enforced its bulletin board rules, but the mailboxes were for hospital-related communications, and for that reason were not to be used for union literature. There is a handbook rule concerning use of the bulletin boards, but there is no written rule concerning mailbox limitations. Historically, mailboxes have often been used for personal messages between and among the staff, and vendors sometimes place solicitations and free samples in the slots.

D. Beth Eichenberger; Alleged Prohibitions Concerning Reading Union Literature and/or Discussing the Union at Work

Beth Eichenberger, during this period, was the director of the Family Birthing Center. She had held that position for about 2-½ years. The birthing center is Respondent's obstetrics unit and provides a labor and delivery service, supports a nursery, offers post partum care and mother/baby counseling, including lactation services. The center employs about 50 registered nurses and one licensed vocational nurse who all provide direct care. In addition, there is a small secretarial staff. Eichenberger plays a big role; she is responsible for budget, hiring, firing, staffing, scheduling, and oversight for competency. In addition, she is responsible for maintaining and purchasing equipment.

About August 8 or 9, she had a conversation with RN Cheryl "Cherri" Dobson. She is a specialist in intensive care nursing and has been assigned to the birthing center since her hire in 1999. On one of the days in question she observed a copy of a union pamphlet, G.C.Exh. 15, on the desk of the nurses station. The pamphlet is easily recognizable, if one has perused it. Its cover is bright orange, displaying a large, easily read, title: "CNA POCKET NOTES: NAVIGATING THROUGH AN ANTI UNION CAMPAIGN"; it also contains the drawn figure of a professional woman holding a clipboard. At the bottom is the California Nurses Association logo, followed by its slogan "A Voice for Nurses, A Vision for Healthcare." The back cover shows an even larger CNA logo, together with the Union's internet web page address. One would not mistake it for a Tenet document, nor would one think it was anything other than what it was, advice to employees regarding what to expect from an employer mounting opposition to the Union's organizing.

Attracted by its color, Dobson picked it up to see what it was. As she paged through it, not reading it with any great care, Eichenberger walked past her, but said nothing. However, according to Dobson, a few hours later, Eichenberger called Dobson to her office. Already present was HR manager Bailey-Stahlnecker, whom Dobson did not know, learning her identity afterwards. Dobson testified:

Q (By Ms. JORDAN) And what did Ms. Eichenberger say to you?

A She told me that she had seen me reading union literature, and that she needed to inform me that reading union literature was not allowed, and further that it was unprofessional.

Q And did you say anything in response to her?

A Yes, I requested a clarification from her, in that I asked her, my statement was "I can understand where it might not be acceptable to read this in a public area, but that it was my understanding that I was allowed to read this in all non-public areas such as the break room."

Q Did she say anything?

A She said that was not the case. That the hospital was private property and that I was not allowed to read it anywhere on hospital property.

Dobson said she did not think Eichenberger was correct and that she would check with someone at the Labor Board (which she thought was in Sacramento; perhaps a state agency?). Dobson really had no idea what the correct rule was, but knew that staff members read anything they wanted in the break room; that there was no rule against it. Dobson says Eichenberger reiterated her prohibition against reading unapproved material on the company's 'private property.' She also said that the HR representative said nothing during the entire meeting, which lasted about 10 minutes.

Later that afternoon, after consulting someone else, she told Eichenberger that she had learned it was okay to read union literature in the break room. Eichenberger said she would follow up on it, but "that was not what she had been told." Dobson never heard the results of any follow-up, if there was one.

Eichenberger's testimony about the incident is a little different. She said she assumed Dobson was on work time when she observed her reading the union literature since Dobson was at the nurses station which is a work area. Nurses on breaks are not expected to be at the nursing station. She did not ask if Dobson was working or on her break. Yet she conceded she would have asked that question had Dobson been reading a novel. If the reader had been on break, Eichenberger would have sent her to the break room.

With respect to the meeting in her office, Eichenberger denies barring Dobson from reading union literature on hospital property, but did testify: "I had seen her reading materials, union literature, at the nurses station earlier in the day, and I told her -- we explained to her -- I explained to her that union material was not allowed to be read in working areas and on working time, and that she needed to not do that anymore." Eichenberger explained she was simply enforcing Respondent's no-solicitation/no-distribution rule. She also said that employees could read the literature in the break room. She denied that she had any second conversation with Dobson or telling Dobson she would check into anything Dobson had said. She also said Bailey-Stahlnecker spoke to Dobson about some hospital rules.

Later, Eichenberger testified:

JUDGE KENNEDY: You [. . .] And this [observing Dobson reading the pamphlet] triggered your discussion with [Dobson] in your office with Stahlnecker?

THE WITNESS: Both that she was reading at the desk and that she was reading the union material at a public place.

JUDGE KENNEDY: Let me ask you, if you had seen her reading a novel there, would you have reacted the same way?

THE WITNESS: I would have asked her -- would have acted the same way? Hm. I would have asked her if she was on her break, you know. If she was, she really needed to go to the back into the break room because it is a very limited space at the nurses station, so I would have questioned her if she had been reading a novel or a magazine at the desk, yes.

JUDGE KENNEDY: Okay. You said a second ago that you were concerned that she was reading union material.

THE WITNESS: Right.

JUDGE KENNEDY: [Do] You distinguish between union material and any other kind of literature she might have been reading[?] [I]f she had been reading that novel?

THE WITNESS: I distinguish because of the area where she was reading it. Just because I saw her reading it doesn't mean she wasn't soliciting, it doesn't mean she wasn't discussing it. I mean, if she is reading a book, most likely she is not going to be discussing that at the nurses station. Union literature during that period of time was being kept in drawers and handed out to others and discussed in a public area, in the work area where there patients around, physicians around, and other nurses.

JUDGE KENNEDY: I'm not sure you answered my question, but you think you did -- you would react a little differently because it was union material?

THE WITNESS: Yes, I would, if that is all you are asking.

JUDGE KENNEDY: When you had the meeting in your office with her, and I think you testified
5 and you can correct me if I am wrong, you then went over the hospital policy which was
[. . .] concerned reading, I think you said? Is that right?

(No response.)

JUDGE KENNEDY: And solicitation?

THE WITNESS: Solicitation and posting.

10 JUDGE KENNEDY: Posting?

THE WITNESS: Reading. Okay, I'm sorry, I am confused.

JUDGE KENNEDY: No, she was reading, right?

THE WITNESS: Okay.

JUDGE KENNEDY: I think you testified that -- maybe it was Stahlnecker who reiterated the
15 hospital policy.

THE WITNESS: She reiterated the policy.

JUDGE KENNEDY: I see, and what did she say again?

THE WITNESS: Review the policy about -- Oh God, reading union literature, you know, having
union literature in a working area on working time.

20 JUDGE KENNEDY: I see.

THE WITNESS: That is, essentially, what the problem was. She was reading at the nurses
station on work time, and she was reading the union literature at the nurses station on what
we assumed to be work time.

JUDGE KENNEDY: I see. What -- did she also say anything about solicitation at that point?
25 Stahlnecker?

THE WITNESS: I believe she reviewed that with her.

JUDGE KENNEDY: The solicitation policy?

THE WITNESS: The solicitation of [sic] policy, I believe so, and this -- [indicating pamphlet]

JUDGE KENNEDY: From your point of view it didn't sound to me like Dobson was doing any
30 solicitation, she was simply abusing her time by reading material at that moment?

Solicitation didn't seem to me to be a concern, and I am just wondering whether that was --
what was the concern about solicitation at that point?

THE WITNESS: In that she was at the nurses station where other nurses were working, she
had the union literature there, so she was imposing -- she potentially could be imposing that
35 union literature on working people in a work area. ⁸

40 Thus, while their testimony is similar, the differences are clear. Dobson recalls a bar
against reading union literature on the property; Eichenberger describes it as a reminder
concerning the no-solicitation rule. The problem with Eichenberger's testimony is that she
clearly draws a distinction between reading union literature and other literature because, as she
testified, nurses are less likely to discuss a novel while working than they would union literature.
She regards such discussion as "solicitation" (perhaps because of something Bailey-
Stahlnecker said) and thus a potential violation of the no-solicitation rule. The thrust of her
45 testimony was that she wanted no discussion of the Union at the nurses station or any other
work area, despite the fact that nurses were generally free to discuss any other topic they
wanted while they worked.

50

⁸ Bracketed material indicates judge's correction and/or clarification.

5 About a week later, perhaps August 12, Eichenberger observed RN Ann Wolff as Wolff entered the break room from the locker room. Both, of course, are non-work areas. Wolff, who had worked at Respondent for about 1-½ years, was carrying a copy of the same bright orange CNA pamphlet Dobson had been seen handling. She put it back on the break room table where she had picked it up to read in the rest room. About an hour later, according to Wolff, Eichenberger called Wolff to her office. Eichenberger told her that she 'needed' to tell Wolff that she was not allowed to have or discuss union material on hospital property. Wolff asked "Is this conversation going to go any further than this?" When Eichenberger said no, Wolff responded, "Well, I believe federal law supersedes any hospital policy regarding this." Wolff recalls Eichenberger saying, "That's not what I've been told," reiterating that employees were "not allowed to have or discuss union material anywhere on hospital property."

15 As before, Eichenberger denied any reference to barring union literature from hospital property, again asserting that she was simply reminding Wolff "that union material, again, was not to be read or solicited or posted in working areas during working time." Her admonition is curious, as Wolff had done nothing of the kind. She hadn't been seen reading the document during working time, she hadn't solicited any body concerning anything during working time, nor had she posted any union material in a working area. Yet she agrees that when Wolff questioned her regarding the legality of the limitation being imposed, she responded by saying, "I said well, no, this is a hospital, and this is Tenet, and this is our private property, so that doesn't necessarily apply on private property."

25 Frankly, it seems to me that this is a classic case of retrenchment where backing away from one version of a statement has led Eichenberger to describe another version that also constitutes a misstep. She first denied the property bar described by the mutually corroborative Dobson and Wolff, while simultaneously admitting that she wanted no union talk on the job. Then she conceded that in her conversation with Wolff that she did impose a property bar. In this situation, I must credit both versions, Dobson/Wolff's and Eichenberger's admission that she equates talk with solicitation and that Respondent could bar union material from the hospital. As discussed below, both have consequences under §8(a)(1) of the Act. I do observe, however, that Eichenberger's statements preceded the Bredleau discharge which occurred about 3 days after the admonition to Wolff. They also preceded the bulleting board posting permission extended to union messages which Micheletti announced in her discussion with the Diablo unit RNs on August 22 following Bredleau's discharge/reinstatement.

35 Eichenberger, at the Birthing Center did not appear to be aware of Micheletti's announcement to the Diablo unit permitting the Union's use of the bulletin boards, though depending on timing, Micheletti may not yet have made her announcement. The complaint alleges that on August 19, Eichenberger removed union literature from the birthing center bulletin board while permitting non work-related postings to remain. Eichenberger readily admitted removing a copy of G.C. Exh. 7 from the board sometime in August.⁹ No witness offered a more specific date. Eichenberger says she routinely removes items she deems 'inflammatory', union messages, commercial solicitations not related to the department, off-color jokes and anything not approved by the Hospital.

45 However, she permits staff and patient pictures, postcards and thank-you notes. In addition, there are some commercial messages which she approves, even if the human relations department has not. These include solicitations by for-profit companies offering continuing education classes, at least some of which are aimed at keeping nursing licenses

50 ⁹ The exhibit is a chart of salary ranges for RNs at Bay Area hospitals under CNA contract. It is a copy of the same document which Bredleau posted on the Diablo unit bulletin board on August 15.

current. Yet Micheletti has specifically approved for posting commercial advertising by a skin care products company (Mustela), one of whose products (nursing lotion) is, or has been, sold to patients at the hospital. She explains her approval on the basis that the product is closely connected to the birthing center's mission. She does not explain why the advertisement is posted in a break room for nurses who are not the target market.¹⁰

E. Deanna Holm; No-Distribution Bar; Warning to Janet Thomas

Deanna Holm is the Ambulatory Care Coordinator for the out patient surgery department. She is an admitted supervisor. She has oversight of about 25 RNs and has held the position for 6 of her 13 years with Respondent.

On August 21 or 22, 5 days after the discharge/reinstatement of Bredleau, Holm issued a written counseling form to outpatient surgery nurse Janet Thomas.¹¹ Thomas has worked as a staff nurse for Tenet for about 12 years, the last 8 or 9 at Respondent. This was the first time she had ever been written up. About 3 p.m. on August 20, she was at the department nursing station. At that time, Martha Lindstrom, a pre-op nurse came up to the nursing station with an armload of charts for the next day's patients. Thomas offered a union flyer to her, asking if she wanted to read it. Lindstrom replied that she did but needed to drop the charts off first. Holm, coming out a nearby room, heard the exchange and saw the flyer, which Thomas had put down on the desk for Lindstrom. She told Thomas that she could not distribute the flyer during working hours. Lindstrom, who by then had delivered the charts, said she was about to pick up the flyer and take it to her own office, but Holm took it and walked away.

The following day, Holm wrote the counseling form. There is some inconsequential memory difference regarding the day it was delivered to Thomas, either the same day or August 22. Thomas was called to Holm's office from post-op monitoring duty. When she arrived she found Holm's supervisor, the director of pre-op services, Virginia Field there as well. Field said nothing during the 5 minute session. It began with Holm telling Thomas she was uncomfortable, but Thomas had violated the no-solicitation/no-distribution policy and she was obligated to write Thomas up. Holm then handed the form to Thomas, told her to read it, make any written comment she wished and sign it. The form shows Thomas wrote a comment to the effect that she was unaware of the rule. Holm recalls Thomas's remark and signature were added the next day, August 22; that Thomas had taken the time to compose the comment.

Consistent with her comment, Thomas testified that she was unaware of the policy. She had seen many things on the nursing station desktop and counter which employees picked up and read or handled. These included uniform catalogs, photos of non hospital-sponsored events, a videotape cassette with a name on it, sign-up sheets for dinners given by grateful physicians, and postcards. She, herself, after the terrorist attacks of September 11, 2001, had

¹⁰ Presumably nurses who work in a maternity recovery area would be aware that nursing mothers might need such lotions. A commercial advertisement for the Mustela product would not be of professional interest to them, only the fact that such products are on the market. If Respondent wished to remind its birthing center RNs that such lotions might help a patient, break room advertising for a specific brand would hardly be the optimal way to do it; training classes would be better. More likely, the need for skin cream would be core information known to every birthing center nurse. Advertising by one nursing lotion manufacturer, approved or not, would be entirely superfluous.

¹¹ The form used here permits a range of discipline from "correction" to "discharge," depending on the box being checked. Holm did not check any box, and it is unclear what level of discipline was being levied. Presumably it was the lowest level, "correction," as nothing further occurred.

over a 3 week period, taken orders for a needlepoint American flag which a friend was making and selling. She had placed an example on a white board at the nurses station. Holm knew of the flag offer and permitted it as a patriotic gesture. Finally, Thomas testified without contradiction that on-duty nurses, when not actually caring for a patient, often congregate at the nurses station and discuss any number of topics, often personal or family-related.

Holm’s testimony about the reason for the counseling was somewhat different from the reasons written on the form. The form was conclusionary in its language, saying, “This will confirm that you have been advised that you have violated the hospital’s no-distribution/no-solicitation policy by engaging in a solicitation and distribution of literature during your working time and/or the working time of others in an immediate patient care area. Future violations of this policy may lead to future disciplinary action, up to and including discharge.”

She then described two incidents, only one about which she had personal knowledge, the occasion when Thomas offered Lindstrom the flyer. The second event was that she claimed to have received complaints that Thomas had solicited authorization cards. She says she told Thomas, a few moments after the Lindstrom distribution, that “she could not be distributing literature during work time and in a patient care area.” She never mentioned the latter to Thomas and the first time she told anybody about it seems to have been in the following testimony:

[WITNESS HOLM] There were two different incidents, one which was actually distributing some literature to other nurses in patient care areas during their work time. The other was soliciting signatures for the cards, which was also being done during work time and in patient care areas. Several of the staff -- the one incident I witnessed as I came into the department as far as the giving out, the distributing of the information. The asking the people to sign the cards was done never in my presence, it was deliberately not done in my presence, and I had several staff that came to me and were upset about it because they felt like they were being harassed trying to get [them] to sign these cards that they really didn't want to sign.

Holm says the card solicitation occurred a few days after the Lindstrom matter. Since, according to her information, Thomas had done so during work, it prompted her to take the next step, the counseling write-up. Despite that, she agrees there was no oral discussion about either matter with Thomas, even though the two complainants supposedly asserted that Thomas was misleading them about the nature of the card. She never even asked Thomas for her version of the authorization card complaints. No ‘if, when, where or with whom.’ It was all hearsay (in the colloquial sense). It may not have even constituted solicitation if the only thing that happened was persuasive talk, leading, hopefully, to signing a card after work. Holm’s information was incomplete at the very least. Nonetheless, she testified it was included in the counseling — despite never mentioning the matter to Thomas during their meeting in the office.

Frankly, Holm’s testimony seems to be one part embellishment and one part unreliable hearsay. Accordingly, I discredit her claim that an authorization card incident contributed to the warning. Even if it did contribute, her knowledge about the incident was too vague to support any kind of warning.

F. Fringe Benefit Increases as the Representation Election Approached

The complaint alleges that Respondent timed the announcement of three fringe benefit plan enhancements during the pre-election period. No representation issue is presented as the CNA won the election despite the announcements. Moreover, the complaint asserts, and the General Counsel has reiterated, that the only issue being presented here is the timing of the announced increases, not the grants. Accordingly, I will focus only on the timing, not the fact of

the benefits. Timingwise, the first occurred the day before the election petition was filed; the second and third pronouncements occurred only 7 and 6 days, respectively, before the first polling session on October 9.

5 The facts are straightforward. Specifically, the complaint avers that in August on an
 unknown date (the evidence shows it was August 15),¹² Respondent announced a two-pronged
 wage increase. Earlier, as part of the annual budget prepared for the fiscal year beginning in
 10 June, the RNs were scheduled for a 5% across the board hourly raise to become effective on
 the first pay period in November. In August, however, the day before the petition was filed,
 Respondent announced that the 5% raise was being bumped up to 7%. Simultaneously, in the
 same announcement, it advised the nurses, but not the support staff, that the RNs could pay
 themselves an additional 5% effective in January 2003, by “opting out” of the benefit plans.
 Under this option, for example, if an RN had no need for a health plan (say, due to coverage by
 a spouse’s health plan), she could drop Respondent’s plan and Respondent would pay her
 15 directly the 5% it currently paid the health insurance company. The “opt-out” portion was
 entirely new; it had not been offered before.

Then, according to the complaint, in September (the evidence shows it was October 2),
 Respondent announced a change in the 401(k) retirement plan. Again, there is no dispute.
 This had three prongs. The first increased the Company matching contribution from 3% to 5%.
 20 The second was a dollar for dollar match for any amount contributed by the employee, even if
 the employee did not contribute the entire allowable amount. Third, was a decrease of a new
 employee’s 401(k) eligibility period. Previously, to participate, an employee had to have been
 employed for 1 full year; this change reduced the waiting time to 91 days. The new policy was
 to apply nationally to all Tenet hospitals.

25 The announcement of the third benefit improvement came a day later. This was a
 remarkable due to its generosity. It, too, was system-wide. It was: Beginning in January, 2003,
 Tenet would offer free employee and family PPO health coverage (with a \$500 deductible and
 would simultaneously increase the lifetime benefit to \$1 million without regard to length of
 tenure). Again, there is no dispute regarding the facts.

30 In *Lampi, L.L.C.*, 322 NLRB 502, fn. 4 (1996), the Board reiterated the rule of law to be
 applied in timing cases. There, the Board, quoting itself, said:

35 It is well established that the mere grant of benefits during the critical period is
 not, per se, grounds for setting aside an election. Rather, the critical inquiry is
 whether the benefits were granted for the purpose of influencing the employees’
 vote in the election and were of a type reasonably calculated to have that effect.
NLRB v. Exchange Parts Co., 375 U.S. 405 (1964). As a general rule, an
 employer’s legal duty in deciding whether to grant benefits while a representation
 proceeding is pending is to decide that question precisely as it would if the union
 40 were not on the scene. *R. Dalkin*, supra, quoting *Red Express*, 268 NLRB 1154,
 1155 (1984). In determining whether a grant of benefits is objectionable, the
 Board has drawn the inference that benefits granted during the critical period are
 coercive, but it has allowed the employer to rebut the inference by coming
 forward with an explanation, other than a pending election, for the timing of the
 45 grant or announcement of such benefits. *Uarco Inc.*, 216 NLRB 1, 2 (1974). See,
 e.g., *Singer Co.*, 199 NLRB 1195 (1972).

50 ¹² See G.C.Exh. 10, R.Exhs. 12 and 18, the “7% Great News” announcement and
 connected computer records.

And, although the quote seems to be referring to an election objection case, the Board there made clear that the same test is to be applied in unfair labor practice cases, citing *Holly Farms Corp.*, 311 NLRB 273, 274 (1993), *enfd.* 48 F.3d 1360 (4th Cir. 1994)¹³ and *Speco Corp.*, 298 NLRB 439 fn.2 (1990).

5 Similarly, with respect to the timing of such announcements the Board even more recently said in *Waste Management of Palm Beach*, 329 NLRB 198 (1999):

10 The Board has held that benefits granted during an election campaign are not unlawful if the employer shows that its action was governed by factors other than the pending election. The employer can meet its burden by showing the benefits granted were part of an already established company policy and the employer did not deviate from that policy upon the advent of the union. *American Sunroof Corp.*, 248 NLRB 748, 748–749 (1980), modified on other grounds 667 F.2d 20 (6th Cir. 1981). But, an employer cannot time the announcement of increased
15 benefits to employees in order to dissuade their union support. *Reno Hilton*, 319 NLRB 1154, 1154–1155 (1995); *Capitol EMI Music*, 311 NLRB 997, 1012 (1993), *enfd.* 23 F.3d 399 (4th Cir. 1994).

20 Furthermore, in analyzing the facts themselves to determine whether the announcement was based on factors other than the union organizing/pending election, no presumption may be drawn solely from the timing, but inferences may be drawn from the surrounding circumstances. “The Board makes no presumption that increases granted during an organizing campaign are unlawful, but it will draw an inference of improper motivation and interference with employee free choice from all the evidence and Respondent’s failure to establish a legitimate reason for
25 the timing of the increases.” *Cardinal Home Products*, 338 NLRB No. 154 (2003); *Speco Corp.*, *supra*, n. 2; *Montgomery Ward & Co.*, 288 NLRB 126 (1988). *Cf.*, *Domino of California*, 205 NLRB 1083 (1973).

30 Respondent proffers slightly different explanations for each announcement. With respect to the wage increase, in past years, the budget was put in place in June, but the budgeted wage increase for RNs was not granted until November. For other staff, the increase usually became effective in June at the start of the fiscal year. For the most part, according to the testimony, the same percentage increase granted to the non-nursing staff was usually given to the RNs, but 5 months afterwards. Even so, it is not so clear that the RNs were actually
35 aware of the practice. Usually nurses were notified of their wage increases in October, not by general announcement, but by individualized notification. In June 2002, however, Respondent announced, via a flyer, the 5% wage budgeted increase to the nurses, to be effective in November. This was followed by second announcement on August 14, that the November increase would be 7%, not 5%.

40 Chief operating officer Micheletti, who had been at the Hospital in various capacities since 1990, said she did not remember Respondent ever issuing a June flyer to the RNs before 2002, only that the information became available in June, apparently by word of mouth. She did say that the reason the additional 2% was added in August was the result of complaints by RNs that the 5% raise was insufficient, and that RNs were threatening to leave for higher paying
45 hospitals in the area. She observed that there is strong competition for RNs in the East Bay hospital market. There are several major employers of RNs in the general area served by Respondent. These include Kaiser Permanente (at least 2 hospitals as well as several clinics); Valley Care in both Pleasanton and Livermore; John Muir/Mount Diablo Health System in both

50

¹³ Case heard by the Supreme Court on other issues. 517 U.S. 392 (1996).

Walnut Creek and Concord; and Eden Hospital in Castro Valley. Moreover, there are multiple hospitals within commuting distance to the west in the Berkeley/Oakland /Fremont string of cities, including at least one Tenet sister hospital, Doctors Medical Center in San Pablo and Pinole.

5 Micheletti testified that Respondent regularly participates in salary surveys conducted by the Hospital council of Northern California and also responds to market issues by commissioning wage studies by the Watson & Wyatt market analysis firm. Based on some threats to leave, Lowder commissioned a Watson & Wyatt survey. On August 6, CEO Diane Lowder sent a memo to Dennis Brown, a Tenet regional vice-president, recommending the
10 additional 2% based on a perceived need to retain RNs. The memo was supported by information said to have been prepared by Watson & Wyatt, asserting that the increase would involved a budget increase of \$250,000 for the remainder of the fiscal year. Brown promptly approved the request; there is no evidence regarding what internal discussions he may have had with Lowder or other of Respondent's management team or with any financial people at the
15 corporate level.

Simultaneously, the opt-out option had been being prepared. According to Micheletti, in response to employee requests, an opt-out survey was sent to the entire staff in April or May. The results showed that the primarily interested employees were the RNs, not the support staff.
20 As a result, the program was offered only to the nurses. In late July, HR officer Bailey-Stahlnecker prepared a draft memo ¹⁴ for Brown's approval. She e-mailed it to corporate officials, copying Lowder. Lowder responded on July 31 complimenting Bailey-Stahlnecker for her work. There is nothing in the record showing the next steps taken, the date the proposal was finalized, when it was approved, or by whom; we only know that the program was
25 consolidated for announcement with the 7% wage announcement of August 14. ¹⁵ Micheletti did acknowledge that the opt-out benefit, like the additional 2% wage increase, was not system-wide but directed only to Respondent's RNs. We also know, from R.Exh. 18 (second page), a printscreen record recording the announcement's creation (a file called '7%SRRMC.PUB'), that the record shows the document was last modified at 7:15 p.m. on August 14, well after the
30 normal business day. It was posted and distributed the next day, August 15.

The exhibit shows that the file is located in a computer's "F:" drive, a letter suggesting that it is a drive located on a network server, particularly since the exhibit on its face shows the folder is being accessed through a 'local intranet.' Furthermore the file is located in a sub-folder
35 entitled "Union." It also shows, consistent with Micheletti's testimony, that the file was created by B.J. Yonenaka. Although Yonenaka's title and duties are not shown in the record (she was not called as a witness), one can infer from Micheletti's testimony that she is a clerical. The General Counsel in her brief argues the 'union'-named folder is evidence that items found there reflect the fact that these documents were created in connection to CNA organizing. Given the likelihood that this folder is not local to Ms. Yonenaka's computer (that would more likely be a C,
40 D or E drive), it is probable that the folder was created in order to separate its contents from the contents of other subdirectories. It was not placed in a "salary" or "budget" subdirectory, but a

45

¹⁴ The draft memo, the second page of R.Exh. 14, bears a March 22, 2003 date. That date is inaccurate for it is the result of a date field in the computer-generated document. It reflects the date that particular copy was printed, perhaps as counsel prepared the matter for one of the
50 earlier hearing dates.

¹⁵ Various versions are in the record. G.C.Exh. 10; R.Exhs 12 and 18 (with printscreens).

“union” one. Such a separation would not have been done by a rank-and-file computer user. The folder, and its separation for easy access, would have been created by managers who needed to find its contents easily. Accordingly, I find that documents (files) found in that folder were created to deal with the organizing drive.

5 Even if the wage increase to 7% was made in response to a perceived business need, the “opt-out” additur was not. It was something entirely new and, according to Micheletti, in response to an employee request. And, by its terms, haste was not required. It was not to take effect until January 2003. It could easily have been folded in to the annual “open season” which
10 began in November. Why was it announced mid-August in connection with the pay raise?

10 Clearly the flyer was hastily finished and published. Were its announcements being made deliberately to counter the Union’s probable election petition? Did Respondent expect the petition to come the next day or within the next few days? Perhaps it was simple coincidence that both this flyer and the Union’s reached the RNs on the same day? Or, was it simply
15 Respondent’s early effort to counter the drive by announcing a benefit whether or not an election petition was filed? Whether it was a coincidence is unnecessary to decide. Clearly, the document came from that part of management which was seeking to counter the organization drive. Its presence in the “union” folder, together with its after-hours finalization, leads to the inescapable conclusion that it was anything but routine. It had a specific purpose, to make an
20 announcement that would help blunt the employee-perceived need for union representation.

The 401(k) retirement/investment plan announcement had a little different history. According to Respondent’s current CEO, Gary Sloan, its genesis was partly due to the collective bargaining process between the CNA and Tenet’s Doctors Medical Center in San Pablo. He
25 became Respondent’s CEO in April 2003; prior to that he had been the CEO at Doctors. The CNA collective bargaining contract there had expired on August 31, 2002 and a nurses strike began on November 4. One of the sticking points was a pension plan which the CNA wanted. Sloan had learned sometime in June that Tenet was in the process of improving the extant 401(k) plan on a system-wide basis. He hoped that the plan’s improvements would become
30 known before the contract expired at the end of August.

30 At this point, the election had been scheduled for October 9. With negotiations proceeding in San Pablo, Respondent announced a series of meetings about the 401(k) plan as it then existed. The meetings were scheduled for a hospital conference room on October 1 and 2. Invitations were directed only to the nursing staff, not to support personnel. In the past,
35 401(k) plan issues had been dealt with during the November open period. Here, however, it is clear that the upcoming election was driving these meetings. The CNA’s pension proposals were known to Tenet from its experience at Doctors. It wanted to compare the 401(k) plan to the CNA plan as part of the debate, believing it could persuade the RNs that the Tenet 401(k) plan was a better option. Tenet assigned two individuals, styled as ‘educators,’ from its Texas headquarters to run the meetings, Troy Bond and Debra Andone. Andone appears to have
40 been the leader.

45 RN Janet Thomas and Sue Micheletti are in agreement regarding what occurred at the 2 p.m. meeting on October 2. Thomas was one of about twenty interested nurses; Micheletti as COO was an observer from the administrative staff. During that meeting Andone announced that she had just learned a few minutes before the session that Tenet’s match of contributions to the 401(k) plan would increase in January 1, 2003 from 3% of salary to 5%, that the eligibility period for participation would be reduced from 1 year to 91 days, and that Tenet would match, dollar for dollar an employee’s contribution which was less than 5%.

50

This announcement was immediately followed by a flyer created locally making the same announcement.¹⁶ That document (5%SRRMC.DOC), also located in the same ‘union’ sub-folder in the Company’s network as the salary increase announcement, was finished at 6:37 p.m. on October 2. It, too, was distributed almost immediately, bearing Lowder’s signature.¹⁷ At the same time, however, it appears that Doctors Medical Center CEO Sloan had taken a hand. On October 3, shortly after 4 p.m., a company attorney, James Bowles (trial counsel here) who was providing advice regarding the negotiations, e-mailed a copy of the new 401(k) plan to the CNA’s negotiators there. The following day, at 1:30 p.m. Sloan, in possession of both the flyer and a letter from Tenet’s chairman of the board, Jeffrey C. Barbakow, e-mailed them to his subordinates, directing them to notify all employees of the changes to the 401(k) plan. From Sloan’s perspective, the 401(k) improvements were a counterproposal to be given the CNA at Doctors Medical Center. He had asked for its acceleration to deal with his negotiations. Even so, there is no evidence that the information needed to be simultaneously announced at San Ramon. The election there was only days away. The November open season was only 3 weeks away and was the most likely time for routine announcements about the 401(k) program. Insofar as San Ramon was concerned, nothing about the enhancement, except for election dissuasion, needed to be issued abruptly.

Almost immediately thereafter, a third¹⁸ document was created in that same ‘union’ sub-folder.¹⁹ This file, known as (5%PlusSRRMC.PUB), was a flyer announcing free PPO medical insurance for employees and their families. (It also reiterated the 5% 401(k) match.) The printscreen²⁰ of the folder shows the file to have been last modified on October 3. Micheletti says she first learned of the free PPO benefit on either October 2 or 3. She says because it was such a big benefit, together with its lifetime maximum coverage being increased so dramatically, she had the flyer posted as soon as it was ready that day.

In my view, the totality of the evidence supports the conclusion that all three announcements of the new benefits were timed to influence the electorate. First, the annual raise had never before been publicly announced in June. It had always been provided more privately in October, shortly before the November effective date. When the raise was elevated from 5% to 7%, the announcement was made to match the June announcement, as if that were the norm. Furthermore, by its terms the “opt-out” feature was not even available until January 2003. There was absolutely no need to announce it in August, except to be a double-barreled shot across the CNA’s bow as it proceeded toward filing the election petition. This was followed in early October by the 401(k) enhancement and the free PPO health coverage. Again, a double-barreled shot occurring 7 and 6 days before the election.

The former would not normally have been necessary until the November open season, for as far as Respondent’s employees were concerned it really didn’t matter because the 401(k) change could not be invoked until January, anyway. It may well have been of legitimate utility as a bargaining stance at Doctors Hospital, but it had no immediacy at Respondent except as a

¹⁶ In the record as G.C.Exh. 13, R.Exhs. 16 and 20 (with printscreen).

¹⁷ Tenet later used Respondent’s flyer as a model for the national flyer which it sent out a shortly thereafter.

¹⁸ Actually, there are four documents now in evidence found in that folder relating to the CNA’s efforts at Respondent. The fourth was the sheet used during the October 1 and 2 ‘education’ meetings conducted by Bond and Andone to compare the 401(k) plan with the CNA’s retirement plan. R.Exh. 19. Its computer file (401vsRETIRE.PUB) had been created locally by Yonenaka on September 26.

¹⁹ G.C.Exh. 14; R.Exhs. 15, 21

²⁰ R.Exh. 21 (second page).

carrot to undecided voters in that week’s election. The latter, the free PPO health insurance for the employee and family (and million dollar lifetime coverage) seems almost too good to be true. Respondent really offers no explanation for the timing of this offer. Its appearance seems to have surprised local management as much as anyone. This benefit must have been under study for some time and carefully examined. Presumably it went through some sort of corporate vetting to determine its financial viability. Yet no one testified about its origins. Respondent argues that because it was announced to all 119 Tenet hospitals, the timing could not have been intended to bear on the union activity at San Ramon. Intent, of course is not the test for §8(a)(1) interference.²¹ The test is, as has been said many times, “whether the employer’s conduct may reasonably be seen as tending to interfere with the free exercise of employee rights under the Act.” See, *American Freightways Co.*, 124 NLRB 146, 147 (1959); *El Rancho Market*, 235 NLRB 468, 471 (1978); *Williamhouse of California*, 317 NLRB 699, 713 (1995). Moreover, the Board has held that benefit grants to large groups may only mean that the interference is aimed at everyone, not just the unit sought by the union. See *Holly Farms Corp.*, 311 NLRB 273 (1993) where it said:

The Respondents also contend that the fact that the increase was given to all 11,000 Holly Farms employees who were not represented by bargaining units indicates the lack of an intent to coerce or discriminate against the 201 members of the live haul unit. Although we recognize that the unit employees comprised only a small percentage of the total number of employees receiving the increase, this factor does not persuade us, under the totality of the circumstances here, that the wage increase was not unlawful. In addition to the factors discussed above, we note that at the time the wage increase was given, Holly Farms’ production employees were in the midst of union organizing activities. [footnote omitted] Thus, *the wage increase might have been reasonably calculated to discourage union activity throughout Holly Farms*. See *St. Francis Federation of Nurses v. NLRB*, 729 F.2d 844, 852 (D.C. Cir. 1984), *enfg.* 263 NLRB 834 (1982). (Italics supplied.)

If a wage increase to an entire company can be seen to discourage union activity in a small portion, certainly a deliberately timed announcement can have the same effect. There is really no doubt that Respondent’s announcements here were all accelerated. The question is what was the purpose or effect of doing so? Certainly Respondent has not persuasively shown that the timing was neutral. The August additional 2% wage bump is the only one of the three that has no clear connection to the Union. Even so, we have only Micheletti’s testimony that it was in response to nurses’ threats to leave for better paying jobs. The wage survey run by Watson & Wyatt was not presented, nor was any contract for the survey presented. There is Lowder’s memo to a regional vice-president which asserts the claim. nonetheless, it was adopted seemingly without discussion despite a pricetag of a quarter million dollars. Standing by themselves, those facts certainly create a suspicious circumstance, but are not conclusive. Yet, it must not have been deemed to have been enough, for the increase was simultaneously sweetened with the brand new “opt-out, give yourself an additional 5% increase” offer. What purpose did that serve? Why announce the “opt-out” benefit in the same breath? It could have been held until November for either of the neutrally established period for changes, the annual

²¹ Section 8(a)(1) of the Act provides: “It shall be an unfair labor practice for an employer — to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;. . . .”

wage increase or the open season. Adding the ‘opt-out’ feature in the fashion it did, in my opinion, demonstrates that there was a dissuasive purpose behind the announcement. Finally, the announcement memo is found in the ‘union’ folder on the network server.

5 Yet that circumstance was followed by announcements connected to the Union’s presence by even more concrete facts in October. All of the memos dealing with both those announcements came from the same ‘union’ computer folder. But the 401(k) flyer was preceded by the October 2 surprise announcement to the nurses themselves at an ‘education’ meeting conducted by headquarters personnel. That doesn’t seem like pure chance to me. It sounds more like theater or a sales stunt, rather than the customary and thoughtful presentation of benefits by a professional HR officer. Notice that it was not one, not two, but three separate tasty enticements. That truth becomes more evident when one realizes the announcement could have been made routinely 3 only weeks later during the open season when such matters were normally discussed.

15 But, as an infomercial salesman would say, there was more! The very next day came the free PPO health insurance. It, too, carried an extra inducement, the \$1 million lifetime benefit. Again, this was a surprise. As disc jockeys often say, “The hits just kept on coming.”

20 Synchronized sales pitches such as these during union organizing are designed for only one thing: to influence the manner in which the employees might choose to vote. It can hardly be said that the timing of these announcements was based on Respondent’s neutral business needs. This was coordinated timing, timing based in each instance on an effort to interfere with the employees’ right to freely exercise their §7 right to choose a representative. It had no other purpose. Respondent’s timing here violated §8(a)(1) as alleged. *Waste Management of Palm Beach*, supra; also, *Brooks Bros.*, 261 NLRB 876, 883 (1982), enf. 714 F.2d 111 (2d Cir. 1982)(table) and *H-P Stores, Inc.*, 197 NLRB 361 (1972). Respondent’s evidence in support of the rebuttal is simply insufficient.

30 III. Additional Analysis and Conclusions

Miscellaneous §8(a)(1) Allegations

35 Above, I have performed an analysis and reached some conclusions regarding the no-access rule and the timing of the fringe benefit announcements of section II. B and F. Here, I scrutinize the §8(a)(1) and (3) allegations, together with the defenses, relating to the facts set forth in section II. C, D and E.

40 The first speech-restrictive incident was supervisor Satveer Dhaliwal, on May 6, telling Lynda Bredleau that she was not permitted to discuss the CNA at the nurses station. The second was a near-identical directive issued by birthing center director Beth Eichenberger to Cherri Dobson that there be no discussion about the Union at the nurses station. She issued a similar directive to RN Ann Wolff in a nonworking area. Eichenberger, and Dhaliwal to a lesser extent, appear to equate talking about the union with either solicitation or distribution. In fact, Eichenberger regards union talk as ‘potential solicitation.’ It seems she also regards reading union publications in the same light, as she would treat union pamphlets differently from a novel. She would bar the first without asking if the employee was on duty, but bar the second only after determining that the employee was on duty.

50 The Supreme Court has said, “The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees.” *NLRB v. Magnavox Company of Tennessee*, 415 U.S. 322, 325 (1974). That observation, of course, is tempered with the requirement that employees are expected to

be performing their work during their work time and should not be distracted from working by matters unrelated to work. Every employer knows that workers talk about all sorts of things while they work. They also know that talking can be distracting, but that it often is not. If a distraction of that nature occurs, it is easily correctible (“Hey, folks, get back to work!”). But a rule prohibiting discussion of certain subject matters while allowing others is problematical. Thus, a rule which bars talking about any subject at all might theoretically pass muster under the Act. But, such a rule would make for a very unpleasant place to work and could not be easily enforced. For that reason, such rules are never seen. Recognizing that reality, the Board has held company rules which prohibit talking about matters protected by §7²² during work while permitting talk about any other subjects violate §8(a)(1) of the Act. *Opryland Hotel*, 323 NLRB 723 (1997), citing *Teksid Aluminum Foundry*, 311 NLRB 711, 713-714 (1993); *Meijer, Inc.*, 318 NLRB 50, 57 (1995); *Jennie-O Foods*, 301 NLRB 305, 316 (1991); *T & T Machine Co.*, 278 NLRB 970 (1986); *Orval Kent Food Co.*, 278 NLRB 402 (1986); *Cerock Wire & Cable Group*, 274 NLRB 888, 897 (1985). Also, *Saginaw Control and Engineering*, 339 NLRB No. 76 (2003). Such a rule does not prevent an employer from telling employees who have stopped work to talk to get back to work.

Furthermore, the Board, just weeks ago, again stated the limits on a no-solicitation rule vis-à-vis talking about a union. The distinction had been clearly set forth by Judge John M. Dyer in two cases in the mid 1970’s, *International Signal and Control Corp.*, 226 NLRB 661, 665 (1976) and *W. W. Grainger, Inc.*, 229 NLRB 161 (1977), enfd. 582 F.2d 1118 (7th Cir. 1978). But, in *Wal-Mart Stores, Inc.*, 340 NLRB No. 76, sl. op. at 3-4 (Sept. 30, 2003), the Board had occasion to revisit the issue again. There it said:

In the context of a union campaign, “[s]olicitation’ for a union usually means asking someone to join the union by signing his name to an authorization card.” *W.W. Grainger, Inc.*, [supra]. However, an integral part of the solicitation process is the actual presentation of an authorization card to an employee for signature at that time. As defined, solicitation activity prompts an immediate response from the individual or individuals being solicited and therefore presents a greater potential for interference with employer productivity if the individuals involved are supposed to be working. Solicitation is therefore subject to rules limiting it to nonworking time and, in the special circumstances of retail stores, to nonselling areas.

* * *

Once again, our analysis turns on the distinction between union solicitation and other employee activity in support of union organizing. “[S]olicitation’ for a union is not the same thing as talking about a union or a union meeting or whether a union is good or bad.” In recognition of this distinction, the Board found that an employee did not engage in conduct lawfully proscribed by no-solicitation rules when she merely asked a coworker if she had a union authorization card. In another instance, the Board held that an employee’s act of introducing a union representative to a coworker, and her subsequent statement that the coworker would go along with the union, did not constitute solicitation for which the employee could be disciplined under the employer’s no-solicitation rule. (footnotes omitted.)

²² Section 7 of the Act states: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except[ions not relevant here].”

Clearly, Dhaliwal and Eichenberger have confused the distinction between talking about a union and soliciting. In that circumstance, their interdiction violated §8(a)(1) of the Act.

5 One other comment about the definition of solicitation and perhaps the source of their confusion: Respondent's definition found on p. 45 of the handbook reads: ". . . solicitation is the act of seeking, urging, persuading or petitioning somebody to do something. . . ." That definition is inconsistent with Board law and, although not attacked in the complaint, is too broad, for it does bar union talk in the workplace. Were the rule before me, I would strike it.

10 Similarly, Eichenberger operated under a misconception concerning reading material. Not only did she treat union-published reading material differently from pleasure reading, the credible evidence is that she sought to bar such reading material from the entire hospital property. This effectively barred the material from non-work locations such as the break room, the locker room and even, as Wolff must have perceived, from the rest room.

15 Deanna Holm's warning to Janet Thomas concerning the violation of the no-solicitation/no-distribution rule is also a problem. I do think that Thomas can be seen as having distributed the union flyer to Martha Lindstrom. Both Thomas and Lindstrom were on duty at the time. On its face, there is nothing improper about the rule itself. It clearly bars distribution of literature during working time and in working areas. "Distribution" is defined in the handbook as "the act of delivering or passing out written materials." The prohibition itself says hospital employees

25 . . . may never distribute literature [to] any person, including fellow employees, during their working time or the other employee's working time. 'Working time' means the period of time scheduled for the performance of job duties, not including mealtimes, break-times or other periods when an employee is properly not working. The distribution of literature is never permitted in any work area. 'Work areas' do not include cafeteria(s), gift shops, employee lounges, locker rooms, rest rooms, and parking areas.

30 Additionally, Hospital employees may never . . . distribute literature in any immediate patient care area.

And, Thomas did seek to hand the flyer to Lindstrom during a time when both were on duty and both were in a working area. Literally, Thomas was in violation of the no-distribution rule.

35 Respondent's problem here is that Thomas's warning/correction was for violating both the no-distribution portion of the rule and the no-solicitation portion. As noted above, there is no credible evidence that she had ever engaged in solicitation as defined by the Board. Indeed, there is no evidence that she engaged in solicitation under Respondent's excessively broad definition, either. Neither Holm nor any other manager ever observed such a thing. At best, all

40 Holm had was uncorroborated hearsay from two rank-and-file employees who complained she was seeking signatures during work times and in patient care areas; at worst, the incident was made of whole cloth. Holm's proper response in that situation was either not to include it as part of any discipline or to remind Thomas about the rule. But the rule, as noted, bars union talk and is therefore overbroad.

45 The warning treats the two incidents as if they were one. Assuming that Thomas could appropriately receive an admonishment of some kind for the distribution to Lindstrom, it does not follow that the same admonishment can be aimed at conduct not demonstrated to be true. Holm never investigated the claimed incident in any way. She did not get statements from the

50 two nurses who supposedly complained; she doesn't seem to know when it occurred (or even where, given her lack of specificity); she did not ask anyone else about it (perhaps a charge nurse or other supervisor familiar with the time and place; nor did she attempt to discuss it with

Thomas at all, much less in a manner which could have been noncoercive. Even so, she concluded that her earlier discussion with Thomas had gone unheeded and just tossed the two episodes together in a collective warning.

5 It can be argued, I suppose, that the write-up did not constitute discipline and therefore did not violate the Act. And, it is true that the rebuke was very minor. Yet, it is nearly identical to the “coaching” which was found violative in *Wal-Mart*, supra. That case demonstrates even minor reproaches such as this may reasonably be seen to interfere with the exercise of an employee’s §7 rights. In any event, Holm’s write-up confused unprotected with unproven
10 conduct and was based in large part on a rule which was too broad.

10 In my opinion, the write-up violated §8(a)(1) of the Act. It should be stricken. *Daylin Inc., Discount Division d/b/a Miller's Discount Dept. Stores*, 198 NLRB 281 (1972), enfd. 496 F.2d 484 (6th Cir. 1974) Furthermore, according to *Daylin*, given the fact that the overbroad solicitation portion of the rule became entangled with the valid no-distribution portion and its
15 concomitant invalidity, it became incumbent upon Respondent to demonstrate that Thomas’s distribution actually interfered with production. In *Daylin*, two employees were discharged for “admittedly soliciting union support during working time.” Because the no-solicitation rule invoked by the employer was overbroad, the Board held that the discharges pursuant to it were unlawful, and announced the following doctrine, saying at 281:

20 The Chairman's [dissenting] view appears to be that, because the employer may in a presumptively valid way limit solicitation, there can be no interference with employees' rights by discharging them for soliciting on work-time. The *correct view, however, is that any prohibition of solicitation, by rule or discipline, interferes with employee rights, and that such interference must--in the absence of a valid rule--be supported by an affirmative showing of impairment of*
25 *production.* (emphasis supplied).²³

30 The same analysis holds true for this intertwined distribution rule. No showing has been made that Thomas’s offering Lindstrom the flyer caused any disruption in production. Lindstrom wouldn’t even accept it until after she had delivered the files she was carrying. Had Holm not injected herself into the conversation and taken the flyer, Lindstrom would simply have carried it back with her down the hall to read when she could. Moreover, Respondent has made no showing that Thomas’s own production suffered. Since Holm never had, nor even sought,
35 evidence that Thomas had solicited authorization cards, the definition of solicitation was too broad, and there is no showing that anyone’s production was impaired, I find that the admonition Holm gave Thomas violated §8(a)(1) of the Act. The only conclusion can be that Respondent, driven by Company policy (witness department director Field’s silent presence), was too eager to issue the warning, knowing that it would have a salutary effect upon others. In addition, since
40 the write-up tended to weaken Thomas’s tenure as an employee, the admonition violated §8(a)(3) of the Act. *Victoria Partners*, 328 NLRB 54 (1998).

45 Insofar as removing CNA flyers from the bulletin boards in both the Diablo unit (Dhaliwal) and the birthing center (Eichenberger) bulletin boards is concerned, the testimony and evidence was that personal items such as photographs, postcards and thank you notes as well as some commercial advertising appeared on the bulletin boards. Although Respondent’s bulletin board rule seems to limit postings to Hospital designated documents, any other document supposedly required the approval of the human resources department. Yet even Chief Operation Officer

50 ²³ Accord, *Volkswagen South Atlantic*, 202 NLRB 485, 491 (1973), enfd. mem. 487 F.2d 1398 (4th Cir. 1973); *Pioneer Finishing Corporation*, 247 NLRB 1299 (1980); *Mohawk Industries, Inc.*, 334 NLRB No. 135 (2001).

Sue Micheletti recognized that the policy had not been followed when she announced during the August 22 meeting that union flyers could be posted there. No doubt she had become aware of Board law concerning inconsistent use of such boards and was seeking to defuse the situation. Of course, as the General Counsel notes in her brief, an employer may limit the use of bulletin boards to official company business, but if it permits other types of postings, denial of union-sponsored postings will be regarded as discriminatory. *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983); *Alliance Steel Products*, 340 NLRB No. 65 (Sept. 30, 2003). There is no showing that the HR department ever approved anything that went on these Boards or that it made any effort to enforce the rule. That was left to the ad hoc decisions of the supervisor for each department. Under the rule, they had no authority to grant approval. As a result, Micheletti threw in the towel on the point. Even so, prior to her August 22 announcement, both Dhaliwal and Eichenberger removed union flyers from the Boards. Under the *Honeywell* rule that violated §8(a)(1) of the Act.

Also on August 22, Micheletti, in response to an employee question, said that the mailboxes were for hospital-related communications and could not be used for union business. There was testimony that the mailboxes are commonly used for personal messages between staff members and that outside vendors occasionally placed advertising and free sample in them. There is a photograph in evidence of one such distribution, a promotional gift from Enfamil® (a brand of baby formula), sticking out of a mailbox.

Board law concerning mailbox limitations is the same as for bulletin boards. Specifically, see *Cincinnati Enquirer*, 279 NLRB 1023 (1986); *Fairfax Hospital*, 310 NLRB 299, 305 (1993). Since the mailboxes are used for communications other than hospital-only matters, I find the oral limitation imposed by Micheletti to be in violation of §8(a)(1) as being disparate and promulgated as result of union organizing. It was therefore discriminatory.

Issues Concerning Lynda Bredleau's Discharge and Subsequent Reinstatement

Aside from the discharge allegation concerning Lynda Bredleau, the complaint asserts that supervisor Satveer Dhaliwal coercively interrogated Bredleau about her involvement in posting the two flyers on August 15. Later, of course, Dhaliwal reported the incident to nursing director Jason Black who fired Bredleau for violating the bulletin board rule. That occurred a little over 3 months after Dhaliwal had illegally told Bredleau that she couldn't discuss the union at the nurses station.

On August 15, after observing the Union's flyers on the bulletin board, Dhaliwal removed at least some of them. Then she asked Bredleau, the only nurse in the break room, if she was the one who had posted them. Clearly, Dhaliwal was hunting for a culprit, intending to level discipline on such an individual. When Bredleau acknowledged that she had posted some of them, Dhaliwal had all the information she needed. Taking a few moments, Dhaliwal undoubtedly recalled her May 6 directive regarding discussing the Union and concluded that Bredleau had failed to heed it, even though the two incidents were of a somewhat different character. She promptly bucked the issue up the chain of command to Black.

However, it is Dhaliwal's asking Bredleau if she had put the flyers on the board which is the question here. Did it have a reasonable tendency to interfere with, restrain or coerce an employee in the exercise of rights guaranteed under §7? I conclude that it did. When Dhaliwal saw the flyers, she had choices. The first was to ignore it. The second was to police the board and generally remind employees that union notices did not meet the Company's rules concerning postings; the third was to hunt the offender and visit whatever was company policy upon her. Dhaliwal chose the last, an ad hominem approach. Why that was necessary escapes me. There were many copies of the two flyers on the board, suggesting that more than one hand was involved. Why ask a specific person when the problem needed to be addressed to the staff as a whole? In picking a person to ask, Dhaliwal was sending the message that

there would be consequences for persons making these postings. Her inquiry had no neutral purpose. Indeed, it does not appear that she mentioned to Bredleau that the Company had a rule prohibiting the postings or suggesting that the poster (or the Union) try to get permission from the HR department.²⁴ Looking for someone to punish is a coercive act. That is what
 5 Dhaliwal's question accomplished. It violated §8(a)(1) of the Act as an unlawful interrogation.

And, as the parties basically agree, Dhaliwal's report to nursing director Black resulted in Bredleau's discharge. Respondent argues that it could lawfully discharge an employee who breached the bulletin board policy,²⁵ even if the discharge was not proportional to the infraction. Had the bulletin board policy been even-handedly enforced, I might agree. As discussed above,
 10 it was not. Little more needs to be said. The bulletin board policy was applied discriminatorily and Respondent discharged Bredleau for doing what had been allowed. Her discharge breached §8(a)(3) and (1). *Avondale Industries*, 329 NLRB 1064 (1999); *Marshall Durbin Poultry Co.*, 310 NLRB 68 (1993), *enfd. in pert. part*, 39 F.3d 1312 (5th Cir. 1994); *Brookwood Furniture*, 258 NLRB 208 (1981).
 15

Then it appears Respondent began having second thoughts about the discharge. No doubt several factors were considered. First, the discharge was picked up by the news media, forcing a positive public relations response. Second, the discharge was obviously
 20 disproportional to the nature of the offense. Third, the wrong rules were being applied. And fourth, there was opposition to it within Respondent's own managerial hierarchy. Whether that opposition was based on a sense of fairness or a sense that management had just given the CNA the advantage it was seeking, is not clear. Whatever the reason, Black was ordered to reverse himself. He did so, but grudgingly. His attempt to apologize on the telephone fell short. He only managed to ask Bredleau to work her next scheduled shift while disingenuously saying
 25 that it all happened because she had misunderstood the no-solicitation/no-distribution rule.

Black apparently told his superiors that he had apologized, and for that reason department manager Pam Ranahan believed it was not necessary for Bredleau to attend Micheletti's meeting. When Bredleau told Ranahan that he had not apologized, Ranahan called
 30 Black who spoke to Bredleau again. This time he got closer, but still didn't actually utter words of apology. Instead, he said he "was sorry if she hadn't realized he was apologizing on the phone, but that he had apologized." He simply waltzed around it, still claiming he had done so. However, at the meeting, with Bredleau in attendance, he finally said he was sorry. Then he left.

The termination slip Black prepared is still in Bredleau's personnel jacket. The only notation showing that it was withdrawn is HR officer Bailey-Stahlnecker's handwritten note that it had been "retracted." Bredleau was unaware of the notation.
 35

On this record Respondent argues that it never committed an unfair labor practice with respect to Bredleau's termination, or if it did, by reinstating her, it has been cured. The General
 40 Counsel argues otherwise. Both cite *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978) in support of their respective positions.

In *Passavant*, the Board said that for a repudiation of an unfair labor practice to be effective, it must be timely, unambiguous and to specifically refer to the unlawful conduct.
 45 Moreover, the repudiation must be broadly published and no further violations must have occurred. In *Holly Farms*, *supra*, the Board said the employer must admit wrongdoing. Here, at

²⁴ Had Dhaliwal taken these steps she would still have violated §8(a)(1) because of the disparate application of the rule. However, she would have avoided threatening an employee
 50 with an adverse personnel action, which hunting implies. The two are qualitatively different.

²⁵ Inexplicably, Black thought he was enforcing the no-solicitation/no-distribution rule.

the very least, similar conduct continued to occur. Based on the facts extant here, I conclude that Respondent has not met the requirements set forth there. First, Respondent has never admitted wrongdoing in the sense that it ever admitted that discharging Bredleau interfered with her §7 rights. And, admitting to a ‘mistake’ is not a confession of wrongdoing. At best there was a public apology,²⁶ but it fell short of an admission of misconduct. I do agree that the steps it did take were timely, as the decision was reversed on the following day and Bredleau never lost any work (although that still needs to be confirmed at the compliance stage). Moreover, the discharge record remains in her personnel file. Since it is still there, it becomes a tenure²⁷ matter, for unaware personnel officials may in the future regard it as a previous discipline, subject to heightened punishment in the event of some subsequent incident; indeed, Respondent should have given Bredleau written notice that the discharge had been, in Bailey-Stahlnecker’s words, “retracted” and would not be used against her in any way. As things now stand, the ‘corrective’ action is incomplete. Furthermore, similar conduct continued to occur; the §8(a)(1) and (3) activity did not stop. Only 5 days later, Deanna Holm issued the not dissimilar illegal warning to Janet Thomas, discussed above. And, in October Respondent accelerated two announcements about improved benefits to the nurses simply to influence their choice in the representation election. Accordingly, Respondent’s *Passavant* defense is rejected. See also the court’s discussion in *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 108 (D.C. Cir. 2003): “For an employer’s repudiation to relieve him of liability for unlawful conduct, the repudiation, must be timely, specific, and unambiguous, and -- * * * --the employer must admit wrongdoing and refrain from committing future violations.” (citing cases.)

IV. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As Respondent discriminatorily discharged Lynda Bredleau, it must offer her reinstatement to her previous job, or if that is not available, to a substantially similar job, and make her whole for any loss of earnings and other benefits she may have suffered. Respondent shall take this action without prejudice to Bredleau’s seniority or any other rights or privileges she may have enjoyed. Backpay, if any, shall be computed on a quarterly basis from the date of the discharge to the date Respondent makes a proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Furthermore, Respondent shall be required to expunge from Bredleau’s personnel file any reference to her illegal discharge. Likewise, it shall expunge from Janet Thomas’s personnel file any reference to the discriminatory warning given her in late August. It will also be ordered to advise each of them in writing of the expunction and that the discipline will not be used against them in any way. *Sterling Sugars*, 261 NLRB 472 (1982). Finally, it shall be directed to post a notice to employees advising them of their rights and describing the steps it will take to remedy the unfair labor practices which have been found.

On the above findings of fact, I make the following

²⁶ Micheletti’s nor Lowder’s private apologies met the *Passavant* requirement of a broad publication; nor was either an admission of wrongdoing.

²⁷ Tenure is a specific concern of 8(a)(3) of the Act. That statute states in pertinent part: “It shall be an unfair labor practice for an employer — by discrimination in regard to *hire or tenure* of employment or any term and condition of employment to encourage or discourage union membership in any labor organization. . . .” (Italics supplied)

Conclusions of Law

1. Respondent violated §8(a)(1) of the Act when, acting through Satveer Dhaliwal and Beth Eichenberger, it barred employees from talking about union representation in circumstances where the talking did not interfere with the employees' work.

2. Respondent violated §8(a)(1) of the Act when, acting through Dhaliwal, it coercively interrogated an employee about her union activities.

3. Respondent violated §8(a)(1) of the Act when, acting through Dhaliwal and Eichenberger, it removed California Nurses Association flyers from its bulletin boards.

4. Respondent violated §8(a)(1) of the Act when, acting through Eichenberger, it told employees they could not possess or read union literature on the property during nonwork time and when it treated union reading material more strictly than it did other types of literature.

5. Respondent violated §8(a)(1) of the Act when, acting through Sue Micheletti, it barred employees from using company mailboxes to distribute union literature.

6. Respondent violated §8(a)(1) of the Act when, acting through Deanna Holm, it told an employee she could not distribute union literature in circumstances where it did not interfere with the work of the distributor or the work of the recipient.

7. Respondent violated §8(a)(1) of the Act when in August and October 2002, it timed the announcement of fringe benefit enhancements as a response to union organizing and in order to influence employees' votes in a representation election.

8. Respondent violated §8(a)(3) and (1) of the Act when on August 15, 2002, it discharged its employee Lynda Bredleau.

9. Respondent violated §8(a)(3) and (1) of the Act when on August 21 or 22, 2002, it issued a warning to its employee Janet Thomas.

10. Respondent's "no access policy," set forth in section II. B., above, does not violate the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁸

ORDER

Respondent, San Ramon Regional Medical Center, Inc. dba San Ramon Regional Medical Center, San Ramon, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. barring employees from talking about union representation in circumstances where the talking does not interfere with the employees' work.

b. coercively interrogating employees about their union activities.

c. removing California Nurses Association flyers from its bulletin boards.

²⁸ 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.

d. telling employees they cannot possess union literature on the property or read union literature during nonwork time, or treating union reading material more harshly than other types of literature.

5 e. barring employees from using company mailboxes to distribute union literature.

f. telling employees they cannot distribute union literature in circumstances where the distribution does not interfere with the work of the distributor or the work of the recipient.

10 g. timing announcements of fringe benefit enhancements either in response to union organizing or to influence employees' votes in a representation election.

h. discharging or disciplining employees because of their activities protected by §7 of the Act, including activity on behalf of the California Nurses Association or any other union.

15 i. in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by §7 of the Act.

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

20 a. Within 14 days from the date of this Order, offer Lynda Bredleau immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits she may have suffered as a result of the discrimination against her, in the manner set forth in the Remedy section of the decision, plus interest.

25 b. Within 14 days from the date of this Order, remove from its files any reference to Lynda Bredleau's unlawful discharge and Janet Thomas's unlawful warning, and within 3 days thereafter, notify them in writing that this has been done and that the discharge and warning will not be used against them in any way.

30 c. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

35 d. Within 14 days after service by the Region, post at its medical center in San Ramon, California copies of the attached notice marked "Appendix."²⁹ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, 40 a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 6, 2002.

50 ²⁹ If this Order is enforced by a Judgment of the 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."

e. 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.

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

10

James M. Kennedy
Administrative Law Judge

Dated: November 12, 2003

15

20

25

30

35

40

45

50

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
- ◆ Choose not to engage in any of these protected activities.

WE WILL NOT bar employees from talking about union representation in circumstances where the talking does not interfere with the employees' work.

WE WILL NOT coercively interrogate employees about their union activities.

WE WILL NOT remove **California Nurses Association** flyers from our bulletin boards.

WE WILL NOT tell employees they cannot possess union literature on the property or read union literature during nonwork time and **WE WILL NOT** treat union reading material more strictly than we do other types of literature.

WE WILL NOT bar employees from using company mailboxes to distribute union literature.

WE WILL NOT tell employees they cannot distribute union literature in circumstances where the distribution does not interfere with the work of either the distributor or the recipient.

WE WILL NOT time announcements of fringe benefit improvements either in response to union organizing or to influence employees' votes in a representation election.

WE WILL NOT discharge or discipline employees when their activities are protected by §7 of the Act, including activity on behalf of the **California Nurses Association** or any other union.

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

WE WILL offer **Lynda Bredleau** immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges and **WE WILL** make her whole for any earnings and other benefits she may have lost as a result of our discrimination against her, plus interest.

WE WILL, within 14 days, remove from the our files any reference to **Lynda Bredleau’s unlawful discharge** and **Janet Thomas’s unlawful warning**, and within 3 days thereafter, notify them in writing that we have done so and that the discharge and warning will not be used against them in any way.

**SAN RAMON REGIONAL MEDICAL CENTER, INC. dba
SAN RAMON REGIONAL MEDICAL CENTER**

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board’s Regional Office set forth below. You may also obtain information from the Board’s website: www.nlr.gov.

1301 Clay Street, Federal Building, Room 300N, Oakland, CA 94612-5211

(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE’S COMPLIANCE OFFICER, (510) 637-3270.