Holyoke Visiting Nurses Association *and* Local 285, Service Employees International Union, AFL–CIO, CLC. Cases 1–CA–29743, 1–CA–29965, 1–CA–30187, and 1–CA–30487

April 11, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND BROWNING

On February 4, 1994, Administrative Law Judge Robert W. Leiner issued the attached decision.[1] Counsel for the General Counsel filed exceptions, and the Respondent filed a response in opposition to the General Counsel's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and response and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

The Board has construed the General Counsel's exceptions as a motion to correct an inadvertent error.

In his motion the General Counsel notes that paragraph 3(d) of the judge's conclusions of law provided that the Respondent violated Section 8(a)(1) by threatening to videotape and videotaping its employees who picketed at its Maple Street and Isabella Street locations, that paragraph 1(d) of his recommended Order directed the Respondent to cease and desist therefrom, but that the judge inadvertently omitted any reference thereto in his notice to employees. Accordingly, the General Counsel requests that the notice be amended to include language reflecting paragraph 1(d) of the judge's recommended Order. The General Counsel also requests that the Board modify the judge's recommended Order to reflect that the Respondent has moved from the facilities in which the judge ordered the notice to be posted and that the Respondent should be ordered to post the notice at its facilities located at 330 Whitney Avenue, Holyoke, Massachusetts.

In response, the Respondent contends that the judge did not ''inadvertently omit'' reference to this matter, that the judge's provision in paragraph 1(f) of his recommended Order providing for a broad cease-and-desist order ''has been considered overbroad and unenforceable,'' and that the judge intended to ''capture any and all future coercive action by this statement.'' The Respondent's opposition also argues against a specific reference to videotaping as an unlawful act in that videotaping ''in and of itself IS NOT AN UNLAWFUL ACT,'' that videotaping violations are fact specific, and that videotaping is a ''tremendous POSITIVE, preventive tool for stopping violent acts or property damage.'' Further, the Respondent objects to the General Counsel's reference to the address for posting, contending that the posting has already been accomplished at the new location, so that any requested change is unnecessary.

Having duly considered the matter, the Board grants the General Counsel's motion to correct the judge's inadvertent failure to provide for a paragraph in the notice to correspond to paragraph 1(d) of the judge's recommended Order and to correct the recommended Order to reflect the Respondent's current address.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Holyoke Visiting Nurses Association, Springfield, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for the first sentence in paragraph 2(a).

''(a) Post at its facilities at 330 Whitney Avenue, Holyoke, Massachusetts, copies of the attached notice marked 'Appendix.'''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

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

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

WE WILL NOT direct employees to remove union insignia or buttons or threaten them with discipline for failure thereof where the buttons or insignia are worn in nonpatient care areas.

WE WILL NOT disparately enforce any dress code or rule where the effect thereof is to prevent or prohibit employees from wearing union buttons or insignia in nonpatient care areas.

WE WILL NOT coercively interrogate our employees regarding their intention to engage in or the extent of their engaging in or supporting anticipated strikes or any other concerted protected activities.

[1] The consolidated complaint alleged violations of Sec. 8(a)(1), (3), and (5) of the Act. Prior to the scheduled hearing, the Respondent and the Charging Party entered into a non-Board settlement which disposed of the 8(a)(3) allegations. At the opening of the hearing, the Respondent and the General Counsel entered into a settlement as to the 8(a)(5) allegations which the judge approved over the Charging Party's objections. The judge's decision is limited to various allegations of independent 8(a)(1) conduct. There are no exceptions to the judge's conclusion that the Respondent violated the Act.

WE WILL NOT threaten employees with videotaping, and WE WILL NOT videotape our employees engaged in picketing activities or other concerted protected activities.

WE WILL NOT threaten employees with civil action or other retaliation or discipline for engaging in the protected concerted activities of writing letters to physicians with whom we have business concerning their wages, hours, or other terms or conditions of employment, seeking aid of such physicians, or of the employees' display of union busting signs in their personal vehicles or the display of any other lawful signs relating to protected concerted activities.

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

HOLYOKE VISITING NURSES ASSOCIATION

Gene M. Switzer, Esq., for the General Counsel.
Albert R. Mason, Esq., of Chicopee, Massachusetts, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This consolidated matter was heard in Springfield, Massachusetts, on August 25 and 26, 1993, on General Counsel's consolidated complaints, as amended at the hearing, which allege, in substance[1] that Respondent engaged in conduct in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, (the Act). Specifically, the consolidated complaint in Cases 1–CA–29743 and 1–CA–29965 alleges violation of Section 8(a)(1) of the Act. The complaint in Case 1–CA–30187 alleges violations of Section 8(a)(1), (3), and (5) of the Act. The complaint in Case 1–CA–30487 alleges violation of Section 8(a)(5) of the Act.

Respondent filed timely answers to all of the complaints wherein it admitted the filing and service of the charges, the jurisdictional facts, and the statutory status of certain named Respondent personnel, particularly the supervisory and agency status, within the meaning of Section 2(11) and (13) of the Act, of Elizabeth Stroshine, vice president of operations, and Barbara LaFrance and Deborah Patulak, nursing supervisors.

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

On the entire record, including the briefs, and on my most particular observation of the demeanor of the witnesses as they testified, comparing their testimony to the testimony of adverse witnesses, the interest of the witnesses, and the credibility of the testimony in light of surrounding circumstances, I make the following

FINDINGS OF FACT

I. RESPONDENT AS STATUTORY EMPLOYER

The complaints allege, Respondent admits, and I find that, at all material times, Respondent has been and is a corporation with an office and place of business in Holyoke, Massachusetts, where it is engaged in the business of providing health care services to patients in their homes; that in conducting its business operations, it annually derives gross revenues in excess of $100,000, and that it annually purchases and receives at its Holyoke facility goods valued in excess of $5,000 directly from points located outside the Commonwealth of Massachusetts. Respondent's answers fail to admit or deny the conclusion that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; rather it avers only that that allegation constitutes a question of law to be determined. Without deciding whether Respondent's answer constitutes an admission within Section 102.20 of the Rules and Regulations of the National Labor Relations Board, it is clear that Respondent, by its admissions of annual commercial transactions, has admitted the basis on which the Board exercises jurisdiction over visiting nursing associations. In *East Oakland Community Health Alliance*, 218 NLRB 1270, 1271 (1975), the Board established that it would exercise its discretionary jurisdiction where the visiting nurses association has annual gross revenues of not less than $100,000, the admitted gross annual revenue derived by Respondent. Respondent further admits that it annually received at Holyoke goods valued in excess of $5,000 directly from points located outside Massachusetts. Under such circumstances, I find that the Board would exercise jurisdiction over Respondent as an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE UNION AS STATUTORY LABOR ORGANIZATION

The complaints allege, Respondent admits, and I find that at all material times, Local 285, Service Employees International Union, AFL–CIO, CLC has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Disposition of Various Complaint Allegations at the Opening of the Hearing*

At the opening of the hearing, Respondent and General Counsel entered into a settlement agreement, which I approved over the objection of the Charging Party, covering all allegations of the 8(a)(5) violations in the complaints in Cases 1–CA–30187 and 1–CA–30487. Respondent and Charging Party had already entered into a non-Board settle-

[1] The charges and amended charges supporting complaints in the above four consolidated cases were timely filed and served on the Respondent (G.C. Exhs. 1(a) through (d), (j)–(o), (s)–(v), and (bb)–(ee)). Pursuant to these charges, a complaint issued in Case 1–CA–29743 on October 28, 1992, which was subsequently consolidated with Case 1–CA–29965. This consolidated complaint was issued and served on January 21, 1993. On April 28, 1993, a complaint was issued and served in Case 1–CA–30187. Lastly, on June 16, 1993, a complaint was issued and served in Case 1–CA–30487. The order consolidating the four complaints was issued and served on July 28, 1993.

ment relating to the alleged violations of Section 8(a)(3) in the complaint in Case 1–CA–30187, and the General Counsel having no objection thereto, the General Counsel moved to sever the 8(a)(3) allegations. I granted the motion, with the approval of all parties, conditioned on compliance with non-Board settlement agreement.

The substance of the remaining allegations in the several complaints relates to eight allegations of violation of Section 8(a)(1) of the Act: (1) threatening employees with discipline if they did not remove union buttons; (2) disparately enforcing a dress code rule requiring employees to remove union buttons; (3) maintaining and enforcing a rule forbidding employees from wearing union insignia at work; (4) threatening to videotape employees engaged in picketing; (5) videotaping employees engaged in picketing; (6) polling employees concerning their intentions to strike without giving the employees assurances that their answers would not be held against them; (7) threatening employees with civil and disciplinary action for having engaged in the alleged protected concerted activity of sending letters to various doctors concerning terms and conditions of employment under which they were working for Respondent; and (8) threatening employees with disciplinary action for displaying union signs in their car windows stating that Respondent was ''union busting.''

B. *Background*

Respondent administers nursing care in the privacy of the patient's own homes. It functions from two locations in Holyoke, Massachusetts: the main office at the corner of Maple and Essex Streets; and its hospice on Isabella Street, 3 miles away from its Maple Street office. The employees who regularly administer both physical and emotional nursing services are about 25 registered nurses and therapists directly employed by Respondent and 7–10 ''contract'' nurses regularly supplied by a nursing service. See *Holyoke Visiting Nurses Assn. v. NLRB*, 11 F.3d 302 (1st Cir. 1993). All such persons, however, are subject to Respondent's work rules. Nursing services are rendered to terminally ill patients; to patients requiring medical and surgical services; and to patients requiring maternal health care.

Most of Respondent's employees and the contract nurses report to work prior to 8 a.m. They arrive at the Maple Ave. premises as early as 7 a.m. if their work ends at 3:30 p.m. and at 7:30 if their workday ends at 4 p.m. (Tr. 435). Supervisors distribute the day's work assignments around 8 a.m. and sometimes before 8 a.m. (Tr. 434–435). Employees, as well as contract nurses, spend about an hour in the office speaking to supervisors about the day's work assignments until they leave for work. Thus they are ordinarily in the office at least from 8 to 9 a.m. At the end of the workday, they return to the Maple Street office at or after 3 p.m. and spend about an hour and a half in the office finishing up reports and other documentation concerning the patients who they have treated at their homes during the day. Thus, they spend about 25 percent of their worktime at the Maple Street office and about 75 percent at the homes of patients.

C. *The Dress Code*

After consultation with a committee composed of supervisors (Patulak and Cavanaugh) and the employee-nurses, Respondent, in March 1992 (Tr. 331), issued a revised dress code for all professionals, including contract nurses, entitled ''Professional Dress Code'' to apply in the office and in the field. The code (G.C. Exh. 6), following initial paragraphs admonishing professional, employees that their individual dress reflects on Respondent's relationship to patients and their families, as well as to students and the general public, directs that attire be neat, clean, professional and ''appropriate.'' A name tag is to be worn at all times. Styles should reflect safety considerations and the necessities of patient care. It warns that skirts are to be midknee in length and that sleeveless and tight-fitting garments are unacceptable. The code applies both at Isabella Street and Maple Street.

Separate paragraphs are devoted to the subjects of ''Clothing,'' ''color,'' ''Shoes,'' ''Accessories,'' ''Preferred Dress,'' and ''Acceptable Dress.''

The complaint alleges, and Respondent admits, that at all material times (since March 1992), Respondent has maintained the following rule, devoted to ''Clothing,'' which provides:

> Recreational clothing (such as jeans, any garment with rivets, sweat, t-shirts, clothing of denim or with logos or slogans, shorts, culottes, stirrup and stretch pants) are not acceptable.

The code, in the paragraph devoted to ''Color,'' asserts that clothing can be of any color but only dark or pastel shades are acceptable. Prints and stripes should be small and understated. Under the paragraph on ''Shoes,'' after admonishing the necessity for safety, comfort, and style, the code requires that the shoes be closed toe; low or flat heel and always clean and in good repair and without an easily identified logo. Canvas sneakers and sandals are not acceptable. Hosiery must be worn at all times.

Under the paragraph devoted to ''Accessories,'' the code warns that accessories be selected with staff and patient safety in mind. In particular, ''small earrings (up to 1 inch), rings and nondangling bracelets may be worn.

There is no dispute that at the time Respondent's supervisors consulted unit employees with regard to the promulgation of the new code, prior to its issuance in March 1992, and in the committee discussions, there was no discussion regarding the wearing of ''buttons,'' much less union buttons (Tr. 135). Indeed, in a period of 7 years prior to the promulgation of the new code, employees had sometimes worn large (greater than 2 inches in diameter) white stickers with blue lettering, bearing a slogan of four intertwined ''S'' showing the words safety, security, solidarity, and salary with Local 285, SEIU on the sticker. There were other similar large union stickers worn by the nurses. Employees who wore these stickers to work were not asked to remove them.

D. *The Wearing of Buttons and Insignia Following Issuance of the New Code*

The new dress code issued March 1992. As will be noted hereafter, on September 14, 1992, in preparation for and in aid of a showing of solidarity in contract negotiations, 15 to 20 nurses came to work wearing union buttons, but, on pain of discipline up to discharge, were prohibited from wearing them on Respondent's premises.

The evidence, nevertheless, shows that in the period subsequent to the issuance of the new dress code, but both before

and after Respondent's September 14, 1992 prohibition of the wearing of union buttons, the following unit employees wore ''buttons'' of various types at the Maple Avenue office and in the field:

(a) *Kristine Breng*: For the period of approximately May 1992–May 1993 (when she ceased being a Respondent employee), she wore a ''fanny pack'' to work each day. On the fanny pack, she wore a button of about 1 inch (25 millimeters) in diameter (a little smaller than the union button[2] which read: ''AIDS, Nobody's Fault. Everybody's Problem.'' Respondent's fanny pack is a bag on a strap worn around the waist, either in front or in back of the body. Breng wore the fanny pack (with the button) in front of her body and wore it in or around the office during worktime. Whether or not any Respondent supervisor ever saw the AIDS button attached to the fanny pack, no supervisor ever asked her to remove the button. Supervisor Patulak who had daily contact with Breng and saw her wear the fanny pack around the office denied having seen the button affixed to it. As will be noted hereafter, she wore the fanny pack, with the AIDS button attached, on September 14 without Respondent comment (Tr. 128) when Respondent demanded that she remove her union button, worn on her shirt. Employee Briget Foley recalled that Breng wore the AIDS button even after September 14.

(b) *Martha Fisk*: With the text of the new code having been served on unit employees in March 1992, Martha Fisk, starting on or about Labor Day 1992, continually wore her son's U.S. Air Force Academy pin high up on her shirt near the neck area, clearly visible. About the size of a quarter dollar, it bore on its face the roman numerals ''31'' and a ''Grim Reaper'' squadron symbol: a hand holding a sickle (Tr. 293). After the implementation of the code, she wore it not only in the ordinary workday presence of supervisors (Stroshine, LaFrance, and Patulak) but also during several grievance meetings with them. In addition, she regularly wore the pin without incident in the field while administering patient care. No supervisor ever asked her to remove the pin. Employee Briget Foley recalled that Fisk wore her pin every day (Tr. 216-217).

(c) *Patricia Moreno*: testified that after the new code, she wore a pin from time to time and, on one occasion, a representative of management (the supervisor of maternal child health care) complimented her on the pin (Tr. 100). Other employees also wore pins after the implementation of the new code (Tr. 105). Moreno observed that, on September 14, 1992, when supervisors directed Martha Fisk to remove her union button, they did not ask her to remove her Air Force Academy pin. Fisk corroborated this (Tr. 298).

(d) *Glen E. Daviau*: Daviau, a staff nurse and union steward, like other employees, saw Kristine Breng's AIDS button. Both before and after the issuance of the new code, and even after Respondent's September 14, 1992 prohibition against wearing union buttons, Daviau wore his U.S. Air Force pin representing his squadron patch, bearing the logo ''Operation, Helping Hand'' with the squadron identification identified thereunder, ''74th Aerial Medivac Squadron, Desert Storm.'' The pin also displays a red cross on top of an eagle with wings on a gold facing. Neither at grievance meetings nor at any other time did Respondent's representatives ask him to remove the pin which is about three-quarters of an inch to an inch in diameter. Thus, employees, including Briget Foley, saw Kristine Breng, Glen Daviau, and Martha Fisk wear buttons with numbers and letters on them.

E. *Respondent's Supervisors and the Wearing of Buttons*

Supervisor Patricia Cavanaugh, who drafted the new code, testified that she never saw Kristine Breng's AIDS button on her fanny pack and never noticed Martha Fisk's pin. She testified that if she did see the pin, she thought it was a ''nursing pin'' a classification which is ''allowed'' under the code. When asked whether such a provision was actually in the code, she said that she would first have to check. She finally testified, with regard to nursing pins as ''allowed'' under the code, that it ''was my interpretation of the code, yes, it is'' (Tr. 379). She never noticed Daviau's Air Force pin.

Supervisor LaFrance did not testify in this proceeding.

F. *The Maple Street Facility as a Nonpatient Care Area*

As above noted, employees spend about 25 percent of their worktime in the Maple Street office speaking with supervisors, doing paperwork, receiving assignments, and speaking with coworkers. The remaining 75 percent is spent outside the Maple Street office and is devoted to nursing and medical care in the homes of patients. In the afternoon, employees return to the office after seeing their patients and file reports, thus filling out the workday.

In the 2-1/2 years that staff physical therapist Patricia Moreno was employed by Respondent (leaving voluntarily in November 1992), she observed no patient care in the Maple Street facility (Tr. 86).

Patricia Cavanaugh, who, in September 1992, was the director of the hospice facility on Isabella Street, 3 miles away from the Maple Street facility, testified that the Isabella Street facility is devoted to the administration of care for terminally ill patients. Respondent's nurses, among other personnel, deal with the physical and emotional problems of these patients. Some of Respondent's nurses are concerned solely with the hospice patients. Hospice patients do not receive treatment in the hospice (Tr. 328). ''Very occasionally,'' less than once a week, nonhospice patients are treated in the hospice.

Cavanaugh testified that Respondent's staff personnel, administering hospice medical care, visit the homes of the terminally ill where the families of the terminally ill patients are present (Tr. 331–332). Cavanaugh spends roughly a third of her 32-hour workweek at the Maple Street office, with most of her time spent in meetings, She had little contract with the employees thus offering little opportunity to see what they were wearing (Tr. 360).

With regard to Maple Street, Cavanaugh testified that patients are rarely at that facility for treatment, less than once a month (Tr. 368), since there are no examining rooms or treatment rooms there (Tr. 368). Cavanaugh then admitted that in a period of a year, not more than one or two patients would show up at the Maple Street facility for any purpose including changing of a dressing (Tr. 369). Bereaved patients or hospice patients are not treated at Maple Street (Tr. 370),

[2] The union button, further described below, is about 33 millimeters in diameter. A quarter dollar is 24 millimeters in diameter.

but family members do appear in the hospice at least once a month (Tr. 370–371).

On the other hand, Supervisor Patulak at first testified that some nurses had several of their patients come to the Maple Street facility on a weekly basis (Tr. 384–385). The families of these patients (these were not hospice patients or terminally ill patients) did not accompany the patients. On cross-examination, however, Patulak admitted that she had no personal knowledge of any patient coming to the Maple Street facility for nursing or medical care (Tr. 421–422).

Respondent, other than the testimony of Cavanaugh and Patulak, introduced no testimony with regard to medical care administered either at the Maple Street facility or at the hospice.

G. *The Events of September 14, 1992*

The most recent collective-bargaining agreement between the parties expired on October 31, 1992. Negotiations for a successor agreement took place between September 29, 1992, through February 1993 covering 12 sessions (Tr. 24–25). Of approximately 25 unit employees, approximately 15 to 20 of them, on Monday, September 14, 1992, reported for work at or before 8 a.m. wearing round union buttons, about 1.33 inches in diameter, navy blue background with white lettering which read: ''SEIU LOCAL 285 Massachusetts'' (G.C. Exh. 2).

On the Sunday evening before Monday, September 14, at a union meeting, the membership decided to wear union buttons to work the following morning in order to show support for each other, including support for those employees who had been allegedly suspended for writing a letter to Respondent's board of directors.

The next day, Monday, September 14, about 7:15 a.m., two union agents distributed union buttons to unit employees as they entered the Maple Street facility. As early as 7:45 a.m., an employee came out of the facility and told them that Patulak was asking employees to remove the buttons. The union agents entered the building and asked Patulak whether she had asked the employees to remove the buttons. Patulak said that the union buttons were not part of Respondent's dress code so that the employees were not permitted to wear them. When the union agents insisted that it was illegal to require removal of the buttons, Patulak told them only that the buttons were not part of the dress code. The union agent's reference to the existence of Supreme Court decisions allowing employees to wear union buttons did not persuade Patulak (Tr. 41). Patulak did not deny this conversation or the timing thereof. The union agents then left the building.

Shortly thereafter, an employee came out and told them that nurse Briget Foley had been called into Supervisor Barbara LaFrance's office and was being disciplined for wearing her union button. The union agents reentered the building, vainly sought Supervisor LaFrance, but did encounter Briget Foley. When they asked her if she had been disciplined, she told them that LaFrance told her to remove the union button and she did so under protest, failing which, she would have been disciplined (Tr. 43). Supervisor Patulak admitted that LaFrance told Foley that if she didn't remove the button, she would be subject to discipline (Tr. 484).

Similarly, employee Kristine Breng, without contradiction, testified that she wore the union button on her shirt that morning; was speaking to another nurse who wore the same button; and that Supervisor Patulak came to her desk and told them they had to remove their union buttons (Tr. 123). Patulak said it was against the dress code. Both nurses removed their union buttons (Tr. 123).

Nurse Nancy Hosta also wore the button that morning arriving at her desk between 7:45 and 8 o'clock, i.e., before worktime. Supervisor Patulak came to her desk and asked her to remove the button. She removed the button (Tr. 132). At about the same time, nurse Patricia Moreno asked Hosta to accompany her to Barbara LaFrance's office and she did so. In the office, Supervisor Barbara LaFrance asked Moreno to remove the union button. When Moreno asked why, LaFrance told her that it was not part of the dress code. Moreno told her that the dress code was not being enforced and that she would take the union button off under protest. Supervisor LaFrance told her that if she did not remove the union button, she would be considered insubordinate and subject to discipline (Tr. 133).

Staff Nurse Briget Foley also wore the button that morning. While standing near the mail boxes, Supervisors Patulak and LaFrance told her that the union button wasn't part of the dress code. Foley told them that she had a legal right to wear the button and proceeded to her desk. At that point, she had not been told to remove the button. Patulak and LaFrance told her only was that it was not part of the dress code (Tr. 201). Patulak testified that she asked Foley to remove the button before 8 a.m. (Tr. 434) and asked six or seven other employees to remove their buttons (Tr. 435).

Supervisor LaFrance telephoned Foley and asked to see her in her office. Foley asked if she needed to bring a union steward with her and LaFrance said ''possibly'' (Tr. 202). Foley found union steward Glen Daviau who accompanied her to LaFrance's office. As they entered, Supervisor Patulak walked in behind them and closed the office door. LaFrance told Foley that the union button was not part of the dress code and was clearly a ''label.'' LaFrance told her that she had already been told to remove the button and failed to do so and that such conduct constituted insubordination (Tr. 203). Foley asked LaFrance what she meant by that and LaFrance told her that she would '''have to think about it'' (Tr. 203). Foley testified that when LaFrance used the word ''insubordination,'' it meant that she would be disciplined. Indeed an employee had already been fired for, among other reasons, insubordination (Tr. 204).

Foley then asked LaFrance why employees had never been told to remove even larger union stickers that they had previously worn and were now being asked to remove the smaller union buttons (Tr. 206–208). LaFrance answered that the wearing of the union button was not part of the current dress code (Tr. 208). Foley told LaFrance that she would remove the button because she was compelled to (Tr. 209). Foley testified that when she wore larger union stickers in the past, in the office and in the homes of patients and there had not been any disruption of work in wearing them whether in the office or at their place of administering patient care (Tr. 209). As above noted, Foley, as other employees testified thereafter, saw Kristine Breng continued to wear the AIDS button and Glen Daviau continued to wear his squadron pin (Tr. 217).

Union Steward Glen E. Daviau corroborated Foley's testimony on the events in Supervisor LaFrance's office and

added that LaFrance ultimately told her that if she did not remove the union button she would be subject to discipline ''up to and including discharge'' (Tr. 273–274).

Discussion and Conclusions; Union Buttons

By virtue of the amended consolidated complaint (Cases 1–CA–29743; 1–CA–29965), the General Counsel avers that Respondent violated Section 8(a)(1) of the Act by virtue of the following allegations:

> 7. At all material times, Respondent has maintained the following rule:
>
> Recreational clothing (such as jeans, any garment with rivets, sweats, t-shirts, clothing of denim or with logos or slogans, shorts, culottes, stirrup and stretch pants) are not acceptable.
>
> 8. (a) About September 14, 1992, Respondent through [Supervisors] Patulak and LaFrance, enforced the rule described above in paragraph 7 selectively and disparately by telling employees to remove union buttons and threatened them and impliedly threatened them with disciplinary action if they did not remove the buttons.
>
> (b) Since on or about September 14, 1992, Respondent has maintained and enforced a rule which forbids the wearing of Union insignia while employees are at work.

(1) The above facts demonstrate that nothing in the existing dress code, its preparation, derivation, employer-employee discussions, or any pre-September 14, 1992 understanding or practice, remotely related to, or in any way concerned, the wearing of buttons or a restriction on wearing buttons, union buttons or union stickers. In fact, historically, the practice was quite the other way. The code speaks of clothing, even earrings; but nothing on buttons. It is purely Respondent's September 14 ''interpretation'' that brings buttons within the code (Tr. 379). Supervisor Cavanaugh said it was forbidden by the code because, ipse dixit, she said it was. (2) The Maple Street facility, in particular, and, on the instant evidence, the Isabella Street Hospice facility, were both nonpatient care areas. The most that can be said of either facility is that on particularly rare and isolated occasions, a patient or a family would show up at Maple Street or at Isabella Street. Although it may well be that the Isabella Street facility was concerned with the treatment of families as well as terminally ill patients, there presence in the facility was rare even on Supervisor Cavanaugh's testimony. (3) Respondent's September 14, 1992 prohibition on the wearing of union buttons in Respondent's facilities, a specific prohibition relating to the wearing of union buttons in the workplace in nonpatient care areas, also applied to professional employees while traveling and on nonworktime. This prohibition, finding no basis in the preparation, derivation, understanding, practice, or language in the dress code, was merely an ad hoc demonstration of union animus and discrimination against wearing union buttons. Even if, however, the present Respondent prohibition against the wearing of union buttons were in the code it would make no legal difference; it would remain unlawful. And it would make no difference, in addition, notwithstanding that the prohibition might have extended to pins or buttons with or without logos on them (provided there is no particular offensive language on them). Simply put, Respondent, by dress code or otherwise, under the actual facts herein, could not prohibit employees' wearing an inoffensive union button in the workplace, with union identification thereon. The Board has again recently held, in *Ichikoh Mfg.*, 312 NLRB 1022, 1024 (1993):

> It is well settled that the Act protects the right of employees to wear union insignia while at work and, absent ''special circumstances,'' it violates Section 8(a)(1) for an employer to prohibit employees' wearing of such insignia. *Republic Aviation Corp. v. NLRB*, 324 U.S. 794 (1945).

It is not necessary, in finding a violation of Section 8(a)(1) of the Act based upon unlawful employer coercion, for the employer prohibition to have been an ''order.'' Ibid. It is enough that the employer ensures that the union button-wearers would understand themselves to constitute a disfavored group. Ibid.

Moreover, this is not a case concerning the wearing of an employer ''uniform,'' much less where the wearing of the employer's uniform, together with accessories, is embodied in a collective-bargaining agreement which establishes guidelines to ensure a public image of neat, clean, *uniformed* employees, who may wear only particular employer-furnished pins or buttons. *United Parcel Service*, 312 NLRB 596 (1993). Nor is this a case of a high-fashion department store where a large, gaudy union election button might be unnecessarily intrusive in a selling area although a smaller button might be protected. Compare *Davison Paxon Co. v. NLRB*, 462 F.2d 364 (5th Cir. 1972), with *Nordstrom, Inc.*, 264 NLRB 698 (1982), cited in *Raley's Inc.*, 311 NLRB 1245, 1249 (1993). Furthermore, the employee's statutory right to wear the union button, even in a selling area, is given greater weight than the employer's right against unintrusive union buttons and a uniform appearance, even in a case of uninformed employee, in the presence, as in the instant case, of employee support for ''collective-bargaining activity,'' *Pay'N Save Corp. v. NLRB*, 641 F.2d 697, 701 fn. 10 (9th Cir. 1989). In the instant case, the employees are not in uniform and wore the buttons on September 14 to express solidarity with previously suspended employees and with the union preparing for the collective-bargaining negotiations commencing September 29, 1992.

The rule governing the wearing of union buttons in health care institutions, has been stated in *Asociacion Hospital Del Maestro*, 283 NLRB 419, 425 (1987), enfd. 842 F.2d 575 (1st Cir. 1988). That case, particularly relying on *Mesa Vista Hospital*, 280 NLRB 298 (1986), states the rule as follows:

> In health care facilities, rules that contain restrictions of nonworking time solicitation outside immediate patient care areas are preemptively invalid. *NLRB v. Baptist Hospital*, 422 U.S. 773, 781 (1979). The presumption is also applicable to rules restricting the wearing of insignia outside immediate patient care areas. *George J. London Memorial Hospital*, 238 NLRB 704, 708 (1978). . . . An employer may rebut the presumption by demonstrating that the rule is ''necessary to avoid disruption of healthcare operations or disturbance of patients.'' [Citing *Beth Israel Hospital v. NLRB*, 437 U.S.

> 483, 507 (1978)]. The Supreme Court has observed that the Board's presumption ''does no more than place on the hospital the burden of proving, with respect to areas to which it applies, that union solicitation, may adversely affect patients.'' [Emphasis added.]

While the Supreme Court has held that proscriptions of the wearing of union insignia in ''immediate patient care areas'' are not presumptively valid, *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), because of the special need of patients for a tranquil atmosphere, *Eastern Maine Medical Center v. NLRB*, 658 F.2d 1 (1st Cir. 1981), Respondent proscribes wearing the union button when the nurse was at Maple Street or working in the field. That is altogether too broad since Maple Street and Isabella Street facilities are nonpatient care areas. The Court of Appeals for the First Circuit, in *Asociacion Hospital Del Maestro v. NLRB*, 842 F.2d 575 (1st Cir. 1988), observed:[3]

> Yet, if proscriptions apply to areas other than those associated with immediate patient care, the burden is on the hospital to show the insignia worn only in those areas would still disrupt patient care or disturb patients. *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979).

Respondent adduced no such proof, indeed, the proof is quite the other way.

The General Counsel alleges, in complaint paragraph 8(b), without regard to the existence of the dress code, that since September 14, 1992, Respondent has maintained and enforced a rule which forbids the wearing of union insignia while employees are at work. The General Counsel alleges that this violates Section 8(a)(1) of the Act. Having found that Respondent, on September 14, 1992, forbade its unit employees from wearing the union button anywhere at the Maple Street facility, and since I have found the Maple Street facility in particular (as well as the Isabella Street Hospice facility) is a nonpatient care area, Respondent's actions of September 14, 1992, in declaring that the employees were not to wear the union button any place in the facility, violates Section 8(a)(1) of the Act, as alleged. I find that such a declaration, quite apart from the threat of discipline based on insubordination in case of a failure to remove, constitutes a prima facie violation of Section 8(a)(1) of the Act. The employees, prima facie, have a Section 7 right to wear the button in a nonpatient care area. *Republic Aviation Corp. v. NLRB*, 324 U.S. 794 (1945); *Ichikoh Mfg.*, supra; and *Asociacion Hospital Del Maestro v. NLRB*, supra. The burden of proof then shifts to Respondent to prove ''special circumstances'': that the wearing of the button anywhere in its facilities at any time interferes with patient care and necessitates its rule against wearing the button outside of immediate patient care areas. *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979); *Asociacion Hospital Del Maestro v. NLRB*, supra; *Raley's Inc.*, supra at fn. 3.

The closest Respondent comes to proving ''special circumstances'' to escape violation of Section 8(a)(1) relates to two arguments. The first is the extensive testimony of supervisor Deborah Patulak concerning Respondent's nondiscriminatory enforcement of the dress code. Her testimony was that with regard to employees wearing clothing, otherwise unacceptable under the dress code (without regard to union buttons), they could wear such unacceptable clothing if they were not on worktime (compare Tr. 381–384 with Tr. 436–437). Such testimony, however, is no defense. The Board rule, enforced by the courts, is that the crucial problem is not ''work time'' but the existence of a nonpatient care area. For, in particular, employees, under the Act, are privileged on worktime, to wear union insignia while at work. Absent ''special circumstances'' (ordinarily, that the insignia interferes with patient care, production, safety, or discipline), to coerce employees to refrain from exercising that right violates Section 8(a)(1) of the Act. Compare *Asociacion Hospital Del Maestro*, supra, with *Ichikoh Mfg.*, supra. Patulak's testimony offers no defense.

On the same basis, Respondent seems to argue that because other pins worn by employees did not have clear and observable logos or statements on them, Respondent was privileged to enforce its rule preventing the employees from wearing union buttons which contained prominent union identification on them. But it would seem to be a fruitless exercise in the demonstration of the statutory right to show union solidarity (through privileged ''solicitation'' on worktime in nonpatient care areas), for union proponents to wear blank buttons. Employees can wear union buttons identifying the union. I find that Patulak's testimony on evenhanded proscription of slogans offers Respondent no defense, as I already found with regard to its defense that Respondent permitted the employees to wear union buttons on ''nonwork time,'' which, however, is also not supported by the facts.[4]

The second apparent ''special circumstances'' defense is Respondent's argument (Brief, 5–6) in which it distinguishes the visiting nurses situation from a hospital situation. Thus, in a hospital situation, the wearing of irregular or unacceptable items on a uniform can be corrected by virtue of supervisor observation throughout the workday. Since the visiting nurses herein spend 75 percent of their time away from Maple Street or Isabella Street, Respondent argues that their dress and attire cannot be subject to scrutiny as would nurses in a hospital. Thus Respondent urges that patients, their families, and the ''community'' would not want to see union buttons on these nurses. In order to ''police'' Respondent's right to prevent wearing of union buttons, Respondent insists that it had the right to prevent their wearing the union buttons *in the nonpatient care areas* (''while in the office'') in order to prevent the employees from wearing them out in public, in particular, among the patients or their families (R. Br., 5–6).

That argument has neither record nor speculative support. If Respondent feared that the professionals would wear the allegedly disruptive union button while visiting patients or their families (i.e., in patient care areas) outside the office,

[3] In addition, the court observed that in that case, an employee who was unlawfully subject to an over-broad rule, was not told that he could wear the union ribbon in a nonpatient care area, supra at fn. 3.

[4] Patulak admitted that she asked employee Briget Foley to remove the union button before 8 a.m., i.e., before the commencement of worktime (Tr. 435–436). Respondent's actual position is that it can, under its dress code, forbid professionals wearing the union button any place on its premises, at or before worktime; and at any other place when the professionals are at work.

it could simply have issued an instruction[5] limiting such wearing outside the office. It failed to do so. Instead, it prohibited them from wearing it not only in the office, a nonworkplace area, but where observed by the ''community.'' Furthermore, the little evidence contained in the record with regard to the nurses' willingness to remove buttons is that they obeyed Respondent's orders to remove the buttons without any indication of insubordination (e.g., Briget Foley (Tr. 209); Insofar as the evidence of nurses' experience goes, the record is uncontradicted that nurses wore union buttons and stickers in the presence of patients without disrupting the patients or causing any problems (Tr. 209). At bottom, Respondent's September 14 action supporting its prohibition was simply union animus.

I thus conclude, consistent with General Counsel's allegation in paragraph 8(b), supra, that Respondent failed to support its burden of proof to show ''special circumstances'' relieving it of its violation of Section 8(a)(1) of the Act in maintaining an enforcing a ''rule'' prohibiting the wearing of union buttons in nonpatient care areas. Cf. *Holyoke Visiting Nurses Assn.*, 310 NLRB 684 (1993), enfd. 11 F.3d 302 (1st Cir. 1993).

In paragraph 8(a) of the consolidated complaint (Cases 1–CA–299743; 1–CA–29965), the General Counsel alleges a violation of Section 8(a)(1) commencing September 14, 1992, by Respondent's enforcing its dress code rule concerning clothing (complaint par. 7) selectively and disparately by telling employees to remove union buttons and threatening them with disciplinary action if they failed to do so.

The record is uncontradicted that Respondent supervisors observed employees (Martha Fisk's Air Force Academy Pin; Glen Daviau's squadron pin) wearing buttons on their shirts and other apparel and made no reference to those pins. Indeed, there is some evidence that employee Patricia Moreno received a compliment on her pin (Tr. 100–101) from a supervisor after the new code was in operation. Respondent's Sepember 14 direction to employees to remove only the union buttons is unlawfully disparate and constitutes a prima facie violation of Section 8(a)(1).

To the extent Respondent defends on the ground that the supervisors did not ''see'' the pins, I reject that defense. There is no question that the supervisors actually observed the pins. It may well be true that they did not actually ''notice'' the pins, regardless of whether they had logos on them. All of the pins, except Moreno's, had logos on them whether or not they were as bright and forthcoming as the Union logo on the union pin. The reason, I find, that the Respondent's supervisors ''saw'' but did not ''notice'' the other pins is that the wearing of pins, whether nursing school identification, military buttons or otherwise, was commonplace. The military and similar pins (but not the large AIDS pin) may have been unobtrusive and did not have bold lettering on them as did the union pin. It is for that reason that they were not ''noticed,'' though ''seen.'' The supervisors observed them but simply did not record notice of them. The supervisors did take notice of the union pin, with its white lettering on a dark background, not because it was obtrusive but because it was a union pin. The AIDS pin was even larger and apparently as bright.

It was Respondent's object to prevent the wearing of the union pin regardless that it had ''seen,'' though it had not ''notice,'' the other unobtrusive pins. I find that this disparate enforcement against union pins is a sufficient showing of selectivity to support the General Counsel's allegation in the complaint. I thus find in the alternative, that Respondent's disparate enforcement of its dress code violates Section 8(a)(1) of the Act as alleged. In addition, I find that Respondent's threats of discipline if the pins were not removed were further violations of Section 8(a)(1) of the Act as alleged. Although it is not necessary to find the existence of a threat of discipline in order to find unlawful coercion, nevertheless, I find the threats of discipline by Respondent's supervisors if the employee did not remove the union pins in the nonpatient care areas, to constitute a further violation of the Act. *St. Vincent's Hospital*, 265 NLRB 38, 42 (1982).

Respondent does not argue that the instant case is one where the wearing of the union button in any way would cause dissention among Respondent's employees or that the union identification on the button is in any way obscene or inherently provocative, *Southwestern Bell Telephone Co.*, 200 NLRB 667 (1972). Rather, this case involves nonuniformed employees' wearing pins to show solidarity because of the alleged suspension of employees for engaging in the concerted act of writing a letter to the Respondent's board of directors, and in the presence of impending negotiations for a new collective-bargaining agreement (negotiations commencing September 29, 1992) with the contract expiring October 31, 1992. The wearing of the union button in nonpatient care areas in the presence of approaching collective-bargaining negotiations adds greater weight to employees' statutory right as against Respondent's inchoate, generalized dress code. *Pay'N Save Corp. v. NLRB*, 641 F.2d 697, 701 fn. 10 (9th Cir. 1989).

Basically, the problem in generally banning the union button at its nonpatient care Maple Street facility, and elsewhere, all without regard to a credible impact on patient care, in order to present a good public image while delivering patient care, is that Respondent engaged in the very conduct proscribed in *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500–501: ''[it] is not surprising that [the hospital's] assessment of the need for a particular practice might overcompensate its goals and give too little weight to employee organizational interest.'' In *Beth Israel v. NLRB*, supra, the Supreme Court found unlawful the hospital's ban on union solicitation in the hospital cafeteria used by employees, visitors and patients. *Asociacion Hospital del Maestro*, 283 NLRB 419, 427 fn. 11 (1987).[6]

[5] Again, I am not necessarily suggesting that such a limited rule would pass muster in the presence of evidence that larger union stickers were worn in the presence of patients without ill effect on the patients. This evidence, alone, tends to rebut the ''special circumstances'' defense.

[6] In view of my finding that there was disparate dress code enforcement with regard to *union buttons* as opposed to *other buttons and pins*, I need not and do not reach questions concerning proof of Respondent's other nonenforcement and/or disparate enforcement of its dress code: the length of earrings; the brightness, tightness, or revealing nature of clothing; or the wearing of sweat shirts with or without logos by contract employees and Respondent's own employees. In passing, however, it appeared to me that Respondent was on weak ground in having its supervisor admit that the contract nurses, all subject to Respondent's dress code rules, were the object of 20

Continued

H. *Violation of Section 8(a)(1)*

1. Polling employees in anticipation of the strike

As above noted, Respondent's unfair labor practices with regard to the union buttons and their prohibition occurred on September 14, 1992. The existing collective-bargaining agreement was to expire October 31, 1992. In light of that expiration, negotiations for a further agreement commenced September 29 and continued through February 1993 (Tr. 24–25).

On November 12, however, the Union served on Respondent a 10-day strike notice, the strike to commence Monday, November 23, at 8 a.m. (G.C. Exh. 3). The Union stated that it would picket at the Maple Street and Isabella Street entrances to Respondent's facilities.

On Thursday, November 19, Respondent placed in each employee's mailbox a questionnaire (G.C. Exh. 12) concerning the employee's intention to participate in the strike. Respondent's questionnaire observed that it was preparing to meet patient needs in view of the strike and had issued the questionnaire for that purpose. In particular, it asked each employee whether the employee intended to report to work on November 23; whether the employee would not return to work until the strike was resolved; and whether the strike was a 1-day strike. Respondent further stated that, if the employee did not execute and return the questionnaire, it was assuming that the strike would be a continuing strike and that Respondent would plan for striker replacement for patient needs accordingly. The questionnaire also directed that the form be returned to Supervisor Patulak no later than 2 p.m. on Friday, November 20, 1992. The only evidence of record relating to employee response to the questionnaire was employee Nancy Hota's response (G.C. Exh. 12). She said that she was unable to answer the questionnaire because her answer was contingent on the result of the collective-bargaining negotiation of the next day, Friday, November 20.

Late in a collective-bargaining session of the next day, Friday, November 20, the Union served directly on Respondent a letter (G.C. Exh. 4) in which it notified Respondent that the start of the strike was to be postponed from 8 a.m. on Monday, November 23, to 8 a.m. on Tuesday, November 24.

When the Union served its strike-postponing letter on Respondent, Respondent served a further document on the union and its negotiators (G.C. Exh. 5). It stated that the employees' group health insurance would be ''terminated during a strike situation'' and further advised the employees that they could continue coverage by payment of the premium and a 2-percent surcharge under COBRA.

This Respondent November 20 letter to the Union and the employees also stated that:

> You should also be aware of the fact that any and all picketing activities during the strike will be monitored by sight and sound videotape cameras in order to insure the safety and proper conduct of all concerned. Should any individuals be involved in any improper conduct or conduct that could cause liability, then the individuals involved would be subject to immediate disciplinary action and/or liability. The union will also be held liable given any liability issues.

On Monday, November 23, 1992, bargaining unit employees reported for work at 8 a.m., were met at the front door by Respondent's counsel (Mason) and vice president (Stroshine), and were not allowed in the building though they wished to go to work. The lawyer told the employees that patient assignments had already been made and that he considered the employees to be on strike. None of the employees were then carrying picket signs. Later the same day, Respondent nevertheless distributed to all employees a document (R. Exh. 5) in which it repeated that it had made efforts to determine whether the strike was a 1-day strike and that, absent such knowledge, it was preparing for patient care coverage on a continuing basis. It observed that late in the evening at the prior collective-bargaining session (Friday night, November 20), the Union served notice of a change in the date of the strike. Respondent's memorandum to the employees (R. Exh. 5) stated that the late notice was ''Too Late'' and that arrangements had already been made to provide patient care for Monday, November 23. Thereafter, by picket signs and otherwise, the employees, commencing on November 23, complained that Respondent's refusal to permit them to work on November 23 was a ''lockout.'' Respondent's November 23 memorandum (R. Exh. 5) denied that there was a lockout. It further notified the employees that if they intended to work on Tuesday, November 24, they must notify Respondent no later than 2 p.m. of that same day, November 23, 1992, in order to properly make the necessary assignments for Tuesday, November 24. The employees commenced picketing the Maple Street and Isabella Street office entrances on November 23, 24, and 25, 1992, the picket signs stating that the employees had been locked out.

The picketing, peaceful in all respects, without blocking of entrances, jostling, or otherwise irregular was from 8 a.m. to 5 p.m. on each of the above 3 days with Respondent's video cameras visible to the employees. The Union invited the media to observe the picketing and they arrived with video cameras.

The Union had previously engaged in informational picketing on October 1 with about 12 to 15 employees picketing the Maple Street office after work between 4 p.m. and 6 p.m. The picketing was peaceful and without incident. Prior to that October 1, 1992 picketing, there had been picketing 10 years before, on November 29, 1983, which was peaceful and related to a strike. There also was informational picketing in 1981. During the 1981 picketing, a patient (Goldie Scott) was on the picket line seated in a wheelchair belonging to Respondent. The patient carried a sign stating: ''I am a patient, I support the nurses; give them a contract'' (Tr. 480-481; R. Exh. 14).

Respondent's president and chief executive officer since 1977, Phyllis A. Capers, testified that she had been employed by Respondent since 1971, president and chief executive officer since 1977; and that it was her decision, together with

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communications (after March 1992 inauguration of the dress code) between Respondent and the contractor wherein Respondent protested the contract nurses repeatedly wearing clothing violating Respondent's dress code. After none of these objections was there an improvement in their observance of the dress code, much less was there any Respondent threat of discipline against the contractor for the violations compared to Respondent's instantaneous threat of discipline for insubordination in case of failure to remove union buttons.

counsel and other members of the management team (Tr. 472), to use the videotape cameras and tape the picketing. She further testified that she made the decision on the recommendation of counsel, that ''videotaping be considered as a general practice in order to prevent any impropriety during the strike'' (Tr. 478). She conceded that there had been no acts of violence during previous strike and picketing although there was mass picketing in 1983.

Much of Caper's testimony related to the above 1981 incident involving a Respondent patient in a wheel chair carrying a sign in favor of support for the nurses. Caper first testified that she believed that the patient, Goldie Scott, had been the subject of misconduct by the nurses and possible abuse (Tr. 484), but thereafter admitted that it was even possible that the patient had voluntarily joined in support of the Union (Tr. 484). As a general matter, Caper stated her position that employees and the Union cannot request the help of patients in a labor dispute (Tr. 485) because of the patient relationship with the nurses. It was her testimony that her prior experiences, as a Respondent employee, then with various union actions including the strikes or picketing of 1981 and 1983, together with employee claims of union busting and the Union's actions with other employers, all caused her to conclude that videotaping was in order. There is no proof of record that this Union, with this Employer or any other Employer, engaged in violence at any time.[7]

Respondent's counsel testified that he had been involved in a strike in which ''somebody'' was killed on the picket line (Tr. 539). That incident involved a different union and a different employer (Tr. 539-540). Attorney Mason testified that based upon his overall experience, he now makes it a practice of recommending to his clients that they videotape any and all picketing and strike activity (Tr. 540). He admitted that prior to the instant strike activity regarding the Holyoke Visiting Nurse Association, he had no prior experience with this union concerning strike activity (Tr. 543, 544). In the one situation in which he was retained and in which Local 285 engaged in picketing (Nonotuck Resource), his information with regard to alleged union misconduct was only hearsay (Tr. 545).

During the first week that the unit employees returned to work after the strike, Respondent distributed a notice to them (R. Exh. 8) advising them that there would be no disciplinary action taken against any individual who ''acted in a legal and proper manner.''

[7] Respondent adduced in evidence, solely for purposes of judging Caper's state of mind in ordering the videotaping, a newspaper picture and report concerning mass picketing by Local 1199, New England Health Care Employees' Union (R. Exh. 16). Local 1199 thereafter was merged with the instant local of the SEIU, Local 285. The date of the apparent mass picketing by Local 1199 was more than 12 years before the instant picketing and before the merger of the unions. Although another document in evidence (R. Exh. 15) shows members of this Local 285 ''crowding'' into the office of another employer, there is no suggestion that those employees were engaged in any violations in crowding into the office. Moreover, I am confused, in the face of Respondent adducing evidence with regard to other employers' relationships with this local union and other unions' relationships with other employers by Respondent identifying the union herein, not as Local 285, but as Local 404 of the Service Employees International Union (R. Br., p. 11).

2. Polling of the employees concerning the strike

Respondent's questionnaire to the employees (G.C. Exh. 12) of November 19, 1992, inquires into their intent to report to work on the first day of the proposed strike; whether the employees will continue this strike until it is resolved and into the anticipated length of the strike. The failure to return the questionnaire raises the assumption, according to Respondent, that the employee will continue to participate in the strike until the strike is over. This constitutes polling of employees relating to their engaging in a protected, concerted activity.

There is no question that the Respondent, in fact, notified the employees, certainly in the November 29 distribution, that in view of the Union's strike notice of November 12, it was preparing to meet Respondent's patients' needs (G.C. Exh. 12). I further find that it was in response to meeting its patients' needs that Respondent made the inquiries contained in its November 19 questionnaire.

Notwithstanding that such inquiries, so motivated, are entirely lawful, the Board, in *Preterm, Inc.*, 240 NLRB 654, 656 (1979), has explicitly ruled that:

> In order to lessen the inherently coercive effect of the polling of its employees, Respondent had an obligation to explain fully the purpose of the questioning, to assure the employees that no reprisals would be taken against them as a result of their response, and to refrain from otherwise creating a coercive atmosphere. By the failure of its representative to comply with these requirements in questioning a number of employees, Respondent interfered with, restrained and coerced its employees in the exercise of their right to engage in protected, concerted activity.

The Board expressly rejected the contention that the strict safeguards of *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965), be relaxed in cases of interrogation of prospective strikers by health care institutions. The entire rationale of *Johnnie's Poultry* is premised on the establishment of specific safeguards designed to minimize the coercive impact of otherwise unlawful employer interrogation into the concerted protected and union activities of its employees, *Johnnie's Poultry Co.*, supra at 775. As General Counsel's citation of *Preterm, Inc.*, supra, indicates, the interrogation must take place with a simultaneous assurance to those employees interrogated that there will be no reprisal based on their answers. Such assurance was not given here. I am constrained to conclude, as General Counsel argues, that the questionnaire of November 19, 1992, inquiring into the individual employee's intent with regard to engaging in the strike and whether the employee will continue on strike until the strike is resolved, violates Section 8(a)(1) of the Act because of no simultaneous assurance that there would be no reprisal.

In addition, quite apart from the *Johnnie's Poultry* requirement that the participation of the employee must be on a voluntary basis, a further *Johnnie's Poultry* condition (*Johnnie's Poultry*, supra at 775) is that ''the questioning must occur in a context free from employer hostility to union organization.''

Two months before the distribution of this questionnaire, and in the context of the approaching termination of the ex-

isting collective-bargaining agreement, Respondent demonstrated union animus and indeed engaged in unfair labor practices in prohibiting the wearing of union buttons in Respondent's nonpatient care area, supra.

Respondent's written communication to the employees served on them after their return from picketing, in or about the last week of November 1992, in which it advised the employees that there would be no retaliation for their picketing, November 23–25, has no curative effect on the lawfulness of the prior unlawful interrogation of November 19. Not only was the assurance untimely, but it related to the picketing, not Respondent's interrogation. An assurance that there would be no retaliation for picketing ''against anyone who acted in a legal and proper manner . . . [if] we find that misconduct was not involved'' neither relates to nor cannot affect the lawfulness of the earlier interrogation. Moreover, the promise of no retaliation is conditioned on the picketing being conducted in a ''legal and proper manner.'' What must the employees avoid in order to engage in legal picketing which is also ''proper''?

3. Videotaping and threat to videotape

President of Respondent (Phyllis Capers) testified that she made the final decision to videotape with regard to the instant November 23–25 picketing (R. Br., p. 12). Respondent concedes that she had been involved in only two previous strike situations with the Union; the first, a 1-day strike, wherein the videotape camera was not used; the other, 10 years prior to that (Friday, September 11, 1981, therefore 12 years before the present incident) where a patient was placed in a wheelchair taken from Respondent without its permission, with the patient bearing a sign in support of the picketing unit employees. Respondent argues that since the borrowed wheelchair and the use of the patient was an abuse of the nurse-patient relationship, Respondent's president's final decision was to use the videotape camera for safety and security purposes (R. Br., p. 13).

Respondent further concedes that on Friday night, November 20, 2 days before the picketing, Respondent passed out notices (G.C. Exh. 5) to the staff and union officials notifying them that the video camera together with a sound camera was going to be used ''to insure safety and proper conduct for all concerned.'' The notice warns of disciplinary action against any individual ''involved in any improper conduct'' (G.C. Exh. 5). Respondent observes that no union or official employee protested Respondent's notice. Lastly, Respondent notes that the picketing was peaceful in all respects and that newspaper reporters, photographers, and TV reporters and cameramen were called, apparently by the Union, to report on and record the picketing.

Respondent makes the following arguments with regard to the videotaping: (1) since there were no objections to Respondent's November 20 notice that there would be videotaping, and since the Union sought out the media to photograph and record the picketing, then Respondent's own videotaping was not unlawful. In support of that position Respondent cites *U.S. Steel Corp. v. NLRB*, 682 F.2d 98 (6th Cir. 1982).

Respondent further argues that when the staff returned to work, they were advised that there would be no reprisals taken if there was no unlawful conduct. Under such circumstances, Respondent urges that there was no unlawful surveillance or the impression of surveillance since there was no tendency to interfere with, restrain, or coerce employees in the exercise of their rights under the Act.

On the other hand, General Counsel argues, and I find, that there is a violation of Section 8(a)(1) of the Act if there is videotaping without some legitimate justification or rationale. Videotaping has a tendency to intimidate employees, creating fear of reprisals. *Waco, Inc*., 273 NLRB 746, 747 (1984), *F. W. Woolworth Co.*, 310 NLRB 1197 (1993). Videotaping here was not mere ''observation''; and when, as here, employer surveillance constitutes more than ''mere observation,'' it violates the Act. *F. W. Woolworth*, supra. Here, videotaping consisted of continuous scrutiny over a substantial period of time *Nashville Plastic Products*, 313 NLRB 462 (1993), and was not ''mere observation'' and is unlawful. Indeed the intimidating object of the videotaping is readily discerned from Respondent's own objective (G.C. Exh. 5): ''to insure the safety and proper conduct of all concerned.'' Having then added that ''improper conduct'' would lead to ''immediate disciplinary action,'' Respondent leaves the picketers in doubt as to what constitutes ''improper conduct'' on the picket line. Is repetitive chanting, name-calling, or shouting ''improper''? The natural effect of such a threat is to intimidate the pickets to refrain not merely from illegal activity but from what Respondent conceives as ''improper conduct.'' Such videotaping and the threat thereof violates Section 8(a)(1) of the Act.

The evidence shows that in September 1981, the Union, apparently without Respondent's permission, took a wheelchair and placed a patient in there with a sign supporting the nurses picketing and urging Respondent to ''give them a contract.'' Assuming arguendo that the wheelchair was Respondent's and was taken without permission, there is no evidence with regard to whether the patient, Goldie Scott, in the wheelchair, was a voluntary participant in the picketing or whether through overt or implicit coercion, taking advantage of the nurse-patient relationship, the elderly woman was coerced into supporting the picket line. I conclude, in any event, that Respondent's concern for this arguably illegal act, with no nexus to picket line violence, was too remote to justify the instant videotaping. Furthermore, the existence of peaceful informational picketing in October 1992 or peaceful picketing during the strike of 1984 cannot serve as a basis for videotaping in November 1992.

The fact remains, as I observed the witnesses as they testified and reviewed the record, that the videotaping of the peaceful November 23–25 picketing was solely at the explicit urging of counsel (Albert R. Mason, Esq.) notwithstanding that the ''decision'' to engage in the videotaping was the ''decision'' of Respondent's president. In terms of the actual motivation for the videotaping, I brush aside Respondent's attempts to demonstrate a historical basis to legitimize the instant videotaping, particularly the Union's 1981, 1984, and early 1992 picketing all of which was peaceful and notwithstanding the 1981 picketing involving the placing of a patient in Respondent's wheelchair. The actual motivation for President Caper's ''decision'' is to be found in the testimony of Attorney Mason (Tr. 538 et seq.). Although he testified that he merely ''advised'' Respondent, he conceded that it was his practice based upon past experience to recommend that in most, if not all instances, that there be videotaping whenever there is any kind of strike ac-

tivity as a ''preventive measure'' (Tr. 538). This anticipatory antisepsis—a ''preventive measure''—is, by its own terms, redolent with intimidation, not with merely recording action on the picket line. Furthermore, there is no question, as I observed his emotional testimony, that the motivation for the instant videotaping, based on counsel Mason's generalized preference for videotaping, is to be found in his 1970 experience where an individual was killed on the picket line (Tr. 539). Such a basis for motivation has the ring of truth and was the actual source for videotaping in this case.

I have no doubt of Attorney Mason's credibility and the genuineness of his experience in 1970 when an individual was killed on the picket line in a labor matter in which he was involved. Again, I have no doubt that it was this experience which propelled him into generally advising his clients, as a ''preventive measure,'' to videotape in order to warn pickets and forestall any similar or lesser acts of violence, intimidation, or coercion. Yet, on this record, the objective of the videotaping was intimidating since it was obscure (''proper conduct'') and Attorney Mason has had no experience with this union based on strike activity (Tr. 543). In the one situation where there might have been unlawful activity by this union in a picketing situation, it was clear that Attorney Mason's knowledge of any such activity was solely hearsay (Tr. 545). In addition a patient in Respondent's wheelchair on picket line 10 years earlier does not license generalized videotaping in order to ensure ''proper conduct.''

It follows, therefore, that since Respondent President Capers made her decision based particularly on Attorney Mason's advice; and since Attorney Mason generally advises the videotaping of all picketing in anticipation of the possibility of a repetition of the unhappy violence he experienced in 1970; and since he has had no experience with this union either in strike activity or in picketing activity which proved to be other than lawful, peaceful picketing, I conclude that Respondent's threat to videotape and its actual videotaping of the November 23–25 picketing violated Section 8(a)(1) of the Act, as alleged.

This conclusion finds direct support in *F. W. Woolworth Co.*, 310 NLRB at 1177:

> Here, the record provides no basis for the Respondent reasonably to have anticipated misconduct by those handbilling, and there is no evidence that misconduct did, in fact, occur. Unlike our dissenting colleague, we adhere to the principle that photographing in the mere belief that ''something might happen'' does not justify Respondent's conduct when balanced against the tendency of that conduct to interfere with the employees' right to engage in concerted activity.

Furthermore, in *F. W. Woolworth Co.*, supra, the Board rejected the dissenting member's reliance on *United States Steel Corp. v. NLRB*, 682 F.2d 98 (3d Cir. 1982), denying enf. 255 NLRB 1338 (1981). There, the Board held that the fact that the employees publicized their activities is entitled to ''little weight'' in determining the coercive effect of employer recordation. The Board has continued to rely on its own decision in that case. See *F. W. Woolworth Co.*, supra. Indeed, the Board's decision in *U.S. Steel* was cited in *John Ascuaga's Nugget*, 298 NLRB 524 fn. 3, 554 (1990), enfd. in relevant part 968 F.2d 991 (9th Cir. 1992). Lastly, distinguishing the cases of non-surveillance when the employer was engaged in mere observation, the Board held, in *F. W. Woolworth Co.*, supra, that the pictorial recording of employees engaged in protective concerted activities tends to create fear among employees of future reprisals. That ''something might happen'' is the equivalent of Respondent's ''preventive measure.'' Bound by the Board's rules and decisions, particularly *F. W. Woolworth*, supra (''something might happen''), I necessarily am constrained to reject Respondent's reliance on *U.S. Steel Corp. v. NLRB*, supra, as a defense.

To the extent Respondent suggests that when the employees returned to work and were provided with a notice stating that there would be no reprisals, this might constitute sufficient assurance against a repetition of Respondent's conduct or reprisals for employee conduct, such a Respondent communication (R. Exh. 8) does not amount, under Board law, to a repudiation of Respondent's unfair labor practice in videotaping the picketing. Respondent did not explicitly guarantee against Respondent's repetition of its conduct. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

4. The employees' right to communicate with doctors and Respondent's answer thereto; the display of the ''Union busting'' signs and Respondent's answer thereto

After the picketing of November 23–25, 1992, the employees returned to work on November 27.

Sometime in December 1992, 20 unit employees signed a letter delivered to physicians with whom Respondent dealt (R. Exh. 1). After first observing that the unit has been unionized for over 10 years and that for the most part the parties enjoyed a positive working relationship, the letter adverts to a ''crisis situation'' over issues which did not involve money or benefits. The first complaint is the group's inability to meet with Respondent concerning working conditions and patient care. The letter refers to a prior letter to the Respondent's board of directors which resulted in 19 employees being suspended from work. They next complain that they never reached taking a final strike authorization vote because Respondent locked them out of work during Thanksgiving week. In addition, they complain that Respondent ''immediately canceled our health insurance coverage with no notice or warning.'' Finally the letter appeals to the physicians for help because they are concerned with issues which relate to the giving of quality patient care. The writers of the letter invite the physicians to express their concerns to Respondent's management.

Respondent urges that this letter written by the 20 employees contains falsehoods which could cause Respondent harm (R. Br., p. 9).

As a result of this letter to the doctors, Respondent answered with its own letter of January 8, 1993, to each of the subscribers to the letter (G.C. Exh. 8). In particular, Respondent's letter urges that the employees' letter to the doctors was false in three respects: (1) that Respondent locked out its staff; (2) that Respondent canceled the group insurance without notice or warning; and (3) that Respondent had suspended the 19 members of its staff simply because they had written a letter to Respondent's board of directors.

Respondent's January 8, 1993 letter to the employees (G.C. Exh. 8), after adverting to the substance of the letter which it is answering, observes:

> Initially, we are taking this opportunity to point out to you that the above statements are ''*false*'' and could be the grounds for a civil action if damages to the agency results from your actions.

Respondent particularly states that the 19 employees who had previously written to the board of directors were suspended for insubordination. Respondent further observes that there had been no determination by any competent authority that there was a lockout during the Thanksgiving week, moreover, that the employees were notified, in writing, concerning the cancellation of insurance coverage and how to keep the coverage in effect should the employees choose to do so. It then states that the employees' letter to the physicians constitutes grounds for civil action against all the individuals should any damage or harm to the agency come about due to the letter.

Respondent's letter then makes two further observations: (a) it warns the employees that, under Respondent's work rules, as private sector employees, any damaging remarks or adverse actions by them outside of agency time, and/or off agency premises that do, or can, have an adverse impact on, the Respondent, are subject to disciplinary action up to and including discharge; (2) employees who return to work from a labor dispute must work under Respondent's terms and conditions of employment and not set their own.

Lastly, it notes that some employees are displaying signs in their car windows that state Respondent is ''Union busting, Its illegal.'' Respondent observes that such a display subjects the employees to disciplinary action particularly because they chose to work for the employer and must work under the Employer's conditions. It observes that these signs cause the employee to be subject to discipline for disparaging the Employer.

The letter ends by stating to the employees that they are being *notified and warned* that, in the future, should they refrain from taking action that can disparage or harm Respondent, as well as refrain from contacting persons with whom Respondent works, with ''untrue and disparaging remarks'' about Respondent, that ''could adversely impact'' upon Respondent. Respondent warns that then ''you would be subject to immediate disciplinary action up to and including discharge'' (G.C. Exh. 8).

Elizabeth Stroshine, Respondent's vice president of operations, testified that Attorney Mason drafted the letter (G.C. Exh. 8; Tr. 467) and that there were three things that concerned Respondent about the employees' letter to the doctors, all of which resulted in Respondent's January 8 answer: the employees had chosen to write to the doctors; the letter contained false statements that disparage Respondent; and the letter, sent after the nurses had returned to work, was thus sent at a time when the employees were subject to Respondent's work rules. In particular, however, Stroshine testified that the only disparagement suffered by Respondent in the employee letter (G.C. Exh. 8) were the false statements concerning the suspension of the employees' having written to the board of directors; the lockout; and the cancellation of insurance (Tr. 469–470).

General Counsel's witness testified that the employees believed themselves to have been locked out on November 23 because on November 20 (Friday) they had notified Respondent that they were postponing the strike to a commencement date of November 24; that when, on Monday, November 23, they were not permitted to work, it was not a matter of the employees striking; rather it was a matter of Respondent locking them out.

Similarly, with regard to the cancellation of insurance, the employees believed that it was canceled as a result of Respondent's lockout. The cancellation of insurance would result only if there had been a strike. Since there was no strike, General Counsel argues, their insurance was canceled unilaterally by Respondent. Lastly, General Counsel's witness testified that the 19 employees had been suspended on September 9, as a result of a letter written in the summer of 1992, not for insubordination but for contacting the board of director's concerning a labor relations problem.

The ''Union busting at Holyoke VNA It is illegal'' signs were placed in the employee car windows and clearly visible to those passing by. The sign showed a diagonal red line through a facsimile of the union button. Employee Hostal testified that she put the sign in her car because of the labor dispute with the parties. This dispute resulted in Respondent's warning, above, with regard to such signs being ''inappropriate,'' subjecting an employee whose car bears such a sign with disciplinary action for disparaging the Employer.

5. Respondent's warning employees of a civil action for engaging in concerted protected activities and warning of discipline for displaying the union busting sign

There are two issues of fact which govern the legal conclusions relating to Respondent's warning its employees of a civil action in retaliation for their writing the letter to the physicians and its warning of discipline for displaying ''union busting'' signs in the employees' cars. The first significant issue is my conclusion that it may be assumed, arguendo, that Respondent is correct in that the employees' assertions in the doctors' letter are false. The second is that the only disparagement to Respondent, as Vice-President Stroshine testified (Tr. 469–470), resulted from the falsity of the statements. In other words, there was no further, other, or independent proof that the ''disparagement'' arose from circumstances other than the falsity of the three alleged statements in the employees' doctor letter and there was no proof that any of these ''false'' statements were derived from malice by the writers, or any of them.

The General Counsel correctly cites *Allied Aviation Service Co.*, 248 NLRB 229, 230 (1980), enfd. 108 LRRM 2279 (3d Cir. 1980), for the Board rule that:

> An employee may properly engage in communication with a third party in an effort to obtain the third party's assistance in circumstances where the communication was related to a legitimate, ongoing labor dispute between the employees and their employer, and where the communication did not constitute a disparagement or vilification of the employer's product or its reputation.

That case, however, went further than the rule cited by General Counsel. The Board held therein that it would not limit the employees' communications to the third party for assistance to the strict confines of the specific arguments raised with their employer (*Allied Aviation Service Co.*, supra at 231). Furthermore, the Board held, in determining whether the employee communication constituted disparagement of

the employer or its product, that absent a ''malicious motive,'' an employee's right to appeal to the third party is not dependent on the sensitivity of the employer to the employees' choice of forum. Moreover, the Board held that appealing to a class of persons who would put economic or other pressure on the employer was a protected activity (supra at 231).

To the extent that Respondent argues that it was ''disparaged'' because of the employees' false statements, as Vice President Stroshine testified (and as I have assumed, arguendo), the courts enforcing Board decisions, have established that employers may proscribe ''maliciously false'' statements, but may not proscribe and punish the publication of ''false'' statements. *Texaco, Inc. v. NLRB*, 462 F.2d 812, 815 (3d Cir. 1972), cert. denied 409 U.S. 1008. Accord: *American Cast Iron Pipe Co. v. NLRB*, 600 F.2d 132 (8th Cir. 1979), enfg. 234 NLRB 1126 (1978). Thus, absent proof of malice, the merely ''false'' statements, which Stroshine testified disparaged Respondent, are insufficient as a matter of law, to meet the test of unlawful disparagement which would provide a defense to Respondent. The defense of ''disparagement'' must rest on employee malice and, as above, there was no proof, offer to prove, or any evidence of any such condition. Thus, assuming arguendo that the employee statements in their letter to the physicians were false, Respondent may not threaten them with discipline or a civil action in retaliation therefore without violating Section 8(a)(1) of the Act. See *Pioneer Finishing Corp. v. NLRB*, 667 F.2d 199 (1st Cir. 1981), enfg. 247 NLRB 1299 (1980), cert. denied 406 U.S. 1080 (1983); also *Local 1-2 Utility Workers Union (Consolidated Edison)*, 312 NLRB 1143 fn. 2 (1993).

Respondent argues that, in any event, the employees who wrote the letter to the doctors had already returned to Respondent's employ from the picket line and therefore the letter was in some way unprotected or subject to Respondent's work rules. In the first place, a work rule which prohibited employees from engaging in otherwise protected concerted activities would appear to be unlawful. It is the statute rather than Respondent's work rules that govern the statutory rights of employees, absent special circumstances (interference with production, safety, or discipline) or a clear and unmistakable waiver in a collective-bargaining agreement, to engage in such activity. In the instant case, there is no claim that Respondent's work rules are embodied in the collective-bargaining agreement, that the employees' activities interfered with patient care or discipline, and there is no independent evidence of a union or employee waiver of the right to engage in protected concerted activities. Thus Respondent's work rules, if any, which would unilaterally restrict the employees' statutory rights would be unlawful.

To the extent Respondent argues that employees may not engage in concerted protected activities because they are not on the picket line or on strike or, in any event, are actually working for Respondent, Respondent has cited no authority for that proposition. Employees may lawfully engage in protected activities while on strike, on a picket line or, within limitations, while in ordinary employment. I find, in any event, that Respondent's work rules fail to constitute a defense to Respondent's threat to bring a civil action against the employees for having engaged in a protected, concerted protected activity, arguably containing false statements, in their letter to the doctors.

With regard to the ''union busting'' sign, the General Counsel correctly notes that Board precedent has permitted various extravagant statements of opinion in describing unattractive features of employers. If the Board, with court approval, protects statements on signs which asks the public: ''Please don't feed management. They only suck blood,'' then a mere ''union busting'' assertion against an employer, the Respondent herein, pales in comparison. See *RAI Research Corp.*, 257 NLRB 918 (1981), enfd. 688 F.2d 816 (2d Cir. 1982). That the employees had returned to employment is irrelevant. Respondent's threat of discipline in its January, 1993 letter (G.C. Exh. 8) is an unlawful threat and violates Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Holyoke Visiting Nurses Association, Respondent, at all material times, has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act.

2. Local 285, Service Employees International Union, AFL–CIO, CLC, the Union, at all material times has been and is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has interfered with, restrained, and coerced and continuing to interfere with, restrain, and coerce its employees in the exercise of the rights guaranteed in Section 7 of the Act, thereby violating Section 8(a)(1) of the Act by the following acts and conduct at its Maple Street and Isabella Street facilities in Holyoke, Massachusetts.

(a) Since on or about September 14, 1992, Respondent violated Section 8(a)(1) of the Act when it directed its employees to remove their union buttons worn in nonpatient care areas and thereafter separately violated Section 8(a)(1) of the Act by threatening them with discipline for failure to obey that direction.

(b) Since on or about September 14, 1992, Respondent violated Section 8(a)(1) of the Act by disparately enforcing its dress code so as to prohibit employees from wearing union buttons.

(c) Since on or about November 19, 1992, Respondent violated Section 8(a)(1) of the Act when, against a background union animus derived from unremedied unfair labor practices regarding the removal of union buttons as above-described in subparagraphs (a) and (b) hereof, and without first assuring employees of their freedom from retaliation, Respondent coercively interrogated its employees regarding their intention to engage in, and the extent of their engaging in and supporting, an anticipated strike.

(d) Since on or about November 20, 1992, Respondent violated Section 8(a)(1) of the Act by threatening to videotape and videotaping its employees engaged in picketing activities at its Maple Street and Isabella Street locations in Holyoke, Massachusetts.

(e) Respondent violated Section 8(a)(1) of the Act by threatening employees with civil action and discipline for engaging in the protected concerted activities of writing a letter to physicians with whom Respondent did business and in displaying signs in their personal vehicles accusing Respondent of union busting.

On the above findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Holyoke Visiting Nurses Association, SpringField, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Directing employees to remove their union buttons worn in nonpatient care areas and thereafter threatening them with discipline for failure thereof.

(b) Disparately enforcing any dress code or rule so as to prohibit employees from wearing union buttons or other union insignia in nonpatient care areas.

(c) Coercively interrogating employees with regard to their intention to engage in, and the extent of their engaging in and supporting, anticipated strikes or other concerted protected activities.

(d) Threatening employees with videotaping, and videotaping, their picketing or other concerted protected activities.

(e) Threatening employees with civil action or other discipline for engaging in protected concerted activities including writing letters to physicians with whom Respondent has business activities and displaying union busting signs in their personal vehicles.

(f) In any other manner[9] interfering with, restraining, or coercing its employees in the exercise of rights guaranteed by Section 7 of the Act.

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

(a) Post at its facilities at Maple Street and Isabella Street, Holyoke, Massachusetts, copies of the attached notice marked ''Appendix.''[10] Copies of said notice on forms provided by the Regional Director for Region 1, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

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[8] 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.

[9] In view of the findings in *Holyoke Visiting Nurses Assn. v. NLRB*, 11 F.3d 302 (1st Cir. 1993), it appears that Respondent should be placed under the obligation of a broader responsibility to avoid violating the Act, *Hickmott Foods*, 242 NLRB 1357 (1979). The court having sustained the Board's findings and conclusions of a studied 8(a)(3) discharge involving the same labor organization, the present violations must be viewed in a different light. Respondent appears not to be an embattled employer innocently overstepping the limits of lawful action, defending against an aggressive union. Rather, Respondent is a repeat offender along a broad spectrum of 8(a)(1) conduct. Bad motivation in 8(a)(1) violations is not a necessary element. *El Rancho Market*, 235 NLRB 468, 471 (1978). The effect here, if not the motive, was, by a series of unlawful acts, to intimidate the Union. Respondent has already had a bite of the apple. To fail to invoke a broad injunctive order is to invite further statutory misconduct.

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