Albert Einstein Medical Center *and* National Federation of Guards, Local 5. Cases 4–CA–21894 and 4–CA–22231

March 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On September 28, 1994, Administrative Law Judge Robert M. Schwarzbart issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed cross-exceptions and a supporting brief.

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

The General Counsel and the Respondent submit that the judge erred in finding that the Respondent violated Section 8(a)(1) by its disparate application of section 16.5 of the parties' collective-bargaining agreement which prohibits unit employees ''from wearing buttons, hats or other clothing displaying union insignias in any areas to which patients, have access, including common areas, such as cafeterias.'' The General Counsel and the Respondent contend that this allegation was neither alleged in the complaint nor litigated by the parties nor did the General Counsel ever seek to amend the complaint to include this allegation. We agree. In these circumstances, it was inappropriate for the judge to find a violation. Therefore, we reverse the judge's finding that the Respondent violated Section 8(a)(1) of the Act by disparately enforcing a contractual provision banning the wearing of union insignia.

We agree, however, with the judge's finding that the Respondent violated Section 8(a)(1) by the conduct of its supervisor, Jerome Johnson. Johnson approached employee Paul Ablaza and told him that the Union could not help a recently discharged employee get his job back because it was too weak; it had no money and it had a lawyer with Alzheimer's disease, and that the employees should have listened to management and not voted for the Union. We agree with the judge that this attempt to denigrate the Union violated Section 8(a)(1) because it effectively conveyed the position that it was futile to support or remain a member of the Union.[1]

[1] Contrary to the judge's finding, the General Counsel correctly notes that this incident was alleged in the complaint.

AMENDED CONCLUSION OF LAW

Substitute the following for the judge's Conclusion of Law 3.

''3. By telling employees that it was futile to join and/or support the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.''

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Albert Einstein Medical Center, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and reletter the subsequent paragraphs.
2. Delete paragraph 2(a) and reletter the subsequent paragraphs.
3. Substitute the attached notice for that of the administrative law judge.

MEMBER STEPHENS, dissenting in part.

I would not find that the remarks by the Respondent's supervisor Johnson to employee Ablaza were coercive or interfered with 8(a)(1) employee rights. The discharge to which Johnson referred was not unlawful, and his remarks merely reflected his opinion that the Union was not very strong or competent. I would find this to be an expression of ''opinion'' containing ''no threat of reprisal or force or promise of benefit'' within the meaning of Section 8(c) of the Act and therefore, would dismiss the complaint in its entirety.

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 inform you that it is futile to join and/or support the National Federation of Guards, Local 5, or any other labor organization.

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

ALBERT EINSTEIN MEDICAL CENTER

Henry R. Protas, Esq., for the General Counsel.
James A. Matthews, Esq. (Fox, Rothschild, O'Brien & Frankel), of Philadelphia, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge. This case was heard in Philadelphia, Pennsylvania, on a complaint issued pursuant to charges filed by National Federation of Guards, Local 5 (the Union).[1] The complaint alleges that Albert Einstein Medical Center (the Respondent), violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act), by discriminatorily discharging employee shop stewards Robert Jardine and Tyrone Foster because of their union activities; Section 8(a)(5) and (1) of the Act by willfully furnishing the Union with false information that misled it into signing a collective-bargaining agreement containing a provision later unlawfully used as a basis for Foster's termination; and by conduct independently violative of Section 8(a)(1). The Respondent, in its timely filed answer, denied the commission of unfair labor practices.[2]

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Briefs, filed by the General Counsel and the Respondent, have been carefully considered. Upon the entire record of the case, including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Pennsylvania corporation, has been engaged in the operation of a hospital in Philadelphia, Pennsylvania, where it annually derived gross revenues in excess of $250,000 and purchased and received goods and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. The Respondent admits and I find that, at all material times, it was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, that it was a health care institution within the meaning of Section 2(14) of the Act and that the Union was a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent, at its Philadelphia, Pennsylvania hospital complex, employs approximately 631 licensed employees and an unlicensed staff of 534.

On September 3, 1992, the Union was certified as the exclusive bargaining representative of a unit of employees in the Respondent's security department.[3] The Respondent and Union signed a collective-bargaining agreement, effective April 12, 1993, through December 15, 1995 (the contract or agreement), covering these employees. The terms of this contract was costly to security employees. The Union accepted pay rates that were below the wages the employees had enjoyed before the contract and agreed to changes in the shift differential to a lesser figure than before the contract; to reduced vacations; to elimination of some sick days; and to a buyout of some employees' personal days. Although security officers who worked the first two shifts, like the Respondent's other nonunit employees on those shifts, previously had paid-for on-premises parking while at work, none of the Respondent's third-shift employees, including third-shift security personnel, previously had paid-for parking.[4] For the Respondent's other, nonsecurity unit third-shift employees, this continued to be true. As to security personnel, however, article 17.3 of the above-referenced contract provided that:

> Bargaining unit employees who park on-campus are responsible to pay for such on-campus parking at the following rates, without exception, and subject to any increases applicable to other employees:
> (a) For surface lots—$ 9.79 per pay period
> (b) For garages—$11.38 per pay period

Other relevant contract provisions include:

> *Section 16.4* No employee shall engage in any union activity, including the distribution of literature during working time; in working areas of the Employer at any time; or in immediate patient care areas, such as patient rooms, adjacent corridors, sitting rooms accessible to patients, and elevators and stairways used to transport patients, at any time, except as otherwise provided in this Article.
> *Section 16.5* Employees shall not wear buttons, hats, or other clothing displaying union insignias, in any areas to which patients have access, including common areas such as cafeterias.
> . . . .
> *Section 17.1* Any equipment which the Employer deems necessary for the safe performance of work will continue to be provided by the Employer to employees assigned such work. The Employer shall issue one (1) set of goggles to each employee, and replace it if it is damaged and returned to the Employer. . . . Goggles will be regarded as part of an employees' uniform, to be carried at all times, including roll call.

During the relevant period, Nancy Glasberg was the Respondent's assistant general director for human resources; Beth Duffy, Respondent's assistant general director; James Kendig, the director of security; Lieutenant Andrew Wright and Sergeants Jerome Johnson, Charles Jackson Jr., Archie Allen, and Rosie McDaniels, supervisors in the Respondent's security department. Attorney Barnett Satinsky represented

[1] The relevant docket entries are as follows: The charges in Cases 4–CA–21894 and 4–CA–22231 were filed by the Union on July 22 and November 8, 1993, respectively, and complaint issued on January 27, 1994. The hearing was held on April 19 and 20, 1994.

[2] All dates hereinafter are in 1993 unless otherwise indicated.

[3] The appropriate unit was as follows:

> All full-time and regular part-time security officers and investigators employed by the Respondent at the Hospital, excluding all other employees, professional employees and supervisors as defined in the Act.

[4] The Respondent's first, second, and third shifts, respectively, worked from about 6 a.m. to 3 p.m., 3 p.m. to 10 p.m., and 10 p.m. to 6 a.m.

the Respondent during contract negotiations with the Union, serving as principal spokesman.

Steven Bellano, the Union's business manager, was its principal representative during contract negotiations.

B. *The Parties' Positions*

The General Counsel and Union contend that the Respondent, on different dates, separately terminated security officers Tyrone Foster and Robert Jardine because of their union activities as union shop stewards on their respective shifts and because Foster, who also had been a member of the Union's bargaining committee, had participated in negotiating the collective-bargaining agreement, had been active in the Union's organizing, campaign and had supported unit employees while steward. In furtherance of their arguments concerning Foster, these parties argue that Foster's termination was inconsistent with the favorable job evaluation and pay increase he had received shortly before his discharge. They also would counter the Respondent's position that Foster was discharged for theft of parking services in not having paid for garage parking while parked on the Respondent's premises when at work, with the assertion that the Respondent should not be permitted to rely on article 17.3 of the contract, above, under which third-shift unit employees for the first time were required to pay for parking at the stated rates. This is because the Respondent, during the contract negotiations which resulted in that provision, assertedly had misled the Union into acceptance by inaccurately representing to the Union that all third-shift hospital employees, not just the security employees in the represented unit, were being required to pay for parking.

The Respondent, denying any form of misrepresentation, asserts that it was entitled to rely on article 17.3 of the contract and that the work rules in the employees handbook in charging Foster with theft, which offense, under existing work rules, mandated immediate termination on the first offense without recourse to the Respondent's system for progressive discipline.

The General Counsel and Union assert that security officer Robert Jardine was terminated because of his union activities as a shop steward after having been subjected by various supervisors to what, in effect, were systematically repeated unlawful comments concerning the Union. The Respondent denies that unlawful comments were made to Jardine and argues that he was discharged only after going through the established progressive disciplinary system.

C. *The Facts*

1. Tyrone Foster's discharge

Security officer Foster[5] testified that he had been active from the start in the Union's organizing campaign, which had run from mid-1992 until the August 1992 election. During the campaign, he had distributed union authorization cards to three fellow third-shift employees and had talked to other employees about joining the Union. Foster also had told the Respondent's security department supervisors, Lieutenant Andrew White and Sergeants Jerome Johnson and Charles Jackson, Jr., that there was a need for the men to have some form of representation and that he believed in the Union. Shortly after the Union was selected, Foster was elected shop steward for the third shift in which capacity he routinely interacted with Kendig and other supervisors on behalf of unit employees. As a member of the Union's committee, he regularly had participated in the contract negotiations.

Foster related that at rollcall[6] during the start of his shift on the night of the August 1992 representation election, Lieutenant Wright announced that they would be going by the book and that the lunchbreak was being cut back from 45 minutes to one-half hour. Although Respondent's Employee Handbook, which contained work rules and the schedule of discipline for various offenses, described a 30-minute lunchbreak, all employees, including the guards, had been getting 45 minutes. Foster testified that he told Johnson after the rollcall that it did not make sense to get into an argument over the 15 minutes for lunch, or to bring the Union into the matter. Later that night, Foster repeated these remarks to Wright when he came through the emergency unit where Foster then was assigned. Wright replied that he was going by what it said in the book; ''Thirty minutes for lunch and that was what we were going to do.'' After Wright finished work, he notified the Union of the change in the lunch period. At the rollcall for the start of his next shift, Wright told Foster that he had spoken to Beth Duffy, Respondent's assistant general director in charge, inter alia, of security, and Susan Bernini, Respondent's senior vice president and general director, and that everything would remain the same—the 45-minute lunchbreaks would continue in effect. This temporary reduction in lunchbreak periods was not alleged as violative in the complaint.

Two or three days after the election, Foster was elected third-shift shop steward by the employees on that shift and, in that capacity, attended every negotiating session. While so engaged on October 29, 1992, Foster received his initial disciplinary incident—for ''negative time off for union negotiations.'' Foster explained that he had worked his October 28–29 shift from 10 p.m. to 6 a.m., after which he had gone to the offices of the Respondent's counsel to participate in the negotiations which resumed at 10 a.m. on October 29. As the discussions that day continued into the afternoon, Foster did not know how long the session would last, but realized that he might have to return to work at 10 p.m. without having had any sleep. Accordingly, he called Wright and asked if he could have the day. Wright referred him to Duffy who was at the session. Duffy, in turn, told Foster that if he took the day, it would be an incident.[7] In response to Foster's further inquiry, Duffy told Foster that he then had two incidents on his record and that, if he took that day off, it would be

[5] Foster, who had been a Philadelphia police officer for more than 24 years, was employed by the Respondent as a security officer since July 1991.

[6] The security officers received their assignments during rollcalls.

[7] Under the Respondent's system of progressive discipline as applied to its no-fault attendance policy, unexpired ''incidents,'' or ''occurrences'' could accumulate in specified amounts within prescribed timeframes so as to result in increasingly severe disciplinary measures. For example since, under the Respondent's policy, a prescribed number of incidents (latenesses or absences), occurring within a 6-month period brought discipline. Foster's negative time off for union negotiations on the day in question combined with three later absences for sickness between January 8 and April 6, 1993, resulted in issuance of a counseling document on April 19, 1993. Counseling documents were the Respondent's initial form of written warning.

three. In effect, Duffy informed Foster that to avoid the next disciplinary step, a counseling document, he should not get another incident on his record until January 1, 1993.[8] Nevertheless, Foster decided not to work his shift that night. Thereafter, on April 19, 1993, Foster received his first counseling document for negative time off for union negotiations on October 29, 1992, and for three absences for illness between January 8 and April 6, 1993.

At a rollcall in October 1993, the security officers were informed that the security department's mobile van could not be used to pick up food. Foster related that this created a problem because the third-shift guards did not have access to food. The hospital cafeteria was closed by the start of that shift and the only food available on premises was a sandwich machine near the cafeteria. The restaurant that previously served them had stopped making deliveries and the Chinese restaurant located 2 blocks from the Respondent's hospital did not deliver. Accordingly, on the night of October 14, Foster, admittedly without supervisory authorization, asked security officer James Higgins, who drove the van, to pick up Foster's food order and sodas for two emergency room nurses at the Chinese restaurant. Higgins agreed. However, management later learned that the van had broken down at the Chinese restaurant while Higgins was on this errand and that Higgins had to have the van pushed back to the Respondent's premises. Foster did not recall the names of the two nurses and, unlike Foster and Higgins, they never were identified in the record or disciplined for their participation in this incident.[9]

About 1–2 days after the so-called Chinese food incident and less than a week before his discharge, Foster, having learned that the van had broken down while Higgins was picking up his food order, asked to see Kendig to find out what was going to happen to Higgins. This meeting also was attended by Duffy. Foster announced that he knew of the incident and that it was he who had asked Higgins to pick up the food order. Kendig told Foster that the van could not to be used to pick up lunches because it was not supposed to leave the hospital grounds and that the matter would be investigated. Foster was not then told whether he would be disciplined for his involvement.

On October 21, Foster was summoned to meet with Kendig, Wright, Johnson, and Jackson in the dispatcher's cubicle behind the base station. Kendig told Foster that he was being terminated for not having paid for parking in the garage. After reading the charges against Foster aloud, Kendig handed Foster his discharge notice. Foster declined to sign the notice, claiming that he had not parked at the garage and asserting that the matter would be placed in the hands of his lawyers. The ''Reason for Discharge'' on Foster's discharge notice was as follows:

> On about Friday, July 16, 1993, you parked in the Korman Parking Garage knowing that you were not permitted to do so unless you paid by payroll deduction or paid for the parking.
>
> On or about Saturday, July 17, 1993, you were informed of the need to pay for parking.
>
> On or about April 18, 1993, you were informed of the need to pay for parking. On or about April 20, 1993, you were also provided a payroll deduction form for parking fees which you opted not to complete.
>
> #14—Failure to use appropriate judgment[10]
> #23—Inappropriate and unprofessional behavior
> #39—Theft
> #42—Violation of a parking rule
>
> On Thursday, October 14, 1993, you asked Security Officer James Higgins to respond off-campus to pick up a personal food order from a Chinese Restaurant . . . several blocks from the hospital campus.
>
> #14—Failure to use appropriate judgment
> #17—Failure to fulfill the responsibilities of the job
> #23—Engaging in activities which interfere with the operation of the hospital and/or services to patients
> #42—Violation of a security related rule

Foster testified that he had not been informed before receiving the discharge notice that he had failed to pay for parking; third-shift guards had not had to pay for parking at the hospital's facilities before the labor agreement was signed. After it was executed and the security officers were told that they would have to pay for parking, the third-shift employees collectively decided that they were not going to pay for parking and began to park on nearby Tabor Road. Foster, who did not own an automobile, generally traveled to work by public transportation. Occasionally, however, he did drive his girlfriend's car to work. He also had had good relationships with Sergeants Jackson and Johnson, having given Jackson one ride home and Johnson about two rides. When Foster did not drive, he and Johnson would travel together via public transportation.

Security officer Paul Ablaza[11] testified that about a week after Foster was terminated, Johnson, while stopping by the guards' post, asked if Ablaza had heard from Tyrone Foster. When Ablaza replied that he had not, Johnson told him that the guys should have listened to the administration's plea not to vote for the Union. There was that nothing Foster could do and the Union cannot help him to get back his job because it is weak. The Union has no money and has a lawyer who has Alzheimer's disease. Johnson, on direct examination, would not testify to more than that he could not recall having told Ablaza that the Union could not help Foster get his job back and that the Union did not have any money, declining to actually deny having said the same. Johnson, however, did specifically deny having mentioned to Ablaza that the Union's attorney has Alzheimer's disease. In his testi-

[8] As will be considered more fully below, Foster's effort to get the day off was recorded as an incident because he had not requested the personal day in accordance with security department rules as to how many days in advance such a request had to be made.

[9] The record shows that included as a basis for one of the four disciplinary documents that had been given to Higgins was a warning notice for his role in having improperly driven the van off campus on October 14 to get the Chinese food.

[10] The various numbers preceding the listed offenses in Foster's discharge notice were references to where they appeared in the Respondent's employee handbook in the section entitled ''Guides to Disciplinary Actions.''

[11] Ablaza, still employed at the time of the hearing, had been a security officer with the Respondent for nearly 11 years, mostly on the third shift.

mony on cross-examination, Johnson did deny having spoken to Ablaza about the Union or about Foster's termination.

On May 14, 1993, Ablaza was issued a counseling document, the first written warning under the Respondent's progressive discipline system, for having parked his personal vehicle in the Tabor Garage on April 7 without having paid. Ablaza was not discharged for this incident. Ablaza recalled that he had explained to the dispatcher, Officer Reno, that he had been unable to find street parking and was permitted by that dispatcher to park in the Tabor Garage without paying while working two consecutive shifts—the second and third, from 2 p.m. to 10 p.m. and then from 10 p.m. to 6 a.m. The Tabor Garage, unlike the Korman Garage, was used only by those Respondent's employees who had been issued access cards. It was not used by nonemployees and could not be entered by pulling a ticket from a dispensing machine. Ablaza did not have an access card. About an hour before the end of his third shift, a sergeant asked Ablaza to move his car even though it was a Sunday and his was the only vehicle parked on that level. The sergeant wrote up this incident, recommending that Ablaza receive counseling.

To show disparate use of the security department van, Officer Robert Jardine[12] testified that on October 24, 3 days after Foster's discharge, he saw security department Rosie McDaniels use that vehicle to make an apparent purchase at a nearby delicatessen.

Jardine also testified that, earlier that same day, he saw security department Supervisor Sergeant Archie Allen drive two nonsecurity employees in another security van to a (funeral) viewing. In response to these two incidents, Jardine filed a grievance with Kendig who stated that he was going to look into the allegations and question the two supervisors about them.

Nancy Glasberg, since 1989 the Respondent's assistant general director for human resources, described the Respondent's no-fault attendance policy. This policy had been effectuated because the Respondent considered it more important to have its employees on the job with maximum frequency than it did the reasons for absences. This no-fault policy applied throughout the hospital and also included the security officers. Under this policy, the reason for absence did not matter, and incidents were charged against employees' records regardless of explanation. Accordingly, Foster was charged with an incident when, on October 29, he requested a day off to attend negotiations because he had not conformed to the security department's rules concerning how long in advance the request for a personal day had to be made. While Foster had offered 2–3 hours' notice, that department required 5 days' advance notice. This undisputed requirement, however, applied only to the security department since each department set its own rules.[13] Accordingly, Foster's ''negative time off'' for that incident referred to a situation where Foster could take a paid day off because he had accumulated sufficient personal days, but the recorded incident was the price he paid for not having provided sufficient notice.

Beth Duffy[14] testified that the Korman Parking Garage, where Foster was charged with having parked without paying, is a multitiered facility located on the Respondent's premises and used by employees, visitors and patients.[15] Most employees elected to pay for parking by biweekly payroll deductions as opposed to pulling a ticket and, like patients and visitors, paying the cashier the daily public rate when they leave. Employees who opted for the payroll deduction method were issued access cards which could be run through a card reader when they entered and left the garage. The cashiers at the garage booths were employed by DLC Management, a separate company under contract with the Respondent. In July, DLC's onsite manager at the Respondent's premises was Jim Hennessey.

Duffy related that on July 16, Kendig called notifying her that Johnnie Williams, a security department employee, had been found by a security supervisor asleep in his automobile parked in the Korman Garage, for which offense Kendig proposed to discipline Williams. Duffy authorized Kendig to discipline Williams for sleeping in the garage, but also directed him to look into whether Williams had had parking privileges and, if not, to determine how he had entered and exited from the garage. Kendig reported back that Williams had not paid for the parking. When Williams admitted to the Respondent's officials that he had made his way into the garage by pulling a ticket, but had left by telling the cashier to lift the gate for him because he was on duty and his access card was not working, he was discharged.

Duffy explained that Williams had been terminated with specific reference to the following items in the employee handbook—for failure to use appropriate judgment, inappropriate and unprofessional behavior, theft of parking services, and violation of the parking rule. Although under the Respondent's system of progressive discipline, a first offender within a particular offense category could be penalized within a range of handbook-prescribed minimums to maximums for that offense, the only listed penalty for theft, even for the first offense, was discharge. Williams' conduct was characterized as theft of parking services because, when he left the garage, he had advised the attendant that his access card was not working when, in fact, no such card had been issued to him.

After Williams was terminated, a grievance and an unfair labor practice (ULP) charge were filed, respectively, with the Respondent and the Board. Kendig, in preparing for the ULP case,[16] approached Melvin Young, the DLC parking attendant who had let Williams out of the garage, through Young's

[12] As noted, Jardine's November 1, 1993 termination by the Respondent also is an issue in this proceeding.

[13] There is no evidence that the Respondent's security department had changed its existing policy concerning the amount of advance notice necessary for a personal day because of the advent of the Union.

[14] Duffy, a Respondent's assistant general director since October 1989, had exercised general oversight, inter alia, over the security department. After Kendig left the Respondent's employ on October 31 and moved out of state, Duffy temporarily assumed immediate responsibility for the security department until a replacement for Kendig could be found. At the time of the hearing, Duffy was still in overall charge of that department's daily operations.

[15] As noted, another parking facility on the Respondent's premises, the Tabor Garage, was used only by employees with access cards.

[16] Williams had had a more extensive record of prior discipline than did Foster, including a February 16, 1993 counseling document for absenteeism, and Williams was twice suspended for other infractions. These included ''Disregard for departmental uniform.''

supervisor, Hennessey. Young, produced by Hennessey declared that it had not been Johnnie Williams who had exited the garage on the night in question. Young was certain of this because he knew Williams as the school bus driver for one of his children. Later, Kendig, at Duffy's instruction, asked Young to review photographs of security officers. From these pictures, Young, with certainty, was able to identify Foster as the security officer he had let out the garage. At the Respondent's request, Young, on October 21, signed an affidavit to that effect. Williams' discharge was not rescinded because he had admitted to the conduct on which his termination was based, but Foster, too, was fired for the same conduct.

Garage cashier Young displayed distinct memory problems in his testimony. Although his affidavit gave July 16, 1993, as when the incident concerning Foster occurred, he had not even an approximate recollection of the relevant date. Young had started to work at the Korman Garage in April 1993 at a time when, he related, third-shift guards were not expected to pay for parking. It was not until sometime later that Hennessey had informed him that third-shift security officers would be charged for parking. Young testified that, when he had seen Foster leave the Korman Garage, it was before Hennessey told him that there would be a change in the parking rules affecting third-shift security guards. In his October 21 affidavit, Young related that, on July 16, ''at approximately 6:15 a.m., a black male Albert Einstein Medical Center Security Officer attempted to exit the Korman Garage using his Albert Einstein Medical Center employee access card. When the Officer inserted his card, the gate did not lift. As he was known to me as a security guard, I therefore lifted the gate and allowed him to exit without requiring him to pay the normal parking fee.'' In his affidavit, Young stated that he had reported the incident to Hennessey at the time. Not having been asked the security officer's name, he identified Foster only by description. He had recognized Foster because he had seen Foster several days a week during their corresponding work hours.

Thereafter, when Hennessey, weeks later, called Young in connection with the Respondent's investigation of this incident, he recalled the event. Young related that, before signing the affidavit, he several times had told Hennessey and the Respondent's officials in attendance, that he could not remember the date when he had seen Foster leave the garage. Young, however, affirmed that Duffy had told him that if he was not sure of the date, he should not sign the affidavit. There was no compulsion and the affidavit was amended in various respects to meet his concerns before Young finally signed. Young testified that he had not told Hennessey, Duffy, or the others of his belief that, when he saw Foster leave the garage on the occasion at issue, third-shift guards still were allowed to park free. Duffy, on rebuttal, testified that although she had been present at all the meetings that led to the signing of Young's affidavit, she never heard Young say that he was not sure of the date of the reported incident.

Duffy testified that in the course of the Respondent's investigation of Williams, Young had freely identified Foster as the individual he had seen leaving the garage on July 16 by pretending to have an access card that did not work so as to be let out without paying. This, according to Duffy, constituted a theft of parking services which, under the Respondent's employee handbook, mandated discharge regardless of the other offenses listed in Foster's discharge notice and in spite of the fact that Foster generally had been regarded as a satisfactory employee.

On October 6, just 2 weeks before his discharge, the Respondent had given Foster a favorable performance evaluation.

As to the Chinese food incident referenced in Foster's discharge notice, no action was taken against the two unnamed emergency room nurses whose requested sodas had been part of Foster's food order. Duffy related that she did not inquire into the nurses' identities since she did not have responsibility for the emergency department and did not know if Kendig ever had contacted that department's nurse-supervisor. Also, the internal rules of the security department did not apply to personnel in other departments.

Wright, in turn, testified that the described instances where the security van was used for destinations away from the Respondent's premises were authorized exercises of supervisory prerogative. Wright, in his official capacity, had permitted Sergeant Allen to use the van to drive several members of the Respondent's staff to the viewing of an employee who had been murdered. As a supervisor, Sergeant McDaniels also had authority to use the van although, after Jardine's complaint that she had utilized it to go to a delicatessen, McDaniels was told by Kendig not to use it again for that purpose.

As noted, the General Counsel and Union also argue that section 17.3 of the collective-bargaining agreement above which, as construed by the Respondent, for the first time included third-shift security officers among those who must pay for parking on the Respondent's premises, should not be relied on as a valid ground for Foster's discharge. This is because the provision had been invalidly obtained by deliberate misrepresentation at the bargaining table in response to the Union's request for information. These parties argue that such conduct also constitutes an unlawful refusal to bargain.

2. The alleged refusal to bargain

Steven Bellano, the Union's business manager since June 1992, testified that, on September 29, 1992, following the Union's September 3, 1992 certification as bargaining representative for the Respondent's security officers and investigators, the parties began negotiations for an initial collective-bargaining agreement. Bellano, who was the General Counsel's only witness concerning these bargaining sessions, served as the Union's principal spokesman. He headed a several member negotiating committee that included Tyrone Foster. Attorney Barnett Satinsky was the Respondent's chief negotiator and witness in this area. The Respondent's negotiating committee throughout, among others, included Assistant General Directors Glasberg and Duffy.

Bellano related that at the September 29 session, the Respondent proposed at section 17.3 that unit employees pay the same rate for on-campus parking as the general public was charged. In this connection, Satinsky told the union representatives that third-shift employees were not paying and the Respondent wanted it stopped. Bellano wrote on his copy of the Respondent's written proposal ''No. Possibly the same as all other hospital employees * Not public rates.'' The union representatives responded that unit employees would not pay the public rates which were higher than employee

rates, but would continue to do what they had been doing, pay the same as every employee on all shifts.

Bellano next described the March 23, 1993 bargaining session in relevant part. While the parties were reviewing proposals, Satinsky asked for the Union's response to its above proposal for article 17.3. Bellano replied that the Union did not want to agree to pay at all, but to get the issue finished, the Union would agree to pay as every other hospital employee pays. The Respondent's representatives did not reply. Later, during the lunchbreak, Foster reminded Bellano that the third-shift guards did not pay for parking. Bellano replied that he understood this and that the Company is very upset about it; they want the employees to pay. If everybody else in the hospital pays for parking, they, too, would pay as a way of being fair. Foster told Bellano to ask if everybody pays.

When on March 23, during the afternoon session, Bellano asked if everybody in the hospital paid for parking, Satinsky said yes. The Union, accordingly, agreed to pay as everybody else in the hospital paid. The parties then agreed that the union employees would pay the same parking rate increases as all other hospital employees. Bellano emphasized that on March 23, in response to the Respondent's original proposal that the unit employees pay the same parking rates as were charged to the general public, the Union stated that its employees would pay the same as all other hospital employees and that it was this that had been agreed.

Bellano related that on April 20, after the collective-bargaining agreement had become effective, Foster called him at his office. Foster pointed out that third-shift employees had received slips for parking; that it was his understanding that third-shift employees would pay the same as all other hospital employees; and that third-shift employees did not pay for parking. Bellano reviewed his notes and the contract and asked Foster if third-shift employees who were not in the bargaining unit paid for parking. When Foster answered no, Bellano told him that they were not supposed to pay, either.

On April 29, Foster filed a grievance that the Company was in violation of the intent of section 17.3, which assertedly was that security would pay for parking under the same conditions as all other employees. Since third-shift employees hospitalwide did not pay, third-shift security employees should not pay. Foster, in effect, asked that the Respondent stop charging third-shift security personnel for parking. The Respondent rejected the grievance because untimely; because the contract language unambiguously stated that those employees parking on campus shall pay the contractual rate *without exception*; and because the charges were totally consistent with the negotiating history and the Respondent's proposal, which the Union had accepted. The Respondent closed its reply by asserting that the Union could not get through the grievance procedure that which it had failed to get at the bargaining table. The Union did not pursue arbitration, claiming that its attorney had been hard to reach[17] but, 2 months later, filed the initial charge in this proceeding.

On cross-examination, however, Bellano admitted that his memory and notes of contract negotiations were quite incomplete. Such notes as he had principally listed only dates when bargaining sessions were held, beginning in February 1993. He, however, agreed that meetings not on his list had been held in 1992 and 1993. Claiming to have lost them, Bellano had virtually no substantive notes of what had occurred during negotiations.

Although Bellano, as noted, testified that he had agreed to pay for third-shift parking only after Satinsky, on March 23, had answered yes to his question as to whether all employees paid for parking, he conceded that section 17.3 of the signed contract contained no language exempting third-shift security employees from that provision's paid parking requirements and that the two signed side letters executed by the Company and Union concerning interpretation and application of the contract did not memorialize the Union's position concerning third-shift parking. As also noted, Bellano had no notes of the March 23 session to support his assertions.

The detailed account of the relevant negotiating sessions was provided by Satinsky who, in his testimony, relied on contemporaneously kept notes. Satinsky related that all negotiating sessions took place in the offices of the Philadelphia law firm of which he is a member. At the first meeting, on October 1, 1992, the Respondent presented its written proposals to the Union. As described by Bellano, the Company initially proposed that the employees, regardless of shift, pay for parking at the rates charged to the general public. This proposal would require third-shift security employees to pay for parking for the first time. Parking was not discussed at the first session.

At the next, November 9, 1992 session, Satinsky raised the problem of employees who had been parking improperly as one of the matters he wanted resolved. Security officers were not ticketing the cars of other security officers who were wrongfully parked, letting them get away. Foster, of the Union's negotiating committee, acknowledged that this was a problem; that the Union was not disputing this; and that it essentially was a problem with some employees on the third shift. There was no discussion at that meeting as to whether other nonunit third-shift employees were required to pay for parking.

Bargaining sessions thereafter were held in November and December 1992 and January 1993. Although the Union submitted its own complete set of proposals at the December 1 session, it did not include a response to the Company's pending proposal on parking. Bellano admitted that the Union's proposal on that matter had been inadvertently omitted. The topic was still on the table.

The issue of parking again arose during the February 17 session. The Union having presented its revised set of proposals in December, the parties, just before Christmas, had agreed that it might be more fruitful if the chief negotiators met alone without the respective full committees. Accordingly, Satinsky met with Bellano and the Union's disbarred attorney on two or three occasions. The Company wanted to ensure that the Union understood that, when it referred in its proposal to the posted public parking rates, it meant the garage and lot rates charged to the general public, but not the more costly valet parking rates. There was no discussion on February 17 as to whether third-shift security employees would have to pay for parking.

At the February 25 meeting, Satinsky reiterated the Respondent's position on parking. The Company was not talk-

[17] The Union's legal advisor during negotiations and thereafter previously had lost his license to practice law either by disbarment or suspension and, by the time of the hearing, was institutionalized with Alzheimer's disease.

ing about the valet parking rate, but about general parking. Bellano stated that the Union did not want to pay for parking. When the parties returned from caucus, the Respondent presented revised proposals. The Company's reworded proposal concerning parking was that the bargaining unit members should pay 50 percent of the general public garage rate, rather than the full amount previously proposed. A reference in Satinsky's notes of that session to ''Brother Collier'' related to a unit employee whom both sides knew parked illegally. The Respondent contended that this should stop.

Satinsky testified that, at the March 3 meeting, the Union wanted to retain a $7 or $9 rate per pay period in response to the Company's proposal that unit employees pay half the public parking rate. This would have been the amount that first- and second-shift employees were paying at the time, rather than the higher Company proposed rate. The Union did not say that they expected to retain the system under which third-shift employees did not pay. During a caucus, the Respondent's representatives were able to ascertain by phone the exact parking rates and returned with a proposal that the employees pay $9.79 per pay period for surface lot parking and $11.38 per pay period for parking in the garages; to be strictly enforced across the board, no exceptions, each rate to be subject to any increases applicable to other employees. Accordingly, assuming inflation, the rates might not be locked in for the 3-year term of the contract.

Satinsky's notes of the March 12 session reminded him that, when that item was reached, the Union had not replied to the Respondent's March 3 proposal on parking. Satinsky reiterated his proposal from the prior meeting, making clear that it would apply without exception. After he finished going over his proposals, the union representatives caucused. Upon their return, Bellano stated that at the last session, on March 3, he had not heard Satinsky say that the proposed rates would be subject to any increases applicable to other employees. He did not dispute that Satinsky had made such a statement, but he just had not heard it until March 12. This might or might not influence whether his position would be favorable, but it was Bellano's first understanding that the Company was talking about a rate that would be subject to adjustment. After extended lunch and caucus breaks, the parties reconvened at 3:15 p.m. When they returned, the Respondent having calculated to what extent the rates might increase, proposed to the Union that if it wanted a 3-year rate, effective at the start of the contract that would not be subject to adjustment during the contract term, those rates would be $12.24 per pay period for the surface lots and $14.23 per pay period for the garages.

At the start of the March 23 session, Satinsky gave the union representatives a proposed complete contract, which included language, except for rates, that the Respondent's representatives believed had been agreed to concerning parking. The Respondent's position on parking was what it had proposed on March 3, that the employees who park on-campus pay ''$9.79/pay period for surface lots, $11.38/pay period for garage; to be strictly enforced across the board, without exception, and subject to any increases applicable to other employees.'' The matter of parking was not reached until after the Union's 11 a.m. caucus. During that caucus, Bellano gave Satinsky the Union's response, which was that parking was agreed if the Union received the language of a specified provision of the contract between the Respondent and the Operating Engineers, covering the Respondent's operations and maintenance employees. That language provided a ''most favored nations'' clause so that if the hospital were to change certain benefits during the contract term, the employees in the Operating Engineers-represented unit would get the benefit of those changes. Satinsky withheld his response until he had an opportunity to look at the Operating Engineers agreement. When negotiations resumed at 1:15 p.m., the Respondent rejected the Union's request for a ''most favored nations'' clause. Agreement was reached that day on parking based on the Company's proposal distributed on March 23. Satinsky, contrary to Bellano, emphasized that there had been no discussion prior to reaching agreement about whether third-shift employees would pay for parking. The issue of the third shift, or of rates for different shifts, did not come up during negotiations. Satinsky further testified that at no time between the March 23 session, when the parking language was agreed, to the April 12 effective date of the contract, no one from the Union raised any questions about third-shift employees paying for parking.

Satinsky avowed that the Union had not divided its discussion or proposals into consideration of different shifts. Initially, the Union had not wanted to pay for parking on any shift, but never questioned how other employees were being treated in terms of shift. The Union merely had spoken in terms of getting the same rates as applicable to other, nonunit employees. Satinsky, for his part, had tried to be clear in demonstrating the intended broad applicability of the Respondent's parking proposal to all unit employees, regardless of shift, by repeatedly using the language that ultimately became part of the collective-bargaining agreement, ''without exception, to be strictly enforced, across the board.''

3. The discharge of Robert Jardine

a. *Acts of coercion, interference, and restraint affecting Jardine*

Jardine[18] became first-shift union steward about 1-1/2 to 2 months after the August 1992 representation election, after two others had held the post.

Jardine testified that after he became steward of the day shift, the largest with about 18 employees, Lieutenant Wright told him that he was not allowed to speak of the Union or its functions on company time. He recalled that, even while his predecessor was steward, Wright would pull aside employees who had been talking about the Union, most often right after rollcall, and tell them that they were not allowed to do so; that it was against the rules; and that they could be disciplined, suspended, terminated for speaking about the Union on company time. The individuals who were so approached were not identified.

Jardine described further incidents involving Wright. On an occasion when Jardine first became steward, he discreetly answered questions about the Union that had been raised by another officer while they were in the tower lobby. When Jardine returned to work after taking the next 2 days off,

[18] A security officer with the Respondent since August 1991, Jardine had worked on the second shift during the Union's organizing campaign. By the time of the election, Jardine was on the first shift where he remained for the rest of his employment by the Respondent.

Wright told him to remain after rollcall. When he complied, Wright and Sergeants Allen and Flaherty told Jardine that he was not to speak of the Union on company time. When Jardine asked about his First Amendment rights, Flaherty told him that he had no such rights because this was Einstein; that that was what the Company's policy was; and that was it. Jardine was told that, if he kept it up, he could be suspended, written up, or terminated. The Company did not have an active contract so there were no rules they had to follow; the Company could make its own. When Jardine protested the impropriety of this, stating that even though there was no contract, Einstein still had to follow some rules, some laws, he was told that he was wrong. The Company could do what it wanted. on cross-examination, however, Jardine testified that statements by Wright and Flaherty that Jardine was not supposed to discuss union business on company time were consistent with section 16.4 of the labor contract which read: ''No employee shall engage in any union activity, including the distribution of union literature, during working time.''

While Jardine could not recall the approximate dates of various conversations with Wright about the Union, he testified that 2 to 3 times a week, starting right after he became steward in around October 1992, and continuing until his discharge, Wright, when he walked by Jardine's post, would stop and make such remarks as that the men had screwed up by voting in the Union; that the Company was looking at Jardine and would terminate him when it could; that, if anything happened, it was the men's fault because they had brought in the Union; that the hospital was going to break the Union; that the Company was going to get the Union decertified; and that the Company was going to get rid of the guards and bring in Wackenhut for $6.50 an hour. Jardine related that he had spoken to Union Business Manager Bellano about these repeated statements, but he did not file a grievance concerning them.

Jardine related that, at a rollcall in April 1993, Wright read aloud a memorandum from Kendig that employees were not permitted to wear union pins, or any other pins, on their identification (ID) badges. Immediately thereafter, Jardine told Wright that that was ridiculous. If the guards had to take off their pins, then it also would be necessary for them to take off their service and United Way pins. Jardine and other unidentified guards who were present asked what about the nurses who had stickers all over their ID badges to such extent that their names and faces could not be seen. The response was that this applied only to union employees. Jardine related that, during virtually his entire time with the Respondent, he had worn a small American flag pin and a star-like pin for Local 5, Fraternal Order of Police (FOP), which he had put on for the Union's organizing campaign. The FOP did not represent the Respondent's employees but did represent the Philadelphia police officers. On cross-examination, Jardine conceded that Wright's statement that Jardine and the other employees could not wear union pins on their ID badges was consistent with section 16.5 of the collective-bargaining agreement with the Union which provided that: ''Employees shall not wear buttons, hats or other clothing displaying union insignias in any area to which patients have access, including common areas, such as cafeterias.''

b. *Jardine's discharge*

Jardine was terminated on November 1, 1993, after having received for various accumulated infractions a counseling document, three warning notices, and two suspensions. The asserted proximate cause of discharge, in the context of referenced previous disciplinary actions, was that, on October 23, Jardine had failed to provide proper notice of absence, in violation of section 11.1(d) of the labor agreement by having his girlfriend call into the command center about 10 minutes before the start of his shift that he would be out sick.[19] Although the language of the discharge notice indicated that the Respondent also might have considered it objectionable that Jardine's girlfriend, rather than he, personally, had placed the call, the Respondent has made clear that Jardine's breach on that occasion was based on his failure to provide at least an hour's notice of his unavailability for work, as provided in the contract, and not on who had provided the information that Jardine would not be in.

Earlier, on May 4, 1993, Jardine received a counseling document from the Respondent for the following stated reason:

> On April 21, 1993, S/O R. Jardine failed to carry out specific orders, instructions, and an assignment, when he failed to report to Patient Tower Lobby. S/O Jardine was also absent from his work area without appropriate notification and approval from his supervisor.

Jardine testified that the above counseling document had been issued inappropriately. During his preceding shift, his ribs and arms had been injured while assisting a fellow officer in restraining a patient on the psychiatric floor. According to the employee handbook, Jardine had to be cleared by employee health before he could return to duty. He, could not report there immediately, however, because employee health did not open until 9 a.m., 3 hours after the start of Jardine's shift. When Jardine explained this to Sergeant Flaherty, he was told to punch in, to go to his post, and to proceed to employee health when it opened. Accordingly, at 9 a.m., Jardine radioed Flaherty that he was leaving; where he was going and went to employee health. Jardine was next aware that he was in a room near the front desk. Sergeant Allen asked him about Form 482, about which Jardine had not heard. As Allen left, Flaherty came in and asked the same thing. Jardine received the above counseling document, but took no immediate steps to rectify the situation because he had had ''a lot of personal problems at the time.'' Even though he had had Flaherty's permission to leave his post, Jardine merely accepted the writeup. When Jardine did speak to Flaherty about the matter, Flaherty merely confirmed that the writeup was consistent with his report. Jardine's subsequent related grievance was rejected as untimely.

On June 7, 1993, Jardine was given a warning notice for having been absent four times in a 6-month period. All four absences, which occurred between February 16 and May 25, 1993, were for illness. Jardine conceded that he had been ab-

[19] Sec. 11.1(d) of the collective-bargaining agreement provides, in relevant part, that:

> To be eligible for sick leave pay, a sick or injured employee must notify his supervisor at least one (1) hour prior to the start of the Day Shift. . . .

sent as indicated on the warning notice and that, under the Respondent's' existing policy, four absences during a 6-month period resulted in a warning.

Jardine received a second warning notice on June 29, 1993, for failing to arrive at rollcall in complete uniform—specifically, on June 10, without goggles and hat, and on June 23, without hat throughout the shift. This was in violation of a specific security department policy procedure requiring security officers to be in complete standard uniform at time of rollcall and that the uniform hat be worn while officers were on duty outside the Respondent's buildings. Jardine explained that he had been asked by the lieutenant about his hat and goggles on June 10, when he arrived for rollcall, and replied that he had forgotten them in the trunk of his car. After rollcall, Jardine retrieved the goggles and hat from his car and went to his post. Although Jardine volunteered in his testimony that the lieutenant had not asked anyone else about them, he conceded that such an inquiry would have been inapplicable since no one else was out of uniform. On cross-examination, Jardine admitted that, contrary to his original testimony, he had been disciplined not just not for having had his goggles during a single day's rollcall, but for three separate infractions on different dates. Jardine had not had his goggles on June 10, had been without his goggles and hat on June 22 and had worked his entire June 23 shift without his hat. Under section 17.1 of the contract, which the Respondent considered violated in this regard, the Respondent was to provide goggles to employees as part of equipment deemed necessary for the safe performance of work, replacing them if returned damaged. The terms of the collective-bargaining agreement provided that goggles were to be ''regarded as part of an employees' uniform, to be carried at all times, including roll call.''

A third warning notice was issued to Jardine on June 21 for, on June 17, having patrolled with a radio that reportedly was battery-weak, contrary to Jardine's responsibilities. Jardine explained that his radio had become dead during that shift. The radio had worked well until 12 or 12:30 p.m. and he did not think anything had gone wrong with it after it went silent—just that nothing was going on. Later, as he passed one of the security officers, Jardine was told that the department had been trying to get in touch with him. Jardine went to the base and was told to check his radio. When he did, he found that the battery was dead. He changed batteries and finished his shift.

On cross-examination, Jardine recognized that the radio was the security officers' principal means of communication, was used for emergencies and that it had been his responsibility to see that it was in good working order and turned on at all times. Audible radio communication was not just between Jardine and the base station, but between all the security officers and the base station. Since all had walkie-talkies, Jardine normally could hear not just calls to himself, but conversations between all the other security officers and the base station. Still, Jardine protested that it was not unusual for the radio to be quiet late in his shift.

Jardine received a 1-day suspension notice on August 17 for a furlough that was given on August 24. This was because, although excused for a medical appointment while required to work mandatory overtime, Jardine assertedly had failed to provide proper notice that he would not return to work, thereby violating the rule that an employee assigned mandatory overtime who was unable to work such overtime, regardless of the reason, be responsible for finding a qualified replacement. Lieutenant Johnson, of the second shift, had told Jardine 10 minutes before his shift was to end at 2:15 p.m. on the day in question, that he was required to work mandatory overtime that day. It was his turn to stay. Jardine testified that he then informed Johnson that he had a doctor's appointment. Johnson told him to keep the appointment and then return. It took Jardine 45–60 minutes to drive from the Respondent's premises to his physician's office. From there, he called Lieutenant Johnson and reported that the doctor wanted to do a hospital test at another location. The lieutenant asked to speak to one of the nurses, whom Jardine put on the phone. When she handed back the phone, the nurse told Jardine that the lieutenant wanted to know if he was coming back. Jardine took the phone and told Johnson that he did not think he would be returning because he did not know how long the test would take and he had to go back to the doctor's office after that, anyway. The lieutenant said, ''O.K.,'' ending the conversation.

As to Jardine's suspension for not working overtime on August 17, under the relevant section 15.6 of the collective-bargaining agreement, the Respondent had the right to determine the amount of overtime work necessary and the number of employees needed. Where overtime was required, the procedure was that the Respondent first must offer it on a voluntary basis to the employees on the shift then ending; then to a maximum of five employees on shifts not then ending; and, finally, may mandatorily assign it to employees on the shift then ending, in inverse order of seniority, on a rotating basis. The record is clear that the rotation list for mandatory overtime had not been posted and was not readily available to employees. Jardine testified that overtime was worked about 2–3 times a week and that he had made the appointment with the doctor about a week before. Jardine was aware that the employee immediately ahead of him on the rotation list had been called to work overtime about 2 days before himself. The supervisor had not excused him from working his overtime but, in effect, had told Jardine to keep his doctor's appointment if he could be back in 1-1/2 hours.

Jardine next was given a 2-day suspension notice on October 4, showing that he was to be suspended on November 11 and 12 for seven latenesses between April 21–September 18. This allegedly violated the Respondent's above ''no-fault'' rule that lateness, whether or not excused, which occurred during four or more consecutive biweekly pay periods or seven or more times during any 6-month period, was excessive. Jardine averred that on October 4, at 2 p.m., Kendig called him to his office where Jardine met with him and Wright. As Kendig gave Jardine the suspension notice, he told him that if the Union was not in Einstein, he could have brushed the incident under the carpet but, because there was a Union, if he let Jardine go, he would have to let the next one go. So, Kendig had to make an example out of somebody. Jardine did not file a grievance or unfair labor practice charge over Kendig's statement because, as he testified, he had been afraid of losing his job.

On November 1, at 1:45 p.m., Kendig called Jardine to his office and, in Wright's presence, gave Jardine his discharge notice. The notice specified that the terminal action was being taken because, in the context of his earlier enumerated conduct occurring between April 29–September 2, 1993,

which had resulted in the issuance of one counseling document, three warning notices, and two suspensions, Jardine, on October 23, 1993, had failed ''to provide proper notice of absence by having one Maureen' call into the Command Center at 5:50 a.m. that Officer Jardine would be out sick.'' As noted, this assertedly violated section 11.1(d), of the labor contract, which required that sick or injured first-shift security officers, to be eligible for sick leave pay, must appropriately notify their supervisors at least 1 hour prior to the start of the day shift. Jardine explained that he had awakened that morning with a queasy stomach, had vomited heavily while en route to work and had returned home, unable to make it to work. He had told his then-girlfriend, Maureen, to call in for him to explain that he was sick and throwing up. When Maureen called, she explained what was happening to Sergeant Johnson, telling him that Jardine was unable to come to work. On November 1, when issuing the discharge notice, Kendig told Jardine that he was being terminated, that he should sign the notice form and turn in his badge and ID. Jardine declared that this was ridiculous, but complied and left.

Jardine admitted doing all that he had been charged with in the various disciplinary measures taken against him, except that he disputed the validity of being penalized for having been away from his work area without his supervisor's permission on April 21, when his visit to employee health had been approved by Sergeant Flaherty, and when he later was faulted for the battery-dead radio. Jardine contended that even though all the censurable conduct for which he had been disciplined had occurred, his above conversations with Kendig and Wright demonstrate that he would not have been fired if he had not been the union steward.

c. *The Respondent's evidence concerning Jardine*

Lieutenant Wright testified that Jardine had been only a mediocre employee while with the Respondent. At times, Wright had had to tell Jardine to go back to his post, recalling an occasion when he had found Jardine in the security office when he should have been in the lobby. Jardine had explained that he was there to pick up a log.

Wright related that a problem with Jardine had been his uniform and that he had issued the warning notice concerning the missing hat and goggles to Jardine because, on more than one occasion, he not only had not been in uniform, but was not always well groomed. Sometimes, too, Wright had had to tell Jardine to bring in his equipment. Wright explained that he was responsible for inspecting the guards' appearances before the start of their shift and to call uniform and equipment deficiencies to their attention.

Wright denied Jardine's testimony that, after the latter had become union steward, he had stopped by the Jardine's post two to three times a week to tell him, repetitively or at all, that the men had screwed up by voting in the Union; that the jobs of Jardine and the other security officers were in danger because of this; that the Employer would bring in Wackenhut security guards for $6.50 per hour, and all other such statements attributed to him by Jardine in that context.

At an unrecalled date, Wright did tell Jardine that he could not discuss union activities on working time, having based this admonition on the above-indicated language of the collective-bargaining agreement. He, however never told Jardine anything about what he could do during nonworking time, nor did he tell Jardine that he could not perform his job as steward. Wright admits that he did tell Jardine that, under the contract, he was not allowed to wear pins on his ID badge. Wright conceded that he wore an Albert Einstein Medical Society pin on his uniform and that he also would allow his supervisors to wear one. Wright would need Duffy's approval, however, before permitting his security officers to wear such a pin.

Wright related that he had issued the counseling document to Jardine for having left his post without supervisory permission on the occasion when Jardine went to employee health because, as reported to him by Sergeant Flaherty, Jardine had not notified Flaherty or otherwise obtained permission to go there. Jardine had notified the dispatcher, but not the sergeant. Notification to the dispatcher did not constitute sufficient notice to the Respondent, and the nonsupervisory dispatchers were not authorized to give security officers permission to leave their posts.

Wright gave Jardine the warning notice concerning the dead radio because Jardine should have checked his radio batteries well before he did. While there was no battery tester available and the radios did not crackle, Jardine's day shift was always busy and transmissions could be overheard at, at least, 30- to 40-second intervals. Since the radios never were to be turned off during the guards' shifts, and since all the various guards' different activities could be heard when reported, Wright testified that, if a radio were silent for even a very short period, the red light on the machine, indicating battery life, should be checked. Jardine's failure to have timely inspected his radio had resulted in a situation where he did not respond to a ''stat'' call, to assist fellow officers in a situation where a patient being admitted to the psychiatric emergency service unit was physically trying to fight the staff members.

With respect to Jardine's infraction concerning his failure to work mandatory overtime because his postshift medical appointment had precluded him from returning to work the extra hours, Wright testified that the guards usually learned from their supervisors that they were required to work mandatory overtime 2 to 4 hours before the end of their shifts. For no good reason, the mandatory overtime list that could show employee placement never was posted so that, to obtain advance notice, employees would have to ask their supervisors where they stood on the list.

Wright, who was present when Kendig gave Jardine his third and last warning notice, for latenesses, did not hear Kendig tell Jardine that, if it were not for the Union, he could have swept the incident under the rug, or words to the effect that Kendig had to make an example of Jardine. Rather, Jardine had apologized for the latenesses, explaining that he had been having troubles with both his ex-wife and his girlfriend. Kendig, in turn, had replied that he understood Jardine's situation, that he hoped that Jardine cleared things up but, unfortunately, that, it was Kendig's job to issue these warning notices.

D. *Discussion and Conclusions*

1. Credibility; the alleged refusal to bargain

From the entire record, I accept the testimony of the Respondent's attorney and chief negotiator, Satinsky, over Bellano, to conclude that the Union's agreement to section

17.3 of the collective-bargaining agreement, which, in effect, provided that all unit employees, including for the first time third-shift security officers, should pay for parking, without exception, was not based upon the Respondent's misrepresentation. This is because the clarity of that provision's language which, by its terms, applied across the board, with no exceptions; because of the absence of any side agreement attached to the contract memorializing the Union's position, as was done by the parties with respect to other matters; because Satinsky's testimony concerning the negotiating process that led to section 17.3, supported by contemporaneously-kept notes, was markedly clearer and more comprehensive that that of Bellano; and because the disputed provision is consistent with the Union's broader pattern of yielding on economic issues of benefit to the employees it represented. Accordingly, with the adoption of the collective-bargaining agreement, the Respondent's security officers experienced reduced wages, diminution of the shift differentials, reductions in vacations, and elimination of some sick days. Just before the Union accepted section 17.3 as written by the Respondent, that Employer also had rejected the Union's request that it be given ''most favored nation'' provision such as appeared in the Respondent's contract with the International Union of Operating Engineers covering its maintenance employees. This rejection, also absorbed by the Union, further indicates that, in entering into the relevant labor agreement, the Respondent did not intend to extend to the security employees' bargaining unit terms and conditions of employment that were tied to or, necessarily, were as favorable as those applicable to its other employees. With respect to corroboration, although both Satinsky and Bellano were the sole witnesses for the Respondent and General Counsel, respectively, concerning the negotiation of section 17.3, Satinsky's account was backed by the encompassing language of that provision, itself, which affirms his interpretation of the parties' agreement. By contrast, Bellano had poor memory of the overall negotiations and notes that mostly were a partial listing of the negotiating sessions' dates. Even Foster, who had attended all bargaining sessions as a member of the union negotiating committee and had testified at length concerning his discharge, was not called upon to confirm Bellano's shaky account of the history of the provision upon which his termination principally was based.

From the credited evidence, I find that the Respondent did not violate Section 8(a)(5) and (1) of the Act in persuading the Union to agree to section 17.3 of the labor agreement by furnishing the Union with false information concerning parking rules affecting other, nonunit employees, in response to the Union's request for such information.

Although the amended complaint alleges but three instances where the Respondent in various ways coerced or interfered with the rights of its employees in violation of Section 8(a)(1) of the Act, additional such incidents are described in the record. In one such instance, I credit the account of security officer Paul Ablaza, that about a week after Foster was discharged, he was approached at his post by Sergeant Johnson who asked if he had heard from Tyrone Foster. When Ablaza replied that he had not, Johnson told him that the men should have listened to the administration's plea not to vote for the Union; that there was nothing Foster could do; that the Union could not help him because it was weak; and that the Union had no money and had a lawyer with Alzheimer's disease. Ablaza's testimony in this regard was not effectively countered by Johnson, who initially specifically denied only so much of Ablaza's account as described him as having said that the Union's attorney had Alzheimer's disease. He could not recall having made the other statements attributed to him by Ablaza. Although Johnson later attempted to alter his testimony to actually deny having spoken to Ablaza about the Union or about Foster's termination, I find this subsequent change to be unconvincing, particularly after Johnson had been given several opportunities to initially deny testimony he insisted that he merely could not recall. Accordingly, I find that Johnson violated Section 8(a)(1) of the Act by, in effect, telling Ablaza that it was futile to support or to remain a member of the Union. In so concluding, it further is noted, as argued by the General Counsel, that Ablaza's credibility is enhanced by risk since, when he testified against the Respondent's interest, Ablaza was in its employ.[20]

As background to credibility issues concerning the remaining allegations, unlike many cases alleging discharge for union activity, the Respondent here had small cause to so resent the Union as to be motivated to orchestrate actions against employees who acted on its behalf. This is because factors that most often could incur hostile reaction were absent in the present matter. Most employers object to unions because a duty to bargain, inter alia, might interfere with their sovereignty in the workplace, the ability to direct workers without the interference potentially invoked by negotiated work rules and by need to conform to a grievance/arbitration procedure; and may involve increased costs in wages, benefits, and possible labor disputes. Here, however, such concerns were largely nonexistent. As noted, since the collective-bargaining agreement with the Union became effective, the bargaining unit employees earned less than before in wages and shift differentials, their vacations were reduced and some sick days were eliminated. The Union also agreed to a buyout of some personal days. As for benefits, section 18.2 of other contract provided merely for the continuation of the pension plan that had been in effect for such employees since March 1, 1993, prior to the effective date of the labor agreement. While a possibly new health and welfare plan was made a part of the contract, enabling regular full-time employees to have access to a specified health maintenance organization at $10 per visit, that plan also required employee premium contributions of $15 to $35 per week, respectively, based on single to family coverage. These above ''give-backs'' in wages and certain benefits occurred with no practical challenge to the Respondent's sovereignty. The Respondent's stringent work rules, including the ''no-fault'' attendance policy; the security department's requirement for a 5-day advance notice for a personal day; mandatory overtime on short notice; and the system of qualified progressive discipline, all remained intact as from before the Union's advent. While the record of this proceeding described several

[20] *Pittsburgh Press Co.*, 252 NLRB 500, 504 (1980); *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1966). Although not alleged in the complaint, this incident concerning Ablaza was closely related to matters that were alleged, arose from the same legal theory and was fully litigated. See *Nickles Bakery of Indiana*, 296 NLRB 927 (1989); *Redd-I, Inc.*, 209 NLRB 1115 (1988). Also, see the broader analysis in *Reebie Storage & Moving Co.*, 313 NLRB 510 (1993). Cf. *Lotus Suites, Inc.*, 147 LRRM 2001 (D.C. Cir. 1994).

union-filed grievances, all of which were rejected by the Respondent, none proceeded to arbitration. This Respondent well might have had additional grounds for regarding the union contract as beneficial since it potentially served as a bar to a costlier and more demanding collective-bargaining agreement with some other union. Accordingly, the Respondent's disincentives for objecting to the Union and, by extension, its adherents, are a practical backdrop factor in assessing credibility. Absent the traditional grounds for opposition, it is less clear here than in some other cases of this type that the Respondent's officials would be moved to systematically proceed against the Union and its adherents.

The two alleged discriminatees in this matter, Foster and Jardine, were quite different. Foster was impressive personally and professionally. Foster had had a good work record while with the Respondent, having received a favorable performance evaluation just 2 weeks before his discharge. While it did not help Foster's career with the Respondent when he took initiative to shift blame to himself from Officer Higgins for the Chinese food incident by volunteering to management that that errand had been run at his request, his action was high-minded. As a member of the Union's negotiating committee, attending all bargaining sessions, and as a grievance-filing steward, Foster had been more active on the Union's behalf than Jardine. Accordingly, in considering the evidence concerning Foster's termination, I credit his clear and convincing testimony.[21]

Jardine, on the other hand, was not an imposing witness. He did not seriously contest the occurrence of virtually all the infractions with which he was charged, including the attributed absences, latenesses and times when, contrary to the labor contract and work rules, he had come to work not completely in uniform and without required relevant equipment. In fact, Jardine was not above attempting to smokescreen his testimony by volunteering that Wright, on a particular occasion, had not spoken to anyone but him about not being in uniform when, on further questioning, Jardine conceded that he had been the only security officer who had not been in uniform that day. Jardine's testimony that Wright repeated essentially the same antiunion comments to him two to three times a week every week for more than a year, from when he became steward until his discharge, seems an exaggeration. This is particularly true since, as noted, the Respondent did not have that much to dislike in this Union and the record does not show that Jardine, while steward, had been particularly active. The record shows that he had filed one grievance concerning the off-premises use of the security department van by supervisors and an untimely grievance on his own behalf. Accordingly, noting that Jardine appeared to be willing to stretch the truth to cover for a spotty employment record, I do not credit him where his testimony conflicts with that of other witnesses.

Therefore, for reasons noted above, I do not accept Jardine's testimony that Wright, two to three times a week, would stop by Jardine's work station during the approximately 13 months from the time Jardine became steward until his termination, to tell him over and over again that the men had screwed up by voting in the Union; that the Company was looking at Jardine and would terminate him when it could; that the Company was going to get the Union decertified and bring in Wackenhut guards for $6.50 an hour, and other such remarks. In so concluding, it is noted that, despite the asserted duration and intensity of these remarks, neither Jardine, nor the Union on his behalf, had filed a grievance or a separate unfair labor practice charge concerning these incidents, and that the complaint, as issued, alleged that only a single instance of such conduct had occurred in mid-October, a year after that pattern was supposed to have begun.

Although not alleged in the complaint, Jardine testified about conversations with Wright and Sergeant Flaherty, after he became steward, where these supervisors told him that he was not allowed to speak about the Union on company time, but that what he had been told in this regard was consistent with section 16.4 of the collective-bargaining agreement which provided that ''No employee shall engage in any union activity, including the distribution of union literature, during working time.'' In *Jay Metals*,[22] the Board reiterated that a rule against solicitation and/or distribution of literature on company premises during working time is presumptively lawful and will not be condemned as ambiguous because the term ''working time'' is not expressly defined for employees.[23] This presumptive validity is because the term connotes when employees are performing actual duties, periods which do not include employees' own time such as lunch and break periods. Since the General Counsel has not rebutted the presumptive validity of the contractual rule, I find that it does not violate Section 8(a)(1) of the Act. In so concluding, consistent with my above determination concerning Jardine's credibility, I find that he was so cautioned during the contract term in accordance with section 16.4 thereof.

By contrast, I do conclude that the Respondent violated Section 8(a)(1) by its disparate application of section 16.5 of the contract, which prohibits employees from ''wearing buttons, hats or other clothing displaying union insignias in any areas to which patients have access, including common areas, such as cafeterias.'' It long has been settled that the wearing of union insignia on an employer's premises during working time is activity protected by Section 7 of the Act unless special circumstances make restriction of that right necessary in order to maintain discipline and, in the case of a manufacturing facility, uninterrupted production.[24] Although employees, such as Jardine, were not permitted to wear union badges on their uniforms, here for a union other than their own certified

[21] I, accordingly, credit Foster's account of the incident where Wright, on the night of the representation election, announced that the lunch break would be reduced from 45 minutes to 30, only to declare that that policy was retracted the next night after Foster protested. The event took place before the advent of the collective-bargaining agreement, at a time when the Respondent still might have perceived the Union as a threat. Since this announced change in the lunch break was soon canceled and was not alleged as violative in the complaint, I make no finding in that regard.

[22] 308 NLRB 167, 168 (1992), citing *Our Way, Inc.*, 268 NLRB 394 (1983), and *Chugach Alaska Fisheries*, 295 NLRB 44 (1989).

[23] By contrast not applicable here from the credited evidence, such a prohibition against solicitation and/or distribution on ''Company time'' would have been unlawful as overly broad since ''Company time'' could reasonably be construed as encompassing both working and nonworking time. *Southeastern Brush Co.*, 306 NLRB 884 fn. 1 (1992).

[24] See *Escanaba Paper Co.*, 314 NLRB 732 (1994), citing *Kimble Glass Co.*, 113 NLRB 577 (1955), enfd. 230 F.2d 484 (6th Cir. 1956).

bargaining representative, Wright and other security supervisors, and nurses in other departments routinely did wear buttons with other types of insignia on their uniforms. As held by the U.S. Court of Appeals in *NLRB v. Shelby Memorial Home:*[25]

> While *Beth Israel* ([*Hospital v. NLRB*, 437 U.S. 483 (1978)] involving a rule that prohibited employees from soliciting and distributing union literature except in certain designated areas of the hospital) would support the proposition that a health care facility may prohibit the wearing of patches that reasonably tend to interfere with employee discipline or disturb . . . residents, it clearly does not endorse selective enforcement of an otherwise valid rule against wearing insignia unrelated to health care delivery.

While here, as in *Shelby Memorial*, supra, the Respondent does not argue that the badge worn by Jardine for the union that represented the Philadelphia police officers had the potential to disrupt the efficient and ordered delivery of patient services, the Respondent has not justified why it must disparately enforce a rule against wearing insignia on uniforms apparently only against its rank-and-file security officers, noncare giving employees who have only tangential involvement with patients. The Respondent, in fact, has not argued that the wearing of such insignia would adversely affect persons being treated in its hospital. Contrary to the Respondent, under *Universal Fuels*,[26] the rule involved here is not made lawful because included in a collective-bargaining agreement with the Union. As there stated:

> Under the principles of *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, 325 (1974), a union may not waive employees' rights relating to their choice of a bargaining representative ''whether to have no bargaining representative, or to retain the present one, or to obtain a new one.''

While *Magnavox* and *Universal Fuels* dealt with rules that did not involve the wearing of union insignia, the principal in those cases, translatable here, is that a disparately applied rule restricting the wearing of union insignia unduly burdened Jardine and other security department employees in the expression of their support either for the incumbent Union or for a rival labor organization that potentially could succeed the current bargaining representative. Therefore, the Union invalidly waived the employees' rights by agreeing to section 16.5 of the collective-bargaining agreement and the Respondent's discriminatorily enforced rule against the wearing of union insignia is in violation of Section 8(a)(1) of the Act.

Finally, I credit Wright's testimony that, on October 4 when Kendig gave Jardine his 2-day suspension notice, he did not tell Jardine that, if the Union were not in the Respondent's hospital, he could have brushed the incident under the carpet but, because there was a union, if he let Jardine go, he would have to let the next one go, and Kendig had to make an example out of somebody. Since that discipline marked Jardine's second suspension based on cumulative infractions, following a counseling document, three warning notices and a 1-day suspension, the Respondent was not looking for ways to overlook Jardine's errors.

2. Foster's discharge

Although, as noted, I accept the accuracy of Foster's testimony, I find that he was not unlawfully discharged because the record does not establish that his termination was discriminatory. While Foster was disciplined and, finally, discharged in conformity with the Respondent's stringent work rules and policies, some of which were incorporated in the collective-bargaining agreement, from the credited testimony, the Union never effectively challenged any of them until, in this proceeding, it sought to evade the contractual provision that, inter alia, required for the first time that third-shift employees pay for parking at the Employer's on-campus parking facilities. While the rules were harsh, except for the contractual ban on union insignia, considered above, they were not unlawful and the evidence does not establish that, in Foster's case, they were discriminatorily applied.

Foster was disciplined as a result of the October 29 incident where he was charged with ''negative time off'' because he attempted to take a personal day without following the security department's rule requiring 5 days' advance notice before taking a personal day; because of the so-called Chinese food incident where, contrary to his department's announced policy, Foster had asked another security officer, Higgins, to take the mobile van off the Respondent's premises to pick up his food order; and, finally, through his termination for, by assertedly deceptive means, having failed to pay for third-shift parking at a Respondent's garage.

None of these disciplinary actions, however, were disparately administered. Foster was not given the counseling document just for having taken the ''negative time off'' on October 29, 1992, but, rather, it was consistent with the Respondent's ''no-fault absentee'' policy. The counseling document incorporating this infraction was not issued immediately, but only 6 months later, in April, and then also for three specifically referenced absences that had occurred between January and April 1993. Under the Respondent's standing policies, an employee with an otherwise ''clean slate'' who was absent from work, regardless of the reasons therefore, on four occasions in a 6-month period, or who in such interval took a personal day and three absences, would be given a counseling document. The General Counsel has not argued or shown that the security department rule requiring 5 days' notice as prerequisite to taking a personal day, however harsh in its implementation and application, was a recent promulgation to penalize Foster for his union activities as opposed to being a longstanding departmental regulation. The occurrence of the other absences referenced in the April counseling document were undisputed and, as noted, the Union never has bargained away the Respondent's ''no-fault absentee'' policy. This rule, which was applied to all the Respondent's employees, was in effect before the Union's advent and continued afterwards. Accordingly, the Respondent, although recording the October 29 incident, did not take overt action against Foster until 6 months later. Had Foster not incurred three additional work absences in that period, under the Respondent's policy, the October 29 incident arguably would have expired and the counseling document not issued.

[25] 1 F.3d 550, 565 (7th Cir. 1993).
[26] 298 NLRB 254, 256 (1990).

The Chinese food incident did not, in itself, result in Foster's termination. Foster admittedly willfully broke a security department rule by asking Higgins to take the mobile van off the Respondent's premises to pick up his food order. Higgins, with no demonstrated record of union activity, received a second warning notice for his role in the food incident.[27] In this, Higgins received even a harsher immediate penalty for his part in that incident than did Foster, who was not separately warned. Although the Chinese food incident was subsequently listed as an offense in Foster's discharge notice, the record shows that he actually was terminated because of the Respondent's belief that he had caused the parking attendant to lift the gate for him to exit without paying by pretending that his garage access card was not working when, in fact, Foster had not been issued such a card. This, in the Respondent's view and under its published employee handbook rules, had constituted theft, in this case of parking services. Theft was punishable by discharge on the first offense without recourse to the Respondent's system of progressive discipline or reference to other prior offenses.[28] Foster had come to the Respondent's attention in this regard during its investigation of Johnnie Williams, where Foster was identified as the culpable party by the DLC parking attendant on duty at the time, Melvin Young. While Young's memory of events was poor, there is no evidence that he was coerced into signing his statement identifying Foster as the individual who had left the garage on July 16 without paying and, since Young had known Williams in another capacity, he had had valid reason when identifying the guard in question to be certain that it was not him. Although Young was uncertain of the date when he supposedly saw Foster leave the garage without paying, he did freely sign the statement identifying July 16—the night in question. He did not indicate to the others his suspicion that the incident might have taken place before third-shift employees were required to pay for parking. Accordingly, I do not determine here whether Foster, in fact, was the security officer who had left the Korman Garage on July 16 without having paid. What is relevant is that the Respondent's officials had had good-faith reason to believe that he had done so. Again, Foster's treatment for this type of offense was no different from that of Williams, who also was terminated for theft of parking services, having admitted to same. That Williams had a more comprehensive record of prior discipline than Foster is immaterial because, in either case, the mandated immediate penalty for theft was discharge.

I find merit in the Respondent's explanation that the favorable performance evaluation given to Foster in the weeks immediately before his termination showed that the Employer's longstanding knowledge of Foster's union activities did not prejudice its assessment of assessing his value as an employee and, by extension, affect its later decision to discharge him.[29]

Therefore, in accordance with *Wright Line*,[30] the General Counsel established that Foster had been openly active on the Union's behalf in its organizing campaign, as a member of its negotiating committee and as third-shift steward; that he generally had been a good employee; that he had been variously disciplined for undisputed violations of the Respondent's stringent work rules; and that he was terminated for violation of the labor contract provision requiring that all unit employees, including those on the third shift, pay for parking. The General Counsel did not establish, however, that the collective-bargaining provision on which the Respondent relied in discharging Foster had been obtained during negotiations by misrepresentation or bad-faith bargaining, so as to preclude such dependence.

The Respondent, in turn, has demonstrated that all disciplinary actions involving Foster, including termination, were consistent with its established work rules and/or the collective-bargaining agreement, that he was not treated differently than other employees so situated and that, based on a good-faith belief that Foster had misappropriated parking services, he would have been terminated regardless of his union activities. From the foregoing, I conclude that the General Counsel has not proved by a preponderance of the evidence that Foster was discharged for his union activities in violation of Section 8(a)(3) and (1) of the Act.[31]

3. Jardine's discharge

Although Jardine had been the union steward for the first shift, and did file a grievance related to Foster's discharge concerning the off-premises use of the van by supervisors and an untimely grievance for himself, the credited evidence does not sustain the General Counsel's contention that he was terminated for union activities. Rather, the record shows

[27] Higgins previously had been counseled and had received an earlier warning notice for latenesses. Several years before, in 1990, Higgins had been given a warning notice for not having reported for duty.

[28] The evidence does not indicate that Foster and Higgins were treated discriminatorily by being penalized for having cooperated to take the van off the Respondent's premises when others had been allowed to do so. The two cited instances where the van was so utilized were examples of supervisory discretion—where Wright authorized its use to transport several employees to the viewing of a murdered fellow worker, and where Sergeant McDaniels had taken it to a delicatessen. Although the purpose for which McDaniels used the van was more marginal and, in response to Jardine's complaint, she was told not to do it anymore, both Wright and McDaniels were supervisors with authority to assign use of the van. The record contains no instance when any Respondent's nonsupervisory employees, on their own initiative, were able to take the van off the Respondent's premises without being disciplined therefore.

[29] Contrary to the General Counsel, Security Officer Ablaza was differently situated from Foster and Williams when he parked without paying and was counseled rather than discharged. This was because Ablaza had been permitted by the dispatcher to park in the Tabor Garage after explaining to the dispatcher that he had been unable to find street parking. While the dispatcher, apparently, did not have authority to approve the gratis parking, and Ablaza thereafter was written up for the incident, there was no element of deception in his manner of gaining access to and egress from the garage. That Ablaza was disciplined in those less-aggravated circumstances illustrated the uniform seriousness with which the Respondent regarded the requirement that security employees pay for parking.

[30] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1980), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

[31] While Johnson's remarks to Ablaza, after Foster's termination, indicating the futility of joining and/or supporting the Union, found unlawful above, displayed union animus, in the context of the record as a whole they do not establish that Foster's discharge was discriminatory or that it would not have occurred in the absence of his union activities.

that Jardine was let go only after an extensive series of essentially uncontested infractions which, before discharge, had aggregated to result in one counseling document, three warning notices, and two suspensions. Far from being abruptly terminated on some pretextual matter, he had gone through the Respondent's entire system of progressive discipline. Jardine, as noted, generally did not dispute either the that the multiple charged infractions cumulatively underlying each of these disciplinary notices had occurred or that they were in violation of standing work rules. Jardine, however, in testimony did dispute the validity of his having been penalized for having been away from his work area without his supervisor's permission on April 21 when his visit to employee health had been approved by Sergeant Flaherty, and when he later was faulted for working his shift with a battery-dead radio. While Flaherty did not testify, Lieutenant Wright related that he had issued the counseling document to Jardine for having left his post without permission to go to employee health because, as reported to him by Flaherty, Jardine had not first obtained Flaherty's permission but, instead, had notified the dispatcher. This was deemed insufficient because the nonsupervisory dispatchers were not authorized to give security officers permission to leave their posts. Even as Jardine described the incident, Flaherty was among the supervisors who directly confronted him when he returned from employee health and, who, when again asked about the matter, had told Jardine that the disciplinary writeup had been consistent with his report. Since I generally have not found Jardine to be a credible witness, I do not accept his account.

I do not credit Jardine's testimony that he could have worked for any significant timeperiod without becoming aware that his radio was battery-dead. There were 18 security guards on Jardine's first shift, all with walkie-talkies, who were required to be in fairly constant communication with the base station, reporting their whereabouts and activities. All of these conversations should have been audible on Jardine's radio. Since, as Jardine conceded, the radio was the security officers' principal means of communication and was used for emergencies, it was his responsibility to check the battery light if there was any period of silence.

Jardine was not discriminated against with regard to other infractions, such as having repeatedly been out of uniform. Discharged employee Johnnie Willams' disciplinary record shows that he had received a second suspension notice in July 1993, inter alia, for, on April 27, 1993, having disregarded the departmental/dress uniform by not wearing the appropriate belt. This uniform infraction was backgrounded again into Williams' discharge notice. The Respondent did not apply its policy concerning proper uniforms, a requirement reflected in the collective-bargaining agreement, only to Jardine.

Finally, from the credited evidence, except for the violation found above concerning the discriminatorily enforced rule prohibiting union insignia, which had not been alleged as unlawful in the complaint, none of the 8(a)(1) allegations supposedly targeting Jardine have been found meritorious. While, as noted, Jardine did file the grievance concerning the supervisors' use of the van, he did not timely grieve or arbitrate matters affecting his own discipline. The record does not establish that Jardine had been militant on the Union's behalf or, as also noted, that the Respondent, after the contract was settled, had had reason to oppose this Union and its representatives. Accordingly, even if the General Counsel, from the credited evidence, could be found to have made a prima facie showing from Jardine's position as union steward and the timing of his grievance concerning supervisory use of the van, filed just a few weeks before Jardine was terminated, that his ''protected activities'' had been a ''motivating factor'' in the Respondent's decision to terminate him, the Respondent has sufficiently demonstrated that the same action would have taken place in the absence of the protected conduct.[32]

It, therefore, is concluded that the General Counsel has not established by a preponderance of the evidence that Jardine was terminated for his union activities in violation of Section 8(a)(3) and (1) of the Act.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. By respectively telling employees that it was futile to join and/or support the Union and by discriminatorily prohibiting its security officers from wearing buttons, hats, or other clothing displaying union insignia, or other items which carry messages pertaining to its employees' exercise of activities protected under Section 7 of the Act, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)1) and Section 2(6) and (7) of the Act.

4. The Respondent has not otherwise violated the Act.

Remedy

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[33]

ORDER

The Respondent, Albert Einstein Medical Center, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting its employees from wearing buttons, hats, or other clothing displaying union insignia, or other items which carry messages pertaining to employees' exercise of activities protected under Section 7 of the Act.

(b) Telling its employees that it is futile to join and/or support National Federation of Guards, Local 5 or any other labor organization.

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[32] *Wright Line*, supra; *NLRB v. Transportation Management Corp.*, supra.

[33] 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.

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

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

(a) Remove from its collective-bargaining agreement with the above-named Union any reference to the discriminatorily enforced provision prohibiting its employees from wearing buttons, hats, or other clothing displaying union insignia, or other items which carry messages pertaining to employees' exercise of activities protected under Section 7 of the Act, and notify its employees by separate conspicuously posted notices that this has been done.

(b) Post at its facility in Philadelphia, Pennsylvania, copies of the attached notice marked ''Appendix.''[34] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

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

[34] 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.''