Colonial Haven Nursing Home, Inc. *and* Service and Hospital Employees, Local No. 50, of Service Employees International Union, AFL–CIO–CLC.[1]
Cases 14–CA–7906 and 14–CA–7962

June 30, 1975

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND PENELLO

On December 27, 1974, Administrative Law Judge Jerry B. Stone issued the attached Decision in this proceeding. Thereafter, both General Counsel and Respondent filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the parties' exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge to the extent they are consistent herewith.

1. We find merit in General Counsel's exception to the Administrative Law Judge's failure to find an 8(a)(1) violation with respect to the complaint allegations that Respondent's administrator, Walter, coercively interrogated employee Sharon Bridick.

Bridick testified that on or about March 6, 1974,[3] Walter engaged her in a conversation in which he asked her, among other things, whether she "had heard anything about the union . . . ." Walter testified that he asked employees if they had seen the NLRB notice which had been posted that day.

The Administrative Law Judge nowhere specifically discusses this allegation in his Decision. However, with respect to almost identical allegations of 8(a)(1) conduct by Walter involving interrogations of other employees on the same day, the Administrative Law Judge discredited Walter's explanation and found the alleged interrogations to have been coercive in violation of Section 8(a)(1). Since we believe the Administrative Law Judge's failure to discuss the Bridick incident was an oversight, and there being no reason to believe that the Administrative Law Judge would have treated her testimony any different from that of the other employees whose testimony he credited, if he had specifically considered it, we hereby find that Walter did interrogate employee Bridick as alleged in the complaint. We further find that, in the absence of any justification or explanation for his asking her, without assurances of nonreprisals, about her knowledge of union activity, such questioning was coercive in violation of Section 8(a)(1) of the Act.

2. We also find merit in General Counsel's exceptions to the Administrative Law Judge's failure to find an 8(a)(1) violation with respect to the complaint allegation that Walter impliedly promised wage increases to employees to encourage them to abandon their support for the Union.

Crediting employee Pierson's testimony over that of Walter where they conflicted with respect to the substance of a conversation between them on or about March 6, the Administrative Law Judge found that Walter told Pierson "that he had been an administrator of 13 nursing homes and either one of them didn't have a union and they got along quite well and that he was a nickel and dime man. . . . He said that he would rather give the employees a raise when he thought that they really needed it than to spend it out every 3 months. . . ."[4] The Administrative Law Judge further credited the testimony of employee Willaredt over that of Walter, as to the substance of a conversation which he found occurred on March 7, that Walter told Willaredt, in the context of describing the disadvantages of a union, that "some nursing homes where he used to work that if the girls wanted to make a good wage they could as long as they worked at it." And although not discussed or considered by the Administrative Law Judge, again apparently through oversight, the testimony of employee Bridick reveals that, on or about the same date that Walter asked her whether she had heard anything about the Union, he discussed with her the disadvantages of a union, gave her a paycheck which he indicated would reflect a 10-cent-per-hour increase in her pay, and told her that the employees "might be evaluated again and get a raise in a couple of months."

Notwithstanding the above evidence, the Administrative Law Judge found that "the facts [were] insufficient to reveal that the Respondent . . . impliedly promised employees wage increases if they abandon[ed] the Union." We disagree. In our view, Walter's statements to the employees about his wage policies, when considered in context and together with his discussion of the disadvantages of a union, his interrogation of employees as to union activities,

[1] The name of the Charging Party appears as amended at the hearing.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] Hereinafter all dates refer to 1974, unless otherwise indicated.

[4] As part of that same testimony, Mrs. Pierson further testified that Walter told her "that there was a nursing home where he had been an administrator where the nurses aides can get as high as $2.85 an hour and they were non-union."

and his announcement of wage increases for each of the employees he spoke with,[5] establish that Walter was clearly attempting to impress upon employees Pierson, Willaredt, and Bridick that they could get wage increases *in the future* without the assistance of the Union. Under long-established Board precedent, such implied promises of future wage increases, having as their object to dissuade employees from continuing their support for the Union, constitute interference with the employees' exercise of their Section 7 rights and, as such, violate Section 8(a)(1) of the Act.[6] We so find here.

3. We find merit in General Counsel's exception to the Administrative Law Judge's failure to find an 8(a)(1) violation in Respondent's grant of a 25-cent-per-hour increase in pay to employee Pierson.

Although the Administrative Law Judge found that on April 27, 1974, Administrator Walter told Pierson that she would receive a raise of 25 cents per hour for being in charge of a wing of the nursing home, he found insufficient evidence that the raise was given to discourage the employees' union activities. We disagree.

As General Counsel notes, the Union had notified Respondent on April 26 that it intended to picket Respondent's premises the next day commencing at 6:30 a.m. unless Respondent took action to settle the unfair labor practice charges which were pending against it. Then, on April 27, at almost the precise time that the announced picketing was scheduled to begin, Walter approached Pierson as she was preparing to clock out for the day and told her that she would be getting a 25-cent-an-hour increase for being in charge, asked her how many days she had been in charge,[7] and instructed her to write on her timecard the number of days she had been in charge so that he could pay her in accordance with the new rate. Pierson further testified that, about 3 minutes after her conversation with Walter, Mrs. Skube, the director of nursing, approached her and informed her for the first time that she was in charge. It is also noteworthy that Pierson was one of the employees whom the Administrative Law Judge found that Walter unlawfully interrogated about the Union in early March during the same conversation when he informed her that she was getting a 10-cent-an-hour increase, and during which, as we have previously concluded, Walter unlawfully promised by implication that further increases would be forthcoming.

Under these circumstances, we believe that the timing of the 25-cent raise and the unusual size of that pay increase was enough to make out a *prima facie* case of interference. Having done so, the burden shifted to Respondent to establish (1) that such a substantial increase was consistent with its prior practice with respect to compensating individuals similarly situated as being in charge of a wing of the nursing home, and (2) to explain the unusual coincidence of the timing of the increase granted here to the commencement of the strike, particularly in view of the unrefuted evidence that by then Pierson had been in charge for 4 days and had not previously been notified that she would be receiving such an increase for having been placed in charge. Having adduced no evidence with respect to these matters, Respondent has not, in our view, satisfied that burden. Accordingly, we find that the 25-cent-an-hour increase which Respondent granted Pierson on April 27 was an attempt to encourage her to abandon the Union and not join in the strike commencing that very morning and that, by such conduct, Respondent violated Section 8(a)(1) of the Act.

4. We find merit in General Counsel's exception to the Administrative Law Judge's finding that the Union's April 27 to May 31 strike was for an unlawful recognitional object rather than an unfair labor practice strike, as General Counsel contends.

With respect to the strike, the Administrative Law Judge found the following facts: On April 23, the Regional Director issued his decision dismissing the Union's petition on the ground that the sought-after unit did not yet contain a representative complement of employees. The Union received the decision the next day, April 24. That evening and the next evening the Union held meetings of its supporters during the course of which, Potterton, the Union's field representative responsible for organizing Respondent's employees throughout the campaign, told the employees that the Union and the employees had "gotten ripped off" by Respondent and that Respondent had committed many unfair labor practices. Potterton then advanced several alternative courses of action which the employees could take, including (1) appealing the Regional Director's dismissal decision, (2) filing a new petition, or (3) going on strike and filing unfair labor practice charges. Potterton also told those present that he thought "a strike would be one way in which we could both get some recourse and get an election, and also put the company to cease their unfair labor practices." The Administrative Law Judge further credited employee Pierson's testimony that Potterton also alluded to securing recognition from Respondent as part of its object in pursuing the strike alternative.

[5] For the reasons stated by the Administrative Law Judge, we do not find that the increases that were given that day to employees violated the Act.

[6] See, e.g., *JFB Manufacturing, Inc.*, 208 NLRB 2 (1973)

[7] Pierson testified that she told Walter "that this was the fourth day" that she had been in charge.

At the meeting held on the evening of April 25, Potterton read the text of the letter he had drafted which was to be delivered to Respondent if the employees decided that they wanted to proceed with a threat to strike and a strike if necessary. The letter reads in pertinent part:

> Colonial Haven Nursing Home has engaged in a series of unfair labor practices and has repeatedly refused to recognize the rights of its employees.
>
> Unless an action in good faith is taken to settle these charges by Saturday, April 27 at 6:30 a.m., an authorized picket line will be established at that time. . . .

After reading the letter, Potterton asked the employees to vote on whether they wanted to go ahead with the strike plan. Those present apparently voted to proceed with it. When Respondent failed to respond to the letter by 6:30 the next morning, April 27, picket lines were established and approximately 37 employees failed to appear for work.

The Administrative Law Judge found that during the strike, although generally the Union had employees carrying picket signs at the premises which did not allude to a recognition object, on occasion other employees could be seen carrying picket signs nearby which did refer to recognition as being one of the objects of the strike. Also a union bulletin which issued during the strike gave as the second reason behind the strike that "our employer has refused to recognize [the Union] as our collective bargaining agent even though a majority of us have signed application cards requesting such representation."

Essentially based on the foregoing facts, the Administrative Law Judge concluded that the employees' strike was not an unfair labor practice strike, reasoning (1) the unfair labor practices involved only a "few instances" of 8(a)(1) conduct including interrogations and a request to one employee to report back on the union activities of others, and these "unfair labor practices are not the type reasonably to be expected to cause a union or employees to seek the self-help use of a strike for correction"; and (2) "the overwhelming weight of the facts reveals that the Union and employees were motivated in having a strike as a means of putting pressure on the Respondent to immediately and voluntarily recognize the Union as bargaining agent . . .," and even "if the Union were seeking to force an election, it was seeking to force an election . . . at a time that such election would be improper." Accordingly, the Administrative Law Judge concluded that "the overriding reason for the strike was for an unlawful purpose—the obtaining of recognition by the Union as an exclusive collective bargaining agent in a bargaining unit which the Regional Director had determined to be a nonrepresentative complement." We disagree.

The principle is well established that employees may be entitled to the special reinstatement rights provided unfair labor practice strikers even though the strike activity may have been motivated by concerns which went beyond their employer's commission of unfair labor practices, so long as it can be determined from the record as a whole that the unfair labor practices contributed in part to the employees' decision to strike. Thus as this Board stated in footnote 4 of *Larand Leisurelies, Inc.,* 213 NLRB No. 37 (1974):

> Even assuming, *arguendo,* that the Administrative Law Judge was correct in asserting that the discharge of Bell and Brown [not alleged to be unlawful] was a primary cause of the strike, such a finding would not warrant a conclusion that the strike was an economic strike in view of the convincing record evidence that the employees' decision to strike was also occasioned by the Employer's numerous unlawful acts. Thus, as we have elsewhere pointed out, when it is reasonable to infer from the record as a whole that an employer's unlawful conduct played a part in the decision of employees to strike, the strike is an unfair labor practice strike. *Juniata Packing Company,* 182 NLRB 934 (1970).

Although, as noted, the Administrative Law Judge found that the "overriding reason for the strike" was recognitional, he did not specifically make a finding as to whether Respondent's unfair labor practices contributed to the employees' decision to strike. We find it unnecessary to determine which concerns predominated in the employees' minds in determining to go out on strike (if indeed recognition was an object), as it is clear from the facts found by the Administrative Law Judge and detailed above that Respondent's unfair labor practices clearly contributed to their desire to take the concerted action of engaging in a strike. We so find.

Having found that Respondent's unfair labor practices contributed to the employees' motivation to strike, we find the strikers to be unfair labor practice strikers. As such, they would be entitled to automatic reinstatement upon their unconditional offer to return to work unless, as found by the Administrative Law Judge, the strikers are to be deemed to have lost this privileged status—and even their protected "employee" status under the Act—because other objects sought to be promoted by the strike were unlawful or contrary to the policies of the Act. The Administrative Law Judge found that the Union was

either attempting to obtain recognition from the Respondent by means of its strike, or attempting to get an election, and that these objects contravened the policies of the Act inasmuch as the Regional Director had only recently dismissed its petition for an election as seeking to bargain for a unit that was not representative of the anticipated complement of employees. Contrary to the Administrative Law Judge, we do not believe that the employees' strike lost its status as an unfair labor practice strike, or that they were no longer entitled to the Act's protection of them as employees for engaging in it.

At the outset, we note that there is nothing unlawful or contrary to the Act in attempting to obtain voluntary recognition from an employer at a time when the Board under its expanding unit principles will not authorize the use of its resources to conduct an election because there is evidence that in the near future the number of employees in the sought-after unit and number of classifications filled will increase substantially. Although the Board will not recognize such voluntary recognition, or any agreement entered into as a result thereof, to be a bar against petitions filed after the unit has been filled by a representative complement,[8] that policy was designed to preserve the right of participation in choosing a representative, or not to be represented, to as many employees as possible so as not to "lock in" for the term of contracts up to 3 years in duration a group of nonconsenting employees disproportionately larger than that which initially made the choice between representation and no representation;[9] it was never intended, however, to preclude an employer and employees from entering into an agreement providing for terms and conditions of employment until such time as a petition has been filed for the expanded unit.

Moreover, Section 8(b)(7)(C) of the Act clearly permits picketing for a recognitional object, so long as its provisions are satisfied.[10] Although it appears from the record here that the employees struck and picketed for approximately a week longer than the 30-day maximum grace period provided therein for filing a petition,[11] no 8(b)(7) charge was ever filed in this case putting the conduct in issue and putting the Union on notice that it would be held to defend against same, nor were these issues sufficiently litigated in the present proceeding to make any findings thereon.

However, even assuming *arguendo* that the Union's picketing was motivated in part by a recognitional object and that its extended picketing may have been found to have violated Section 8(b)(7)(C) of the Act had it been charged and litigated, we would nonetheless find that the Union's conduct in picketing Respondent's premises for over 30 days did not seriously contravene the policies of the Act under the circumstances present here. In this regard, we note that the Union commenced its picketing motivated in substantial part by Respondent's unfair labor practices; there is no record evidence of any affirmative attempt by the Union to request recognition during its picketing; and there is no evidence that the duration of its picketing was extended because of its recognitional object. Moreover, in weighing the relative wrongdoings on both sides (assuming *arguendo* the Union's picketing may have been found unlawful) we do not consider the Union's conduct in picketing a few days longer than the 30 days provided under Section 8(b)(7)(C) without filing a petition, under the circumstances here where a prior petition filed by the Union had just been dismissed by the Regional Director for expanding unit reasons, to outweigh the unfair labor practices which we have found Respondent committed in this case.[12] As the

[8] *General Extrusion Company, Inc., General Bronze Alwintite Products Corp.*, 121 NLRB 1165 (1958).

[9] See *Clement-Blythe Companies, A Joint Venture*, 182 NLRB 502 (1970), for a more extensive discussion of the policy considerations underlying this Board policy.

[10] Contrary to the Administrative Law Judge's suggestion that the Union's picketing, to the extent it was in support of an expedited election, was also "improper," the Board has previously interpreted Sec. 8(b)(7)(C) as providing adequate procedures against abuse. Thus, as the Board stated in *International Hod Carriers Building and Common Laborers Union of America, Local 840, AFL-CIO (C. A. Blinne Construction Company)*, 135 NLRB 1153 at 1157 (1962):

> The expedited election procedure is applicable, of course, only in a Section 8(b)(7)(C) proceeding, i.e., where an 8(b)(7)(C) unfair labor practice charge has been filed. . . . Thus, in the absence of an 8(b)(7)(C) unfair labor practice charge, a union will not be enabled to obtain an expedited election by the mere device of engaging in recognition or organization picketing and filing a representation petition. [Footnote omitted.] And on the other hand, a picketing union which files a representation petition pursuant to the mandate of Section 8(b)(7)(C) and to avoid its sanctions will not be propelled into an expedited election, which it may desire, merely because it has filed such a petition. . . .
>
> This, in our considered judgment, puts the expedited election procedure prescribed in the first proviso to subparagraph C in its proper and intended focus. *That procedure was devised to shield aggrieved employers and employees from the adverse effects of prolonged recognition or organization picketing Absent such a grievance, it was not designed either to benefit or to handicap picketing activity.* [Emphasis supplied.]

[11] It is, of course, no defense to an 8(b)(7)(C) charge that a union's picketing was also motivated by the employer's unfair labor practices, where part of the union's object in picketing is recognitional. *International Hod Carriers, supra*, fn. 8.

[12] See, e.g., *Newspaper Production Company*, 205 NLRB 738, 741 (1973), where the Board found employees not to have lost their reinstatement rights by striking in support of their demand to expand the unit to include additional classifications of employees, reasoning:

> Under all of these circumstances, we cannot say that the Union's insistence to impasse upon the kind of unit expansion which had traditionally been treated as a suitable subject for contractual commitment, and where the unit sought by the Union was one fully

First Circuit stated in *N.L.R.B.* v. *Thayer Company and H. N. Thayer,* 213 F.2d 748 at 753 (C.A. 1, 1954), enfg. 99 NLRB 1122 (1952), cert. denied 348 U.S. 883 (1954):

> On the other hand where, as in the instant case, the strike was caused by an unfair labor practice, the power of the Board to order reinstatement is not necessarily dependent upon a determination that the strike activity was a "concerted activity" within the protection of §7. Even if it was not, the National Labor Relations Board has power under §10(c) to order reinstatement if the discharges were not "for cause" [footnote omitted] and if such an order would effectuate the policies of the Act. Of course the discharge of strikers engaged in non-Section 7 activities often may be for cause, or their reinstatement may not effectuate the policies of the Act, but in certain circumstances it may. [Footnote omitted.] The point is that where collective action is precipitated by an unfair labor practice, a finding that that action is not protected under §7 does not, *ipso facto,* preclude an order reinstating employees who have been discharged because of their participation in the unprotected activity. [Footnote omitted.]

We think it is clear here that Respondent's refusal to reinstate the striking employees was not "for cause." Respondent presented no evidence of strike misconduct by any of the employees denied reinstatement nor did it rely on their picketing beyond 30 days without filing a petition for denying them reinstatement. The only reason it gave for refusing to reinstate them was that they had been replaced. Nor do we think the circumstances in this case are such as to warrant denying the employees their special reinstatement rights as unfair labor practice strikers, even assuming *arguendo* that they engaged in a technical violation of Section 8(b)(7)(C), in order to carry out the purposes of the Act.[13]

Consequently, for all the above reasons, we find, contrary to the Administrative Law Judge, that the employees' strike and picketing here were motivated in substantial part by Respondent's unfair labor practices and that the employees did not lose their status as unfair labor practice strikers with the attendant right to prompt reinstatement upon their unconditional offer to return to work because an object of the strike may also have been to obtain recognition or an expedited election.

5. Having found the strikers to be unfair labor practice strikers entitled to reinstatement upon their unconditional offer to return to work, we also find merit in General Counsel's exception to the Administrative Law Judge's finding that only those employees who personally applied to Respondent for reinstatement made an unconditional offer to return to work.

As found by the Administrative Law Judge, the Union sent Respondent a letter dated May 31, the substance of which reads as follows:

> We represent striking employees of Colonial Haven Nursing Home. This is to advise you that these employees are herewith unconditionally offering to return to work.
>
> We have notified employees on strike to report to work at their regular starting times on Monday, June 3, 1974.

Thereafter, several employees personally appeared for work or phoned Respondent to inquire about working. All were told that they had been replaced and that they had to make new applications for jobs.

On those facts the Administrative Law Judge found—relying on the circumstances that the letter's last sentence alludes to notification of employees, considered together with the fact that many employees did thereafter personally contact Respondent—that the offer to return to work was only on behalf of those employees who later contacted Respondent. We disagree.

The principle is well settled that a union can make a collective offer to return to work for all striking employees, and "Once such a request is made, the burden is on the employer to offer reinstatement to employees for whom positions are available."[14] Contrary to the Administrative Law Judge, we find the Union's letter of May 31 clearly reflected that the unconditional offer to return to work was for *all* striking employees, and not just for those personally applying thereafter.

6. Finally, we find merit in General Counsel's exception to the Administrative Law Judge's failure

compatible with our own standards for appropriateness, was any more violative of its bargaining obligation than was [the Employer's] upon maintaining the established, voluntarily created, and also appropriate, unit.

[13] Cf. *Local Union No. 707, Highway and Local Motor Freight Drivers, Dockmen and Helpers, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Claremont Polychemical Corporation),* 196 NLRB 613 (1972), where the majority of the Board refused to provide a reinstatement remedy for two employees who participated in picketing which was found to be violative of Sec. 8(b)(7)(B) of the Act. In that case, the picketing was charged, litigated, and found to be violative, and the employer relied on the picketing as the reason for denying the employees reinstatement. It is also significant that there the picketing was solely in support of recognitional objectives and therefore did not present some of the offsetting considerations present in an unfair labor practice strike setting, such as this one, and upon which is predicated the special reinstatement rights of unfair labor practice strikers. See *Mastro Plastics Corp., et al.* v. *N.L.R.B.,* 350 U.S. 270 (1956).

[14] *Newspaper Production Company* v. *N.L.R.B.,* 503 F.2d 821 (C.A. 5, 1974), enfg. 205 NLRB 738 (1973); *National Business Forms,* 189 NLRB 964 (1971), enfd. 457 F.2d 737 (C.A. 6, 1972).

to find an 8(a)(1) violation of the Act in Respondent's conduct in taking pictures of those employees picketing in front of its premises.

As found by the Administrative Law Judge, on the first 2 days of the strike, April 27–28, Respondent's president, Swiatek, from time to time engaged in photographing employees carrying picket signs in front of Respondent's premises, and also attempted to use a movie camera (although that camera was inoperative). Swiatek's only justification for engaging in picture-taking was that it was done upon the advice of counsel. The Administrative Law Judge dismissed the 8(a)(1) complaint allegation predicated on this conduct on the ground that, since he was finding the striking activity of the employees to be unprotected, picture-taking of such unprotected conduct does not violate Section 8(a)(1).

Having previously found that the employees' strike and picketing at no time lost its protected nature, and in the absence of any showing that Respondent had a reasonable basis to expect picket line misconduct or violence, we find, contrary to the Administrative Law Judge, that Respondent's picture-taking created the appearance of coercive surveillance for purposes of future reprisals and as such violated Section 8(a)(1) of the Act.[15]

THE REMEDY

As we have found that the Respondent has engaged in unfair labor practices, in addition to those found by the Administrative Law Judge, we shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

In view of our finding that the Respondent unlawfully refused to reinstate the unfair labor practice strikers upon the Union's unconditional application on May 31, 1974, we shall order it to offer them immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them by payment to them of a sum of money equal to that they normally would have earned from the date of the Union's unconditional request for reinstatement to the date of Respondent's offer of reinstatement, less any net earnings during such period. The backpay shall be computed in accordance with the remedial relief policies set forth in *F. W. Woolworth Company,* 90 NLRB 289 (1950), and *Isis Plumbing and Heating Co.,* 138 NLRB 716 (1962). (We leave to the compliance stage of this proceeding the determination as to whether any of the striking employees have abandoned their interest in a job with Respondent.)

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Colonial Haven Nursing Home, Inc., Granite City, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union membership, activities, and sympathies; requesting employees to engage in surveillance of other employees' union activity and to report results thereof; impliedly promising wage increases to employees to encourage them to abandon their support for the Union; granting wage increases to employees for the same purpose; and photographing or creating the appearance of taking pictures of employees as they peacefully picket.

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

2. Take the following affirmative action which the Board finds necessary to effectuate the policies of the Act:

(a) Offer unfair labor practice strikers immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, dismissing, if necessary, any employees hired as replacements for such positions. Respondent shall make whole said unfair labor practice strikers for any loss of pay they may have suffered by reason of Respondent's refusal, if any, to reinstate them, by payment to each of them a sum of money equal to what he would have earned as wages during the period from the date of the Union's first unconditional request for reinstatement of the strikers to the date of Respondent's offer of reinstatement, such loss to be computed in the manner and with interest as in *F. W. Woolworth Company,* 90 NLRB 289 (1950), and *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

[15] *Larand Leisurelies, Inc*, 213 NLRB No. 37 (1974), discussed in sec. III, A, "The Nature of the Strike," of the Administrative Law Judge's Decision; *The Udylite Corporation,* 183 NLRB 163, 173 (1970), see text accompanying fn. 55, and cases cited in the footnote.

(c) Post at its Granite City, Illinois, nursing home copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 14, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[16] In the event that 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."

APPENDIX

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

After a hearing in which both sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the law and has ordered us to post this notice; and we intend to carry out the order of the Board and abide by the following:

WE WILL NOT ask employees how they feel about the Union or about their union activities.

WE WILL NOT ask employees to report on the union activities of other employees.

WE WILL NOT promise future wage increases to employees in order to persuade them to stop their support of the Union.

WE WILL NOT grant wage increases to employees to lure them away from the Union.

WE WILL NOT take pictures of employees as they peacefully picket our premises.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed employees in the National Labor Relations Act which are as follows:

To engage in self-organization
To form, join, or help a union
To bargain collectively through a representative of your own choosing
To act together for collective bargaining or other mutual aid or protection
To refrain from any and all these things.

WE WILL offer the employees who engaged in a strike from April 27 through May 31, 1974, immediate and full reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to seniority or other rights and privileges, dismissing if necessary any employees hired to replace them, and make them whole for any loss of pay they may have suffered because of our refusal to reinstate them.

COLONIAL HAVEN
NURSING HOME, INC.

DECISION

STATEMENT OF THE CASE

JERRY B. STONE, Administrative Law Judge: This proceeding, under Section 10(b) of the National Labor Relations Act, as amended, was tried pursuant to due notice on October 21, 22, 23, and 24, 1974, at St. Louis, Missouri.

The original charge in Case 14–CA–7906 was filed on April 25, 1974. The original charge in Case 14–CA–7962 was filed on June 3, 1974. The cases were duly consolidated on September 11, 1974, and such order of consolidation and the complaint issued on said date. The issues are whether (1) Respondent has violated Section 8(a)(1) of the Act by acts of interrogation, promises of benefits, requests for surveillance, by suggestions of disloyalty, by granting a wage increase to an employee, and by the taking of pictures of a picket line, (2) a strike by employees from April 27 to May 31, 1974, was an unfair labor practice strike, and (3) Respondent has violated Section 8(a)(3) and (1) of the Act by refusing to reinstate employees, who had been on strike, to their jobs upon their unconditional offer to return to work.

All parties were afforded full opportunity to participate in the proceeding, and the General Counsel and the Respondent have filed briefs which have been considered.[1]

Upon the entire record in the case and from my observation of the witnesses, I hereby make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYER

Colonial Haven Nursing Home, Inc., the Respondent, is and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Delaware.

[1] The Respondent reiterates a request that an oral settlement understanding between the Respondent and the Charging Party be approved. I find no reason to reverse my trial ruling rejecting such oral settlement on the basis or inadequacy as to settlement of the allegations in issue. The General Counsel is entitled under the circumstances of this case to have such issues litigated and determined.

At all times material herein, Respondent has maintained its principal office and place of business at 3900 Stearns Avenue, in the city of Granite City, and State of Illinois, herein called the Respondent's facility. Respondent is, and has been at all times material herein, engaged in the operation of a proprietary professional care nursing home. Respondent's facility located at 3900 Stearns Avenue, Granite City, Illinois, is the only facility involved in this proceeding.

During the year ending October 31, 1974, which period is deemed representative of its operations at all times material hereto, Respondent, in the course and conduct of its business operations, is deemed to have derived gross revenues in excess of $100,000 and is deemed to have purchased and caused to be transported and delivered at its Granite City, Illinois, facility, nursing supplies and other goods and materials valued in excess of $3,600, of which goods and materials valued in excess of $3,600 were transported and delivered to its Granite City, Illinois, facility directly from points located outside the State of Illinois.

Based upon the foregoing and as conceded by the Respondent, the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Service and Hospital Employees, Local No. 50, of Service Employees International, AFL–CIO–CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Supervisory Status*

There is no issue and, based upon the pleadings and admissions therein, it is concluded and found that at all times material herein, the following named persons occupied positions set opposite their respective names, and have been and are now supervisors of Respondent, within the meaning of Section 2(11) of the Act, and its agents:

Robert Swiatek — President
Jerry Walter — Administrator
Mary Jo Skube — Director of Nurses
Roger Hotson — Administrator-in-Training

B. *Background*[2]

Colonial Haven Nursing Home, Inc., the Respondent, is engaged in the operation of a proprietary care nursing home. The Respondent, in 1970, purchased land for the construction of a nursing home to consist of two identical 122-bed facilities. In March 1973, the Respondent commenced construction of the first said facility, and, in October 1973, hired some employees and opened for business. Thereafter other employees have been hired.

During the initial months of operation the Respondent has had to cope with problems of completing and correcting details of construction and installation of equipment, and problems of personnel change. Thus, Respondent has had changes in administrators during the initial period of operation.

The overall facts reveal that Respondent has a policy and practice of telling employees at time of hiring that their job performance will be evaluated within 3 to 6 months for purposes of possible raises. The Respondent also has procedures which involve the employee's own actions with respect to such evaluation and training process.

The overall facts, however, do not reveal that the Respondent has told all employees, when hired, about its 3- to 6-month evaluation plan, or that the Respondent has involved all such employees in its "evaluation" process. The overall facts do reveal that such evaluation plan was a part of policy and practice and that many such employees were so advised and involved in such procedures. The overall facts persuade that the problems of correcting details in construction and installation of equipment resulted in some delay in job performance evaluations.

The Union commenced its organizational activity on February 5, 1974, when Union Representative Potterton visited the nursing home, entered the premises, and handed out union literature. On that day Administrator Walter saw Union Representative Potterton in the kitchen part of the home, and asked what he was doing there. Potterton told Walter that he was talking to the employees. Administrator Walter told Potterton that he could not be on the premises, it was private property, that if he saw him again on the property, he would have him arrested, and escorted him off the premises.

Thereafter the Union continued its organizational efforts, received signed authorization cards from many employees, and on March 5, 1974, filed a petition relating to representation rights of Respondent's employees, in Case 14–RC–7604 with the NLRB.

In the meantime Walter, who had become administrator in late January 1974, had been told by the previous administrator that it was important that he commence the job evaluations with respect to raises. Around the same time Walter was receiving similar requests from Nursing Supervisor Skube and employees.

Prior to February 26, 1974, Nursing Supervisor Skube told Administrator Walter in effect that they should evaluate all of the employees who had commenced work in October 1973. Walter, thereupon, told Skube to prepare such a list. It appears that Skube prepared a list of employees for such evaluation and that evaluations of such employees were made on February 26, 1974, and thereafter until March 5, 1974. As to the evaluation of most of the employees, Walter noted on small commercial memo-type note paper that the employees listed thereon were employees who had been there since October 1973. Walter rated the employees on a scale from 0-10 and set forth separately employee names and wage scales as granted.

Excepting for Walter's testimony and the notes to the effect that the employees who were evaluated had been there since October 1973, there is little evidence relating to the original employment date of such employees. Pierson,

[2] The facts are not in dispute and are based on the credited aspects of the testimony of Potterton, Swiatek, and Walter, and on stipulations and exhibits in the record. Included in such exhibits is the Regional Director's Decision and Order in Case 14–RC–7604, issued on April 23, 1974.

one of the employees evaluated, testified to the effect that she participated in a workshop on October 5, 1973, and was hired on November 1, 1973. Barry, another employee who was evaluated, testified to the effect that she was hired on November 1, 1973. Coleman, another employee who was evaluated, testified to the effect that she was hired about December 1, 1973.

The sum of the evidence reveals that Walter intended to evaluate the employees who had commenced working in October 1973, and that with minor exception the employees who were evaluated on February 26, 1974, were employees who had commenced work in October 1973. Considering the closeness in time of November and October 1973, I am persuaded that Pierson and Barry may or may not have commenced work in October 1973. In any event, it would appear that with Pierson's having participated in the October 5 workshop, that this would have warranted considering her as having commenced work in October 1973. Whether Coleman's inclusion in the list resulted from simple inadvertent error by Skube, was the result of confusion, or simply resulted from Skube's desire to have her evaluated and to receive a wage increase is not clear. It very well may have resulted from Skube's desire to have Coleman evaluated within the scope of the policy of evaluation within 3 to 6 months.

The evidence relating to the ratings and raises given on March 5, 1974, reveal that employee Rosenberger had a rating of 9 and received a 5-cent raise, that employees Barker and Ponder had ratings of 8, and that employee Pierson had a rating of 7, and that Barker, Ponder and Pierson all received raises of 10 cents per hour.

It is clear that Walter was in a hurry to get the evaluations completed and raises granted. Walter credibly testified to the effect that he was trying to complete the evaluations and the granting of raises before Skube left for vacation during the first week of March 1974. On March 5, 1974, Walter sent the payroll information, including the granted wage increases, to the office that prepared the payroll and checks the payroll information.

On March 6, 1974, around midday, the Respondent received a copy of the Union's petition (Case 14–RC–7604) and a notice, concerning employees rights, which the NLRB suggested be posted.

On March 7, 1974, Walter received the payroll checks and thereafter paid the employees for the payroll period ending on March 5, 1974.[3]

C. *Conduct of Walter*

Early March, circa March 6, 1974

1. Walter had a conversation with Vicki Barry in early March 1974, concerning her job evaluation and raise.[4]

The facts relating to Walter's conversation with Barry are revealed by the following credited excerpts from Barry's testimony.

> A. He told me that they thought that I did good work and I was flexible and they thought that I deserved a raise. We talked about his family and he asked me if I had been approached by any union people and I told him no. He talked against the union. He said that he had been in places where there was a union and that patient care was bad and the help wasn't any good at all. He just talked about that. I can't remember anything else.
>
> Q. Did he at any point tell you what your raise was?
>
> A. When I was leaving, I asked him and he told me that it was a nickle.
>
> Q. Have you now told us everything that you can remember about that conversation?
>
> A. Yes.
>
> Q. Was there any discussion of union cards?
>
> A. I think so, but I can't remember exactly what was said.
>
> Q. What was said, if you can remember?
>
> A. He said that somehow the girls had gotten ahold of union cards from someone. I don't remember.

2. On March 7, 1974, Administrator Walter spoke to employee Peggy Coleman about her job evaluation and raise. Prior thereto, on March 6, 1974, Nursing Supervisor Skube had spoken to Coleman as is revealed by the following credited excerpts from Coleman's testimony.

> A. The day the home received the petition for an election, Mary Jo told me that I would be getting a raise. She said she was sorry that she hadn't had time to do the evaluation, she had been too busy. I asked her how much a raise I would be getting and she said it would show it. She said to keep it confidential.

As indicated, on March 7, 1974, Walter spoke to Coleman as is revealed by the following credited excerpts from Coleman's testimony.

> Q. Who did you talk to?
>
> A. Jerry Walter.
>
> Q. What did he say?
>
> A. I went down to pick up my check and he said that he wanted to talk to me. I went in his office and he said he had been doing evaluations and he asked me if I wanted to see mine. I said yes. He took a sheet of paper from a filing cabinet and he went down a long list of things. He said he was satisfied with my work and that I would be getting a raise. I asked him how much of a raise and he said five cents.

The facts are clear that Coleman's paycheck, received on March 7, 1974, reflected a raise for the payroll period ending on March 5, 1974.

3. In early March 1974, Administrator Walter spoke to employee Pierson about her job evaluation and raise as is

[3] I am persuaded that Walter's testimony on this point is more reliable than that of Pierson and Willaredt and credit the facts as found. Coleman's testimony corroborated Walter's on this point.

[4] Barry's testimony was to the effect that the conversation with Walter took place in early March. Walter's testimony was to the effect that when talking to some of the employees, he alluded to the suggested NLRB notice received by him on March 6, 1974. As to the details of the conversation, I find Barry's testimony to be more complete and objective, and so credit it over Walter's where in conflict. As to whether such conversation took place prior to March 6, 1974, I find the evidence insufficient to so establish.

revealed by the following credited excerpts from her testimony.[5]

> A. Well, I was called into his office at night because I worked nights, around 12 or 12:30, and he was telling me that the reason why I was in there I was being evaluated at the time and he was telling me what a good job I was doing and he talked about this other girl that I worked with, Vicky Mack, that if he had more employees like Vicky Mack and myself that the nursing home would run just fine. He told me, he started talking about his family, he asked me about my family and then he asked me if I had seen a petition going around the nursing home and then I asked him, 'What sort of a petition?'. He said, 'Something from the union,' and then I commented that I hadn't seen or heard anything about a union. Then he started telling me the disadvantages of a union in health care.
>
> Q. What did he say, if you remember?
>
> A. He said that he had been an administrator of 13 nursing homes and either one of them didn't have a union and they got along quite well and that he was a nickel and dime man. I think I just smiled at the time. He said that he would rather give the employees a raise when he thought that they really needed it than to spend it out every three months or every six months. He said that the union wasn't, he didn't like the union in health care because the employees wouldn't do their work right and if they were told to do something which they were not hired for they wouldn't do it. They would always throw the union up. But, he told me that I would be getting a dime raise and I thanked him. He asked me to bring the other girl, Vicky Mack in, that's all.

4. On March 7, 1974, Administrator Walter spoke to employee Willaredt about her job evaluation and a raise.[6]

> Q. Would you tell us, please, what the conversation was that you had with Mr. Walter?
>
> A. He told me that they had made the evaluations and that I would be getting a nickel raise and that he like the way I got along with the patients. Then he started talking about the union. He asked me if I had heard about a petition about the union and I told him no. Then he started talking about what he thought was the disadvantages of it and from what I can remember he said, like if I get pregnant and want to come back after the union was there I would have to—
>
> MR. FRENCH (interrupting): Your Honor, the witness is speaking too fast and too low. I can't hear her.
>
> JUDGE STONE: Would you speak slower so that everybody can hear.
>
> A. He said one disadvantage was that like if I would get pregnant and I wanted to come back to work that I would have to pay an initiation fee to join the union again and he said that like some nursing homes where he used to work that if the girls wanted to make a good wage they could as long as they worked at it. He also said that if there ever came an election he wouldn't try to persuade me to vote either for it or against it and if I wanted to I could talk to somebody who belonged to the union, and then I left.
>
> Q. (By Mr. Dexter) And did you receive the raise on your paycheck?
>
> A. Yes, I did.
>
> Q. How long was it after Mr. Walter talked to you that you received the paycheck?
>
> A. That day.

5. The facts clearly reveal that a number of employees received raises in their paychecks which were given them on March 7, 1974. The overall facts persuade that such checks were dated on March 6, 1974, and were for the payroll period ending on March 5, 1974.

Contentions and Conclusions

1. The General Counsel contends that the Respondent, by Walter, engaged in unlawful interrogation of employee union activities or desires in the conversations with Willaredt, Pierson, and Barry. The Respondent contends that it did not engage in unlawful interrogation but merely referred in the conversations with employees to a notice (referring to the union's petition) which the NLRB had suggested that it post. The Respondent contends that such "notice" was received on March 6, 1974, and posted sometime thereafter.

Considering all of the facts, I am persuaded and conclude and find that the Respondent, by Walter, violated Section 8(a)(1) of the Act, by questioning Barry as to whether she had been approached by any union people. The evidence reveals no legitimate basis for such inquiry and reveals no assurances of nonreprisals. Accordingly, it is concluded and found that such questioning as to employee union activity was done in a manner constituting interference and restraint, within the meaning of Section 8(a)(1) of the Act, and therefore is violative of Section 8(a)(1) of the Act.

Considering all of the facts, I am persuaded and conclude and find that the Respondent, by Walter, violated Section 8(a)(1) of the Act, by asking Pierson if she had seen a petition (from the Union) going around the nursing home, and by asking Willaredt if she had heard about a petition about the Union. While the Respondent could refer to the NLRB notice relating to the Union's representation petition and present its arguments against the Union, it cannot question employees in a manner to ascertain their knowledge of employee activity with respect to such union representation petition. The Respondent's

[5] On direct examination Pierson placed the timing of the event as on March 3 or 4, 1974. On cross-examination Pierson placed the timing of the event as on March 3, 4, or 5, and that she was unsure of the exact date. Considering this, I find her testimony unreliable to establish that the event occurred before March 6, 1974, when the Respondent received a suggested "notice" for posting from the NLRB (in which "notice" reference was made to the union's representation petition). I credit Pierson's testimony as to the details as to what was said since I found her testimony more complete and objective than Walter's on such points. However, I credit Walter's testimony over Pierson's as to the date that she received her payroll check.

[6] Willaredt places the time of such conversation as occurring on March 6, 1974. Considering all of the facts relating to the timing of the payroll checks, I find that the event took place on March 7, 1974. As to the details otherwise, I found Willaredt's testimony to be more complete and in detail and credit it over Walter's where in conflict.

questions about the union representation petition was not a limited reference to the "notice" relating to such petition. No legitimate basis for its broad inquiry and no assurances of nonreprisals were given. Accordingly, I conclude and find that the questioning of Willaredt and Pierson as to the union petition was done in a manner constituting interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act. It is so concluded and found.

2. The General Counsel contends that the Respondent, by Walter, on or about March 6, 1974, granted employees wage increases in order to discourage their union activity. The Respondent contends that the wage increases that were granted were not given in order to discourage employee union activity.

Considering all of the facts, I am persuaded and conclude and find that the facts are insufficient to establish that the Respondent, by Walter, on or about March 6, 1974, granted wage increases in order to discourage employee union activity. The facts clearly reveal that prior to the advent of unionism the Respondent had plans to evaluate employee job performance and to grant wage increases where warranted within 3 to 6 months after employment and prior evaluations. These plans were made known to most employees at the time of hiring. The job evaluations and wage increases granted on or about March 6, 1974, were consistent with the above-referred-to plans and announcements. Although Respondent's officials spoke to some employees about the Union at the time of the wage increases, statements made to the employees were to the effect that the employees had earned and merited such wage increases. Under such circumstances, the timing of the wage increases and statements about the Union do not warrant an inference that the wage increases were given to discourage unionism. The Respondent has a right to carry out existing plans as to wage increases as long as such is done without regard to unionism.

The General Counsel contends that the job evaluations and wage increases were done in haste and in order to dissuade employee support of the Union. I am persuaded that the job evaluations and wage increases were done in haste. I am also persuaded that such haste was because the Respondent was aware that it was somewhat behind in its evaluation program because of the shakedown problems in getting started in its operations, because of change in some managerial personnel, and because of a desire to complete the same before Nursing Supervisor Skube went on vacation during the first week in March 1974. Further, I am persuaded that Walter, a self-described nickel-and-dime man as regards wages, handled the manner of the evaluations as he did because he considered it an efficient way to dispose of the matter in relationship to other business problems. In the realities of life many business matters are conducted similarly. The General Counsel's major thesis of haste for improper reasons may be said to relate to the timing of the job evaluations and wage increases with the timing of the initial advent of unionism on February 5, 1974, and the filing of the Union's petition for representation on March 5, 1974. As to the first date of February 5, 1974, I note that the job evaluations were made on or around February 26, 1974, and the wage increases therefrom on or about March 6, 1974. I am persuaded therefore that the timing of such job evaluations and wage increases, in connection with the plans announced prior thereto, does not reveal the job evaluations and wage increases to have been improper. Further, as to the timing of such job evaluations and wage increases as compared to the timing of the Union's representation petition filed on March 5, 1974, I note that the facts reveal that Respondent's first knowledge of such petition occurred on March 6, 1974, after the job evaluations and wage increases had been determined. Thus, the timing of the Union's representation petition had no bearing on the job evaluations and wage increases granted. Accordingly, it is concluded and found that the facts do not reveal that the Respondent granted wage increases on or about March 6, 1974, to discourage employee union activity.

3. The General Counsel contends that the Respondent, by Walter, on or about March 6, 1974, impliedly promised employees wage increases if they would abandon the Union. The Respondent denies that Walter impliedly promised employees wage increases on or about March 6, 1974.

Considering all of the facts, I am persuaded, and conclude and find that the facts are insufficient to reveal that the Respondent, by Walter, on or about March 6, 1974, impliedly promised employees wage increases if they would abandon the Union. Thus, the facts reveal that the Respondent had plans, prior to the advent of unionism, to make job performance evaluations and to grant wage increases where appropriate. Most, if not all, of Respondent's employees were aware of Respondent's plans for job evaluations and wage increases. As indicated previously, it has been found that the wage increases granted on or about March 6, 1974, were not done to discourage union activity. A careful examination of the statements made to employees reveal that the employees were told that they had earned and merited their wage increases. As indicated previously, the granting of wage increases consistent with policy, announced prior to the advent of unionism, does not warrant the implication because of timing that the wage increases were granted to discourage unionism. Nor does it warrant an implication that the granting of wage increases constitutes a promise of wage increases if the employees abandon the Union. Accordingly, it will be recommended that the allegation of unlawful conduct in such regard be dismissed.

D. *Conduct of Swiatek circa March 7, 1974*[7]

The facts reveal that President Swiatek has known employee Gregory for some time and that the relationship was friendly and proper. Gregory commenced working for the Respondent on December 26, 1974, and was considered a good and conscientious employee.

Around March 1, 1974, Gregory had to enter a local hospital. While in the hospital, on March 7, 1974, President

[7] The event concerns a conversation between President Swiatek and an employee named Gregory. Gregory testified to the effect that the event took place in February 1974. Swiatek places the event around March 7, 1974. There is little dispute as to the actual facts. I am persuaded that Swiatek's timing of the events is more reliable than Gregory's and place the event as occurring on March 7, 1974.

Swiatek visited the hospital. What occurred is revealed by the following excerpts from Gregory's testimony.[8]

A. To the best of my recollection, he walked in the room. He asked me how I was doing. I said I was doing fine. He walked over and handed me a box of candy and presented me with a check and said it was for appreciation causes, that I was a good worker, everyone missed me. Then he asked me if the union had bothered me.
Q. What did you say?
A. I said no.
Q. What did he say then?
A. To the best of my recollection, I believe he said O.K., fine, because there was something about a union going on.

Considering the foregoing, the facts reveal no legitimate basis for the questioning of Gregory about the Union, no assurance of nonreprisal were given, and, accordingly, such questioning was done in a manner constituting interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act, and therefore such conduct is violative of Section 8(a)(1) of the Act. It is so concluded and found.

E. *Conduct of Swiatek Late March 1974*

In late March 1974, President Swiatek had another conversation with Gregory about the Union. Such conversation is revealed by the following credited excerpts from Gregory's testimony.

Q. And who did you talk to?
A. Mr. Swiatek.
Q. What did he say to you?
A. He said he believed that we were pretty good friends and that, he said also that if I heard anything about the union I was to let him know. He also stated something about a lot of us could not keep up with the union dues anyway.
Q. Is that all you can remember that he said?
A. Right now that is all I can remember.
Q. What did you say to him?
A. I said yes, we were good friends.

Considering the foregoing, I am persuaded and conclude and find that the Respondent, by President Swiatek, as alleged, engaged in conduct violative of Section 8(a)(1) of the Act by requesting an employee to engage in surveillance of other employees' union activity. Such conduct is violative of Section 8(a)(1) of the Act. It is so concluded and found.

F. *Alleged Conduct of Swiatek circa April 11, 1974*

The General Counsel alleges, and the Respondent denies, that "on or about April 11, 1974, President Swiatek interrogated an employee concerning the union activities of said employee and others."

The General Counsel's witness to this alleged event was Gregory. Gregory's testimony to this alleged event is revealed by the following excerpts from her testimony.

Q. Now, between the time you went back to work until the strike, did you have any other conversations with Mr. Swiatek?
A. I did.
Q. How many did you have?
A. Two.
Q. When was the first one?
A. I believe it was in April.
Q. Do you recall the day?
A. I do not.
Q. How long before the strike was it?
A. Maybe a week, maybe two weeks. I don't know.
Q. And where did the conversation take place?
A. In the hallway.
Q. And who else was present?
A. I saw no one.
Q. What time of the day was it?
A. It was in the late afternoon.
Q. And what was the conversation?
A. He asked how I was doing and I said fine. He mentioned the union and I had just tried to walk away from it.
Q. What did he say about the union?
A. I believe he asked if I had heard anything.
Q. What did you tell him?
A. No.

Swiatek testified to the effect that this event did not occur, that he was away from the area at the time.

Considering all of the above and the demeanor of the witnesses, I found Gregory to appear unsure and hesitant in her testimony, and her testimony did not have the ring of truth as to this alleged event. I credit Swiatek's denial of the event and discredit Gregory's testimony as to such alleged event. Accordingly, it will be recommended that the allegation of unlawful conduct thereto be dismissed.

G. *Conduct of Hotson circa April 18, 1974*

Employee Lieneman was hired on November 27, 1974. At such time she was told by Administrator Pope that, depending on the work she was doing, if she were doing her job well, she would be considered for a raise.

About a week before April 27, 1974, Administrator-in-Training Hotson told Lieneman that he appreciated the job she was doing (in the laundry), she was a good worker, and she was receiving a 20-cent raise. Hotson did not mention the Union in the conversation.

Considering the foregoing and all of the facts, I find that the evidence is insufficient to establish, as alleged, that Hotson, on or about April 18, 1974, informed an employee of a wage increase granted by the Respondent in order to discourage employee union activity. Accordingly, it will be recommended that the allegation of unlawful conduct in such regard be dismissed.

[8] Swiatek's testimony was essentially to the same effect. It was made clear to the parties that the issues in this proceeding were those formally alleged. The General Counsel *has not alleged that the extra pay or sickpay given by Respondent was violative of the Act.*

H. *Conduct of Walter circa April 24, 1974*

Administrator Walter spoke to employee Lieneman on or about April 24, 1974, concerning the wearing of a union button, the Union, and sick leave. The facts are revealed by the following credited excerpts from Lieneman's and Walter's testimony.

Q. (By Mr. Dexter) And where was the discussion you had with Mr. Walter?
A. It was in the laundry room.
Q. Who else was present?
A. No one.
Q. Would you tell us what he said and what you said, please?
A. He asked me if Archer had talked to me about my raise and I said, 'Yes.' He said that they did appreciate the job I was doing and that I did my job well and he asked me why we wanted a union in the home. I said, for sick benefits for one thing and he said, 'Well, we pay some sick benefits,' and he said that they gave Charolette Gregory $100 when she was out sick and that they gave Betty Gasparovic when she was out, how much he didn't say, and took off a week when her little boy was in the hospital and he said, 'I believe we gave money to you,' and I told him, 'No, they didn't.'
Q. What else was said?
A. Then he gave me an illustration about an employee, her name was Mae, I can't remember her last name, but she worked in the kitchen for a while and then they transferred her to the laundry and was then transferred to housekeeping and she didn't do the work very well. He said that if we had a worker like her and a worker like me in the laundry that I would be doing all the work and she would be doing nothing and they anticipated that I would quit and they would have her and maybe get another one like her and they wouldn't be able to fire her because of the union.
Q. Is that all the conversation you now remember?
A. Yes.
Q. Was there any discussion of union buttons?
A. On the morning of—

MR. FRENCH (interrupting): I'm going to object to this. There is no allegation in the case and that is immaterial and irrelevant at this stage.

JUDGE STONE: Overruled.

THE WITNESS: The morning of the 25th, I believe it was a Friday, before we went on strike on Saturday, Mr. Walter met me in the hallway of the nursing home and I was wearing a union button and he asked me to take off the button because it wasn't part of my uniform.

Excerpts from Walter's Testimony[9]

Q. (By Mr. Dexter) Mr. Walter, did you talk with any employee individually?
A. Yes, I did.
Q. About a union notice, a notice referring to the union or the union button, and I don't mean the simple demand, take it off. I mean beyond that.
A. Yes, I asked people if they had seen the notice. I make rounds throughout the home and I converse with the employees as I go through. I remember talking with employees relative to having seen the notice, yes.
Q. You talked to them relative to, other than to take them off?
A. One that I can remember, Vicky Barry challenged me that she had the right to put the button on because she was on her lunch hour but she challenged me relative to that and I told her that if she was on her time, fine, but when she came back from her lunch hour I would ask that she remove it from her uniform.
Q. Did you have any discussion with the other employees regarding this union button?
A. Yes, there was one young lady who I told that I was surprised that she had one on.
Q. Who was that young lady?
A. Janice Lienemann.
Q. Would you tell us what the conversation was?
A. I told her that I was surprised that she had a union button on.
Q. What did she say?
A. She said, 'Everybody else is wearing them,' so she was too.
Q. And what did you say then?
A. What else could I say?
Q. I don't know, what did you say?
A. I don't recall saying anything other than that.
Q. Did you tell her why you were surprised?
A. No, I made a statement that I was surprised that she was wearing a union button.

Considering all of the foregoing, the fact that no legitimate purpose was shown for interrogation of an employee about union activity or desires, the fact that assurances of nonreprisals were not given, I am persuaded and conclude and find that the Respondent, by Walter, interrogated an employee about union activities or desires in a manner constituting interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act, and by such conduct violated Section 8(a)(1) of the Act.

Considering all of the foregoing, I am persuaded and conclude and find that the evidence is insufficient to reveal that the Respondent, by Walter, impliedly promised an employee sickpay in order to discourage employee union activity. The facts reveal that the Respondent has a discretionary sick leave policy and has paid some employees for sick leave. Thus, the Respondent has paid Gregory and Gasparovic for sick leave. Although much evidence was adduced with respect to sick leave pay to Gregory, the General Counsel did not allege such sick leave pay to constitute violative conduct. For such evidence to have real meaning, the General Counsel would have had to litigate and establish it to have been violative. Considering all of this, the facts reveal that Respondent was merely arguing its good points relating to sick leave pay as argument against the reason an employee should want a union. Accordingly, the allegation of unlawful conduct relating to promises of sick leave pay will be recommended to be dismissed.

[9] Walter also credibly testified to the effect that the Respondent had a discretionary sick leave policy.

Considering all of the foregoing, I am persuaded and conclude and find that the evidence, relating to Administrator Walter's statement to Lieneman to the effect that he was surprised that she had a union button on, is insufficient to reveal that it constituted conduct violative of Section 8(a)(1) of the Act. The questioning of Walter by the General Counsel and Walter's answers indicate that the Respondent had a notice relating to the wearing of union buttons. Statements by counsel reveal that the General Counsel had refused to issue complaint concerning Respondent's requirement that employees not wear union buttons. Under all the circumstances, the evidence is not of sufficient probative clarity to reveal that Walter's remarks were other than surprise at an employee's wearing a union button contrary to Respondent's rules. Accordingly, the allegation of unlawful conduct by Walter's remarks concerning surprise at Lieneman's wearing of a union button shall be recommended to be dismissed.

I. *Conduct of Walter circa April 27, 1974*

On or about April 23, 1974, employee Pierson, a nurses aide, was placed in charge of a wing of the nursing home. It appears that the employee, Geisler, who had previously performed such duties had quit or resigned. Thereafter, on or about April 27, 1974, Administrator Walter told Pierson in effect that she would receive a raise of 25 cents per hour for "being in charge."

Considering all of the foregoing and all of the facts, it is clear that the evidence is insufficient to reveal that the 25-cent raise was given in order to discourage said employee's union activities. Accordingly, it will be recommended that the allegation of unlawful conduct in such regard be dismissed.

J. *Conduct of Swiatek circa April 27, 1974*

As indicated in more detail later herein, many of Respondent's employees went out on strike on April 27, 1974, and remained on strike until around May 31, 1974.

On April 27 and 28, 1974, President Swiatek took pictures from time to time of the employees who were picketing and of picket signs on the picket line established in front of Respondent's facility. Such pictures were taken with a Polaroid and an Instamatic camera. Swiatek also attempted to take pictures on such occasions with a movie camera, which was inoperative.

The activities of Swiatek with respect to picture taking and attempted picture taking were accomplished in such a manner as to be readily seen and were observed by striking employees.

Swiatek testified to the effect that he engaged in his picture taking and attempted picture taking activity on advice of counsel. No evidence was given as to the advice of counsel otherwise or the motivation therefor.

As found later herein, the strike that occurred from April 27 to May 31, 1974, had an unlawful purpose and was not a strike caused by unfair labor practices.

Considering the foregoing, the facts relating to Swiatek's picture taking during the first several days of the strike do not reveal conduct violative of Section 8(a)(1) of the Act. The striking activity of the employees, as indicated later herein, constituted unprotected activity. It follows, therefore, that the taking of pictures or purported taking of pictures of the strikers does not constitute conduct violative of Section 8(a)(1) of the Act.

K. *The Strike*

The NLRB representation petition filed by the Union on March 5, 1974, in Case 14–RC–7604, was dismissed by the Regional Director's decision and order dated April 23, 1974. The basis for the dismissal essentially was because the Regional Director found that the current complement of bargaining unit employees was not representative in that the Respondent planned more job classifications and a larger number of employees.

The Union received the above-referred-to Regional Director's decision and order on April 24, 1974. Thereafter the Union held meetings with employees on April 24 and 25, 1974. At the meeting on April 24, 1974, Union Official Potterton told the employees about the Regional Director's decision and order dismissing the representation petition. Potterton told the employees that the Union and the employees had "gotten ripped off" by the Respondent, that the Respondent had committed many unfair labor practices, and discussed various courses of action that could be taken. Potterton told the employees in effect that the Regional Director's decision and order could be appealed, that a new petition could be filed, or that the employees could go on strike, and that unfair labor practice charges could be filed. Potterton told the employees that he thought that a strike could result in some recourse, obtain an election and cause the Company to cease engaging in unfair labor practices. At the meeting on April 24, 1974, Potterton also sought information from the employees as to potential unfair labor practices.[10]

As is often the case, many of the details were presented in fragmented fashion. Thus, Potterton testified credibly to the effect that if a new petition were filed, it could take from 6 months to a year before they could find out anything about the petition. Although Potterton did not testify to the time delay that would be involved in an appeal from the Regional Director's Decision and Order dismissing the representation petition, the overall tenor of his testimony and the events persuade that the employees were advised of some time delay thereto.

Potterton, and most of the General Counsel's witnesses who testified as to the union meetings, testified to the effect that the recourse sought was cessation of unfair labor practices and the securing of an election. Pierson testified to the effect, and I credit such testimony, that Potterton alluded to securing recognition from the Respondent. The totality of the facts, including a union press release and bulletin, and employee signs used in picketing, reveals that the employees and union sought to secure recognition of

[10] The General Counsel argues in his brief in effect that the Union's first knowledge of unfair labor practices occurred around April 24, 1974. Potterton at one point in his testimony testified to the effect that on March 5, 1974, he became aware of potential unfair labor practices. A trial ruling at that point stopped further examination on this point. Later, however, the General Counsel was advised that he could question Potterton and others on such issue. The General Counsel elected not to do so further.

the Union by the Respondent. Considering all of such facts, as indicated, I credit Pierson's testimony as indicated.

I note that the letters and communications from the Union to the Respondent were carefully worded and referred to recognition of employee rights and to the use of the Federal Mediation and Conciliation Service. Such communications did not spell out that the Union was seeking voluntary recognition. The overall facts, however, make it clear that the language used was intended to convey such message.

At a meeting on April 25, 1974, Potterton told the employees that they would have to vote as to whether to strike to put pressure on the employer. Potterton read a draft letter to the Respondent which he proposed to give the Respondent with copy of an unfair labor practice charge. The message in such letter was to the effect that the Respondent had engaged in unfair labor practices, the Respondent had refused to recognize the rights of employees, and, unless action in good faith were taken to settle the charge by Saturday, April 27, 1974, at 6:30 a.m., a strike would ensue.

Potterton at a meeting on April 25 discussed with the employees the mechanics of a strike, read the proposed unfair labor practice charge and proposed letter to the company, answered questions as to whether striking employees could be replaced, and told employees that unfair labor practice strikers could not be replaced. Employees were given ballots to mark as to whether they wished to strike or not.

Potterton, at another meeting on April 25, 1974, apparently conducted a meeting similar to the first meeting on April 25, 1974. What occurred is essentially revealed by the following credited excerpt from Potterton's testimony.

> A. Approximately seven o'clock that evening, the 25th.
>
> Q. Would you tell us, please, what you said at that meeting?
>
> A. I told the employees that I was glad to see such a large turnout and it meant to me that there was strong support behind the strike. I read to them the letter that I was to deliver to the company the next day. Then, I said that I had a plan, but I would need their approval before we carried it out. The plan would be that I would deliver this letter along with the unfair labor practice charges, if they gave me the o.k., and if we did not hear anything from the company by 6:30 o'clock on the 27th, we would carry out a threat as stated in the letter to strike. I then asked everybody to bring up all the questions that they had about this and I did my best to answer the questions. I then said about the list of other nursing homes that we would provide to relatives, I asked where certain people were who weren't at the meeting that I knew were employees, and I passed around ballots and asked the employees to vote whether they wanted to carry out the plan I had outlined.

It is clear that the employees approved Potterton's proposed course of action.

On April 25, 1974, Potterton, for the Union, filed charges of 8(a)(1) violations against the Respondent with the NLRB Regional Office in Case 14–CA–7906. On April 26, 1974, Potterton delivered a letter and a copy of the above-referred-to unfair labor practice charges to the Respondent.

The details of the April 26, 1974, letter are as herein set out:

> April 26, 1974
>
> Mr. Robert Swiatek, President
> Colonial Haven Nursing Home Inc.
> 3900 Stearns
> Granite City, Illinois 62040
>
> Dear Mr. Swiatek:
>
> Colonial Haven Nursing Home has engaged in a series of unfair labor practices and has repeatedly refused to recognize the rights of its employees.
>
> Unless an action in good faith is taken to settle these charges by Saturday, April 27 at 6:30 A.M., an authorized picket line will be established at that time. If you do not intend to alter your position, please make arrangements to move the home's patients so that they will not suffer any undue hardships.
>
> I am available to meet and discuss this situation with you at your convenience.
>
> Yours truly,
>
> /s/ Jim Potterton
>
> Jim Potterton
> Field Representative

The Respondent made no response to the Union's letter of April 26, 1974. On April 27, 1974, at 6:30 a.m., a strike by certain of Respondent's employees commenced and continued to May 31, 1974, at 1 p.m. It is clear that the Union conducted and directed said strike. The number of employees who initially participated in the strike was around 37. Cheryl Davis was hired by the Respondent during the strike and told to report to work on a stated day. Instead, Davis joined the strike. At the end of the strike there were 34 employees, including Davis, who had commenced striking activity and who had not returned to work at the Respondent.

On May 2, 1974, the Union transmitted a letter to the following effect to the Respondent.

> May 2, 1974.
>
> Mr. Robert Swiatek, President
> Colonial Haven Nursing Home, Inc.,
> 3900 Stearns Avenue
> Granite City, Illinois 62040

Dear Mr. Swiatek:
In the spirit of trying to arrive at an amicable settlement of our dispute, I am inviting you to join with me in requesting the assistance of the Federal Mediation and Conciliation Service.

I hope that your concern for a peaceful resolution of our Labor dispute will prompt you to join with me in this request.

Very truly yours,

/s/ James Potterton

James Potterton
Field Representative
Local 50

JP:mb
opeiu #13

cc — Director
Federal Mediation & Conciliation Service

During the strike the Union had employees to carry picket signs on the picket lines. These signs did not allude to a "recognition" purpose. Some employees nearby, however, on occasion carried picket signs referring to a "recognition" purpose of the strike. A union bulletin also referred to a "recognition" purpose of the strike. Such bulletin contained in part the following language.

Second, our employer has refused to recognize Service Employees Union, Local #50, AFL–CIO as our collective bargaining agent even though a majority of us have signed application cards requesting such representation.

On May 31, 1974, the Union sent a letter to the following effect to the Respondent:

May 31, 1974

Mr. Robert Swiatek, President
Colonial Haven Nursing Home
3900 Stearns
Granite City, Illinois 62040

Dear Mr. Swiatek:

We represent striking employees of Colonial Haven Nursing Home. This is to advise you that these employees are herewith unconditionally offering to return to work.

We have notified employees on strike to report to work at their regular starting times on Monday, June 3, 1974.

Sincerely,

/s/ Jim Potterton

Jim Potterton,
Field Representative

Thereafter a large number of employees appeared in person or telephoned the Respondent's agents concerning going back to work. Such employees were told that they had been replaced and that they would have to make new applications for jobs. There was a small number of employees who did not contact the Respondent for reinstatement after the strike.[11]

Contentions and Conclusions

The General Counsel contends that the strike from April 27 to May 31, 1974, was an unfair labor practice strike, that therefore the Respondent could not lawfully replace such employees, and that the failure of the Respondent to put such employees back to work upon their unconditional offer to return to work violated Section 8(a)(3) and (1) of the Act. The Respondent contends in effect that the strike was for an unlawful purpose, that the employees had been replaced, and that it had no obligation to put the employees back to work.

The General Counsel asserts in effect that the issue is a factual issue as to whether the strike was an unfair labor practice strike or was for an unlawful purpose.

Considering all of the facts, I am persuaded that the strike was not an unfair labor practice strike, and that the overriding reason for the strike was for an unlawful purpose — the obtaining of recognition by the Union as an exclusive collective-bargaining agent in a bargaining unit which the Regional Director had determined to be a nonrepresentative complement. The unfair labor practices are not the type reasonably to be expected to cause a union or employees to seek the self-help use of a strike for correction. Thus, the unfair labor practices reveal only a few instances of unlawful interrogation of employees as to their or others' union activities or sympathies, and an instance of requesting an employee to report on union activity of other employees. The overwhelming weight of the facts reveals that the Union and employees were motivated in having a strike as a means of putting pressure on the Respondent to immediately and voluntarily recognize the Union as bargaining agent rather than waiting until the proper time for an election or recognition. Further, even if the Union were seeking to force an election, it was seeking to force an election (representation) at a time that such election would be improper.

It is thus clear that the strike was for an unlawful purpose, that the employees' striking activity was not protected, and that the Respondent had no obligation to

[11] The details of which employees did and did not contact the Respondent for reinstatement are not in dispute. Because of the findings in this case that the strike was for an unlawful purpose, I do not find it necessary to set forth the details as to who did or did not contact the Respondent for reinstatement. The Union's letter concerning the offer to return to work alludes to its notification of employees to return to work. Considering this, the letter and subsequent action of employees reveal the offer to return to work to be on behalf of the employees who later contacted the Respondent for reinstatement and not on behalf of the other employees who had originally gone out on strike but who did not contact the Respondent after the strike.

reinstate them either on the basis of rights as unfair labor strikers or even as economic strikers.[12]

Accordingly, it is concluded and found that the Respondent's failure to reinstate the striking employees upon their unconditional offer to work, on May 31, 1974, and thereafter, does not constitute conduct violative of Section 8(a)(3) and (1) of the Act. It is so found and concluded.[13]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's operation described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Colonial Haven Nursing Home, Inc., the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Service and Hospital Employees Union, Local No. 50 of Service Employees International Union, AFL–CIO–CLC, is a labor organization within the meaning of Section 2(5) of the Act.
3. By interfering with, restraining, and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act, the Respondent engaged in unfair labor practices proscribed by Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

[12] The Respondent's action in telling the employees that they were replaced and that they had to make new applications for employment is tantamount to a message of discharge. Since the employee strike activity was unprotected, there is no violation of the Act by such action.

[13] See *ABC Prestress & Concrete*, 201 NLRB 820 (1973), and *Local 707, Highway and Local Motor Freight Drivers, Dockmen and Helpers, Teamsters (Claremont Polychemical Corporation)*, 196 NLRB 613 (1972).