**Saint Vincent's Hospital *and* Local 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL–CIO.** Cases 10–CA–15828, 10–CA–16214, and 10–CA–16444

October 8, 1982

## DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 26, 1981, Administrative Law Judge Philip M. Browning issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs, and Respondent filed a brief in support of certain portions of the Administrative Law Judge's Decision.

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 exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

1. The Administrative Law Judge found that, pursuant to its no-solicitation policy, Respondent lawfully discharged employee LaCosta Miles and lawfully reprimanded Miles and employee Linda Menefee. In his exceptions, the General Counsel does not argue that the policy is unlawful on its face, but does contend that Respondent applied its policy in a discriminatory fashion to discourage union activity. We find merit to the General Counsel's contentions, and we find for the reasons below that Respondent violated Section 8(a)(1) by discriminatorily enforcing its no-solicitation rule, and violated Section 8(a)(3) and (1) by reprimanding Miles and Menefee and by discharging Miles for soliciting on behalf of the Union.

Respondent's policy governing solicitation and distribution reads, in pertinent part:

> No distribution of any kind, including circulars or other printed materials, shall be permitted in any work area at any time.
>
> No solicitations of any kind, including solicitations for memberships or subscriptions, which may interfere with patient care or disturb patients will be permitted in immediate patient care areas . . . .
>
> No solicitation of any kind, including solicitation for memberships or subscriptions, will be permitted at any time by associates who are supposed to be working, or in such a way as to interfere with the work of other associates who are supposed to be working. Anyone who does so and thereby neglects his or her work or interferes with the work of others will be subject to disciplinary action.

The record supports the Administrative Law Judge's finding that prior to issuing the oral "clarification" of its policy on August 7, 1980,[1] Respondent permitted solicitations which were inconsistent with the policy.[2] Thus, Supervisor Virginia Wallace testified that wedding invitations were placed on the bulletin board in the locker room, and Supervisors Linda Vann and Joy Dobinson indicated that solicitations for flower funds were permitted. As the Administrative Law Judge noted, employee Charlene Weeks testified that in June she purchased two raffle tickets from a nursing student during working hours. Additionally, employee Mellow Smith recalled that in the summer of 1980 a student and part-time clerk asked several employees during working time to buy raffle tickets. Smith further recalled that sometime in August an employee tried during working time to sell tickets to a "whiskey bash" to other employees. Also in August, according to Smith, employee Mahalia Brown sold Avon products during working time to employees at the nurses' desk in the labor room. The Administrative Law Judge also noted employee Queen Ester Steen's testimony that, at some point between May and July during working time, she was asked to purchase raffle tickets by a student nurse who claimed that the hospital administration had authorized the selling of such tickets. Steen further recalled that in the summer of 1980 an employee engaged in working-time sales of candy to other employees, and another employee sold her a ticket to a raffle.[3]

On August 7, Respondent's attorney "clarified" the policy by informing supervisors that solicitations were prohibited for flower funds, shower and

[1] Unless otherwise specified, all dates herein refer to 1980.

[2] Respondent has not excepted to the Administrative Law Judge's finding in this regard.

[3] We note that there is no evidence that supervisors were present during the incidents about which Weeks, Smith, and Steen testified. However, we find that the incidents were sufficiently open, frequent, and widespread to warrant drawing an inference that Respondent had knowledge of the solicitations. See *Hammary Manufacturing Corporation, a Division of U.S. Industries, Inc.*, 258 NLRB 1319 (1981); *The Timken Company*, 236 NLRB 757, 758 (1978). We also base this inference on the testimony of Supervisors Wallace, Vann, and Dobinson that other types of solicitation were tolerated, and we note that Respondent did not except to the Administrative Law Judge's finding that prior to August 7 solicitations were permitted contrary to Respondent's rule.

It is not entirely clear whether some of the above incidents occurred just before or soon after August 7. In either case the incidents form part of a widespread pattern of solicitation which warrants a finding that Respondent knew of and permitted substantial deviations from its policy prior to August 7.

wedding invitations, and the selling of such items as Avon products, doughnuts, and candy. Respondent's employees were orally advised by their supervisors of the clarification. However, it is undisputed that after August 7 hospitalwide solicitation for the United Appeal continued with Respondent's approval.

Pursuant to its policy, Respondent took several disciplinary measures after August 7 against employees who engaged in union activities. Supervisor Betty Eaford gave employee LaCosta Miles a written reprimand[4] on October 1 for distributing union literature in the conference room in the intensive care unit and in the conference room on "Third-East." On October 15, Miles delivered a written invitation to a union meeting to employee Inez Jackson, who was working in the coronary care unit. On October 27, Miles was summoned to a meeting with Eaford and Surgical Division Manager Joyce Williams, who told Miles that giving another employee an invitation to a union meeting was a form of solicitation. Williams then informed Miles that she was terminated for soliciting in patient care areas.[5]

Additionally, it is undisputed that employee Linda Menefee was given a written reprimand on September 16 for soliciting employees during working time. The reprimand cited five separate incidents in which Menefee, an active union advocate, either questioned employees concerning their views on the Union or asked employees to attend union meetings.

As the Administrative Law Judge found, Respondent continued to condone some types of nonunion solicitation subsequent to August 7. The record discloses several examples of Respondent's undisputed tolerance of the hospitalwide solicitation for the United Appeal. Thus, Supervisor Linda Vann testified that after August she witnessed solicitations for the United Appeal on working time in patient care areas, and employee Steen testified that in December United Appeal cards were distributed on working time in the presence of Supervisor Virginia Wallace. On September 22, during working time, employee Charlene Weeks was given a United Appeal card by another employee in front of the nurses' desk on "Second-East."

Apart from the United Appeal solicitations, the Administrative Law Judge found that Respondent permitted solicitations which were inconsistent with its policy on three occasions after August 7.[6] In October, Supervisor Sharon Blankenship distributed wedding invitations to employees during their working time in the locker room of the labor room, and Supervisor Belle Snyder handed a dollar to employee Charlene Weeks, telling her to "get something going" for an employee who was sick. Snyder said nothing to Weeks concerning when or where the contributions were to be solicited, and until early November Weeks solicited money from 19 or 20 employees, at least 4 of whom were working at the time of the solicitation. The record also discloses that in September or October, prior to a morning change-of-shift report, Supervisor Roberta Smith invited some employees to a housewarming party. The Administrative Law Judge concluded that, even though Respondent tolerated such activities while simultaneously enforcing its rule against Miles and Menefee, its conduct did not "rise to the level of discriminatory enforcement of the no-solicitation rule."

The Administrative Law Judge recognized that Respondent did not enforce its rule before August 7, but he evaluated only the evidence arising after that date in determining whether Respondent enforced its rule in a discriminatory manner. He did so because he apparently believed that Respondent's August 7 clarification was not prompted by its employees' union activities. Consequently, he in effect gave Respondent a clean slate and failed to give weight to those instances of inconsistent enforcement arising before August 7. Contrary to the Administrative Law Judge, we do not view the clarification to have been simply Respondent's good-faith reaction to the confusion of its supervisors over the breadth of the rule.[7] Rather, we find that the purpose of the clarification was to provide Respondent with a basis for the subsequent enforcement of its rules against employees who engaged in union solicitation.

Such a conclusion is warranted from the circumstances in which the clarification took place. With respect to its timing, we note that the clarification occurred while the organizational campaign was in progress, and we note especially that shortly after August 7 Respondent suddenly began to enforce its

[4] The reprimand was dated September 26, and indicated that Miles would be terminated for any further violations of Respondent's policy.

[5] The Administrative Law Judge found that at the time of Miles' discharge Eaford was unaware that the solicitation involved an invitation to a union meeting, and he apparently found that Eaford alone made the decision to terminate Miles. However, Eaford's undisputed testimony discloses that the decision to terminate Miles was made jointly by Eaford and Williams. Further it is clear that Williams knew that the invitation concerned a union meeting, since, as found by the Administrative Law Judge, Williams informed Miles at the termination interview that an invitation to a union meeting was a form of solicitation. No exceptions were raised to the Administrative Law Judge's finding in this regard. We therefore find that Respondent knew that the invitation involved a union meeting at the time that it discharged Miles.

[6] No exceptions were raised to the Administrative Law Judge's finding in this regard.

[7] The Administrative Law Judge noted Supervisor Vann's testimony that she and others had requested clarification of the policy because they were uncertain as to what constituted solicitation.

rule against employees who engaged in union solicitation, while simultaneously continuing to display tolerance of some types of nonunion solicitation. Thus, Menefee was reprimanded on September 16, and Miles was reprimanded on October 1 and discharged on October 27. In examining the context of the clarification, we also find it relevant that Respondent had previously engaged in unlawful activity of a similar nature. From 1978 until September 15, 1980, Respondent maintained an overly broad rule governing the wearing of insignia,[8] and, as found *infra*, it unlawfully enforced that rule on April 16 against employee Cynthia Hildreth by instructing her to remove her union button.[9] Additionally, as found *infra*, Respondent unlawfully interrogated employee Hildreth on September 1 concerning her union activities.[10]

In view of the foregoing, we find that the clarification merely marked the point at which Respondent began to strictly enforce its rule as a response to its employees' union activities, and therefore we are not restricted to evaluating only the evidence of discriminatory enforcement arising after August 7. Consequently, we find that Respondent's tolerance of widespread nonunion solicitation prior to that date, when coupled with the activities which it permitted afterwards, constitutes substantial evidence of discrimination and demonstrates that Respondent had no interest in enforcing its rule until its employees began to engage in union activities. It is well settled that an employer violates Section 8(a)(1) by failing to enforce a no-solicitation rule against activities similar to those involved here, while simultaneously enforcing the rule against solicitation on behalf of a union.[11] Similarly, discipline of an employee pursuant to a no-solicitation rule violates Section 8(a)(3) and (1) where the rule has been selectively applied to prohibit union activities.[12] In view of the foregoing, we find that Respondent violated Section 8(a)(1) by discriminatorily enforcing its no-solicitation and no-distribution rule, and violated Section 8(a)(3) and (1) by reprimanding and discharging Miles and by reprimanding Menefee for engaging in union solicitation.[13]

We would reach the same result even if we utilized the Administrative Law Judge's analysis and considered only the evidence of discrimination arising after August 7. Viewing the evidence in such a light, we find that the Administrative Law Judge gave insufficient weight to the instances of inconsistent enforcement occurring after that date. Thus, he acknowledged that Respondent permitted working-time solicitation for the United Appeal, but he apparently did not consider such an exemption to be evidence of discrimination. Although the Board has found that an employer's tolerance of isolated beneficent solicitation does not by itself constitute sufficient evidence of discriminatory enforcement,[14] it has never granted a blanket exemption to all charitable solicitation. Indeed, the Board has consistently evaluated evidence of such solicitation in determining whether a rule has been discriminatorily enforced.[15]

Here, the activities on behalf of the United Appeal occurred in conjunction with the three other instances of solicitation outlined above, and we find in the circumstances that all of these incidents cannot be dismissed as "isolated," particularly since some of the activities consumed a considerable amount of time. Thus, it is clear that United Appeal solicitations persisted over a period of several months, since the record discloses that employee Weeks was solicited in September and since United Appeal cards were distributed in the presence of Supervisor Virginia Wallace in December. Supervisor Linda Vann indicated that she had witnessed working-time activities on behalf of the United Appeal since August. Additionally, Weeks' collection for a sick employee pursuant to Supervisor Snyder's request continued over a significant amount of time during October and November. These activities, when coupled with Supervisor Blankenship's distribution of wedding invitations in October and Supervisor Smith's invitation to a housewarming party in September or October, constitute substantial evidence that Respondent discriminatorily enforced its rule, even if the period after August 7 is viewed in isolation. We emphasize that this evidence assumes added significance in light of the active participation of supervisors in the conduct, which occurred so soon after Respondent announced that it would no longer condone solicitation. Such supervisory conduct further demonstrates that Respondent had no interest in enforcing its rule, apart from its desire to inhibit its employees' union activities. Therefore, we find that the

[8] See sec. 3, *infra*.

[9] See sec. 4, *infra*.

[10] See sec. 2, *infra*.

[11] See, e.g., *Westinghouse Electric Corporation*, 240 NLRB 905, 916 (1979); *Imco Container Company*, 208 NLRB 874, 878–879 (1974).

[12] See, e.g., *Westinghouse Electric Corporation, supra* at 916; *Capitol Records, Inc.*, 233 NLRB 1041, 1045–46 (1977).

[13] See *Hammary Manufacturing Corporation, supra*; *Capitol Records, Inc., supra*. In light of our decision herein, we find it unnecessary to reach the question of whether the conference room in the intensive care unit is an immediate patient care area.

[14] See *Emerson Electric Co., U.S. Electrical Motors Division*, 187 NLRB 294, fn. 2 (1970); *Serv-Air, Inc.*, 175 NLRB 801, 802, fn. 3 (1969). See also *Hammary Manufacturing Corporation, a Division of U.S. Industries, Inc.*, 265 NLRB No. 7 (1982).

[15] See, e.g., *Lance, Inc.*, 241 NLRB 655, fn. 5 (1979); *Imco Container Company, supra* at 878–879. See also *Paceco, a Division of Fruehauf Corporation*, 237 NLRB 399, 401 (1978).

result herein would not be altered by excluding the evidence of discrimination arising before August 7.

2. The Administrative Law Judge found that Supervisor Linda Vann did not interrogate employee Cynthia Hildreth on September 1 outside the locker room on "Third-Main." We find merit to the General Counsel's exceptions in this regard, and we find for the reasons below that Vann interrogated Hildreth in violation of Section 8(a)(1).

On September 1, Vann was sitting at the nurses' station on Third-Main when she noticed Hildreth walking by. Vann approached Hildreth and asked whether she had just come out of the locker room. Hildreth turned to face Vann and answered affirmatively, and at that point Vann observed that Hildreth was holding union literature in her hand. Vann then asked her what she was doing there and whether she had left any literature in the locker room. Asserting that her conduct was legal because she was on her own time, Hildreth confirmed that she had distributed the literature. Vann asked her to state her name and to indicate whether she was on a break, and Hildreth gave her name and replied that she was on her lunch period. Vann then inquired as to Hildreth's work location, and Hildreth responded that she worked on "Seventh-Main." At that point Vann and Hildreth terminated their encounter.

The Administrative Law Judge observed that Vann was policing the locker room area since there recently had been several thefts of billfolds from both patients and employees. He also found that the encounter had occurred in a pleasant atmosphere, that the questioning was not part of any "systematic and intensive" interrogation, and that Vann neither reprimanded nor scolded Hildreth. Relying on these circumstances, the Administrative Law Judge found that Vann's questioning of Hildreth did not violate Section 8(a)(1).

Although it is clear, as the Administrative Law Judge found, that the propriety of Vann's attempt to police the area cannot be questioned, it is equally clear that in doing so Vann was not free to interrogate Hildreth as to her union activity. After a careful review of the record, we find that, while Vann may have originally stopped Hildreth for security reasons, her inquiries quickly exceeded her policing function and interfered with Hildreth's Section 7 rights. We note especially that, when Vann recognized at the outset that Hildreth was holding union leaflets, she immediately began asking questions related to Hildreth's union activity, including inquiries as to why she was in the area and whether she had distributed the leaflets in the locker room. In response to Hildreth's assertion that she could distribute literature on her own time, Vann pursued the issue by asking whether Hildreth was on lunchtime or breaktime. It was in this context of discussing her union activity that Vann asked Hildreth to state her name and to reveal her work location. When the record is viewed as a whole, it is clear that Vann's questions focused on Hildreth's union activity and were unrelated to security considerations. It is also noteworthy that Vann failed to inform Hildreth of her purpose[16] and did not mention the theft problem or her policing function.

In examining the context of the incident, we also recognize that Vann's questioning of Hildreth did not occur in a vacuum, since it was a prelude to Respondent's discriminatory application of its no-solicitation rule.[17] We note further that it was Hildreth against whom Respondent had previously enforced its unlawful rule governing the wearing of insignia.[18]

We also find that the Administrative Law Judge erred in relying on the pleasant atmosphere surrounding the encounter. The Board has frequently found that inquiries concerning union activities are unlawful even when conducted in such an atmosphere,[19] and consequently questioning need not be systematic, intensive, or harsh in order to be found unlawful. The test is "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act."[20] We therefore find under all of the circumstances that Respondent violated Section 8(a)(1) by questioning Hildreth as to whether she was engaged in the distribution of union literature and by attempting to ascertain her identity in that context.[21]

3. We agree with the Administrative Law Judge that prior to September 15 Respondent's rule governing the wearing of insignia was overly broad, since the rule prohibited such insignia at all locations on Respondent's property while employees were on duty or in uniform. However, the Administrative Law Judge did not provide a remedy for the violation in view of Respondent's promulgation of a revised rule on September 15.[22] In agreement with the General Counsel, we find that the Administrative Law Judge erred in not providing such a

[16] See *Pacific Southwest Airlines*, 201 NLRB 647, 650-651 (1973).

[17] See *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975).

[18] See sec. 4, *infra*.

[19] See, e.g., *Jody Tootique*, 245 NLRB 734, 739 (1979); *Hanes Hosiery, Inc., supra* at 338, fn. 2.

[20] *American Freightways Co., Inc.*, 124 NLRB 146, 147 (1959).

[21] Cf. *Fremont Manufacturing Company, Inc.*, 224 NLRB 597, 604 (1976). See also *Montgomery County MH/MR Emergency Service*, 239 NLBR 821, 824 (1978).

[22] The General Counsel does not contend that the revised rule of September 15 is unlawful. Therefore, the issue of whether the rule is valid is not before us.

remedy. Under certain circumstances an employer may repudiate its unlawful conduct and thereby relieve itself from liability.[23] In the instant case, however, Respondent has made no effort to repudiate its conduct, and we find that Respondent's mere revision of the rule does not constitute an effective repudiation.

We also find that this is not a case in which the violation is insufficiently serious to warrant the issuance of a remedial order.[24] We consider Respondent's maintenance of the rule over a period of approximately 2 years to be a serious restriction of the Section 7 rights of its employees,[25] and therefore we shall make appropriate modifications to the Administrative Law Judge's recommended Order.

4. The Administrative Law Judge found that Respondent did not violate the Act when its supervisor, Linda Piccard, acting pursuant to the unlawful rule governing insignia, told employee Cynthia Hildreth on April 16 to remove the union pin which she was wearing in a patient care area. The Administrative Law Judge reasoned that Piccard's conduct would have been unlawful if Hildreth had been disciplined in connection with the incident. We find merit to the General Counsel's contentions concerning this issue.

Contrary to the Administrative Law Judge's conclusion, formal disciplinary action is not a prerequisite to finding that an overly broad rule has been unlawfully enforced. The Board has found that enforcement of an invalid rule violates the Act even where the enforcement consists merely of instructing an employee to cease engaging in union activity.[26] We therefore find that Respondent violated Section 8(a)(1) by telling Hildreth to remove her button.[27]

## CONCLUSIONS OF LAW

1. Saint Vincent's Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By permitting nonunion solicitation during working time while prohibiting union solicitation during working time, by interrogating employee Cynthia Hildreth concerning her union activities, by instructing its supervisor, John Gilbert, to engage in surveillance of its employees' union activities, by maintaining an overly broad rule governing the wearing of insignia, and by enforcing that rule against employee Cynthia Hildreth, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By reprimanding employee Linda Menefee and by reprimanding and discharging employee LaCosta Miles because of their union activities, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. All other allegations of the complaint herein that Respondent has engaged in unlawful conduct have not been supported by substantial evidence.

## THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, we shall order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Accordingly, we shall order Respondent to offer LaCosta Miles immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and to make her whole for any loss of earnings she may have suffered as a result of the discrimination practiced against her by paying to her a sum equal to what she would have earned, less any net interim earnings, plus interest. Backpay shall be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner described in *Florida Steel Corporation*, 231 NLRB 651 (1977).[28]

We shall also order Respondent to expunge from its records any reference to the unlawful discharge of Miles and to the unlawful reprimands issued to Miles and Linda Menefee.

[23] To be effective, a repudiation must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed illegal conduct. The repudiation must be adequately published, and the employer must not engage in proscribed conduct after the publication. *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978). Cf. *Baldor Electric Company*, 245 NLRB 614 (1979).

[24] See, generally, *Carolina American Textiles, Inc.*, 219 NLRB 457 (1975); *Texberry Container Corporation*, 217 NLRB 58 (1975).

[25] See *Custom Trim Products*, 255 NLRB 787 (1981), where the Board adopted an administrative law judge's issuance of a cease-and-desist order for an overly broad rule which was maintained for only 20 days.

[26] *Winn-Dixie Stores, Inc.*, 224 NLRB 1418, 1428-29 (1976).

[27] See *Schwan's Sales Enterprises, Inc.*, 257 NLRB 1244 (1981).

[28] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

In accordance with our decision in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), we shall also provide a narrow cease-and-desist order.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Saint Vincent's Hospital, Birmingham, Alabama, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, reprimanding, or otherwise discriminating against employees because they engage in union activities.

(b) Discriminatorily enforcing its no-solicitation and no-distribution rule against employees who engage in union activities.

(c) Maintaining a rule which prohibits employees from wearing insignia, pins, or buttons at all locations on its property while employees are on duty or in uniform.

(d) Enforcing against employees a rule which prohibits the wearing of insignia, pins, or buttons at all locations on its property while employees are on duty or in uniform.

(e) Interrogating employees concerning their union activities.

(f) Instructing or ordering its supervisors to engage in surveillance of its employees' union activities.

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

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer LaCosta Miles immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any losses incurred by reason of the discrimination practiced against her in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Expunge from its files any reference to the discharge of LaCosta Miles and to the reprimands issued to LaCosta Miles and Linda Menefee, and notify each of them, in writing, that this has been done and that its unlawful conduct will not be used as a basis for future personnel actions concerning them.

(c) 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.

(d) Post at its Birmingham, Alabama, facility copies of the attached notice marked "Appendix."[29] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's authorized representative, shall be posted by Respondent 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 ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaints be, and they hereby are, dismissed insofar as they allege violations of the Act not specifically found herein.

[29] 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

WE WILL NOT discharge, reprimand, or otherwise discriminate against our employees because they engage in union activities.

WE WILL NOT discriminatorily enforce our no-solicitation and no-distribution rule against employees who engage in union activities.

WE WILL NOT maintain a rule which prohibits our employees from wearing insignia, pins, or buttons at all locations on our property while our employees are on duty or in uniform.

WE WILL NOT enforce against our employees a rule which prohibits the wearing of insignia, pins, or buttons at all locations on our property while our employees are on duty or in uniform.

WE WILL NOT interrogate our employees concerning their union activities.

WE WILL NOT instruct or order our supervisors to engage in surveillance of our employees' union activities.

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

WE WILL offer LaCosta Miles immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and WE WILL make her whole, with interest, for any losses incurred by reason of the discrimination practiced against her.

WE WILL expunge from our files any references to the discharge of LaCosta Miles and to the reprimands issued to LaCosta Miles and Linda Menefee, and WE WILL notify each of them, in writing, that this has been done and that our unlawful conduct will not be used as a basis for future personnel action concerning them.

## SAINT VINCENT'S HOSPITAL

## DECISION

### STATEMENT OF THE CASE

PHILIP M. BROWNING, Administrative Law Judge: Upon a charge filed on May 14, 1980, and an amended charge filed on June 25, 1980, by Local 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL-CIO (hereinafter the Union), against St. Vincent's Hospital (hereinafter Respondent), the General Counsel of the National Labor Relations Board (hereinafter the General Counsel), through the Regional Director for Region 10 of the Board, issued his complaint and notice of hearing dated August 12, 1980, in Case 10-CA-15828. Upon a charge filed by the Union on September 4, 1980, against Respondent, the General Counsel issued his complaint, order consolidating cases, and notice of hearing dated September 26, 1980, in Cases 10-CA-16214 and 10-CA-15828. Upon a charge filed by the Union on November 21, 1980, against Respondent, the General Counsel issued his complaint (as amended January 9, 1981), order consolidating cases, and notice of hearing dated December 31, 1980, in Cases 10-CA-16444, 10-CA-16214, and 10-CA-15828.

Respondent, by its duly filed answers to each of the indicated complaints, essentially denied and placed in issue the allegations of unfair labor practices contained therein.

A hearing was held in Birmingham, Alabama, on March 9 and 10, 1981, in which all parties participated. Post-hearing briefs were filed on behalf of all parties by counsel and have been carefully considered.

Upon the entire record in these consolidated cases, and from my observation of the testimonial demeanor of the witnesses, I make the following:

### FINDINGS OF FACT AND CONCLUSIONS

#### I. JURISDICTION

##### A. *Respondent*

At all material times, Respondent has been and is an Alabama corporation with office and place of business located in Birmingham, Alabama, where it is engaged as a health care institution in the operation of a hospital providing inpatient and outpatient medical and professional care services. During the representative 12-month period immediately preceding issuance of the original complaint in Case 10-CA-15828, Respondent received gross revenues exceeding $250,000 in the course and conduct of that business and received at its Birmingham, Alabama, institution supplies valued in excess of $5,000 directly in interstate commerce from places outside the State of Alabama. I find that Respondent is, and at all times has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

##### B. *The Union*

The answers admit, and I find, that at all material times the Union is and has been a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

##### A. *Issues Involved*

The basic issues were set forth in the brief of the General Counsel, *viz*, whether a preponderance of credible evidence supports findings that Respondent: (1) maintained and enforced rules that prohibited employees from displaying union insignia in nonpatient care areas, in violation of Section 8(a)(1) of the Act; (2) interrogated employees concerning their membership in union activities and desires in violation of Section 8(a)(1) of the Act; (3) instructed its employees to surveil their fellow employees' activities on behalf of the Union, in violation of Section 8(a)(1) of the Act: (4) reprimanded its employee, Linda Menefee, because she engaged in activities on behalf of the Union, in violation of Section 8(a)(3) and (1) of the Act; and (5) reprimanded and discharged its employee, LaCosta Miles, because she engaged in activities on behalf of the Union, in violation of Section 8(a)(3) and (1) of the Act.[1]

[1] Respondent's contentions with respect to the procedural issues raised by it on brief, *viz* (1) that the General Counsel's earlier withdrawal of the charges relating to the warning given Linda Menefee and to the termination of LaCosta Miles bars their subsequent filing herein and (2) that the absence of an embracing charge in the case of the alleged warning given Miles warrants its dismissal, have been considered and, in the absence of a showing that the filing of the related complaints was in any way barred by Sec. 10(b) of the Act or that the contentions otherwise are meritorious, are not found to constitute an impediment to a consideration of the enumerated issues on the merits.

### B. *The Dress Code*

#### 1. The facts

The first complaint alleges in essence that Respondent maintains and has enforced an overly broad rule that prohibits the wearing of union insignia or buttons at all times while on hospital property. In its answer Respondent admits that its employee handbook, published in 1978,[2] contained a rule with respect to identification badges which included, *inter alia*, the following paragraph:[3]

> In addition to the official hospital identification badge, associates are permitted to wear official school or occupational pins, but no other insignia, pins, or buttons are permitted to be worn by associates while on duty or while in uniform on hospital property.

In an amended answer to the first complaint, Respondent indicates that its employee handbook was amended on September 15 to contain, *inter alia*, the following revised paragraph with respect to identification badges:[4]

> In addition to the official hospital identification badge, associates are permitted to wear official school or occupational pins, but no other insignia, pins, or buttons are permitted to be worn by associates in immediate patient care areas which include the patients' rooms, operating rooms, and places where patients receive treatment (such as X-Ray and therapy areas), corridors and sitting rooms adjoining or accessible to patient rooms and treatment rooms, and elevators or stairways used substantially to transport patient[s].

It is uncontroverted that, prior to the promulgation of the September 15 revision, Respondent, through its assistant director of nurses, enforced the rule.

For several days in April (April 10–16) employee Cynthia Hildreth wore her union button to work. Hildreth testified that, on April 16, Medical Nursing Manager Linda Piccard advised her the union pin (Local 1199) she was displaying was contrary to hospital policy, not part of the uniform, and that she was not to wear anything on her uniform but a name tag and her school designation. Hildreth responded by inquiring whether the practice of other employees in wearing various pins, flowers, and other insignia was against hospital policy also, to which Piccard replied in the affirmative. The conversation took place in front of the nurses desk in a patient unit known as "Seventh-Main." Piccard testified that on that day she had inspected employees on various shifts for the proper display of the identification badges required of all employees and their general compliance with the hospital dress code, i.e., to make certain they had on the pins they were supposed to and were not wearing things that were prohibited. She found employees were wearing various types of paraphernalia, such as bunny rabbits, extra pins, chickadees, etc. She asked them to remove all except their identification badges and nurse's or school pins. A nurse's pin denotes the school conferring the nursing degree and usually also indicates whether the wearer is a registered, or a licensed practical, nurse. Nurses are required to wear their pins. While Piccard had on a number of previous occasions requested employees to remove other pins, buttons, etc., she testified she had never previously directed the removal of a union button. On the occasion in issue, Piccard approached Hildreth from a distance and noted the latter's school pin and "another pin" and asked if the other pin was a nursing pin. When Hildreth replied in the negative, Piccard requested its removal. It was only when Hildreth was in the process of removing it that Piccard noted what kind of pin it was.

#### 2. Analysis and concluding findings

The undisputed facts are that prior to September 15 Respondent maintained a rule prohibiting employees from wearing insignia, other than those of a professional nature, which was not restricted to patient care areas. It is also undisputed that the rule was amended effective September 15 as to apply only to patient care areas. I find that the rule maintained prior to September was overly broad and unlawful, as it was not restricted to patient care areas.[5] Thus, Respondent, by maintenance of

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[2] All dates hereinafter are in 1980 unless otherwise indicated.

[3] The entire rule reads:

IDENTIFICATION BADGES

St. Vincent's Hospital follows official personnel identification procedures to maintain hospital security for patients, visitors, and associates.

All associates are provided with identification badges when they are employed. It is a requirement that these badges be worn by all associates when they are on duty.

There is no charge for the first badge. When a badge is lost or mutilated, the associate contacts the Personnel Department for a new badge. A nominal fee is charged for the replacement badge.

An associate who leaves the employment of the hospital may not receive a final paycheck until the identification badge is returned to the Personnel Department.

In addition to the official hospital identification badge, associates are permitted to wear official school or occupational pins, but no other insignia, pins, or buttons are permitted to be worn by associates while on duty or while in uniform on hospital property.

[4] The entire revised rule (after September 15) reads:

IDENTIFICATION BADGES

Photo Identification Badges are issued to all associates by the Personnel Department. Associates are required to wear identification badges at all times while on hospital premises.

An associate who changes name, job title, or department is required to have a new badge made. This badge is issued without charge.

For lost, mutilated, or destroyed badges, a nominal fee will be charged for replacement.

At termination the associate is required to return the badge to the hospital.

In addition to the official hospital identification badge, associates are permitted to wear official school or occupational pins, but no other insignia, pins, or buttons are permitted to be worn by associates in immediate patient care areas which include the patients' rooms, operating rooms, and places where patients receive treatment (such as X-Ray and therapy areas), corridors and sitting rooms adjoining or accessible to patient rooms and treatment rooms, and elevators or stairways used substantially to transport patient[s].

[5] *George J. London Memorial Hospital*, 238 NLRB 704, 708 (1978).

the dress code as it existed prior to its revision of September 15, violated Section 8(a)(1) of the Act.

Further, it is uncontested that Respondent, through the medical nursing manager, enforced the rule on April 16 by informing employee Cynthia Hildreth that the union pin she was displaying on her uniform was contrary to hospital policy and, accordingly, must be removed. This incident occurred in a patient care area, and Piccard was making a periodic inspection for dress code compliance. While there is no evidence that the dress code was in that instance discriminatorily enforced, the Board has held that when an employer maintains an overly broad no-solicitation rule (a union button is a form of solicitation), the rule is invalid for all purposes. Accordingly, if enforcement of the rule results in discipline, the discipline is unlawful even though the activity may have otherwise been lawfully restricted from a particular area.[6]

Thus, if discipline had resulted from Respondent's enforcement of its unlawful rule on April 16, it would have been unlawful, in violation of Section 8(a)(1) of the Act, notwithstanding Respondent's assertion that the dress code was not discriminatorily enforced. Hildreth was neither reprimanded nor warned, however, and there is no remedy appropriate under the circumstances save the entry of an appropriate order to assure Respondent's future compliance with the Act in the maintenance and enforcement of a dress code. There is, however, no contention raised that maintenance of Respondent's revised dress code is overly broad, or otherwise violative of Section 8(a)(1) of the Act, and there was no evidence presented that could serve as a basis for a finding that the rule was ever discriminatorily enforced. It is, therefore, concluded that the mandate of a remedy in this instance would not serve a useful purpose since Respondent's rule as presently contained in its amended employee handbook does not appear unlawful on its face.

### C. *The Interrogation*

#### 1. The facts

The second complaint alleges an instance of unlawful interrogation of an employee by Unit Coordinator Linda Vann, who was at all times material an admitted supervisor.[7]

On September 1 at or about 12:05 p.m., which was during employee Cynthia Hildreth's lunch break on the last day of her employment,[8] Hildreth placed union literature in the locker room on "Third-Main."

According to Hildreth, when she was walking away from the locker room toward the elevators, Unit Coordinator Vann addressed her with a "hey, you" and inquired as to whether she had been in the locker room. Hildreth replied in the affirmative, and Vann asked if she had left the material she was carrying (leaflets) in the locker room.[9] Hildreth affirmatively replied and then said: "It is legal for me to do this because the locker room is a non-patient care area." Vann then asked for her name and where she worked, to which Hildreth responded with her name and the fact she worked on "Seventh-Main." Hildreth also told Vann that she was on her lunch break and then walked away holding some union leaflets of the kind she had deposited in the locker room on "Third-Main" and distributed on other floors that day. "Seventh-Main" where Hildreth worked, is four floors from "Third-Main," where the conversation in question occurred and where Vann worked. Hildreth acknowledged that Vann probably did not know her, that when Vann first addressed her as indicated her back was to Vann, and that she was smiling throughout the encounter since it had occurred in a pleasant atmosphere. Hildreth also testified that she had received a verbal warning from her supervisor, Virginia Wallace, who was unit coordinator, for violating the no-solicitation rule. This warning was not alleged to be a violation of the Act in this action.

While Vann's version of the episode in issue varies in some particulars, it does not differ significantly from that of Hildreth. She was sitting at the nurses station on "Third-Main" at or about 12:05 p.m. on September 1 when she heard the locker room door open. When she looked up, she saw a nurse whom she did not recognize walk by her station. Vann was policing the activity on "Third-Main" since it is an OB floor with many visitors and there had been thefts of billfolds from both patients and employees on the floor. She believed the locker room empty and was policing it to see that no one entered that she did not recognize. As she did not recognize Hildreth, she tried to stop her with an "excuse me." Hildreth, however, kept walking and Vann finally got up and followed her, stopped her halfway down the hall with another "excuse me." Vann asked Hildreth if she had just come out of the locker room. Hildreth turned around to face Vann "grinning" and answered that she had. Vann noticed the papers Hildreth had in her hand. The way Hildreth had them turned, Vann could and did recognize them as union literature. Vann then asked what she was doing there and whether she had left some of the literature in the locker room. Hildreth laughed and replied that she had and that she could do anything she wanted to in a nonpatient area as long as she was on her own time. Vann then asked for her name and whether she was on her lunchtime or breaktime, and Hildreth answered with her name and that she was on her lunch break. Vann asked her where she worked, to which she responded "Seventh-Main" and Vann thanked her and walked away. Vann did not recognize Hildreth as anyone she knew even after Hildreth identified herself, and did not reprimand her for leaving union literature in the locker room. During the course of her testimony, Vann expressed an opinion that, although the locker room was a nonworking area, it would have been contrary to hospital policy to leave union literature there for the reason that those persons who enter that area would

[6] *A.T. & S.F. Memorial Hospital, Inc.*, 234 NLRB 436 (1978).

[7] At the time of hearing, Linda Vann was no longer associated with Respondent.

[8] Cynthia Hildreth was employed at the hospital as an LPN (licensed practical nurse) from October 1973 to September 1, when she resigned to marry and move to Chicago.

[9] According to Hildreth, this area is used by nurses to rest, read, use the restroom located there, and store their purses.

not necessarily be on their breaks and thus would not be allowed to leave it there.

Virginia Wallace, who was Hildreth's supervisor at the time in question, testified that, while she had been aware of the incident, she never verbally reprimanded Hildreth for soliciting or distributing union literature.

2. Analysis and concluding findings

There is no real dispute that, as contended by the General Counsel, Unit Coordinator Vann asked employee Cynthia Hildreth, after the latter left the locker room on "Third-Main," whether she had left some union literature in the locker room, and that Vann did so after recognizing the leaflets as union literature.

The questioning cannot be taken out of context, however. There had been a theft problem on "Third-Main" involving billfolds. That floor has many visitors. The locker room is used by nurses too, among other things, store their purses. Vann was policing the locker room to see no one entered whom she did not recognize. She thought the locker room to be empty. She did not recognize Hildreth as the latter emerged from the locker room, and tried to, and finally did, get her stopped halfway down the hall. Vann asked her if she had just come out of the locker room. After Hildreth turned around to face Vann, the latter saw the papers Hildreth had in her hand, identified them as union literature, and asked Hildreth what she was doing in the locker room. Then she asked about the leaflets. Hildreth was smiling throughout the encounter since it occurred in a pleasant atmosphere. Hildreth answered truthfully that she had left the leaflets in the locker room. She claimed to know her rights to do so, and so stated them.

No one can seriously question the propriety of Vann's policing of traffic on "Third-Main" in view of the frequency of strangers and the prior thefts on the floor involved. Here, there could have been no connection between the questioning of Hildreth and her prior union activities since she worked on "Seventh-Main," four floors away, and Vann did not recognize her as anyone she knew even after Hildreth identified herself. Similarly, there was no connection between the questioning of Hildreth and the fact that it occurred on Hildreth's lunch break on her last day of employment with the hospital. She was not terminated but resigned to marry and move to Chicago. The questioning here was an isolated incident, not part of any systematic and intensive interrogation. Hildreth gave truthful answers without fear of reprisal. As seen, this was her last day of work, and she claimed to know her rights to distribute union literature and stated them to Vann. Vann neither reprimanded nor scolded Hildreth. While the latter claimed to have been orally warned by her supervisor, Virginia Wallace, this warning was not alleged to be a violation of the Act in this action, and Wallace denied ever verbally reprimanding Hildreth for soliciting or distributing union literature. The facts do not rise to the level of coercion.

Under all of the circumstances presented here, I find and conclude that the evidence does not sustain the contention of counsel for the General Counsel and of the Union that Respondent by and through Unit Coordinator Linda Vann on or about September 1, in and about the vicinity of its hospital, unlawfully interrogated its employees. Accordingly, I find and conclude that the evidence in this nature does not sustain a violation of Section 8(a)(1) of the Act.[10]

On brief, the General Counsel charges that Respondent also violated Section 8(a)(1) of the Act by maintaining an invalid no-distribution rule. This violation was not alleged in the complaint, but counsel for the General Counsel points out that this is not a bar to such a finding, since the Board law is clear that a finding may be made thereon as the matter was fully litigated at the hearing, and Respondent had ample opportunity to offer evidence.

The basis of the new charge is Unit Coordinator Vann's responses to the following questions that appear in the transcript of testimony:

> Q. Is the locker room a working area?
> Q. Is it a working area?
> Q. Yes.
> A. No, sir.
> Q. So, no one would be prohibited from distributing literature in the locker room?
> A. It is not considered a working area.
> Q. In other words, an employee would be free to distribute literature on his own time in that area? It wouldn't be a violation of hospital policy to do that, would it?
> Q. Do you understand my question?
> A. Would it be against hospital policy to leave literature in the locker room?
> Q. Right.
> A. It would be because the ones that go through there are not necessarily on their breaks. So, they would not be allowed to leave it in there. They could read it like downstairs in the cafeteria, in the canteen, or in the lobby, but, no, they would not be allowed to read it in the locker room because not all the people are on breaks in there.
> Q. So, it was contrary to hospital policy to leave literature in a non-working area?
> A. No, that's not against policy.

From at least a portion of this exchange, counsel for the General Counsel apparently concludes that Vann stated that it is contrary to hospital policy to distribute literature in the locker room, yet acknowledging that the locker room is a nonworking area.

While some of Vann's answers in the exchange may have been confusing, I do not share counsel's interpretation of them. In essence, she was asked for her interpretation of hospital policy as it relates to the locker room. She may not have fully understood the question, "Would it be against hospital policy to leave literature in the locker room?" and was not as clear as she might have been in her answer. In any event, the basis of her opinion was stated, and a reading of the entire exchange between counsel and witness does not sustain counsel's contention on brief that by that exchange Vann admitted to the

[10] Cf. *N.L.R.B.* v. *Camco, Incorporated*, 340 F.2d 803, 807 (5th Cir. 1965), cert. denied 382 U.S. 926.

maintenance of an overly broad no-distribution rule. Accordingly, I find and conclude that the evidence in this instance does not constitute a violation of Section 8(a)(1) of the Act.

### D. *The Solicited Surveillance*

#### 1. The facts

Paragraph 7 of the complaint issued December 31 alleges that Respondent, by its supervisor and agent, Nursing Supervisor Lorraine Hartley, "solicited its employees to surveil their fellow employees' activities on behalf of the Union."

The General Counsel offered the testimony of former Security Supervisor John Gilbert as proof of that allegation.[11] His testimony was also offered to show that Respondent did entertain hostility towards its employees' union activities.

Gilbert first testified concerning an incident that allegedly occurred in October 1979 when Security Director William B. King, then Gilbert's superior, assertedly informed him that there was going to be a union seminar in the Sheraton Motor Inn, Downtown, that he (King) wanted to know what would transpire, who would attend from St. Vincent's, and who would attend from other hospitals. King, according to Gilbert, wanted him to remember faces and names of those in attendance and bring that information back. King told him to get in and out without being seen, if possible, since it was against the law for him to be there in the first place. Gilbert testified that he told King he would do it and that he attended the seminar held in October 1979 and reported back to King. According to Gilbert, King told him "it was very important that I keep this between me and him because what had happened was against the law and that he didn't want me to discuss it with anybody else in the department or in the hospital, that it should be just mine and his little secret." Gilbert testified that he went to the union meeting and reported back to King that there were people from St. Vincent's in attendance, as well as from other hospitals, but was unable to provide names because he did not know anybody's name.

Further to show Respondent entertained hostility toward the Union, the General Counsel offered Gilbert's testimony relating to another incident involving King that allegedly occurred prior to the spy episode, in September 1979, and during which King had assertedly directed the security personnel to identify individuals passing out union literature outside of the hospital, to stay out of sight of those from the Union passing out the pamphlets but to submit to him the names of those individuals in writing as soon as possible. Gilbert testified he did as instructed on more than one occasion.

In support of the allegation contained in paragraph 7 of the third complaint the General Counsel offered the testimony of Gilbert relating to an incident allegedly occurring in September, not in August as set forth in the complaint. Gilbert testified that he was summoned to the second floor of the main wing by Nursing Supervisor Lorraine Hartley who asked him if he knew that the Union was outside handing out handbills and whether he knew any of the employees involved. Gilbert responded that he was aware that the Union was distributing handbills outside but that he did not know any of the employees. Hartley reportedly then identified three of the individuals by name, *viz*, Cynthia Hildreth, Don Douglas, and LaCosta Miles, and in Gilbert's sight and hearing then talked with Medical Nursing Manager Linda Piccard, requesting the particular location where Miles worked. Hartley then instructed Gilbert to keep his eye on them and to report the matter to King. Gilbert did so by leaving a note in King's desk that morning, as he had been instructed to do, so that the names could be turned over to the hospital's attorneys and would go undetected in event Respondent's files were to be subpoenaed to court. This procedure was assertedly instituted by King in September 1979, prior to the retention of counsel of record.

At the time of hearing, Gilbert was no longer associated with the hospital, having resigned on October 30. The circumstances of his resignation, as conceded by Gilbert, were that King advised him that he had a choice of being fired or of resigning, i.e., King was going to demote him, and he resigned rather than take the demotion. Gilbert claimed to harbor no resentment toward either King or the hospital as a result and also claimed to think King justified in his action. Gilbert voluntarily gave a statement to a Board agent approximately 2 weeks after his resignation and appeared voluntarily to testify at the hearing herein because he felt that "there was a lot of injustice being done to a lot of people," citing as two examples the incidents involving the union meeting and Hartley. He also referred to "injustices" perpetrated upon himself, but gave no particulars. Gilbert expressed displeasure, however, over the fact that, while he was supposed to have authority to reprimand the three men he had working under him, King never permitted him to exercise that authority. He testified further that one of the men he had tried to discipline ended up by getting his job when he resigned and noted that King is an ex-Birmingham policeman, as is the man that got his job.

In his testimony on behalf of Respondent, King stated that his decision to demote Gilbert was based upon the latter's falsification of a timecard and that Gilbert resigned rather than take the demotion. King specifically denied that he had instructed Gilbert to attend a union seminar and to report the names of employees in attendance. He did testify he had heard from an ex-employee that Gilbert had attended a union meeting. King also denied that Gilbert had provided him with any names of employees picketing or leafleting the hospital. He also testified that he did not recall giving Gilbert any instructions to identify the people who were handbilling to see whether they had been authorized to be in the hospital. He also testified that the security force was alerted when

[11] The General Counsel concedes the record reflects that Gilbert was at all times relevant a supervisor within the meaning of the Act. Accordingly, since the matter was fully litigated at the hearing, Gilbert's testimony is treated as having been offered, *inter alia*, in support of the General Counsel's contention on brief that Respondent violated Sec. 8(a)(1) of the Act by instructing its supervisor, Gilbert, to surveil its employees' union activities. See *Crown Zellerbach Corporation*, 225 NLRB 911 (1976).

union advocates appeared at the hospital entrances. Those persons were identified, where possible, and that information, including the handouts, were given to the attorney representing the hospital at that time. At shift change time, security would dispatch guards to the entrances to keep them open.

2. Analysis and concluding findings

As noted previously, the General Counsel offered the testimony of former Security Supervisor John Gilbert for two purposes, *viz*: (1) to show that Respondent did entertain hostility toward its employees' union activities,[12] and (2) as proof of the charge that Respondent through Nursing Supervisor Lorraine Hartley "solicited its employees to surveil their fellow employees' activities on behalf of the Union."

As was previously observed above,[13] Gilbert's testimony is treated here as having been offered, *inter alia*, in support of the General Counsel's contention on brief that Respondent violated Section 8(a)(1) of the Act by instructing its *supervisor*, Gilbert, to surveil its employees' union activities since the matter was fully litigated at the hearing.

According to Gilbert, in September, Nursing Supervisor Lorraine Hartley identified three employees (Cynthia Hildreth, Don Douglas, and LaCosta Miles) to him as being among those individuals outside the hospital distributing union literature. Within his sight and hearing, she conversed with Medical Nursing Manager Piccard to determine Miles' work location, and then instructed Gilbert to "keep my eye on them and to be sure to report this to [Security Manager] King."

Respondent offered no testimony to refute Gilbert's testimony in this regard. Hartley did not appear or testify as a witness for Respondent. Since she was in a position to refute Gilbert's testimony, Respondent's failure to call Hartley to testify raises an inference that her testimony would have been unfavorable to Respondent.[14] Further, although Piccard did testify on Respondent's behalf, she failed to testify about the conversation between Hartley and Gilbert. While Respondent did offer testimony to contradict Gilbert's testimony relative to his alleged spying at a union seminar at the behest of the security director, Gilbert's testimony in respect to the foregoing incident stands as undisputed fact[15] and must be credited.

The undisputed evidence of record, therefore, shows that Respondent instructed Gilbert, a supervisor, to surveil its employees' union activities and inform it with respect thereto. The Board has held that an employer's instructions to a supervisor to surveil its employees' union activities violate the Act.[16] As seen, paragraph 7 of the complaint alleges that Respondent solicited its employees, rather than its supervisors, to surveil. Nonetheless, Respondent's activities were no less unlawful and, as the allegations were fully litigated, they support a finding that Respondent violated Section 8(a)(1) of the Act.[17]

Accordingly, I find and conclude that the evidence sustains the contention of counsel for the General Counsel and the Union that Respondent unlawfully instructed its supervisor, John Gilbert, to surveil its employees' union activities, in violation of Section 8(a)(1) of the Act.

E. *The Reprimands of LaCosta Miles and Linda Menefee, the Termination of Miles, and the No-Solicitation Rule*

1. The facts

a. *The reprimand and termination of LaCosta Miles*

The January 9, 1981, amendment to the December 31 complaint issued herein charges Respondent with unlawfully issuing an "Employee Counseling and Corrective Action Notice"[18] to its employees, Linda Menefee[19] and LaCosta Miles, and with unlawfully discharging and thereafter refusing to reinstate its employee, LaCosta Miles. These allegations involve Respondent's enforcement of its no-solicitation policy.

(1) The no-solicitation policy

The hospital policy relating to solicitation, which the General Counsel does not here contend is *per se* unlawful, is divided into several parts. As pertinent here, the policy prohibits: (1) "solicitations of any kind" which may interfere with "patient care or disturb patients" in "immediate patient care areas" including, among others, "corridors and sitting rooms adjoining or accessible to patient rooms and treatment rooms"; and (2) "solicitations of any kind" by "associates who are supposed to be working" or solicitations which "interfere with the work of other associates who are supposed to be working"; and (3) violations of the no-solicitation policy[20] will

[12] The controverted portion of Gilbert's testimony, which was offered to show union animus on the part of Respondent by reason of the asserted direction by Security Director King of both the spy episode and the other 1979 surveillance incident, is not credited in view of Gilbert's manifest hostility toward King and the undisputed reason for Gilbert's discharge. While he denied harboring a grudge, Gilbert's testimony radiated resentment toward King for his alleged mistreatment by the latter.

[13] See fn. 11, *supra*.

[14] *Goodyear Tire & Rubber Company Highway Transportation Department*, 190 NLRB 84, 86, fn. 3 (1971).

[15] *Locke Insulators, Inc.*, 218 NLRB 653 (1975).

[16] *Belcher Towing Company*, 238 NLRB 446 (1978); *Harvey's Wagon Wheel, Inc., d/b/a Harvey's Resort Hotel & Harvey's Inn*, 236 NLRB 1670, 1681 (1978).

[17] *Crown Zellerbach Corporation, supra*, and cases cited therein.

[18] A euphemism for reprimand.

[19] The reprimand of Linda Menefee will be treated *infra*.

[20] The no-solicitation policy in its entirety is set forth below:

POLICY

In order to protect persons within the hospital from unnecessary annoyance or inconvenience by any form of solicitation or distribution of literature, the following rules will be enforced:

No distribution of any kind, including circulars or other printed materials, shall be permitted in any work area at any time.

No solicitations of any kind, including solicitations for memberships or subscriptions, which may interfere with patient care or disturb patients will be permitted in immediate patient care areas which include the patients' rooms, operating rooms, and places where patients receive treatment (such as X-ray and therapy areas), corridors and sitting rooms adjoining or accessible to patient rooms and treatment rooms, and elevators or stairways used substantially to transport patients.

*Continued*

"subject associates to disciplinary action in accordance with the hospital personnel policy."

(2) The reprimand

According to Miles, her immediate supervisor, Unit Coordinator Betty Eaford, called her into her office on October 1. Eaford told Miles that she had been soliciting employees in the intensive care unit (hereinafter ICU) conference room, which was against the hospital no-solicitation policy because the ICU conference room was considered to be a patient care area. When Miles responded that she did not know that the conference room was a patient care area, Eaford stated that the hospital considered it to be a patient care area since it was used by nurses for change-of-shift reports concerning patients' progress and as a place to console patients' families. Eaford also presented Miles with the following written reprimand for soliciting, which is dated September 26:

> Solicitation of St. Vincent's associates within departmental work areas during work hours on September 5 and September 12. This type of activity is in violation of Administrative Policy No. 8650–049. Any more solicitations in violation of Hospital Policy will subject you to termination.

Miles read the notice of reprimand, and Eaford requested her to sign it. Miles refused, stating that she would have to check her book. Miles testified that she declined to sign because she could not remember what she had done on the specific dates indicated. In any event, Miles never came to Eaford with contrary information. At the time she received the reprimand, Miles was given a copy of the no-solicitation policy and was asked if she were aware of it. She answered affirmatively.

According to Eaford, the bases of the reprimand were the two instances of solicitation by Miles involving employees Roselle Bonner and Lois Hill in two patient care areas, *viz* the ICU conference room and the conference room on "Third-East," respectively. Eaford was told about the Bonner solicitation by Bonner herself and about the Hill solicitation by Eaford's immediate superior who had been informed of it by Hill's supervisor. Bonner informed Eaford that Miles had approached her in the ICU conference room during or "right after" the change-of-shift report, and handed her union literature. Bonner was upset over the incident and told Eaford that she did not want Miles bothering her. In the other incident, Miles had reportedly given union literature to Hill in the conference room on "Third-East." Based upon those reports Eaford decided to reprimand Miles. She did not independently investigate either incident. Thus, the reprimand of Miles by Eaford was based upon the two reported violations by Miles of the no-solicitation policy by soliciting in both the ICU and "Third-East" conference rooms.

While Miles acknowledged talking "one time" to Lois Hill in the conference room on "Third-East" and talking to Bonner on several occasions in the kitchen of "Third-Main" and in the "conference room,"[21] she could not remember the dates and could not recall talking to Bonner "at any other place" about the Union. In her testimony Miles also acknowledged two conversations in the ICU conference room about the Union with other employees, *viz* Deborah Vance, Vicky McCombs, and Debbie Jones, sometime in September during the course of which she showed Vance and gave McCombs union literature to read. Miles claimed she was "on a break" during each conversation and that Vance and Jones were also "on break." She did not know that McCombs was on a break, however. During that conversation Eaford walked into the conference room, and McCombs returned the literature to Miles. Miles testified she knew that she was on her designated 15-minute break during each of those conversations by virtue of the fact she "had made a notation to herself that when anybody wanted to talk about the Union . . . I always tell them . . . wait until I get on my break." The conversation with Vance and Jones took place between 10 and 11 p.m., toward the end of Miles' customary shift of 3 to 11 p.m. Miles was unaware of the hospital policy forbidding a break toward the end of a shift, but she was aware that "within the last few months" the hospital had instructed employees to leave their work areas to take breaks.

(3) The discharge

According to Miles' version of the episode leading to her termination, she was about to take a break between 10 and 11 p.m. on October 15, at which time she telephoned the coronary care unit (hereinafter CCU) and spoke to unit clerk Alice Lockhart. Miles asked Lockhart whether employee Inez Jackson was working. Lockhart replied that she was, but was in the restroom at that time. Immediately thereafter, Miles left her work area and went to the CCU to give Jackson "a personal invitation" to a union meeting at her home. When she arrived at the CCU, Jackson was still in the restroom. Miles waited for Jackson to come out, standing in the hallway adjacent to the nurses desk across from the restroom, in the CCU. When Jackson exited the restroom, Miles handed her a sealed envelope containing the invitation, asking her how she was and telling her there was something for her in the envelope. Jackson said nothing, and Miles then left the CCU.[22] Miles did

No solicitation of any kind, including solicitations for memberships or subscriptions, will be permitted at any time by associates who are supposed to be working, or in such a way as to interfere with the work of other associates who are supposed to be working. Anyone who does so and thereby neglects his or her work or interferes with the work of others will be subject to disciplinary action.

[21] Miles was recalled by the General Counsel and denied soliciting Bonner in the ICU conference room.

[22] On rebuttal, unit clerk Lockhart testified that she was leaving the CCU to go on break when Miles walked in. While she did not witness any conversation between Miles and Jackson, she testified she had advised Miles when she called the CCU that Jackson was in the restroom. Lockhart had not seen Jackson come out before Miles walked in, and she herself walked out of, the CCU. Lockhart also recalled the time of Miles' call as being between 10 and 10:30 p.m. and that a patient named Underwood had died in CCU between 7 and 8 p.m. that day but she could not recall the date, because she had been "off the job so long."

not know whether or not Jackson was on break on that occasion and acknowledged that the restroom can be used anytime at the hospital. Miles, who was not working in the CCU that night, recalled that the large double doors leading into both the ICU and the CCU are marked "Immediate Family Only" or "Visitors Restricted to Immediate Family, One at a Time, Please" or "something of that nature."

Respondent presented the testimony of Lydia Thompson with respect to the same episode. Thompson is, and was at all times pertinent, a registered nurse employed by the hospital in CCU. On the day in question, Thompson was seated "at the monitor" desk. Miles came into the CCU and asked for "Inez" (Jackson). Her recollection was that Jackson was called, but she was busy at the time and was not "out in the area." Miles had a yellow-looking envelope in her hand, which she did not put down but held. Jackson came out of patient Underwood's room, came to the nurses desk and told Miles that she was busy and could not talk to her. Miles thereupon told Jackson, "Well, I'm leaving this here for you." She then left the envelope, which was sealed, on the side of the monitor where it stayed because at that particular time a "silent code"[23] was being worked on patient Underwood. Thompson specifically denied that Jackson came out of the restroom but, instead, had come out of Underwood's room to run an EKG because "we were really swamped at that time." This incident, according to Thompson, occurred at or about 10:30 p.m. or "a little after that."[24] She also testified that Underwood did not die until later[25] but was "real serious" that night. Thompson acknowledged that she was busy that day and that there were many things going on at the time in question because of the "silent code" being worked on Underwood. Later on, after things quieted down, the yellow envelope left by Miles for Jackson was opened, and its contents comprised a yellow invitation to a union meeting. Thompson had seen Miles come into the CCU several times previously to talk to the unit clerk or to someone else with whom she had been talking. On cross-examination, Thompson responded affirmatively to questions concerning whether she liked the hospital and whether she had been treated well there and negatively to whether she "would want to see a union in there to disrupt any relationship you have with the people there."

Medical Nursing Manager Piccard also testified concerning her involvement in the episode leading to Miles' discharge. She conveyed the information she had received from talking with some of the personnel who were on the CCU at that time to "the person in charge of Miles." Piccard talked with both Jackson and Thompson. While Jackson did not advise her that Miles had interfered with the former's work on that occasion, she did tell Piccard that she had been told earlier someone was waiting to see her, that it was several minutes before she came out of the room, that she was too busy to talk with anyone, and that she just waved off Miles and went on to do the EKG on Underwood. Piccard relayed the substance of her conversation with Jackson and Thompson to the manager of the surgical division, Joyce Williams.

On October 27, Miles was summoned to Unit Coordinator Betty Eaford's office and asked to wait in the ICU conference room for the arrival of Unit Manager Joyce Williams. When Williams arrived, they went to Eaford's office. There she was informed that she had continued to solicit in patient care areas despite the prior warning that this was against hospital policy. Miles denied that she had spoken to anyone about the Union. Williams then directed her attention to the fact that giving another employee an invitation to a union meeting was a form of solicitation and that she was, therefore, being terminated for soliciting in patient care areas. While Eaford told her the name of the other employee involved was confidential, Miles testified that she knew it was Jackson, since she had given Jackson the invitation.

Eaford had received the report of Miles' October 15 solicitation from her manager, Joyce Williams, who had in turn received the information from Linda Piccard. Eaford was herself unaware that it involved an invitation to a union meeting. She thought the discharge warranted, however, because Miles had again solicited in a patient care area, this time the CCU which is an intensive care area, after being warned she would be terminated if she solicited again.

### b. *The intensive care areas and Respondent's enforcement of its no-solicitation policy*

According to the witnesses called by the parties, the physical layouts and utilization of both of the intensive care areas, the ICU and CCU, are essentially the same, with a variation relating to the separation of the nurses desk from the conference room: The former has a wall and the latter a window. Thus, a description of the ICU will suffice for both.

#### (1) The intensive care areas

The ICU is a self-contained unit that houses the critically ill, which is separated from the rest of the hospital by two sets of double wooden doors on either side of the unit. These doors, which remain closed, are labeled "Intensive Care Unit" and are also marked "Visitors Restricted to Immediate Family—One at a Time, Please." The ICU and CCU are the only units in the hospital set apart by closed wooden doors.

Outside the double doors there is the ICU waiting room and a lobby with an elevator. There is also a waiting area in front of the elevators. Upon entering the double doors on the left, the conference room is on the right. Upon entering the double doors on the right, the conference room is on the left. The single doors on both ends of the conference room leading into the room from the hallways located at either end have glass at the top and wood at the bottom.

In addition to the conference room and the nurses station adjacent thereto, which is separated from the conference room by a solid wall (in the case of the ICU) or

[23] "Silent Code" was defined by the witness as "a death threatening situation to the patient."

[24] According to Medical Nursing Manager Linda Piccard, the hospital's medical records reflect that an EKG was performed on Underwood at 10:40 p.m. "on the night Ms. Miles is supposed to have made a contact with Ms. Jackson."

[25] According to Medical Nursing Manager Piccard, Underwood died 36 hours after the incident in question.

a wall with a window (in the case of the CCU), there are nine patients' rooms inside the ICU. The distance between one of the doors to the conference room and one of the nearest patients' rooms is approximately 6 feet. Since the conference room doors have glass at the top, patients can be observed a few feet away by someone sitting at the table in the conference room. In addition to the conference room, nurses station, and nine patients' rooms, there are a restroom and two supply areas located inside the ICU. While there is no designated break area in the ICU, there is such an area in "Four-Main," which is adjacent to the ICU.

A table is located in the center of the conference room, which also contains a telephone, a coffeemaker, a refrigerator, a cupboard, a bulletin board, a mailbox, a lounge chair, cabinets, and a cupboard.

Coffee from the coffee machine is principally used to serve the ICU patients. It may also be served to family members of a patient during a consultation with a doctor, and night-shift employees are allowed to drink that coffee. The refrigerator contains juice and milk for patients, and employees may keep their lunches there. Stationery and literature on nursing are kept in the cabinets. The mailbox is used to deliver mail concerning hospital business to employees. Employees have also received personal mail in the mailbox. The conference room telephone is used for business calls, but employees also use it to make and receive personal calls. The lounge chair is principally used by night-shift nurses for breaks.

The conference room is not utilized in the treatment of patients. It has, however, many other uses. It is used for change-of-shift reports, that is, the off-going shift of nurses reports the medical condition of the patients to the on-coming shift. These reports are made while both shifts are on duty, before those going off duty punch out, and after those coming on duty punch in at the time-clock located outside the unit. Clinical conferences are also conducted in the conference room, as are intradepartmental meetings and "relaxation" therapy[26] classes. In addition, the doctors at the hospital use the conference room to consult with the families of patients when the patient's condition has changed. This is usually bad news, e.g., death is inevitable, loss of kidney function, loss of respiratory energy, etc. These conferences usually involve patients who have "gone sour," and the conference room is the only place in the hospital that provides privacy for the family to hear such news. Usually these sessions involve death or a change just prior to death. Four deaths occurred during the 2-week period prior to the hearing. The average death count for a 2-week period is three. Doctors also use the conference room to discuss cases among themselves. Respiratory therapists set their cart on the conference room tables and organize their work. Nurses may also use the conference room to chart, i.e., bring a patient's record of treatment or medications given and doctor notifications up to date, which becomes part of the permanent record. And night-shift nurses may use the recliner in the conference room to take their "rest breaks," during which they are permitted to recline for 1 hour.

The conference room is the designated smoking area since the rest of the unit comprises patients' rooms and the nurses station. Smoking is not possible at the nurses desk because of the presence of oxygen and respirators. Although employees may store their lunches on the bottom shelf of the refrigerator in the conference room, they may not eat them in the conference room. While ICU Coordinator Eaford, who has worked for the hospital for 20 years, testified she had never observed an employee eating lunch in the conference room, she acknowledged that prior to August she had seen an employee eating "chips and coke" in the conference room and that she had instructed employees not to eat their lunches in that room. Employees are also not permitted to take their breaks in the conference room. The hospital rule is that breaks should be taken in the cafeteria or the canteen, away from the unit.

ICU patients are seldom ambulatory. If they are at all, it is limited to their rooms and from their rooms to the restroom. According to LaCosta Miles, the latter occurred four or five times within the year she worked in the ICU.

In the opinion of ICU Coordinator Eaford, who has been a registered nurse for at least 20 years, political activities should not be discussed in the ICU in light of the fact that patients are too close and "when voices start rising they'll hear all the commotion."

LaCosta Miles, who had been employed "just about a year" in the ICU prior to her termination in October, testified that the ICU conference room is used for the employees "to take a short break, or a break, or whatever, we would go into the conference room and read the paper or drink coffee." She acknowledged, however, that, within the last few months she worked there, the employees had been told to take their supper breaks in the cafeteria or canteen and to leave their work areas to take their 15-minute breaks. Miles, who was on the 3 to 11 p.m. shift, also recognized that she and her coworkers could and did drink coffee in the conference room during worktime.

(2) Solicitation in the ICU

Miles testified to two incidents of nonunion solicitation that took place in the ICU conference room. One occurred in early March and the other in September or October. The first involved a lingerie shower invitation for an employee who was getting married.[27] The invitation was received by Miles in the conference room in the first week of March. The other involved a cake for a retiring employee whose name Miles could not recall. Neither act of solicitation occurred in the presence of ICU Coordinator Eaford, but she did notice the shower invitation posted on the bulletin board in the conference room. Since August, postings of that nature are not permitted. There has been no solicitation for Avon or the flower fund for at least a year. Also, prior to August, there had

[26] Classes to teach nurses to relax after a stressful day.

[27] The invitation was received in evidence as G.C. Exh. 9.

been parties in the conference room but not after August.

(3) Solicitation in other areas

Employee Charlene Weeks testified that, in June, one of St. Vincent's School of Nursing students sold her two raffle tickets (to raise money for the school) during working hours in the pantry area on "Two-East." One of the school's instructors, Loper, had told her and other employees about the raffle in the break area on "Two-East," known as the "little hole," at which time only other employees were present. On September 22, Weeks testified that another employee, Patricia Scales, gave her a United Appeal card in front of the "Second-East" nurses desk in the hall used as a passageway for patients and employees to gain access to "different rooms." Scales reportedly told her that she had been appointed by Unit Coordinator Belle Snyder to take up money for the United Appeal from the employees on "Second-East." This took place when both Scales and Snyder were working. In October, Belle Snyder reportedly contributed $1 and told Weeks that "we needed to get something going for Ms. Walker," an employee who was off sick at the time. This conversation took place in the hallway in "Second-East" as Weeks was exiting the pantry. The location involved is approximately 8 to 10 feet from a patient's room. Weeks thereafter solicited contributions for Walker from 19 to 20 other employees over a period of time in October and early November. A total of $23 was collected and was given to Walker upon her return to work. No supervisor was present at the time of any of the solicitations, but Weeks testified that at least four of the solicitations had occurred at the nurses desk during the working time of the individuals involved. According to Weeks, Snyder told her nothing with respect to when or where she was to take up a contribution. Snyder was not called to testify.

In October 1980 Unit Coordinator Sharon Blankenship handed Mellow Smith and other employees a wedding invitation in the locker room of the labor room during their worktime, according to employee Smith. Blankenship told them that the reason she handed it to them was because she did not have their addresses so she could not mail it. At that time, Smith and the other employees were sitting in the lounge, smoking cigarettes and drinking coffee; however, they should have been working, according to Smith. The locker room is 10 or 15 feet from the labor rooms. Another instance occurring in October involved employee Lowe who gave Mellow Smith a wedding shower invitation in the locker room. She also placed invitations in other employees' lockers. At the time Mellow Smith was getting ready to go to work and Lowe was just about to clock in. No one else was present on this occasion. The third instance observed by Smith took place in the summer in the nursery during worktime when a student and part-time unit clerk asked two nurses, an assistant nurse, and Smith, if they wanted to buy a raffle ticket. No supervisor was present on that occasion. The fourth instance of solicitation about which Mellow Smith testified involved raffle tickets to a "whiskey bash." This occurred in August in the nursery during worktime. Employee Evans tried to sell two tickets to the "bash" to two other employees. No supervisor was present. The fifth occasion of solicitation observed by Smith occurred at the nurses station in the labor room in August when LPN[28] Mahalia Brown sold Avon products at the nurses desk in the labor room to Smith, a nurse and others, not identified. This occurred during Smith's worktime. No supervisor was indicated to have been present.

According to LPN Queen Ester Steen, she observed five instances of nonunion solicitation in the period from summer 1980 through November, involving raffles, the United Appeal, candy, and doughnuts. Sometime between May and July on "Seventh-Main" an unidentified student nurse asked Steen during her worktime to buy a raffle ticket. The only other person present was a fellow employee who asked the student how she could solicit for a raffle since it was not permitted by the hospital. The student nurse replied that they were given special permission by the administration. The second instance occurred in December and involved the distribution of United Appeal cards by an RN[29] at the nursing station on "Seventh-Main" during working time. Unit Coordinator Virginia Wallace, a unit clerk, and two RNs were present. The nurses station is located in the middle of the hall, and on both sides are located patients' rooms. The third instance occurred in the summer months and involved the sale of candy by an RN whose "son was selling it for something at school." This solicitation took place during the working hours of the individuals involved. The fourth instance took place in October or November when Steen herself solicited several people to buy doughnuts at the nurses station during working hours. No supervisor was indicated to have been involved. The fifth solicitation observed by Steen took place at the elevator on "Seventh-Main" in the summer months when employee John Richards gave Steen a ticket to a raffle. No supervisor was indicated to have been present during this solicitation. LPN Steen's supervisor is Manager of Nursing Linda Piccard, however, she reports directly to Unit Coordinator Virginia Wallace.

According to employee Sandra Herrod, in September or October Unit Coordinator Roberta Smith[30] prior to a change-of-shift report invited some employees to her housewarming party. Herrod also testified to the time in 1978 and 1979 when she was given the responsibility of distributing the United Appeal pledge cards by her unit coordinator at the time. She testified further concerning receiving a United Appeal card in 1980 from a fellow employee at the nurses desk at "Sixth-Main."

Unit Coordinator Virginia Wallace, LPN Steen's immediate supervisor, testified that United Appeal solicitations are continuing, but that all other solicitations have been stopped. She was unaware of solicitations of doughnuts and candy on her floor. The practice of posting invitations on the bulletin board in the locker room was stopped in August. In that month at a meeting of her em-

[28] Licensed practical nurse.

[29] Registered nurse.

[30] According to the testimony of both Herrod and Unit Coordinator Eaford, all unit coordinators possess the authority of a supervisor.

ployees, she told them that "St. Vincent's had a no-solicitation policy and that it would be strictly enforced." Since that time, she has been unaware of any violations of it.

The former unit coordinator for "Third-Main," Linda Vann, testified that in August she and others requested clarification of Respondent's solicitation policy because they were uncertain as to what was considered solicitation and what was not. Specifically, they were uncertain about solicitation for things like the flower fund some of the floors had for people in the hospital. Following clarification by counsel of record, Vann testified that "[W]e were instructed to have meetings with all of our personnel and inform them exactly what the solicitation policy was, and that nothing was to be solicited." An exception was made for the United Appeal solicitation, which was allowed to continue.

According to the central supply supervisor for St. Vincent's, Joy Dobinson, prior to August, Central Supply had a flower fund, which was used to send flowers in the event of someone's hospitalization or death. At the beginning of August at a meeting of everyone in her group, Dobinson informed her employees that the flower fund was a form of solicitation and would be permitted only during breaks or lunchtime.

Medical Nursing Manager Piccard testified that the hospital's policy prohibiting certain solicitations was clarified on August 7 and covers such activity as flower funds, wedding invitations, and the selling of various items, such as Avon products, doughnuts, and candy. She has seen no such activity at all within the last 5 or 6 months, and no solicitation has been reported to her except in the cases of LaCosta Miles and Linda Menefee.

ICU Coordinator Eaford was aware that counsel of record began representing the hospital in August, at which time the prior practice of permitting such activities as the posting of invitations on the ICU conference room bulletin board, the selling of Avon products, and retirement parties in the conference room was discontinued, and such activities have been banned. The flower fund was reportedly stopped "years ago."

### c. *The reprimand of Linda Menefee*

Linda Menefee has been employed by Respondent in its Linen Services Department since 1972. The union organizational campaign started in 1979, and Menefee was an active union adherent. She distributed union literature at the entrance of the hospital, attended union meetings, conversed with other employees about the Union, and signed a union authorization card. Knowledge of Menefee's solicitation activities is imputable to the hospital. Central Supply Supervisor Joy Dobinson testified that five employees had advised her of Menefee's solicitation of them during working hours to attend union meetings or participate in other union activities. This information was passed on to Dobinson's superior, Linen Supervisor Lewis Stewart.

On September 16, Menefee was called into Supervisor Stewart's office. Stewart handed Menefee a written reprimand[31] and asked her to sign it, which she did. After Menefee read it, Stewart asked if she had any questions, and Menefee replied in the negative. Menefee was disciplined for failure to follow hospital policy. The reprimand also states, *inter alia*: "Solicitations of St. Vincent's associates[32] within Department work areas to discuss and attend Professional Organization Meetings." The dates, a brief synopsis of the incidents, and names of the five associates involved were also set forth. The dates and names were: Late August—Hazel Wilson; September 9—Tina Harris; September 12—Belinda Parker; September 12—Marie Crawford; and September 10—Kim Belcher. In her testimony, Menefee described each of the incidents involved. Wilson had just come to work, and Menefee was about to clock out when Menefee solicited Wilson's views on the Union. The conversation with Harris took place in Menefee's work area while she was working. Menefee asked Harris if she were interested in the Union. Harris responded that she knew nothing about it. Menefee told her if she would come to a meeting she would find out all about it. The Parker conversation also took place in Menefee's work area during her worktime. Menefee told Parker of a union meeting and asked her to attend. The Crawford conversation also took place in Menefee's work area during her worktime. Menefee asked Crawford for her opinion about the Union. Crawford responded that she would have to pray over it. The conversation with Belcher occurred while they were walking from their work area to the bathroom. Menefee asked her, "would she come to a union meeting?" The five individuals involved reported the incidents to their supervisor, Joy Dobinson, who, as seen, reported the same to Stewart.

### 2. Analysis and concluding findings

The General Counsel does not contend that Respondent's no-solicitation rule is *per se* unlawful. In support of his contention that the discipline of Miles and Menefee and the discharge of Miles were unlawful, the General Counsel essentially launches a twofold attack on Respondent's enforcement of its no-solicitation policy. First, the General Counsel contends that Respondent has discriminatorily applied its no-solicitation rule by disparate treatment of individuals under it, thus rendering enforcement of the facially valid rule against the union activities of Miles and Menefee and the discipline meted out pursuant thereto unlawful. Thus, it is asserted that, inasmuch as the record evidence reveals that Respondent has long tolerated solicitation within immediate patient care areas during worktime, the sudden enforcement of the rule with respect to Miles and Menefee constituted unlawful discriminatory enforcement. Secondly, the General Counsel contends that Respondent's application of the no-solicitation rule to the ICU conference room constitutes a violation of Section 8(a)(1) and (3), since it is not an "immediate patient-care area." Since Miles was disciplined as a result of an unlawful application of the rule, the discipline must fail, and the resulting discharge, which was triggered by the October 1 reprimand, must be found unlawful.

[31] Received in evidence as G.C. Exh. 10.

[32] A term used synonymously with "employee" by the hospital staff.

There is no real dispute that Menefee and Miles were disciplined for failing to follow hospital policy and that Miles was terminated for continuing to do so in spite of the warning that such failure would subject her to termination. Although the General Counsel at one point argues that Menefee was not engaged in solicitation but was merely talking to fellow employees about the Union, Menefee herself testified that, in at least two of the five conversations with fellow employees that were the subject of the reprimand, she had invited the individuals involved to attend a union meeting and that in another she told her fellow employee she should attend a union meeting to find out about the Union. The wording of Menefee's reprimand is thus reasonably accurate. It is undisputed from her own testimony that each of the incidents involved occurred during Menefee's worktime.

In the case of Miles, who claimed to have been on a free-time break during each of the instances for which she was disciplined, whether she actually was on a break is not material. In any event, her conduct would nevertheless have constituted violations of the first part of the no-solicitation rule. She solicited and was disciplined, *inter alia*, for soliciting in what the hospital considers to be patient care areas; i.e., the ICU conference room and the conference room on "Third-East." As noted previously, Miles called on rebuttal denied soliciting Bonner in the ICU conference room. In any event, whether she did or did not, she was specifically warned that solicitation "in violation of Hospital Policy" would subject her to termination. There is no dispute that Miles entered one of the two sensitive areas of the hospital, the CCU, and engaged in another act of solicitation subsequent to the warning.

There is a dispute over whether Miles also interfered with the work of another employee, Inez Jackson, who, the hospital submits, was in the process of running an EKG on a patient who was on the verge of death. The resolution of the conflict of testimony as to whether Jackson was in the restroom or engaged in running an EKG when Miles entered the CCU and waited to see her is unnecessary to a disposition of this case. Resolution of that conflict would only be relevant to a consideration of whether the second part of the no-solicitation rule was also violated. It is not disputed here that the incident took place in a patient care area, *viz* in the corridor inside the CCU adjoining or accessible to a patient's room. And it really cannot be disputed that Miles' conduct "may" have interfered with patient care and "may" have disturbed patients.

The issues remaining for resolution are: (1) whether Respondent discriminatorily enforced its no-solicitation rule and (2) whether application of the no-solicitation rule to the ICU conference room constitutes a violation of Section 8(a)(1) and (3) since it is not an "immediate patient-care area."

There is no question that a health care facility may lawfully restrict employees from soliciting in immediate patient care areas even on nonworking time.[33] The first issue really involves a determination of whether Respondent's toleration of certain kinds of solicitation in the past in patient care areas, as previously set forth in detail, renders its action with respect to Miles and Menefee a "sudden" or unexpected and discriminatory enforcement of the rule, and the discipline pursuant thereto unlawful.

Initially it is observed that Miles, like Menefee, was given a copy of the solicitation policy and a notice that she was not to violate the hospital's solicitation policy. It is also observed that, although Lydia Thompson was aware of the nature of Miles' solicitation in the CCU, Eaford, who discharged Miles, was not. At the time of Miles' discharge, the record shows that Eaford was unaware that the solicitation involved an invitation to a union meeting.

It is not contested that Respondent permitted employee solicitation during working time and that a hospital-wide solicitation for the United Appeal continues at the present time. It is also beyond dispute that, prior to August, Respondent permitted solicitation contrary to its policy. On August 7, the hospital's solicitation policy was "clarified," that is, broadened by interpretation to include prohibitions against such activities as flower funds, the posting or distribution of shower and wedding invitations, and the selling of various items, such as Avon products, doughnuts, and candy. At that time the employees were orally advised of the August 7 clarification of the rule by their supervisors at various meetings, and none of the supervisors who appeared and testified (Vann, Wallace, Dobinson, Eaford, and Piccard) was aware of any solicitations subsequent to August, except for the United Appeal. The only evidence presented of solicitations occurring subsequent to August in the presence of a supervisor involved a collection for a sick employee reportedly organized by a unit coordinator in October, the hand delivery of a wedding invitation in October to several employees, in lieu of mail, an oral solicitation to a housewarming party by a unit coordinator, and solicitation for the United Appeal.

The record contains no evidence of solicitations after August in either the ICU, CCU, or Central Supply, the units involved here. Stated differently, there is no proof of other solicitation occurring within the areas supervised by either Eaford or Dobinson during any relevant period of time. It would thus be unreasonable to infer discriminatory motivation on their part.

There was proof of two other instances of post-August solicitation occurring outside the presence of a supervisor. These clearly do not constitute open and notorious solicitation sufficient to charge Respondent with notice, and it is reasonable to conclude that the other instances (except solicitation for the United Appeal) either resulted from a misapprehension of the breadth of the interpretation of the rule subsequent to August or that the witnesses were mistaken and that they occurred prior to August. In any event, the failure to redress these three instances of so-called solicitation occurring in the presence of supervisors, and at or about the same time warning Miles and Menefee against soliciting for the Union, clearly does not rise to the level of discriminatory enforcement of the no-solicitation rule.

[33] *St. John's Hospital*, 222 NLRB 1150 (1976); *N.L.R.B.* v. *Baptist Hospital, Inc.*, 442 U.S. 773 (1979).

Both Miles and Menefee were given unambiguous warnings that further solicitation would subject them to discharge. Miles acted in defiance of the warning and presumably Menefee did not. Furthermore, it is reasonable to expect supervisors in a large complex such as this to interpret and enforce rules differently. Obviously, before an act can be condoned, there must be knowledge of it and the authority to redress or condone it. Neither of the supervisors directly involved here, Eaford or Dobinson, condoned any acts of solicitation after August 7 except for the United Appeal. Under all of the circumstances presented, I find no "sudden" or otherwise discriminatory enforcement of the rule as to Miles or Menefee as to render unlawful the discipline meted out pursuant thereto.

The final issue presented is whether application of the no-solicitation rule to the ICU conference room by Respondent is itself unlawful. The utilization of the ICU conference room has been detailed previously. The General Counsel argues that the Board has consistently held and recently reiterated that "employer rules which prohibit employee solicitation in health care facilities in areas other than immediate patient-care areas are invalid."[34] Since the ICU is not used in the treatment of patients, it is not an immediate patient care area, according to the General Counsel.

It is noted that the ban on solicitation in *Eastern Maine* occurred in a lobby which was located 200 feet from the nearest patient's room, separated by a corridor, and that the physicians took those awaiting news of the results of surgery into the surgery waiting room, rather than confer with them in the lobby. Here, the ICU conference room is located only within approximately 6 feet from the nearest patient's room. When the physicians need to confer with or console the families of ICU patients who are dying or whose conditions have changed for the worse, the conference room is the only place in the hospital that provides privacy for the families to hear such news. Certainly, such families "need a restful, uncluttered, relaxing and helpful atmosphere, rather than one remindful of the tensions of the marketplace, in addition to the tensions of the sick bed."[35] Manifestly, solicitation has no place in the ICU conference room at such times. While these conferences do not occur daily, as seen, death is not an infrequent visitor to the ICU and its visits are not precisely predictable. In view of such a serious environment and the close proximity of patients, the hospital should have the right to control the activities taking place in the ICU conference room.

Under the circumstances, I find and conclude that the application of the no-solicitation rule to the ICU conference room does not constitute a violation of Section 8(a)(1) and (3) of the Act.

### III. THE REMEDY

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

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

### CONCLUSIONS OF LAW

1. St. Vincent's Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 1199, National Union of Hospital and Health Care Employees, Retail, Wholesale and Department Store Union, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By instructing its supervisor, John Gilbert, to surveil its employees' union activities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

4. All other allegations of the complaints herein that Respondent has engaged in conduct violative of Section 8(a)(1) and (3) of the Act have not been supported by substantial evidence.

[Recommended Order omitted from publication.]

[34] *Eastern Maine Medical Center*, 253 NLRB 224 (1980).

[35] *Beth Israel Hospital* v. *N.L.R.B.*, 437 U.S. 483 (1978).