Brook Meade Health Care Acquirors, Inc. d/b/a Maple Grove Health Care Center *and* United Mine Workers of America. Cases 11–CA–17212 and 11–CA–17409

March 3, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On June 30, 1997, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order and to adopt the judge's Order as modified.[2]

The judge found that the Respondent violated Section 8(a)(1) of the Act by interrogating an employee and asking him to report on the union activities of other employees, by soliciting and implicitly promising to remedy employees' grievances, and by threatening to fire union supporters while expressing disappointment with an employee for wearing a union T-shirt. The judge also found that the Respondent violated Section 8(a)(3) by discharging employee Lovana Thomas in retaliation for her support of the Union. Finally, the judge found that the Respondent violated Section 8(a)(5) by unilaterally increasing the amounts employees were required to pay for health insurance, without giving the Union sufficient notice and opportunity to bargain. We affirm the judge's findings of the 8(a)(1) and (5) violations. Contrary to the judge, however, we find that the Respondent has demonstrated that it would have discharged Thomas regardless of her union activity. We therefore shall dismiss the 8(a)(3) allegation.

1. The Union commenced an organizing campaign among the Respondent's employees in August 1996.[3] The Respondent learned about the campaign by September 3. District Manager Ed Guinup visited the facility the next day and held several meetings with employees and supervisors. The judge found that at one of those meetings, Guinup violated Section 8(a)(1) by interrogating certified nursing assistant John Botkins and by asking him to report on other employees' union activities. The judge also found that Guinup violated Section 8(a)(1) at another meeting by soliciting and promising to remedy employees' grievances. The judge further found that on October 31, Director of Nursing Sue Owens violated Section 8(a)(1) by telling employee Liama Mounts that she was disappointed that Mounts was wearing a union T-shirt, and that employees who supported the Union would be discharged.

We affirm the judge's findings of each of these violations. Concerning the solicitation of grievances, we note the following observations of the administrative law judge in *Capitol EMI Music:*[4]

> Absent a previous practice of doing so . . . the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act. I note it is the promise, expressed or implied, to remedy the grievances that constitutes the essence of the violation. I further note that the solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. Furthermore, the fact an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. [T]he inference that an employer is going to remedy the same when it solicits grievances in a preelection setting is a rebuttable one[.][5]

There is nothing in the record in this case to rebut the inference that Guinup was implicitly promising to remedy the employees' grievances. Contrary to the Respondent, it is immaterial that the employees' council to which Guinup directed his solicition of grievances was not newly created, since there is no evidence that the council had been used in the past as a forum to air and remedy employees' grievances.[6] Nor is there any evidence that Guinup made clear to the employees that he was not promising to remedy their grievances.[7]

As for Owens' October 31 expression of disappointment at Mounts' wearing a union T-shirt, the coercive nature of that statement is apparent in the context of Owens' other contemporaneous statement that union supporters would be fired. Mounts could reasonably have believed, particularly from hearing the two statements together, that Owens' "disappointment" might well manifest itself in her own discharge.

2. Lovana Thomas was the principal union supporter and leader of the organizing effort within the facility. It was she who made the first contact with the Union on

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997).

[3] Unless otherwise noted, all dates refer to 1996.

[4] 311 NLRB 997 (1993).

[5] Id. at 1007.

[6] Id.

[7] See, e.g., *Merle Lindsey Chevrolet*, 231 NLRB 478 fn. 2 (1977).

August 6. Beginning August 13, Thomas attended weekly organizational meetings with union organizer Jerry Stallard and other interested employees in a local park. Thomas testified that she did not wear a union T-shirt or other insignia at the facility, but that she did have a union bumper sticker on her vehicle, which she parked in the Respondent's parking lot used by other employees and members of management.

Thomas was the facility's medical records clerk at the time of the union organizing campaign. The Respondent's records show that she had been counselled and disciplined a number of times, both orally and in writing, concerning problems with her job performance. In particular, she had received a written verification of verbal counseling in August 1995 and two written warnings in July 1996, all of which were signed by Director of Nursing Owens. None of those instances of discipline are alleged to be unlawful.

On Thursday, September 12, Owens was making rounds at the facility accompanied by her supervisor, Edie LeMons, the Respondent's regional director of compliance, and LeMons' supervisor, Gail Varner, its director of quality assurance. According to Owens and LeMons, they found the door to the medical records office open and several open charts on the desk and table, but no one in the room. LeMons testified that Federal and state regulations require, in the interest of confidentiality, that patient records be locked up whenever they are unattended. Varner closed and locked the door, and instructed Owens to write up the medical records person for leaving the office open with files out, unattended. According to LeMons, Varner had never visited the facility before September 12 and did not know at that time who the medical records person was.[8] On Monday, September 16, Owens discharged Thomas, assertedly because the writeup was her third and discharge therefore was automatic. Thomas denied having left the files unattended, although she testified that she always left the medical records office door open when she was out of the office.

As noted, the judge found that Thomas' discharge was unlawful. He first found that the Respondent had knowledge of Thomas' union activity. He based that finding on the Respondent's knowledge of the campaign, the small size of the facility (50 to 60 employees), Thomas' role as the leading union advocate among the employees, and the fact that her vehicle, which she parked in the Respondent's parking lot, bore a union bumper sticker.[9]

The judge also found that the Respondent harbored union animus, chiefly because of Owens' unlawful statements to employee Mounts on October 31 concerning her union T-shirt and that union supporters would be fired. He further found the timing of Thomas' discharge to indicate that the discharge was in retaliation for her union activities. Finally, the judge found that the Respondent had tolerated similarly cavalier treatment of medical files and records by other individuals, and that the Respondent had "capitalized on this situation" as a pretext to get rid of a leading union adherent. He thus (implicitly) found, on the basis of the foregoing evidence, that the General Counsel had demonstrated that animus against Thomas' union activity was a motivating factor in the Respondent's decision to discharge her. He also found that the Respondent had failed to rebut that evidence by demonstrating that it would have discharged Thomas even absent her union activity.[10]

Although we agree with the judge that the General Counsel has shown that antiunion animus contributed to Thomas' discharge, we find that the Respondent has shown that it would have discharged her even had she not been a union activist, and therefore we shall dismiss this allegation of the complaint.

First, although the judge did not explicitly credit Owens' and LeMons' testimony (over Thomas' denial) that they found open files unattended on September 12, he apparently accepted their version of that day's events.[11] Thus, he made no finding that the supervisors did not see the open files when they were making their rounds. Instead, he stated that the Respondent "capitalized on this situation" to rid itself of a leading union adherent. On this record, the only "situation" the Respondent could have "capitalized on" was the discovery of the open, unattended files on September 12. We therefore infer that the judge found as a fact that Varner, LeMons, and Owens did discover open files unattended in the medical records office on that date.

Next, we find, contrary to the judge, that the Union's campaign, and Thomas' role in it, played no role in the Respondent's decision to discipline her in writing. Indeed, the complaint does not allege that the decision to write her up was unlawful.

We further find that a preponderance of the evidence establishes that Thomas was automatically discharged pursuant to the Respondent's policy, under which a third written discipline leads automatically to termination.

[8] Varner did not testify. On cross-examination, LeMons testified that Owens could have told Varner Thomas' name, but Owens did not testify that she had done so. In fact, Owens testified that, concerning the medical records office, Varner referred to "whoever's office that is," thus indicating that she did not know who the medical records person was. Owens further testified that Varner never used Thomas' name. LeMons also testified that, to her knowledge, Varner would not receive documentation with Thomas' name on it, nor would she receive records regarding disciplinary actions.

[9] The judge noted that Owens admitted that she knew what vehicle Thomas drove and that she parked in the parking lot herself. He apparently discredited Owens' testimony that she did not see the bumper sticker.

[10] *Wright Line*, 251 NLRB 1083 (1980).

[11] As we discuss below, documentary evidence supports Owens' and LeMons' testimony.

Thus, Owens testified that that is the Respondent's policy and is contained in the handbook that is applicable at the facility.[12] She also testified that she informed Thomas on September 16 that she was being terminated because the writeup ordered by Varner was her third and led automatically to termination. Thomas also testified that Owens told her that it was her third writeup and that Owens was going to fire her.

Moreover, the Respondent's personnel documents introduced at the hearing corroborate Owens' testimony. They include forms styled "Progressive Discipline Notification System for Employees," with spaces for four instances of discipline. The first space, at the top of the form, is titled "Verbal Counseling Verification." The second, below the first, is titled "Written Warning Notification." The third, below the second, is titled "Second Written Warning or Work Suspension." The last, at the bottom of the form, is titled "Employee Termination Notification." The form thus apparently contemplates a progressive discipline policy culminating in discharge after one verbal counseling and either two written warnings or one written warning and a suspension.

The form for Thomas is completely filled out. The verbal counseling verification blank contains a notation dated August 8, 1995, indicating that audits had not been completed in a satisfactory fashion. The written warning notification blank contains a notation dated July 5, 1996, to the effect that Thomas was auditing only 5 charts a week instead of 10. The next blank is dated July 8, with "work suspension" scratched out, leaving "second written warning [or]." It indicates that Thomas was warned for failing to file more than 100 lab reports.[13] The final blank, for employee termination, contains a notation dated September 16. It states that Owens, LeMons, and Varner had found open files left unattended in the medical records office with the door open on September 12 and that Varner had ordered a written reprimand. The documentary evidence thus supports Owens' testimony that Varner's order to write up Thomas led automatically to her discharge because she had previously received two written warnings.[14]

In reaching this conclusion, we are mindful of the testimony of numerous witnesses that other employees had left medical records where they might have been seen by individuals who had no business seeing them, but were not disciplined.[15] However, there is no evidence that the Respondent had made exceptions to its "three strikes and you're out" policy for any other employee. In light of Thomas' apparently poor performance record and the Respondent's clearly expressed dissatisfaction with it, we do not find that the Respondent treated her in a disparate manner because of her union activities or that its failure to treat her more leniently vitiates its affirmative defense.[16]

3. The Union won the November 1996 election and was certified as the employees' bargaining representative. About January 13, 1997,[17] the Respondent was notified by its insurance carrier that the premiums charged under the Accordia plan, one of the health insurance programs offered to employees, were going to increase by 24.4 percent effective February 1.[18] At its other facilities where the Accordia plan was in effect, the Respondent addressed the premium increase by increasing the portions of the total premium paid both by it and by the employees by 24.4 percent. At the Maple Grove facility,

[12] The Respondent offered to introduce the handbook into evidence, but the judge, at the objection of counsel for the General Counsel, excluded the handbook on the ground that it had not been properly identified under the business records exception to the hearsay rule. At the Respondent's request, the handbook was placed in a rejected exhibits file. Later, the Respondent's exhibits were withdrawn for copying and, after they were returned to the court reporter, they were lost. The Respondent furnished duplicate copies of most of the exhibits, but not of the handbook. Thus, we cannot examine the handbook to determine whether or not it supports Owens' testimony.

[13] There are peculiarities with regard to the July 5 and 8 written warnings. The first was originally dated July 12, but the date was later changed. Both warnings were given to Thomas on July 22, rather than on the dates of the infractions. And some time after the warnings were given to Thomas, notations were added to the effect that the July 5 infraction constituted "Disregard Corp. Policy," and that the July 8 incident involved "Gross Negligence of Duty." If those warnings had been alleged to be unlawful, these apparent anomalies might be cause for concern. But the warnings are not alleged to be unlawful, and both of them antedate Thomas' first contact with the Union. Accordingly, we find nothing about those warnings to indicate that animus against union activity was a motivating factor in the issuance of either one.

[14] There is evidence that might suggest otherwise. LeMons testified that discharge is automatic with the *fourth* written warning, not the third. LeMons may have considered the "verbal counseling verification" on the discipline form to be a "written warning." As LeMons also testified that she does not get involved in disciplinary matters, it is possible that she confused the two terms. However, even if LeMons did think that four written warnings, excluding notations of verbal counseling, were required for automatic termination, we find that the preponderance of the evidence supports Owens' testimony. See *Merillat Industries*, 307 NLRB 1301, 1303 (1992) (respondent is required to establish its *Wright Line* defense only by a preponderance of the evidence; the defense does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it).

The judge failed to resolve the discrepancy between the testimony of Owens and LeMons. In fact, in rejecting the Respondent's *Wright Line* defense, he failed to discuss either Owens' contention that Thomas' discharge was automatic or the documentary evidence supporting it.

[15] The judge apparently credited that testimony: "I find the evidence is overwhelming that this facility operated in a rather liberal fashion with respect to close monitoring of these files[.]"

[16] The Respondent has excepted to the judge's refusal to admit into evidence documents assertedly discovered in Thomas' office after she was discharged. The Respondent contends that the documents bear on the complaint allegation that it unlawfully refused to reinstate Thomas. The judge, however, found no such violation, and no exceptions have been filed to his failure to do so. Accordingly, we find it unnecessary to reach the merits of this exception.

[17] Henceforth, all dates refer to 1997.

[18] Only about 10 of the approximately 45 unit employees were enrolled in the Accordia plan. The rest were covered by another program (the Kanawha plan); the premiums charged under that program are not at issue.

however, the Respondent did not immediately increase the amount of the premium paid by employees, nor did it immediately notify the Union that the premiums had increased.

The first bargaining session took place on February 4,1997;[19] the second session was held on February 25. In the afternoon of the second session, the Respondent's negotiators, Human Resources Administrator Lori Smith and attorney MacArthur Irvin, informed the union negotiators for the first time about the premium increase under the Accordia plan. They said that they wanted the portion of the premiums paid by the company and the portion paid by the employees to increase by the same percentage (24.4 percent), as had been done at the other facilities.

The witnesses gave differing accounts of what happened next.[20] Smith and Irvin testified that they offered alternative proposals, which were rejected by the Union. Bobby Webb, one of the Union's negotiators, denied that any alternatives were offered. Smith testified that one of the union negotiators, Donnie Lowe, stated that the Union would never agree to the employees' paying any portion of the higher premiums. Webb testified that he personally made no such statement; he was not asked whether Lowe did.[21] Webb testified that he told the Respondent's negotiators that he was not prepared to comment on the proposal at that time; Irvin testified that Webb said "something of that nature." Smith and Irvin testified that Webb said that the Respondent would do what it wanted to do or was going to do; Webb denied telling them to implement the premium increase. All three of those witnesses, however, agreed that Webb stated that he was not sure that what the Respondent was proposing was lawful and that he wanted to consult with the Union's attorney before discussing it further.

In any event, no agreement was reached over the question of who would bear what proportion of the premium increase. Irvin then announced that the Respondent would go ahead and implement the proposed increase in employee premiums and that the parties could bargain later over whether there should be an adjustment in how the increase was allocated. Two days later, on February 27, the Respondent notified employees that their premiums would increase by 24.4 percent effective March 1 unless they chose to cancel the coverage. The parties stipulated that the premiums were increased according to the terms of the February 27 notice.

The judge found that the Respondent failed to give the Union sufficient notice to enable it to address the impending premium increase adequately or to engage in collective bargaining, but instead had presented the Union with a fait accompli. He noted in this regard that the Respondent had been notified of the premium increase by the carrier about January 13, but failed to inform the Union either immediately or even at the first bargaining session on February 4. Instead, it waited to tell the Union until February 25, only 2 days before it announced to employees that they would be paying a portion of the increase. The judge also found that the Union had not waived its right to bargain over the premium increase and that Webb's refusal to discuss the matter until he had talked with the Union's attorney did not support a finding that the parties were at impasse. He therefore found that the Respondent violated Section 8(a)(5) by unilaterally increasing the employees' portion of the premiums.

In its exceptions, the Respondent contends, contrary to the judge, that its actions were lawful because it gave the Union advance notice of the proposed premium increase, offered to discuss alternatives, and implemented the proposal only after the union negotiators flatly rejected the proposal and refused to consider any alternatives. The Respondent argues that the Union had ample opportunity to bargain, but by ignoring that opportunity and by failing to cloak its negotiators with authority to bargain over the premium issue, the Union waived its right to protest the increase. The Respondent also contends that it increased the employees' premiums in reaction to "compelling economic circumstances," and therefore that its action should not be viewed as an unlawful unilateral change in a mandatory bargaining subject. We find no merit in any of these arguments.

We agree with the judge that the Union did not waive its right to bargain over the issue of whether employees should pay increased premiums. Waiver of a statutory right will not be inferred unless the waiver is "clear and unmistakable."[22] Assuming that the union negotiators flatly refused to ever agree to any increase in premiums paid by employees, that still would not indicate that the Union was content for the Respondent to exercise a free hand in this respect.[23] To the contrary, Webb stated on February 25 that he wanted to contact the Union's attorney to determine whether the Respondent even had the right to change the amounts paid by employees. This is not "clear and unmistakable" evidence of a waiver by the Union of its right to bargain over the proposed change. It indicates only that the Union's negotiators reasonably wished to obtain legal advice before proceeding further on the subject.[24] By the same token, Webb's insistence

[19] The judge inadvertently stated that this session occurred on February 2.

[20] The judge did not resolve the testimonial discrepancies.

[21] Lowe did not testify.

[22] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

[23] Member Hurtgen does not necessarily agree with this proposition. If a party states, at the outset of negotiations on a subject, that its position is inflexible, that position may well privilege the other party to act unilaterally. However, Member Hurtgen notes that only Union Negotiator Lowe took this inflexible position. The other union negotiators indicated that they would consider Respondent's proposal, after first speaking with union counsel.

[24] That a party takes a seemingly intransigent position on an issue at the outset of bargaining does not mean that it will never yield the point. This would seem to be especially true if its initial opposition is based

on consulting the Union's attorney does not indicate that the union negotiators lacked the authority to bargain over the premium increase. It shows merely that Webb did not wish to discuss the issue until he could obtain legal advice. Had the Respondent informed the Union, as it could have done any time after January 13, that the premiums had increased and that the issue of who should bear the burden of the increase would be discussed on February 25, the union negotiators could have consulted their attorney before the bargaining session, or the attorney could have been present at the negotiations (as Irvin was for the Respondent). The Respondent, however, deliberately concealed that information from the Union for 6 weeks, and revealed it only halfway through the February 25 bargaining session. Because the union negotiators were not aware until February 25 that they would need to obtain legal advice, we cannot fault them for being unwilling to discuss the proposed allocation of the increased premiums until they had an opportunity to consult their attorney, and we agree with the judge that they did not waive their right to bargain by doing so.[25]

We also agree with the judge that the Respondent's actions constituted a fait accompli.[26] The Respondent did not simply wait 6 weeks to inform the Union about the premium increase and to make a proposal for sharing the burden of that increase. Even after Webb stated on February 25 that he wanted to discuss the matter (about which he had known nothing before that afternoon) with the Union's attorney, Irvin informed him that the Respondent was going to put the proposed increase into effect.[27] And, as noted, the Respondent informed the employees of the increase 2 days later. Thus, by announcing that the premium increases would be implemented, and by implementing them shortly thereafter, without waiting for the union negotiators to obtain the legal advice they desired, the Respondent effectively prevented them from making a reasoned decision concerning bargaining.

But even if the Respondent had given the Union sufficient notice and opportunity to bargain over the premium increase, it still would not have been entitled to implement its proposal unilaterally without the Union's consent. When parties are engaged in contract negotiations, the employer may not unilaterally implement changes in terms and conditions of employment, even after giving the union notice and an opportunity to bargain over the subject of the proposed change, absent an overall impasse in bargaining. The only exceptions to this rule are when a union engages in tactics designed to delay bargaining and when economic exigencies compel prompt action.[28] Neither of those exceptions is present here. Certainly the Union did not engage in delaying tactics simply by insisting on getting legal advice. If either party did so, it was the Respondent, by waiting some 6 weeks to inform the Union of the need to decide who was going to pay the increased premiums. Nor are the increased premiums "economic exigencies" in which time is of the essence and which, therefore, demand prompt action. The Respondent, after all, waited 6 weeks to inform the Union of the situation in the first place, and did not increase the Maple Grove employees' premiums in February as it had done at other facilities. Moreover, only about 10 employees at Maple Grove were affected by the premium increase; the increase that the Respondent wanted the employees to pay was $3.40 per biweekly pay period for single coverage. Thus, it was highly unlikely (and, indeed, there is no contention) that the Respondent would have been placed in straitened financial circumstances had it paid the entire premium increase until overall impasse had been reached.[29]

There is even less support for the Respondent's contention that the premium increase was a "compelling economic circumstance" that should excuse it from bargaining. The Board recognizes as "compelling economic considerations" only extraordinary, unforeseen events having a major economic effect that requires the employer to take immediate action.[30] There is no showing that the increased premiums for the 10 unit employees at Maple Grove could have a major economic effect on the Respondent, and thus they do not constitute "compelling economic considerations" excusing the Respondent from bargaining.

The Respondent also contends that even though it raised by 24.4 percent the amounts employees paid in health insurance premiums, the status quo ante actually did not change because the premiums paid by the Re-

on doubt that the other party's proposal is even lawful. If it is advised that the proposal is, in fact, lawful, its position may become more flexible. Accordingly, we need not determine whether Lowe actually said that the Union would never agree to the premium increase.

[25] When confronted with an employer's proposal to change terms and conditions of employment, a union normally must demand to bargain or be found to have waived the right to bargain over the proposed change; simply objecting is not enough. See, e.g., *Clarkwood Corp.*, 233 NLRB 1172 (1977); *Medicenter Mid-South Hospital*, 221 NLRB 670, 678–679 (1975). Here, however, the union negotiators did not simply object to the proposed increase in premiums; they also reasonably stated that they needed to consult their attorney about the lawfulness of the Respondent's proposal.

[26] We do not, however, rely on *Valley Counseling Services*, 305 NLRB 959, 961 (1991), cited by the judge. Unlike the Respondent, the employer in that case gave the union no advance notice of the unilateral change.

[27] In these circumstances, whatever Webb may have said to the effect that the Respondent would do whatever it was going to do can only be interpreted as evidence of resignation, not of acquiescence in the Respondent's actions.

[28] *RBE Electronics of S.D.*, 320 NLRB 80, 81–82 (1995).

[29] See *L & L Wine & Liquor Corp.*, 323 NLRB 848, 852 (1997).

The Respondent no longer contends that the parties bargained to impasse over the premium increase. But even if the parties had bargained in good faith to impasse over the premium issue, the Respondent still could not lawfully impose the premium increase on the employees when it did, for the same reasons just discussed. *RBE Electronics of S.D.*, 320 NLRB at 81–82.

[30] *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995).

spondent also increased by 24.4 percent. Thus, according to the Respondent, the employees' terms and conditions of employment did not change, because the percentages of the total premiums paid by the employees and by the Respondent did not change; they were simply the same percentages of a larger number imposed by the insurance carrier.[31]

In support of this contention, the Respondent cites *House of the Good Samaritan*,[32] in which the Board found that the employer lawfully passed an insurance premium increase along to employees. In that case, the employer's practice had been to pay the entire cost of health insurance. That was because, although the policy manual had a maximum dollar amount that the employer would pay, the maximum had formerly equaled or exceeded the total premiums; thus, the employees had paid nothing. When the insurance carrier raised the premiums, however, the employer required the unit employees to pay the portion of the increased premium that exceeded the limit set forth in the manual. In a decision adopted by the Board, the administrative law judge found that the employer was required to maintain the status quo ante by adhering to the terms of the policy manual, and that it had done so by continuing to pay up to the maximum amount contained in the manual. Because the employer had done so, it could legitimately charge the premiums in excess of that maximum to the employees. As the administrative law judge noted, had the employer paid the entire amount of the premium increase, thus exceeding the maximum amount set forth in the manual, it would have courted a charge of unilaterally granting increased benefits.[33]

There are other circumstances in which an employer might lawfully pass on part of an externally imposed insurance premium increase to employees without first bargaining with their collective-bargaining representative. Thus, if an employer had a practice of paying, for example, 80 percent of the premiums and the employees 20 percent, no change in the status quo ante would be found if both the employer and the employees continued, after the increase, to pay the same percentages of the larger total.[34] Or, if the employer's practice was to pay a specified amount for each employee's health insurance, and for the employees to pay the rest, the employer could lawfully require the employees to bear the entire weight of the premium increase. On the other hand, if an employer's practice was for *employees* to pay a set amount of the premium and the *employer* to pay the rest, the employer could not lawfully impose any part of the increase on the employees without first bargaining to agreement or impasse with the union.

Thus, when an insurance carrier imposes a premium increase, the employer may unilaterally require employees to shoulder part or all of the increase if it can show that the status quo ante is not changed as a result.[35] To show that no change has taken place in the status quo ante, however, the employer must show what the status quo ante was. The Respondent has made no such showing in this case. The record does not indicate what, if any, understanding the Respondent had with its employees concerning the portions of the health insurance premiums that it and they, respectively, would bear. Indeed, the Respondent makes contradictory assertions in this regard. It vigorously argues that it maintained the status quo by raising the premiums paid by it and by the employees by 24.4 percent, and thus not changing the proportion of the total premiums paid by anyone. It also contends, however, that it could have preserved the status quo ante by continuing to pay only what it had previously paid and by requiring the employees to pay the entire increase in premiums. Clearly, those alternatives could not *both* preserve the status quo ante, although either one *might*, as we have noted above.

That the percentages of the total premium paid by the Respondent and by employees assertedly did not change as a result of the Respondent's actions is not dispositive of the issue. True, if the Respondent's previous understanding with the employees was that each would pay a certain *percentage* of the total premium, then if those percentages remained unchanged, the increases in the *amounts* paid imposed by the Respondent would not have changed the status quo ante. But the Respondent has not shown that that was the understanding. For all we know, the understanding may have been that the employees would pay a certain amount and the Respondent would pay the rest.[36] In that circumstance, as we have noted, any increase in the employees' contribution would change the status quo ante. In sum, the Respondent has failed to demonstrate that the status quo ante was maintained even though the employees' premiums were increased; consequently, we agree with the judge that the

[31] The Respondent did not make this argument to the judge, and the judge did not consider it.

[32] 268 NLRB 236 (1983).

[33] Id. at 237.

[34] See *A-V Corp.*, 209 NLRB 451, 451–452 (1974); *Luther Manor Nursing Home*, 270 NLRB 949, 959 (1984).

[35] See, e.g., *M.J. Santulli Mail Services*, 281 NLRB 1288, 1295 (1986) (once the General Counsel shows that an employer has a contractual obligation to make contributions to an employee benefit fund and that it has unilaterally ceased to make those payments, it is the employer's burden to show that the payments need not be made, e.g., because the underlying trust agreement provides for payments to cease at the expiration of the collective-bargaining agreement.)

[36] In fact, Smith testified that when the Respondent switched from another program to the Accordia plan in May 1996, it told employees that "they would not have an increase in their deduction or their contribution. That it would remain the same." Although that statement probably meant that the employees' premiums under the new plan would be the same as under the old plan, and not that their premiums would never increase, it certainly does not support the Respondent's contention that the status quo ante was maintained even though the employees' premiums were increased.

Respondent violated Section 8(a)(5) by unilaterally changing the unit employees' terms and conditions of employment.[37]

ORDER

The National Labor Relations Board orders that the Respondent, Brook Meade Health Care Acquirors, Inc., d/b/a Maple Grove Health Center, Lebanon, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union activities and asking them to report on the union activities of their fellow employees.

(b) Soliciting grievances from its employees with the implicit promise to remedy them in order to defeat a union organizing campaign.

(c) Telling employees they are disappointed with them because of their wearing of union T-shirts and threatening them that union supporters will be discharged.

(d) Refusing to bargain with the United Mine Workers of America, Local Union No. 984, by unilaterally increasing the employees' portion of their health insurance premiums without first providing the Union adequate notice and opportunity to bargain.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Within 14 days from the date of this Order, rescind the unlawfully imposed increase in the employees' health insurance premiums.

(b) Reimburse the employees for all losses incurred as a result of the increase in health insurance premiums in the manner set forth in the remedy section of the judge's decision.

(c) Bargain in good faith with the Union concerning wages, hours, and terms and conditions of employment of employees in the following appropriate bargaining unit:

> All non-supervisory employees including CNAs (certified nursing assistants), medical records employees, dietary workers, housekeeping and laundry employees employed at the Respondent's Lebanon, Virginia facility, excluding all office clerical and professional employees, LPNs (licensed practical nurses), guards and supervisors as defined in the Act.

(d) Preserve and, within 14 days of a 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.

(e) Within 14 days after service by the Region, post at copies of the attached notice marked ``Appendix.''[38] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 4, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees concerning their union activities.

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

WE WILL NOT solicit employees' grievances with the implicit promise to remedy them in order to dissuade them from supporting a union.

[37] Member Hurtgen agrees with his colleagues' rejection of this contention by Respondent. However, he does so only on the procedural ground that it was not raised by Respondent at trial.

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

WE WILL NOT tell employees that we are disappointed with them for wearing union T-shirts and threaten them that union supporters will be discharged.

WE WILL NOT refuse to bargain in good faith with United Mine Workers of America, Local Union 984, by unilaterally increasing the health insurance premiums of our employees in the following appropriate unit without affording the Union adequate notice and opportunity to bargain:

> All non-supervisory employees including CNAs (certified nursing assistants), medical records employees, dietary workers, housekeeping and laundry employees employed at our Lebanon, Virginia facility, excluding all office clerical and professional employees, LPNs (licensed practical nurses), guards and supervisors as defined in the Act.

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

WE WILL , within 14 days of the Board's Order, rescind the unlawful increase in the health insurance premiums paid by our unit employees, and WE WILL make the employees whole, with interest, for any losses incurred because of the unlawful increase.

WE WILL, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above.

BROOK MEADE HEALTH CARE ACQUIRORS, INC., D/B/A MAPLE GROVE HEALTH CARE CENTER

Ronald Morgan, Esq., for the General Counsel.
A. McArthur Irvin, Esq. (Irvin, Stanford, & Kessler), of Atlanta, Georgia, for the Respondent.
Jerry Stallard, United Mine Workers, for the Charging Party.

BENCH DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN**,** Administrative Law Judge. This case was heard before me on May 28 and 29, 1997, pursuant to a consolidated complaint, as amended at the hearing, filed by the Regional Director for Region 11 of the National Labor Relations Board (the Board) on May 13, 1997, and is based on an amended charge filed in Case 11–CA–17212 by the United Mine Workers of America (the Charging Party or the Union) on December 27, 1996, and an amended charge filed by the Charging Party in Case 11–CA–17409 on May 8, 1997. The complaint alleges that Brook Meade Health Care Center Acquirors, Inc. d/b/a Maple Grove Health Care Center (the Respondent or Maple Grove) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The complaint is joined by the answer filed by the Respondent on January 3, 1997, as amended at the hearing.

I issued a bench decision at the hearing on May 29, 1997, pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, on the entire record in this proceeding including my observations of the witnesses who testified here, and after due consideration of the arguments at the hearing, and the trial memoranda filed by the parties. In accordance with Section 102.45 of the Board's Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A" the pertinent portions (pp. 590–623;) of the trial transcript as corrected and modified by me which contain the bench decision issued at the hearing.

FINDINGS OF FACT

I. JURISDICTION

The Business of Respondent

Respondent is a Georgia corporation with a nursing facility located at Lebanon, Virginia, where it is engaged in providing health care services and is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The United Mine Workers of America, Local Union No. 984 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE APPROPRIATE UNIT

The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All non-supervisory employees including CNAs, medical records employees, dietary workers, housekeeping and laundry employees employed at Respondent's Lebanon, Virginia facility; excluding all office clerical and professional employees, LPNs, guards and supervisors as defined in the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act and was the exclusive collective-bargaining representative of the employees in the aforesaid appropriate collective-bargaining unit.
3. Respondent violated Section 8(a)(1) of the Act by interrogation by its agent Ed Guinup of its employees regarding their union activities on September 4, 1996.
4. Respondent violated Section 8(a)(1) of the Act by its solicitation by its agent Ed Guinup of its employee John Botkin to report on the union activities of other employees on September 4, 1996.
5. Respondent violated Section 8(a)(1) of the Act by its solicitation of employee grievances with the implicit promise to remedy them in order to dissuade them from supporting a union engaged in by its agent Ed Guinup on September 4, 1996.
6. Respondent violated Section 8(a)(1) of the Act by Director of Nurses Sue Owens' statement to employee Lioma Mounts that she was disappointed with her for wearing a union T-shirt and that the employees wearing the union T-shirts would get fired.
7. Respondent violated Section 8(a)(3) and (1) of the Act by issuing on September 12, 1996, the written warning to, and its discharge of, Lovana Thomas on September 16, 1996, because of her engagement in concerted activities on behalf of the Union.
8. Respondent violated Section 8(a)(5) and (1) of the Act by its refusal to bargain with the Union on behalf of the unit em-

ployees by unilaterally, and without affording adequate notice and opportunity to bargain, imposing an increase in the employee's portion of their health insurance premiums.

9. The above unfair labor practices in connection with the business engaged in by Respondent have the effect of burdening commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in violations of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act and post the appropriate notice.

It is recommended that Respondent rescind the unlawful warning and discharge of employee Lovana Thomas and offer Thomas immediate reinstatement to her former position or, to a substantially equivalent position, if her former position no longer exists, and that Respondent make Thomas whole for all loss of backpay and benefits sustained as a result of the discrimination against her by Respondent in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Respondent shall also rescind the increase in the employee's portion of their health care premiums unlawfully imposed on them until it has afforded the Union adequate opportunity to bargain and it has bargained with the Union concerning this and reached agreement or a valid impasse and shall reimburse the employees for all loss by reason of the unilaterally imposed increase in insurance premiums. Backpay benefits and reimbursement of the increase in insurance premiums shall be with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1982).[1]

[Recommended Order omitted from publication.]

APPENDIX A

BENCH DECISION

[Errors in the transcript have been noted and corrected.]

590

fully justified to continue on as we felt like we had to do as a company. We totally felt that we were justified to contact the employees so to say that we did something on the 27th to the employees that is one thing we're absolutely—totally believe we had the authority.

I had nothing to do with that document. The reason is that I thought we had total freedom to contact the employees as a convenience the Union wanted. At any rate we urge Your Honor to dismiss this 8(5) and to dismiss the 8(3) that we urge Your Honor. Thank you very much.

JUDGE CULLEN: All right, I'm now going to enter my bench decision in this case starting with the complaint. The complaint alleges, Respondent admits, and I find that the charge in Case 11–CA–17212 was filed by the Union on October 4 and served on Respondent October 4, 1996, and amended charge in Case 11–CA–17212 was filed by the Union on December 27 and was served on Respondent on December 30, 1996.

The charge in Case 11–CA–17409 was filed by the Union on March 10, 1997, and was served on Respondent on March 10, 1997. An amended charge in Case 11–CA–17409 was filed by the Union on May 8, 1997, and was served on Respondent on May 8, 1997.

The complaint further alleges with respect to the business of the Employer that the Respondent is now and has at all times material here been a Georgia corporation with a

591

facility located at Lebanon, Virginia, where it is engaged in providing health care services. That during the past 12 months which period is representative of all times material, Respondent received gross revenues in excess of $100,000 and during that same period purchased and received at its Lebanon, Virginia facility goods and materials valued in excess of $50,0000 directly from points outside the Commonwealth of Virginia.

It is further alleged that Respondent admits, and I find that the Respondent is now and has been at all times material here an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The complaint also alleges that the United Mine Workers of America is now and has been at all times material here a labor organization within the meaning of Section 2(5) of the Act and I so find.

It is also alleged that Sue Owens, director of nursing, Jane Roberts, administrator of the facility, Ed Guinup, G-u-i-n-u-p, was a supervisor and I believe the record has identified him as a regional director or district director of several nursing homes other than the facility involved in this particular case and that Martha Smith was an activity coordinator. These allegations are admitted. However, Respondent has denied Agency.

I find that Owens, Roberts, and Guinup were at all times supervisors and agents of Respondent within the meaning of

592

Section 2(11) of the Act.

All right, the complaint also alleges that since on or about April 4, 1996, and continuing to date Respondent through the action of its agents and supervisors interfered with, restrained, and coerced and interfered with restrain and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act by the following acts and conduct:

Paragraph 8(a) interrogated its employees regarding their union activities. 8(b) Solicited its employees to report on the union activities of other employees. 8(c) Solicited employee grievances and promised to remedy said grievances to discourage union activity and the author of these incidents is alleged to have been Ed Guinup and these events are alleged to have occurred on September 4, 1996.

Additionally, at the hearing the General Counsel amended paragraph 8 to add paragraph (d) alleging that Respondent had advised its employee that by its director of nursing, Sue Owens, that she was disappointed that the employee was wearing a union T-shirt during an election campaign on October 31, 1996, and has added also paragraph 8(e). That Respondent threatened its employee by its supervisor and Director of Nursing, Sue Owens, that employees who supported the Union would be discharged.

This amendment was granted and Respondent issued a denial at the hearing and the complaint is joined by its answer in

593

this regard as well as its answer filed previously with regard to the complaint which I began to read. Additionally, the complaint alleges that Respondent violated Section 8(a)(3) and (1)

[1] Interest shall be computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

of the Act by discharging and thereafter failing and refusing to reinstate its employee, Love Thomas, on or about September 16, 1996, because of her engagement in concerted activity and for the purpose of collective bargaining or other mutual aid or protection in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The complaint further alleges that the following employees, and Respondent admits, and I find that the following employees of Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act and that is all nonsupervisory employees including CNAs also known as certified nursing assistants; medical records employees; dietary workers; housekeeping and laundry employees employed at Respondent's Lebanon, Virginia facility.

Excluding all office clerical and professional employees, LPNs, also known as licensed practical nurses; guards, and supervisors as defined in the Act. The complaint further alleges, Respondent admits, and I find that on November 21, 1996, the majority of the employees of Respondent in the unit

594

described above by secret-ballot election conducted under the supervision of the Regional Director for Region 11 of the Board designated and selected the Union as their representative for the purpose of collective bargaining with the Respondent, and on November 29, 1996, the Union was certified as the exclusive collective-bargaining representative of employees in the unit.

Further, that at all times since November 21, 1996, and continuing to date, the Union has been the representative for the purpose of collective bargaining of the employees in the unit described above in paragraph 11 and by virtue of Section 9(a) of the Act has been and is now the exclusive representative of the employees in the unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Further, the complaint alleges that on or about January 3, 1997, and continuing to date, the Union has requested and is requesting Respondent to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment as the exclusive representative of all employees of Respondent in the unit described above in paragraph 11 and I so find.

The complaint also alleges that commencing on or about late January 1997 and at all times thereafter, Respondent

595

refused and continued to refuse to recognize and bargain collectively with the Union as the exclusive bargaining representative of all employees in the unit described above in paragraph 11 in that on or about February 25, 1997, Respondent unilaterally and without notice to or consultation with the Union changed the terms of the health insurance policy of its employee by increasing their health insurance premium.

It is alleged by the acts described in all these paragraphs the Respondent has violated Section 8(a)(1) of the Act. It is alleged that with respect to the discharge of employee Thomas, Respondent has violated Section 8(a)(3) of the Act and with respect to the alleged unilateral implementation of a change in the terms of the health insurance policy of its employees by increasing their health insurance premiums that Respondent has violated Section 8(a)(5) of the Act.

The Respondent has by its answer duly answered the complaint as its answer was amended at the hearing to meet the additional allegations to paragraph 8 permitted by me.

A review of the testimony presented by the General Counsel, going through the witnesses basically Jerry Stallard, the lead organizer of the United Mine Workers, has held that position since February 1991. He testified that the organizational campaign at the facility started on August 6, 1996, when he received a call from employee Love Thomas who

596

was interested in organizing a union at the facility.

Thomas was the medical records clerk at the Maple Grove facility. Subsequently, he met in a city park in Lebanon, Virginia, with Thomas and other interested employees and since then they held a union meeting every week thereafter until the election which occurred on November 21, 1996.

There were 46 employees listed on the *Excelsior* list and 33 voted for the Union and 5 for the Company with 4 challenges. There were three shifts of employees and the Union met with different shifts at different times on the same day in the course of these weekly meetings which continued until the election.

The Union gave the employees union stickers, buttons, and T-shirts and bumper stickers. Stallard testified that the leader of the Union campaign among the employees was Love Thomas who was his chief contact in the course of the organizational campaign and that Love Thomas was discharged on September 12, 1996.

Employee John Botkins, a certified nursing assistant, who was originally employed on October 4, 1993, and whose employment was terminated on October 5, 1996 and resumed on March 31, 1997 testified concerning his union activities. In mid-July 1996, he started talking about the Union with Thomas and she called union official Jerry Stallard approximately the first week of August and they met at the

597

park in Lebanon.

Other employees who were there were employee Vandyke, Donna Branham, and Thomas and himself along with the union representative. Meetings were held weekly thereafter. Botkins testified further that on September 4, 1996, he was called into a conference room by his supervisor, Sue Owens, who was the director of nursing. Present in the conference room were Owens, District Manager Ed Guinup, and the facility's administrator, Jane Roberts.

He testified that Guinup asked him if he knew of any problems on the floor and he replied in the negative. Guinup also told them that he had heard a rumor about the Union being organized—beginning an organizational campaign and Botkins replied that he did not know anything about it. At that point Guinup then asked him if he knew anything about it if he would tell them about it and he replied that he usually told Owens about any problems.

Botkins testified further that there was an employee council which had been formed among the employees prior to his original employment with the Employer which was a group of employees organized to help workers in case they were ill or had overdue bills that they were unable to pay and that Guinup asked him if he would get together a meeting with the rest of the employee council as he himself, Botkins, served on that council and he did so.

598

They met that afternoon with the employee council. At that meeting Guinup asked what the employee council was about and whether there were any concerns and the employees talked about a Christmas Party and asked if they would still be able to have one and he asked them to determine whether they would rather have an inside facility party or an outside party. Botkins testified further that he shared an office with Thomas in 1996, as he was a restorative nurse from March to April 12, 1996, when he assumed another capacity with Respondent. His hours as a restorative nurse were 6 a.m. to 2 p.m. He testified that when he got to the office in the morning the office door was locked and he would open it and prop the door open as the door otherwise would close automatically and while he was there the door was open throughout the day.

He testified that Thomas had a desk 7 feet inside the office, that no one ever told him or Thomas that the door to the medical records office should be kept closed, and that the supervisors observed this door open on a daily basis.

He testified further that resident's charts were kept on every resident and that he saw them in this office. Whenever one was discharged or had passed away a record was kept in the medical records office and there were usually some of these records in that office every day.

599

He testified he never saw medical charts open on Thomas' desk at anytime when she was not in the office. Otherwise, they were on a shelf behind her desk in binders. He testified that he observed resident charts being present in the employee lounge, in the dining room, and at nurses' stations and that generally the nurses might be in any one of these particular rooms and might be charting actively while they were watching residents or performing other duties, or were in the lounge or the breakroom.

He testified that CNAs, housekeeping, and dietary employees did not have access to these charts. He testified further with regard to the lounge and the dining room that all the staff were allowed to enter those areas as were the general public. He testified that two or three times each shift he saw open charts at the nurse's station and that there were 60 patients per station and that the public comes and goes at these nurse's stations.

He testified further he was not aware of any employees ever having been disciplined with respect to having these charts in these above various places. He testified that on September 17, 1996, he observed the director of nursing, Owens, office open with open charts in there and with the office unoccupied and with charts on her desk.

He was aware that at that time she had gone to the medical records office on the other side of the building. He

600

called certified nursing assistant Patsy Beaver and Mary Vance, a housekeeper, over to observe this also. He testified that he had never seen any written instructions that the doors to the file room or any other area should be closed.

General Counsel's[Exhibit] 6 was reviewed by him and several other employees reviewed on the stand at the hearing and they all testified that they had never seen it. It was subsequently identified by former Director of Nursing Sue Owens who testified that she posted that notice and the notice bears the date of July 31, 1996.

This notice speaks of policies which must be complied with to maintain state fire and safety requirements no doors may be blocked open. It does not on its face appear to relate to the keeping of records, but rather safety. However, as noted Botkins and other employees, who testified who will be mentioned hereafter, testified they had never seen any such notice.

On cross-examination Botkins testified that he had never observed Thomas working on charts of active residents but the charts that he had observed her working on were those of discharged or deceased residents. He testified further he had never observed Thomas leave the office with charts on her desk.

601

On redirect examination Botkins testified that when he was questioned by Guinup who wanted to know if they had any problems Guinup gave him and the other employees no explanation as to why he was inquiring.

Employee Lavana Thomas referred to as Love Thomas was hired as a certified nursing assistant and worked for 2 years in that position and then worked as a restorative aid for approximately 1-1/2 years and then as a medical records clerk until September 16, 1996, when she was terminated. She was originally hired on November 11, 1990.

She testified that the Director of Nursing Sue Owens was her immediate supervisor. She testified that prior to August 6, 1996, she and Botkins and other employees discussed the Union and that on August 6, 1996, she called the United Mine Workers and a secretary gave her Jerry Stallard's home telephone number.

She called his home and he returned her call the next day with a union meeting being set up on August 13 attended by several employees and herself including employees—I'm sorry Vandyke, Addison, Donna Branham, and Stallard as well as Botkins and meetings were held once a week and she attended all meetings.

She was the president of the employee's council and this was a group of employees that had been started approximately 2 years prior to September 1996. She met with management

602

on September 4, 1996, at the meeting described by Botkins previously. Guinup said he had heard that employees were having problems and he wanted to know if he could help the employees with any problems.

There was discussion of employees being unable to get home during snow days. Then administrator Jane Roberts was the new administrator and she attended that meeting also and she said that if there were any problems, the employees could come and see her and that she had an open door in order for them to discuss any problems with her. Thomas later learned that evening that Roberts was discharged on this date.

Thomas testified that Director of Nursing Owens discharged her on Monday, September 16, 1996. She returned from a physician's office having obtained some signatures on documents and brought the papers into Owens and Owens told her she would like to talk to her and then told her that she was going to discharge her because on a Friday prior to that Owens and Respondent's Edie LeMons and Gail Varner had made rounds and they had observed open charts on Thomas' desk with the door to her office open and no one in the office and that they had closed and locked the door.

Thomas then took her personal belongings, brought the keys to the office, and turned them over to Owens. She testified that the medical records office had always been open

603

and the key was in the office in her purse every day. Her hours were 6:30 a.m. to 3 p.m. and she observed the door when she came to work in the morning.

She told Owens that she had never left any charts on her desk and she testified that Owens looked at her and grinned and said that's the way it would be. Thomas had received several warnings in the past. She had received a verbal counseling on August 8, 1995, with respect to an audit which had not been performed which was signed by Owens.

She had received a written warning notification on July 5, 1996. This warning was for failing to audit 10 charts per week and was also issued by Owens. The written warning notification was signed on July 22, 1996, with the date of the incident noted as July 5, 1996.

She received a second warning notice citing the date of the incident as July 8 and that notice was dated July 22, 1996, also listing Owens as the supervisor issuing the warning. This was for failure to file all current labs and doctor's office and noted that during a state survey Owens had found 100 lab reports which had not been filed and some of which were almost 2 months old.

Director of Nursing Owens issued Thomas a

604

warning for disregard of corporate policy on September 12, 1996, noting that rounds of the facility were made by herself, Edie LeMons, quality assurance nurse, and Gail Varner, the resident care coordinator, for the Region and that three resident's charts were lying in the open in the medical records office with the door open and no one in the room noting that the door was then locked by Varner with instructions by Varner to Owens to issue a written reprimand for violation of Respondent's policy. Thomas refused to sign this warning.

Thomas testified that no one had ever told her to keep the door closed to the medical records office. That she shared the office with Botkins and he came earlier at 6:30 and the door was open when she arrived. That there was a chair propped to keep the door open and that Botkins left earlier than she did and left the door open until she left at 3 p.m. when she would close the door for the day.

She testified further that when Botkins was transferred to another job on August 12, 1996, he was replaced by Melissa Field and that no change in the door situation occurred thereafter. She testified further that she handled discharge and current charts which were at the nurse's stations. She kept the discharge charts in her office approximately 30 days as residents often went to the hospital and could lose

605

their place at the home and might return after their hospital visit.

She also kept the records for deceased clients for 30 days in her office and thereafter these charts were separated and put in order and placed in locked file cabinets. She testified at no time had she ever varied her methods of handling the charts. She reiterated that she had never left her office with open files on her desk at anytime and she had never closed the door during the workday.

She testified that Owens had been in her office prior to September 12, 1995, and had seen the charts and had seen the open door and had never said anything to her about this. Owens never told her that she could not leave the charts in the room with the door open.

She testified further that at the nurse's stations various resident charts were open on a daily basis and that the general public and other employees had access to the nurse's stations. She testified further as had Botkins that charts were in the breakrooms, the dining rooms, and the employee's lounge.

She testified concerning her method of charting current residents, she would obtain them from the nurse's station, work on them, and then return them to the nurse's stations but that she never left them in her office. She had not received any instructions regarding this procedure.

606

(Pause in Proceedings.)

Employee Yemma Mounts, a CNA hired in March 1995, testified that on October 31, 1996, Director of Nursing Sue Owens met her in a resident's room as she was getting ready to check the resident and Owens approached her and told her that she was very disappointed that she was wearing a UMWA T-shirt and could not believe that she was for the UMWA and told her that the employees that had the UMWA T-shirts would get fired. This testimony was not rebutted by Sue Owens who testified and who was not questioned concerning this.

Mounts also testified that she had never observed General Counsel's Exhibit 6, which was the notice with respect to the locked doors allegedly posted on Respondent's premises. Mounts testified further that she had never observed any memos stating that any doors should be locked and that she saw open resident charts at nurse's stations, employee breakrooms, and in the cafeteria all of which places the public and other employees had access to.

General Counsel also called Jane Adell Roberts who was the administrator for the Respondent during a very brief period from August 5 to September 4, 1996. Roberts replaced administrator Josie Seals who had left on July 15, 1996.

607

Roberts testified that it never came to her attention that the employees were engaging in union activity until September 3, 1996, when Maintenance Supervisor Dennis Strong told her that the employees were organizing and had had a meeting at Easterly Park in Lebanon. He told her this at a regular daily meeting which she held with department heads at the beginning of the shift on that date.

Strong said that the employees had organized at a meeting at Easterly Park. She immediately called Regional Director of Operations Ed Guinup at Soddy Daisy, Tennessee, where at his office and told him of the union organizing campaign.

He then faxed her a list of "do's and don't's with respect to Unions" and he appeared at Respondent's facility about 3 or 4 p.m. that same day. She talked with him concerning this matter and the next morning she and he met with department heads. She handed out copies of the do's and don't's and he went over them with the department heads.

Subsequently, Guinup held a meeting with Botkins and Sue Owens and herself in the conference room and Guinup talked about the employee council and their bake sale and asked questions of Botkins as to whether he had heard of anything and asked if Botkins had heard of any activities.

Guinup did mention the word union and she believed that

608

this was implied in his questioning. Later that day a meeting was held with the employee council. In fact, there were several meetings held that day. She was discharged later that day on September 4 by Guinup who was accompanied by Sue Owens and Guinup told her he didn't think it was going to work out, meaning her employment.

She testified that she personally had never had any reason to discipline Love Thomas. She had observed the door of the medical office open and had not considered anything wrong with the charts being in the office. She testified further that Director of Nursing Owens' office frequently had charts on the desk and when Owens was not in the office and that this occurred more than once a week. She was not involved in the discharge of Thomas.

However, prior to her own discharge on September 4, Owens had asked her to discharge Thomas about 7 to 10 days before Labor Day. She asked Owens why and she cannot recall whether Owens gave her a reason or not but if she did, she had not given her any work-related reason and she said that she would not discharge Thomas as she was not aware of anything that would cause her to discipline Thomas.

Employee Peggy Caudill, a CNA on the 10 a.m. to 6 p.m. shift, was hired on November 11, 1990, as a CNA. She testified that she wore union buttons, T-shirts, and was on

609

the negotiating team. She also had never seen General Counsel's [Exhibit] 6—the notice with respect to the locked doors. She had also observed resident's charts on top of and around nurse's stations, breakrooms, cafeterias, smoke rooms, on the desk of the director of nursing and the assistant director of nursing almost on a daily basis, and almost on a daily basis at the nurse's station. She was not aware of any discipline ever having been issued to any employee for the maintenance of these open charts at the nurse's station. She was not aware of any change in the method of operation of handling resident's charts after the discharge of Thomas.

Employee Mary Vance, a housekeeper hired on May 3, 1994, who worked from 7 a.m. to 3 p.m., testified she attended union meetings and wore union badges. She learned of the Union through Thomas. She also had never seen General Counsel's Exhibit 6 or similar notice with respect to locking doors. She testified that she went to Thomas' office virtually every day to clean and sometimes to talk and that the door was always open and at times Thomas was not in the office but that immediately after the discharge of Thomas the door was closed.

She had never observed any patient's charts or records on Thomas' desk when Thomas was not in the office. She testified that she saw resident's charts at nurse's stations,

610

and in breakrooms, and on Director of Nurses Owens' desk. Sometimes these charts were open. She is not aware of any prior discipline of employees for maintaining open charts in public places. She testified further that on September 17, 1996, she observed open charts on Director of Nurses Owens' desk at a time when Owens was absent and that this was also observed at that time by Botkins and Beavers. She also saw an LPN leave a chart in the breakroom.

Employee Patricia Beavers, a CNA hired in November 1990 who worked until September 1995 and then took a leave of absence and returned on September 8, 1996 as a CNA, testified that she also had never seen General Counsel's Exhibit 6, the notice regarding locking of doors. She had observed resident's charts regularly open at the nurse's stations and in breakrooms, and on September 17 with respect to the director of nurses' office and she had observed these charts in the breakroom. These charts were open and they were unattended. She also was not aware of any discipline having been issued to anyone for maintaining these charts in such public places in an open manner.

Unita Vandyke, a day-shift cook who had been hired approximately 7 years ago, testified that she had never seen General Counsel's Exhibit 6 with respect to the closing

611

of doors. She had seen resident's charts in the breakroom, nurse's stations, on medicine carts, and in Supervisory Dietician Lois Callahan's office. She was not aware of anyone ever having received discipline for maintaining these open charts in these places.

Donna Branham, a housekeeper hired on August 25, 1994, who worked on the day shift from 6 a.m. to 2 p.m., testified that she had never seen General Counsel's [Exhibit] 6 with respect to the closing of doors and that she had observed the medical records office open. She had never observed files on the desk in the absence of Thomas. She had, however, observed resident's charts on the floor of the hall, in breakrooms, on medicine carts, and was not aware of any discipline having been issued to any employees in this regard.

Employee Peggy Sue Barton testified that she was employed in laundry and housekeeping and she had never seen General Counsel's Exhibit 6 with respect to the notice to close the doors. She had observed the medical records office open. However, had never observed charts on the desk at a time when Thomas was absent. She had seen resident's charts in the breakroom, nurse's stations, and on medicine carts on a daily basis and was not aware of any discipline having been issued to any employees in that regard.

The Respondent called Director of Nurses Sue Owens who was employed on October 1994 and resigned

612

her employment with the Employer in December 1996, the day following the election. When she initially started in 1994 she started as a resident nurse and was promoted to an assistant director of nursing a month later and approximately 3 to 4 weeks later was promoted to the director of nursing position.

She served as the acting administrator from July 1996 until shortly before she left. Owens' position at the hearing was that Thomas was not doing her job to keep up with the auditing of files and that this was a continuing problem. She testified that they were unable to give medication without a licensed physician's order and she had talked to Thomas about updating the files and that Thomas would merely reply that she did not have enough time to do this and walk off.

She testified further that Don DeSorbo, the first resident care coordinator the Respondent has ever had and who came in at the time when Health Prime, a predecessor owner, came in, was responsible for a survey and finding problems at the Respondent's facility in order to solve them, cited problems with respect to auditing and updating of charts. This was an area of

concern that resident's charts were not being thinned and that he had observed coffee stains on some charts. She testified—these were charts maintained by Thomas. She testified that she talked to Thomas about it and Thomas made no comment. She testified with respect to the

613

verbal and written warnings described above. She testified further that in September 1996, Gail Varner and LeMons, who was her direct supervisor, visited the Maple Grove facility and that she and Varner and LeMons were making rounds and that at the time she, herself, Owens, was the acting administrator.

As they made the rounds they observed the door propped open to the medical records room with record charts lying around. She testified that Varner became upset with this and cited this as a violation of confidentiality and wanted the responsible individual written up and the door locked. She agreed to do so and told her that she had had other problems with Thomas. Varner told her to write Thomas up and she did. Varner did not testify. The date of this incident was September 12, which was a Thursday and she subsequently on the following Monday, September 16, 1996, contacted Thomas. She told Thomas this would be her final reprimand as this was her third reprimand and she was being discharged and she gave her an opportunity to resign but Thomas refused to do so and left. Thomas later came back and brought the keys back. She filled out a termination form and gave Thomas the employee's copy.

With respect to the take over by Health Prime which took over the facility early in the year of 1996, she testified that after Health Prime took over they supervised more closely and

614

required adherence to rules and ran a tighter facility than had the predecessor.

She testified with respect to the termination of Roberts. Roberts had been terminated because she was causing problems and engaged in unprofessional behavior and was not getting along well with the staff and that she sat in on the discharge.

She testified that Guinup did not ask her, Owens, anything with regard to union activities but did go over the pros and cons of dealing with Unions. She testified that in September she was aware there was a rumor of a union campaign but did not remember meeting—a meeting but did remember receiving a list of do's and don't's with respect to Unions. She believes that Supervisor Dennis Strong brought the matter of the Union to her attention.

She testified that three charts were on the table in her office near the filing cabinets—in Thomas' office near the filing cabinets at the time they observed the open office when Varner and LeMons were doing the walk around or making their rounds. She testified the reason for discharging Thomas was that she had three warnings and in accordance with the employee manual the final one calls for termination. She was unaware whether there was any limitation on the period for the accumulation of three warnings.

Respondent called Edie LeMons, Health Prime's regional

615

director of compliance since August 1, 1996. She testified that she visited Maple Grove facility on August 1, 6, 7, and 8, 1996, and reviewed medical records and noted that they were unorganized and a lot of sheets were torn and a lot of materials needed to be thinned off of the charts.

She told Owens that the medical records needed to be audited and that Owens should report this back to her. Gail Varner, the director of quality assurance, is her supervisor. She and Varner visited Maple Grove on Thursday, September 8, 1996, and they found the medical records room door open with no one in the room and with medical records on the desk and the table. Varner asked Owens where the medical records person was and Varner closed the door. Varner at that time did not know who the medical records clerk was. Owens told Varner that she was having a problem with regard to the door being left open and records being left open. LeMons had no conversation with Thomas that day or prior thereto. Varner told Owens to write Thomas up. Owens told Varner that this may be Thomas's fourth writeup. On cross-examination LeMons testified that she observed one open chart on Thomas' desk and three on the table. Varner was not called to testify. Guinup was not called to testify.

Assistant Director of Nursing Barbara Atkins testified that she had been the assistant director of

616

nursing since January 1997 and she now shares an office with the medical records clerk, Lisa Street. She testified with respect to a written warning issued to Thomas by Owens on July 22. That she was called to the office in order to witness Owens' issuance of the written warning to Thomas for over 100 lab slips not having been put on the charts she (Atkins) told Thomas that she hoped that Owens had not been confused with faxed lab reports which she herself kept and that she later asked Owens this. Owens told her that she had not confused these with the original ones. On cross-examination she testified that she herself had never observed 100 original lab reports at the nurse's station. She testified further that she had observed charts in the director of nurses' office at a time when the director of nurses wasn't in her office and that on occasions the door would be closed and on other occasions the door would be open.

With respect to the allegations of the complaint paragraphs A, B, and C, these all relate to the incidences in which Guinup called Botkins and later other employees into the office and questioned Botkins regarding union activities and asked about problems and I find that this was at least a veiled implicit

617

interrogation even if the word Union was not used in the meeting that he had initially with Botkins.

Additionally, I find that in the earlier meeting that he solicited Botkins to report on the union activities of other employees when he asked if, in fact, Botkins had heard of anything and if he would tell him if he had.

Further, I find in the later meeting with the employees council that Guinup did solicit employee grievances and promised to remedy these grievances at least implicitly by indicating an interest to the employees and attempting to answer their questions although this had not previously been done by him. I find in each instance Respondent violated Section 8(a)(1) of the Act.

With respect to Section 8(d) and (e), the amended allegations wherein Director of Nursing Owens advised the employee as set out above that she was disappointed that the employee was wearing a T-shirt for the Union and also threatened her that employees who supported the Union would be discharged that Respondent violated Section 8(a)(1) of the Act in each of these instances.

With respect to the discharge of Love Thomas I find that the Respondent had knowledge of her union activity.

618

The undisputed testimony of Union Representatives Stallard, Thomas, and Botkins establishes that Thomas was the leading union advocate who first contacted the Union and who spearheaded the campaign among the employees at the facility. I further credit Thomas' testimony that she had a union bumper sticker on her vehicle which she parked in the rear parking lot of the facility and that this was readily observable by members of management as well as by the other employees and I note Director of Nurses Owens' testimony that she believed she knew what vehicle Thomas drove and that she herself parked in the rear of the facility from time to time. I note that this was a small facility with approximately 50 or 60 employees and find also that knowledge can be inferred from this as well. Additionally, I find that animus both before and after the discharge with respect to the 8(a)(1) violations by Owens which occurred on the October 31, 1996, establish antiunion animus on the part of the Respondent. Additionally, I find that the Respondent's immediate acts of interrogation engaged in the morning of the day after Respondent learned of the union campaign are evidence of knowledge of the union campaign.

I note that Thomas was the president of

619

the employee's committee and was one of the employees called into that meeting. I find that the highly unusual situation in which the administrator was fired the same day as that Respondent's director, Guinup, met with the employees on September 4 after learning of the union campaign on September 3, 1996, demonstrates that the actions were taken in response to the union campaign. Whether Guinup perceived that Roberts was not adequate to deal with this situation or some other problem existed is a matter of speculation. However Roberts was only a 1-month employee and the reason given by Guinup to her at the time of her discharge was that he did not think things would work out. This was vague and did not pinpoint any particular reason for her discharge and supports the inference that Roberts' discharge was associated with the union campaign. Moreover, the testimony of Owens in this regard consisted of several reasons which were not documented and appear to me to be opinion rather than concrete facts.

The timing of the discharge of Thomas supports the inference that the discharge was precipitated by Thomas' engagement in concerted activities. I find the particular violation listed as the reason for the final warning for leaving the medical records room door open and files open was pretextual.

620

I find the evidence is overwhelming that this facility operated in a rather liberal fashion with respect to close monitoring of these files and that the Respondent merely capitalized on this situation in order to rid itself of Thomas as a union adherent. The adverse action of firing Thomas obviously was the final summation of dealing with her in retaliation for her engagement in concerted activities.

I find that Respondent thereby violated Section 8(a)(3) and (1) of the Act. I find that the Respondent has failed to rebut the testimony established by the General Counsel by the preponderance of the evidence and I cite *Wright Line*, 251 NLRB 1083 (1980), and *Manno Electric,* 321 NLRB 278 (1996).

With respect to the alleged 8(a)(5) violation—the unilateral change by the increase in the insurance premium, I find that Respondent also violated Section 8(a)(5) and (1) of the Act. I rely on the testimony of both Lori Smith, the human relations representative, and Respondent's counsel, A. MacArthur Irvin. The individuals who represented the Respondent at bargaining sessions first held on February 2 and 25, 1996, that they were aware that there was an impending rate increase by the health insurance provider as early as January 13, 1996, but for reasons best known to themselves.

621

decided that they did not want to (as I understood Irvin's testimony) bring an unfavorable matter with the Union up at an early stage of negotiations which could have been done obviously by notifying the Union by letter of the impending rate increase by the insurance company as early as January 13 when the letter was received from the insurance company and certainly at the first negotiating meeting on February 2 and certainly at the commencement of the second meeting on February 25. However, this matter was not taken up with the Union until the afternoon of February 25. Irvin contends that when Bobby Webb, who was the chief spokesman for the United Mine Workers at that meeting, stated that he wished to contact his attorneys and refused to discuss the matter further that there was a valid impasse. I find that nothing of the sort existed.

Initially, the Respondent did not give the Union sufficient notice in which to enable it to adequately address the situation, engage in collective bargaining, and proceed to an amiable resolution through negotiations but rather presented the union representatives with a fait accompli.

While Respondent's position that it was between a rock and a hard place because of the impending rate increase is not to be ignored, nonetheless, the Act requires that unilateral changes cannot be made where there is a union representative representing the

622

employees and that the Employer must give notice to the Union and an opportunity to bargain. In *Valley Counseling Services*, 305 NLRB 959, 961 (1991), the Board rejected the employer's same argument that an increase was inevitable and found a violation of the employer's unilateral changes.

I reject the Respondent's position that there was a waiver of the Union's right to bargain in this case. Rather this matter was not presented to the Union until February 25 and a notice of the premium increase went out to the employees on February 27 to be made effective as of March 1, 1996.

Accordingly, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing the insurance premium increase without affording the Union an opportunity to bargain concerning it.

All right, I find that the Employer is an—that the Respondent is an employer within the meaning of Section 2(6) and (7) of the Act and that the above unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the Act.

I shall order an appropriate remedy. I shall order a cease-and-desist order. I shall order the posting of a notice. I shall order the reinstatement of Love Thomas with backpay and benefits with interest and I shall order the reimbursement to the employees for the additional insurance premiums which they were charged pursuant to the unilateral change and will

623

issue a formal decision on my return and review of the transcript.

Is there anything further before I close the record?

MR. MORGAN: The General Counsel has nothing.

JUDGE CULLEN: All right, the record is now closed.

(Off the record.)

(Whereupon, the hearing in the above-entitled matter was closed at 7:30 p.m.)