Westwood Health Care Center, a division of Medcare Associates, Inc. *and* Professional & Technical Health Care Union, Local 113, SEIU. Case 18–CA–11703

March 20, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND BRAME

On January 20, 1993, Administrative Law Judge George Christensen issued the attached decision. The General Counsel filed exceptions and a supporting brief; the Charging Party, Local 113, filed exceptions and a supporting brief; and the Respondent filed cross-exceptions, a supporting brief, and briefs in reply to the General Counsel's and the Charging Party's exceptions.

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

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

The primary issue in this case is whether the Respondent violated Section 8(a)(3) and (1) of the Act by discharging licensed practical nurse (LPN) Pamela Davis and registered nurse (RN) Nancy Duerr because of their union activities. As explained in section I below, we find, in agreement with the judge, that Davis and Duerr were supervisors within the meaning of Section 2(11) of the Act at the time of their discharges, and therefore the discharges were not unlawful. In section II below, addressing certain allegations of 8(a)(1) violations, we adopt the judge's findings of certain unlawful statements and solicitations of grievances and for reasons there stated, reverse his dismissals of allegations that other violations of Section 8(a)(1), principally interrogations about union sentiments, were committed against LPNs Joanne Plourde and Paula Brill.

I. THE ALLEGED UNLAWFUL DISCHARGES OF DAVIS AND DUERR

The General Counsel and the Charging Party contend that Davis and Duerr were employees covered by the Act at the time of their discharges for union activity on April 3, 1991,[2] and that therefore their discharges were unlawful. Alternatively, the General Counsel and the Charging Party contend that even if Davis and Duerr were statutory supervisors at the time of their discharges, their discharges were nevertheless unlawful because the Respondent promoted Davis and Duerr to supervisory positions only on March 25, after it learned that they were engaging in union activity. The General Counsel and the Charging Party assert, in effect, that Davis' and Duerr's promotions were themselves unlawful because their purpose was to inhibit Davis and Duerr from engaging in union activity and to place them outside the protection of the Act.

The resolution of these issues depends on whether Davis and Duerr were statutory supervisors at the time of their discharges and, if so, whether the Respondent promoted Davis and Duerr to supervisory positions before or after February 22, the date on which the Respondent first learned of their union activity. Since we find that the record supports the judge's finding that the Respondent promoted Davis and Duerr to supervisory positions prior to February 22, we also find that the promotions were not a sham, and that therefore Davis and Duerr were bona fide statutory supervisors at the time the Respondent discharged them. Since Section 2(3) of the Act excludes individuals who are statutory supervisors from the Act's protection, we also agree with the judge that the Respondent did not violate Section 8(a)(3) by discharging Davis and Duerr.

The judge has fully set out the facts relating to Davis' and Duerr's supervisory status and their alleged unlawful discharges. We shall only briefly review them here.

The Respondent operates three nursing homes in the Minneapolis, Minnesota area, including the Westwood Health Care Center (Westwood), the only facility at issue here. Local 113 (the Union) represents the Respondent's housekeeping, janitorial, kitchen, laundry, and nurse assistant employees at the Westwood facility in a single bargaining unit. The approximately 22 registered nurses (RNs) and licensed practical nurses (LPNs) at the Westwood facility are not represented.

Prior to 1989, the management structure at Westwood and the two other facilities operated by the Respondent in the Minneapolis area, the Bryn Mawr Health Care Center (Bryn Mawr) and the Queen Health Care Center (Queen), were identical.[3] Each facility had an administrator in overall charge of the facility and a director and assistant director of nursing in charge of the nursing staff during the day shift, Monday through Friday. A chief or charge nurse was in charge of the nurses at each station during the day shift, Monday through Friday. A swing shift, or p.m., building supervisor was in charge of the facility during the evening hours and a night-shift building supervisor was in charge of the facility during the late night and early morning hours. Finally, a weekend building supervisor was in charge of the facility on Saturdays and Sundays.[4]

[1] The Order contains remedial provisions that are in accord with our decision in *Indian Hills Health Care Center*, 321 NLRB 144 (1996), as modified in *Excel Container, Inc.,* 325 NLRB 17 (1997).

[2] All dates hereafter refer to 1991 unless otherwise stated.

[3] The Bryn Mawr and Queen facilities are in adjacent buildings approximately 3 miles from the Westwood facility.

[4] In 1984, the Regional Director for Region 18 clarified the unit at the Bryn Mawr facility in Case 18–UC–168 to exclude from the bargaining unit the p.m., night, and weekend building supervisors on the ground that they were statutory supervisors.

Davis assumed the weekend building supervisor position at Westwood in 1983 or 1984, but was not formally so designated until January 1989. In this capacity, Davis was in charge of the Westwood facility during her 12-hour work shifts (reduced to 9-1/2-hour shifts in late 1990) that extended over both the day and p.m. shifts on Saturdays and Sundays when some 57 employees, including janitorial, housekeeping, laundry, and kitchen personnel, as well as nurses, were on duty. Terri Walburg, as the p.m., or swing shift, supervisor, and Cheryl Wandersee, as the night building supervisor, were in charge of the facility on their respective shifts during the week. When they were on duty as building managers, Davis, Walburg, and Wandersee were the Respondent's highest-ranking representatives at Westwood.

Also in 1989, the Respondent established the nurse manager position at the Bryn Mawr and Queen facilities and assigned a nurse manager to each floor of the two facilities to be in charge of the nurses working there. As a result, the head nurses who had been in charge of the nurses at each station lost some of their authority and their premium pay of $1 per hour. Although the administrator and director of nursing at the Westwood facility contemplated making a similar change at Westwood in 1989, the change was not implemented prior to the departure of the then director of nursing.

After Andrea Levich became the director of nursing at Westwood in October 1990, she and Cheryl Stinski, Westwood's administrator, decided to introduce the nurse manager position at Westwood. They offered the positions to Head Nurses Duerr and Moffitt, both of whom had been interviewed for the nurse manager position in 1989. Levich and Stinski reviewed with Duerr and Moffitt their responsibilities as nurse managers, including the evaluation of employee performance and the discipline of employees for cause. Duerr and Moffitt accepted the positions, with Duerr as the nurse manager on the first floor and Moffitt as the nurse manager on the second floor. At a general meeting of all nurses on January 9, Levich told the nurses that the head nurse position was abolished and that supervision on each floor was consolidated in the nurse manager position, and that Duerr and Moffitt would fill those positions. Thus, Duerr and Moffitt were promoted to the position of nurse manager in late 1990, the promotions were effective January 1, and were announced to the nurses on January 9.

On February 4, Levich held an evening meeting with Moffitt, Duerr, Davis, Walburg, Staff Coordinator Carol Lindeberg, and nurse Joan Ebert, who filled in for Davis as weekend building supervisor when Davis was absent from the facility.[5] At this meeting, Levich distributed new disciplinary warning notice forms to those present and reviewed the forms with them. Levich advised the nurse managers and building supervisors that they were responsible, on their own authority, for the issuance of disciplinary warnings to employees.

As to Davis' and Duerr's union activity, Davis, with Duerr's assent, invited a representative from the Minnesota Nurses Association (MNA) to attend a regularly scheduled meeting of the Westwood nurses' support group scheduled for February 22 at Duerr's home. At the meeting, the nurses and the MNA representative discussed, inter alia, the pros and cons of union representation. Cards authorizing the MNA to represent the nurses were distributed and Davis was designated "keeper of the cards." Stinksi and Levich learned of the meeting shortly thereafter.

On Sunday, February 24, Stinski summoned Davis to her office, told Davis that she had heard that the nurses were investigating union representation, and asked Davis what she knew about it. Davis denied any knowledge. The next day, February 25, Levich, in the presence of Staff Coordinator Carol Lindeberg, asked Davis what had happened at the meeting. Davis mentioned certain topics that had been discussed, but did not mention the MNA. When Levich asked Davis about the MNA presence and discussion at the meeting, Davis asked Levich how she knew about it. Levich replied that she had received a report that Davis had invited an MNA representative to address the nurses at the meeting and stated that she was disappointed that Davis would do this to her. Eventually, Davis refused to discuss the matter further and the meeting ended.[6] Also on February 25, Levich summoned Duerr to her office and told Duerr that she was very upset that Duerr would host a union meeting in her home and hoped that it would not happen again.[7]

Because of a lack of interest in representation by the MNA, the nurses decided to seek Local 113 representation. Davis contacted Local 113 about March 20 and

[5] At sec. II,A,17,c of his decision, the judge stated that this meeting took place a "short time" after the January 9 nurses meeting described above. The record establishes that this evening meeting was held on February 4. Wandersee was not present at the meeting because she was on duty.

[6] The complaint alleges that the Respondent violated Sec. 8(a)(1) by interrogating LPN Pamela Davis, creating the impression of surveillance, and threatening Davis with reprisal because of her union activity. Because he found that Davis was a statutory supervisor, the judge dismissed these allegations. The General Counsel excepts, inter alia, on the ground that because bargaining unit employee Lindeberg was present during the conversation, the judge should have found that the Respondent violated Sec. 8(a)(1) by its interrogation and creation of the impression of surveillance. We find it unnecessary to pass on the General Counsel's contentions in this regard as any such findings would be cumulative to our decision.

[7] On February 27, Stinski, Levich, and Tamara Staska, the assistant director of nursing at Westwood, conducted a meeting with the Westwood LPNs and a second meeting with the Westwood RNs. We adopt the judge's findings that the Respondent violated Sec. 8(a)(1) at the LPN meeting by soliciting employees' grievances and promising to remedy them and that it violated Sec. 8(a)(1) at the RN meeting by telling employees that they were supervisors and therefore prohibited from engaging in union activity.

arranged for a Local 113 representative to attend the next nurses' support group meeting scheduled for March 27 at Duerr's home.

On March 25, Duerr was called to a meeting with Stinksi, Levich, and Staska. Levich handed Duerr a document entitled "Nurse Manager Job Description" and told Duerr to read it. The document contained a summary of the nurse manager job description, the qualifications necessary for the job, the job requirements, and a list of 17 job duties.[8] After Duerr, in response to questioning by Levich, said that she guessed that she would be able to perform the duties set out in the document, Stinski read a document to Duerr that stated that it was illegal for employees in management positions to attend union meetings and/or participate in collective bargaining, and that they were subject to discharge if they did so. Stinski asked if Duerr had a problem with that. Duerr replied that she did not because she did not think that she was in a management position. When Stinski replied that Duerr's job description was that of a manager, Duerr stated that the determination of who were supervisors occurred when an election was directed. Finally, Stinski said that she needed to know that Duerr was loyal to management and promanagement or she could be terminated. Duerr replied that she guessed she was promanagement. Stinski and Levich then stated that that meant Duerr could not attend any more union meetings.

Also on March 25, Stinski and Levich met with Davis. They gave Davis a document entitled "Building Supervisor Job Description—Weekend Shift" and told her to read it. The document contained the weekend building supervisor job description, qualifications necessary to perform the job, the job requirements, and 14 job duties.[9] After a brief discussion, Stinski asked Davis whether she had any problems with her job duties as weekend building supervisor. Davis replied that she had a problem if the described duties meant that she could not pursue protection for herself or other employees. After Stinski asked why Davis was antimanagement and Davis asked why Stinski was afraid of unions, Levich ended the meeting with the statement that this was serious business, Westwood was playing hardball, and that could mean Davis' job.

On March 26, Stinski held a meeting with Levich, Staska, Moffitt, Walburg, Wandersee, Davis, and Duerr. Stinski gave each their respective job descriptions and had them read their individual job descriptions. After a brief discussion, James Dawson, the Respondent's counsel, joined the meeting. Dawson stated that those present were Westwood's management team and that as supervisors they were barred from engaging in union activities. Dawson added that he understood the nurses were exploring representation by Local 113 and asked what issues were troubling the nurses. Davis and Duerr responded that the nurses were concerned about short staffing and wage problems. Dawson advised those present that he would be assigning each of them to talk to two or three nurses to find out their views regarding union representation and to try to dissuade them from supporting the Union. Also on March 26, Levich told Duerr that she had heard that Duerr was going to host a union meeting at her home the following evening. Levich hoped that this wasn't true. Duerr denied it.

On the following day, March 27, a substantial number of Westwood nurses attended a meeting at the VFW hall, where the meeting originally to be held at Duerr's home had been relocated. A Local 113 official addressed the nurses. A sufficient number of them, including Davis and Duerr, signed authorization cards to allow Local 113 to petition for certification.

On March 28, Levich suspended Davis and Duerr for defying her instructions not to attend union meetings and informed them that they were suspended indefinitely for such attendance. On April 3, Stinski and Levich met with Davis and Duerr. Stinski asked them why they had attended a union meeting when they had been told that they were supervisors and therefore barred from attending such meetings. Davis and Duerr responded that being told they were supervisors did not make them supervisors and that they believed that they could do what they pleased during their nonworking time. After a brief discussion of the issues that were troubling the nurses, Stinski offered to accept their resignations. When Davis and Duerr refused to resign, Stinski discharged them for engaging in union activities while employed as supervisors.

On April 5, Local 113 filed petitions with Region 18 seeking to represent the Westwood nurses in two separate units, the first to include all full-time and regularly scheduled registered nurses (Case 18–RC–15000), and the second to include all full-time and regularly scheduled LPNs (Case 18–RC–15002). Prior to the election, the parties stipulated that Walburg, the p.m. building supervisor, should be excluded from the bargaining unit as a statutory supervisor. Local 113 did not contest the Respondent's contention that Moffitt, the second-floor nurse manager, and Wandersee, the night building supervisor, should also be excluded as statutory supervisors. The Union lost the August 2 election.

[8] The contents of this document are set out in full at sec. II,A,7 of the judge's decision and are therefore not repeated here. We note, however, that the duties set out included the following:

> 13. Discipline employees including direct authority to issue oral and written warnings and to suspend employees and to make recommendations to the Director of Nursing regarding the termination of employees.

[9] The contents of this document are set out at sec. II,A,7 of the judge's decision and are therefore not repeated here. We note, however, that the listed duties include the following:

> 12. Disciplines employees including direct authority to issue oral and written warnings and to suspend employees and make recommendations to the Director of Nursing regarding the termination of employees.

As set out above, the issue here is whether Davis and Duerr were statutory supervisors prior to February 22, the date the Respondent first learned of their union activity. The judge found that they were supervisors, based on his findings, inter alia, that both prior to and after February 22, Davis and Duerr had the authority to assign, reassign, and transfer employees as the need arose; to call-in and release employees as the need arose; to conduct performance evaluations; to issue verbal and written disciplinary warnings and to suspend employees; and to grant overtime. Although noting that Davis and Duerr had not exercised all the duties assigned to them, the judge, relying on *Riverchase Health Care Center*, 304 NLRB 861, 862 fn. 9 (1991), found that this was not dispositive of the issue because "it is the possession of supervisory power rather than its exercise that determines supervisory status." Id.

While we agree with the judge's result, we are mindful that the *Riverchase* language relied on by the judge further states that:

> [T]he Employer is not absolved, in the first instance, of establishing that [the employees at issue] actually possess supervisory authority. Thus, we examine the evidence in light of the 2(11) criteria to determine whether [the employees at issue] employed by this Employer possess sufficient authority to warrant a finding that they are statutory supervisors.[10] [Id. at fn. 9.]

As explained in *Lakeview Health Center*, 308 NLRB 75, 78 (1992) (citations omitted):

> To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in the Act. Rather, possession of any one of them is sufficient to confer supervisory status. . . . [In determining whether an employee is a statutory supervisor] the decisive question is whether the employee has been found to possess the authority to use independent judgment with respect to the exercise of one or more of the specific authorities listed in the Act. Moreover, in connection with the authority to recommend actions, Section 2(11) of the Act requires that the recommendations must be effective. The burden of proving that one is a supervisor rests on the party alleging that such status exists.

In finding, in agreement with the judge, that the Respondent has satisfied its burden here, we rely primarily on the judge's findings that Davis and Duerr, both before and after February 22, had the authority to discipline employees within the meaning of Section 2(11) of the Act.[11]

Initially, we note that at the late December 1990 meeting at which Staska and Levich reviewed the new position of nurse manager with Moffitt and Duerr, one of the duties listed in the tentative job description (G.C. Exh. 11) was "Participation in evaluation of employee performance and disciplinary action." According to Moffitt's uncontradicted testimony, when she asked Staska and Levich what they meant by "participation," Levich told her that she was "to do both the evaluations and the discipline of all the staff on the second floor." When Moffitt asked what Levich meant by "discipline," Levich replied "oral, written, and suspension." Further, according to Moffitt's uncontroverted testimony, at the February 4 meeting of building supervisors and nurse managers, Levich told them that they had the authority to issue oral and written warnings, to suspend, and to recommend termination.[12] Similarly, Walburg, the p.m. building supervisor, also testified without contradiction that at the February 4 meeting Levich told the nurse managers and building supervisors that they had the authority to issue oral and written warnings and to suspend.[13] Further, according to Levich's uncontradicted testimony, she has never independently investigated a suspension or a recommendation that an employee be terminated by a nurse manager or a building supervisor. Accordingly, we find that at least as of February 4, the Respondent assigned to the building supervisors and nurse managers, including Davis and Duerr, the authority effectively to suspend employees and effectively to recommend their termination within the meaning of Section 2(11) of the Act. We find from this that Davis and Duerr accepted the positions with the understanding that they would have such authority. That such authority may have been "codified" in the March 25 job description does not alter the fact that the Respondent assigned such authority to the building supervisors and nurse managers prior to February 22. Based on the above, we find that the Respondent has met its burden of showing that Davis and Duerr were statutory supervisors prior to February the

[10] Sec. 2(11) of the Act defines a "supervisor" as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[11] Since we find that Davis and Duerr were statutory supervisors on this basis, we need not address the issue of whether their authority to conduct evaluations constituted supervisory authority under Sec. 2(11) of the Act. Nor need we address the issue of whether Davis and Duerr had the authority under Sec. 2(11) to responsibly direct other employees.

[12] The General Counsel and the Charging Party argue that because two employees who were found eligible to vote in the August 2 election, Lindeberg and Ebert, were present at this meeting, the Respondent's instructions to the building supervisors and nurse managers regarding the discipline of employees were not sufficient to establish supervisory status. We find, however, that Lindeberg's and Ebert's mere presence at the February 4 meeting does not affect our finding that the Respondent imbued the building supervisors and nurse managers with supervisory authority at the February 4 meeting, if not earlier.

[13] Wandersee, the night building supervisor, did not attend this meeting because she was on duty.

the date the Respondent first learned of their union activity.

Finally, while not dispositive of the issue, we note that the Petitioner does not dispute that Moffitt, the other nurse manager whose duties were comparable to those of Nurse Manager Duerr, and Walburg and Wandersee, the other building managers whose duties were comparable to those of weekend Building Supervisor Davis, were statutory supervisors. In this regard, as set out above, Local 113 and the Respondent stipulated prior to the election that Walburg was a statutory supervisor and Local 113 did not contest the Respondent's contention that Moffitt and Wandersee were also statutory supervisors. In these circumstances, where Moffitt and Duerr were both present when Staska and Levich explained their duties as nurse managers in late December 1990, including the duty to discipline employees, and where both Davis and Duerr were present at the February 4 meeting where Staska and Levich made clear that the building supervisors and nurse managers had the authority effectively to discipline employees, it would be anomalous indeed to find that Davis and Duerr, who possessed the same supervisory authority in this regard as did Moffitt, Walburg, and Wandersee, somehow were not statutory supervisors. We find no grounds for reaching such a result here.[14]

For these reasons, we agree with the judge that Davis and Duerr were bona fide statutory supervisors prior to February 22 and that therefore the Respondent did not violate Section 8(a)(3) and (1) when it discharged them for engaging in union activity under the Board's holding in *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), affd. sub nom. *Automobile Salesmen Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1988), and its progeny.

II. THE ALLEGED 8(a)(1) ALLEGATIONS RELATING TO PLOURDE AND BRILL

The complaint alleged, inter alia, that the Respondent had violated Section 8(a)(1) of the Act by unlawful interrogations, creation of the impression of surveillance, and certain unlawful statements.[15] Evidence of such conduct directed toward LPNs Plourde and Brill was introduced. The judge found that the Respondent had violated Section 8(a)(1) through a statement to Brill suggesting that she would have been more severely disciplined for absenteeism had she been represented by the Union, but he dismissed other allegations pertaining to these two employees. The General Counsel and the Charging Party have excepted to the dismissals. We find merit in certain of their exceptions, as explained below.

1. Applicable principles

We agree with our dissenting colleague that the applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation is the totality-of-the-circumstances test adopted by the Board in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), and adhered to by the Board for the past 15 years.[16] We also agree that in analyzing alleged interrogations under the *Rossmore House* test, it is appropriate to consider what have come to be known as "the *Bourne* factors," so named because they were first set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Those factors are:

> (1) The background, i.e. is there a history of employer hostility and discrimination?
>
> (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
>
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
>
> (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
>
> (5) Truthfulness of the reply.

Unlike our colleague, however, we note that these and other relevant factors "are not to be mechanically applied in each case." 269 NLRB at 1178 fn. 20. As the D.C. Circuit Court of Appeals has similarly noted, determining whether employee questioning violates the Act does not require "strict evaluation of each factor; instead, '[t]he flexibility and deliberately broad focus of this test make clear that the *Bourne* criteria are not prerequisites to a finding of coercive questioning, but rather useful indicia that serve as a starting point for assessing the 'totality of the circumstances.'" *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998),

[14] We also note that the Regional Director's finding in 1984, discussed above, that the p.m., night, and weekend building supervisors at the Bryn Mawr facility were statutory supervisors is consistent with our finding here that Davis is a statutory supervisor.

[15] Sec. 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7." Sec. 7 provides as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

[16] Our dissenting colleague points to a handful of cases—out of the hundreds in which the Board has ruled on interrogation allegations since *Rossmore House* was decided—in which courts have disagreed with the Board's finding that particular questioning was coercive, and contends that they demonstrate that the Board has either expressly or sub silentio abandoned the *Rossmore House* test. As with any test which involves a totality-of-the-circumstances analysis, there will inevitably be disagreements about whether the evidence in a particular case is sufficient for a finding that questioning had a tendency to coerce or restrain the targeted employee or employees in the exercise of Sec. 7 rights. The existence of such occasional disagreements does not, however, mean that the Board is not applying the proper test.

quoting *Timsco, Inc. v. NLRB*, 819 F.2d 1173, 1178 (D.C. Cir. 1987). In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act. Thus, we reject our colleague's suggestion that our analysis must be limited to a formalistic application of the *Bourne* factors to each of the separate incidents alleged to be unlawful. When, as the record reflects was the case here with regard to LPNs Plourde and Brill, employees have been subjected in several different incidents to explicit questioning or implicit pressure to elicit an expression of union sentiments, a proper analysis must take all of those incidents into account rather than considering each one in isolation. Suggestions conveyed in one conversation may contribute to the impact of the next. By the same token, a question that might seem innocuous in its immediate context may, in the light of later events, acquire a more ominous tone. For that reason, in the analysis below of the evidence pertaining to alleged interrogations of Plourde and Brill, we consider the full extent of what each employee experienced before determining whether each was subjected to coercive questioning.[17]

2. Allegations pertaining to employee Joanne Plourde

a. Summary of factual findings

As set out in section I above, union activity at the Respondent's facility began at a February 22 Westwood nurses' support group meeting, to which a representative of the MNA had been invited by LPN Davis and at which union authorization cards were distributed. It was clear that Director of Nursing Levich and Administrator Stinski knew about the union activity at the meeting soon afterward, since Stinski told Davis on February 24 that she had heard the nurses were investigating union representation. On February 25, when Levich encountered Plourde in a stairwell, she asked Plourde whether she had attended the meeting. Plourde said, "No, I didn't go." Levich nonetheless persisted, asking Plourde "what went on there." Plourde repeated, "I didn't go. I don't know."[18] Plourde had in fact known about the meeting from Davis and Duerr.[19] Two days later, on February 27, Plourde attended a mandatory meeting of LPNs conducted by Levich and Stinski. Levich commented at that meeting that the nurses support meeting "had turned into a union meeting," thereby making clear that she knew the nurses had been discussing unions. Both she and Stinksi then said they wanted to know what issues were concerning the nurses, and expressed the view that the nurses should be coming to them with any problems they might have. Levich told the LPNs that she took the matter "personally" and saw unionization as a threat to her and her job.

In early March, in the evening, at a time Levich was not normally on duty, she telephoned Plourde at her work station wanting to know why, as Levich had heard, Plourde was "concerned" over the termination of another nurse, Lois Forliti. When Plourde said she had heard that Forliti was fired because she was "pro-union," Levich denied that and said that Forliti had been "coached" to say it. Levich then asked Plourde how she "felt about things." Plourde mentioned some concerns, such as raises, and stated that she would reflect upon her "feelings" about such matters during her upcoming vacation and talk to Levich about it afterwards. Levich agreed that Plourde should consider any problems she had with Westwood, and added that "we [don't] need any outside help." Levich again said she was "taking this very personally."

In early April, after the Respondent had discharged LPN Davis and RN Duerr because they had, against orders, engaged in union activities, Levich called Plourde at her work station, directing her to come to Levich's office and then taking her down to the first floor lounge, where they could talk "privately."[20] Levich said she wanted to explain why Davis and Duerr had been fired—that she had to fire them because "they went to a union meeting and they were not supposed to do that because

[17] As our dissenting colleague correctly notes, the Board's standard for evaluating alleged violations of Sec. 8(a)(1)—whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights—is an "objective" standard. To say that the standard is objective, however, means that it does not take into account either the motive of the employer or the actual impact on the employee. See, e.g., *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999) (under objective test, employer's motivation for the statement or the act is irrelevant, as is whether or not a particular employee was actually coerced or considered himself to be coerced); *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981) (inquiry under Sec. 8(a)(1) is an objective one which examines not whether the employer intended, or the employee perceived, any coercive effect but whether the employer's actions would tend to coerce a reasonable employee). It does not mean, as our colleague seems to suggest, that the standard is to be mechanically applied, or that in evaluating whether, under all the circumstances, an alleged interrogation had a reasonable tendency to coerce, the Board is barred from taking into account events or statements that occurred before or after the particular incident in question that may throw light on its significance. An employee may reasonably come to realize only after the fact, in light of subsequent statements or events, that seemingly benign questions were actually efforts to ferret out his union sentiments by an employer hostile to union activity. Thus, our dissenting colleague is simply wrong in asserting that by considering the full context in which the particular events at issue here occurred, we are abandoning the traditional objective test and "applying *sub silentio* a subjective standard."

[18] There was no specific complaint allegation about this incident, but the Respondent was aware that it was accused of unlawful interrogations, the judge has made the requisite factual findings, and the Respondent has not contended that the issue was not fully litigated. Accordingly, the judge could properly find a violation based on this incident.

[19] This account is based on the testimony of Plourde, whom the judge seems generally to have credited. Levich was not asked about these incidents at the hearing.

[20] Plourde had recalled this incident as occurring in late March, but the judge concluded it occurred in early April because of the references to the Davis and Duerr discharges, which took place on April 3.

they are management." She asked Plourde if she had any "concerns" or "issues" and advised that if she did, she should take them to Levich or Stinski because Plourde "didn't need any outside help." Levich also pressed Plourde for an explanation why "Pam [Davis] would do this to us." Levich said again she was "taking this very personally." When she asked Plourde how she "felt," Plourde interpreted the question as a question about union sentiments and replied that she wanted "to stay neutral." Levich responded: "You can't stay neutral. You need to take a side. It just doesn't work like that and we need you on our side." Plourde didn't respond.

On April 20, about 2 weeks after Local 113 filed its representation petition for an election among the Respondent's nurses, Plourde was summoned to a meeting at which, because two other invited employees failed to appear, she was the only nonmanagement participant. Stinski reviewed once again the Respondent's reasons for firing Davis and Duerr. Both Stinski and Levich asked Plourde why "Pam [is] doing this to us." Plourde testified that Stinski and Levich seemed clearly aware that "Pam was the main organizer." Stinski stated that a union creates "a house divided" and said they wanted Plourde "on our side." They asked Plourde what her own "issues" were, and brought up the subject of union cards. Levich started to ask Plourde whether she had signed one, but then stopped, saying that perhaps she couldn't ask that. She advised Plourde that if she had signed a card, she could get it back.

b. Analysis

The judge found (1) that the February 27 meeting at which the LPNs were quizzed about what issues or problems were concerning them was prompted by management's awareness that the nurses had recently been exploring union representation, (2) that the meeting was unprecedented in nature, and (3) that, at that meeting, Levich and Stinski were essentially soliciting grievances and impliedly promising to remedy them, in violation of Section 8(a)(1) of the Act. He concluded, however, that, apart from that meeting, nothing in the record suggested that Plourde had at any time been coercively interrogated about her union sentiments or was otherwise the victim of unfair labor practices. We agree with the judge that the Respondent unlawfully solicited grievances at the February 27 meeting, but we disagree with his dismissal of the other allegations pertaining to Plourde, which involve essentially four incidents.

To be sure, if nothing more had occurred to Plourde than the initial stairway conversation with Levich in which unions were not mentioned, or Levich's later question about how Plourde felt "about things," we would not likely find that a violation of Section 8(a)(1) had occurred. But given the whole course of events, including the February 27 meeting, Plourde could not, in retrospect, have viewed the question about the February 22 meeting as innocuous or the later question about how she felt "about things" as an inquiry unrelated to her stance on unions.

An analysis of the *Bourne* factors militates in favor of a finding that Plourde was unlawfully interrogated. Both Stinski and Levich were high level managers. The questioning sometimes occurred at unusual times or in unusual settings—on one occasion Levich calling Plourde at a time when Levich usually was not on duty, on another taking her down to the lounge for a private conversation, and finally, questioning her in a meeting in which she was the sole employee among six members of management. While Plourde did not give untruthful replies, she failed to give responses on several occasions, and begged to be allowed to remain "neutral."

Finally, and most significantly, the conversations at issue were against "a background of hostility" and unlawful conduct. The judge agreed that, as early as February 27, the Respondent had committed unfair labor practices not only by soliciting grievances, but also by stating that all RNs were forbidden to engage in union activities. Furthermore, in both that February 27 meeting and Levich's telephone conversation with Plourde in early March, Levich emphasized that she was taking the union campaign "personally." Since, in that same conversation, she emphasized that the employees did not need "outside help," Plourde could hardly have regarded the question about what she felt "about things" as unrelated to the union campaign.

Indeed, in the April incident in which Levich took Plourde to the lounge for a "private" conversation, Plourde construed Levich's question about how she "felt" as a question about her views on the union campaign, since she expressed a desire to remain "neutral." In our view, Levich's response that Plourde could not remain neutral, must choose sides, and was wanted on the Respondent's side, not only contributed to the coerciveness of the questioning, but also constituted an independent violation of Section 8(a)(1). Levich thereby clearly implied that Plourde would be regarded as disloyal to the Respondent by not lining up on its side against the Union—an impression reinforced by Levich's anguished question about why "Pam [Davis] is doing this to us."[21] Plourde testified that both Levich and Stinski

[21] See *HarperCollins San Fransciso v. NLRB*, 79 F.3d 1324, 1330 (2d Cir. 1996) (statements equating union support with disloyalty unlawful; hence, violation where company official told employees union effort was "extremely disloyal and ill-conceived."). Accord: *Ferguson-Williams, Inc.,* 322 NLRB 695, 699 (1996) (unlawful to tell employee that her comments in defense of the union had "greatly offended" employer's chief officers); *House Calls, Inc.,* 304 NLRB 311, 313 (1991) (telling employees that by seeking union representation they showed themselves "ingrates" unlawful).

Levich's response to Plourde's attempt to remain neutral could also be viewed as an interrogation in itself, since, as the Fifth Circuit has noted: "unlawful interrogations may occur even when remarks are not 'couched as questions' if an employer agent makes statements that are 'calculated to elicit responses from [employees] about their union sen-

clearly seemed aware that "Pam was the main union organizer." The same disloyalty theme recurred in the April 20 meeting, in Stinski's "house divided" remarks, and renewed insistence that Plourde be on management's "side." Given that context, Levich's advice to Plourde at that meeting that she could get her union card back had the impact of a command rather than a suggestion and made the questioning about Plourde's "issues" and Davis's motives for leading the union campaign all the more coercive.

Finally, although, as set out in section I above, the Respondent did not violate the Act when the Respondent fired Davis and Duerr for their union activities, and therefore could lawfully describe its reasons for the discharges to the other employees, we do not think that those events can simply be ignored in determining how employees reacted to probing of their union sentiments. The explanation of the firings certainly produced an atmosphere of tension for the conversations probing Plourde's "feelings."[22] In this context, contrary to our dissenting colleague, we do not think that the probing of Plourde's sentiments can be dismissed because the questioner's "tone of voice" was not "threatening." As the Fifth Circuit, quoting from the underlying Board opinion has observed:

> [A]n employee is entitled to keep from his employer his views so that the employee may exercise a full and free choice on whether to select the Union or not, uninfluenced by the employer's knowledge or suspicion about those views and the possible reaction toward the employee that his views may stimulate in the employer. That the interrogation might be courteous and low keyed instead of boisterous, rude, and profane does not alter the case.

NLRB v. Laredo Coca Cola Bottling Co., 613 F.2d 1338, 1342 fn. 7 (5th Cir. 1980), cert. denied 449 U.S. 889 (1980), quoting from *Laredo Coca Cola Bottling Co.,* 241 NLRB 167, 172 (1979).

In sum, it is entirely unrealistic, given the extensive control over Plourde's livelihood which Stinski and Levich possessed, to suppose that the series of incidents described above would not tend to coerce Plourde in the exercise of Section 7 rights. We therefore find sufficient record evidence to support a conclusion of law that on February 25, on one occasion in March, and on two occasions in April, agents of the Respondent interrogated LPN Joanne Plourde, in violation of Section 8(a)(1) of the Act, and therefore to support a provision in the order that the Respondent cease and desist from interrogating employees. In our view, each of the April incidents could independently sustain such an order. We need not decide, however, whether the February 25 hallway conversation and the early March telephone call, standing alone, would also suffice, since they were coercive in the context of the entire course of events. We also find a sufficient basis for a separate conclusion of law that the Respondent violated Section 8(a)(1) of the Act by telling Plourde she must take sides on the union campaign and was needed on the Respondent's side against the Union, thereby equating loyalty to the Respondent with opposition to the Union.

3. Allegations pertaining to employee Paula Brill

a. Summary of factual findings

LPN Brill attended the February 22 nurses' support meeting at which the MNA representative appeared and distributed union cards. Like Plourde, Brill was at the February 27 mandatory meeting where Levich asked the LPNs what their "issues" were and described the union campaign as a threat to her and her job. In addition, Brill testified to what appear to be at least three occasions in April when she met with either Assistant Director of Nursing Staska or with Staska together with Director of Nursing Levich.[23] As discussed below, two of those meetings involved explicit or implicit questioning about her union sentiments. At the third, as the judge found, the Respondent, through Levich, unlawfully suggested to Brill that a caution she was receiving for excessive absenteeism would have been a 3-day suspension had the unit employees been represented by Local 113.

Brill was uncertain about exact dates, but placed the first incident, in which Brill was summoned by Staska to a meeting in her office with Staska and Levich, in early April. At that meeting, Staska advised Brill of the reason that union activists Davis and Duerr had been terminated—because they were supervisors and had been directed not to engage in union activity. Levich brought up the name of Alex Larkin, an occupational therapy assistant at the facility, and asked Brill if she knew that Larkin had wanted to become involved in the nurses' union activities and that some of the nurses were upset about this because Larkin was not a nurse.

Brill testified that on an occasion perhaps 2 weeks later she was summoned to Staska's office and advised that she could get a union card back by simply contacting the

timents.'" *NLRB v. McCullough Environmental Services*, 5 F.3d 923, 929 (5th Cir. 1993).

[22] See *V & S ProGalv v. NLRB*, 168 F.3d 270, 279–280 (6th Cir. 1999) (question whether employee had "fun talking with the NLRB yesterday" coercive, despite employer's claim that it was merely a "smart-aleck throw-away line that did not have any negative effect"; court noted that it was "asked in a background cloaked with tension regarding the Union's decertification").

[23] Brill's testimony taken as a whole seems to depict three conversations with management when the subject of the Union was brought up: an early April meeting, another meeting about 2 weeks later, and a third meeting, also around mid-April, just before she was to leave for a doctor's appointment, at which, as discussed below, Brill was threatened that no leniency would be shown for absences if a union came in. Her testimony is not certain on this point, however, and it is possible that, as the judge found, there were four. Whether there were three meetings or four makes no difference to our analysis.

Union. Brill indicated that in that same meeting Staska handed Brill a "sheet of paper" listing things a union could and could not do. She questioned Brill about what Brill thought unions could do. Brill avoided responding.[24]

Also, on a day around the middle of April, Brill reported to Staska's office to obtain permission to leave during her shift to seek treatment for an on-the-job injury. According to the testimony of Brill, whom the judge appears to have credited concerning this conversation, Staska told Brill she was absent from work too much. Brill had received two previous warnings for excessive absences and was at risk for more severe discipline for a third absence. Staska did not impose discipline, however. Rather, she simply gave Brill a "reminder," while observing that if the nurses were represented by Local 113 and were working under a contract between the Respondent and Local 113, Staska would have been required to give Brill a 3-day suspension. While Staska testified that she had "reassured" Brill that absences for back injury were not covered by the Respondent's current disciplinary procedure, she admitted bringing up the subject of "the union activity that was going on" and telling Brill that she "probably would have been suspended by now" if she were covered by the union contract that applied to other facility employees. Staska conceded, however, that a contract would not necessarily "require" the Respondent to suspend Brill under such circumstances but might simply permit it. She testified that she "never thought about that distinction."

b. Analysis

While this is a closer case on interrogation than the allegations regarding Plourde, we agree with the Charging Party and the General Counsel that Brill was interrogated in violation of Section 8(a)(1). Staska's singling out of Brill and summoning her to her office, where Levich questioned her about her knowledge of another employee's activities on behalf of the Union and the reaction of other employees to it, clearly was calculated to elicit infomation about what Brill knew and felt about the Union, and Brill, like Plourde, had been made aware from the February 27 meeting of Levich's view of union activity as a personal threat to her. Furthermore, the appearance Levich gave of possessing a detailed knowledge about the controversy among the nurses over Larkin's union representation aspirations gave the appearance of surveillance of union activity, an independent violation of Section 8(a)(1).[25]

At the second meeting, the one-on-one questioning by Staska about her views of what a union could do for Brill, was coupled with the suggestion that she could get her union card back. Applying the *Bourne* factors, we note that Levich at least was a high-level management official, and Staska was her second in command. Brill was summoned to the supervisory offices and was alone with her questioners; the questioning was against a background of expressed hostility to the union organizational campaign, and the gratuitous advice about getting her union card back was hardly subtle. Also, around the time of the second incident Brill was the target of an unlawful statement regarding the suspension she allegedly would have received for absenteeism had she been represented by Local 113.

In agreement with the judge, and contrary to the Respondent and our dissenting colleague, we find that Staska's comment on Brill's absences, when Brill sought leave to seek treatment for an injury, was a violation of Section 8(a)(1). The Respondent and our colleague contend that the Board's decision in *NTA Graphics*, 303 NLRB 801 (1991), requires a reversal. We disagree. In *NTA Graphics*, the judge credited a supervisor's testimony that, while holding a union contract in his hand, he told an employee that under that contract the employee could effectively suffer a demotion because he could be required to enter a union apprentice program that might take up to 4 years and it could take up to 8 years for him to become a journeyman pressman. The Board agreed with the judge's finding that that description of the union contract apprenticeship provision was not unlawful. In the present case, Staska did not merely discuss what could happen under a union contract. In giving Brill the "reminder" she essentially suggested that Brill was receiving an exemption from punishment for a third infraction, while threatening that a 3-day suspension would be a certainty under a union contract. She thereby unlawfully implied that the Respondent would apply applicable disciplinary procedures leniently if there were no union and strictly if the employees were under a union contract. Contrary to our dissenting colleague, we cannot conclude that Staska's mere reference to the contract negated the coerciveness of her remarks, particularly in light of Staska's admission that she had no firm basis for sug-

[24] Although the record is not entirely clear, we disagree with our dissenting colleague that the questioning about what Brill thought unions could do occurred in the first meeting, described above, rather than at this second meeting. In any event, our finding, discussed below, that this questioning was coercive is unaffected by whether the questioning occurred at this meeting, at the earlier April meeting or, as the judge seemed to think, at a separate fourth meeting later in the month.

[25] See, e.g., *Adderley Industries*, 322 NLRB 1016, 1024 (1997) (unlawful impression of surveillance where manager identified two employees as having signed union cards and said he knew why they signed); *Flexsteel Industries*, 311 NLRB 257 (1993) (unlawful to tell employee that manager had "heard" rumors about the employee's union activity; irrelevant whether employer had actually spied on employees, since the impression of monitoring alone is coercive); *United Charter Service*, 306 NLRB 150, 150–151 (1992) (supervisor's statements suggested surveillance because he "went into detail" about union issues reportedly discussed by employees).

gesting that a suspension would be mandatory under a union contract.

4. Summary

In sum, we cannot agree with our dissenting colleague that employees Plourde and Brill were merely the targets of questioning that was innocuous because it was done in a "normal" tone and was not coupled with threats of reprisal. We also do not agree that the Respondent did not independently violate Section 8(a)(1) in the other ways discussed above. In so finding, we have not disregarded the Respondent's right to free speech, but rather have concluded that the incidents we have found unlawful went beyond persuasion or expression of opinion and amounted to coercive pressure on these two employees to reveal their thinking about the ongoing union activity and abandon any support they might have been inclined to give the Union.

AMENDED CONCLUSIONS OF LAW

The following are substituted for the judge's conclusions of law.

1. At all pertinent times, the Respondent was an employer engaged in commerce within the meaning of Section 2(2) of the Act.

2. At all pertinent times, MNA and Local 113 were labor organizations within the meaning of Section 2(5) of the Act.

3. At all pertinent times, Stinski, Levich, Staska, Moffitt, Duerr, Walburg, Wandersee, and Davis were supervisors and agents of the Respondent acting on its behalf within the meaning of Section 2(11) of the Act.

4. The Respondent violated Section 8(a)(1) of the Act by:

(a) Levich's February 25 interrogation of Plourde concerning what happened at the February 22 nurses meeting.

(b) Stinski's February 27 solicitation of employee grievances or complaints, followed by her and Staska's addressing and resolving grievances or complaints expressed by employees.

(c) Stinski's February 27 statement that all the RNs were supervisors barred from union activities.

(d) Levich's April interrogation of Brill and creation of the impression of surveillance.

(e) Levich's April interrogation of Plourde regarding Plourde's concerns.

(f) Levich's April solicitation of Plourde's grievances followed by Levich's implied promise to resolve those grievances.

(g) Levich's April interrogation of Plourde regarding her union sympathies and direction that Plourde be loyal to the Respondent.

(h) Stinski's April 20 interrogation of Plourde regarding her union sympathies and her direction that Plourde abandon the Union.

(i) Stinski's April 20 solicitation of grievances and her implied promise to resolve those grievances.

(j) Either Stinski's or Levich's April 20 solicitation of Plourde to revoke her authorization card.

(k) Staska's April solicitation of Brill to revoke her authorization card.

(l) Staska's April interrogation of Brill regarding her union sympathies.

(m) Staska's April statement that, had Brill been Local 113-represented, she would have been subject to discipline for excessive absenteeism.

ORDER

The National Labor Relations Board orders that the Respondent, Westwood Health Care Center, a division of Medcare Associates, Inc., St. Louis Park, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting and actually or by implication promising to resolve employee complaints or grievances in order to discourage the employees' interest and exploration of union representation to resolve their complaints or grievances.

(b) Interrogating employees concerning their union sympathies.

(c) Telling employees they are supervisors barred from engaging in union activities to discourage their engagement in those activities.

(d) Telling employees that they cannot maintain neutrality regarding the Union.

(e) Soliciting employees to revoke their authorization cards.

(f) Telling any employee that, but for the fact that the employee was not currently represented by Local 113, the employee would be disciplined but, since the employee was not currently represented, the employee would merely be cautioned to avoid continued transgression of the Respondent's rules.

(g) Creating the impression of surveillance of employees' union activity.

(h) 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 policies of the Act.

(a) Within 14 days after service by the Region, post at its St. Louis Park, Minnesota facility copies of the attached notice marked "Appendix."[26] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent

[26] 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."

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 February 25, 1991.

(b) 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.

MEMBER BRAME, concurring in part and dissenting in part.

I agree with my colleagues, for the reasons set out by the judge, that Registered Nurse (RN) Nancy Duerr and Licensed Practical Nurse (LPN) Pamela Davis were statutory supervisors and that the Respondent had promoted them to such positions prior to the Respondent's learning of the nurses' union activities. I therefore adopt the judge's finding that the Respondent did not violate Section 8(a)(3) of the Act when it discharged Davis and Duerr for engaging in union activity.

I do not agree, however, with my colleagues' decision to reverse the judge and find that the Respondent violated Section 8(a)(1) of the Act by, inter alia, interrogating (LPNs) Joanne Plourde and Paula Brill. Rather, I agree with the judge, for the reasons set out below, that the questionings at issue here were not unlawful because neither the words themselves nor the context in which they were uttered constituted coercive conduct that might interfere with the nurses' Section 7 right to engage in union activities. Before discussing each of the alleged unlawful interrogations relating to Plourde and Brill, however, it is necessary to review the analysis of interrogations employed by the courts and the Board. I will then set out the appropriate analysis for determining whether "it may reasonably be said [that an alleged unlawful interrogation] tends to interfere with the free exercise of employee rights under the Act."[1] Finally, I will apply this analysis to the facts of this case.

[1] *American Freightways Co.,* 124 NLRB 146, 147 (1959) (footnote omitted):

> It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.

I. INTERROGATION ANALYSIS

A. The Board and the Courts

From its earliest days, the Board insisted on strict employer neutrality[2] and regarded an employer's inquiries of its employees concerning unions and unionization as per se violations of the Act.[3] The Board set out its rationale for treating such questions as *per se* unlawful in *Standard-Coosa-Thatcher Co.,* 85 NLRB 1358 (1949), a case in which the Board adopted the trial examiner's findings[4] that the respondent had violated Section 8(a)(1) by, inter alia, supervisors' questioning of employees concerning their attendance at union meetings, union membership, union sympathies, reasons for joining or sympathizing with the union, and concerning their voting intentions. Id. at 1358–1359. The Board explained that

> [i]nherent in the very nature of the rights protected by Section 7 [i.e., to engage in organization and association] is the concomitant *right of privacy* in their enjoyment—"full freedom" from employer intermeddling, intrusion, or even knowledge. . . . [Thus, w]henever an employer directly or indirectly attempts to secure information concerning the manner in which or the extent to which his employees have chosen to engage in union organization or other concerted activity, he invades an area guaranteed to be exclusively the business and concern of his employees. [Id. at 1360, emphasis added.]

The courts, however, had a different view. In *Jacksonville Paper Co. v. NLRB*, 137 F.2d 148 (1943), the Fifth Circuit, citing the Supreme Court's decision in *NLRB v. Virginia Power Co.,* 314 U.S. 469 (1941),[5] explained that

[2] As explained in Ian M. Adams & Richard L. Wyatt Jr., *Free Speech and Administrative Agency Deference: Section 8(c) and the National Labor Relations Board—An Expostulation on Preserving the First Amendment*, 22 J. of Contemp. Law 19, 22 (1996) (footnotes omitted):

> One of the newly constituted Board's first actions was to hold that all speech on the part of the employer in the context of a union election was an unfair labor practice. This Board policy, sometimes referred to as the doctrine of "strict neutrality" was based on the premise that the hostile background and history of labor relations, and the economic dependence of workers on their employer made any statement by an employer about unions "coercive."

As Adams & Wyatt went on to observe, "[t]his doctrine virtually obliterated the First Amendment rights of employers and was harshly criticized by a number of circuit courts." Id. at 22–23 and fn. 22. See also James W. Wimberly Jr. & Martin H. Steckel, *NLRB Campaign Laboratory Conditions Doctrine and Free Speech Revisited*, 32 Mercer L. Rev. 535, 536–537 (1981*); Comment, Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections*, 127 U. Pa. L. Rev. 755, 756–758 (1979).

[3] See, e.g., *Greensboro Lumber Co.,* 1 NLRB 629 (1936).

[4] The title "Trial Examiner" was changed to "Administrative Law Judge" in 1972.

[5] In *NLRB v. Virginia Power Co.,* 314 U.S 469 (1941), the Supreme Court rejected the Board's strict neutrality rule and affirmed the First Amendment right of employers under the jurisdiction of the National Labor Relations Act to express their views on unions and unionization so long as such expressions were not coercive in nature:

> The Act does not take away the employer's right to freedom of speech. The constitutional right of freedom of speech could not be so abridged as to preclude an employer from expressing his views on labor policy or problems so long as such utterances do not, by reason of other circumstances, have a coercive effect on employees. [Id. at 152.]

Significantly, in *Jacksonville Paper Co.*, the Fifth Circuit recognized that the First Amendment's guarantee of freedom of speech was broad enough to protect not only an employer's right to express his opinion, whether good or bad, about a union's leaders, but also the "right to inquire if the Union was organized or if it ha[d] 'washed up.'" Id. In this regard, the court found that an employer "is not precluded by the Act from inquiring or being informed as to the progress of the efforts at unionization." Id. Applying this analysis to the facts of the case before it, the court held that the respondent's general manager's inquiries of an employee as to whether he belonged to the union and what he expected to gain by belonging to the union, and, on a subsequent occasion, whether the union was "washed up," were not unlawful. The court found, in effect, that the inquiries were protected by the First Amendment, and that they did not lose that protection because they were not accompanied by any threatening, coercive, or punitive action forbidden by the Act. Id.[6]

With the enactment of Section 8(c), included in the 1947 Taft-Hartley amendments to the Act, Congress wrote into the Act itself the constitutional guarantee of freedom of speech earlier upheld by the Supreme Court in *Virginia Power Co.,* supra. Section 8(c) provides that

> [t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Even after *Jacksonville Paper*, supra, and the enactment of Section 8(c), the Board continued to find that interrogations were per se unlawful. In deciding that even noncoercive interrogations were not protected by Section 8(c), the Board reasoned that "[i]nterrogation cannot be considered an expression of 'views, arguments, or opinion' within the meaning of that provision." *Standard-Coosa-Thatcher Co.,* 85 NLRB at 1360.

The circuit courts of appeal, however, recognized that Section 8(c) afforded statutory protection to an employer's right to inquire of its employees about unions and unionization. In *NLRB v. Montgomery Ward & Co.,* 192 F.2d 160, 163 (2d Cir. 1951), for example, the court held, contrary to the Board, that a manager's questioning of one employee regarding whether she had received a union application blank and whether she "was going to be on his side," and of another employee regarding whether she had received a union card and letter, were not unlawful. In reaching this conclusion, the court explained that

> [i]nquiries made by the manager concerning what was being done in behalf of the union, and statements as to his not liking the union, to the extent that they constituted no threat or intimidation, or promise of favor or benefit in return for resistance to the union, were not unlawful, particularly after the 1947 amendment of the Act found in § 8(c), 29 U.S.C.A. § 158(c).

In *NLRB v. Associated Dry Goods Corp.,* 209 F.2d 593, 595 (1954), the Second Circuit adhered to its decision in *NLRB v. Montgomery Ward & Co.,* supra, and noted that its decision in that case was supported by the decisions of other circuits in *Wayside Press, Inc. v. NLRB*, 206 F.2d 862 (9th Cir. 1953); *NLRB v. England Bros.,* 201 F.2d 395 (1st Cir. 1953); and *NLRB v. Arthur Winer, Inc.,* 194 F.2d 370 (7th Cir. 1952). Other circuits also rejected the Board's view that interrogations were per se unlawful. See, e.g., *NLRB. v. Fuchs Baking Co.,* 207 F.2d 737 (5th Cir. 1953); *NLRB v. Tennessee Coach Co.,* 191 F.2d 546 (6th Cir. 1951); *NLRB v. Protein Blenders,* 215 F.2d 749 (8th Cir. 1954); and *Atlas Life Ins. Co. v. NLRB*, 195 F.2d 136 (10th Cir. 1952).

In *Blue Flash Express*, 109 NLRB 591 (1954), the Board finally abandoned the position that all questions regarding unions and unionization were per se unlawful in favor of a test as to "whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act." Id. at 594. The Board applied the *Blue Flash* test for over two decades, only to abandon it in *PPG Industries*, 251 NLRB 1146 (1980), and return to the per se standard for interrogations, which it had applied prior to *Blue Flash*. Finally, in *Rossmore House*,

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Neither the Act nor the Board's order here enjoins the employer from expressing its view on labor policies or problems, nor is a penalty imposed upon it because of any utterances which it has made. The sanctions of the Act are imposed not in punishment of the employer but for the protection of the employees. [Id. at 477.]

[6] Applying a similar analysis, the Seventh Circuit, in *Sax v. NLRB*, 171 F.2d 769 (1948), reversed the Board's findings that the respondent had violated Sec. 8(a)(1) of the Act by interrogating its employees about their union membership and organizational activities. In this regard, the Board had found unlawful a production supervisor's inquiring of a striking employee whether she was for the union and, upon her response that she was, her reasons therefor; his inquiring of two other striking employees why they had signed union cards; and his inquiring of one of these striking employees why she had not come to the employer if she wanted to have a union. In finding that these inquiries were not unlawful, the court held that

> [s]uch perfunctory, innocuous remarks and queries, standing alone as they do in this case, are insufficient to support a finding of a violation of Section 8[(a)](1). They come instead within the protection of free speech protected by the First Amendment to the Federal Constitution. The Supreme Court indicated that speech would not be sufficient to sustain a finding of a violation of Sec. 8[a](1) in *NLRB v. Virginia Power Co.,* 314 U.S. 469.

[Id. at 772.]

269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), discussed infra, the Board overruled *PPG Industries* and returned to the "all of the circumstances" test first announced in *Blue Flash*, supra.

While the Board has vacillated in its interrogation analysis, courts have continued to hold that "interrogation of employees is not illegal per se," and that only when "either the words themselves or the context in which they are used . . . suggest an element of coercion or interference," does interrogation violate Section 8(a)(1) of the Act.[7] The courts have also reaffirmed the right of employers, under Section 8(c), to ask their employees noncoercive questions during a union campaign. As the Third Circuit explained in *Graham Architectural Products v. NLRB*, 697 F.2d 534, 541 (1983), rehearing and rehearing en banc denied, 706 F.2d 441 (1983), modified 112 LRRM 3111 (1983), reversing three of the Board's findings of unlawful interrogation,

> [a]s the United States Supreme Court recognized in *NLRB v. Gissel Packing Co.,* 395 U.S. 575 . . . (1969), the First Amendment permits employers to communicate with their employees concerning an ongoing union organizing campaign "so long as the communications do not contain a threat of reprisal or force or promise of benefit." *Id.* at 618, 89 S.Ct. at 1942.[8] This right is recognized in section 8(c) of the Act. If section 8(a)(1) of the Act deprived the employers of any right to ask non-coercive questions of their employees during such a campaign, the Act would directly collide with the Constitution. *What the Act proscribes is only those instances of true "interrogation" which tend to interfere with the employees' right to organize.* [Emphasis added.]

A central problem, of course, is how to define "true 'interrogation.'" For while the Board, in finding interrogations *per se* unlawful, necessarily construed the word "interrogation" as at least implying coercion, the definition of the word "interrogation" contains no such implication.[9] As the Seventh Circuit observed in *Sioux Products, Inc. v. NLRB*, 684 F.2d 1251, 1256 fn. 7 (1982):

> Once a conversation is labelled "interrogation," it is quite easy—indeed, appealing—to find a section 8(a)(1) violation. But the label "interrogation" must be used with some restraint.

Therefore, the Board must eschew equating noncoercive questioning with "true 'interrogation.'" For, as explained in *Sax v. NLRB*, 171 F.2d at 773:

> Mere words of interrogation or perfunctory remarks not threatening or intimidating in themselves made by an employer with no anti-union background and not associated as a part of a pattern or course of conduct hostile to unionism or as part of espionage upon employees cannot, standing naked and alone, support a finding of a violation of Section 8[a](1).

Consequently, to satisfy his burden of establishing that an employer's questioning of an employee is unlawful, the General Counsel must do more than argue that an inquiry is an interrogation. The General Counsel must show that the inquiry is, in fact, coercive.

To assist in determining whether an employer's questioning of an employee is a "true interrogation," the Second Circuit, in *Bourne v. NLRB*, 332 F. 2d 47, 48 (1964), explained that it would not find interrogations, nonthreatening in themselves, to be unfair labor practices unless they met "fairly severe standards," including:

> (1) The background, i.e. is there a history of employer hostility and discrimination?
>
> (2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?
>
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
>
> (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality"?
>
> (5) Truthfulness of the reply.[10]

Applying these factors to the interrogation at issue in *Bourne*, the court found "that the interrogation involved here did not in any realistic sense meet the tests set forth [above]." Id. at 48. In this regard, the court found that:

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[7] *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980).

[8] In *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), the Supreme Court addressed the relationship of an employer's right of free speech, as protected by Sec. 8(c), and its employees' rights to engage in activities protected by Sec. 7 of the Act. While reaffirming the constitutional right of an employer to express its views on unions and unionization, the Court explained that this right is not absolute, but must be interpreted in the context of its employees' rights, "rights . . . embodied in § 7 and protected by § 8(a)(1) and the proviso to § 8(c)." Id. at 617. In determining whether employer speech contains an element of coercion that would interfere with the employees in the exercise of their Sec.7 rights, the *Gissel* Court instructed that one must consider the "necessary tendency of [employees] . . . to pick up intended implications of [their employers] that might be more readily dismissed by a more disinterested ear." Id.

[9] See, e.g., Webster's New Collegiate Dictionary (revd. 1961), which defines "interrogate" as "To question; esp., to examine by asking questions[.]"

[10] As observed in*, Teamsters Local 633 v. NLRB*, 509 F.2d 490, 494 (D.C. Cir. 1974) (footnotes omitted):

> Virtually every Circuit Court of Appeals has adopted, explicitly or implicitly, the *Bourne* factors and we think that these factors supply the proper starting place for judicial and administrative analysis of whether particular employer questioning was in the totality of circumstances "coercive" or merely persuasive.

(1) There [was] very little to show any pattern of employer hostility and discrimination.

(2) The information sought was quite general. "How is the union doing?"; "Are the employees for the union?" rather than specifically "Who are the ring leaders?" "Who has joined?" etc.

(3) The principal interrogation was by low ranking supervisors.

(4) The employees were interrogated informally while at work.

(5) In general the replies were truthful, i.e.[,] there was no evidence that the interrogation actually inspired fear.

Other factors which may be helpful in determining whether a particular inquiry is coercive are the tone, duration, and purpose of the questioning and whether it is repeated. See, e.g., *NLRB v. Champion Laboratories, Inc.,* 99 F.3d 223, 227 (7th Cir. 1996).

As to the Board, as noted, in *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), it abandoned for a second time a per se approach to interrogations and announced that henceforth it would apply a test to determine whether alleged unlawful interrogations violated the Act, i.e., "whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act."[11] In reaching this conclusion, the majority observed that this view was "consonant" with that expressed by the Seventh Circuit in *Midwest Stock Exchange v. NLRB*, 635 F.2d at 1267, that interrogation of employees is not *per se* unlawful, and that of the Third Circuit in *Graham Architectural Products v. NLRB*, 697 F.2d at 541, that the Act would directly collide with the Constitution if Section 8(a)(1) deprived employers of any right to ask noncoercive questions of their employees during a campaign. Id. Finally, in a footnote, the majority noted and rejected the dissent's contention that under its decision the majority would not weigh the setting and nature of interrogations involving open and active union supporters. In affirming that it would examine on a case-by-case basis whether alleged interrogations were unlawful, the majority announced that four of the five *Bourne* factors, set out above, were relevant in analyzing alleged interrogations. Specifically, the majority stated that the following *Bourne* factors may be considered in determining whether an alleged interrogation is unlawful: (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation.[12] The majority concluded, however, that

> [t]hese and other relevant factors are not to be mechanically applied in each case. Rather, they represent some areas of inquiry that may be considered in applying the *Blue Flash* test of whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.[13]

The Board's belated acquiescence in the courts' rejection of a per se interrogation standard in *Rossmore House,* however, did not erase the effects of its historical rejection of employer speech rights. The difference may come in the order of approach: courts, unlike the Board, have from the beginning recognized the employer's right to freedom of speech, as defined by the First Amendment and codified by Section 8(c). By beginning with the right, courts more readily protect it, and therefore demand proof of coercion or promise of benefit before they will intrude upon that right.[14] By contrast, the Board's hesitancy in acknowledging the legitimacy of this employer right has led the Board to neglect it. The result is apparent in the number of cases in which the courts have reversed the Board's findings of 8(a)(1) violations arising from alleged unlawful interrogations.[15]

[11] See supra.

[12] *Rossmore House*, 269 NLRB at 1178 fn. 20.

[13] Id. In *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), the Board extended the *Rossmore House* test to cases in which employees were not open and active union supporters. In adopting the judge's finding that under *Rossmore House*, supra, the questioning at issue did not constitute an unlawful interrogation, the majority explained that while the "specific purpose" of the *Rossmore House* decision was to reject the *per se* approach to the interrogation of open and active union supporters,

> [a]n important additional purpose of the Board's decision in *Rossmore House* was to signal disapproval of a per se approach to allegedly unlawful interrogations in general, and to return to a case-by-case analysis which takes into account the circumstances surrounding an alleged interrogation and does not ignore the reality of the workplace. [277 NLRB at 1217.]

[14] As set out in *Thomas v. Collins*, 323 U.S. 516, 537–538 (1944) (footnotes omitted; emphasis added):

> Accordingly, decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. *Labor Board v. Virginia Electric & Power Co.,* 314 U.S. 469. Decisions of other courts have done likewise. When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. Cf. *Labor Board v. Virginia Electric & Power Co., supra*. *But short of that limit the employer's freedom cannot be impaired.*

[15] See, e.g., *NLRB v. Champion Laboratories*, 99 F.3d 223 at 227–228, where the court reversed the Board and found that a supervisor's query to an employee about the number of people on their production line who attended the previous day's union meeting was not unlawful. Although the court noted the hostile atmosphere which already existed at the plant, it found that such an atmosphere was "not sufficient to transform a single query, addressed in private to a single worker who was in his supervisor's office for normal business reasons, into 'coercive interrogation.'" See also *NLRB v. Okun Bros. Shoe Store*, 825 F.2d 102, 108 (6th Cir. 1987), cert. denied 485 U.S. 935 (1988), where the court reversed the Board and found that Assistant Manager Nezamus' inquiry of employee Weston concerning how many employees might have signed up for the union was not coercive. While noting that "[t]he Board appear[ed] to have believed that by questioning Weston, Nezamus was building upon his earlier threat of a reduction in hours

From a policy point of view, the Board's failure to recognize and protect an employer's right to freedom of speech is puzzling. If the heart of our statute, as set out in Section 7, is that "[e]mployees shall have the right to self-organization," then the Board should be hesitant to curtail lawful employer inquiries (and speech) which would result in the employees being furnished information relevant to their exercise of their Section 7 right.[16]

In this regard, I find it significant that, to my knowledge, the Board, unlike the courts, has never straightforwardly acknowledged that an employer has the right, protected by the Constitution and confirmed by Section 8(c) of the Act, to question its employees regarding union issues so long as the questioning is noncoercive. For example, although the Board majority in *Rossmore House* stated that its view of interrogations was "consonant" with that of the Seventh Circuit in *Midwest Stock Exchange v. NLRB*, supra, and that of the Third Circuit in *Graham Architectural Products v. NLRB*, supra, the Board did not there explicitly state, and to my knowledge has not done so elsewhere, that an employer's right to freedom of speech codified under Section 8(c) includes the right to inquire noncoercively of its employees about unions and union issues. By failing to acknowledge this employer right, the Board has laid the foundation for its historic failure to protect it.[17] In the present case, I believe that the majority's reaching out to find unlawful the interrogations at issue here exemplifies this failure.

B. Applicable Interrogation Analysis

As explained above, the Board's test for interference, restraint, and coercion under Section 8(a)(1) of the Act is an objective one and depends on "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways*, 124 NLRB at 147. Since the word "interrogation" itself contains no implication of coercion, for an interrogation to be unlawful "either the words themselves or the context in which they are used . . . [must] suggest an element of coercion or interference."[18] In analyzing whether alleged unlawful interrogations are coercive of employees' Section 7 rights, *Bourne's* widely approved "fairly severe standards" (i.e., (1) the background, (2) the nature of the information sought, (3) the identity of the questioner, (4) the place and method of interrogation, and (5) the truthfulness of the reply), will be applied. Of course, "the *Bourne* criteria are not prerequisites to a finding of coercive questioning, but rather useful indicia that serve as a starting point for assessing the 'totality of the circumstances.'"[19] The analysis may also consider other factors such as the tone, duration, and purpose of the question and whether it was repeated.

Finally, while *Gissel* requires sensitivity to the fact that statements and queries by an employer may have a greater impact on its own employees than on those who are not economically dependent on it, *Gissel* does not permit the Board, under the guise of "picking up intended implications," to find coercion where none exists. Such a finding would unduly infringe upon an employer's right, under Section 8(c), to inquire of its employees concerning union organizing and union activities so long as that questioning is noncoercive.[20] Yet, as the following analysis explains, that is precisely what the majority has done here.

II. THE ALLEGED 8(a)(1) VIOLATIONS RELATING TO LPNS PLOURDE AND BRILL

A. Background

At all times, Andrea Levich and Tamara Staska were, respectively, the director and assistant director of nursing at the Respondent's Westwood facility, and Cheryl Stinski was Westwood's administrator. The approximately 22 RNs and LPNs at the Respondent's Westwood facility were not represented, but they invited a representative of the Minnesota Nurses Association (MNA) to attend a nurses' support group meeting scheduled for February 22, 1991.[21] Levich and Stinski learned of the meeting

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and was at least obliquely asking Weston how active he was in the union's organizing drive," the court found that none of the evidence before the Board showed that Nezamus' questioning of Weston was coercive.

[16] See, e.g., *Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419, 1428 (2d Cir. 1996) (in embodying the First Amendment's guarantee of freedom of speech, Sec. 8(c) of the Act does more than affirm an employer's right to communicate with its employees—it also helps employees by permiting them to make informed decision).

[17] See *Baptist Medical System v. NLRB*, 876 F.2d 661, 665 (8th Cir. 1989), where the court, in reversing the Board's finding of an unlawful interrogation, explained that:

> Section 8 of the Act prohibits, among other things, interrogation of employees which interferes with, restrains, or threatens their rights of self-organization. That section does not prohibit all employer questioning of employees regarding unionization. "Questioning which does not coerce or restrain employees in their right to organize is permissible; when properly exercised it is protected by the constitutional right to freedom of speech, which is recognized in § 8(c) of the Act. . . . *NLRB v. Douglas Division, Scott & Fetzer Co.,* 570 F.2d 742, 745 (8th Cir. 1978).

[18] *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d at 1267.

[19] As explained in *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998):

> Determining whether employee questioning violates the Act does not require strict evaluation of each factor; instead, "[t]he flexibility and deliberately broad focus of this test make clear that the *Bourne* criteria are not prerequisites to a finding of coercive questioning, but rather useful indicia that serve as a starting point for assessing the 'totality of the circumstances.'" *Timsco Inc. v. NLRB*, 819 F.2d 1173, 1178 (D.C. Cir. 1987).

[20] I agree with the Seventh Circuit's comment in *NLRB v. Acme Die Casting Corp.,* 728 F.2d 959, 962 (1984), that

> [i]t would be untenable, as well as an insulting reflection on the American worker's courage and character, to assume that any question put to a worker by his supervisor about unions, whatever its nature and whatever the circumstances, has a tendency to intimidate, and thus to interfere with concerted activities in violation of section 8(a)(1).

[21] All dates hereafter refer to 1991.

shortly after it was held. On February 25, Levich met with LPN Pamela Davis, who, as explained above, was a statutory supervisor, and asked her certain questions about the meeting and the MNA's presence there.

On February 27, Stinski, Levich, and Staska held a meeting with the Westwood LPNs, and a second meeting with the RNs. At the LPN meeting, after Levich was assured that there was nothing personal in the LPNs' pursuit of possible union representation, Stinksi and Levich asked what problems were troubling the nurses. The LPNs responded that they were upset by staffing shortages, floating assignments, failure to receive wage increases on anticipated dates, and wages. Staska replied that a policy for floating assignments would be implemented shortly and that the nurses would receive written copies of the policy. Stinski said that she would check into the timeliness of wage increases and asked that nurses who were concerned about this problem should come to her individually and she would adjust any inequities. At the subsequent RN meeting, Stinski stated, inter alia, that she had heard that the nurses were exploring union representation and told the RNs that they were charge nurses and supervisors, and that it was therefore unlawful for them to participate in union activities.[22]

Also in February and March, Levich and Stinski met with RN Duerr and LPN Davis on several occasions to advise them that they were statutory supervisors and therefore could not engage in union activities and to warn them that further disregard of this prohibition could result in discharge. On April 3, the Respondent discharged Davis and Duerr for continuing to participate in union activities after being warned not to do so. Two days later, the Union filed election petitions to represent the RNs and the LPNs in two separate units. An election was held in each unit on August 2. The Union lost the elections and the Regional Director thereafter certified the results of the elections.

B. The Analysis

As explained above, the analysis shall apply the Bourne factors to the incidents of alleged interrogation to determine whether they were coercive and therefore unlawful. Since four of these factors, i.e., the background, the nature of the information sought, the identity of the questioner, and the truthfulness of the reply, are virtually the same or similar for all of these incidents, the analysis will first summarize findings based on these *Bourne* factors, factors "that serve as a starting point for assessing the 'totality of the circumstance[s]'" (see fn. 19 above), and then provide a detailed analysis of the specific incidents of alleged interrogation that also responds to certain arguments raised by my colleagues in reversing the judge's dismissal of these allegations.

Before beginning the analysis, however, I first address my colleagues' assertion that the analysis set out below, instead of applying the "totality of the circumstances" test required in *Rossmore House*, supra, is "limited to a formalistic application of the *Bourne* factors to each of the separate incidents alleged to be unlawful." Contrary to this assertion, "these [*Bourne*] factors supply the proper starting place for judicial and administrative analysis of whether particular employer questioning was in the totality of circumstances 'coercive' or merely persuasive." *Teamsters Local 633*, 509 F.2d at 494. Thus, the *Bourne* factors are a primary analytical tool in determining whether an employer's questioning of employees is coercive and therefore unlawful and, as such, they offer a systematic application of a totality of the circumstances analysis. Accordingly, I reject my colleagues' contention that the analysis set out below fails to address the totality of circumstances surrounding the incidents in issue.

If, however, my colleagues assert that a totality of the circumstances analysis must consider, as they have done here, all alleged incidents of unlawful interrogation taken together as a whole before determining whether the employer's conduct in each individual instance was unlawful, then I agree that the analysis set out below does not apply such a totality of the circumstances test. And it does not for a specific reason. As explained at footnote 1 above, the Board is required to apply an objective standard to determine whether an employer violated Section 8(a)(1) of the Act, i.e., "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co.,* 124 NLRB at 147. In my view, the application of the *Bourne* factors initially to each separate alleged incident of unlawful interrogation is the best way to ensure that the analysis applies the requisite objective standard to determine whether an employer's conduct "may reasonably be said . . . to interfere with the free exercise of employee rights under the Act." As explained more fully below, by abandoning such an approach in favor of this more impressionistic "analysis," my colleagues apply sub silentio a subjective standard to find violations where none, in fact, exist.

As noted above, the dissent will now apply four of the *Bourne* factors, i.e., the background, the nature of the information sought, the identity of the questioner, and the truthfulness of the reply, to the incidents at issue here. As to the background—"i.e., is there a history of employer hostility and discrimination?"—the answer is negative. Although my colleagues profess to find an extensive pattern of unfair labor practices from which to infer that the queries discussed below, innocuous in themselves, must convey implied threats or promises of benefits, the violations found here are in fact two isolated

[22] I agree with my colleagues that the Respondent violated Sec. 8(a)(1) at the LPN meeting by soliciting employees' grievances and promising to remedy them and that it violated Sec. 8(a)(1) at the RN meeting by telling employees that they were supervisors and therefore prohibited from engaging in union activity.

incidents. The most serious allegations of the complaint, those alleging the unlawful discharges of Davis and Duerr, are found to be without merit and are therefore dismissed. Thus, the only violations that occurred prior to the alleged unlawful interrogations of Plourde and Brill were those involving the RN and LPN meetings on February 27. As discussed above, these incidents concerned an instruction at the RN meeting that the RNs were supervisors and therefore could not participate in union activities and a solicitation of grievances at the LPN meeting. Two isolated incidents are simply not sufficient to establish a background "of employer hostility and discrimination" in which the queries addressed to Plourde and Brill, innocuous in themselves, might reasonably be said to convey implied threats or promises.

My colleagues, however, find that the conversations at issue here occurred "against 'a background of hostility' and unlawful conduct." Aside from the isolated 8(a)(1) violations arising from the Respondent's conduct at the February 27 LPN and RN meetings, discussed above, my colleagues fail to provide any objective support for their assertion that can withstand scrutiny. Thus, in support of their assertion that the conversations at issue occurred against a background of hostility, my colleagues repeatedly state that Levich told employees that she took the union issue "personally." I cannot find, as my colleagues do, that such an expression of personal concern must, in effect, be construed as an implied threat or as otherwise coercive. Indeed, the opposite conclusion—that Levich's feelings were hurt—seems more appropriate. My colleagues further assert that the Respondent's truthful explanation of the lawful reasons for the discharges of Davis and Duerr must "certainly [have] produced an atmosphere of tension." Thus, my colleagues can only bolster their claim that there was a background of hostility by converting the Respondent's honest reassurance into, in effect, an implied threat. Doubtless, if the Respondent had failed to reassure Plourde of the legitimate reasons for Davis' and Duerr's terminations, my colleagues would find that the discharges themselves created an atmosphere of tension because the Respondent failed truthfully to explain the lawful reasons for the discharges. In such ways, my colleagues, having asserted that there was a background of unlawful conduct and hostility, are forced to create one with which to lime their analysis. Two isolated 8(a)(1) violations, however, do not create a background of unlawful conduct, nor do Levich's statement that she was taking things "personally" and her truthful explanation of the reasons for Davis' and Duerr's discharges establish a background of hostility.

As to the nature of the information sought—"i.e., did the interrogator appear to be seeking information on which to base taking action against individual employees?—the answer is likewise negative. Thus, as set out below, Levich asked Plourde questions such as how Plourde felt "about things," what Plourde's "concerns" were, and what the "issues" were. Staska asked Brill what she felt the Union "could do." Such general questions about working conditions and unionization cannot reasonably be understood to encompass either a threat of retaliation if the employee gives the "wrong" answer or a promise of benefit if the employee gives the "right" answer. Consequently, such questions, framed as they are to gather information and promote discourse between employers and employees, and without coercive impact, are protected under Section 8(c) of the Act.[23]

As to the identity of the questioner—"i.e., how high was [s]he in the company hierarchy?"—Levich, Staska, and Stinski were the officials who questioned Plourde and Brill. These three individuals, respectively, the Respondent's director of nursing, assistant director of nursing, and administrator, were obviously high up in the facility's hierarchy. This factor, standing alone, however, does not render otherwise noncoercive questioning unlawful interrogation, especially where, as here, the questioners did not otherwise engage in conduct that could be perceived as threatening or intimidating.

Finally, as to the truthfulness of the reply, the evidence establishes, as set out below, that Plourde and Brill either truthfully responded to the questions at issue here or felt free not to respond to the questions. Thus, there is "no evidence that the interrogation[s] actually inspired fear." *Bourne v. NLRB*, 332 F.2d at 48.

I will now address in detail the alleged unlawful interrogations relating to Plourde and Brill (as well as other conduct alleged to be violative of Section 8(a)(1)), with special emphasis on the place and method of interrogation, and such other factors as may relate particularly to each incident. For the reasons explained below, an impartial analysis of these incidents compels
the adoption of the judge's findings that the Respondent's queries here were not coercive and were therefore lawful.

1. Alleged violations relating to Plourde

a. On February 25, Levich questioned Plourde about whether she had attended the nurse support group's February 22 meeting and what had happened at the meeting. Plourde answered truthfully that she had not attended the meeting and was not aware of what had happened there. The judge found that Levich's questioning of Plourde was not coercive and therefore not unlawful. I agree.

Initially, I note that Plourde testified without contradiction that the February 22 nurses' meeting referred to by Levich was known throughout the facility as a nurses' support group meeting and that Levich had encouraged

[23] I note, however, that Levich asked Brill a specific question about another employee's (Larkin's) union activities. Contrary to my colleagues, however, I would not find this inquiry unlawful either because, as explained below, I find that it was not coercive and had a legitimate purpose.

the nurses to hold the meeting. Given this context, Levich's questions may reasonably be construed as an expression of interest in the nurses' meeting as a support group.[24] The noncoercive nature of the information sought by Levich is further supported by the facts that Levich neither mentioned the Union nor asked who attended the meeting, and that the brief encounter occurred during a chance meeting in a stairwell. Finally, Plourde truthfully replied that she had not attended the meeting and did not know what had happened there. Thus, an analysis of the *Bourne* factors clearly establishes that Levich's inquiries were not coercive.[25] For the reasons set out above, I cannot then agree with my colleagues that this noncoercive questioning was unlawful because it must have been coercive "in retrospect." My colleagues provide no objective basis for such a conclusion.

b. In early March, Levich telephoned Plourde at her workplace to ask why Plourde was concerned about the termination of another nurse. After addressing this issue, Levich asked Plourde how she felt "about things." Plourde said that she was concerned about several nurses not receiving their wage increases on time and that she would have time on her vacation to think about the Westwood problem and her views about them. Levich requested that when she returned from vacation, Plourde discuss with her any problems she had with Westwood and whether she thought outside help was needed.

Relying on *Rossmore House*, supra, the judge found that Levich's questioning of Plourde in early March was not unlawful because it did not have a reasonable tendency to restrain or coerce Plourde in the exercise of her Section 7 rights. In reaching this conclusion, the judge specifically found that Levich's questioning of Plourde was unaccompanied by any intimidation, threats, or promises, actual or implied. Contrary to my colleagues, I would adopt the judge's dismissal of this allegation.

In reaching this conclusion, I observe that while Levich was a high-ranking official, her telephone call to Plourde was informal and her tone of voice normal, and that the nature of the inquiry was to find out how Plourde felt about certain work-related matters, not to seek out information to retaliate against Plourde or any other employee.[26] Finally, Plourde truthfully answered Levich's questions. In sum, these *Bourne* factors require a finding that Levich's questioning of Plourde was not coercive and was therefore lawful.

As with the February 25 hallway conversation, my colleagues err by again finding that questioning, which they agree, in effect, was not coercive when it occurred, must have been "coercive in the entire course of events." As explained above, the record is devoid of objective evidence that would support such a finding.

c. In early April, Levich telephoned Plourde at her duty station and asked Plourde to come to her office. After Plourde arrived, Levich and Plourde went to a first floor lounge. Once there, Levich explained that she wanted to have a private conversation with Plourde. After briefly telling Plourde why Davis and Duerr had been discharged, Levich asked Plourde what her concerns were and told Plourde that she should come to her or Stinski with any problems she had. Levich then told Plourde that she could not stay neutral, that she needed to take a side, and that Levich needed Plourde on her side.

The judge found unlawful neither Levich's question about Plourde's concerns, nor her statement that Plourde could not remain neutral. My colleagues, however, having, as explained above, created out of whole cloth a background of unfair labor practices in which to evaluate Levich's conduct, reverse the judge to find that Levich's question regarding Plourde's "concerns" was an unlawful interrogation and that her statement to the effect that Plourde had to choose a side was coercive because it implied that the Respondent would view Plourde as disloyal if she did not support the Respondent. Since neither Levich's question itself nor her statement that Plourde had to choose a side were, in fact, coercive, I would adopt the judge's recommended dismissal of these allegations.

Levich's question regarding Plourde's concerns was not coercive, and therefore not unlawful, because the nature of the information sought, i.e., Plourde's concerns, could not reasonably be understood as an attempt to attain information for the purpose of retaliating against Plourde or against other employees for engaging in union activities. Further, contrary to my colleagues, I find that the place and method of Levich's query did not transform an otherwise innocuous question into an unlawful interrogation. Although my colleagues find evidence of coercion in Levich's asking Plourde what her concerns were "after Levich had tak[en Plourde] down to the lounge for a private conversation," I find, to the contrary,

[24] In finding that Levich's questioning of Plourde was designed to secure information "particularly [about] the concerns which prompted the nurses to seek union representation to resolve those concerns," the judge relied on the fact that earlier on February 25 Levich had asked Davis questions regarding the Union's presence at the nurses' meeting. There is no evidence, however, that Plourde was aware of that conversation when Levich asked her (Plourde) what transpired at the nurses' meeting. In these circumstances, Plourde cannot reasonably have understood that Levich was inquiring about the Union when Levich asked Plourde about the nurses' meeting. Cf. *E & L Transport Co. v. NLRB*, 85 F.3d 1258, 1273–1274 (7th Cir. 1996).

[25] See *NLRB v. Acme Die Casting Corp*., 728 F.2d 959, 962 (7th Cir. 1984), in which the court reversed an interrogation finding where an employee was asked, more specifically than here, whether he knew "something about the Union." The court found that the "question [was] neither tendentious nor intimidating either in content or inflection, [was] asked casually and in a friendly manner, and [was] not followed up." Id. at 963.

[26] See, e.g., *Midwest Stock Exchange*, 635 F.2d at 1267–1268, where the court, in finding no violation where a supervisor asked an employee directly on two successive days how she felt about the union, noted the absence of an implied or explicit threat, as well as of any warning against soliciting for or joining the union.

that the context of the conversation was nonthreatening and, indeed, that Levich went out of her way to ensure that this was so. Thus, while Levich initially called Plourde to her office, Levich chose to have a private conversation with Plourde in the more relaxed and open setting of an employee lounge rather than a formal meeting in her own office. I do not find this informal setting creates an atmosphere of coercion as my colleagues do. Finally, when Plourde did not respond, Levich did not renew the questioning.[27] Under *Bourne,* Levich's query was noncoercive and therefore lawful.[28]

I also disagree with my colleagues' finding that Levich violated Section 8(a)(1) by telling Plourde that she could not remain neutral and that Levich needed Plourde on her side. Levich did not ask Plourde what side she was on, did not direct her to take a particular side, and did not threaten her with adverse consequences if Plourde did not take her side. Further, I find that it was permissible under Section 8(c) for Levich to urge Plourde to take her (the Respondent's) side.[29]

d. On April 20, in a meeting with Levich, Stinski, Staska, Night Supervisor Walburg, Nurse Manager Moffitt, and Staff Coordinator Lindeberg, Stinski repeated Levich's explanation of the reasons for Davis' and Duerr's dismissals.[30] Stinski then told Plourde that a union created a house divided and that management needed Plourde on its side. Stinski asked Plourde what the issues were and Plourde responded that she was concerned about the nurses' failure to receive raises on their due dates and about the discharges of Forliti, Davis, and Duerr. Either Stinski or Levich then told Plourde that if she had signed an authorization card, she could get it back. The judge found this conversation was not unlawful because it contained neither threats nor promise of benefits.

My colleagues, however, reverse the judge to find that Stinski's remark regarding a "house divided" and her comment, that management needed Plourde on its "side," were a continuation of the early April "disloyalty theme."

Contrary to my colleagues, I find that Stinski's "house divided" remark and her management "side" comment were protected under Section 8(c) of the Act and that they did not lose the protection of Section 8(c) because they were noncoercive.[31] Stinski did not direct Plourde to take management's side and there was no indication that Plourde would be the subject of retaliation if she did not.

I find further that Stinski's asking Plourde what the issues were was not unlawful because the nature of the question was neither a threat of retaliation nor was it a promise, express or implied, to remedy any grievances.[32] While the setting of Stinski's question was a formal meeting of managers and supervisors, there is no evidence that Stinski's manner or tone of voice was threatening or hostile. Further, Plourde truthfully responded to the question. The *Bourne* factors do not support the conclusion that Stinski's questioning was coercive and therefore unlawful.

Finally, I find that the Respondent had the right, protected under Section 8(c) of the Act, to advise Plourde that she could get her authorization card back. I further find that the Respondent did not forfeit the protection of Section 8(c) because Levich's or Stinski's advice to Plourde in this regard was not coercive. Thus, the Respondent did not attempt to ascertain whether Plourde would avail herself of the right to revoke her authorization card, did not suggest that it would take reprisals against Plourde if she did not do so, and did not otherwise create a situation in which Plourde "would tend to feel peril in refraining from such revocation."[33] In these circumstances, my colleagues' assertion that Levich's advice to Plourde, i.e., that Plourde could get her card back, "had the impact of a command rather than a suggestion" is simply not supported by objective evidence and therefore cannot be sustained.

2. Alleged violations relating to Brill

Before discussing, inter alia, the alleged incidents of interrogation relating to LPN Brill, this dissent will first consider whether the Respondent violated Section 8(a)(1)

[27] See, e.g., *NLRB v. Village IX, Inc.,* 723 F.2d 1360 (7th Cir. 1983), where the court, in reversing the Board's finding of an unlawful interrogation arising from the respondent's co-owners asking a retarded employee at a social gathering whether any union people had visited him in his home, explained that

> [a]n employer in planning his campaign has a legitimate interest in finding out whether the union has approached his employees, and if he merely asks—without pressing the inquiry when the employee balks, or following up with coercive statements—he has not violated the statute. [Id. at 1369.]

[28] See *Baptist Medical System,* 876 F.2d at 665–666 (no violation where supervisor asked nurse "why she was prounion and what problems she had with hospital management").

[29] As to the remaining allegations of unlawful conduct arising out of this incident, I agree with my colleagues that Levich's explanation to Plourde of the reasons for Davis' and Duerr's discharges was not unlawful, but as noted above, I disagree with their subjective assertion that the explanation "certainly produced an atmosphere of tension." I agree with my colleagues that Levich's direction to Plourde, that she should bring any problems to her or Stinski, constituted an unlawful solicitation of grievances.

[30] I agree with my colleagues that Stinski's explanation of the reasons for Davis' and Duerr's discharges was not unlawful, but, as noted above, not with their assertion that such a lawful explanation "produced an atmosphere of tension."

[31] Indeed, I fail to see how management's "need" for support constitutes a "threat" rather than a plea.

[32] See *Baptist Medical System,* 876 F.2d at 665–666.

[33] *Mariposa Press*, 273 NLRB 528–529 (1984), where the Board explained that

> [a]n employer may lawfully inform employees of their right to revoke their authorization cards even if employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance or otherwise creates a situation in which employees would tend to feel peril in refraining from such revocation.

when, in April, Staska told Brill, as Brill was leaving work for a medical appointment, that Brill was absent from work too much and that if the nurses were represented by Local 113 and were working under a contract between the Respondent and Local 113, Staska would have to give Brill a 3-day suspension for absenteeism.

In adopting the judge's finding of a violation, my colleagues agree with the judge that Staska's statement was unlawful because through it the Respondent was attempting to discourage Brill's support for the Union by implying that she would be disciplined for her absence if the nurses chose Local 113 to represent them and were covered by a contract between the Respondent and Local 113. In reaching this conclusion, my colleagues consider and reject the Respondent's contention that *NTA Graphics*, 303 NLRB 801 (1991), is controlling here and requires a reversal of the judge's finding of a violation.

In *NTA Graphics*, 303 NLRB at 801–802, it was alleged that Tremonti, the respondent's operations manager, had threatened employee Rogers that if the union was voted in, his progress toward becoming an apprentice and a journeyman printer would be slowed. In this regard, while Rogers testified that Tremonti had told him that if the union came in, Tremonti could demote Rogers to apprentice and that it could take Rogers 4 to 6 years to get a journeyman card, the judge credited Tremonti's testimony that he told Rogers that under the union's labor agreement, Rogers would have to enter an apprenticeship program and that it could take up to 4 years, and that it would take up to 8 years for Rogers to become a journeyman. In adopting the judge's finding that Tremonti did not act unlawfully by telling Rogers that he could be demoted if the union came in, the Board reasoned that Tremonti was discussing what could happen under a union contract.

By informing Brill that she would have to give Brill a 3-day suspension for excessive absenteeism if the nurses were working under a contract between the Respondent and Local 113, I find that Staska was merely "discussing what could happen under a union contract." *NTA Graphics*, 303 NLRB at 802. The contract then in effect between the Respondent and Local 113 covering other employees at the Respondent's facility provided that employees could be disciplined for excessive absenteeism, as defined in the contract. The Respondent had issued 3-day suspensions for excessive absenteeism to employees covered under that contract. Further, Brill testified without contradiction that she knew that the Respondent's existing contract with Local 113 provided for such discipline for excessive absenteeism, and that Staska was merely explaining what could happen if similar provisions were included in the contract that covered Brill. Thus, when Staska informed Brill that she would have to give Brill a 3-day suspension if a contract with Local 113 were in effect, Staska did nothing more than truthfully remind Brill that union contracts had negative as well as positive ramifications. Contrary to my colleagues, I find that this reminder of possible consequences outside of Staska's control was protected under Section 8(c) as a lawful prediction of what could happen if the Union were voted in. *Gissel Packing Co*., 395 U.S. at 617–619. Finally, that Staska's statement was a reminder particularly applicable to Brill's own situation is shown by the fact that Brill had been warned and placed on probation for excessive absenteeism in 1989 and, for a second time, in 1990.

a. In their first meeting, which occurred in early April, Staska met with Brill in her office. After explaining the reasons why the Respondent had terminated Davis and Duerr, Staska gave Brill a document purportedly stating what a union could and could not do and asked Brill what she felt the Union could do.[34] Brill did not respond. Noting that Brill was not an open union supporter, my colleagues reverse the judge to find Staska's questioning of Brill, which they interpret as an interrogation regarding Brill's union sympathies, was coercive in nature.

I agree with my colleagues that the Respondent did not violate Section 8(a)(1) through Staska's advising Brill of the reasons why the Respondent discharged Davis and Duerr.[35] Contrary to my colleagues, however, I agree with the judge that Staska's asking Brill what, in effect, the employees expected to accomplish by union representation was not unlawful because it was accompanied neither by threats nor actual or implied promises to remedy any complaints. Further, the nature of the query indicates that Staska did not seek this information to retaliate against employees for their protected activities. There is no evidence that Staska's manner or tone was threatening and Brill felt free not to respond. These

[34] Contrary to my colleagues, I find that the record establishes that Staska explained the reasons for Davis' and Duerr's discharges in the same meeting, i.e., the first, in which she gave Brill the document and asked Brill what she felt the Union could do. Brill testified that in her first meeting with Staska, Staska explained the reasons for Davis' and Duerr's discharges. Counsel for the General Counsel then asked Brill if she had any further meetings with Staska at which the subject of the Union came up. In response, Brill testified that in a subsequent meeting, Staska informed her that she could get her union card back. Counsel for the General Counsel then asked whether Brill could recall anything else about "this particular meeting" Brill had "just described with Tamara Staska." When Brill responded that she could recall nothing else about "that particular meeting," counsel for the General Counsel refreshed Brill's recollection by asking Brill whether she recalled Staska's asking her any questions about what the Union could do for her. In response, Brill described the piece of paper incident. (Tr. 34–35.) Accordingly, I find that when counsel for the General Counsel referred to this "particular" meeting with only Tamara Staska, he was referring to the first meeting that Brill had with Staska, and that Brill understood this to be the case. That this is so is underscored by the fact that Brill further testified that it was in her subsequent meeting with both Levich and Staska, in which Levich mentioned employee Larkin, that Staska told Brill that she could get her union card back. (See Tr. 36–37.)

[35] As noted above, however, I do not agree with my colleagues' assertion that such reassurance must have "certainly produced an atmosphere of tension."

Bourne factors further evidence the noncoercive nature of Staska's questioning of Brill. See *Federal-Mogul Corp. v. NLRB,* 566 F.2d at 1249–1251 (5th Cir. 1978) (among other inquiries found not coercive: "What could the Union do for the employees?"). The fact that Brill was not an open union supporter does not change this result. See *Sunnyvale Medical Clinic*, 277 NLRB at 1217–1218.

b. In a meeting which Staska and Levich held with Brill in Staska's office, Levich asked Brill if she was aware that employee Larkin wanted to become involved in the nurses' union activities and informed her that some of the nurses were upset because Larkin was not a nurse.[36] At the same meeting, Staska told Brill that she could get her authorization card back simply by asking Local 113 to return it.[37] Contrary to my colleagues, I find that Levich's questioning of Brill regarding the union activities of another employee, Larkin, neither constituted an unlawful interrogation nor created the impression of surveillance. Nor do I agree with my colleagues that Staska's informing Brill that she could get her authorization card back was unlawful.

As to the first of these issues, the alleged unlawful interrogation, Levich's query, as Brill testified, was whether Brill was aware that Larkin, who was not a nurse, "had been wanting to join the union activities and become involved in the bargaining unit." (Tr. 36.) Clearly, this inquiry did not contain a threat, either explicit or implicit, of reprisal for engaging in union activity. Further, Levich's immediate explanation, as Brill further testified, "that apparently some of the nurses had become upset over th[is because] . . . she [Larkin] was not a nurse and she wanted to pursue this with us and wanted to join us" (Tr. 36) makes clear that the purpose of the question was neither to punish an employee for her union activities nor gather information about them, but to indicate a situation of potential conflict arising from a nonbargaining unit employee's desire to join in the nurses' bargaining unit activities. In these circumstances, the Respondent had a legitimate purpose, i.e., the monitoring of a potentially disruptive situation, in asking Brill about Larkin's desire to become involved in the nurses' union activities.[38] Further, that Brill understood that this was the sole purpose of Levich's question is clear from her further testimony that "she [Levich] thought that this may upset myself, which it didn't seem to bother. And that was basically about it." (Tr. 36.) Since the question itself contained no explicit nor implied threat of reprisal for engaging in union activities, and was itself an isolated question that had a legitimate purpose, I would not find this inquiry an unlawful interrogation.

I find further that the inquiry did not create an impression of surveillance. In this regard, Levich's isolated question indicates only that employees were unhappy with Larkin's behavior, not that the Respondent surveyed its employees. Indeed, there is no evidence that the Respondent spied on the nurses or otherwise engaged in covert activity. Accordingly, I find that the evidence does not establish that Levich's question created the impression of surveillance. See *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1252–1253. Finally, consistent with my finding above regarding Plourde at section II,B,1,(d), I find that Staska's advising Brill of her right to get her card back was lawful under Section 8(c) of the Act, and that it did not lose the Act's protection because it contained no implication that there would be reprisals if she failed to do so.

Conclusion

As the above analysis reveals, and as the judge correctly found, the underlying facts do not support a finding that the Respondent's inquiries of Plourde and Brill were coercive and therefore unlawful. In finding to the contrary, my colleagues, perhaps impelled by the Board's historical inclination to find all inquiries suspect, have created out of whole cloth a background of unlawful conduct and hostility, and then have relied on this context to find that the questionings at issue here were unlawful. By finding violations where no coercion exists, the majority has failed to protect the Respondent's right to freedom of speech.

In approaching the issue of employee interrogations from a different point of view, i.e., in finding an employer's inquiries, noncoercive in nature, per se lawful, I do no more than what Section 8(c), the courts, and the Board itself, require. Further, contrary to some who would argue that such interrogations serve no valid purpose,[39] an employer's ability, its right, to question employees, as here, about their concerns and their views of unionization may gain the employer a better understanding of a union's campaign promises and propaganda. That the employer may then use this information to further frame the issues for its employees, to fashion its arguments, and to respond to the union's message, can only further the purposes of Section 8(c) by providing the employer—and the union—a wider opportunity to debate issues of importance to employees. The employees can only be the beneficiaries of such an exchange.[40]

[36] As my colleagues note, the judge inadvertently failed to address Levich's conduct at issue here.

[37] See fn. 34, above.

[38] Cf. *Perdue Farms, Inc.,* supra, 144 F.3d at 836.

[39] See, e.g., Member Zimmerman's dissent in *Rossmore House*, 269 NLRB at 1178, where he stated that

> [s]uch questioning necessarily calls upon an employee to defend his Section 7 right to support a union. In most cases, there is no justification for putting an employee in such a defensive position, particularly since these conversations serve no valid employer purpose.

[40] See fn. 16 above.

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 employees regarding their union sympathies.

WE WILL NOT solicit grievances or complaints from our employees and actually or impliedly promise to resolve them to discourage our employees from seeking representation by Professional & Technical Health Care Union, Local 113, SEIU, or any other labor organization to resolve their complaints or grievances.

WE WILL NOT tell employees they are supervisors barred from engaging in activities on behalf of Local 113 or any other labor organization to discourage their participation in such activities.

WE WILL NOT tell employees that they cannot maintain neutrality regarding the Union.

WE WILL NOT solicit our employees' revocation of their authorization cards.

WE WILL NOT tell unrepresented employees that but for the fact that they were not represented by Professional & Technical Health Care Union, Local 113, SEIU they would be disciplined.

WE WILL NOT create the impression of surveillance of employees' union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

WESTWOOD HEALTH CARE CENTER, A DIVISION OF MEDCARE ASSOCIATES, INC.

James L. Fox, for the General Counsel.
James M. Dawson (Felhaber, Larson, Fenlon & Vogt), of Minneapolis, Minnesota, for Westwood.
Roger A. Jensen (Peterson, Bell, Converse & Jensen), of St. Paul, Minnesota, for Local 113.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge. On October 1 through 4, 1991,[1] I conducted a hearing at Minneapolis, Minnesota, to try issues raised by a complaint issued on July 15 based on charges filed by Professional & Technical Health Care Union, Local 113, SEIU (Local 113) on April 3 and 17.

The complaint alleged and the answer denied during an effort by registered and licensed practical nurses employed at the Westwood Health Care Center, a division of Medcare Associates, Inc. (Respondent) to secure union representation, the Respondent committed numerous violations of Section 8(a)(1) of the National Labor Relations Act (the Act) while opposing that effort, to wit: interrogating employees about their and other employees' union activities; creating the impression the Respondent was surveilling the employees' union activities; threatening employees with reprisals for engaging in union activities; soliciting employee grievances and promising to address them; telling employees they were supervisors prohibited from engaging in union activities; threatening to discharge employees for engaging in union activities; directing employees to interrogate other employees about their union activities; telling employees they were being discharged for engaging in union activities; promising employees benefits to discourage their engagement in union activities; telling employees other employees were discharged for engaging in union activities; directing employees to abandon their support for union representation and to secure the return from Local 113 of the cards they signed authorizing Local 113 to represent them; and advising an employee she would have been suspended because of her attendance problems if she had been represented by Local 113.

The complaint also alleged and the Respondent conceded during the campaign the Respondent suspended and subsequently discharged Pamela Davis, a licensed practical nurse (LPN) and Nancy Duerr, a registered nurse (RN) for engaging in union activities. The complaint alleged and the Respondent denied, however, the Respondent thereby violated Section 8(a)(1) and (3) of the Act, the Respondent contending the two were supervisors within the meaning of Section 2 of the Act; that they were suspended and discharged for failing and refusing to comply with the Respondent's instructions to cease their union activities and support the Respondent's opposition to union representation of its nurses, thereby engaging in unprotected activity. In response to this contention, the General Counsel argues, assuming arguendo the two were supervisors, they were promoted to supervisory status during the campaign to inhibit their union activities and thus were protected under the Act.

The issues presented by the foregoing are whether:

1. The Respondent committed the acts alleged as violations of Section 8(a)(1) of the Act.

2. At pertinent times Davis and Duerr were employees or supervisors.

3. If supervisors, whether they are nevertheless entitled to the protections of the Act.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by the acts alleged as violations of Section 8(a)(1) and the Davis/Duerr suspensions and discharges.

[1] Read 1991 after further date references omitting the year.

The General Counsel, Local 113, and the Respondent appeared by counsel and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue and file briefs. All three filed briefs.

Based upon my review of the entire record,[2] observation of the witnesses, perusal of the briefs and research, I enter the following

FINDINGS OF FACT[3]

I. JURISDICTION & LABOR ORGANIZATION

The complaint alleged, the answer thereto admitted, and I find at all pertinent times the Respondent was an employer engaged in commerce in a business affecting commerce and Local 113 was a labor organization within the meaning of Section 2 of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Background

At pertinent times the Respondent operated three nursing homes in the Minneapolis area, including Westwood Health Care Center (Westwood). Westwood's maximum capacity was 190 residents and Westwood employed approximately 170 nursing, maintenance, and service personnel in its operations. The bulk of the employees were janitorial, housekeeping, kitchen, laundry, and nurse assistant personnel represented by Local 113 and covered by a collective-bargaining agreement between Local 113 and the Respondent. The approximately 22 registered nurses (RNs) and licensed practical nurses (LPNs) were unrepresented.

LPNs Davis and Melinda Zroka began to explore union representation of the nurses in late 1990, discussing the idea with other nurses and representatives of the Minnesota Nurses Association (MNA).[4]

Believing by February 1991 a sufficient number of Westwood nurses were interested in representation Davis, with Duerr's concurrence, invited a representative of MNA to attend a nurses support meeting scheduled for February 22 at Duerr's home (the nurses, with the encouragement of management, regularly scheduled and held support meetings to discuss problems of mutual concern). At the February 22 meeting, the MNA representative and the Westwood nurses in attendance discussed the pros and cons of union representation, cards authorizing MNA to represent the Westwood nurses were distributed, and Davis was designated "keeper of the cards."

Westwood's administrator, Cheryl Stinski, and Westwood's director of nurses, Andrea Levich,[5] were unaware of the MNA invitation, attendance, and discussion of union representation prior to the meeting. They learned of the invitation, attendance, and discussion, however, shortly after the meeting, from nurses who attended the meeting.

2. The alleged unlawful February 24 Stinski interrogation

February 24 was a Sunday, a day Stinski normally did not appear at the Westwood facility.[6] She appeared that Sunday, however, and summoned Davis to her office. Stinski stated she heard the nurses were investigating union representation and asked Davis what she knew about the effort. Davis denied any knowledge.[7]

Stinski referred to a "letter of understanding" each Westwood nurse had been furnished,[8] stated the letter seemed always to take care of problems in the past, commented she did not understand why the nurses would be interested in union representation, and asked Davis what problems were troubling the nurses. Davis responded she was only aware of a single problem, the late receipt of scheduled wage increases by two nurses.

3. The alleged unlawful February 25 Levich interrogation, surveillance impression, and reprisal threats

The next day Levich directed Davis to come to her office to discuss the February meeting. Staff Coordinator Carol Lindeberg was present in Levich's office when Davis arrived at Levich's office. Levich asked Davis what transpired at the meeting. Davis responded the nurses discussed the flex plan the Respondent was demanding of Local 113 in its current contract negotiations with Local 113, the possibility of a strike by the Local 113-represented Westwood employees, and what the nurses would do in the event a strike occurred. Levich asked what about the MNA discussion. Davis asked Levich how she knew of that discussion. Levich replied she received a report Davis invited an MNA representative to address the nurses at the meeting; she was disappointed Davis would do this to her; Stinski advised her Davis lied to Stinski about the MNA attendance and discussion; she didn't think Davis was so unethical; and continued to criticize Davis until Davis accused her of trying to intimidate her. Levich responded she didn't want to intimidate Davis, she just wanted Davis to tell her what was going on. Davis refused to discuss the matter and the meeting ended.

Levich also summoned Duerr to her office on February 25; told Duerr she was very upset Duerr would host a union meeting at her home, that was not what she had in mind when she approved the nurses' support group meetings and she hoped it would not happen again.

Within the same time frame, Levich asked LPN Joanne Plourde what transpired at the February 22 meeting. Plourde replied she did not attend the meeting and was unaware what transpired there.

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[2] The Respondent's unopposed motion to correct the transcript by changing "Dargay" to "Davis" at p. 549, L. 9, is granted.

[3] While every apparent or nonapparent conflict in the evidence has not been specifically resolved below, my findings are based upon my examination of the entire record, my observation of the witnesses' demeanor while testifying and my evaluation of the reliability of their testimony; therefore any testimony in the record which is inconsistent with my findings is hereby discredited.

[4] I find at all pertinent times MNA was a labor organization within the meaning of Sec. 2 of the Act.

[5] Stinski was in overall charge of Westwood's operations and Levich was in charge of the nurses. I find at all pertinent times Stinski and Levich were supervisors and agents of the Respondent acting on its behalf within the meaning of Sec. 2 of the Act.

[6] Her normal workweek was Monday through Friday.

[7] Pursuant to advice by the MNA representative.

[8] The letter set forth the rates of pay, wages, hours, and working conditions of the Westwood nurses, including a grievance/arbitration procedure. It was signed by each nurse at the time each was hired.

4. The alleged unlawful February 27 Stinski and Levich interrogations; bar from union activities; solicitations of grievances; and promises to resolve

On February 27 Stinski, Levich, and the Assistant Director of Nurses Tamara Staska[9] conducted a meeting with the LPNs employed at Westwood and a second meeting with the Westwood RNs.

At the LPN meeting, Levich told the LPNs she felt their exploration of union representation personally threatened her and her job but was assured there was nothing personal in their pursuit of possible union representation. Both Stinski and Levich asked what problems were troubling the nurses and received responses the nurses were troubled by: (1) staffing shortages; (2) floating assignments (unanticipated transfers between stations and floors); (3) not receiving wage increases on anticipated dates; and (4) wages. Staska stated a firm policy concerning floating assignments was going to be implemented shortly and the nurses would receive written copies of the policy; Stinski stated she would check into the timeliness of wage increase payments and requested nurses who were concerned over that problem come to her individually and she would adjust any inequities.

At the RN meeting, Stinski stated she heard the nurses were exploring union representation, she did not understand why, since no problems had been presented to her by the nurses; stated the RNs were charge nurses and supervisors, so it was unlawful for them to participate in union activities; and requested the RNs bring any problems to her so she could address them.

5. The alleged unlawful early March Levich threat of reprisal because of union activities and promise of benefit to discourage union activities

In early March, Levich telephoned LPN Joanne Plourde at her workplace and stated she understood Plourde was concerned over the termination of nurse Lois Forliti and asked why she was concerned. Plourde replied Forliti told her she believed she had been discharged because she was prounion and she thought that was unfair. Levich replied Forliti was coached to say that, Forliti told her she had personal problems and did not want to continue working at Westwood with the trained medical aide (TMA) at her station and she let Forliti resign. Levich asked Plourde how she felt "about things." Plourde replied she was concerned about several nurses not receiving their wage increases on time, she was going on vacation and would have time to think about the Westwood problems and her views. Levich requested she discuss with her any problems she had with Westwood and whether she thought outside help was needed on returning from her vacation.

6. The March decision to seek representation by Local 113

Between February 22 and March 20, an insufficient number of Westwood nurses to support a filing with the Region of a petition for certification as their representative was submitted to Davis due to the reluctance of the nurses to comply with MNA's demand for a tender of 4 months of dues, accompanied by execution of a representation authorization and application for membership.

During this period, the nurses at their weekly support group meeting discussed seeking representation by Local 113 rather than MNA, since Local 113 did not require the dues tender as a prerequisite to acting on their behalf. The discussions culminated in a March 20 decision to seek Local 113 representation rather than MNA representation.

Davis contacted Local 113 and it was agreed a representative of Local 113 would attend the next nurses support group meeting, scheduled for March 27 at Duerr's home.

7. The March 25 job description distributions, alleged unlawful prohibition of union activity, and discharge threat

On March 25, Duerr was summoned to a meeting with Stinski, Levich, and Staska. Levich handed Duerr a document titled "Nurse Manager Job Description" and instructed to read it. The document read as follows:

Department: Nursing

Responsible To: Director of Nursing

Summary of Job:

The Nurse Manager is ultimately responsible for nursing care within his/her nursing station(s) including responsibility for the overall supervision and direction of staff assigned to that station or stations.

Qualifications:

Must be a registered nurse who is currently licensed to practice nursing in the state of Minnesota. Long-term care experience as a registered nurse preferred, but not required.

Job Requirements:

The nurse manager must be able to provide leadership and support for resident care and the management of staff on his/her station(s). She/he must be able to function in crisis situations and be able to assess resident conditions as well as appropriately handle personnel and labor relations matters as management's representative. The nurse manager is responsible for compliance with the Minnesota Department of Health rules and regulations; is responsible for implementing policies and procedures of the facility and recommending changes when appropriate. The nurse manager is also responsible for compliance with applicable bargaining agreements and contracts. As a member of the management team, the nurse manager will attend management meetings and other meetings which are, from time to time, necessary to the appropriate functioning of her/his position.

Job duties:

1. Daily rounds of resident areas and nursing stations to monitor the following: change in residents' condition, nursing follow-up, infection control, positioning and safety, etc.

2. Attend morning meetings and relay information between nursing and other departments.

3. Monitor care plans to assure they are up to date and reflect current orders for care. Coordinate the integration of all care plans into the new format and attend all initial care conferences.

4. Coordinate admissions, discharges and room changes to assure a smooth transition for the resident.

[9] Staska was Levich's second in command and exercised supervisory authority over the nurses. I find at all pertinent times Staska was a supervisor and agent of the Respondent acting on its behalf within the meaning of Sec. 2 of the Act.

5. Introduce and make self available to all new residents and family members within three to five days of admission to provide prompt response to concerns or complaints.

6. Monitor MDs and admission documentation for completeness and accuracy and to support case files.

7. Develop a cohesive nursing team. This includes participating in all areas of team management, i.e., training, counseling, discipline and evaluation of employee performance, etc.

8. Provide direction at meal time to assure timely, efficient and comfortable meal service.

9. Participate in monthly Quality Assurance Committee.

10. Assist with checking physician's renewals and med sheets.

11. Participate in on-call rotation as assigned by Director of Nurses.

12. Provide initial and annual evaluation of employees and meet with employees to review those written evaluations and determine whether probationary employees should be employed after completion of the probationary period.

13. Discipline employees including direct authority to issue oral and written warnings and to suspend employees and to make recommendations to the Director of Nursing regarding the termination of employees.

14. Provide for effective employer/employee relations with responsibility for monitoring and seeking compliance with various facility policies and procedures including bargaining agreements and contracts and is responsible for handling employee grievances at the Step 1 level pursuant to the applicable grievance procedure.

15. Responsible for determining appropriate staffing levels, including calling extra staff in when necessary and advising staff to stay home or leave early.

16. Responsible for determining whether overtime should be worked and authorizing the payment of overtime.

17. Any other duties as assigned by the Director of Nursing.[10]

When Duerr finished reading the document, Levich asked if she would have any difficulty performing the described duties. Duerr replied she guessed not. Levich asked if she was able to perform the described duties. Duerr replied she guessed so. Stinski then read a document to Duerr which in essence stated it was illegal for employees in management positions to attend union meetings and/or participate in collective bargaining, and were subject to discharge if they did so. When Stinski completed her reading, she asked Duerr if she had any problem with that. Duerr replied she did not have a problem, since she did not think she was in a management position. Stinski stated Duerr just read her job description, stating she was a manager. Duerr replied the determination of who was a manager occurred when an election was directed. Stinski stated she needed to know if Duerr was loyal to management. Duerr responded she needed her job. Stinski stated she did not want to hear Duerr say she was a manager just because she needed her job, she wanted to know right now whether Duerr was promanagement or she could be terminated. Duerr replied then she guessed she was promanagement. Stinski stated that meant Duerr could not attend any more union meetings. Levich repeated that observation.

Davis was summoned to a meeting with Stinski and Levich the same day. Davis was handed a job description titled "Building Supervisor Job Description—Weekend Shift" and instructed to read it. The document read as follows:

Department: Nursing

Responsible To: Director of Nursing

Summary of Job:

The building supervisor is responsible for the management and supervision of all departments of the Nursing Home while on duty. While on duty, the building supervisor functions as the representative of the Nursing Home Administration.

Qualifications:

Must be a registered nurse or a licensed practical nurse who is currently licensed to practice nursing in the state of Minnesota. Should possess a high level of nursing and managerial skills, including the ability to supervise professional and non-professional staff. Possesses good communication skills in relating to patients, families and staff in a professional manner, and is able to function independently as well as a team member of nursing and in her/his disciplinary services.

Job Requirements:

The building supervisor is the highest member of management on premises, and is responsible for the overall operation of the facility and the supervision of all staff. All departments of the Nursing Home report to the building supervisor while she/he is on duty. She/he is also responsible for handling and providing supervision and direction in connection with any and all emergencies that may occur at the Nursing Home. The building supervisor is also responsible for appropriately handling personnel and labor relations matters as management's representative. The building supervisor is responsible for implementing policies and procedures of the facility and recommending changes when appropriate. The building supervisor is also responsible for compliance with applicable bargaining agreements and contracts. As a member of the management team, the building supervisor will attend management meetings and other meetings which are, from time to time, necessary to the appropriate functioning of her/his position.

Job Duties

1. Has the authority to direct the work of all employees regardless of the department in which such employees work.

2. When called upon, conducts performance evaluations for nursing staff, including making recommendations with respect to whether probationary employees should be retained after the conclusion of their probationary period.

3. Is responsible for handling the keys for all outside doors in all departments and make security rounds of the entire building several times during his/her shift.

[10] Suzanne Moffitt, the designated nurse manager for the second floor at Westwood, was supplied a similar job description at about the time Duerr received her job description.

4. Takes charge if there is a fire, severe weather or other emergency and utilizes all available nursing staff as appropriate.

5. Provides emergency care for all accidents/injuries to staff and assesses the need for further medical attention and makes arrangements for it if necessary.

6. Is responsible for coordinating patient care in all nursing areas, including visits to newly admitted patients and those whose condition has changed to assess their condition and needs.

7. Makes daily rounds of nursing stations to assure that residents are properly groomed and dressed and that their surroundings are clean, orderly and safe.

8. Consults with the physician and others involved in treatments in planning patients' medical care.

9. Is responsible for handling staffing assignments, including calling in staff if additional staff are needed as well as advising staff to leave early or stay home.

10. Determines whether overtime should be worked and authorizes overtime.

11. Assures staff compliance with Nursing Home policies and procedures.

12. Disciplines employees including direct authority to issue oral and written warnings and to suspend employees and make recommendations to the Director of Nursing regarding the termination of employees.

13. Provides for effective employer/employee relations with responsibility for monitoring and seeking compliance with various facility policies and procedures including bargaining agreements and contracts and is responsible for handling employee grievances at the Step 1 level pursuant to the applicable grievance procedure.

14. Any other duties as assigned by the Director of Nursing.[11]

When Davis finished reading the document, Levich asked her if there was any question Davis was a building supervisor; Davis replied she guessed not. Stinski asked Davis if she had any questions about her described duties. Davis said, with reference to 3., she did not have keys to the maintenance room. Stinski said the keys would be provided and asked Davis if she had any other problems with respect to her described duties. Davis responded she had a problem if the described duties meant she could not pursue protection for herself or other employees. Stinski asked Davis why she was antimanagement. Davis responded she was not antimanagement, every facility needed managers. Stinski criticized unions and Davis asked Stinski why she was afraid of unions. Stinski replied she was not afraid of unions but did not like them because they disrupted management-labor relations and recited problems she experienced with Local 113.

Levich ended the meeting with the comment this was serious business, Westwood was playing hardball, and that could mean Davis' job.

[11] Terri Walburg, the p.m. or swing-shift building supervisor, and Cheryl Wandersee, the night-shift building supervisor, also received copies of similar job descriptions about the same time.

8. The alleged unlawful March 26 prohibition of union activities, direction to interrogate other employees about union activities, and solicitation of employee grievances

Davis and Duerr were directed to attend a March 26 meeting. Stinski, Levich, Staska, Moffitt, Walburg, Davis, and Duerr attended the meeting.

Stinski distributed job descriptions to everyone present at the outset of the meeting and had all seven (Levich, Staska, Moffitt, Walburg, Wandersee, Davis, and Duerr) read their respective job descriptions. When the seven finished reading the documents, Stinski asked if anyone had any problem with the duties described for their respective jobs. There was no response. Stinski took the seven through the procedures to be followed in processing employee grievances. Respondent's counsel Dawson then entered the room and asked if everyone present received and read their job descriptions and received an affirmative response. He repeated an earlier Stinski comment the Westwood personnel present constituted Westwood's management team, adding as supervisors they were barred from engaging in union activities. He stated he understood the Westwood nurses had been looking into representation by MNA, they were currently exploring Local 113 representation and he could not understand why, he could not see what the nurses thought a union could do for them. He asked what issues were troubling the nurses. Duerr responded the nurses were concerned with short staffing and whether Westwood would back them if their licenses were jeopardized; Davis stated there had been some wage problems. Dawson responded he didn't know what the nurses thought the union could do about those problems and passed out instructions on supervisory "do's and do not's," i.e., not to threaten employees for engaging in union activities, not to interrogate employees about union activities, and not to promise anything for refraining from union activities. He then advised those present he would be assigning each of them two or three nurses to talk to, find out their views and reasons for seeking union representation and try to dissuade those who supported representation.

9. The alleged March 26 unlawful interrogation, impression of surveillance, and threat

The same day the meeting just described took place, Levich approached Duerr at the facility, stated she heard Duerr was hosting a union meeting at her home the following evening and hoped that was not true. Duerr denied what Levich heard was correct.[12]

10. The March 27 meeting

A substantial number of Westwood nurses attended the March 27 meeting at the VFW facility, including Davis and Duerr. A Local 113 representative appeared at the meeting, addressed the assembled nurses and solicited their signatures to cards authorizing Local 113 to act as their collective-bargaining representative. A sufficient number of nurses signed the cards to enable Local 113 to petition for certification by the Region as their representative, including Davis and Duerr.

11. The allegedly unlawful March 28 suspensions

The day following the meeting, Levich summoned Duerr to her office, stated she had been informed Duerr attended a union meeting the previous evening, she had defied specific earlier

[12] The meeting scheduled for March 27 at Duerr's home was relocated and held at a local VFW facility.

instructions to refrain from such activity, and she was suspended indefinitely for such attendance. Levich communicated the same message by telephone to Davis, who was not scheduled for work on March 28.

12. The alleged unlawful April 3 interrogations, solicitations, and discharges

On April 3 Davis and Duerr met with Stinski and Levich. Stinski asked the two why they attended a union meeting when they had been instructed they were supervisors barred from such attendance. Duerr and Davis responded being told they were supervisors did not make them supervisors and they believed they could do what they pleased during their nonworking time. Stinski asked the two what the issues were which were troubling the nurses and Davis recited a list, including short staffing, floating assignments, wages, etc. Stinski offered to accept their resignations. The two declined the invitation. Stinski then informed them they were discharged for engaging in union activities while employed as supervisors.

13. The alleged unlawful April advice other employees were discharged for engaging in union activities, solicitation of grievances, and interrogation regarding union sentiments[13]

In early April, Levich telephoned Plourde at her duty station and asked Plourde to come to her office. When Plourde arrived, Levich escorted her to the first floor lounge in the facility, stating she wanted to conduct a private conversation. On arrival at the lounge, Levich stated she wanted to tell Plourde the Davis/Duerr discharge was fair, since the two went to a union meeting after being warned not to attend union meetings or they would be discharged. She stated she was taking this very personally, she could not understand why Davis was doing this to her and asked what Plourde's concerns were. Plourde responded she was concerned about the Forliti, Davis, and Duerr discharges, they were all good nurses, the nurses did not know what to believe, and about nurses not receiving timely wage increases. Levich told Plourde to come to her or Stinski with any problems she had, she didn't need any outside help. Plourde said she wanted to stay neutral. Levich responded she couldn't stay neutral, she needed to take a side, she needed Plourde on her side. Plourde did not respond.

Also in April, Staska contacted LPN Paula Brill and told her to stop by her office. When Brill arrived, Staska asked Brill if she was aware of the reason for the discharges of Davis and Duerr. Brill replied she was not sure. Staska stated the two were discharged because they were told, as supervisors, not to attend union meetings but defied those instructions A second time during the same month, Staska told Brill to come to her office and, upon her arrival, told Brill she could get back her card authorizing Local 113 to represent her by simply asking Local 113 to return the card.

Still during the same month, prior to Brill's departure from the facility during her shift hours to secure medical treatment for an on-the-job injury, Staska directed Brill to report to her office before leaving the facility. On Brill's arrival, Staska told Brill she was absent from work too much (Brill previously received two disciplinary warnings for excessive absenteeism and risked more severe discipline for a third absence); if the nurses were represented by Local 113, she would have to give Brill a 3-day suspension for excessive absenteeism but, since the nurses were unrepresented, she was just going to remind Brill she was absent too much.

On a fourth occasion during April, Staska gave Brill a document purportedly stating what a union could and could not do for employees it represented and asked Brill what she felt the union could do; Brill did not respond.

14. The April petitions

On April 5, Local 113 filed petitions with the Region seeking certification as the exclusive collective-bargaining representative of: (1) all full-time and regularly scheduled registered nurses, including the staff development coordinator, employed by Westwood, excluding office clerical employees, managerial employees, professional employees, watchmen, guards, and supervisors as defined in the Act, and all other employees (Case 18–RC–15000) and (2) all full-time and regularly scheduled technical employees, including licensed practical nurses and the rehabilitation nursing coordinator employed by Westwood, with the same exclusions (Case 18–RC–15002).

15. The alleged unlawful April 20 interrogation, direction to abandon support for Local 113, obtain the return of a signed authorization card, take management's side re: union representation and grievance solicitation

On April 20 LPN Plourde was summoned to a meeting. In attendance were Plourde, Stinski, Levich, Staska, Walburg, Moffitt, and Carol Lindeberg (the staff development coordinator).

Stinski repeated Levich's earlier statement to Plourde to the effect Davis and Duerr were discharged because they violated instructions, as supervisors, not to attend union meetings. Stinski described the duties of Moffitt and stated Duerr was in the same position; i.e., both were supervisors. She described the duties of Walburg and stated Davis was in the same position as Walburg; i.e., they were both supervisors; described Lindeberg's duties and stated she also was a supervisor.

Stinski stated a union creates a house divided, Westwood management needed Plourde on their side, stated they were aware Davis was the union's chief organizer and asked why Davis was doing this, was it something personal with Davis. Plourde stated she was not aware of anything personal in Davis' actions. Levich stated she was taking this personally, the union campaign was taking so much of management's time it was interfering with getting work accomplished and taking care of patients. Stinski asked Plourde what the issues were. Plourde repeated what she earlier stated to Levich, i.e., the three discharges and the nurses' failure to receive raises on dates due. Either Stinski or Levich told Plourde if she signed a card authorizing Local 113 to represent her, she could get it back.

16. The May hearing on the petitions, the July direction of election, the August election, and the August certifications of the election results

On May 6 the Region conducted a hearing on the two petitions and on July 3 the Regional Director directed an election in the units specified above.

The parties stipulated Walburg, the p.m. building supervisor, should be excluded as a supervisor within the meaning of the

[13] The complaint alleged (par. 5,m.) in late March Levich engaged in the conduct set out in this caption. The witness who testified concerning those actions, Joanne Plourde, placed the conversation when the alleged remarks were made in late March, as well. While I find a conversation between Levich and Plourde took place in which remarks set out below were made, I find the conversation took place in early April, since the Davis/Duerr discharges were discussed during the conversation.

Act and Local 113 did not dispute the Respondent's contention Moffitt, a nurse manager, and Wandersee, the night building supervisor, should also be excluded as supervisors within the meaning of the Act. The staff coordinator, contrary to the Respondent's contentions, was included within the RN unit and the rehabilitation coordinator, again contrary to the Respondent's contentions, was included in the LPN unit.

The Regional Director did not resolve the contrary contentions of the Respondent and Local 113 concerning the status of Davis and Duerr, deciding they might vote by challenged ballot.

The Respondent submitted a list of 13 registered nurses, including the staff coordinator, as eligible to vote in the RN unit and 14 licensed practical nurses, including the rehabilitation coordinator, as eligible to vote in the LPN unit.

The election was conducted on August 2.

In the RN unit, 13 votes were cast, 1 for Local 113 representation, 6 against Local 113 representation, with 6 challenged ballots. In the LPN unit, l6 votes were cast, 5 for Local 113 representation, 9 against Local 113 representation, with 2 challenged ballots. The parties later stipulated 5 of the 6 challenges in the RN unit election were valid, producing a tally of 1 vote for Local 113 representation, 6 votes against Local 113 representation and 1 challenged ballot.

Since in both cases the challenges were insufficient to affect the results of the election, in August the Regional Director certified a majority of the valid votes cast in the two elections were against Local 113 representation.

17. The powers, duties, and responsibilities of Westwood's building supervisors and nurse managers

a. Preliminary

The other two nursing homes operated by the Respondent in the Minneapolis area were housed in adjacent buildings about 3 miles from Westwood. One was called Bryn Mawr Health Care Center (Bryn Mawr) and the other Queen Health Care Center (Queen).

Prior to 1989, the management structure at the three centers was identical; i.e., each had an administrator in overall charge of the facility; a director and assistant director of nursing in charge of the nursing staff, whose normal work shift extended over the day shift, Monday through Friday; a chief or charge nurse at each station in charge of the nursing staff at their respective stations during the day shift, Monday through Friday; a p.m. or swing-shift building supervisor in overall charge of all personnel employed at the facility during his or her shift, Monday through Friday; a night-shift building supervisor in charge of all personnel employed at the facility during his or her shift, Monday through Friday; a weekend building supervisor, in charge of all personnel employed at the facility during his or her shift on Saturdays and Sundays; and a rotating assignment of nurses to cover those hours on the Saturday and Sunday evening or swing shifts and night shifts the weekend building supervisor was off duty.

In 1984 the unit composition was clarified at the Bryn Mawr facility by a ruling issued by the Regional Director for Region 18 to the effect the p.m., night, and weekend building supervisors were supervisors within the meaning of Section 2 of the Act and therefore excluded from the bargaining unit represented by a labor organization other than Local 113 (Case 18–UC–168).

As noted earlier, the Regional Director for Region 18 also excluded Westwood's p.m. and night supervisors from the bargaining units Local 113 sought to represent at Westwood, as well as Nurse Manager Moffitt.[14]

In 1989 a nurse manager position was created at the Bryn Mawr and Queen centers and one nurse manager was placed in charge of the nursing staffs on each floor of the two facilities on the day shift, Monday through Friday rather than having a head nurse at each station on each floor in charge of the nursing staff assigned to his or her station (with a consequent loss of the $1-per-hour premium pay paid to each of the head nurses), and a lessening of the head nurse's authority and powers as well.

The then administrator and director of nursing at Westwood discussed making a similar change at Westwood, interviewed candidates for the planned nurse manager positions (including Duerr and Moffitt) and announced the proposed change, but failed to implement the change when the director of nursing left the Respondent's employ.

b. The creation of the nurse manager position at Westwood

The director of nursing position remained vacant until October 1990, when Levich assumed the post. She and Stinski decided to implement the change at that time, offered the positions to Duerr and Moffitt, who accepted, and discussed the job requirements, including evaluating employee performance and disciplining employees for cause. The two were advised they would retain their $1-per-hour premium rate (both were head nurses)[15] and assigned floors (Moffitt, the second floor; Duerr, the first floor).

At a general meeting of all the nurses on January 9, 1991, Levich advised the assembled nurses the head nurse position was abolished, supervision was consolidated in the person of a single nurse manager on each floor, and Duerr and Moffitt would man the two positions.

c. The duties of the nurse managers and the building supervisors

A short time thereafter Levich conducted an evening meeting with Moffitt, Duerr, Davis, Walburg, Staff Coordinator Carol Lindeberg, and Joan Ebert, who filled in for Davis as building supervisor during Davis' absence.[16]

Levich distributed forms Westwood developed in late 1990 for use in issuing disciplinary warning notices, reviewed the forms with those present at the meeting, and advised the nurse managers and building supervisors they were responsible, on their own authority for the issuance of disciplinary warnings to employees whose conduct they deemed warranted discipline. Levich also distributed forms Westwood developed for evaluating employee performance, reviewed the forms and advised the nurse managers and building supervisors they were also responsible for making such evaluations and reviewing their evaluations with affected employees prior to transmission to her.

Walburg, Wandersee, and Davis were appointed p.m., night and weekend building supervisors and were receiving their premium rate of pay long before the nurses began their exploration of possible union representation. The three were the high-

[14] The nurse manager position was not created at any of the three centers until 1989, as discussed below.

[15] With a consequent loss of the premium by head nurses at the five stations on the two floors of the facility.

[16] Wandersee was on duty.

est representatives of management at the center during their service as building managers; they directed and monitored the performance of all the employees at the facility during their shifts, both Local 113-represented and nonrepresented; they adjusted employee complaints;[17] they were responsible for the overall security of the center during their shifts; they granted or denied requests by employees working their shifts to either leave early or arrive late; they were authorized to schedule overtime and did so;[18] they assigned, reassigned, and transferred employees between stations and floors as needed, without recourse to higher authority; they evaluated the job performance of employees working their shifts and reviewed the appraisals with the affected employees (the form had a space for the signature of the employee he or she had reviewed the appraisal), including the review of the job performance of probationary employees and recommendations utilized in deciding on retention or nonretention;[19] and they issued oral and written disciplinary warnings to employees working their shifts, including (as to Walburg and Wandersee) the suspension of employees for cause and the effective recommendation of employee discharges for cause.

Both Walburg and Wandersee were supplied a document describing the duties they were authorized and expected to perform at the time they were appointed as building supervisors. Davis denied she received or reviewed such a document when she was appointed a building manager.

Davis assumed her duties and received premium pay as a weekend building supervisor in 1983 or 1984 but was not formally designated weekend building supervisor until January 1989. Until about November 1990, she worked 12-hour shifts on Saturdays and Sundays, from 6 a.m. to 6 p.m., as weekend building supervisor and 8-hour shifts on the p.m. or swing shift on Monday and Tuesday as a staff nurse under Building Supervisor Walburg (oftentimes substituting for Walburg during her absences or unavailability). In late 1990 her weekend workshift was reduced from 12 to 9-1/2 hours and she remained on that schedule until her April 3 discharge.[20]

There was a staff on duty on Walburg's p.m. or swing shifts of approximately 39 employees, including RNs, LPNs, CNAs, and TMAs; approximately 20 on Wandersee's night shifts; and at least 57 during Davis' weekend shifts (which extended over both day and p.m. shifts and included janitorial, kitchen, housekeeping, and laundry as well as nursing personnel).

Duerr and Moffitt were appointed nurse managers in late 1990. The nursing staff was informed of their designation and the consequent loss of premium pay, loss of authority, and reduced responsibility of the head nurses at the various stations in January 1991.

Both had the opportunity in 1989 to review the duties it was anticipated the nurse managers would be authorized and expected to perform. Those duties were set out in a document posted at the facility and included, inter alia: the disciplining of nursing staff for cause,[21] including suspension and discharge recommendations; assignment and reassignment, or transfer of nursing staff as needed; supervising and monitoring the work of the nursing staff; completion of performance evaluations of probationary employees, including recommendations regarding retention or nonretention; completion of annual performance evaluations of all nursing staff on the floor; plus monitoring and assuring compliance with Westwood policies, procedures and the provisions of applicable collective-bargaining agreements, including processing step-1 grievances.

From the time Moffitt assumed her position as nurse manager of the second floor, she ceased carrying a patient care load at a particular station (administering medications and treatment, etc.) unless staff shortages or heavy demand required her performance of those functions; directed and monitored the work of the nursing staff during her shift; either prepared or saw to the correct preparation of all paperwork required during her shift; called in, transferred or reassigned nursing staff to meet patient needs; issued disciplinary warnings; suspended employees for cause; effectively recommended employee discharges; authorized employees to come in late or leave early; evaluated probationary employees after 30 and 60 days of employment and effectively recommended retention or non-retention of such employees; authorized overtime; and adjusted employee grievances either at step 1 of the Respondent-Local 113 contract's grievance procedure or step 1 of the letters of understanding executed by the Respondent and the nurses upon the nurses' hire.

Duerr also, on assuming her position of nurse manager on the first floor: directed and monitored the work of the first-floor nursing staff; performed or reviewed for accuracy all paperwork prepared during her shift; transferred or reassigned nursing staff to meet patient needs; contacted the staffing coordinator for procurement of staff to fill absences; performed a few employee performance evaluations, reviewed those evaluations with the affected employees, including an entry in the recommendation section of her report concerning a probationary employee on completion of 60 days of the employee's probationary period certifying the employee's satisfactory performance of assigned work during the 60-day period; authorized and approved overtime; and had no cause to issue disciplinary warnings to employees or to suspend employees or to recommend the discharge of employees; and did not receive or adjust any employee grievances.

From and after the time they were appointed as nurse managers, Duerr and Moffatt spent varying portions of their working time administering medications, treatments, etc., as well as performing their duties as nurse managers.

Duerr stated following her designation as a nurse manager, the staffing schedule for the first floor called for (in addition to Duerr) one nurse at station 1 assisted by three to four aides (TMAs and CNAs) and three aides at station 2, though oftentimes the schedule was not met and she was short staff. Davis and Moffatt stated approximately 19 nurses and aides were assigned to stations 3, 4, and 5 on the second floor (where the

[17] Davis stated she did not make any formal adjustments, though she sought to satisfy wage complaints brought to her by employees working during her weekend shifts as building manager.

[18] Davis stated she scheduled her own overtime without consultation with anyone else but did not schedule overtime for other employees without securing prior authorization. Stinski contradicted that testimony, stating there was no such requirement. I credit Stinski's testimony.

[19] Davis stated she did not perform any employee evaluations despite Levich' advice that was one of her duties.

[20] Between January 1991 and her April 3, 1991 discharge, 76 percent of her worktime was spent working either as a weekend or p.m. shift building supervisor.

[21] RNs, LPNs, CANs and TMAs.

larger number and more seriously disabled patients or residents were housed).

d. The alleged change in Davis' and Duerr's job status from employee to supervisory status

The General Counsel and the Charging Party contend Davis and Duerr were promoted to supervisory status when the Respondent became aware of their union activities in order to inhibit those activities and place them in an unprotected status under the Act.

A resolution of this question turns on the powers and responsibilities the building supervisors and nurse managers were given and expected to exercise prior to the Respondent's awareness of union activities among the nurses. That awareness occurred on February 22, when Stinski and Levich received reports from other nurses that during the previous evening's support meeting, Davis and Duerr invited an MNA representative to appear and solicit their authorizing MNA to represent them for collective-bargaining purposes.

Prior to February 22:

1. Walburg, Wandersee, and Davis were functioning as building supervisors on their respective shifts.

2. The three were responsible for and expected to see that quality care was afforded patients or residents by all staff on duty at the facility during their respective shifts, including both the nursing and all other staff personnel on duty during those shifts.

3. The three received premium pay for so functioning.

4. The three were the highest management representatives on duty during their respective shifts.

5. The three were authorized and expected to:

(a) direct and monitor the work of all represented and unrepresented employees on duty during their respective shifts;

(b) require all personnel on duty to comply with state laws, rules and regulations, as well as Westwood's rules, regulations, policies and procedures during their respective shifts;

(c) either prepare or oversee the proper preparation of all charts and other documentation required during their respective shifts;

(d) patrol the facility and assure the security of the entire facility during their respective shifts, with sole possession of keys necessary to conduct the patrols;

(e) assign, re-assign or transfer employees on duty between floors, stations, etc., as need dictated, during their respective shifts;

(f) release employees from duty during their normal working hours and call in employees to fill vacancies as need dictated during their respective shifts;

(g) conduct job performance evaluations of employees working their respective shifts, including 30 and 60 day evaluations of the performance of probationary employees, to determine whether such employees should be retained;[22]

(h) issue verbal and written disciplinary warnings to employees working their respective shifts for cause, suspending employees working their shifts for cause, and recommending the discharge of employees working their shifts for cause;[23]

(i) authorize and grant overtime to employees on their shifts as need dictated.

6. The employees on their respective shifts recognized Davis, Walburg, and Wandersee as authorized to direct, assign, and reassign their work, relieve them from duty, discipline them, evaluate their job performance, and otherwise carry out the duties just enumerated.

Also prior to February 22, the nurse managers:

1. Were responsible for maintaining proper nursing care of all patients on their respective floors during their shifts.

2. Were authorized to, directed and monitored the work of all nursing staff (RNs, LPNs, CNAs, and TMAs) at all stations on their floors during their shifts.

3. Were responsible for compliance with state laws, rules and regulations; Westwood's rules, regulations, practices and procedures; and the proper preparation of all documentation by the nursing staff during their shifts.

4. Were authorized and expected to issue disciplinary warnings and suspensions for cause to nursing staff working their respective shifts, as well as recommendations for discharges for cause.[24]

5. Were responsible for compliance with applicable collective-bargaining agreements, including authorization to handle step 1 grievances under the Respondent-Local 113 agreement and the nurses' letters of understanding.[25]

6. Were responsible for and expected to conduct performance evaluations of all nursing staff on their respective floors and shifts, including the 30 and 60 day evaluations of probationary employees and recommendations concerning their retention or nonkretention.[26]

7. Were authorized to call in, release early, and instruct nursing staff on their floors not to come in.[27]

8. Were authorized to grant overtime.

9. Received premium pay over the rates of pay paid the RNs, etc. on their floors during their shifts.

10. Were recognized by the nursing staffs on their floors during their shifts as empowered to direct, assign and reassign their work, administer discipline, conduct evaluations, grant or deny requests to leave early or come in late, etc.

Neither the nurse managers nor the building supervisors hired, laid off, recalled, promoted, or rewarded employees.

Subsequent to February 22, the duties Warburg, Wandersee, Davis, Moffitt, and Duerr were empowered to perform, ex-

[22] Davis did not conduct any evaluations subsequent to her appointment as a building supervisor. She was advised by Levich on February 4, however, this was one of the duties she was expected to perform.

[23] Davis issued several disciplinary warnings but neither suspended nor recommended the discharge of any employees on her shift while functioning as a building supervisor, though advised in January she was authorized and expected to do so if any employee conduct warranted such action.

[24] While Duerr stated she found no cause to take any disciplinary actions during her shifts, she was authorized and expected to do so prior to February 22.

[25] While Duerr stated she did not receive or handle any grievances, she was authorized and expected to do so prior to February 22.

[26] Duerr conducted at least one probationary employee evaluation during her tenure as a nurse manager; both the 1989 job description posted prior to Duerr's application for the position in 1989 and Levich's January 1990 instructions to Moffitt and Duerr included an instruction to conduct such evaluations.

[27] While Duerr stated she contacted the staff coordinator when she wanted extra or pool nursing staff called in, she was authorized to call directly.

pected to perform, and did perform, as described above, continued unchanged and were codified and clarified in formal job descriptions issued to the five on March 25 and set out above.

B. Analysis and Conclusions[28]

1. The employee/supervisor issue

Section 2(11) of the Act states the term "supervisor" covers any person with authority on behalf of his or her employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority requires the use of independent judgment.

The section is worded in the disjunctive; i.e., if the person was authorized by his or her employer to exercise any one or more of the described duties, that person is a supervisor, so long as he or she was authorized to use his or her independent judgment in carrying out his or her authorized duties or functions on behalf of his or her employer.[29]

Conceding Moffitt, Walburg, and Wandersee were Westwood supervisors and ignoring the Region's determination all nurse managers and building supervisors at Bryn Mawr, including the weekend supervisor, are supervisors within the meaning of the Act, the General Counsel and the Charging Party contend Davis and Duerr, while titled weekend building supervisor and nurse manager respectively, were employees within the meaning of the Act, at least until the issuance of their March 25 job descriptions.

The General Counsel and the Charging Party rely upon a rationale developed by the Board to the effect nurse's aides are simply carrying out routine tasks set by professionals, i.e., doctors and nurses, and therefore the nurse who directs their performance and insures proper care of the patients under his or her charge, is not a supervisor exercising independent judgment on behalf of his or her employer when he or she orders the performance of the work in question, but simply exercising "routine" judgment in issuing her orders or instructions. As a corollary in some cases, the Board has also indicated, since the nurse in charge is a professional exercising professional responsibilities which may not necessarily be in his or her employer's interest, this fails to satisfy the supervisory requirement a supervisor is one acting on his or her employer's behalf.[30]

With one notable exception, many circuit courts have adopted the rationale.[31]

The Sixth Circuit Court has consistently rejected the rationale, however, finding no logical basis for a conclusion the direction of employees in the performance of their work by an employee charged with the duty of assuring other employees perform their work efficiently in the health field is distinguishable from the exercise of such direction in other industries.[32]

The cases cited by the General Counsel and the Charging Party are not decisive for here, as in cases cited below (in several cases in the same circuits listed above), the building supervisors and the nurse managers were empowered to do far more than direct and monitor the work of the staff personnel during their respective shifts to assure quality care for the patients or residents in their charge. They were empowered to assign, reassign and transfer other employees as they determined a need therefor; to release and call in employees as they determined a need therefor; to conduct employee performance evaluations, including evaluations which determined continued employment (as to probationers) and possible need for additional training or reassignment; to issue verbal and written disciplinary warnings and suspend employees if they determined employee conduct warranted such action; to grant overtime if they determined the necessity therefor; to assure compliance by other employees with applicable laws, rules, regulations, and contracts; were recognized as representatives of management by employees on their respective shifts authorized to affect their employment; received premium pay for their duties; and would result in an irrational ratio of supervisors to employees if they were classified "employees" (especially on those shifts when they were the sole management representatives on duty (a ratio of 0 supervisors to staff on the p.m., night, and weekend shifts and two supervisors to the entire nursing staff employed on the day shifts) and in most cases cited below there was a shift supervisor over the nurses whose status was in question.[33]

The fact Davis spent time during her supervisory shifts performing staff duties is immaterial, inasmuch as she was empowered and expected to exercise the powers described above.[34]

The same logic applies to the fact Davis and Duerr did not exercise all the powers they possessed following their appointments to the management team.[35]

As the Board noted in *Riverchase*, supra, "The employer correctly points out that it is the possession of supervisory power rather than its exercise that determines supervisory status . . . ."[36]

Nor is the contention nurses other than Davis, Duerr, Moffatt, Walburg, and Wandersee have exercised some of the powers and duties granted and assigned to those five employees decisive, for such exercise occurred prior to the creation of the two nurse manager positions and while head or charge nurses were authorized to exercise those powers or during periods staff

[28] Some of the conduct attributed to representatives of the Respondent discussed below was not detailed in the complaint allegations. The issues raised by such conduct, however, were fully litigated and have been resolved on the merits.

[29] *NLRB v. Yeshiva University*, 444 U.S. 672 (1980).

[30] *Health Care Corp*., 306 NLRB 63 (1992); *Riverchase Health Care Center*, 304 NLRB 861 (1991); *Waverly-Cedar Falls Health Care*, 297 NLRB 390 (1989); *Waverly-Cedar Falls Health Center*, 298 NLRB 997 (1990); *Hillview Health Care Center*, 261 NLRB 160 (1982).

[31] *Misericordia Hospital Medical Center v. NLRB*, 628 F.2d 808 (2d Cir. 1980); *NLRB v. Res-Care, Inc*., 705 F.2d 1461 (7th Cir. 1983); *Waverly-Cedar Falls Health Care. Inc. v. NLRB*, 933 F.2d 626 (8th Cir. 1991); *NLRB v. Walker County Medical Center*, 722 F.2d 1535 (11th Cir. 1984).

[32] *Beverly Enterprises v. NLRB*, 661 F.2d 1095 (6th Cir. 1981); *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076 (6th Cir. 1987); *Beverly California Corp. v. NLRB*, 970 F.2d 1548 (6th Cir. 1992). Also see *NLRB v. Yeshiva University*, supra.

[33] *NLRB v. American Medical Services, Inc*., 705 F.2d 1472 (7th Cir. 1983); *NLRB v. St. Mary's Home, Inc*., 690 F.2d 1062 (4th Cir. 1982); *Beverly California Corp. v. NLRB*, ibid; *Los Alamitos Medical Center*, 287 NLRB 415 (1987); *Lincoln Lutheran*, 290 NLRB 1077 (1988); *Wright Memorial Hospital*, 255 NLRB 1319 (1980). Also see *NLRB v. Yeshiva University*, ibid, wherein the "professional" rationale described above was rejected.

[34] *Northwoods Manor, Inc*., 260 NLRB 854 (1982); *Olympic Plastics Corp.,* 266 NLRB 519 (1983).

[35] *Columbia Textile Services, Inc*., 293 NLRB 1034 (1989).

[36] 304 NLRB 861at fn. 9.

nurses were substituting for building managers or nurse managers in such exercise.

I therefore conclude from and after their appointment to their respective positions as either nurse manager or building supervisor, Davis, Duerr, Moffitt, Walburg, and Wandersee were supervisors within the meaning of Section 2(11) of the Act.

2. The alleged protected status of Davis and Duerr

The General Counsel and the Charging Party allege the Respondent promoted Davis and Duerr to their positions as building supervisor and nurse manager during the campaign to inhibit their union activities and for that reason enjoyed the status of employees protected under the Act following those promotions.

The evidence does not support this contention.

Both Davis and Duerr were promoted to their respective positions prior to management awareness of their engagement in any union activities; prior to such awareness, both were authorized to perform the duties or functions described in 1 above, received premium pay therefor, and were recognized by the employees under their supervision as possessing and charged with carrying out the supervisory duties or functions they were assigned, paid for and expected to utilize; thus neither one was an "employee" within the meaning of the Act prior to management awareness of their union activities nor was either promoted after such awareness; rather, they were "supervisors" throughout, i.e., both before and after their engagement in union activities.

The Respondent's issuance of the March 25 job descriptions to Moffitt, Duerr, Walburg, Wandersee, and Davis did, as Davis stated, describe powers and duties she had not exercised; this, however, did not change her powers and duties. As Moffitt stated, they simply set forth what she understood the nurse managers were empowered and expected to do. I therefore find and conclude their issuance did not change the status of Davis and Duerr from that of "employees" to that of "supervisors" within the meaning of Section 2 of the Act but rather find and conclude Davis and Duerr were supervisors within the meaning of the Act both before and after the issuance of the March 25 job descriptions.

3. The alleged 8(a)(3) violations

The Board has held supervisors are not protected under the Act and therefore may be discharged for engaging in union activity without violating the Act.

I therefore conclude the Respondent did not violate the Act by suspending and discharging Davis and Duerr for defying management's instructions to cease advocating and supporting Local 113's campaign to organize the Westwood nurses and to support Westwood in its opposition thereto. *Parker-Robb Chevrolet, Inc.,* 262 NLRB 402 (1982), petition for review denied sub nom., 711 F.2d 383 (1983); *Lincoln Lutheran*, 290 NLRB 1077 (1990); *Pontiac Osteopathic Hospital*, 234 NLRB 442 (1987); *Greenbriar Valley Hospital*, 265 NLRB 1056 (1982).

4. Alleged 8(a)(1) violations in which only Davis and/or Duerr and/or Davis, Duerr, and other supervisors were involved

Section 8(a)(1) of the Act requires an alleged unfair labor practice within the meaning of that section to be employer interference, restraint, or coercion of employees in the exercise of their rights under Section 7 of the Act.

Inasmuch as I have entered findings and conclusions Davis and Duerr were supervisors and not employees within the meaning of the Act at the times it was alleged the Respondent interfered with, restrained or coerced the two in the exercise of Section 7 rights, the Stinski, Levich, and Dawson statements and conduct related in sections A2,3,7,8,9,11, and 12 above must be dismissed. Each of those sections involve statements or conduct by Stinski, Levich, or Dawson directed towards Davis, Duerr, Davis and Duerr or Davis, Duerr, and other supervisors, i.e., they involve statements or conduct by agents of the Respondent directed to supervisors, not employees.

I therefore recommend the dismissal of those sections of the complaint relying on statements or conduct directed by Westwood management and counsel to Davis and/or Duerr, as well as statements or conduct by Westwood management and counsel during meetings or conferences attended by Davis, Duerr, and other supervisors.

5. The alleged violations involving LPN Plourde (sections A.3,5,13, and 15 above)

The General Counsel and the Charging Party contend the Respondent violated Section 8(a)(1) of the Act by Levich's February 25 questioning of Plourde concerning whether she attended the support group meeting addressed by an MNA representative and what transpired during that meeting; by Levich's early March questioning of Plourde concerning the problems she thought were of sufficient concern to the nurses, they were contemplating seeking union representation to resolve them; by Levich's early April advice to Plourde of the Respondent's reasons for discharging Davis and Duerr, reiterating her questioning of Plourde concerning the problems she thought were of sufficient concern to the nurses they were contemplating seeking union representation to resolve them, requesting Plourde come to her with any problems she had, for her resolution thereof; telling Plourde she had to take sides, she could not remain neutral, and she wanted Plourde on her side; and by Stinski's and Levich's April 20 repeated advice of the Respondent's reasons for discharging Davis and Duerr; questioning Plourde concerning the reasons Davis engaged in the effort to achieve union representation of the nurses; reiterating the questioning of Plourde concerning the problems she thought were of sufficient concern to the nurses they were contemplating seeking union representation to resolve them; and telling Plourde she could secure the card she signed authorizing the union to represent her by asking the union to return it.

Levich's questioning of Plourde on February 25 clearly was designed to secure information about what transpired at the February 22 support meeting, particularly the concerns which prompted the nurses to seek union representation to resolve those concerns.[37]

The questions produced no meaningful response, however, and were not accompanied by any threats, coercion, or actual or implied promises to resolve any concerns expressed.

I therefore find and conclude the Respondent by Levich did not violate Section 8(a)(1) of the Act by the February 25 questions Levich addressed to Plourde.[38]

Nor was Levich's second, early March attempt to learn from Plourde what problems were causing interest in securing union representation for their resolution violative of the Act.

[37] As indicated by the questions she addressed to Davis in a preceding interview.

[38] *Great Lakes Oriental Products*, 283 NLRB 99 (1987).

As the Board stated in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), management questioning of an employee is not violative of the Act unless it reasonably tends to restrain or coerce the questioned employee's exercise of his or her rights under Section 7 of the Act. Levich's second attempt to learn from Plourde what the employees hoped to accomplish through union representation was unaccompanied by any intimidation, threats, or promises. either actual or implied, to resolve the complaints or issues described by Plourde, so the exercise of her Section 7 rights were not affected.

I therefore find and conclude the Respondent by Levich did not violate Section 8(a)(1) of the Act by Levich's second, early March attempt to learn from Plourde what concerns caused the nurses' exploration of union representation to resolve those concerns.[39]

Levich's third effort to acquire information from Plourde, in early April, as well as her truthful recitation of the reasons for the Davis/Duerr suspensions and discharges and her plea to support management's resistance to union representation of the nurses was also unaccompanied by any intimidation, threats or actual or implied promises to remedy the employee complaints or grievances recited by Plourde.

I therefore conclude the Respondent by Levich did not violate Section 8(a)(1) of the Act in the course of the early April verbal exchanges between Levich and Plourde.

Nor was any intimidation, threats or actual or promises to remedy the employee complaints or grievances recited by Plourde expressed during Stinski's and Levich's April 20 discussion with Plourde; again the Westwood managers truthfully advised Plourde of Westwood's reasons for suspending and discharging Davis and Duerr; again sought to learn from Plourde what concerns caused the nurses to explore union representation as a means for resolving those concerns without stating or implying those concerns would be resolved and advised, not instructed, Plourde she could secure the return of a card signed by her authorizing Local 113 to represent her for collective-bargaining purposes simply by requesting Local 113 to return the card to her.

I thus conclude neither Stinski nor Levich violated Section 8(a)(1) of the Act in the course of the April 20 discussion.[40]

6. The Alleged 8(a)(1) violations involving LPN Brill (sec. A,13 above)

The General Counsel and the Charging Party allege the Respondent violated Section 8(a)(1) of the Act by the following SStaska conduct during the month of April: (1) Staska's telling Brill that Davis and Duerr were discharged for defying instructions as supervisors to refrain from union activity; (2) telling Brill she could get any card she signed authorizing Local 113 to represent her returned simply be requesting its return; (3) asking Brill what she thought the Union could do for the nurses after handing Brill a document purporting to state what a union could do and what it could not do; and (4) telling Brill if she was Local 113-represented, she was subject to a 3-day disciplinary layoff for excessive absenteeism but, since currently she was not Local-113 represented, she was merely going to caution Brill about her excessive absenteeism.

I have entered a conclusion in section II,B,5 above an employer representative's truthful and correct advice to an employee a supervisor or supervisors have been disciplined because they engaged in union activity is not violative of the Act. I have entered a similar conclusion in the same section with respect to an employer representative's telling an employee he or she could secure the return of any authorization card she signed authorizing a labor organization to represent him or her by requesting the labor organization to return the card. I have also concluded earlier an inquiry by an employer's representative addressed to an employee inquiring what employees expected to accomplish through union representation, unaccompanied by any threats or actual or implied promises to remedy any complaints voiced is not violative of the Act.

I reach the same conclusions here, on the basis of the authorities cited heretofore.

I therefore conclude the Respondent did not violate the Act by the Staska statements set out in (1), (2), and (3) above.

The Staska statement Brill would be subject to a disciplinary suspension for excessive absenteeism (in view of her previous history of absenteeism) were she currently represented by Local 113 and covered by the current Respondent-Local 113 agreement but, since Brill currently was unrepresented, she was only going to remind Brill not to be absent too much, stands on different grounds.

It is clear Staska, aware of Brill's previous absenteeism record, utilized the opportunity afforded by Brill's again absenting herself during working hours for medical treatment as a basis for attempting to discourage Brill's support for Local 113 representation by implying Brill would be disciplined for the current absence, were she Local 113-represented and covered by the Respondent-Local 113 agreement.

I conclude such attempted discouragement violative of Section 8(a)(1) of the Act, since it carried both an implied promise (no discipline if the nurses remained unrepresented) and an implied threat (observance of strict disciplinary procedures if the nurses chose Local 113 representation).[41]

7. The alleged Stinski and Levich February 27 violations of Section 8(a)(1) during meetings with all the RNs and LPNs (sec. A,4 above)

The General Counsel and the Charging Party allege the Respondent violated Section 8(a)(1) of the Act by Stinski's and Levich's February 27 interrogation of nurses regarding what problems or issues were troubling them, indicating problems or issues they recited would be addressed, and telling nurses they were supervisors prohibited from engaging in union activities.

Stinski's February 27 inquiry as to what problems or issues were troubling the nurses was prompted by her receipt of information the nurses attended a February 22 meeting to explore securing union representation to resolve their dissatisfaction with aspects of their wages, hours, or working conditions. There was no evidence a similar meeting and inquiry had ever

[39] *Ohmite Mfg. Co*., 290 NLRB 1036 (1988); *Santa Rosa Blueprint Service*, 288 NLRB 762 (1988); *Keystone Lamp Mfg. Corp*., 284 NLRB 626 (1987).

[40] *Mountaineer Petroleum*, 301 NLRB 801 (1991); *Brunswick Food & Drug*, 284 NLRB 663 (1987); *Rockwell Corp*., 278 NLRB 55 (1986); *Mariposa Press*, 273 NLRB 528 (1984); and *R. L. White Co*., 262 NLRB 575 (1982), and cases cited above.

[41] *Rossmore House,* supra; *NLRB v. Dynamics Corp. of America,* 928 F.2d 609 (2d Cir. 1991), enfg. 286 NLRB 920 1987), and 296 NLRB 1252 (1989); *Video Tape Co*., 288 NLRB 646 (1988); *Resistance Technology*, 280 NLRB 1004 (1986); *Rood Industries*, 278 NLRB 160 (1986).

been conducted prior to Stinski's awareness of the nurses' interest in possible union representation to resolve their complaints or grievances against management, the unprecedented meeting was attended by all the available LPNs and the management representatives' responses to two of the complaints indicated those complaints would be addressed and rectified.

Such conduct is violative of Section 8(a)(1) of the Act.

As the administrative law judge in a recent case noted, where

> [t]here is no evidence that the Respondent had a practice of soliciting employees' grievances and complaints before the union's organizational drive began .... This creates "a compelling inference" that the employer is implicitly promising to correct the problems its inquiries turn up. *Reliance Electric Co.*, 191 NLRB 44, 46 (1971). In *Uarco, Inc*., 216 NLRB 1 (1974), the Board held that it is not necessary for an employer that has solicited grievances to have committed itself to specific corrective action in order for there to be unlawful interference with employees' rights because "employees would tend to anticipate improved conditions of employment that would make union representation unnecessary."[42]

That doctrine is well established.[43]

I therefore conclude by the February 27 management conduct described above, the Respondent violated Section 8(a)(1) of the Act.

I reach a similar conclusion with respect to Stinski's telling the RNs assembled at a separate meeting on February 27 they were supervisors barred from engaging in union activity.

That statement was erroneous, since most of the RNs attending the meeting were not supervisors. As the Board stated in a recent case,[44] informing individuals they are supervisors barred from union activities when it has been determined in a companion representation case (as here) the individuals in question were employees and not supervisors, the statement had the necessary effect of chilling those employees' exercise of their Section 7 rights as employees and therefore violated Section 8(a)(1) of the Act.

[42] *Heartland of Lansing Nursing Home*, 307 NLRB 152, 156 (1992).

[43] *NLRB v. S. E. Nichols, Inc*., 862 F.2d 952 (2d Cir. 1988); *Escada (USA) Inc. v. NLRB*, 970 F.2d 898 (3d Cir. 1992), enfg. 304 NLRB 845, (1990); *El Rancho Market*, 235 NLRB 468 (1978), enfd. 603 F.2d 223 (9th Cir. 1979); *House of Raeford Farms*, 308 NLRB 568 (1992); *Safety Kleen Oil Services*, 308 NLRB 208 (1992); *Davis Supermarkets*, 306 NLRB 426 (1992); *New Life Bakery*, 301 NLRB 421 (1991); *Nissan Research & Development*, 296 NLRB 598 (1989); *Ona Corp*., 285 NLRB 400 (1987).

[44] *Shelby Memorial Home*, 305 NLRB 910 (1991).

CONCLUSIONS OF LAW

1. At all pertinent times the Respondent was an employer engaged in commerce in a business affecting commerce within the meaning of Section 2 of the Act.

2. At all pertinent times MNA and Local 113 were labor organizations within the meaning of Section 2 of the Act.

3. At all pertinent times Stinski, Levich, Staska, Moffett, Duerr, Walburg, Wandersee, and Davis were supervisors and agents of the Respondent acting on its behalf within the meaning of Section 2 of the Act.

4. The Respondent violated Section 8(a)(l) of the Act by:

(a) Stinski's February 27 solicitation of employee grievances or complaints, followed by her and Staska's addressing and resolving grievances or complaints expressed by employees.

(b) Stinski's February 27 statement all the RNs were supervisors barred from union activities.

(c) Staska's April statement Brill would have been subject to discipline for excessive absenteeism, had she been Local 113 represented.

5. The Respondent did not otherwise violate the Act.

6. The aforesaid unfair labor practices affected and affect interstate commerce as defined in the Act.

THE REMEDY

Having found the Respondent engaged in unfair labor practices, I recommend the Respondent be directed to cease and desist therefrom and post notices stating it will not interfere with, restrain, or coerce its employees by the actions and conduct described as unfair labor practices above.

[Recommended Order omitted from publication.]