Church Homes, Inc. d/b/a Avery Heights *and* New England Health Care Employees Union, District 1199, AFL–CIO. Case 34–CA–9168

December 16, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

This case presents two main issues: (1) whether the Respondent's discharge of four economic strikers for alleged picket line misconduct violated the Act; and (2) whether the Respondent's failure to reinstate permanently replaced economic strikers violated the Act because the Respondent had an unlawful independent motive in hiring the permanent replacements.[1] The judge found violations in both instances. Having considered the decision and the record in light of the exceptions and briefs, the Board agrees with the judge only in part. A majority of the panel finds that the Respondent violated Section 8(a)(1) and (3) of the Act in discharging three of the strikers.[2] A different majority finds that the Respondent lawfully discharged the fourth striker.[3] A panel majority further finds no showing that the Respondent had an independent unlawful motive in hiring the permanent replacements, and therefore the Respondent did not violate the Act by failing to reinstate all strikers on their unconditional request to return to work.[4] Accordingly, the Board has decided to affirm the judge's rulings, findings,[5] and conclusions only to the extent consistent with this Decision and Order.

[1] On November 1, 2001, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions, a supporting brief, and an answering brief; and the General Counsel filed limited cross-exceptions, a supporting brief, and an answering brief.

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

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

No exceptions were filed to the judge's dismissal of an 8(a)(5) allegation that the Respondent misrepresented to the Union its intentions regarding the hiring of permanent replacements.

[2] Members Schaumber and Walsh. (Chairman Battista dissents.)

[3] Chairman Battista and Member Schaumber. (Member Walsh dissents.)

[4] Chairman Battista and Member Schaumber. (Member Walsh dissents.)

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

Background

Located in Hartford, Connecticut, Respondent Avery Heights provides nursing home care, assisted living residences, independent living units, and adult day care. New England Health Care Employees Union, District 1199, AFL–CIO (the Union) represents a bargaining unit consisting of the Respondent's approximately 180–185 service and maintenance employees. A collective-bargaining agreement covering these unit employees expired on October 31, 1999. On November 17, 1999, during negotiations for a successor contract, the Union launched an economic strike. The Respondent began hiring permanent replacements on or about December 15, 1999. By January 20, 2000, the date that the Respondent concedes the Union made an unconditional request for strikers to return to work, the Respondent had hired about 130 permanent replacements. During the recall of striking employees, the Respondent discharged four employees—Opal Clayton, Patricia Hurdle, Georgia Stewart, and Pauline Taylor—for alleged picket line misconduct.

Alleged Violations

I. THE DISCHARGES OF OPAL CLAYTON, PATRICIA HURDLE, AND GEORGIA STEWART[6]

A. Facts

Clayton, Hurdle, and Stewart worked for the Respondent as certified nursing assistants (CNAs). Each participated in the strike, serving as a picket captain. During the strike, the Respondent's administrator, Miriam Parker, heard from a nurse that a patient's son had had some sort of encounter with strikers on the picket line. When Parker saw the son, Alan Richards, she inquired about what happened. Richards reported that, during the first week of the strike, while he was in his car waiting in line to exit the facility, Clayton, Hurdle, and Stewart saw him, faced him, raised their hands, and said, "Help me, help me, help me" in imitation of his mother. Richards' mother is known to utter the phrase "help me, help me, help me" repeatedly and uncontrollably. Parker had Richards write out a statement, which was neither dated nor signed.

Following the Union's unconditional offer to return to work, Hurdle and Stewart were recalled and reported to work on January 25, 2000. Each was told, however, not to begin work, but instead to report to Parker and the Respondent's director of nursing, Barbara Brigandi. Parker and Brigandi met with Stewart first, telling Stewart that Richards had accused her of mimicking his mother on the picket line. No other information was provided. Stewart denied the charge, and she was sent home pending investigation. Parker and Brigandi then

met with Hurdle. She was told that a family member complained about a gesture she had made on the picket line. On request, she was told that it was Richards who complained. No other details were provided. Hurdle denied the charge, and she was sent home pending investigation. The Respondent conducted no further investigation. On January 26, 2000, the Respondent sent termination letters to Hurdle and Stewart that outlined their alleged misconduct in general terms. Hurdle and Stewart learned the specifics of the allegation on February 17, 2000, at an unemployment office hearing.

Clayton had not yet been recalled by the time of the February 17 unemployment hearing. Clayton was identified at the unemployment hearing as a participant in the alleged misconduct, and she received a termination letter dated February 22, 2000. The Respondent did not discuss the allegation with Clayton prior to discharging her.

At the hearing, Richards testified that he saw Clayton, Hurdle, and Stewart mimicking his mother. The three CNAs all denied under oath that they did so. Although not doubting that Richards *believed* he saw the three CNAs engaging in the alleged conduct, the judge nevertheless credited the CNAs' denials. The judge found, therefore, that Clayton, Hurdle, and Stewart did not in fact engage in the alleged misconduct.

B. Analysis

An employer may lawfully discharge a striker whose misconduct, under all the circumstances, would reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986). An analogous standard governs where, as here, the misconduct is directed against persons who do not enjoy the protection of Section 7 of the Act. Id. at 1046 fn. 14. In cases presenting this issue, the General Counsel has the overall burden of proving discrimination, but the burden of going forward with the evidence shifts. Initially, the General Counsel must show that the employee in question was a striker and the employer took action against the employee for conduct related to the strike. If the General Counsel makes this showing, the burden shifts to the employer to show that it honestly believed the employee engaged in the conduct for which he or she was discharged. If the employer does so, the burden shifts back to the General Counsel to establish that the employee did not in fact engage in the alleged misconduct. *Detroit Newspapers*, 340 NLRB 1019, 1024 (2003); *Siemens Energy & Automation, Inc.*, 328 NLRB 1175 (1999). Even if the misconduct did in fact occur, the Act will still have been violated if the conduct at issue was not sufficiently egregious under *Clear Pine Mouldings*, supra, to lose the protection of the Act.

In this case, it is unnecessary to traverse each step of the analysis. Based on credibility determinations, which we have adopted, the judge found that Clayton, Hurdle, and Stewart, who were all engaged in the protected activity of striking, did not mimic Richards' mother. Thus, regardless of whether it honestly believed to the contrary, the Respondent violated the Act by discharging Clayton, Hurdle, and Stewart for an act they did not, in fact, commit.[7]

Our dissenting colleague rejects the judge's decision to credit Clayton, Hurdle, and Stewart. Stating that the judge based his credibility finding on the employees' employment history, our colleague claims that the employees' long record of no prior misconduct is, "at best, only marginally relevant." We disagree. The judge relied on a number of factors in making his credibility determination, "such as" the three employees' length of service and employment records, and the presence of guards with video cameras. As to the judge's reference to employment history, the fact that persons act well in one context might not guarantee their good conduct in another, but surely it is more than marginally probative of how they would behave. As to the video cameras near the picket line, it is undisputed fact that no videotaped evidence of the alleged incident exists. In addition, at the outset of his decision, the judge stated that his findings were also based on his "observation of the demeanor of the witnesses."[8]

Further, our dissenting colleague asserts that Richards "had nothing against" the alleged discriminatees and was "simply appalled by the[ir] conduct." In so stating, our colleague suggests the judge discredited Richards. But the judge did not discredit Richards; rather, he found that Richards was sincere in his belief of what happened, but mistaken. The record supports this finding. In addition to the three employees' credited denials, the record reveals that at the time of the alleged incident, Richards

[7] In finding a violation of the Act for the discharges of Clayton, Hurdle, and Stewart, the judge additionally relied on his findings that the Respondent lacked an honest belief that these three had mimicked Richards' mother, and that even if the alleged incident had occurred, it was not sufficiently egregious to deprive the three CNAs of the Act's protection. Having found that the Respondent violated the Act because the alleged incident did not in fact occur, we find it unnecessary to pass on these additional findings. Thus, the Chairman is incorrect in his dissent, in indicating that the Respondent had a good-faith belief that the employees engaged in the misconduct, that the majority does "not argue to the contrary." Rather, we do not pass on that issue.

[8] In adopting the judge's decision to credit the testimony of Clayton, Hurdle, and Stewart, Member Schaumber does not rely on the judge's blanket statement at the outset of the decision that his findings were based on his "observation of the demeanor of the witnesses."

was 60 feet away from the picketers, in a car with the windows rolled up. In addition, there were other factors that called into question the reliability of his testimony. Richards insisted the incident lasted 30 seconds despite the 3 seconds it took him to utter the words "help me, help me, help me" in his testimony; Richards incorrectly claimed no one else was talking or making noise on the picket line at the time of the alleged incident; and although he crossed the picket line multiple times a day, Richards said he *never* heard cheering or chanting.[9] In sum, then, we see no reason to second-guess the judge's credibility-based findings concerning this alleged incident.

II. THE DISCHARGE OF PAULINE TAYLOR[10]

A. Facts

Taylor worked as a CNA for the Respondent. The Respondent had discharged Taylor in 1998, but was obligated, pursuant to an arbitration award, to reinstate her without backpay in August 1999. Shortly before her reinstatement, the Respondent's chief executive officer, Norman Harper, told the Union's president that he never wanted to take Taylor back.

Taylor joined the strike at its inception. During the strike, Parker received a complaint about Taylor from Kathy Falcon, the daughter of an 82-year-old resident of the Respondent's nursing home. Falcon provided Parker a written statement, which alleged that on December 4, 1999, at approximately 9:15 p.m., as Falcon was stopped in her vehicle near the picket line with her window halfway down, Falcon heard Taylor screaming something at her. According to Falcon's signed statement, Taylor's "*exact* words were—'there's that bitch Horan's daughter. That bitch—that piece of trash! She's a little piece of trash and so is her mother.'" (Emphasis in original.) Prior to this incident, Falcon had testified for the Respondent against a friend of Taylor at an arbitration hearing. On February 22, 2000, before Taylor was recalled to work, the Respondent sent her a termination letter for cursing and insulting a resident and her family member.

B. Analysis

Applying the burden-shifting analysis summarized above, the judge found it undisputed that Taylor was terminated for strike-related misconduct. Thus, the burden shifted to the Respondent to show it honestly believed that Taylor had engaged in that misconduct. The judge found that the Respondent failed to sustain this burden. In so finding, the judge emphasized that the discharge decision was based on Falcon's statement alone, without the Respondent's having conducted any further investigation. In this connection, the judge referenced his previous discussion of the other three CNA discharges, in which he observed that the Respondent's prestrike practice had been to investigate allegations of misconduct before taking disciplinary action. The judge also relied on the fact that the Respondent gave Taylor no opportunity to respond to Falcon's accusation. Although the judge found, based on credited testimony, that Taylor probably engaged in the alleged conduct, he concluded that the Respondent did not meet its burden of showing it acted in good faith when it discharged Taylor. Rather, he concluded that the Respondent seized on Falcon's report to rid itself of a union-activist employee it had previously tried to discharge and never wanted to take back.

The judge also found that, even if the Respondent honestly believed that Taylor had done what Falcon said, such conduct was not egregious enough to warrant the denial of reinstatement. To be sufficiently egregious under the objective standard of *Clear Pine Mouldings*, supra, strike-related misconduct must have a reasonable tendency, under all the surrounding circumstances, to coerce or intimidate. The judge held that, under Board precedent, verbal assaults like Taylor's do not reasonably tend to coerce or intimidate unless they are accompanied by overt or indirect physical threats or otherwise make a physical confrontation reasonably likely. Although he criticized Taylor's outburst as "profane, abusive and unprofessional," the judge found there was no evidence of any words or actions that "could reasonably be deemed threatening or likely to result in a physical confrontation." Accordingly, the judge found that the Respondent violated Section 8(a)(3) when it discharged Taylor for her picket line misconduct.

Contrary to the judge, we find that the Respondent did have an honest belief that Taylor shouted the words attributed to her by Falcon (as she in fact did), and that Taylor's misconduct was egregious enough to result in the loss of her reinstatement rights.

1. The Respondent's honest belief

Board precedent establishes a relatively low threshold for an employer to show it honestly believed that a strik-

[9] Further, while we adopt the judge's finding that Richards was sincere in his belief but mistaken, the record does not support our colleague's assertion that Richards "had nothing against" the alleged discriminatees. He once complained to the Respondent about the alleged discriminatees' work performance; the strike concerned him because it disrupted his mother's care; he occasionally drove his mother's personal caregiver, who also worked for the Respondent, into the facility, and he thought it was unfair of strikers to call her a scab as he drove by; and Richards said to a picketer, after the end of the strike, "It'll be 10 years before you get anything out of this."

[10] Member Walsh does not join in this section of the decision.

ing employee engaged in misconduct. Although the employer must do more than merely assert an honest belief, some specific record evidence linking particular employees to particular allegations of misconduct will suffice. *General Telephone Co. of Michigan*, 251 NLRB 737, 739 (1980). An employer's honest belief may be based on hearsay sources, including the reports of nonstriking employees, supervisors, security guards, investigators, police, and others. See *Detroit Newspapers*, supra, 340 NLRB 1019, 1025. Moreover, an employer need not interview the accused striking employee before taking disciplinary action. See *Giddings & Lewis, Inc.*, 240 NLRB 441, 448 (1979).

The Respondent's showing meets the foregoing standard. Falcon's signed statement linked Taylor to a particular allegation of misconduct. Moreover, the report was specific and circumstantially detailed, and Falcon's prior testimony against Taylor's friend would furnish a motive for the conduct Falcon reported. Contrary to the judge, the Respondent was not obliged to give Taylor an opportunity to respond before taking disciplinary action.

In finding the violation, the judge relied in part on the fact that the Respondent did not follow its past practice of investigating allegations of misconduct prior to making disciplinary decisions. That past practice, however, is irrelevant to the applicable legal analysis. Under *General Telephone*, the employer need only show "some specificity in the record, linking particular employees to particular allegations of misconduct." 251 NLRB at 739. The purpose of this requirement is simply to afford the General Counsel a fair opportunity to meet his ultimate burden of proving that the employee did not in fact engage in the alleged misconduct. That is, if the General Counsel were without knowledge as to the misconduct that the respondent is relying on and as to the identity of employees who allegedly engaged in it, the General Counsel's task would be impossible. As the Board explained in *General Telephone*, "[i]t is not the General Counsel's responsibility to ferret out what alleged misconduct Respondent relied on in disciplining each employee." Id. Here, as noted above, Falcon's statement contained more than enough detail to enable the General Counsel to proceed and try to prove that Taylor did not, in fact, engage in the misconduct of which she was accused. The dissent requires more than is necessary. The dissent, in effect, requires the Respondent to prove that Taylor committed the alleged misconduct. This is far more than "some specificity" that is required under *General Telephone* to establish the Respondent's honest belief. Further, it is not for the Board to say that a better investigation would have uncovered more. It is enough that the Respondent shows "some specificity" for its belief.[11]

Our colleague also confuses the nature of the General Counsel's case. The General Counsel is not alleging a discriminatorily motivated 8(a)(3) discharge.[12] Rather, the General Counsel is alleging that the Respondent did not have a good-faith belief that Taylor engaged in misconduct, and, even if Respondent had such a belief, Taylor was innocent of the misconduct. See *Siemens Energy & Automation, Inc.*, 328 NLRB 1175 (1999) (*Wright Line*, 251 NLRB 1083 (1980), analysis inappropriate for striker misconduct discharge). For the reasons indicated herein, we reject both contentions.

In further support of the Respondent's good-faith belief that Taylor had engaged in the alleged conduct, we note that the Respondent discharged Taylor in 1998 for alleged patient abuse. Given the Respondent's belief that Taylor had committed patient abuse, it was all the more likely that the Respondent would honestly believe an impartial, highly specific allegation that Taylor had again engaged in abusive behavior.

For all of the foregoing reasons, we find that the Respondent had an honest belief that Taylor had engaged in the conduct for which she was discharged.[13]

2. The egregiousness of the conduct

Also contrary to the judge, we find that Taylor's misconduct was egregious enough to result in the loss of her Section 7 reinstatement rights. Specifically, we disagree with the judge's finding that Taylor's comments could not reasonably be deemed threatening or likely to result in a physical confrontation. Taylor referred to Falcon's mother, Horan, as a "bitch" and a "piece of trash." At the time, Horan was a vulnerable 82-year-old resident of a nursing home. Given Taylor's choice of words and her decision to yell them at Falcon in a public setting, it is apparent that Taylor harbored feelings of hostility toward. Horan and considered her undeserving of proper treatment. In these circumstances, and contrary to our dissenting colleague, we find that Taylor's statement could reasonably be deemed an implied threat that Taylor would mistreat Horan upon Taylor's return to work, pos-

[11] Our colleague suggests that the Respondent purposely chose to forego further inquiry in order to avoid finding any facts to the contrary. If there were evidence of such a motive, that could show bad faith. However, there is no such evidence.

[12] Thus, as our colleague acknowledges, "it is undisputed that the Respondent discharged Taylor for conduct related to the strike."

[13] Although our dissenting colleague acknowledges the low burden for an employer in establishing its honest belief that a striker engaged in misconduct, he nevertheless appears to require the Respondent to have undertaken an investigation thorough enough to establish the misconduct as a certainty. Board law is clear that the Respondent has no such duty. See, e.g., *Detroit Newspapers*, supra at 1024.

sibly in a position as Horan's caregiver. Thus, we find that Taylor's comments would reasonably tend to coerce or intimidate others under *Clear Pine Mouldings*, supra, and therefore were egregious enough to justify the loss of her reinstatement rights.[14]

For all of the above reasons, we find that the Respondent did not violate Section 8(a)(3) by discharging Taylor for picket line misconduct.

III. THE HIRING OF PERMANENT REPLACEMENTS[15]

A. Facts

The strike began on November 17, 1999. Initially, the Respondent relied on nonstriking employees, managers, temporary employees, and volunteers to fill in for the strikers. As it admitted in its answer, however, the Respondent commenced hiring permanent replacements on December 15. The Respondent also offered permanent jobs to temporary workers it had taken on since the beginning of the strike.

The Respondent admits that it decided not to inform the Union of its decision to permanently replace the striking employees. Scott Cohen, the owner of one of the agencies supplying temporary employees to the Respondent, testified that the Respondent's director of operations told him that its plans regarding permanent replacements were to be kept "hush-hush" and that it needed to get as many bodies hired as it could before the Union found out. Based on blind ads for jobs similar to those held by the strikers, the Union became suspicious that the Respondent was planning to hire permanent replacements. Around the end of December 1999, the Union received a report from someone who claimed that she was offered a permanent job with the Respondent. The Union then arranged for a meeting with the Respondent and a Federal mediator on January 3, 2000. At the January 3 meeting, the Respondent admitted that it already had hired "over 100" permanent replacements.

On December 31, 1999, Harper sent a memorandum to the Respondent's board of directors. The memorandum noted that "as a well-executed surprise event the day before Christmas, we began to permanently replace striking workers at Avery. . . . So far, we have hired 104 permanent replacements at Avery, replacing 60% of those on strike. If [the Union] refuses to seriously negotiate in good faith, we plan to add one or more permanent replacements each day. We have [the Union] in a real bind at Avery."

B. Analysis

An employer violates Section 8(a)(3) by failing to immediately reinstate striking employees on their unconditional offer to return to work, unless the employer establishes a legitimate and substantial business justification for failing to do so. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Capehorn Industry*, 336 NLRB 364, 365 (2001). The employer establishes a legitimate and substantial business justification where it shows that the positions claimed by the strikers are filled by permanent replacements. *Fleetwood Trailer*, supra; see *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345–346 (1938). However, a violation will still lie if it is shown that, in hiring the permanent replacements, the employer was motivated by "an independent unlawful purpose." *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964). Apart from such a purpose, the employer's motive for hiring permanent replacements is immaterial. Id.

The theory of the General Counsel's case was that in hiring permanent replacements, the Respondent had an independent unlawful purpose: punishing the strikers and breaking the Union's solidarity by replacing a majority of the unit employees. The judge found that the General Counsel proved an independent unlawful motive for the following reasons.

First, the Respondent concealed its hiring plans from the Union. "An employer who hires permanent replacements in secret," the judge wrote, "without affording the strikers an opportunity to abandon the strike and return to their jobs while still vacant, may be motivated not by legitimate business considerations, but by a desire to punish the strikers by effectively terminating them." The Respondent claimed that it was concerned about union harassment and misconduct if the Union were to become aware of the hiring scheme, but the judge rejected that claim as unsupported by the record.

Second, the judge found that Harper's December 31, 1999 memorandum demonstrated the Respondent's intent to use replacements to break the solidarity of Avery's union employees by replacing a majority of the unit before the Union found out, thus putting pressure on the Union to acquiesce in the Respondent's bargaining position. The judge also viewed Harper's memo in light of Cohen's testimony, which he credited, and which showed that the Respondent was aiming to replace a majority of the unit before the Union found out. Based on the Respondent's concealment, Harper's memorandum, and Cohen's testimony, the judge found that the Respondent had an independent unlawful motive for hiring permanent replacements, and that the unlawful motive outweighed the business justifications advanced by the Respondent for its permanent replacement hires. Accord-

[14] Further, even if the comment was not a threat of future mistreatment of Horan's mother, Chairman Battista finds that the conduct is sufficiently egregious to warrant discipline. Simply stated, it is unacceptable to have a caregiver in a nursing home refer to an elderly patient as a "bitch" and a "piece of trash." No nursing home should be compelled by the Government to retain such an employee.

ingly, the judge found that the Respondent violated Section 8(a)(3) by failing to reinstate the striking employees in response to the Union's January 20, 2000 unconditional offer to return to work.

We disagree with the judge. It is important to properly frame the issue in this case. The Respondent permanently replaced the economic strikers. It is clear beyond peradventure that an employer has a right to do so. See *NLRB v. Mackay Radio*, 304 U.S. 333 (1938). The rationale for this result is that employers have a right to "fight back" in the economic battle and the right to try to continue operations during a strike. Our colleague seems to recognize this, and seeks only to show that the Respondent's real motive here was to break the Union, as distinguished from the motives of winning the economic battle and continuing operations. In this regard, he posits a *Wright Line*[16] test as to motive. We conclude there was no showing of an independent unlawful motive in this case.

The judge's finding of an independent unlawful motive is based on three primary facts: the Respondent's acknowledged secrecy in hiring permanent replacements, Cohen's "hush-hush" testimony, and Harper's December 31, 1999 memorandum. We do not find that these facts, either separately or in any combination, establish an unlawful motive in hiring permanent replacements. Cohen's testimony simply confirmed the Respondent's secrecy in hiring the permanent replacements, a fact that the Respondent has openly acknowledged in this proceeding. Moreover, the Board has never held that an employer is under a duty to disclose to a union its intention to hire permanent replacements. Our dissenting colleague finds secrecy to be inimical to any lawful motives an employer might have for choosing to hire replacements. However, he does not dispute that Board precedent imposes no obligation on an employer to inform a union of its plan to hire permanent replacements. Rather, citing *Eads Transfer*, 304 NLRB 711 (1991), he states that the Respondent should have provided notice that it was hiring permanent replacements because, in the situation of a bargaining lockout, the Board requires an employer to provide notice of the lockout. A lockout is for the purpose of bringing pressure to bear on the employees and their union, so that they will yield to the employer's bargaining position. Thus, it is essential that the employer give the union notice of the lockout. By contrast, hiring strike replacements enhances the employer's position in two ways: (1) the employer can operate during the strike and can thus "hold out" longer than the strikers (who are not receiving an income); and (2) the strikers will learn of their being replaced and will pressure their union to accept the employer's bargaining position. We agree that the second factor presupposes that the employees are aware that permanent replacements have been hired. The first factor is not dependent on such knowledge. Thus, the Respondent need not disclose the hiring of permanent replacements.

But even assuming that the notice requirement should apply in the context of permanent replacements for strikers, the Respondent complied with that requirement. As explained in *Eads Transfer* and again in *Ancor Concepts*,[17] notice of a lockout must be given "before or in immediate response to the strikers' unconditional offers to return to work." 323 NLRB at 744 (citing *Eads Transfer*, 304 NLRB at 713). The Respondent here did exactly that—in immediate response to the strikers' first offer to return to work on January 5, the Respondent informed some of them that they were permanently replaced.[18] Indeed, the Respondent told the Union, even before January 5, that it was permanently replacing the strikers. On January 3, the Respondent gave this information to both the Union and the FMCS. Apparently, our dissenting colleague would require that this information be disclosed still earlier, i.e., at the time of the decision to replace or at the time of the commencement of hiring replacements. As noted above, we know of no duty to disclose at all, much less a duty to disclose at a particular time. Accordingly, these facts, and the record in general, demonstrate merely that the Respondent used the hiring of permanent replacements to gain economic leverage over the Union in bargaining, and to continue operations during the strike.

Our colleague insists that the failure to disclose the hiring of replacements at the time of such hiring establishes that the hiring was for an illicit motive. CEO Harper testified about the fact that the Respondent did not tell the Union about the permanent replacements. Harper said that this nondisclosure was not for the purpose of gaining economic leverage in bargaining. Our colleague seizes on this point to argue that the secrecy was for the purpose of undermining the Union's status. However, this is a non sequitur. A purpose of the hiring of replacements was to gain economic leverage in bargaining.[19] As stated above, there is no duty to disclose the

[16] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[17] *Ancor Concepts, Inc.*, 323 NLRB 742, 743–744 (1997).

[18] As for others whose positions were still vacant, the Respondent reinstated the strikers.

[19] Contrary to the suggestion of our colleague, we are finding only that a purpose of the hiring of replacements was to gain economic leverage. We are *not* saying that the failure to disclose had that purpose.

use of this weapon. Nor is there an obligation to justify such a nondisclosure. Thus, the nondisclosure did not have an illicit motive.

Finally, the Respondent did tell the Union about the hiring of replacements. It did so only 2 weeks after the hiring began. Thus, at that point the disclosure itself had the purpose of placing bargaining pressure on the Union. The fact that there was a 2-week delay in such disclosure does not establish an illicit motive.

In finding improper motive, the judge has missed an important distinction. There is a sharp distinction between seeking to prevail over the Union and seeking to oust the Union as bargaining representative. The former is what the Respondent did here. Although a victory over a union in an economic battle may cause employee disaffection from the union, that does not take away the employer's right to seek to win the economic battle.

The evidence in this case, including Harper's memorandum, simply does not establish some kind of a nefarious scheme to punish striking employees by hiring permanent replacements. Contrary to the judge's interpretation, Harper's memorandum shows that the Respondent wanted to gain an advantage in bargaining and nothing more. The memorandum speaks of placing the Union "in a real bind" at both of the facilities where it was negotiating with the Respondent.[20] That bind was economic. As the Respondent filled the unit with new employees with fewer loyalties to the Union, the Respondent changed the mathematics of both support for the strike and a future contract ratification vote. This placed greater pressure on the Union to reach agreement on terms more favorable to the Respondent. By the same token, if the hiring of replacements persuaded some employees that further striking was unwise, that would inure to the bargaining benefit of the employer.

The judge acknowledged this fact when he characterized the "surprise" to which Harper's memo refers as "a strategic move to break the solidarity of the union employees at Avery and put economic pressure on the leadership at both Avery and [the other facility] to acquiesce to the Respondent's bargaining position." The judge found this to be a sinister, unlawful motive on the Respondent's part. We do not. Rather, the judge's own characterization of the Respondent's goal clearly states the Respondent's legitimate aim to obtain economic leverage in bargaining.

Although Harper's memorandum characterized the hiring of permanent replacements as "a well-executed surprise event," that is no more than a restatement of the Respondent's acknowledged policy of secrecy surrounding the hires. Harper's memorandum also lists several "distinct advantages" of hiring permanent replacements. Conspicuously absent from this list is any reference at all to the strikers, much less a reference to a desire to punish them. That is a telling omission. Thus, Harper's characterization of the hiring event merely restates the Respondent's desire to surprise the Union and thereby obtain an economic advantage in the ongoing contract negotiations.

Further, even assuming, as our dissenting colleague would have it, that the Respondent's motive was to break the Union's solidarity in the economic battle, such an objective is not unlawful. The judge and the dissent lose sight of the big picture here—the parties were engaged in economic warfare. To win that battle, the Union deployed its strike weapon in the midst of bargaining negotiations, with the hope of securing agreement on its terms for a new contract.

In essence, the Respondent had two options. It could either capitulate to the Union's demands, or it could employ economic weapons of its own. As the Supreme Court observed in *Machinists Lodge 76 v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 152–153 (1976), permanent replacement is an economic weapon, and the Respondent's choice to wield that weapon to break the Union's solidarity was entirely consistent with the purpose of economic weaponry—to inflict punishing economic harm on the other party in order to force that party to yield in the economic bargaining dispute. See *Central Illinois Public Service Co.*, 326 NLRB 928, 931–932 (1998).

In *Central Illinois Public Service*, the respondent utilized a lockout as its economic weapon to counter the union's "inside game" strategy, a newly devised economic weapon in which employees, as an alternative to a strike, remained on the job but engaged in work-to-rule tactics and refused to work voluntary overtime.[21] The judge, like the judge and our dissenting colleague here, found the employer's action violated Section 8(a)(1) and (3) because it was designed to "punish employees for engaging in protected activity." 329 NLRB at 929. This conclusion was based on the judge's view of the evidence showing that the "lockout had one, and only one,

We think that it is obvious, and not "abstract" as our colleague asserts, that an employer (including the Respondent) gains an economic advantage by being able to operate with replacements during a strike. We do not contend that an employer (including the Respondent) necessarily gains an economic advantage by not *disclosing* the hiring of replacements.

[20] The complaint allegations concern only the Respondent's actions at the Avery Heights facility.

[21] The Board assumed arguendo that the employees' conduct was protected.

objective—to stop the Union's inside game activities." Id. at 931. In reversing the judge, the Board found, as we do here, that "even assuming as true that the sole objective of the lockout was to force the unions to cease their inside game activities, such is not an impermissible business objective." Id. The Board explained that to hold otherwise disregards the Supreme Court's decision in *American Ship Building*[22] that a union's right to strike in support of its bargaining position "does not entail any right to insist on one's position free from economic disadvantage." Id., quoting *American Ship Building* at 309.[23]

We recognize that the employer weapon in *Central Illinois* was a lockout and here it was permanent replacement of strikers. However, in both cases, the weapon was designed to win the economic battle.

In disregard of this precedent, the dissent contends, in effect, that the Union's protected right to employ its economic strike weapon against the Respondent was shielded from any adverse counteraction by the Respondent. This is not the law. The Union's strike weapon was causing economic injury to the Respondent's operations. Permanent replacement was the Respondent's economic counter-weapon, deployed with the lawful intended effect of forcing the strikers and their Union to yield.

Our dissenting colleague complains that the Respondent only belatedly pled the "bargaining weapon" justification for the hiring of replacements. However, that complaint misses the point. As discussed above, it was the General Counsel's initial burden to prove unlawful motive, not the Respondent's burden to prove a business justification, for hiring permanent replacements. Inasmuch as that burden was not met, the analysis need not reach the Respondent's business justification defense. In any event, that defense is a meritorious one. As discussed above, the hiring of permanent replacements during an economic strike has a legitimate business justification under well-settled law. It is simply too late in the law's development to argue the contrary. The only argument available to the General Counsel rests on motive, and that argument has not been supported.

In sum, although the Respondent's actions had serious consequences for the striking employees, there is nothing unlawful in its motive of achieving its ultimate, lawful goal of pressuring the Union into settling the contract terms on a basis more agreeable to the Respondent. Accordingly, we find that the Respondent properly exercised its right to hire permanent replacements for its striking employees and that it did not violate Section 8(a)(3) when it refused to reinstate the strikers upon their January 20, 2000 unconditional request to return to work.

[22] *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965).

[23] The Board's decision was enforced by the D.C. Circuit. See *Electrical Workers Local 702 v. NLRB*, 215 F.3d 11 (2000).

AMENDED REMEDY

As stated above, the judge found that the permanent replacement of the strikers was unlawful. Accordingly, the make-whole remedy he provided for discharged strikers Clayton, Hurdle, and Stewart did not take into account whether any of them had been permanently replaced. However, we have found, contrary to the judge, that the permanent replacement of the strikers was lawful. Therefore, if any of the three employees, Clayton, Hurdle, or Stewart, was permanently replaced before her unlawful discharge, the judge's remedy must be amended to provide that backpay for that individual or those individuals shall commence on the date the Respondent was obligated to recall her or them to work. *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

Hurdle and Stewart were not permanently replaced. Each received a letter dated January 21 instructing her to report for work on January 25, which was the first date that returning strikers were recalled following the Union's January 20 offer to return to work. Although both employees arrived at the Respondent's facility on time and dressed for work, they were not permitted to start work. A few days later, they were unlawfully discharged. Accordingly, their backpay will commence on January 25.

Clayton, however, had been permanently replaced. She received a letter from the Respondent notifying her of that fact and informing her that her name had been placed on a preferential rehire list. Clayton was unlawfully discharged prior to being recalled. Accordingly, her backpay will commence on the date that she would have been recalled but for her unlawful discharge. That date may be determined at the compliance stage of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Church Homes, Inc. d/b/a Avery Heights, Hartford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting New England Health Care Employees Union, District 1199, AFL–CIO, or any other union.

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

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

(a) Within 14 days from the date of this Order, offer Opal Clayton, Patricia Hurdle, and Georgia Stewart full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. If no employment is available for Clayton by virtue of her having been permanently replaced, she shall be placed on a preferential hiring list based on seniority, or some other nondiscriminatory basis, for employment as jobs become available.

(b) Make the above-named employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision, as amended.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of the above-named employees, and within 3 days thereafter notify those employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or within such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Hartford, Connecticut facility copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 26, 2000.

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

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

CHAIRMAN BATTISTA, dissenting in part.

I disagree that the General Counsel has shown, by a preponderance of the evidence, that employees Clayton, Hurdle, and Stewart did not engage in picket line misconduct. The misconduct was that the three employees ridiculed the mother of Alan Richards.

First, I find that the Respondent had a good-faith belief that the three employees engaged in the misconduct. Indeed, my colleagues do not argue to the contrary. The Respondent, through Dr. Parker, acted on the basis of what Richards told her. The burden then shifted to the General Counsel to prove that the employees had not engaged in the misconduct.

Richards testified unequivocally that he saw and heard the three employees ridicule his mother, an elderly and frail patient at the Respondent's nursing home. The three employees denied the misconduct. The judge credited that denial. In doing so, the judge did not rely upon their particular testimonial demeanor.[1]

The three employees had an obvious interest in testifying as they did. Their very jobs depended on that testimony. By contrast, Richards was a disinterested witness. He had nothing against these employees, and no reason to help the Respondent in litigation. He was simply appalled by the conduct concerning his mother.

My colleagues dispute my characterization of Mr. Richards as a disinterested witness by noting that he was opposed to the strike. I disagree. Although Richards was upset about the strike, that sentiment was only because he was concerned that the strike would interfere with his mother's care. There is no suggestion that he took sides as to the bargaining issues in dispute. Further, his opposition to the strike, which involved 180 employees, does not explain why he would wish to single out the 3 strikers to accuse them of misconduct. Indeed, Richards was reluctant to accuse them; he did not seek out the Respondent to report their misconduct.

[24] 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."

[1] The judge made a general statement, at the outset of his opinion, that he relied upon "his observation of the demeanor of the witnesses." He gave no further explanation. Moreover, he made no specific reference to the demeanor of the witnesses as to the particular incident involved herein.

In crediting the three employees, the judge relied upon their employment history, including the length of employment and the record of that employment. However, the fact that the employees engaged in no prior misconduct for a long period of time at work is, at best, only marginally relevant to whether they engaged in misconduct on a picket line in the midst of a bitter labor dispute.

In an effort to support the judge's credibility finding, my colleagues rely upon factors that the judge himself did not rely upon. It is little wonder that the judge declined to rely upon these factors for they do not support his credibility resolution. First, the three strikers were "yelling" their taunts from 60 feet away. It is not unreasonable to say that this yelling could be heard from that distance. Second, although the judge found that Richards' car window (singular) was rolled up, he did not say that the other windows were rolled up. Third, the fact that the taunting words "help me, help me, help me" can be uttered in 3 seconds does not mean that the entire incident lasted only 3 seconds.

The judge relied upon the lack of videotape evidence. However, videotape would not capture the verbal taunts involved herein. Similarly, the guards were instructed to videotape only "inappropriate incidents." Of course, the guards would not have recognized the cruelty of the taunt "help me." Only Richards would recognize that.

In sum, I do not believe that the judge's finding of fact is supportable. At most, the evidence is in equipoise. Thus, there is not a preponderance of evidence supporting the General Counsel's contention.

Finally, there can be little doubt that the misconduct was sufficiently egregious to warrant discharge. Indeed, it is difficult to think of any conduct more heinous than that of nursing home employees who ridicule a cry for help by an elderly and frail patient.

MEMBER WALSH, dissenting in part.

It is well established that the "employer alone is responsible for its conduct and it alone bears the burden of explaining the motivation for its actions." *Inland Steel Co*., 257 NLRB 65, 68 (1981), enfd. mem. 681 F.2d 819 (7th Cir. 1982). Today, however, in reversing an administrative law judge and holding that the Respondent lawfully refused to reinstate economic strikers, the majority relies not on a justification the Respondent advanced, but on one it explicitly disavowed. Compounding its error, the majority conjures up a "justification" that amounts to a blanket endorsement of an employer's blatant use of its raw economic power, not to maintain business operations during a strike, but to erode the strikers' support for the Union. Accordingly, I must dissent from the majority's reversal of the judge's well-reasoned finding that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate the strikers upon their unconditional offer to return to work. Before turning to that issue, I will first address another of the majority's errors: the reversal of the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging Pauline Taylor.[1]

I. THE DISCHARGE OF PAULINE TAYLOR

A. Facts

Taylor worked as a CNA for the Respondent. She had been a union delegate since 1992, had served as one of the Union's two chapter officers, and was a picket captain during both a strike in 1995 and the 1999 strike at issue here. The Respondent discharged Taylor in 1998, but was obligated, pursuant to an arbitration award, to reinstate her without backpay in August 1999. Shortly before her reinstatement, the Respondent's chief executive officer, Norman Harper, told the Union's president that he never wanted to take Taylor back and that he did not like her as a human being.

Taylor joined the 1999 strike at its inception. During the strike, the Respondent's administrator, Miriam Parker, received a complaint about Taylor from a resident's daughter, Kathy Falcon. Parker had Falcon provide a written statement, which alleged Taylor yelled at Falcon as she was leaving the facility on December 4, 1999. Falcon wrote that Taylor's "*exact* words were—'there's that bitch Horan's daughter. That bitch—that piece of trash! She's a little piece of trash and so is her mother.'" (Emphasis in original.) On February 22, 2000, before Taylor was recalled to work, the Respondent sent her a termination letter for cursing and insulting a resident and her family member.

B. Analysis

It is well settled that an employer may discharge a striker whose misconduct, under all the circumstances, may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. *Clear Pine Mouldings*, 268 NLRB 1044 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986). The Board applies an analogous test in considering a striker's misconduct directed against persons who do not enjoy the protection of Section 7 of the Act. Id. at 1046 fn. 14. If the General Counsel establishes that an employee was discharged for strike-related conduct, the burden shifts to the Respondent to show it had an honest belief that the striker engaged in the conduct for which he or she was discharged. If the Respondent establishes its honest belief, the burden shifts back to the General

[1] I agree with Member Schaumber that the Respondent violated Sec. 8(a)(3) and (1) by discharging Opal Clayton, Patricia Hurdle, and Georgia Stewart.

Counsel to establish that the striker did not in fact engage in the alleged misconduct. *Siemens Energy & Automation, Inc.*, 328 NLRB 1175 (1999). Even where the employer has an honest belief that the employee engaged in misconduct and the employee in fact did so, verbal conduct will warrant discharge only if it reasonably tends to coerce or intimidate employees in the exercise of rights protected under the Act, or if it meets the analogous test for misconduct directed against persons who do not enjoy the Act's protection. *Clear Pine Mouldings*, supra at 1046 fn. 14.

It is undisputed that the Respondent discharged Taylor for conduct related to the strike, and neither the General Counsel nor the Union has excepted to the judge's finding that Taylor did, in fact, commit the alleged act. Accordingly, the lawfulness of the Respondent's disciplinary action turns on whether it had an honest belief that Taylor committed the act at the time it discharged her, and whether Taylor's comments were so egregious that they warranted the loss of her reinstatement rights. For the reasons discussed below, the judge correctly found (1) that the Respondent was not acting honestly and in good faith when it terminated Taylor, and (2) that even if it was, Taylor's conduct did not warrant discharge.

1. The Respondent's honest belief

The Board has held that an employer's honest belief must be supported by record evidence linking the striker to the alleged misconduct. *General Telephone Co. of Michigan*, 251 NLRB 737, 739 (1980). Although the employer is not necessarily obligated to interview the accused striker, whether it had an honest belief is judged on the basis of the evidence available to it when it took the disciplinary action at issue. *Detroit Newspapers*, 340 NLRB 1019, 1025 (2003); *Giddings & Lewis, Inc.*, 240 NLRB 441, 448 (1979). Although the Respondent's burden of proof on this matter is not heavy, an examination of the circumstances of this case demonstrates that it ignored all potentially available evidence except for Falcon's report. Thus, as the judge concluded, the Respondent used Falcon's report as an excuse to get rid of a striking union activist who the Respondent's chief executive officer identified approximately 6 months earlier as someone he did not want to reemploy.

The Respondent discharged Taylor based on a single report from one resident's family member without investigating the allegation in any way. In *Giddings & Lewis*, supra, although the disciplined striking employees were not interviewed, the employer relied on oral and written reports of supervisors, public records (including arrest reports), interviews with witnesses and police officials, and a film record of picket line misconduct. Under those circumstances, the Board found it "not unreasonable" for the employer to dispense with interviews of the strikers. Id. at 448. Here, by contrast, the Respondent avoided any inquiry whatsoever into the matter. The Respondent did not ask the security guards it hired for the strike, or anyone else, if they could corroborate Falcon's allegation. Neither did the Respondent attempt to check videotape footage shot by its security guards to see if the confrontation Falcon alleged had been captured by a camera that was to be used when misconduct occurred. The Respondent's failure to even attempt to verify Falcon's report shows that it was not acting in good faith when it decided to terminate Taylor.[2]

Furthermore, the Respondent's handling of the Taylor situation was notably different from its ordinary course of business. Parker testified that, in contemplating discipline for employee misconduct, she ordinarily conducts an investigation and looks into all the details in order to be fair to the accused employee. The Respondent's nursing department policy and procedure manual requires a thorough investigation of abuse. Further, Jon Webb, a union delegate, testified that of the 40 suspensions and 9–10 terminations in which he has represented union members, Taylor's discharge was one of only two cases that involved suspension or termination without the employee first being allowed to respond to the allegations of misconduct. (Opal Clayton's discharge was the other.)

Moreover, the Respondent's handling of the discharges of Hurdle and Stewart provides further insight into the Respondent's motivation in discharging Taylor. The Respondent suspended both Hurdle and Stewart pending investigation into the charges leveled at them. The Respondent discharged them, however, without conducting any further investigation. The Respondent not only failed to perform a genuine investigation into the allegations against Hurdle and Stewart, but it failed to follow the procedure it said it would follow when it suspended them. This failure supports the finding that the Respondent acted out of a desire to rid itself of striking union activists, including Taylor, rather than an honest belief that the discharged employees had engaged in picket line misconduct.

Contrary to my colleagues' suggestion, I neither confuse the nature of the General Counsel's case nor require the Respondent to prove that Taylor committed the alleged misconduct. I simply require the Respondent to meet the standard of honest belief. The majority's application of that standard drains it of meaning. As applied by the majority, *General Telephone*, supra, would stand

[2] The "honest belief" requirement has been described as synonymous with a "good-faith belief." See *Champ Corp.*, 291 NLRB 803, 803 (1988), enfd. 933 F.2d 688 (9th Cir. 1990), cert. denied 502 U.S. 957 (1991).

for the proposition that as soon as an employer has a report linking an employee to an allegation of misconduct, it may forego its customary investigative practices in order to avoid learning anything further, and then claim honest belief. *General Telephone* does not, however, compel such a position, nor should it be read in such a way as to turn "honest belief" into an empty phrase. In the circumstances presented here, the Respondent's unwillingness to make any inquiry that might contradict Falcon's statement belies any claim it might otherwise have to an honest, good-faith belief in Falcon's report. The fact that the Respondent ultimately was able to prove the veracity of Falcon's statement at the hearing before the judge has no bearing on the bona fides of its belief at the time of the discharge.

2. The egregiousness of the conduct

Without minimizing the offensiveness of Taylor's conduct, it still must be analyzed within the framework of the Act. Taylor's conduct occurred while she was on the picket line in support of an economic strike, an activity protected by the Act. In that context, a certain amount of impulsive behavior is to be expected and must be tolerated so as not to discourage the exercise of Section 7 rights. See, e.g., *CKS Tool & Engineering, Inc. of Bad Axe,* 332 NLRB 1578, 1585–1586 (2000), and cases cited therein; *Shalom Nursing Home*, 276 NLRB 1123, 1137 (1985). Thus, any consideration of stripping Taylor of the protection of the Act must be undertaken carefully.

Taylor, in the presence of a resident's daughter, called the resident and the daughter a "bitch" and "a little piece of trash." Falcon is not a nonstriking employee, so the *Clear Pine Mouldings* standard—whether, under all the circumstances, Taylor's comments would reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act—does not directly apply. But *Clear Pine Mouldings* states that an analogous test applies where a striker's statements are directed at nonemployees, such as Falcon.

Although Taylor's comments were extremely offensive, it is well established that such spontaneous picket line activity as the use of obscene and insulting language does not warrant the loss of an employee's reinstatement rights. See *Chevron U.S.A., Inc. v. NLRB*, 672 F.2d 359, 360 (3d Cir. 1982) (summarizing cases). Contrary to the majority's view, Taylor's language did not imply a threat that Taylor would mistreat Falcon's mother. To be sure, the language was disdainful of and insulting to both Falcon and Horan. But there was no suggestion, by word or gesture, of any action that Taylor intended to take toward either woman. In the absence of any such suggestion, the mere fact that Horan was an 82-year-old resident of the nursing home does not create a threat where there was none. Accordingly, the judge concluded correctly that Taylor's conduct did not warrant the denial of her reinstatement rights, and the Respondent violated Section 8(a)(3) of the Act by discharging her.

II. THE HIRING OF PERMANENT REPLACEMENTS

A. Facts

The strike began on November 17, 1999. Initially, the Respondent relied on nonstriking employees, managers, temporary employees, and volunteers to fill in for the strikers. The Respondent commenced hiring permanent replacements on or about December 15, 1999. It hired a consulting firm to run a job fair to help it hire permanent replacements, at a cost of approximately $16,000–$17,000. In addition, the Respondent offered permanent jobs to temporary workers it had taken on since the beginning of the strike, agreeing to pay Class Act, one of the agencies supplying temporary employees, $1100 per Class Act employee that it converted to permanent status. The Respondent also paid the replacements $12.19 an hour, the wage rate for its most senior employees and substantially more than the "new hire" rate of $10 an hour in the recently expired contract.

The Respondent admits that it decided not to inform the Union of its decision to permanently replace the striking employees. Scott Cohen, owner of Class Act, testified that the Respondent told him that its plans regarding permanent replacements were to be kept "hush-hush" and that it needed to get as many bodies hired as possible before the Union found out. Based on blind ads for jobs similar to those held by the strikers, the Union became suspicious that the Respondent was planning to hire permanent replacements. Around the end of December 1999, the Union received a report from someone who claimed that she was offered a permanent job with the Respondent. The Union then arranged for a meeting with the Respondent and a Federal mediator on January 3, 2000. At the January 3 meeting, the Respondent admitted that it already had hired "over 100" permanent replacements.

On January 5, the Union sent the Respondent a letter offering on behalf of the strikers to "return to work immediately, as a group, and to continue working under the terms and conditions of the [expired] collective bargaining agreement . . . pending the negotiation of a successor collective bargaining agreement." Parker replied that same day by letter stating, inter alia, that "in reviewing your letter, it appears that it is not an unconditional offer but includes a number of preconditions including but not limited to" the retention of the expired contract's union-security clause and the apparent offer for either all or no employees to return to work "as a group." Parker asked

the Union to advise her if her understanding was incorrect. The next day, the Union wrote to Parker advising that it was not insisting on the retention of the union-security clause. On January 20, 2000, the Union again offered on behalf of the strikers to return to work, this time with no stated conditions.

While these events were unfolding, on December 31, 1999, the Respondent's CEO, Norman Harper, sent a memorandum to the Respondent's board of directors. The memorandum, in pertinent part, reported that "as a well-executed surprise event the day before Christmas, we began to permanently replace striking workers at Avery. . . . So far, we have hired 104 permanent replacements at Avery, replacing 60% of those on strike. If [the Union] refuses to seriously negotiate in good faith, we plan to add one or more permanent replacements each day. We have [the Union] in a real bind at Avery."

B. Analysis

An employer violates Section 8(a)(3) by failing to immediately reinstate striking employees on their unconditional offer to return to work, unless the employer establishes a legitimate and substantial business justification for failing to do so. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Capehorn Industry*, 336 NLRB 364, 365 (2001). That the positions claimed by the strikers are filled by permanent replacements constitutes a legitimate and substantial business justification. *Fleetwood Trailer*, supra; see *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345–346 (1938). However, an employer will still be held to have violated the Act if, in hiring permanent replacements, it was motivated by "an independent unlawful purpose." *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964).

The issue here is whether the Respondent, in hiring permanent replacements, had an independent unlawful purpose of punishing the strikers and breaking the Union's solidarity by replacing a majority of its supporters. This is a case of first impression: the Board has never found the hiring of permanent replacements unlawful based on the *Hot Shoppes* "independent unlawful motive" exception.[3] Neither has it articulated the standard to be applied for proving the existence of such a motive. I turn first to the latter threshold issue.

The General Counsel contends that a *Wright Line*[4] analysis should apply. Under that analysis, the General Counsel must first establish that union or other protected activity was a motivating factor in the employer's adverse employment action against an employee. If that is established, the burden shifts to the employer to show that it would have taken the same action in the absence of the protected activity. 251 NLRB at 1089. The judge rejected the General Counsel's contention, holding that the General Counsel must show that the "independent unlawful motive outweighed any legitimate and substantial business [justification] that the employer may have had." However, Board law is clear that *Wright Line* does apply where, as here, the respondent's motivation for taking the allegedly unlawful action is disputed. Id. Adhering to *Wright Line* but adapting it to the present context yields the following standard. Initially, the General Counsel has the burden of showing that an independent unlawful purpose was a motivating factor in the employer's decision to permanently replace the economic strikers. If that is shown, the burden shifts to the employer to prove that it would have taken the same action even in the absence of any unlawful purpose.

The General Counsel sustained his initial burden. The Respondent's deliberate concealment of its plans, Harper's gloating memorandum referring to a "well-executed surprise event" and to placing the Union "in a real bind," and Cohen's testimony about a "hush-hush" program to replace as many strikers as possible before the Union found out, considered together, raise an inference that a desire to punish the strikers and break the Union's solidarity by permanently replacing a majority of its supporters was a motivating factor in the Respondent's decision.[5] Bolstering this finding is the fact that the Respondent pursued this course of action at considerable economic cost to itself, paying Class Act a per capita fee of $1100 to convert its temporary employees to permanent status, paying a consulting firm $16,000-$17,000 to run a job fair to attract permanent replacements, and paying replacements well in excess of its existing wage rate for new hires.[6]

The General Counsel having sustained his initial burden, the burden shifted to the Respondent to show that it would have taken the same action of secretly hiring permanent replacements even in the absence of any unlaw-

[3] In a larger sense, this is really not a novel case. As the Fourth Circuit has explained, "The principle that otherwise lawful acts can be rendered unlawful when motivated by improper intentions is widely accepted and appears repeatedly throughout the law." *RGC (USA) Mineral Sands, Inc. v. NLRB*, 281 F.3d 442, 450 (4th Cir. 2002).

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[5] The Respondent argues that the Board has never required an employer to provide advance notice to a union of its plan to hire permanent replacements. This argument misses the point. While the Respondent may not have been required to notify the Union, the fact that it was willing to go to great lengths to conceal its intentions is one factor, among others, supporting a finding that the decision to replace the strikers was motivated by an independent unlawful purpose.

[6] Contrary to the majority's assertion, the evidence summarized above, ignored by the majority, does support a finding that the General Counsel sustained his initial burden of proving unlawful motive.

ful purpose. To this end, the Respondent presented the judge and the Board with three reasons for its course of action: (1) to provide quality care to its residents; (2) to relieve its interim staff of long hours; and (3) to operate long-term at a lower cost. The record shows, however, that these were not the real reasons the Respondent secretly hired permanent replacements, but are mere pretexts.

First, unlike the replacements, the strikers knew both the residents and the work. The strikers, therefore, were the ones capable of immediately providing the quality of care the Respondent says it wanted. Indeed, both Harper and Parker testified that they would have preferred to have the strikers return to their jobs rather than to hire an entirely new work force unfamiliar with the Respondent's operation. Therefore, if the Respondent were truly concerned about the continuity of care, it would have disclosed its plan to the strikers in order to induce them to abandon the strike and return to work. Instead, the Respondent took pains to keep the hiring of permanent replacements a secret and thus acted in a manner inconsistent with a genuine desire to maintain quality care.

Second, the Respondent's claim of employee "burnout" is contradicted by Harper's memorandum, which states that "[m]orale among staff and management remains high and determined." Thus, this alleged reason is not supported by the record.

Third, the Respondent's long-term cost analysis is mostly confined to showing that permanent replacements cost less than temporary workers. The Respondent also contends that permanent replacements would have cost less than what the Union was asking for at the bargaining table, but it does not contend that strikers returning to work under the terms of the expired contract would have been more costly than the replacements. Indeed, as explained above, it was just the reverse: permanent replacements cost more than less senior returning strikers would have and at least as much as the most senior returning strikers would have. Again, if the Respondent's true motive were to reduce costs, then it would have revealed its plan to permanently replace the strikers in order to induce them to return to work under the terms of the expired contract. Instead, it kept its plans secret, which virtually ensured that cost savings would not be realized.

Thus, the foregoing three reasons cannot be accepted as a truthful explanation of the Respondent's decision to secretly hire permanent replacements. By offering such transparently incredible reasons for its conduct, the Respondent not only failed to rebut the General Counsel's case, but actually bolstered it. "It is . . . well settled . . . that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal." *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

In its brief to the Board, the Respondent proffered a fourth reason for its secret plan: to obtain economic leverage over the Union in bargaining. However, the Respondent did not urge this fourth reason in its posthearing brief to the judge. In fact, at the hearing, the Respondent expressly disavowed any contention that it was motivated by a desire to gain an economic advantage over the Union.[7] Where, as here, an employer has shifted reasons for its actions, "an inference may be drawn that the real reason for its conduct is not among those asserted." *Sound One Corp*., 317 NLRB 854, 858 (1995) (citation and internal quotation omitted), enfd. mem. 104 F.3d 356 (2d Cir. 1996).

Even assuming the bargaining-leverage rationale were properly before the Board, the Respondent's conduct still violated the Act under the test set forth in a series of Supreme Court decisions carefully balancing the conflicting legitimate interests of employers and employees in strike situations. In striking that balance, the starting point is that an employer's refusal to reinstate striking employees violates Section 8(a)(1) and (3) of the Act, *unless* the employer demonstrates that its refusal is based on "legitimate and substantial business justifications." *Fleetwood Trailer*, supra, 389 U.S. at 378, quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967). The need to continue business operations is such a justification, and the employer that hires permanent replacements is presumed to have done so "to protect and continue his business by supplying places left vacant by the strikers." *Mackay*, supra, 304 U.S. at 345. In other words, the employer's limited right to refuse reinstatement to economic strikers is based on the presumption that such hiring is necessary to continue business operations. This pre-

[7] When the Union's attorney asked whether the Respondent intended to argue that the replacement of the strikers was "simply a wake up call for the Union to begin bargaining seriously," the Respondent's attorney replied as follows: "Well I'll tell you that we are going to present evidence that the reason that we hired permanent replacements was because the temporary replacements were getting burned out. It's important to have continuity of care and the cost factor. Are we going to rely on a particular—*are we going to say that it's a tactic to strong arm the union—no.* Does that answer your question?" (Emphasis added.) Moreover, CEO Harper himself denied—not once, but twice—that gaining economic leverage was the motive. Asked why he had not considered telling the Union about the permanent replacements, Harper testified: "I didn't see it as a negotiating lever. My only focus was on the quality of services going forward in the future." Asked a second time, Harper reiterated: "Like I said previously, I just didn't see it as an option for leverage in negotiating."

sumption does not supercede the balancing of interests; on the contrary, it results from such a balancing. Permanently replacing strikers discourages union membership and concerted activity. See *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 232 (1963). Nevertheless, the Court permitted employers to hire permanent replacements after engaging in the "delicate task . . . of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct." Id. at 229.

In sum, under the above test, the balance tips in favor of an employer that hires permanent replacements in order to continue operating its business. In that instance, the employer's legitimate and substantial business interest is held to outweigh the invasion of the Section 7 rights of the permanently replaced economic strikers. Here, however, the Respondent's alleged business justifications for hiring permanent replacements were not "legitimate" or "substantial"; they have been exposed as shams. Thus, there is nothing to put on the Respondent's side of the scale to balance against the damage to the Section 7 rights of the striking employees. Those rights necessarily predominate, and the Respondent's failure to reinstate the strikers violated the Act.

The majority incorrectly characterizes the Respondent's covert scheme as an economic weapon. The Respondent's conduct was not economically motivated. On the contrary, the Respondent was successfully operating its business without permanent replacements. Harper admitted as much in his memo. The Respondent had no bona fide need to hire.[8] Indeed, as explained above, the record shows that the reasons the Respondent advanced for hiring permanent replacements were pretexts. In reality, the Respondent's independently unlawful motive was to undermine the Union by engendering striker dissatisfaction with the Union. The intended result of the Respondent's actions was to force a majority of the strikers to endure the hardship of waiting an indefinite period of time after the end of the strike to return to their jobs. The foreseeable result of that hardship would be hostility toward the Union for a perceived failure to protect the strikers' interests, thus driving a wedge between the Union and its formerly supportive members. This intended consequence, described in Harper's memorandum as the "bind" in which the Union was placed, reveals the Respondent's independently unlawful motive in secretly hiring permanent replacements in violation of Section 8(a)(3) of the Act.

My colleagues rely on *Central Illinois Public Service Co.*, 326 NLRB 928 (1998),[9] to argue that employers are permitted to use economic weapons in order to win economic battles. That principle is undisputed, but irrelevant here. The Respondent's conduct has nothing to do with economic weapons. My colleagues' discussion of *Central Illinois* cannot mask the fact that they have failed to explain how the Respondent's secrecy is consistent with a motive to gain economic leverage.[10] Instead of explaining how a secret hiring scheme could serve such a motive, my colleagues say that the Board has never held that the hiring of permanent replacements must be disclosed. In point of fact, as the judge noted, the Board has never expressed an opinion on the subject one way or the other. But, in any event, the Board's silence on the issue does not and cannot explain how the Respondent could have gained bargaining leverage from keeping the hirings secret. Harper understood that such leverage could only have been exerted through disclosure. Asked why he had

[8] In this respect, the Respondent's conduct is akin to unit packing, which the Board has long held unlawful. See, e.g., *Airborne Freight Corp.*, 263 NLRB 1376 (1982), enf. denied on other grounds 728 F.2d 357 (6th Cir. 1984); *Suburban Ford, Inc.*, 248 NLRB 364 (1980), enf. denied 646 F.2d 1244 (8th Cir. 1981). Unit packing is the "egregious tactic of deliberately 'loading' the bargaining units so as to insure the abortion of any fair election, . . . in direct opposition to the congressionally declared national policy as set forth in the Act." *Suburban Ford*, supra at 373. The only difference between unit packing cases and this case is one of timing: in unit packing, the employer seeks to obstruct the formation of a bargaining relationship; here, the Respondent sought to subvert an existing bargaining relationship.

[9] Petition for review denied sub nom. *Local 702, Electrical Workers v. NLRB*, 215 F.3d 11 (D.C. Cir. 2000), cert. denied 531 U.S. 1051 (2000).

[10] Moreover, *Central Illinois* is distinguishable. In *Central Illinois*, the employer locked out employees. Lockouts must be disclosed. *Eads Transfer*, 304 NLRB 711, 712 (1991) ("[W]e conclude that an employer can only justify its failure to reinstate economic strikers for legitimate and substantial business reasons based on a lockout by its timely announcement to the strikers that it is locking them out in support of its bargaining position.") (internal quotations omitted), enfd. 989 F.2d 373 (9th Cir. 1993). Moreover, a lockout cannot be exploited to effect the *permanent* replacement of strikers. See *Harter Equipment*, 293 NLRB 647, 648 (1989). Under the majority's holding today, however, a resourceful employer—i.e., one that successfully keeps its permanent replacement project hidden beneath a veil of secrecy—may circumvent this inconvenient limitation attendant upon lockouts.

Citing, inter alia, *Eads Transfer*, the majority attempts to manufacture a specious legitimacy for the Respondent's conduct by claiming that the Respondent promptly disclosed its hiring of permanent replacements after the strikers offered to return to work. That is not what happened. What happened was that the Union got wind of what the Respondent was up to, and the Respondent admitted its secret hiring scheme when the Union confronted it in the presence of a Federal mediator. The Respondent's admission in this regard was not an *Eads*-like disclosure, but simply a rueful acknowledgment that the secret was out. In the meantime, the Respondent had surreptitiously hired over 100 permanent replacements, representing more than half the positions in the bargaining unit.

not considered telling the Union about the permanent replacements, Harper testified that he "didn't see it as a negotiating lever." Indeed, despite their assertions to the contrary, my colleagues tacitly admit the same point. They say that "if the hiring of replacements persuaded some employees that further striking was unwise, that would inure to the bargaining benefit of the employer." But striking employees could only be thus persuaded *if they knew their employer was hiring permanent replacements*. Here, by contrast, the Union and strikers were deliberately kept in the dark. Harper testified truthfully when he denied a motive to gain leverage in collective bargaining. In truth, the Respondent's conduct is intelligible only in light of a purpose to punish the strikers for their protected activity and subvert the Union.

The majority seeks to salvage its "economic leverage" rationale by drawing a distinction between the Respondent's decision to hire permanent replacements and its decision to do so *secretly*, and then defending the former but not the latter as motivated by a purpose to gain economic leverage: "[W]e are finding only that a purpose of the hiring of replacements was to gain economic leverage. We are *not* saying that the failure to disclose had that purpose." Again, however, my colleagues miss the point: *undisclosed, the hiring of replacements exerted no economic leverage*.

Speaking in the abstract, the majority says that hiring replacements gains "an employer" an economic advantage, regardless of whether the union knows of that hiring or not, because replacements enable operations to be maintained during a strike. The issue, however, is not what might motivate a hypothetical employer, but what motivated the Respondent. My colleagues do not contend, and there is no evidence, that the Respondent's secret hiring scheme was motivated by a need to maintain operations. On the contrary, as stated above, the Respondent was successfully operating its business during the strike without permanent replacements. Therefore, the majority's theoretical argument does not explain the Respondent's decision to secretly hire permanent replacements.

In sum, the General Counsel has satisfied his burden of showing that a desire to punish the strikers and break the Union's solidarity was a motivating factor in the Respondent's decision to secretly hire permanent replacements. The Respondent, however, has failed to show that it would have taken the same action even in the absence of any unlawful purpose. Accordingly, the judge correctly found that the Respondent violated Section 8(a)(3) and (1) by failing to reinstate all the strikers upon their unconditional offer to return to work.

The final remaining issue is the date on which the Union made that unconditional offer on the strikers' behalf. The judge found that the Union's January 5, 2000 offer was conditioned on the maintenance of the terms and conditions of the expired contract. He concluded that the Union's January 20, 2000 offer to return was the first unconditional offer, and that the Respondent violated the Act by its refusal to reinstate all of the strikers at that time.

The January 5 offer to return to work was a conditional offer because, as Parker pointed out in her reply on that same date, the expired contract contained a union-security clause that did not survive contract expiration.[11] On January 6, 2000, the Union advised Parker that it was not insisting on the retention of the union-security clause. The Union's January 6 letter served as a clarification to its January 5 offer, making it clear that it was not insisting on the continued application of contract terms that did not lawfully survive contract expiration. Therefore, the Union made an effective, unconditional offer to return to work on behalf of the striking employees on January 6, 2000. The Respondent's liability for its failure to reinstate all striking employees runs from that date.

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for supporting New England Health Care

[11] Parker also challenged the January 5 offer because it was an offer for the strikers to return "as a group," displacing the permanent replacements. However, since the hiring of those permanent replacements was unlawful under *Hot Shoppes*, supra, the Respondent was obligated to accept the returning strikers as a group, displacing its replacement employees as necessary. Thus, the offer to return "as a group" did not make the offer conditional.

Employees Union, District 1199, AFL–CIO or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer Opal Clayton, Patricia Hurdle, and Georgia Stewart full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make the above-named employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of the above-named employees, and WE WILL within 3 days thereafter notify those employees in writing that this has been done and that the discharges will not be used against them in any way.

CHURCH HOMES, INC. D/B/A AVERY HEIGHTS

Thomas E. Quigley, Esq., for the General Counsel.
Hugh F. Murray III, Esq. and *Michael C. Harrington, Esq. (Murtha Cullina LLP)*, of Hartford, Connecticut, for the Respondent.
John M. Creane, Esq., and *Kevin A. Creane, Esq.,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. This case was tried in Hartford, Connecticut, on March 13–15, 19, 23, and 26–28, 2001. New England Health Care Employees Union, District 1199, AFL–CIO (the Union) filed the charge on February 17 and amended it on July 31, 2000.[1] The complaint issued on November 29, alleging that the Respondent, Church Homes, Inc. d/b/a Avery Heights, violated Section 8(a)(1) (3) and (5) of the Act. On December 12, the Respondent filed its answer to the complaint denying the unfair labor practice allegations and raising affirmative defenses.

The allegations in the complaint arose out of a strike engaged in by the Respondent's employees represented by the Union. The strike commenced on November 17, 1999, and ended when the Union made an unconditional offer to return to work in January. There is no dispute that the strike was at all times an economic strike. The following issues are framed by the pleadings:[2]

1. Whether the Respondent violated Section 8(a)(1) and (3) of the Act by terminating employees Opal Clayton, Patricia Hurdle, Georgia Stewart, and Pauline Taylor for alleged misconduct on the picket line.

2. Whether the Respondent violated Section 8(a)(1) and (5) of the Act by misrepresenting to the Union its intentions regarding the hiring of permanent replacements for striking employees.

3. Whether the Section 8(a)(5) allegation is time-barred by Section 10(b) of the Act.

4. Whether the Respondent had an independent unlawful motive in hiring permanent replacements for its striking employees, thereby violating Section 8(a)(1) and (3) of the Act when it refused to reinstate those economic strikers who had been replaced.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a not-for-profit corporation, provides skilled and semiskilled health care services at its facility in Hartford, Connecticut, where it annually derives gross revenues in excess of $100,000 and purchases and receives goods valued in excess of $50,000 directly from points outside the State of Connecticut. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act. The Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Church Homes, Inc. owns and operates several facilities in Connecticut serving the elderly and infirm. The sole facility involved in this proceeding is the Avery Heights facility in Hartford, Connecticut. That facility consists of a skilled nursing facility, assisted living residences, independent living cottages and adult day care. The facility is home to approximately 500 older adults who need various levels of care. Norman Harper was the chief executive officer and Dr. Miriam Parker the administrator during the period relevant to these proceedings.

The Union has represented a unit of service and maintenance employees at the Avery Heights facility since the mid-1970s. Unit employees work in all areas. The largest category of unit employees is certified nursing assistants (CNAs). The most recent collective-bargaining agreement was effective from November 1, 1995, through October 31, 1999. Agreement was reached on this contract after a 5-week strike. This was the first significant work stoppage in the history of the parties' relationship. According to Union President Jerry Brown, the parties

[1] All dates are in 2000 unless otherwise indicated.

[2] In its answer, the Respondent asserted as an affirmative defense that the strike had an unlawful purpose and was unprotected. The Respondent did not pursue this claim in its brief.

[3] The General Counsel's unopposed motion to correct the transcript is hereby granted.

had a relatively harmonious and productive relationship until 1995. As noted above, the Union commenced another strike on November 17, 1999, when the parties failed to reach agreement on a new contract. At the time of the strike, there were 180–185 employees in the unit.

The Union represents approximately 19,000 employees in the State of Connecticut, employed in private and public sector health care institutions. At the time of the hearing, the Union had collective-bargaining relationships with 71 nursing homes, which represented 27–28 percent of the homes in the State. It is undisputed that the Union has tried over the years to negotiate common wages and benefits at all the facilities it represents. To achieve this result, the Union had five "pattern agreements" which it sought from respective employers on an individual basis depending on the maturity of the bargaining relationship. Until 1995, the Respondent was party to an agreement consistent with the pattern for the most mature relationships, providing for the highest level of wages and benefits. In 1995, the Respondent entered negotiations intent on breaking away from the pattern. Following the 5-week strike, the Union was forced to accept an agreement that departed from its pattern in significant respects. In addition, by negotiating a 5-year agreement, the Respondent was able to separate itself from other employers whose contract expiration dates coincided. The Union generally sought common expiration dates to put increased pressure on the employers by holding out the threat of massive strikes affecting thousands of nursing home residents occurring at the same time. This strategy also gave the Union leverage to obtain increased public expenditures for nursing homes in the state legislature.[4]

During the term of the 1995 contract, the Respondent terminated two union delegates, Margarita Cortavarria and Pauline Taylor, for alleged patient abuse. The Union pursued grievances on behalf of both employees to arbitration. The arbitrators sustained the termination of Cortavarria, but ordered Taylor reinstated without backpay. The Union also filed a number of unfair labor practice charges against the Respondent which were deferred to the parties contractual grievance/arbitration machinery pursuant to the Board's decision in *Collyer Insulated Wire,* 192 NLRB 837 (1971). In October 1998, the union was certified as the representative of a unit of service and maintenance employees at Miller Memorial in Meriden, Connecticut, a skilled nursing facility that was managed by the Respondent for a charitable foundation. In addition, in the fall 1998, the pattern agreements that the Union had negotiated with other homes in 1995 were due to expire. The Union was able to extend about 50 of those contracts into the spring 1999 and began an intense lobbying campaign to convince the State legislature and governor to appropriate more money for nursing home reimbursements that would fund higher wages and benefits for the employees it represented. This campaign was successful, resulting in a $200 million appropriation in the State budget for Medicaid reimbursement, which was specifically designated for increases in wages and benefits. Following this appropriation, the Union negotiated new pattern agreements with other facilities that included substantial increases in wages and benefits. As a result, the wages and benefits in the Respondent's contract fell further behind the pattern typical for employers with such a mature relationship. The pattern agreements that the Union negotiated in the spring 1999 were 2-year agreements set to expire in March 2001.

After the Union reached agreement with the other facilities in the State, Union President Brown requested a meeting with the Respondent's CEO, Harper. This meeting occurred in July 1999 at a restaurant in Hartford. Only Brown and Harper were present. Brown testified that he told Harper that the State's increase in Medicaid reimbursement rates "changed the landscape" for the upcoming negotiations. Harper disagreed, telling Brown that the State's action would have very little impact on the Respondent because so little of its revenue came from Medicaid. Brown then outlined for Harper the economics of the recently-negotiated pattern agreements. According to Brown, Harper said that he did not expect the economics to be a problem for the Respondent. Brown also raised the issue of the two discharged delegates, who were awaiting arbitration. According to Brown, Harper responded by saying that, while he might be able to work something out for Cortavarria, he never wanted to take Taylor back, that he didn't like her as a human being. According to Brown, the meeting ended on a cordial note, with Harper telling Brown that he did not want a fight with the Union. Harper also promised to get back to Brown regarding a possible settlement of Cortavarria's case.

Harper was not specifically asked about this meeting on direct examination. On cross-examination by the Charging Party's counsel, Harper acknowledged having such a meeting with Brown but denied telling Brown that the economics of the new pattern agreement would not be a problem. According to Harper, what he told Brown at this meeting is that the Respondent was looking for essentially the same contract it then had with a "reasonable improvement on the paycheck economics." Harper also denied, on cross-examination, that he made the statement about Taylor that Brown attributed to him. According to Harper, when Brown raised the issue of the two discharges, he told Brown that his administrator and department heads were the key people involved and that he was not in a position to overrule their decision.

Negotiations for a new contract began on September 23, 1999. There were approximately 8 or 9 meetings before the strike commenced on November 17, 1999. The Union was represented by a large negotiating committee comprised of employees, with union staff members Almena Thompson and Louis Guida serving as spokespersons. Neither testified at the hearing. Administrator Parker and Attorney Thomas Cloherty represented the Respondent. Parker and Cloherty testified at the hearing. The Union's initial proposal called for a 16-month term, with an expiration date in March 2001 to coincide with that of its other contracts with Connecticut nursing homes. The Union's initial economic proposal would have returned the Respondent's wages and benefits to the pattern agreement. The Respondent, in contrast, proposed a 7-year contract and only modest improvements in wages and benefits, which would

[4] Most nursing homes receive approximately 70 percent of their revenue through Medicaid and Medicare reimbursement from the government. Because the Respondent's facility was not exclusively a nursing home, less than a quarter of its revenue came from such sources.

place the Respondent's employees even further behind other union-represented employees in the State. The Respondent also proposed other changes in the contract, such as elimination of a "free meal" for employees, reduction in the uniform allowance and termination of the Respondent's contribution to the Union's training fund, which could be perceived as regressive. Brown did not attend negotiations until the last meeting before the strike, on November 16. At this meeting, Brown proposed a three-year contract with a reopener in March 2001. The Respondent had modified its proposal on duration to 6 years. The parties were still far apart on economics, as well as some language items. There is no allegation in the complaint that the Respondent bargained in bad faith with the Union prior to the strike.

During the strike, the parties had several meetings, on and off the record, some with the assistance of the Federal mediator and others with the mayor of Hartford, but no agreement was reached. In addition, Brown and Harper met again at the same restaurant on December 15, 1999. What occurred at this meeting will be discussed in more detail later as it forms the basis for much of the General Counsel's theory of the case and requires a credibility resolution. As of the date of the hearing in this case, the parties had not met for negotiations since March 2000.

The Union's negotiations with the Respondent occurred simultaneously with its negotiations with the sister facility, Miller Memorial. A different attorney from the same law firm represented Miller in those negotiations. Although the Union tried to coordinate bargaining with both facilities, the Respondent kept the negotiations separate. Nevertheless, the Union commenced a strike at Miller on the same day, November 17, 1999. The Union also ended both strikes at the same time. There is no allegation that the Respondent violated the Act with respect to the unit at Miller Memorial. It appears from the evidence in the record here that the Respondent reinstated all of the strikers at Miller.

The strike at the Respondent's facility formally ended either on January 5, when the Union offered to return to work as a group under the terms of the expired contract, or on January 20, when the union made an offer without any conditions or limitations.[5] Only after the second offer did the Respondent reinstate some of the striking employees. At a meeting with the mediator on January 3, the Respondent told the Union for the first time that it had hired more than 100 permanent replacements for striking unit employees. The Respondent had not hired permanent replacements during the 1995 strike, despite distributing literature to the employees before that strike advising them of this risk, and it did not hire any permanent replacements for striking employees at Miller Memorial. As of the hearing, the Respondent had reinstated approximately 78 of the striking employees.

B. Termination of Strikers for Alleged Misconduct

The Board applies a two-part analysis to cases like this where the issue is whether an employer may lawfully refuse to reinstate or terminate a striker on the basis of alleged strike misconduct. As summarized by the Board in *Siemens Energy & Automation, Inc.,* 328 NLRB 1175 (1999):

> First, under the standard in *Clear Pine Mouldings,* 268 NLRB 1044, 1046 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986), an employer may lawfully deny reinstatement to a striker whose strike misconduct under the circumstances may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act. Second, under the framework for analysis in *Rubin Bros.,* 99 NLRB 610 (1952), *General Telephone Co.,* 251 NLRB 737 (1984), and *Axelson, Inc.,* 285 NLRB 862 (1987), once the General Counsel has initially established that a striker was denied reinstatement for conduct related to the strike, the burden of going forward with the evidence shifts to the employer to establish that it had an honest belief that the striker in question engaged in the strike misconduct. If the employer establishes that, then the burden of going forward shifts back to the General Counsel to establish that the striker in question did not in fact engage in the alleged misconduct.

See also *Champ Corp.,* 291 NLRB 803, 806 (1988), enfd. 933 F.2d 688 (9th Cir. 1990). This analytical framework is consistent with the Supreme Court's decision in *NLRB v. Burnup & Sims,* 379 U.S. 21, 23 (1964), holding that an employer who terminates an employee in the mistaken belief that misconduct occurred in the course of protected activity violates the Act, even where the employer is acting in good faith on that mistaken belief. The Board, in *Siemens,* supra, explicitly stated that it is inappropriate to analyze these cases under the analytical framework of *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

1. Opal Clayton, Patricia Hurdle, and Georgia Stewart

Clayton, Hurdle, and Stewart were all employed prior to the strike as full-time CNAs on the day shift. Stewart had been employed by the Respondent for 24 years and Hurdle even longer. Parker acknowledged that they were two of the three most senior employees in the unit. Clayton had been employed by the Respondent for about 3 years. All three were active members of the Union, each serving as a picket captain during the 1999 strike. Clayton had been an elected union delegate since 1998, representing employees in disciplinary interviews and at the initial stages of a grievance. There is no evidence in the record that any of these employees had disciplinary issues before the strike. On the contrary, Parker conceded that at least one of them, Stewart, was a very good caregiver.

Hurdle and Stewart were among the first strikers to be recalled after the Union made its January 20 offer to return to work. Each received a letter dated January 21 instructing her to report for work on January 25. Although both employees arrived at the Respondent's facility on time and dressed for work, they were not permitted to start work. Instead, each was told that she would have to first meet with Barbara Brigandi, the Respondent's director of nursing, and Parker. Stewart was the first to meet with Brigandi and Parker. According to Stewart, Parker opened the meeting by telling Stewart that there might be a problem with something she did on the picket line. When

[5] The issues regarding when the Union unconditionally offered to return to work will be addressed in a later section of this decision.

Stewart asked what it was, Parker at first would only tell her that a family member of a resident had accused her of something. On further questioning by Stewart, Parker finally disclosed the identity of the accuser, telling Stewart that Richards said that Stewart had been mimicking his mother on the picket line. Parker did not give Stewart any other details, such as the date and time this occurred, the identity of any others involved, or the specific conduct which purportedly mimicked Sara Richards. Stewart admittedly became upset and angry. She told Parker that if she knew this was going to happen, she could have had her union representative, Almena Thompson, with her. Parker told Stewart that the Respondent was going to investigate the incident so they could get Stewart back to work as soon as possible.

Hurdle encountered Stewart as she was leaving Brigandi's office, but they did not have time to speak to one another. Only Brigandi was present when Hurdle first entered the office, but Dr. Parker joined them shortly. Parker started the meeting by telling Hurdle that she could not let her work that day because of something that happened at the picket line. Parker told Hurdle that a family member had complained about a gesture Hurdle made on the picket line. When Hurdle indicated that she would like to know who complained, Parker told her it was Richards. No other details of the alleged misconduct were given. According to Hurdle, she responded to this news by saying to Brigandi, "[Y]ou know we've been having problems over the years, little problems, but you know I never got into it with family or family members. You know I wouldn't do that." Brigandi did not respond. Parker told Hurdle that the Respondent had to investigate and that Hurdle had to go home. Hurdle asked why they made her come to work if they knew they were going to do this. Parker responded that the Union knew.[6]

Parker testified for the Respondent about her meetings with Stewart and Hurdle, generally corroborating their testimony. In particular, she acknowledged providing few specifics as to the nature of the misconduct and that she was reluctant to reveal the identity of the accuser. Parker also admitted that both Stewart and Hurdle denied engaging in any conduct toward a family member. Parker's testimony did differ from that of the employees in several respects. She testified, for example, that both employees were asked if they wanted a union delegate and both refused. I find this not to be credible in light of the fact that Hurdle and Stewart were long-time union members who were unlikely to decline such an offer in the face of a meeting like this. Parker also testified that she left the meeting with Hurdle for a moment and returned to hear Hurdle telling Brigandi, "If it was, it was only gestures." Parker then offered hearsay testimony regarding what Brigandi told her Hurdle said while Parker was out of the room. Parker admitted she was not present for the conversation that preceded Hurdle's statement about "gestures". Brigandi, who was still employed by the Respondent at the time of the hearing, did not testify. The Respondent offered no explanation for her absence. I shall therefore disregard Parker's hearsay testimony about the conversation between Brigandi and Hurdle.[7]

The next time Hurdle and Stewart heard from the Respondent was several days later when they received termination letters dated January 26. Each received an identical letter signed by Parker that read:

> We have conducted an investigation regarding a reported event of your violation of policy of Avery Heights.
>
> The act of mimicking and ridiculing a resident's mannerism and behavior is a direct violation of a resident's right to dignity and respect. Each resident has the right to be treated with consideration, respect and full recognition of his/her innate value as a human being. Each employee, in turn is charged with the obligation to act with respect and sensitivity to our residents, families and friends. You have intentionally violated this standard.
>
> You are hereby notified that as of January 26, 2000, you are terminated from your employment at Avery Heights for mimicking the behavior of a frail, cognitively impaired resident in front of her son as he exited Avery Heights.

Parker admitted that she conducted no further investigation between her meetings with Hurdle and Stewart and the drafting of these letters.

According to Hurdle and Stewart, they did not learn the details of their alleged misconduct until they went to the unemployment office for a hearing on February 17. At this hearing, they were told that Richards had complained that Hurdle, Stewart, and another employee, Clayton, had mimicked his mother, Sara Richards, by raising their hands and shouting, in unison, "help me, help me." Richards is known to repeatedly call out in such a fashion. They also learned for the first time that this incident occurred on November 19, 1999, the third day of the strike.

Although Clayton was identified at the unemployment hearing as being a participant in this conduct, she had not yet been terminated. On the contrary, in response to the Union's January 20 offer to return to work, Clayton had received a letter from the Respondent notifying her that she had been permanently replaced and her name placed on a preferential rehire list. After Hurdle's and Stewart's unemployment hearing, Clayton received a termination letter signed by Parker and dated February 22, which is identical to the letters sent to Hurdle and Stewart. There is no dispute that neither Parker nor any other representative of the Respondent spoke to Clayton about her alleged misconduct before sending this letter.

Parker testified that she and Brigandi made the decision to terminate Clayton, Hurdle, and Stewart. According to Parker, they were terminated because they mimicked and mocked the behavior of a resident in front of her son while he was waiting to exit the facility on November 19. Parker learned of this conduct in December from a nurse whose identity she could not

[6] Hurdle had not been told anything by the Union before she reported to work on January 25. Stewart testified that the night before, she spoke to Thompson who told her that there might be a problem when she went to work the next day. Thompson did not tell her what the problem was and Stewart surmised that it was probably something similar to the return from the last strike when it took several days to get everybody back in his or her right positions.

[7] Hurdle denied making the statements that Parker claims Brigandi reported to her.

recall. This nurse told Parker that there had been an issue with Richards on the picket line that involved a violation of residents' rights. Upon receiving this report, Parker "made up [her] mind to chat with Richards about it the next time she saw him." Although Parker could not recall how much time passed after receiving this report, she recalled seeing Richards and speaking to him about it during the holiday season. Richards told Parker that, as he was waiting to exit the facility one day, Clayton, Hurdle and Stewart, in unison, mimicked his mother's cries of "Help me! Help me! Help me!" Parker asked Richards to provide a written statement of the incident. He agreed to do so and a statement was prepared by the Respondent's social worker. This statement is neither dated nor signed by Richards. The statement reads in its entirety:

> During the week of November 17, as I was waiting to exit the facility in the driveway, three nursing assistants (Opal Clayton, Pat Hurdle and Georgia Stewart) saw me in my car and the following occurred:
>
> They stopped and turned toward me and raised their hands and said "Help me, help me, help me!" imitating my mother. It made me feel very sad and depressed and angry and uncomfortable in my concern not only for their current attitude toward their participation in the strike and their relationship with the nursing home, but also my concern for their return to their jobs caring for my mother when they come back. They were the team that cared for my mother on the floor. My mother will be in a position where after this strike she is taken care of by people who have rendered their true attitudes toward my mother apparent, an attitude that shows no respect for resident rights.

Parker testified that she did not do anything with this statement at the time because she saw no need for urgency since the employees were still on strike. In fact, she did nothing about the incident until after the Union made its offer to return to work. That is when she spoke to Hurdle and Stewart. Parker admitted that she conducted no further investigation before making her decision to terminate Hurdle and Stewart. Parker also admitted that she did not speak to Clayton at all before terminating her. According to Parker, there was no need for any further investigation because Richards "was meticulous in his detail of what occurred and [she] believed him."

The Respondent called Richards to testify about the incident. He confirmed giving the statement to Dr. Parker, as described above, but had no explanation for not signing the statement. Richards gave a more detailed account of the incident than that which appears in his statement. According to Richards, at about 10:30 a.m. on November 19, 1999, his was the first car in line waiting to exit the Respondent's driveway as the strikers picketed. He had his window rolled up. He was leaving the facility after dropping off Desirene Kelly, a nonstriking employee of the Respondent who also worked as a private duty companion for Mrs. Richards. He recognized Clayton, Hurdle, and Stewart as three aides who worked on the floor where his mother resided, although none of them were her regular caregivers. Richards recalled observing the three employees pass his car three times from west to east. He recalled that the three appeared to take note of him and then, on the next pass, stopped, looked directly at him, raised their arms and yelled "help me, help, help me," then continued. Richards immediately perceived that the three employees were mimicking his mother. He testified on cross-examination that he was certain of the identity of the three employees because he knew them from his frequent visits to the facility and their conduct stood out because it was so startling. Although he recalled that there were approximately 25 picketers on the line at that time, he saw only Clayton, Hurdle, and Stewart engage in this conduct.

Clayton, Hurdle, and Stewart each emphatically denied engaging in the conduct described by Richards. They were corroborated to some degree by a number of other strikers who testified that they were on the picket line on November 19, 1999, with Clayton, Hurdle, and Stewart and did not see them mimic Mrs. Richards. The General Counsel and the Charging Party also attempted to cast doubt on the credibility of Richards by offering testimony that Stewart and Hurdle were wearing clothing that would render them unrecognizable because it was so cold on the picket line that morning.[8] Clayton, Hurdle, and Stewart, as well as the other strikers who testified, did acknowledge singing and chanting as they walked the picket line. One of their chants involved raising their arms while shouting "up with the Union, then lowering their arms and shouting "down with the boss." Richards denied hearing any such chants during the many times he crossed the picket line.

Although the Respondent had hired a security firm to videotape incidents on the picket line, it is undisputed that no videotaped evidence of this incident exists. Hurdle, Stewart, and other striking employees who testified for the General Counsel testified that the guards appeared to be videotaping all the time. The Respondent's witnesses, including one of the guards who worked for the Respondent's security contractor during the strike, Doug Miller, disputed this. According to Miller and Parker, the guards were instructed only to videotape when Dr. Parker or another supervisor were exiting, or when an "inappropriate incident" occurred. The determination whether an incident should be videotaped was apparently left to the discretion of the guards.

The Respondent relies on the testimony of Richards to establish that Clayton, Hurdle, and Stewart were lawfully terminated, arguing that this case comes down to the question whether Richards or the three terminated employees are lying. The issue is not as simple as the Respondent would frame it. Because there is no dispute that Clayton, Hurdle, and Stewart had engaged in a strike and were terminated for conduct related to the strike, the Respondent had the burden of going forward with evidence to establish that it had a honest, good-faith belief that the employees engaged in misconduct serious enough to warrant the denial of reinstatement. Resolution of this question

[8] Certified records from the National Climatic Data Center that are in evidence show that the air temperature in Hartford was 51 degrees with winds blowing at 11 knots at 10 a.m. on November 19, 1999. By 11 a.m. the temperature had risen 2 degrees but the wind was still blowing at a brisk 9 knots. The wind chill would have made it feel much colder than 51–53 degrees. Moreover, the strikers had been on the picket line at least since 7 a.m. when the wind chill was 30 degrees. Under these conditions, it would not surprise me to find at least some strikers bundled against the cold.

does not turn on the credibility of Richards. It is the credibility of Dr. Parker, and her belief that the employees engaged in misconduct, that is essential to the Respondent meeting its initial burden. Resolution of that question turns on the information she had available at the time she made the decision and the process she used to arrive at that decision.

When Dr. Parker decided to terminate Hurdle and Stewart on January 26, all she had available was the unsigned and undated statement of Richards and the denials by Hurdle and Stewart that they had mimicked Richards' mother on the picket line. Although Dr. Parker told both employees that they were being placed on administrative leave pending an investigation, she admits conducting no investigation. By the time Dr. Parker decided to terminate Clayton, she had the benefit of additional information that was presented at the unemployment fact-finding hearing, but she had not yet provided Clayton with an opportunity to respond to Richards' accusation.[9] The process Dr. Parker followed in deciding to terminate three employees, including two of its most senior CNAs, differed from the procedure employed before the strike when the Respondent sought to terminate an employee for misconduct.

Dr. Parker testified that she chose to believe Richards rather than the employees because he was "meticulous in his detail." While Richards was meticulous in testifying about the incident at the hearing, the brief unsigned statement he provided to Dr. Parker in December 1999, relatively close to the event, was devoid of specifics. Dr. Parker's haste in accepting Mr. Richards statement as proof of misconduct, in the face of Hurdle's and Stewart's denials and without even questioning Clayton, demonstrates that the Respondent did not terminate these three employees because it had a "good-faith belief" they engaged in misconduct. Before making her decision, Dr. Parker made no effort to determine whether Richards might have been mistaken in his perception of what occurred, or might have identified the wrong employees as having been involved. Dr. Parker did not even take the time to review the videotapes that had been taken in the first week of the strike to see if there was any objective evidence to corroborate Richards account.

My finding that Dr. Parker was not acting in good faith when she made her decision to terminate these employees is sufficient to establish a violation of the Act.[10] *Champ Corp.,* supra. Even assuming that the Respondent had met its initial burden, I would still find a violation of the Act here. I do not doubt that Richards sincerely and honestly believed that he saw three CNAs mimic his mother on the picket line and that he was convinced that Clayton, Hurdle, and Stewart were the three employees involved. At the same time, I believe the sworn testimony of Clayton, Hurdle, and Stewart that they did not engage in such conduct. In reaching this conclusion, I attach no wait to the purportedly corroborative evidence of the other striking employees, including the testimony regarding the weather conditions on November 19. My decision to credit the three employees' denial is based instead on factors such as their length of employment with the Respondent as caregivers, the absence of any history of engaging in conduct that was in disregard of residents' rights, and the presence of guards with video cameras near the picket line when the incident allegedly occurred. It simply strains credulity to believe that these three women would engage in such offensive conduct directed at a resident or her family.

I agree with the Respondent that the conduct described by Richards is patently offensive and should not be condoned. However, even if Clayton, Hurdle, and Stewart engaged in this conduct, it would not be sufficient under current Board law to deny them their reinstatement rights. The Board and the courts have long recognized that impulsive behavior is to be expected on the picket line and that not every impropriety committed during a strike deprives an employee of the Act's protection. See *NLRB v. W.C. McQuaide, Inc.,* 552 F.2d 519 (3d Cir. 1977) and cases cited therein.[11] Over the years, the Board has attempted to draw the line between "situations where employees exceed the bounds of lawful conduct in a moment of exuberance or in a manner not activated by improper motives and those flagrant cases in which the misconduct is violent or of such serious character as to render the employees unfit for further service." *J. W. Microelectronics Corp.,* 259 NLRB 327 (1981). Accord: *Shalom Nursing Home,* 276 NLRB 1123, 1137 (1985). In *Clear Pine Mouldings, Inc.,* supra, the Board enunciated the test for determining whether verbal conduct is sufficient to warrant an employee's loss of reinstatement rights. The Board held that it would determine "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." 268 NLRB supra at 1046. Accord: *Briar Crest Nursing Home,* 333 NLRB 935 (2001).[12] The Board held further that it would apply an analogous test to the assessment of strikers' verbal and nonverbal conduct directed against persons who do not enjoy the protection of Section 7 of the Act. 268 NLRB supra at 1046 fn. 14.

Applying the *Clear Pine Mouldings* test to the conduct at issue here, I find that the alleged mimicking of Mrs. Richards was not sufficiently egregious to warrant denial of reinstatement. The alleged misconduct here is similar to conduct, i.e., the taunting of a physically handicapped employee and the crude remarks made when the husband of a nonstriking em-

[9] Although Clayton was given the opportunity to "make a statement" at a grievance meeting she attended with Suzanne DeCourcy, the Respondent's director of employee development, in March, this occurred after Clayton had already been terminated.

[10] I have also drawn an adverse inference from the Respondent's unexplained failure to call Brigandi as a witness. Because she is still employed as the Respondent's director of nursing and was present for the meetings with Hurdle and Stewart and made the decision with Dr. Parker, she is a witness who would be expected to testify favorably for the Respondent. Because she did not testify, I must infer that her testimony would not have corroborated Dr. Parker. *Grimmway Farms,* 314 NLRB 73 fn. 2 (1994).

[11] The Court of Appeals denied enforcement of the Board's order in *McQuaide* (220 NLRB 593), because it rejected the view that a verbal threat alone could never be sufficient to warrant denial of reinstatement. There is no contention that Clayton, Hurdle, or Stewart verbally threatened Mr. Richards or anyone else during the strike.

[12] Although *Clear Pine Mouldings* and *Briar Crest* involved verbal threats, the Board has applied this test to other forms of verbal conduct. See *Shalom Nursing Home,* 276 NLRB, supra at fn. 3; *Catalytic, Inc.,* 275 NLRB 97 (1985).

ployee died suddenly near the picket line, which the Board found was not sufficient to warrant denial of reinstatement in *Shalom Nursing Home,* supra. In that case, the administrative law judge rejected an argument that employees who work in patient care should be held to a higher standard when evaluating striker misconduct. I agree with the judge in that case that there is "no basis for adopting a special standard as there is no basis to find that nursing home employees are of a higher moral character than other people." Id. at 1137 fn. 17.

Accordingly, based on the above, I find that the Respondent violated Section 8(a)(1) and (3) of the Act, as alleged in the complaint, by terminating Patricia Hurdle and Georgia Stewart on January 26 and by terminating Opal Clayton on February 22, 2000.

2. Pauline Taylor

Taylor has been employed by the Respondent for 8 years as a CNA. She has been a union delegate since 1992, has served as one of the Union's two chapter officers and was a picket captain for both the 1995 and 1999 strikes. As noted above, the Respondent terminated Taylor in 1998, but she was reinstated without backpay in August 1999 as a result of an arbitration award. Taylor joined the strike on November 17, 1999, and picketed every day in the first week. Taylor testified that she had a motor vehicle accident on Thanksgiving day, November 25, 1999, which caused her significant pain and injuries lasting to the present day. According to Taylor, she did not go to the picket line after her accident, except for one brief visit around Christmas, for the remainder of the strike. After the Union made its unconditional offer to return to work in January, Taylor received a letter from the Respondent notifying her that she had been permanently replaced but would be placed on a preferential hiring list for vacancies. About 1 month later, Taylor received the following letter from the Respondent, dated February 22 and signed by Brigandi, the director of nursing:

> We have conducted an investigation regarding a reported event of your violation of policy of Avery Heights.
>
> The act of cursing and insulting a resident is a direct violation of a resident's right to dignity and respect. Each resident has the right to be treated with consideration, respect and full recognition of his/her innate value as a human being. Each employee, in turn is charged with the obligation to act with respect and sensitivity to our resident, families and friends. You have intentionally violated this standard.
>
> You are hereby notified that as of February 22, 2000, you are terminated from your employment at Avery Heights for cursing and insulting a frail, physically impaired resident and her family member as the family member passed through the picket line at Avery Heights.

Taylor testified that this letter was her first notification that the Respondent believed she had engaged in misconduct on the picket line. Taylor did not learn the details of the alleged misconduct until she attended a negotiation session at the offices of the Federal Mediation and Conciliation Service (FMCS) in March. At that meeting, Union President Brown asked the Respondent's spokesman, Attorney Cloherty, why Taylor had been terminated. Brown also asked for the date of the incident and whether there was any video or audio tape of the incident. After taking a caucus, Cloherty responded by telling the Union that the incident occurred on December 5, 1999, and the Respondent had captured it on tape. Brown asked to see the videotape before the upcoming third step grievance meeting regarding Taylor's termination. There is no dispute that no video or audio tape of Taylor's alleged misconduct has ever been produced.

Taylor also attended the third step grievance meeting in March. According to Taylor, her representatives, Thompson and Guida, pressed the Respondent for details of the alleged misconduct. Suzanne DeCourcy and Brigandi, the Respondent's representatives, declined to provide any more details, even including the name of Taylor's accuser. DeCourcy told Taylor and her representatives that they were only there to get Taylor's side of the story. Taylor denied having done anything wrong. However, she acknowledged that she did not mention her motor vehicle accident or her absence from the picket line in December 1999.[13] According to Taylor, she did not learn the specifics of her alleged misconduct until she went to a hearing on her unemployment claim in July. At that time she learned that Kathy Falcon, the daughter of a resident, had made a written complaint that Taylor was not fit to work with the elderly because Taylor had cursed her and her family on a certain date. Taylor testified that it was not until she went to a second unemployment hearing in October that she learned what the specific profanity was and the identity of the resident. At the hearing before me, Taylor denied under oath that she engaged in the specific conduct cited by the Respondent.

Dr. Parker testified that she made the decision to terminate Taylor based on a written statement she received from Falcon on December 15, 1999. According to Parker, Falcon called her to complain about the incident on Monday, December 6, 1999, and wrote the statement at Parker's request. The statement, which is handwritten, dated December 8, 1999, and signed by Falcon, reads as follows:

> On Saturday evening, December 4th at approximately 9:15pm, I was leaving Avery Heights Nursing Home after visiting with my mother Louise Horan who is a resident of station 3. When I came to the line of picketers, I was stopped due to traffic build-up. While I was waiting for my turn to proceed, I was verbally badgered by one of your aids (sic)—Pauline Taylor. I could hear her very clearly due to the loudness of her voice and the fact that my window was opened half-way. The fact that Pauline was screaming names and obscenities at me was not nearly as upsetting as the fact that she also began to verbally attack the reputation of my 82 year old mother. Her behavior was unprofessional, immoral and just plain disgusting. Her *exact* words were—"there's that bitch Horan's daughter. That bitch—that piece of trash! She's a little piece of trash and so is her mother."
>
> Being in the health care field myself I find it very difficult to defend or excuse this kind of behavior for any

[13] Neither DeCourcy nor Brigandi testified to contradict Taylor about this meeting.

> reason. My mother resides at Avery and has nothing to do with the strike or Pauline Taylor. I hope that this angry woman will never care for anyone I know. [Emphasis in original.]

Dr. Parker testified that she did not ask Falcon any questions about the incident and did not otherwise investigate this complaint. According to Dr. Parker, she had no reason to doubt that Falcon was telling the truth. In making her decision to terminate Taylor, Dr. Parker also considered the fact that Taylor had only recently returned to work following an 8-month suspension for another alleged violation of a resident's rights. Although Dr. Parker was in possession of Falcon's written statement since December 15, and aware of the incident even earlier, she did not make her decision to terminate Taylor until February 22, which was about the time that Taylor was due to be offered reinstatement.

Falcon testified at the hearing in this case. Her description of the incident was consistent with her previous statement. Although counsel for the General Counsel and the Charging Party extensively cross-examined her, I found nothing in her testimony or demeanor to suggest she was fabricating her testimony. Falcon did acknowledge that she made the complaint of patient abuse that precipitated Cortavarria's termination in October 1998 and that she testified for the Respondent at Cortavarria's arbitration hearing. The alleged abuse involved her mother. Falcon also acknowledged seeing Taylor at Cortavarria's arbitration and that she knew that Taylor was a strong union supporter. The General Counsel and the Charging Party suggest this as a motive for fabricating her complaint against Taylor, arguing that Falcon is not credible because she held a grudge against Taylor stemming from Taylor's support of Cortavarria. I find it more likely that Taylor would hold a grudge against Falcon and her mother for causing the discharge of her friend and fellow union activist and for testifying against Cortavarria at the arbitration. Because of this animosity, I find it more likely than not that Taylor would direct such profanity at Falcon on the picket line.

The General Counsel and the Charging Party argue that Taylor could not have engaged in the alleged misconduct because she was not even on the picket line on December 5. The General Counsel put Taylor's medical records into evidence and called her best friend as a witness to testify that she was caring for Taylor in Taylor's home around the time of this incident and did not see Taylor go to the picket line. According to Taylor's friend, Geraldine Llewellyn, Taylor was in too much pain to leave the house at that time. Although I am not a doctor, it is apparent that the medical records in evidence do not appear to support Taylor's claims of disability for such a prolonged period after her accident. The doctor who treated her in the emergency room 2 days after the accident reported in his notes that Taylor did not appear uncomfortable or in acute distress, denied numbness or tingling in her legs and told the doctor that she had been ambulatory with no apparent discomfort or impairment since the accident. Although the doctor noted some tenderness in her neck and lower back on physical examination, there were no other physical signs of any impairment. The doctor prescribed "rest, ice to the affected areas 15–20 minutes every two hours for the next two to three days". The doctor also instructed Taylor to continue taking over-the-counter Motrin and gave her a prescription for 12 Flexeril to be taken three times a day "as needed" for spasm. There is no evidence in the record that Taylor sought any further medical treatment until February 17. Taylor acknowledged on cross-examination that she had a lawsuit pending regarding the motor vehicle accident.

The only objective evidence that would have confirmed whether Taylor was on the picket line, the log book or sign-in book maintained by the Union to keep track of employees attendance at the picket line, is mysteriously missing. Curiously, it is only the portion of the log book for the month of December that the Union has been unable to locate. The General Counsel offered the testimony of William Welz, the Union's vice president who had been in charge of arranging the facilities for a strike headquarters from the beginning of the strike until March. Welz testified that he rented a camper van from a place in Rhode Island for use as a strike headquarters beginning in January. According to Welz, he returned this van to the rental facility in March, at the request of Almena Thompson. Welz testified that Thompson called him later in March and told him that some photographs and log books that had been in the van were missing. At Thompson's request, Welz contacted the rental company and inquired whether any material had been found in the van. Welz was told that the rental company had no such material and that it was customary to throw out any material found in a van when it is cleaned. Welz' testimony was almost entirely hearsay. Moreover, Thompson, who was present through most of the hearing and presumably would have direct knowledge of the missing log book, did not testify. I must draw an adverse inference from her failure to testify on this point, i.e., that the log book was not lost and that if produced it would show that Taylor was present on December 4 when the misconduct allegedly occurred.

It is undisputed that the Respondent terminated Taylor for conduct related to the strike. Therefore, the Respondent has the burden of establishing that it had an honest belief that Taylor had engaged in misconduct serious enough to warrant denial of reinstatement when it terminated her on February 22. *Siemens Energy & Automation,* supra; *Rubin Bros.,* supra. As noted above, Dr. Parker based her decision solely on Falcon's statement without conducting any investigation and without providing Taylor with an opportunity to respond to the accusations against her. As with the other terminations, it appears that the Respondent seized on Falcon's complaint to rid itself of an active union delegate whom it had been unsuccessful in terminating previously. In this regard, I note the testimony of Brown that Harper told him, in July 1999, that he never wanted to take Taylor back, that he didn't like her as a human being.[14] Al-

[14] Although Harper denied making such a statement, I found his denial less credible than Brown's testimony. I note that the Respondent's counsel did not attempt to elicit this denial during Harper's direct examination, suggesting that counsel did not anticipate such a contradiction. It was only in response to leading questions on cross-examination that Harper denied making such a statement. At the same time, however, he corroborated Brown's testimony regarding the fact that such a meeting had occurred and that the topic of Taylor's reinstatement had been discussed.

though I have found Falcon to be a credible witness, and believe that the incident probably occurred as described in her December 8, 1999 statement, I cannot find that the Respondent was acting honestly and in good faith when Parker terminated Taylor more than 2 months later without even questioning Taylor about the incident.

Even assuming the Respondent had an honest, good-faith belief that Taylor had called Falcon and her mother a coarse and profane name, such conduct would not be sufficiently egregious to warrant denial of reinstatement under current Board law. As noted above, the Board's *Clear Pine Mouldings* standard for evaluating verbal conduct during a strike requires that Taylor's conduct be "such that, under the circumstances existing, it may reasonably tend to coerce or intimidate" persons such as Ms. Falcon. 268 NLRB supra at 1046. See also *Shalom Nursing Home,* supra. The Board has historically found the use of epithets and language such as that used by Taylor here does not meet this objective test unless it is accompanied by overt or indirect physical threats or raises the reasonable likelihood of a physical confrontation. *Nickell Moulding,* 317 NLRB 826, 827–830 (1995); *Calliope Designs, Inc.,* 297 NLRB 510, 521 (1989); *Catalytic, Inc.,* supra. See also *National Assn. of Government Employees,* 327 NLRB 676, 681 (1999), and cases cited therein. There is no evidence here that Taylor's profane, abusive and unprofessional verbal attack on Falcon was accompanied by any words or actions that could reasonably be deemed threatening or likely to result in a physical confrontation.

Accordingly, based on the above, I find that the Respondent violated Section 8(a)(1) and (3) of the Act, as alleged in the complaint, by terminating Pauline Taylor on February 22, 2000.

C. The Respondent's Hiring of Permanent Replacements

The undisputed evidence in the record establishes that the Union, unable to reach agreement on a new collective-bargaining agreement with the Respondent, commenced a strike on November 17, 1999. There is no allegation or evidence in the record that the Respondent had committed any unfair labor practices that caused the employees to go out on strike. Nor is there any allegation that the strike was prolonged by any subsequent unfair labor practice. Thus the issue squarely presented by the pleadings is whether, notwithstanding the long-recognized right of an employer to hire permanent replacements for employees engaged in an economic strike,[15] the Respondent's action in doing so here was discriminatorily motivated in violation of Section 8(a)(1) and (3) of the Act. The General Counsel, while acknowledging that the Board has never found such a violation, argues that language in a 1964 decision by the Board permits finding a violation where there is "evidence of an independent unlawful purpose." *Hot Shoppes, Inc.,* 146 NLRB 802, 805 (1964). The Charging Party would go further, arguing that the Respondent's hiring of permanent replacements was unlawful even absent independent evidence of a discriminatory motive because such conduct is "inherently destructive of important employee rights," relying on the Supreme Court's decisions in *Great Dane Trailers* and *Fleetwood Trailer Co*.[16] The Respondent defends by relying on a wealth of precedent holding, essentially, that an employer faced with an economic strike by its employees can hire permanent replacements "at will." See *Belknap, Inc. v. Hale,* 463 U.S. 491, 504 fn. 8 (1983), citing *Hot Shoppes, Inc.,* supra.

1. The scope of the complaint

At the outset of the hearing, counsel for the General Counsel stated that he was not seeking to establish a violation of the Act under the Charging Party's "inherently destructive" theory. Because the Act confers on the General Counsel exclusive jurisdiction over the prosecution of unfair labor practice complaints, I must first determine whether the Charging Party's theory of the case is cognizable. *Zurn/N.E.P.C.O.,* 329 NLRB 1 (1999); *New Breed Leasing Corp.,* 317 NLRB 1011 (1995); *Kimtruss Corp.,* 305 NLRB 710 (1991); *Penntech Papers,* 262 NLRB 264 (1982). The Charging Party argues that his legal arguments do not impinge upon the General Counsel's jurisdiction because his theory of the case does not "enlarge upon, or alter, the allegations" of the complaint. Under the Charging Party's view of the case, the difference between his and the General Counsel's theories is simply regarding the proper legal standard to apply in analyzing the Respondent's conduct.

The complaint, at paragraphs 13(a) and (b), alleges that, "commencing on or about December 15, 1999, the Respondent permanently replaced certain of its striking employees" and that it engaged in that conduct "because its employees joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities." Paragraph 19 alleges that the Respondent, by engaging in this conduct with such motivation, "has been discriminating in regard to the hire or tenure or terms and conditions of employment of the employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) of the Act." While it is true that both the General Counsel's and the Charging Party's theories require an evaluation of the Respondent's motives in hiring permanent replacements for its economic strikers, they differ in significant respects. Under the General Counsel's *Hot Shoppes* theory, the burden is on him to prove that the Respondent had an "independent unlawful purpose." 146 NLRB at 805. In contrast, the *Great Dane* theory advanced by the Charging Party presumes that the Respondent had an unlawful object and requires a determination of the degree to which its conduct affected employee rights. If, as the Charging Party argues, the Respondent's conduct was "inherently destructive" of those rights, the Board can find a violation even if the Respondent establishes that it was motivated by legitimate business considerations. If the adverse effect on employee rights is "comparatively slight," the burden still rests on the Respondent to prove it had a "legitimate and substantial business justification" for hiring the replacements. 388 U.S. supra at 34. The theory advanced by the Charging Party would thus place a greater burden on the Respondent than that proposed by the General Counsel.

[15] See *NLRB v. Mackay Radio & Telegraph Co.,* 304 U.S. 333 (1938).

[16] *NLRB v. Great Dane Trailers, Inc.,* 388 U.S. 26 (1967); *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375 (1967).

I find that the Charging Party's argument here does "enlarge upon or change" the General Counsel's theory of the case. To agree with the Charging Party's theory would essentially overrule long-standing precedent, including *Hot Shoppes*, that has imposed only a minimal burden on an employer where the hiring of permanent replacements during an economic strike is at issue.[17] A decision whether to argue for overruling such precedent lies exclusively with the General Counsel. Because the General Counsel is not arguing that the Respondent's hiring of permanent replacements was "inherently destructive" of employees' Section 7 rights, I shall not address the Charging Party's theory of the case. See *Zurn/N.E.P.C.O.,* supra.

2. Facts

The Respondent did not hire permanent replacements at the outset of the strike. Instead, the Respondent relied on nonstriking employees, managers, temporary employees, and volunteers to perform the work of its striking employees. In its answer to the complaint, the Respondent admitted the allegation that it commenced hiring permanent replacements on December 15, 1999. The evidence adduced at the hearing, including evidence proffered by the General Counsel, indicates that no permanent replacements were hired before December 22, 1999. Because the Respondent's answer is a confessory admission, I must find as alleged in the complaint that the Respondent began hiring permanent replacements on December 15, 1999. *C.P. Associates,* 336 NLRB 167 (2001). This date coincides with a meeting between Union president Brown and the Respondent's CEO Harper at which the General Counsel alleges that the Respondent unlawfully misrepresented its intentions regarding the hiring of permanent replacements. Brown testified that Harper told him at this meeting that the Respondent had not hired permanent replacements and had no intentions of doing so. Harper denied making any such commitment. Before reaching this credibility resolution, it must be determined whether the Respondent already had made the decision to hire permanent replacements before Harper met with Brown. If not, then Harper's statement would not be a misrepresentation.

The precise date on which the Respondent made the fateful decision to begin permanently replacing the strikers is in dispute. The Respondent's CEO, Harper, and its administrator, Dr. Parker, testified regarding the decision.[18] Harper testified that this decision was made in mid-December when it became apparent that the strike would not soon be over. Harper was "quite sure" the decision had not been made by the time he met with Brown on December 15, 1999. According to Harper, the decision was made a week later, about December 22, 1999. On cross-examination, Harper conceded that he was not clear on the date and that it was possible that the decision was made earlier. Dr. Parker testified that the decision was made "around December 14, [1999] or so." She acknowledged, however, that the Respondent began exploring the possibility of hiring permanent replacements earlier, within the first week to 10 days of December. Robert DeLisa, a consultant hired by the Respondent to assist it in recruiting permanent replacements, testified that he was first contacted by Suzanne DeCourcy, the Respondent's director of employee development, in late November or early December 1999. After meeting with DeCourcy, DeLisa, and his staff developed a plan which included using a job fair to generate a pool of applicants from which permanent replacements could be hired. Invoices from DeLisa, which were paid by the Respondent, show that he started working on this project on December 1, 1999. By December 10, 1999, DeLisa's company had placed ads with radio stations and newspapers. On December 15, 1999, two of his employees staffed a job fair run by another organization and on December 13–17 and 20–22, 1999, staffed its own job fair to recruit potential applicants for the Respondent.

In addition to utilizing the services of DeLisa's consulting company, the Respondent turned to temporary employees that had started working after the strike began as a source of permanent replacements. The testimony of Dr. Parker and Gayle McAllister, the Respondent's director of operations, indicates that the Respondent started offering permanent employment to these temporary employees in mid-December. Scott Cohen, the owner of Class Act Cleaning, one of the agencies supplying temporary employees to the Respondent in the beginning of the strike, testified that he first learned that one of his employees had been offered a permanent position with the Respondent sometime during the second week of December and that he spoke to McAllister about this during the second or third week of December 1999. Cohen reached an agreement with McAllister under which the Respondent would pay class act "$1100/head" for each employee who converted from Class Act to the Respondent's payroll. Invoices in the record establish that the Respondent started receiving invoices for this fee on December 22, 1999. Ingrid Tifa, who started working in housekeeping for the Respondent through another temporary agency on November 29, 1999, testified that she was offered permanent employment on December 22, 1999. Summaries prepared by the Respondent from its payroll and personnel records show that most employees who converted from temporary to permanent did so December 22–24, 1999.

Based on the testimony of Dr. Parker and the other evidence regarding the Respondent's efforts to hire permanent replacements, I find that the Respondent had made its decision to permanently replace the strikers no later than December 14, 1999. There is not a shred of evidence in the record to corroborate Harper's testimony that no decision had been made before he met with Brown.

As noted above, the parties' last negotiation session before the strike was on November 16, 1999. Brown testified that, after the strike began, he telephoned Cloherty, the Respondent's attorney, about once a week to ask if there were any

[17] The Board recently reaffirmed the principal that the hiring of permanent replacements during an economic strike does not cause the long-term consequences that would be indicative of inherently destructive conduct. *Capehorn Industry, Inc.,* 336 NLRB 364, 366–367 (2001).

[18] Harper testified that the decision was made at a meeting with Parker, the Respondent's attorney, Cloherty, and its chief financial officer, Ray Gasparini. Dr. Parker did not identify Cloherty as a participant in the decision. Gasparini did not testify. Although Cloherty testified as to other matters, he was not asked about the Respondent's decision to hire permanent replacements.

developments, or anything that the parties needed to talk about. Each time, Cloherty replied in the negative. Cloherty acknowledged receiving several telephone calls from Brown in the first few weeks of the strike. Both Brown and Cloherty recalled having a specific discussion on December 2 or 3, 1999, regarding the possible duration of the strike. Brown testified that he told Cloherty that the Union would not do what it did in 1995, i.e., offer to return to work without a contract. He told Cloherty that the Union wanted to resolve the contract before returning to work this time. Brown acknowledged saying to Cloherty that, if the parties' positions did not change, he expected it to be a long strike. Cloherty's testimony regarding this conversation was consistent with Brown's testimony. There is no dispute that, at the conclusion of each conversation, Brown would generally tell Cloherty to call him if anything changed on the Respondent's side. Neither Brown nor Cloherty recalled having any specific discussion regarding permanent replacements. Brown testified that he stopped calling Cloherty about four weeks into the strike, which would be in mid-December.

Brown testified that he contacted Harper directly sometime in December to congratulate him on the way he handled an incident that occurred on the picket line at the Respondent's Miller Memorial facility in Meriden. The incident apparently involved a racist attack on one of the strikers which Harper had acted swiftly to condemn. After expressing his appreciation for Harper's response, Brown suggested that the two meet to see if there was an opportunity to resolve the strike. Harper agreed to meet Brown on December 15, 1999, at Corvo's Restaurant in Hartford. Brown and Harper met as planned on December 15. No one else was present. Brown testified that he told Harper at this meeting that incidents like the one in Meriden were the type of things that could happen during a strike which were not planned or anticipated but would make settlement more difficult. He went on to cite other examples of unanticipated events that could protract a strike, such as picket line misconduct or the hiring of permanent replacements. Brown suggested the parties try to resolve the contract issues before these things happened. According to Brown, Harper responded by saying "we have no intention of hiring permanent replacements. We are not hiring permanent replacements. We're doing great with temporaries." Harper then commented that "U.S. Nursing is a great outfit." U.S. Nursing is known to the Union as a supplier of temporary replacements in strike situations. According to Brown, he and Harper then discussed some of the contract issues separating the parties. Brown testified that he and Harper discussed the duration of the contract, with Harper taking the position that he wanted a long-term contract for stability and that he did not want an expiration date that coincided with the Union's other contracts. Harper told Brown that he didn't want to be competing with other facilities for replacement workers. Brown recalled that Harper also expressed his belief that the Union would ultimately agree to a 4-year contract in 9 weeks. Brown replied that the Union would not agree to 4 years in nine weeks. Brown and Harper also discussed the economic package and the Union's desire to bring the Respondent back into the pattern agreement. At one point during the meeting, Brown proposed a 3-year contract with an agreement that the next contract would also be for 6 years with binding arbitration if the parties could not agree on the terms. According to Brown, Harper scoffed at this proposal, saying that an arbitrator would have to consider the Respondent's ability to pay and the Respondent had the ability to pay. Brown testified that 60–70 percent of the conversation at this meeting involved the contract duration and benefit fund contributions. At the end of the meeting, he and Harper shook hands and Harper said the meeting had been useful, that the lines of communication were still open. He told Brown that he would not be doing the negotiations, that Cloherty would be contacting Brown for negotiations. Brown heard nothing further from Harper or Cloherty until the parties met at the FMCS on January 3.

Harper's testimony regarding the December 15, 1999 meeting was elicited primarily through leading questions from the Respondent's counsel. Although Harper corroborated much of Brown's testimony as to the subjects that were discussed, he denied that there was any mention of permanent replacements. He specifically and vigorously denied making the statements attributed to him by Brown regarding the Respondent's intentions. Harper testified that it became apparent to him at this meeting that the Respondent was in for a long strike, that there would be no settlement unless the Respondent capitulated to the Union's demands. Harper's testimony regarding this meeting was far less detailed than Brown's testimony, which at times appeared to be a verbatim record of what was said. The credibility issue and my findings regarding this meeting will be discussed in my analysis of the 8(a)(5) allegation.

Although there is a dispute whether Harper gave Brown any assurances at the December 15 meeting that the Respondent was not going to hire permanent replacements, there is no dispute that Harper did not tell Brown that the Respondent was even considering the matter. In fact, the Respondent's witnesses admitted that a decision was made not to inform the Union of the Respondent's plans to permanently replace the striking employees. Moreover, Cohen, the owner of class act cleaning, testified that McAllister told him, during their discussion of Respondent's interest in hiring Cohen's temporary employees, that the Respondent's plans were to be kept "hush-hush". McAllister told Cohen not to say anything to anyone associated with the Union. McAllister also told Cohen that the Respondent needed to get as many bodies in as it could before the Union found out. Although McAllister denied making such statements to Cohen, I found her not to be a very credible witness. Her answers were often evasive and nonresponsive and she professed a lack of recall about virtually any matter of importance during the early days of the strike. Under those circumstances, her supposed recollection that she did not make these statements to Cohen is hard to believe. In addition, Cohen appeared to be testifying credibly. Cohen acknowledged that his business relationship with the Respondent ended on a sour note, with accusations in both directions of improper conduct. However, he has no stake in the outcome of these proceedings and no reason to commit perjury by fabricating testimony in these proceedings.

Despite the Respondent's efforts to keep the Union from learning about its plans, information came to the attention of the Union which caused it to become suspicious. Brown testified that he was shown a flyer that had been posted about a job

fair for people interested in positions similar to those occupied by the strikers. The flyer did not identify any particular employer. Around the same time, Brown learned from a member that a similar advertisement was being broadcast on a polish-language radio station in New Britain, Connecticut. In order to determine whether the Respondent was soliciting applicants, Brown sent several members who did not work at the Respondent's facility to the job fair. One of these members reported back to him that, after attending the job fair, she was called and offered a permanent position with the Respondent.[19] Brown could not recall the exact date he received this information, but expressed his belief that it was right around Christmas, most probably during the week between Christmas and New Years. The invoices from DeLisa's company, which held the job fair for the Respondent, show that the last day of the fair was December 22, 1999. Upon receiving this information, Brown called the Federal mediator and requested him to set up a meeting with the Respondent for January 3.

Before meeting with the Respondent, Brown had a meeting with attorney Emanuel Psarakis on December 22. Brown has known Psarakis for many years as a management attorney representing other facilities. Psarakis was not representing the Respondent at that time and worked for a different law firm than Cloherty and the Respondent's counsel. Brown's meeting with Psarakis came about after Brown had left a voice mail message for one of the trustees of Miller Memorial. Miller is the nursing home in Meriden, Connecticut, that was managed by the Respondent for a nonprofit, charitable foundation. As noted previously, the Union had been simultaneously in negotiations with the Respondent for the Avery Heights and Miller facilities. Brown reached out to the trustees in the hope of putting pressure on the Respondent to come to terms on a contract at Miller. It was Psarakis who responded to Brown's message to the trustees.

Psarakis and Brown met at a diner in Rocky Hill, Connecticut. No one else was present. Psarakis opened the meeting by stating that he did not represent the Respondent, that the trustees were his clients, and that he was not handling labor relations for them. Brown and Psarakis then discussed the issues separating the Union and the Respondent at Miller. At one point in the conversation, the subject of permanent replacements came up. According to Psarakis, Brown said he heard that the Respondent was hiring permanent replacements at Avery Heights, and "there's going to be a war. I will bring in the AFL–CIO." Brown denied making such a statement to Psarakis. According to Brown, he told Psarakis that if the Respondent hired permanent replacements at Miller, it would be a "serious thing." Brown testified that he raised this subject with Psarakis because of his suspicions that the Respondent was already hiring permanent replacements. On cross-examination, Brown acknowledged that he probably told Psarakis that he suspected that the Respondent was hiring permanent replacements. There is no dispute that Psarakis did not tell Brown at this meeting that the Respondent was in fact hiring permanent replacements at the Avery Heights facility.[20]

The parties met, as planned, on January 3 at the offices of the FMCS. Brown attended this meeting with union staff members Guida and Thompson and an employee committee. The Respondent was represented by Attorney Cloherty and Dr. Parker. At this meeting, Brown asked Cloherty directly if the Respondent had hired permanent replacements. Cloherty said yes. When Brown asked how many, Cloherty said "over 100." This represented more than half the positions in the bargaining unit. Brown then asked if the Respondent had any written agreements or anything in writing about the status of the replacements. Cloherty replied that it did not. Brown admitted that he did not bring up at this meeting the assurance Harper gave him less than 3 weeks earlier that the Respondent was not going to hire permanent replacements. Brown also asked Cloherty what the Respondent was paying the replacements and Cloherty said $12.19 an hour. This was more than the Respondent was offering the Union as a starting wage in negotiations at that time. When Brown asked Cloherty about benefits, Cloherty said the Respondent had not decided yet what to do about benefits, but the replacements would be covered by whatever benefits were agreed upon in a new contract. Although there are some slight differences in Cloherty's recollection of the conversation, he essentially corroborated Brown as to material parts of the meeting, i.e., that Brown asked about replacements and he told Brown that the Respondent had already hired "around 100" replacements. He also agreed with Brown's version of the conversation regarding the wages and benefits paid to the replacements.[21]

After this meeting, Brown called a meeting of the strikers from Avery Heights and Miller. Brown told the striking employees what had happened at the January 3 meeting and recommended they make an immediate offer to return to work. The members agreed and, by letter dated January 5 and faxed to the Respondent's counsel the same day, the Union made the first offer to return to work. In this letter, Brown offered on behalf of the strikers to "return to work immediately, as a group, and to continue working under the terms and conditions of the collective bargaining agreement in effect as of October 30, 1999, pending the negotiation of a successor collective bargaining agreement."

Dr. Parker responded to the Union's offer in a letter the same date. In this letter, Dr. Parker expressed the Respondent's willingness to offer the striking employees reinstatement under the Board's *Laidlaw* doctrine.[22] Specifically, Parker told the Union that "employees who are presently working would retain their positions. Other bargaining unit positions would be available for striking employees. If insufficient positions existed, striking

[19] I received this testimony, not for the truth of the statements in the flyers and the reports Brown received, but to show Brown's state of mind and explain his subsequent actions. Whether the member was in fact offered a job with the Respondent is not as significant as the fact that the Union was presented with information that caused it to believe that the Respondent was hiring permanent replacements.

[20] There is also no dispute that the Respondent did not hire any permanent replacements for striking employees at Miller.

[21] At another meeting the same day, in the presence of the mediator, Brown asked the attorney representing the Respondent in the Miller negotiations, Louis Todisco the same question. Todisco told the Union that no permanent replacements had been hired at Miller.

[22] *Laidlaw Corp.,* 171 NLRB 1366, 1369 (1968).

employees would be placed on a preferential hiring list." Dr. Parker also questioned whether the Union's offer was unconditional. In her letter she specifically asked whether the Union was seeking retention of the union-security clause as a condition to reinstatement and whether the phrase "return as a group" meant either all employees or no employees. Dr. Parker also responded, by letter on January 5, to the Union's inquiry at the January 3 meeting regarding the status of hiring of permanent replacements. She advised the Union that all positions in the job categories of housekeeping, drivers, maintenance, laundry, cooks, dietary personnel, Heights housekeeping, Heights maintenance, Heights dishwashers, Heights wait staff, and all but a 36-hour position for a Heights cook, had been filled by permanent replacements. Dr. Parker advised the Union further that there were 25 CNA positions and 15 part-time positions in the nursing department that were still available for the returning strikers.

Brown responded to Parker's letters on January 6. He stated that the Union was not insisting that the union security clause be honored in the absence of a contract and he reiterated the offer to return "as a group," explaining that this meant the striking employees would not be displaced by permanent or temporary replacements, but would not have to be recalled or could face layoff if work no longer existed for them because, for example, a wing had closed or the census was greatly reduced. It is undisputed that the Respondent did not take any of the striking employees back in response to this offer.

On January 12, the parties met with the Mayor of Hartford at city hall. The mayor was attempting to bring about a settlement of the strike. Brown and Thompson were present for the Union and Cloherty and Harper for the Respondent. Brown testified that Cloherty gave a long explanation for the Respondent's decision to hire permanent replacements, citing the need for stability in light of Brown's statements indicating it would be a long strike. Cloherty also told the Mayor and the Union that the Respondent had to make a commitment of permanent employment to get replacements. When asked if there was any way that the Respondent could take the strikers back, Cloherty replied that the Respondent was "on the hook" to the replacements, that it had made binding commitments to them, citing the Supreme Court's *Belknap* decision. Cloherty told the Mayor and the Union that the Respondent was prepared to negotiate a contract with the Union, but could not discuss terminating the replacements to make room for the returning strikers. The Mayor asked the Respondent for a moratorium on hiring permanent replacements for 10 days during which the parties would engage in intense negotiations for a contract. The Respondent agreed. Cloherty did not dispute Brown's testimony regarding this meeting.

The parties did hold several meetings in the 10-day period after this meeting, but they were unable to reach agreement on a contract. At a meeting in Cloherty's office on January 19, at which Harper was present, Brown proposed a 4-year contract. When the Respondent rejected this proposal, Brown reminded Harper of the prediction he made at their December 15 meeting, i.e., that the Union would agree to 4 years in 9 weeks. Brown said, "it's been nine weeks, does that change your position?" Harper replied, "no." On January 20, the Union presented the Respondent with another offer to return to work. This offer was explicitly unconditional with no mention of terms and conditions or reinstatement as a group. It is undisputed that, in response to this offer, the Respondent began reinstating strikers to vacant positions. By the time of the hearing, the Respondent had reinstated 78 or 79 strikers. The last formal negotiation session occurred on March 3 without any agreement being reached. The Union has maintained a picket line at the Respondent's facility since January 20 to protest the Respondent's refusal to reinstate all the strikers.

Harper and Parker testified regarding the reasons for the Respondent's decision to hire permanent replacements. They testified that the Respondent chose to change its strategy and hire permanent replacements because of concerns about continuity of care for the residents, morale of the staff and reliability and consistency of using temporary employees and volunteers over a long term. The decision to begin hiring permanent replacements coincided with statements made by Brown, in his telephone conversation with Cloherty on December 2 or 3 and his meeting with Harper on December 15, indicating that the strike would not be over soon. Dr. Parker testified that she observed that the managers, supervisors, and nonunit staff who were working mandatory 12-hour shifts to replace the strikers, were getting tired. Some expressed to her their concerns about working long hours during the upcoming holidays. Dr. Parker testified further that the volunteers, although well-meaning, couldn't be counted on to continue to devote time to performing work of strikers in the face of competing demands on their time, particularly with the holiday season approaching. According to Dr. Parker, the temporary employees that had been hired directly and through agencies, were not a good long-term solution. There was considerable turnover among the temporary employees. Each time a new temporary employee was sent to the facility, he or she would have to undergo an orientation to learn the Respondent's procedures and policies. Constantly changing caregivers would also be detrimental to the residents who would not be able to develop any kind of relationship with their caregivers. Dr. Parker also cited the cost of using overtime and agency employees rather than regular employees to perform the work of the strikers.

On December 31, 1999, Harper sent a confidential memorandum to the Respondent's board of directors regarding the status of negotiations and the strike. In this memo, Harper informs the directors of the upcoming meeting on January 3 with the Union and the mediator. He predicts only limited movement from the Union at this meeting, because Brown

> [R]emains in the mode of bringing a handful of strikers to each meeting. In their presence, he seizes the opportunity to grandstand with his no compromise social justice message and threat of a long-term strike.
>
> . . . .
>
> However, while he postures and schedules meetings a week apart, we are making progress.

Harper then listed eight items of "progress" in such areas as quality and consistency of service to residents, employee mo-

rale, state oversight and admission of new residents. The last three address the issue of permanent replacements as follows:

> 6. As a well-executed event the day before Christmas, we began to permanently replace striking workers at Avery. These new employees have some distinct advantages: they are pleased to have the job for the money that we currently pay; they have fine work ethics; they want to learn; they are less expensive than temporary workers; and they bring predictable stability for the future, when the strike is over, because they say they want to work here for a long time. So far, we have hired 104 permanent replacements at Avery, replacing 60% of those on strike. If Mr. Brown refuses to seriously negotiate in good faith, we plan to add one or more permanent replacements each day. We have him in a real bind at Avery.
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> 7. We have not yet begun to add permanent replacements at Miller, but the threat is clearly before Mr. Brown. We also reminded Mr. Brown and the strikers that we are considering the option of no longer paying for their health insurance while they are on strike. The objective of the health insurance tactic was to cause the strikers to gang up on Mr. Brown and demand that he compromise to achieve a contract or they will come across the picket line. Yesterday's movement at Miller may be evidence that the health insurance threat, along with our permanent replacement success at Avery, is working. Remember, the Miller workers are new to the Union and their solidarity commitment is not nearly as solid as at Avery Heights. It could also be said that we have Mr. Brown in a real bind at Miller.
>
> 8. Remember, this Union has no strike fund except for the few members that put in 40 hours a week on the picket line. They receive $100. Depending upon their shift differential status, these workers have become accustomed to earning between $487 and $580 per week. Because of this disparity, we know that some former workers here abandoned the strike and have obtained employment elsewhere.

Harper acknowledged drafting this memo for the Respondent's directors. Cloherty testified that he was not aware of Harper's memo until sometime after it was sent to the board of directors.

3. Analysis and conclusions

a. The alleged December 15 misrepresentation as a violation of Section 8(a)(5)

The complaint alleges that Harper's statement to Brown at their December 15, 1999 meeting, that the Respondent had no intentions of hiring permanent replacements for the strikers, constituted an unlawful misrepresentation in violation of Section 8(a)(5) of the Act. The Respondent has not only denied this allegation on the merits, but has asserted that the allegation is barred by Section 10(b) of the Act because it was not specifically included in the original charge that was filed within 6 months of the incident. The General Counsel acknowledges that this specific allegation first appears in the amended charge that was filed by the Union on July 31 and served on the Respondent on August 7, but argues that it is "closely related" to the allegations of the original charge under the Board's decision in *Redd-I, Inc.,* 290 NLRB 1115, 1118 (1988).

The Board applies a three-part test to determine whether the allegations of an amended charge are closely related to those in an original charge to survive Section 10(b) of the Act. The Board first determines whether the otherwise untimely allegations involve the same legal theory as the allegations in the timely filed charge. Next, the Board looks at whether the otherwise untimely allegations arise from the same factual circumstances or sequence of events as those in the timely charge. Finally, the Board may consider whether a respondent would raise similar defenses to the allegations. *Nickles Bakery of Indiana,* 296 NLRB 927, 928 (1989), citing *Redd-I,* supra. Although *Nickles* and *Redd-I* involved the relatedness of a complaint allegation to a charge, the Board has held that the same test applies for determining whether otherwise time-barred allegations in an amended charge relate back to allegations in an earlier timely filed charge. *Ross Stores, Inc.,* 329 NLRB 573 fn. 6 (1999). See also *Office Depot,* 330 NLRB 640 fn. 4 (2000).

Applying the above test to the facts here, I find that the allegation of the complaint and amended charge that the Respondent bargained in bad faith in violation of Section 8(a)(5) by misrepresenting its intentions regarding the hiring of permanent replacements is closely related to the Section 8(a)(1), (3), and (5) allegations in the original timely filed charge. The charge, as originally filed, alleged, inter alia, that the Respondent violated Section 8(a)(5) as well as Section 8(a)(1) and (3) by hiring permanent replacements and refusing to reinstate all striking employees upon the Union's unconditional offer to return to work. The original charge also contained a general Section 8(a)(5) failure to bargain in good-faith allegation. The allegations in the complaint and amended charge involve the same legal theory as those in the original charge because they place in issue whether the Respondent fulfilled its duty to bargain in good faith by hiring permanent replacements and misleading the Union about this, leading to the employer's refusal to reinstate all the strikers in January. Moreover, the timely and allegedly untimely allegations involve "acts that are part of the same course of conduct, such as a single campaign against a union…or part of an overall plan to resist organization." *Ross Stores, Inc,* supra and cases cited therein. Under the General Counsel and the Charging Party's theory of the case, Harper's December 15 misrepresentation was part of the Respondent's scheme to unlawfully deny reinstatement rights to a majority of the strikers. Thus, the allegations of the amended charge, as well as those in the original charge, arose out of the same sequence of events, i.e., the Respondent's response to its employees exercise of their right to strike in support of the Union's contract demands. The investigation of the Union's original charge would logically entail a review of the parties' collective-bargaining negotiations which preceded the strike and any meetings or communications during the strike, such as Brown's December 15 meeting with Harper. In fact, Harper conceded that he was asked about this meeting in May, while Union's original charge was being investigated. It is therefore undisputed that this specific allegation was presented to the Respondent during the investigation of the original charge, even before

the amended charge specifically mentioned it. Accordingly, I find that this allegation is not barred by Section 10(b) of the Act and shall reject the Respondent's affirmative defense.

A determination of the merits of the charge requires resolution of a conflict in the testimony of Brown and Harper. Harper was as certain that he gave no assurances to Brown as Brown was certain that he did. There was nothing apparent in the demeanor of Brown or Harper that would suggest that either was testifying falsely. The mere fact that Brown gave a more detailed account of the meeting does not mean he was more truthful. This meeting occurred 15 months before the witnesses appeared at the hearing and neither had made or retained any notes of their conversation. Under these circumstances, it is not surprising that Harper's recollection of the details of the meeting would not be very precise. It is also not unfathomable that someone would have a specific recollection as to one subject while not recalling other matters. At the same time, Brown's almost verbatim recitation of the conversation, so long after it occurred, was surprising in view of his acknowledgement that he retained no contemporaneous notes to review before testifying. What I find even more surprising is the fact that Brown made no mention of Harper's commitment not to hire permanent replacements when he learned that the Respondent was in fact doing so. Brown explained his failure to confront Harper about this misrepresentation by testifying that it was only his word against Harper and he did not want to get into a "he said, she said" dispute. Although this explanation is plausible, it is not consistent with Brown's behavior during meetings with Harper in January. While reluctant to confront Harper about this serious misrepresentation, he did confront Harper regarding two other statements Harper made during their December 15 meeting. When the Respondent rejected Brown's proposal for a 4-year contract, Brown didn't hesitate to remind Harper that he had said, on December 15, that the Union would agree to a 4-year contract in nine weeks. Similarly, when Cloherty expressed surprise at Brown's proposal for an extended duration with a reopener and binding arbitration, Brown questioned Harper whether he had communicated this offer to Cloherty when Brown first made it at the December 15 meeting. I have similar doubts about Harper's credibility. Harper's rather vague testimony about his conversations with Brown in general does not provide much confidence in the reliability of his convenient denial that he made this damaging statement. I also note that a deliberate misrepresentation as described by Brown would be consistent with the "pre-Christmas surprise" that Harper was so proud of in his memo to the Respondent's directors.

Having considered the above factors, and while not entirely free from doubt, I find that Harper's denial is more credible than Brown's testimony that Harper told him the Respondent had no intention of hiring permanent replacements. Brown may sincerely believe now that he heard such a commitment from Harper on December 15, 1999. His actions in the period soon after the meeting, however, when such a commitment would have been a critical piece of evidence against the Respondent's hiring of permanent replacements, convince me that the statement was not made by Harper. Because I find that Harper did not tell Brown on December 15, 1999, that the Respondent had no intention or plans to hire permanent replacements, there was no "misrepresentation." Accordingly, I must recommend dismissal of this allegation of the complaint.

b. The Respondent's hiring of permanent replacements for the economic strikers as a violation of Section 8(a)(1) and (3)

The complaint alleges that the Respondent began hiring permanent replacements for its striking employees on December 15, 1999, because "the employees joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities." The General Counsel argues that because the Respondent had an independent discriminatory motive for permanently replacing the strikers, its otherwise lawful conduct violated Section 8(a)(3) of the Act. The complaint further alleges that the Respondent violated Section 8(a)(3) by failing and refusing to reinstate any of the striking employees in response to the Union's January 5 offer to return to work, and by failing and refusing to reinstate all of the striking employees in response to the Union's January 20 offer.

The Board recently reaffirmed the long-standing principals governing cases such as this one:

> It is well established that an employer's discouragement of employee participation in a legitimate strike constitutes discouragement of membership in a labor organization within the meaning of Section 8(a)(3). See *NLRB v. Great Dane Trailers,* 388 U.S. 26, 32 (1967) (citing *NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 233 (1963)). It is also evident that an employer's refusal to reinstate striking employees would tend to discourage employee participation in a strike effort. Accordingly, well-settled precedent dictates that an employer will be held to violate Section 8(a)(3) and (1) of the Act if it fails to immediately reinstate striking workers on their unconditional offer to return to work, unless the employer can establish a "legitimate and substantial business justification" for its failure to do so. See *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375, 378 (1967). The employer bears the burden of proving the existence of such a legitimate and substantial business justification. Id.
>
> But, even if an employer does present sufficient evidence to demonstrate the requisite business justification, that is not the end of the inquiry. Thus, if the Board finds that an employer's conduct is "inherently destructive of employee rights," no proof of antiunion motive is needed, and the Board may find an unfair labor practice notwithstanding that the employer was motivated by business considerations. In contrast, if the adverse effect of the employer's conduct on employee rights is "comparatively slight," an antiunion motive must be proved to sustain an 8(a)(3) charge if the employer has presented evidence of a legitimate and substantial business justification. *Great Dane Trailers,* 388 U.S. at 33–34.

Capehorn Industry, Inc., 336 NLRB 364, 365 (2001).

In *Capehorn,* the Board found that the employer's refusal to reinstate economic strikers was unlawful because the employer did not satisfy its burden of proving a legitimate and substantial business justification. The employer had contended that perma-

nent replacements had been hired for some of the strikers and that the work of other strikers had been permanently subcontracted. While reaffirming the principal that an employer's permanent replacement of economic strikers as a means of continuing its business operations would be a legitimate and substantial business justification for refusing to reinstate the strikers, the Board concluded that the employer had not met its burden of proving that the replacements it hired were indeed permanent.[23] Id. The Board found further that the employer had not satisfied its burden of establishing that it had any business justification for permanently subcontracting unit work during the strike. Because the employer had not met its burden, the Board found it unnecessary to determine, under *Great Dane,* the extent to which the employer's conduct adversely affected employee rights. The Board instead analyzed the employer's conduct as if it had a "comparatively slight" impact on employee rights. Id. The Board's decision in *Capehorn* does not appear to disturb precedent, such as *Hot Shoppes,* supra, which holds that an employer's motive for hiring permanent replacements is essentially "irrelevant" in the absence of evidence of an independent unlawful motive. See also *Belknap v. Hale,* 463 U.S. supra at 504 fn. 8.

The following analytical framework can be gleaned from the decisions in *Fleetwood Trailer,* supra, *Hot Shoppes,* supra, and *Capehorn Industry,* supra. If the General Counsel establishes as a fact that the employer has failed or refused to reinstate economic strikers upon an unconditional offer to return, the Board will infer a discriminatory motive because of the natural tendency of such conduct to discourage employees from supporting a union during a strike. However, the employer can avoid an unfair labor practice finding by presenting evidence of a "legitimate and substantial business justification" for its failure or refusal to reinstate the strikers. An employer who establishes that it has hired permanent replacements to fill positions left vacant by the strikers will be deemed to have presented a legitimate and substantial business justification without further scrutiny. See *Chotaw Maid Farms,* 308 NLRB 521, 528 (1992); *Waterbury Hospital,* 300 NLRB 992, 1006 (1990), enfd. 950 F.2d 849 (2d Cir. 1991).[24] In order to establish an unfair labor practice at that point, under *Hot Shoppes,* the General Counsel would have to present sufficient evidence to show that, in hiring permanent replacements, the employer had "an independent unlawful motive." To date, the Board has never found such a situation to exist. In those few cases where an administrative law judge has found evidence of an independent unlawful motive, the Board has expressly declined to adopt those findings and either reversed the judge, as it did in *Hot Shoppes,* or chosen an alternative basis for finding an unfair labor practice. *Nicholas County Health Care Center,* 331 NLRB 970 (2000); *Pennsylvania Glass Sand Corp.,* 172 NLRB 514 fn. 3 (1968). Under the *Hot Shoppes* analysis, if the General Counsel succeeded in proving the existence of an independent unlawful motive, presumably the burden would shift back to the Respondent to prove affirmatively that it had a legitimate and substantial business justification for choosing to continue operations with permanent replacements rather than by some other means. The Board has never gone this far in any case involving economic strikers.

Assuming the General Counsel presents evidence of an independent unlawful motive and the employer presents evidence to show it had a legitimate and substantial business justification, the question arises as to which party should have the burden of proving which motive prevailed. The General Counsel suggests that this case and the *Hot Shoppes* exception can be analyzed under the Board's *Wright Line* test for determining motivation.[25] Under this analysis, if the General Counsel establishes by a preponderance of the evidence that protected activity was a motivating factor in the employer's decision, then the burden would shift to the employer to prove that it would have taken the same action in the absence of such activity. That would be an unattainable burden in a strike situation because the employer would not have had to make a decision whether to hire permanent replacements in the absence of the employees having exercised their Section 7 right to strike. I believe it is more appropriate to leave the ultimate burden on the General Counsel to show that the independent unlawful motive outweighed any legitimate and substantial business that the employer may have had.

There appears to be no dispute here that the Union's January 20 offer was, as it appears on its face, an unconditional offer sufficient to trigger the Respondent's obligation to reinstate the strikers absent a legitimate and substantial business justification. Because the record shows that the Respondent hired 23 permanent replacements between January 5 and 20, it must be determined whether the Union's earlier offer was unconditional. The Board has held that any request for reinstatement during an economic strike that is conditioned upon removal of the cause of the strike is not an unconditional offer. *Atlanta Daily World,* 192 NLRB 159 (1971). Where the parties are bargaining for a new contract and the Union offers to return to work under the terms and conditions of the expired contract, the offer is not unconditional. *McAllister Bros.,* 312 NLRB 1121, 1123 (1998). In addition, by demanding that all employees be reinstated, where some strikers had been permanently replaced, the Union was also imposing a condition which would limit the effectiveness of its offer. Unless it is found that the hiring of these permanent replacements was unlawful, the Union's January 5 offer would not be an unconditional offer. Cf. *NFL Management Council,* 309 NLRB 78, 80 fn. 11 (1992).

The Respondent here satisfied its initial burden of establishing a legitimate and substantial business justification for failing to reinstate all the strikers in response to either union offer by showing that it had hired permanent replacements beginning on De-

[23] The General Counsel does not contend that the replacements hired by the Respondent on and after December 15, 1999, were not "permanent." The complaint and his theory of the case conceded that point. Moreover, the evidence in the record, including testimony from two replacement employees called as witnesses by the General Counsel, is sufficient to establish their status as permanent replacements.

[24] To the extent the Court would impose a heavier burden on the employer to justify the use of permanent replacements, the Board has never accepted this view. I am constrained to follow the Board's interpretation of the Act until it is reversed by the Supreme Court. *Los Angeles New Hospital,* 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981).

[25] *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

cember 15, 1999. The General Counsel argues that, notwithstanding this legitimate and substantial business justification, there is other evidence that the Respondent had an "independent unlawful motive" for exercising its right to permanently replace striking employees. The General Counsel relies to a great extent on the alleged misrepresentation at the December 15, 1999 meeting where it is claimed that Harper deliberately lied about the Respondent's plans. I have already found, based on credibility, that Harper did not make the representation attributed to him by Brown and therefore, did not lie to the Union about its decision. However, the Respondent admits that it consciously concealed its decision to hire permanent replacements from the Union. The secretive nature of the Respondent's conduct is another piece of evidence relied on by the General Counsel. The General Counsel also relies upon Harper's December 31, 1999 memo to the Respondent's board of directors as proof of the true purpose behind the Respondent's secret plan. Finally, the General Counsel attempted to show that the asserted business justification for the Respondent's decision was a pretext.

I find that the General Counsel has presented sufficient evidence that the Respondent had an independent unlawful motive when it decided, on or about December 15, 1999, to permanently replace its striking employees. It is undisputed that the Respondent made a conscious decision to keep its decision a secret. Thus, even if Harper did not lie about the Respondent's plans, he and the other management officials went out of their way to conceal the Respondent's hiring plans from the Union. The Respondent argues that the Board has never required an employer to notify a Union or the striking employees when it is considering hiring permanent replacements for strikers. The cases cited by the Respondent are administrative law judge decisions adopted by the Board without comment. *Armored Transfer Service, Inc.*, 287 NLRB 1244, 1251 fn. 21 (1988); *American Cyanamid Co.,* 235 NLRB 1316, 1323 (1978). The Board has never expressed an opinion one way or the other regarding what obligation, if any, an employer has to notify the Union in advance. The Board has required notice to be given in the analogous situation where an employer chooses to exert pressure on the Union during negotiations by locking out its employees. *Ancor Concepts, Inc.*, 323 NLRB 742 (1997), citing *Eads Transfer, Inc.,* 304 NLRB 711 (1991). The employer's right to hire permanent replacements in the face of a strike and its right to lock out employees in support of its bargaining position have both been recognized as economic weapons in the employer's arsenal during a strike. As such, they must serve the purpose for which they have been sanctioned. The right to hire permanent replacements has been sanctioned as a legitimate means for the employer to continue operations during a strike, not as a punitive measure. See *Thurston Motor Lines, Inc.,* 166 NLRB 862 (1967). An employer who hires permanent replacements in secret, without affording the strikers an opportunity to abandon the strike and return to their jobs while still vacant, may be motivated not by legitimate business considerations, but by a desire to punish the strikers by effectively terminating them.

The Respondent's witnesses testified that they made the decision to conceal their plan to hire permanent replacements from the Union out of fear that the Union would engage in harassment and other misconduct to impede its efforts to recruit permanent replacements. The only evidence in support of this claim was hearsay. Although there was a police presence throughout the strike and videotape evidence of supposedly inappropriate conduct on the picket line, the record here is devoid of police reports, tapes, or any other evidence to show that the Respondent had a good faith concern that it would not be able to hire permanent replacements in sufficient numbers to continue operations if the Union was aware of its plans. I find credible the testimony of Brown that, had the Union been made aware of the Respondent's plans in advance, it might have decided to end the strike and return to work rather than risk the employees' jobs being lost to permanent replacements. In fact, this is exactly what happened when the Union learned that the Respondent had already begun hiring permanent replacements, i.e., the Union held a meeting and recommended that the employees return to work.[26]

Even assuming the evidence was sufficient to establish that the Respondent had a reasonable concern that would justify its acting in secret, there is other evidence in the record that establishes convincingly that the Respondent's true motive was to punish the strikers. Harper plainly conveyed to his Board of Directors what motivated him to change the Respondent's strategy of using temporary employees, volunteers and nonunit staff to continue operations. The memo makes no mention of union harassment interfering with the Respondent's ability to find replacements. Rather, Harper describes his pre-Christmas surprise as a strategic move to break the solidarity of the union employees at Avery and put pressure on the leadership at both Avery and Miller to acquiesce to the Respondent's bargaining position. The purpose of keeping the plan a secret is clear, i.e., to ensure that the Respondent could replace a majority of the unit before the Union found out. This is exactly what McAllister told Cohen when she told him to keep secret their negotiations for the conversion of his temporary employees to permanent employees of the Respondent. Further evidence of the Respondent's independent unlawful motive in hiring permanent replacements is the fact that it continued to hire such replacements after its secret was revealed at the January 3 meeting and even after the Union had expressed a desire to end the strike on January 5.

The testimony of the Respondent's witnesses, Harper and Dr. Parker, is not sufficient to rebut the clear evidence of an unlawful motive found in Harper's December 31 memo. While the Respondent may indeed have been concerned about continuity of care, employee burnout and the cost of using temporary employees, it was Harper's desire to break the Union's solidarity by replacing a majority of the unit that comes through clearly in his memo. I note that the Respondent had previously, in 1995, weathered a 5-week strike immediately before the Christmas holidays without having to resort to the use of permanent replacements and that it was apparently able to continue operations at Miller Memorial during the same period in December 1999 without the need to hire permanent replacements. Harper's memo

[26] The testimony of Attorney Psarakis does not establish that the Union knew that the Respondent was already hiring permanent replacements on December 22. I find that, at best, Brown expressed to Psarakis his suspicions that this was happening based on the information he had available. Psarakis admittedly did not confirm these suspicions. Brown's suspicions were not confirmed until the January 3 meeting at FMCS.

also shows that the Respondent's strategy of hiring permanent replacements was intended to convey to the striking employees at Miller, "who are new to the Union and [whose] solidarity commitment is not nearly as solid as at Avery Heights" the threat that they could also lose their jobs if they did not abandon the Union. Harper's reference to the loss of wages for the strikers at Avery is further proof of the punitive nature of the Respondent's plan.

Accordingly, I find that the General Counsel has established, through Harper's December 31, 1999 memo, McAllister's statements to Cohen in mid-December 1999 and the deliberate concealment of its plans from the Union that the Respondent had an "independent unlawful motive "for hiring permanent replacements for the strikers. I find further, again based primarily on Harper's statements in his memo, that this unlawful motive outweighed the business justifications advanced for the hiring of permanent replacements here. My finding here is not intended to undermine an employer's recognized right to continue operations in the face of an economic strike by hiring permanent replacements. My finding is based on the unique facts presented here where Harper's memo amounts to the "smoking gun" rarely seen in unfair labor practice cases. As the General Counsel argues in his brief, if this case does not fit the Board's language in *Hot Shoppes,* supra, then the phrase "absent evidence of an independent unlawful motive" is truly meaningless and should be expressly overruled by the Board.

Based on the above, I find that the Respondent has violated Section 8(a)(3) of the Act, as alleged, by failing and refusing to reinstate the economic strikers, including those whose positions had been filled by permanent replacements who were hired in order to punish the employees for showing their support for the Union during the strike. Because the Union's January 5 offer was conditioned on the maintenance of the terms and conditions of the expired contract, the Respondent's failure to reinstate striking employees in response to that offer was not unlawful. The unfair labor practice occurred when the Respondent failed and refused to reinstate all the strikers in response to the Union's January 20 unconditional offer.

CONCLUSIONS OF LAW

1. By terminating Patricia Hurdle and Georgia Stewart on January 26, 2000, and by terminating Opal Clayton and Pauline Taylor on February 22, 2000, because of their protected activities in support of the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

2. By failing and refusing, since January 20, 2000, to reinstate its striking employees, upon their unconditional offer to return to work, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. The Respondent did not violate Section 8(a)(5) of the Act, on December 15, 1999, by misrepresenting its intentions regarding the hiring of permanent replacements.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In order to remedy the unlawful terminations of Clayton, Hurdle, Stewart, and Taylor, the Respondent must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also recommend that the Respondent be ordered to expunge from its records any reference to the employees' unlawful terminations and to notify them that this has been done.

Because the Respondent unlawfully failed and refused to reinstate all the striking employees in response to the Union's January 20 unconditional offer to return to work, it must now reinstate all strikers who have not yet been reinstated, discharging if necessary any permanent replacements hired during the strike. The Respondent must also make the striking employees whole for any loss of earnings and other benefits as described above. This would include making those strikers, whose reinstatement was delayed because a permanent replacement occupied their position on January 20, whole for any wages and benefits lost from January 25, 2000, to the date they were in fact reinstated.[27] The identity of those employees entitled to reinstatement under this Order, the precise date on which individual employees would have been reinstated, absent the Respondent's unlawful conduct, and the amount of backpay required to make each employee whole will be left for determination at the compliance stage of this proceeding.

In his complaint, the General Counsel requested as a special remedy an order further requiring the Respondent to reimburse any employee entitled to a monetary award in this case for any extra Federal and/or State income taxes that might result from a lump sum payment of the award. Counsel for the General Counsel has not explained why such an extraordinary remedy is necessary in this case. In the absence of any showing that such a remedy is necessary to effectuate the purposes and policies of the Act, I decline to recommend this additional relief.

[Recommended Order omitted from publication.]

[27] January 25 is the date the first strikers were reinstated in response to the Union's January 20 offer.