St. Luke's Memorial Hospital, Inc. *and* Unidad Laboral de Enfermeras y Empleados de la Salud (ULEES). Case 24–CA–9271

September 15, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On August 21, 2003, Administrative Law George Alemán issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

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

The judge found that the Respondent violated Section 8(a)(1) of the Act (1) by discriminatorily enforcing its no-solicitation/no-distribution policy against the Union, and (2) by discriminatorily requiring the Union to notify the Respondent 2 days before it came to visit its represented employees at the hospital (the 2-day rule). The Respondent excepts to these findings and asserts, among other things, that the General Counsel failed to establish that the Respondent applied its no-distribution/no-solicitation and 2-day rules in a discriminatory manner against the Union. We find merit in the Respondent's exceptions and find, contrary to the judge, that the Respondent did not unlawfully discriminate against the Union. Accordingly, we reverse the judge's decision and dismiss the complaint.

I. FACTS

A. Background: The Respondent's Acquisition of St. Luke's II

The Respondent is a hospital operating in Ponce, Puerto Rico. Prior to June 2000, the hospital was operated by the Puerto Rico Department of Health, and was known as Jose A. Gandara Hospital. In July 2000, the Gandara Hospital was acquired by a private health care entity known as Hospital Episcopal San Lucas (St. Luke's). St. Luke's already owned a hospital (referred to herein as St. Luke's I.) Upon purchase by the Respondent, the Gandara Hospital was named St. Luke's Memorial Hospital (St. Luke's II or Respondent).

St. Luke's I was covered by three separate collective-bargaining agreements with the Union, encompassing units of registered nurses, practical nurses and clerical employees. Following the acquisition, St. Luke's I transferred between 50–100 employees to St. Luke's II.[2] Although St. Luke's II was not a unionized facility, the Respondent agreed that it would continue to apply the terms of the collective-bargaining agreement to the transferred employees. All three collective-bargaining agreements contained provisions enabling the Union's representatives to visit the hospital's premises to ensure compliance with the agreement, "provided they notify the corresponding Hospital representative in advance about their visit."[3]

B. The Respondent Informs the Union of its No-Solicitation/No-Distribution Policy and 2-Day Rule

On August 28, 2000, the Respondent's counsel wrote to the Union, informing it of the recent acquisition of St. Luke's II and describing the agreement reached regarding the terms for transferred employees. The letter also advised the Union of the Respondent's no-solicitation/no-distribution policy. More specifically, the Respondent stated that distribution of "propaganda and/or informative material" or anything of a "written or verbal nature" would not be permitted "in those areas of direct care and/or immediate care of the patient," pursuant to NLRB v. Baptist Hospital, 442 U.S. 773 (1979). The Respondent further stated its willingness to negotiate with the Union in order to find alternative areas where the Union might distribute its literature, citing the cafeteria (where "only employees have access") as one possibility.[4] Finally, the letter stated that, if agreement could be reached regarding the use of a "determined area in the cafeteria to distribute informational material, this process cannot be turned into a place to hold meetings," and that the Respondent would retain the right "to qualify and control the use that is given in this specific area."

On October 2, 2000, the Respondent's human resources director, Isabel Maldonado, sent a letter to the Union describing the procedure that the Union was to

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

[2] Among the departments transferred from St. Luke's I to St. Luke's II were the delivery and nursery departments, the neonatal intensive care unit (NICU), the OB/GYN department, pediatrics, and the ambulatory surgery department, as well as some clerical and operating room personnel.

[3] The agreement further provided that the visits "will be carried out in a way that it [sic] does not interfere with the work performance and complaints will not be discussed in front of patients or visitors of the Hospital."

[4] The judge found that, contrary to the letter, the cafeteria was open to the general public.

follow when visiting either St. Luke's I or St. Luke's II in connection with its representative duties. The letter informed the Union that "all visits of the representatives [of the union] must be notified in advance to the Human Resources Director, and in his absence, to the Executive Director." The letter further requested that the Union should notify the hospital "one or two days in advance" of its visit. The letter also reiterated the Respondent's no-distribution policy (i.e., in the direct patient care area), as in the previous letter. The Union did not respond or object to the Respondent's letter.

For 1-1/2 years after the correspondence, Union organizer Ingrid Vega visited the transferred employees at St. Luke's II several times per week, either in the cafeteria or at another agreed-upon location. Vega would call the hospital on the morning of the visit and notify the human resources office (either H.R. Director Maldonado or her secretary) of her intent to visit that day. On one occasion in late summer 2000, the Respondent denied the Union permission to visit the hospital, citing the Union's failure to give the Respondent any prior notice, as required by its August 28, 2000 letter.

C. The Events of Early April 2002

In early April, 2002, consistent with her past practice, Union Representative Ingrid Vega called the human resources office at St. Luke's I to inform the Respondent of her intention to visit St. Luke's II that afternoon.[5] She left a message with one of the secretaries approximately one-half hour before visiting. Thereafter, Vega and Union Executive Director Quinones arrived at the Respondent's facilities before noon. For the next 45–90 minutes, Vega and Quinones sat behind a cafeteria table and distributed to employees copies of the recently printed nurses' collective-bargaining agreements and the Union's newspaper. Thereafter, a hospital security guard confronted them and asked Vega to go to H.R. Director Maldonado's office, where Maldonado accused Vega of failing to give her prior notice of her visit. Vega admitted to Maldonado that she had not called St. Luke's II, but maintained that she had left a message with a secretary at the St. Luke's I facility.

Vega then returned to the cafeteria and continued to distribute literature and talk to employees for an hour. Subsequently, two local policemen arrived, accompanied by one or two hospital security guards. At first, Quinones refused to leave, citing his alleged right, under the collective-bargaining agreement, to visit employees. Eventually, the two union representatives left together voluntarily.

[5] Vega explained that she called St. Luke's I (instead of St. Luke's II) because that was where H.R. Director Maldonado normally worked.

Analysis

In his complaint and brief before the judge,[6] the General Counsel alleged that the Respondent's prior notification requirement, set forth in its October 2, 2000 letter, was promulgated and maintained to discourage its employees from joining and/or assisting the Union or engaging in other concerted activities. The General Counsel further asserted that the Respondent's ejection of the two union representatives in April 2002 under its no-solicitation/no-distribution policy was unlawful. The General Counsel argued that the Respondent applied the rule "selectively and disparately by denying access to Union representatives to the Respondent's cafeteria and prohibiting union solicitations and distributions, while permitting nonunion solicitations and distributions."

In his decision, the judge agreed with the General Counsel and found that the Respondent's ejection of the two union representatives in April 2002 under its no-solicitation/no-distribution policy was unlawful. While the judge recognized the rights of an employer to exclude nonemployee union organizers from its property, he noted that an employer may not do so in a discriminatory manner, relying on *Lechmere v. NLRB*, 502 U.S. 527 (1992), and *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). The judge found that the Respondent routinely allowed the distribution of two local newspapers. The judge also cited one instance of an employee's solicitation for her personal business. Thus, the judge found that the Respondent violated Section 8(a)(1) by permitting solicitation and distribution by other parties, while refusing to allow the Union to do so.

The judge further found that the Respondent violated the Act by instituting a new rule requiring the Union to give it 2 days' notice before visiting the cafeteria.[7] The judge found that the imposition of such a 2-day notice requirement on the union officials alone "constitutes disparate treatment solely on the basis of union affiliation, and interferes with the employees' Section 7 right to freely meet with their representatives."

For the reasons stated below, we disagree with the judge's finding that the Respondent violated Section 8(a)(1) by evicting the union representatives from its cafeteria in April 2002 based on a discriminatory application of its no-solicitation/no-distribution policy and a 2-day prior notification rule. As shown below, the Gen-

[6] The General Counsel did not file a brief before the Board.

[7] The judge found that neither the collective-bargaining agreement, nor the October 2, 2000 letter to the Union contained any such 2-day prior notice requirement, and the parties did not have such a past practice. Nonetheless, the judge noted that the Respondent has taken the position that the Union is required to give it 2 days' notice before visiting the cafeteria or any other area of the hospital.

eral Counsel has failed to meet its burden of demonstrating that the Respondent applied these rules in a discriminatory manner.[8]

The No-Solicitation/No-Distribution Policy

The judge found that the Respondent's denial of access to Vega and Quinones was discriminatory because the Respondent tolerated other types of solicitation in the cafeteria. In finding that the Respondent discriminatorily applied its no-solicitation/no-distribution policy, the judge relied on evidence that the Respondent allowed two regional newspapers to leave stacks of papers in the cafeteria for employees to take. He further relied on the fact that a union representative observed an employee handing out flyers in the cafeteria advertising her nail polishing services.[9] We find that the record fails to demonstrate that the Respondent discriminatorily applied its no-solicitation/no-distribution policy against the Union while allowing other organizations to engage in conduct that would arguably violate the policy.

Where it is demonstrated that an employer has treated nonunion solicitations differently than union solicitations, the Board will find that the employer has violated Section 8(a)(1). See e.g., *Big Y Foods*, 315 NLRB 1083, 1086 (1994). Here, it is undisputed that the Respondent has permitted a stack of regional newspapers to be placed in its cafeteria. It is not clear, however, that this is sufficiently analogous to the Union's action of distributing various materials in the cafeteria to warrant a finding of disparate treatment. The Respondent permitted regional newspapers to be placed in the cafeteria for the comfort and convenience of the cafeteria patrons, not to communicate information to the patrons, and these newspapers were not provided for the purpose of engendering any reply or other action on the patrons' part. Accordingly, we find that this apparent deviation from the Respondent's no-solicitation/no-distribution rule does not constitute sufficient evidence of discrimination.

As to the single instance of an employee allegedly soliciting personal business, the evidence of this alleged incident is also insufficient to demonstrate that the Respondent discriminatorily applied its no-solicitation/no-distribution policy. Although Union Organizer Vega testified to observing such solicitation on one occasion, one month prior to the April incident, Human Resources Director Isabel Maldonado testified that such conduct was prohibited, and she denied that the Respondent was aware of the solicitation. Therefore, we find that, in the absence of evidence establishing that the Respondent knew, or was likely to have known, of the employee's solicitation, this single isolated incident fails to demonstrate the Respondent's tolerance of such conduct. We therefore conclude that there is insufficient evidence to establish that the Respondent's application of its no-solicitation/no-distribution policy to Vega and Quinones constituted unlawful discrimination under Section 8(a)(1) because the Respondent tolerated other types of solicitation in the cafeteria.

The 2-Day Prior Notification Rule

Similarly, we reverse the judge's finding that the Respondent violated Section 8(a)(1) by discriminatorily enforcing a 2-day prior notification rule against the Union. Although the Respondent requested advance notice of visitations in a letter to the Union, there is no evidence that the request applied only to the Union and not to other organizations. Indeed, there is no evidence that any other organizations were permitted, or even attempted, to enter onto the hospital's property without advance notification. Thus, because there was no evidence that the Respondent allowed other entities to visit its property without prior notice, there is no evidence that the Respondent discriminatorily applied a prior notice rule to the Union in violation of Section 8(a)(1). Accordingly, we dismiss the complaint.

ORDER

The complaint is dismissed.

Shecyl San Miguel, Esq. and *Ephraim Vega, Esq.*, for the General Counsel.
Jose Olivares Gonzalez, Esq., for the Respondent.
Harold Hopkins, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMÁN, Administrative Law Judge. A trial in this matter was held on March 11 and 12, 2003, in Hato Rey, Puerto Rico, following the filing of an unfair labor practice charge on May 7, 2002[1] (subsequently amended on May 15, and August 28) by Unidad Laboral de Enfermeras y Empleados de la Salud (herein the Union or ULEES), and issuance of a complaint on September 25, by the Regional Director for Region 24 of the

[8] Members Liebman and Walsh note that, the record evidence suggests that the Respondent unlawfully interfered with the employees' right of access to their elected union representatives, as established by past practice, and/or unilaterally changed the parties' agreement and practice regarding notification and access. However, the General Counsel did not litigate this case, under either of those 8(a)(1) and (5) theories. Cf. *Wolgast Corp*., 334 NLRB 203 (2001), enfd. 349 F.3d 250 (6th Cir. 2003), cert. denied, 124 S.Ct. 1656 (2004); *Holyoke Water Power Co*., 273 NLRB 1369 (1985), enfd. 778 F.2d 49 (1st Cir. 1985), cert. denied, 477 U.S. 905 (1986). Chairman Battista finds it unnecessary to reach these issues.

[9] The judge mistakenly found that Human Resources Director Maldonado observed the employee soliciting. It was Union Organizer Vega who testified that she (Vega) observed this.

[1] All dates are in 2002, unless otherwise indicated.

National Labor Relations Board (the Board). The complaint alleges that the Respondent, St. Luke's Memorial Hospital, Inc., violated Section 8(a)(1) of the National Labor Relations Act (the Act) by promulgating and maintaining an unlawful no-solicitation/no-distribution policy, and by selectively and disparately enforcing that policy against union representatives who sought access to its cafeteria for solicitation and distribution purposes. By answer dated October 7, the Respondent denies engaging in any unlawful conduct.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Puerto Rico corporation with an office and place of business in Ponce, Puerto Rico, is an acute health care institution engaged in providing in-patient and out-patient medical care and related services. During the year preceding issuance of the complaint, the Respondent's gross revenues exceeded $250,000, and, in the course conduct of its operations, it purchased and received at its Ponce facility goods valued in excess of $50,000 directly from points and places outside the Commonwealth of Puerto Rico. 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 that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Factual background

The Respondent, formerly known as José A. Gándara Hospital, was, prior to June 2000, owned and operated by the Puerto Rico Department of Health. In or around July 2000, the Respondent was acquired by, and became associated with, a private health care entity known as Hospital Episcopal San Lucas, and renamed St. Lukes Memorial Hospital.[2] St. Lukes I was, at the time, party to three separate collective-bargaining agreements with the Union covering distinct units of registered nurses, practical nurses, and clerical employees.[3] Following its acquisition of St. Lukes II, St. Lukes I transferred several of its departments and the employees working therein to St. Lukes II.[4] The number of unit employees transferred from St. Lukes I to St. Lukes II during this transition totaled between 50 and 100 employees. Under an agreement entered into between the Respondent and the Union, the transferred unit employees' terms and conditions remained the same as they had been at St. Lukes I, and they continued to be represented by the Union and covered by the collective-bargaining agreements that were applicable to them at St. Lukes I.

All three agreements contain an identical provision addressing the visitation rights of union officials to the facilities.[5] The provision reads as follows:

> The officers of the [ULEES] may visit the different branches of the Hospital when they believe that it is necessary during the daytime hours, in order to make certain that the Agreement is complied with or to deal with representatives of the Hospital on issues related to the union members, provided they notify the corresponding Hospital representative in advance about their visit. These visits will be carried out in a way that it [sic] does not interfere with the work performance and complaints will not be discussed in front of patients or visitors of the Hospital.

The record reflects that on August 28, 2000, Respondent's counsel wrote to the Union's executive director, Radamés Quiñones, informing him of the recent acquisition of St. Lukes II by St. Lukes I, and describing, inter alia, the agreement reached between the Respondent and the Union regarding the rights of the transferred employees. (See Jt. Exh. 1[b].) The letter also advised the Union that St. Lukes I maintained a no-solicitation/no-distribution policy at its facilities consistent with the Supreme Court's holding in *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979). It goes on to state that "the distribution of propaganda and/or informative material," or anything of a "written or verbal" nature is not permitted "in those *areas of direct care and/or immediate care of the patient.*" The letter then describes such prohibited areas as including "patients' rooms, hallways, nursing stations, elevators, waiting rooms and/or reception areas, emergency rooms, areas where physicians work and/or family members of the patients are interviewed, x-ray units, or any other area that is for patient access or affects the patient's tranquility and treatment." The Respondent in its letter makes clear that it expects ULEES to adhere to these restrictions, but advises that it was willing to negotiate with the Union in order to find alternative areas where the Union might be free to distribute its literature, citing the cafeteria "(where only employees have access),"[6] the hospital parking entrances, and the employees' parking lot as possible locations. The letter further advises that if an agreement could be reached regarding the use of a "determined area in the cafeteria to distribute informational material, this process cannot be turned into a place to hold meetings," and that the Respondent would retain the right "to qualify and control the use that is given in this specific area."

---

[2] At the hearing, Hospital Episcopal San Lucas was often referred to as St. Lukes I, and the Respondent, St. Lukes Memorial Hospital, as St. Lukes II. For ease of reference, those same designations will be used here, except that St. Lukes II may, at times, also be referred to as the Respondent.

[3] See CP Exhs.1–3. CP Exh. 1, the agreement covering the registered nurses, and CP Exh. 2, the practical nurses' agreement, were both executed in June 2001, and are effective from January 1, 2000 to December 31, 2003. CP Exh. 3, the clerical employees' contract, was apparently executed in May 1999, and was effective from January 1, 1999 to December 31, 2002.

[4] Among the departments transferred from St. Lukes I to the Respondent were the delivery and nursery departments, the neonatal intensive care unit (NICU), the OB/GYN department, pediatrics, and the ambulatory surgery department, as well as some clerical and operating room personnel.

[5] See art. XXVII, sec. E of CP Exh. 1(B); art. XXVI, sec. E of CP Exh. 2(B); art. XXIV, sec. E of CP Exh. 3(B).

[6] Despite the August 28 letter's assertion that "only employees have access" to the cafeteria, the cafeteria is open to the general public.

On October 2, 2000, Respondent's human resources director, Isabel Maldonado, sent a letter to Quiñones, describing the procedure the Union was to follow when visiting either St. Lukes I or St. Lukes II in connection with its representative duties.[7] The procedure described in paragraph 1 of the October 2, letter reads as follows:

> All the visits of the representatives of [ULEES] must be notified in advance to the Human Resources Director, and in his absence, to the Executive Director. Whenever possible, we would appreciate that the visits of the ULEES representatives be notified one or two days in advance, in order to coordinate it with the employees that you need to see, so that the work schedules are not severely altered and services to the patients or Hospital operations are not affected. Likewise an advance notice will help us to make the arrangements to get a private place where the ULEES representatives can meet.[8]

Paragraph 8 of that same letter also describes for the Union the Respondent's no-distribution policy. Tracking the no-solicitation/no-distribution policy described in the August 28, 2000, letter, it reads as follows:

> With regard to the distribution of printed material, the position of the Hospital is that such distribution, literature or discussion of that material may not be done in areas of direct patient care, nor during working hours. Among these areas are the department hallways, nursing stations, patients' rooms, x-ray and other areas of access to patients, among others.

Although the above policy, on its face, imposes a ban on the distribution of literature in certain defined patient-care areas of the Hospital, Maldonado testified that the ban extends to all areas inside the Hospital, including the cafeteria. (Tr. 175.) The Respondent similarly averred, in the first affirmative defense in its answer to the complaint, that it "has a standing order not to allow at its cafeteria distribution of any sort from any party, other than official hospital communications." In this same vein, Maldonado initially testified that, to the best of her knowledge, no solicitation or distribution has ever occurred inside the cafeteria. However, she subsequently conceded, contrary to her prior testimony and to the Respondent's claim that only official hospital communications were allowed to be distributed in the cafeteria, that two local newspapers of general interest to the community at large, e.g., *La Perla* and *L'Opinion*, are in fact distributed in the cafeteria. Maldonado explained that the Hospital has, for many years, allowed such local newspapers to be distributed because they contain news and information that was of interest to the public-at-large. (Tr. 177–179.)

The incident which gave rise to the instant allegations occurred on or around the first week in April, and involved a visit by Quiñones and another Union official, Ingrid Vega, to the Respondent's cafeteria.[9] According to Vega, one of the ways she maintains contact with unit employees is through visits to the medical facilities. She testified that she visited the Respondent between two and three times a week, and that her visits often occurred between 11 a.m. and 1:30 p.m. as this was when unit employees generally took their lunchbreak. The distribution of the union newspaper and other literature was usually done during that time period. On those occasions when she needed to meet with Maldonado, said meetings took place in the latter's offices.

Vega testified that it was her practice before visiting the Respondent to first call the human resources office and let the secretary, or whoever answered the phone, at times Maldonado herself, know that she would be visiting the hospital either that day or on some other particular date. According to Vega, there were occasions when she tried but was unable to reach someone at the St. Lukes II office. On said occasions, which Vega admits did not occur often, she would leave word at the St. Lukes I human resources office of her visit. (Tr. 45.) Vega testified that on these visits, she generally went directly to the cafeteria somewhere between 11 a.m. and 1:30 p.m., and that any distribution she had to make took place during that time period. When the visits called for a meeting with the human resources director, the meeting was held in the director's office; when the visit was for the purpose of going to a specific department, the human resources office would have a supervisor accompany Vega through the department. (Tr. 42–43.)

In early April, Vega and Quiñones went to the Respondent's cafeteria to distribute copies of the Union's newspaper, *El Aguacero*, and of the recently printed nurses' contracts to unit employees. According to Vega, other nonunion material had previously been distributed in the cafeteria. Consistent with Maldonado's testimony, Vega recalls seeing *La Perla* newspaper made available for distribution to employees in the cafeteria, and testified to seeing two other general circulation newspapers, *El Nuevo Dia* and *El Vocero*, also made available for distribution. Maldonado further recalled seeing, sometime in March, an employee distributing flyers advertising "nail polishing" services. Vega testified that before going to the cafeteria, she called the human resources office at St. Lukes I at approximately 11:15 a.m., and left word with one of the two secretaries there that she and Quiñones would be visiting the cafeteria at St. Lukes II that morning. (Tr. 48.) She explained that this was the procedure established by the collective-bargaining agreements and, as noted, consistent with her established practice.

After making her call, Vega and Quiñones arrived at the cafeteria 1/2 hour later, and spent between 45–90 minutes distributing their literature until confronted by a hospital security guard. The guard, Vega claims, told her she had to accompany him to Maldonado's office. Vega purportedly agreed to do so and, on arriving at Maldonado's office, was allegedly told by Maldonado that she and Quiñones could not be in cafeteria because they had not given the Respondent the required advanced notice of their visit. According to Vega, she told Maldonado that while it was true she had not informed

[7] See Jt. Exh. 2(B).

[8] The suggestion in par. 1 of the October 8 letter, that ULEES should try to notify the Respondent "one or two days in advance" of any visit by a union official, is not found in the contracts' visitatorial clauses.

[9] Vega is a representative, organizer, and officer of the Union and is responsible for administering the collective-bargaining agreements, including handling grievance arbitration matters, at both medical facilities. According to Vega, her duties include distributing *El Aquacero* and other union literature to unit employees.

Maldonado at St. Lukes II of the visit, she had in fact left a message advising of the visit at the St. Lukes I facility. (See Tr. 53–54.)

According to Vega, nothing else was said and she returned to the cafeteria where she continued to distribute union literature and to talk to employees until two local policemen arrived approximately 1 hour later accompanied by one or two hospital security guards. (Tr. 58.) Vega claims that the security guards told her and Quiñones they had to leave. The police officers, she testified, did not approach her but did speak with Quiñones and also informed him that management had requested that he leave the premises. Quiñones, Vega recalls, refused to leave, explaining to the police that under the Union's collective-bargaining agreement with the Respondent, union representatives were allowed to visit the facility. Quiñones purportedly further told the police that they were also allowed into the cafeteria because the cafeteria was open to the general public. Following Quiñones conversation with the police, he and Vega simply left the premises. Vega recalls seeing visitors, physicians, unit employees, and supervisory personnel in the cafeteria during this incident. (Tr. 61.) Vega testified that some 2 or 3 weeks later, she advised the Respondent's human resources department that she wished to visit the cafeteria, but that when she and union official Jose Costas arrived at the hospital, they were met by three security guards at the front entrance who denied them entry. (Tr. 63.) She further recalled that sometime in June or July, she notified Maldonado that she was planning to visit St. Lucas I, that Maldonado told her she could not do so because of the Board charges (pertaining to the early April visit) that were pending, and that, unless Vega's visit was for the purpose of addressing specific complaints or grievances, she would not be allowed to visit the facilities until Board charges were resolved. Vega claims that from then on, all of the union-related material, including bulletins, newspapers, and subpoena notices, that had been left in the Respondent's facility were thrown out. (Tr. 89.) Vega's testimony as to her subsequent encounter with security guards as she tried to enter the Respondent's facility following her April visit, as to her conversation with Maldonado in June or July, and regarding the subsequent discarding by Respondent of union-related literature, was undisputed and is credited.

Maldonado also testified as to the procedures the Union was required to follow when visiting the Respondent's facilities, and as to the early April cafeteria incident. Regarding the procedure for visits, she testified that typically the Union, usually Vega, calls the human resources department and informs her of the visit, and its intended purpose. If the purpose is to meet with employees, then her department affords employees the time needed and place to meet with the union official.

As to Vega's and Quiñones' early April visit to the cafeteria, Maldonado testified that on the day in question, she was at her St. Lukes I office when she received a call late that morning from Elizabeth George, her secretary at St. Lukes II, advising that Vega and Quiñones were in the Respondent's cafeteria. George, she further claims, also informed her that Quiñones was making personal negative comments about her (Maldonado) and the Respondent's executive director, Ramon Lopez, and being confrontational with other hospital personnel. Maldonado concedes, however, that George had not personally witnessed Quiñones' behavior at the cafeteria, and had instead been told of Quiñones' activities by a security guard, Lieutenant Gonzalez, and by St. Lukes II facilities supervisor, Domingo Colon. (Tr. 190–191.) Maldonado's description of the information she purportedly received from George does not, it should be noted, include any mention by George of Quiñones giving a speech or holding an employee rally in the cafeteria. According to Maldonado, after receiving the information from George, she inquired of the four secretaries in the St. Lukes I human resources office if Vega had notified any of them of her visit, and all four denied receiving any such call. (Tr. 229.)

Maldonado claims that following George's phone call, she called Colon and Gonzalez and directed them to remove Vega and Quiñones from the premises. She purportedly also called Hector Rivera, the head of environmental affairs at the facility, as well as Lopez, to update him on what was going on. She recalls telling Lopez that Vega and Quiñones had not given the Respondent prior notice of their visit and that, consequently, she had issued instructions to have them removed from the hospital premises. (Tr. 234.) Although initially citing only the failure to give prior notice of the visit as the reason for having Vega and Quiñones ejected from the hospital premises, on further questioning from me, Maldonado altered her response by adding that Quiñones' conduct in the cafeteria, which she described as a "crisis," was also a factor in her decision to have them expelled. (Tr. 234–235.)

Maldonado could not recall if, prior to calling Colon, she inquired of her staff at the St. Lukes II human resources office whether Vega had given it prior notice of her visit. Further, while she claims to have asked the staff at the St. Lukes I office if Vega had notified them of her visit, she could not recall if this latter inquiry occurred before or after she directed Colon to evict Vega and Quiñones from the Respondent's cafeteria. (Tr. 224.) After calling these individuals, Maldonado testified she headed over to St. Lukes II and, on arriving, went straight to Lopez' office where she and Lopez spent several hours discussing numerous topics, including Vega's and Quiñones' visit to the cafeteria. (Tr. 168.)

Maldonado denies Vega's claim that the two met personally that day, and instead testified that she and Vega only spoke on the phone. Thus, she testified that Vega called her around noontime, while she was still meeting with Lopez in the latter's office, to inform that the hospital's security guards were asking her to leave, and also apologized for not having notified Maldonado in advance of her visit. Maldonado purportedly replied that she, Vega, definitely needed to leave the hospital premises. Maldonado admits she never personally went to the cafeteria to investigate the incident. Maldonado claims that at some point, she gave instructions to Colon and/or Rivera, both of whom were in the cafeteria at her direction, to call the local police because Quiñones was refusing to leave the cafeteria unless the police were called. Maldonado purportedly chose not to investigate the incident herself because she feared Quiñones "aggressive attitude." (Tr. 202–203.)

Colon testified to receiving a call in early April from Maldonado at around 12:40 p.m. asking him to look into Vega's and Quiñones activities in the cafeteria. Colon claims

that on arriving at the cafeteria, he observed Quiñones giving a speech on how the Respondent was "fooling the people," and that a security official, Lieutenant Gonzalez, was trying to get Quiñones to lower his voice by telling him that there were patients in the area. Colon claims he too got involved in trying to get Quiñones to lower his voice. Vega denies that Quiñones gave a speech in the cafeteria that day. Colon claims that at one point, when he approached Quiñones, the latter asked him who he was, and he proceeded to identify himself to Quiñones. Quiñones, according to Colon, then took Colon's picture over the latter's objection.[10] At one point, Quiñones, Colon claims, called him a "charlatan" and stated he could not understand how "the administration could count on someone like" Colon. Colon then left the cafeteria to call Maldonado and update her on what was transpiring, and thereafter presumably returned to the cafeteria. He claims that he in fact called Maldonado on several occasions to inform her of what was going on, and that, on the last call, told Maldonado that the police had arrived, that everything had calmed down, and that Quiñones and Vega had left the facility.

Although Gonzalez did not testify, Colon claims the latter at one point asked Quiñones to leave the cafeteria, but that Quiñones declined to do so unless the police were called. He testified that some 5 minutes later, the police were called. On their arrival, Gonzalez, according to Colon, explained to the police that Quiñones had been giving a speech and had failed to follow the proper procedure for visiting the hospital. The police, however, declined to take any action because Vega and Quiñones were calm at the time and not doing anything. (Tr. 277.) Quiñones, according to Colon, left either during or shortly after the police officer's conversation with Gonzalez. Colon claims that he spent about 35 minutes in total in the cafeteria during this incident, and that, during that period, he did not see either Vega or Quiñones handing out union literature.

Called by the Respondent, Eduardo Mercado, a messenger at St. Lukes II, testified that he was in the cafeteria for about 5 or 10 minutes around noontime on the day in question, and, during that period, heard Quiñones say in a loud voice that the funds that were intended to cover employee benefits were instead being given to Maldonado and Lopez. Mercado recalls seeing other coworkers, as well as nurses, physicians, and cafeteria personnel, in the cafeteria at the time the incident occurred. Although claiming that Quiñones was speaking somewhat loudly in the cafeteria, Mercado never claimed to have seen or heard Quiñones making a speech or conducting a rally.

I am not convinced that Quiñones made a speech or conducted a rally in the cafeteria during his early April visit, as claimed by the Respondent on brief. While Maldonado and Colon testified that he did, Vega, contrary to the Respondent's further assertion on brief, denies that Quiñones engaged in any such conduct.[11] Except for the brief period of time when Maldonado purportedly summoned her from the cafeteria, Vega was in the cafeteria and had first hand knowledge of what transpired therein. Maldonado, on the other hand, never went to the cafeteria and had no direct knowledge of Quiñones' activities.[12] Although Colon did testify to having seen Quiñones giving a speech in the cafeteria, Mercado, as noted, made no such claim in his testimony, and testified only that Quiñones was being loud. Having considered the above conflicting testimony, I am persuaded that while Quiñones may have been speaking somewhat loudly, he did not give a speech or engage in a rally. I note in this regard that, according to Colon, the police felt it unnecessary to take any action because neither Quiñones nor Vega were engaging in any inappropriate conduct when they arrived.

B. Discussion

The complaint, as noted, alleges, the General Counsel contends, and the Respondent denies that its ejection of Vega and Quiñones from the hospital's cafeteria in early April was unlawful and in violation of Section 8(a)(1) of the Act. The Respondent on brief raises two principal defenses to the allegation, both of which I find lack merit. First, the Respondent contends that Vega and Quiñones were lawfully evicted from its premises because they did not provide the Respondent with advance notice of their visit. Second, it argues that its actions were justified because Vega's and Quiñones' distribution of union literature violated its no-solicitation/no-distribution policy.

As to the Respondent's claim that it did not receive prior notice of the Union's early April visit, Vega, as noted, testified that she, in fact, called the St. Lukes I human resources office prior to her visit and left word with a secretary that she and Quiñones would be visiting the St. Lukes II cafeteria that morning. Her claim in this regard was not seriously challenged by the Respondent. The only contrary evidence on this question came from Maldonado who, as noted, testified that she inquired of the secretaries at the St. Lukes I office and that all denied receiving any such call from Vega. None of the secretaries, however, was called to corroborate Maldonado's claim in this regard. As for Maldonado, she was not a particularly credible witness. Her rather vague and ambiguous testimony on whom

[10] Vega explained that Quiñones brought a camera with him that day to take photos of unit employees receiving copies of their collective-bargaining agreements and that the photos were to be included in the Union's newspaper.

[11] The Respondent's claim, on brief at pp. 4 and 7 (fn. 5), that Vega admitted on cross-examination that Quiñones "made a speech" during the early April visit to the cafeteria is patently wrong and misleading, for when asked by Respondent's counsel on cross-examination if Quiñones made a speech that day, Vega twice stated clearly and unambiguously that he had not. (Tr. 121.)

[12] Maldonado, as noted, claims that the information she received about Quiñones' activities came from George who, in turn, purportedly received the information from security guard Gonzalez and Colon. Neither George nor Gonzalez were called to testify, and while Colon did testify, he made no mention in his testimony of having seen or spoken with George regarding this incident. In fact, Colon's testimony suggests that he first learned of Vega and Quiñones being in the cafeteria when Maldonado called him and asked him to look into the matter. Colon's testimony, if true, makes patently clear that he could not have reported to George that Quiñones was giving a speech in the cafeteria, as claimed by Maldonado. Maldonado's claim, therefore, that George learned that Quiñones was speaking ill of her and Lopez in the cafeteria from Gonzalez and Colon, is uncorroborated and, indeed, somewhat inconsistent with Colon's own testimony. Accordingly, Maldonado's testimony regarding what she was told by George is found not to be credible.

she may have called, and what she may have done or been told, following her receipt of George's call, was full of contradictions and is simply not worthy of belief. The inconsistency between her claim at the hearing that George described to her what Quiñones was doing in the cafeteria, and the admission in her sworn affidavit that George made no such statements to her, further undermines her overall credibility.

Vega on the other hand came across as more reliable and sincere than Maldonado. Her claim, therefore, of having given the Respondent prior notice of her early April visit, and her version of what transpired between her and Maldonado during her visit, is credited. The Respondent's assertion on brief, that a 2-day advance notice from the Union was required for any such visit, is without merit, for neither the October 2 letter it sent to the Union and on which it relies to support its assertion, nor the notice provision in the parties' collective-bargaining agreement, contains any such requirement. Rather, as described above, both the October 2 letter and the notice provision in the contract state only that advance notice should be given without specifying the amount of advance notice expected or required.[13]

Regarding its claim that Vega and Quiñones were lawfully evicted under its no-solicitation/no-distribution policy,[14] the Respondent, on brief, correctly points out that under *Lechmere v. NLRB*, 502 U.S. 527 (1992), an employer cannot be compelled to allow distribution of union literature by nonemployee organizers on his property unless the employees are otherwise inaccessible, id., at 534, a factor it contends, and I agree, is not present here. This, however, does not end the inquiry, for there is another long-established exception, which the Respondent does not mention, to an employer's right to restrict access to its property, e.g., a "nondiscrimination" exception. Under this latter exception, an employer may not discriminate by refusing to allow a union to distribute literature on its premises while allowing similar distribution or solicitation by nonemployee entities other than the union. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956); *Price Chopper*, 325 NLRB 186, 187 (1997), enfd. *Four B Corp. v. NLRB*, 163 F.3d 1177 (10th Cir. 1998).[15] I agree with the General Counsel's claim on brief that the "nondiscrimination" exception is applicable here.

The record evidence makes patently clear, and the Respondent on brief concedes as much, that the distribution of nonunion literature, e.g., local newspapers, has long been allowed in the hospital cafeteria. Maldonado admitted as much in her testimony, with corroboration from Vega. Vega also testified, credibly and without contradiction, to having observed, one month prior to her and Quiñones' April visit, an employee soliciting and distributing literature for a nail-polishing business in the cafeteria, establishing to my satisfaction that the solicitation and distribution of other literature of a nonunion, nonwork related nature also occurs. It is also patently clear, and the Respondent does not contend otherwise, that these past incidents of solicitation and distribution in the cafeteria do not fall within either of the previously-cited exceptions to the "nondiscrimination" rule. (see fn. 15 supra.) The Respondent's refusal in early April, therefore, to allow Vega and Quiñones to distribute union material in its cafeteria, when it has allowed other nonunion material to be distributed, was, I find, discriminatory and a violation of Section 8(a)(1) of the Act.

I further agree with the General Counsel that the Respondent's rule requiring that the Union give it 2-days prior notice before visiting the cafeteria further violates Section 8(a)(1) of the Act.[16] There is in this regard no evidence to indicate, and the Respondent does not contend, that this 2-day advance notice requirement applies to other members of the public who may wish to enter and use its cafeteria. The imposition of such a 2-day notice requirement on the union officials alone constitutes disparate treatment solely on the basis of union affiliation, and interferes with the employees' Section 7 right to freely meet with their representatives. The 2-day prior notice requirement is therefore discriminatory and, as noted, violative of Section 8(a)(1).

[13] Although the October 2 letter states that the Union should, "*whenever possible*," give "one or two days" advance notice of a visit, it is patently clear from the above "whenever possible" language that the "one or two day" notice was more of a suggestion to the Union rather than a requirement. As noted, this "one or two day" language is not found in the notice provision of the parties' agreement. There is no evidence here to suggest, nor does the Respondent contend, that a 2-day advance notice was an established practice of which the Union was aware and to which it had acquiesced. In fact, Vega's testimony is to the contrary, for she testified that she generally called the Respondent between 15 minutes to 1 hour before making any such visit. (Tr. 72–73.) I credit her testimony in this regard.

[14] As previously described, the no-distribution policy in the October 2, 2000 letter to the Union bans the distribution of literature "in areas of direct patient care," and includes "department hallways, nursing stations, patients' rooms, x-ray and other areas of access to patients, among others." The cafeteria is not included in the list of areas where distribution of literature is prohibited, suggesting the possibility that the ban on distribution of literature does not extend to the cafeteria. Nor does the cafeteria qualify as a "direct patient care" area. As such, a ban on the solicitation and distribution of literature in the cafeteria, absent a showing that the ban is needed to avoid a disruption of patient care, may very well be unlawful under the *NLRB v. Baptist Hospital* holding referenced by the Respondent in its August 28, 2000 letter. The complaint, however, does not allege the Respondent's no-distribution policy, as set forth in the October 2, 2000 letter to be unlawful. Rather, the allegation here is that the Respondent has applied its no-distribution policy in a disparate and discriminatory manner. Accordingly, I make no finding regarding the actual validity of the Respondent's no-solicitation/no-distribution policy.

[15] The "nondiscrimination" rule is itself subject to two exceptions. Thus, an employer's refusal to allow union solicitation will not violate the Act if the nonunion solicitations it has allowed consist only of a small number of "isolated beneficent acts," or are related "to the employer's business functions and purposes." *Four B. Corp. v. NLRB*, supra at 1183; *Albertson's*, 332 NLRB 1132, 1135 (2000); *Sandusky Mall Co.*, 329 NLRB 618, 621 (1999); *Hammery Mfg. Corp.*, 265 NLRB 57 fn. 4 (1982).

[16] Although, as previously discussed, neither the collective-bargaining agreement, nor the October 2 letter to the Union, contains any such 2-day prior notice requirement, the Respondent, as noted, has taken the position that the Union is required to give it 2 days' notice before visiting the cafeteria or any other area of the hospital.

CONCLUSIONS OF LAW

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

2. Unidad Laboral de Enfermeras y Empleados de la Salud (ULEES) is a labor organization within the meaning of Section 2(5) of the Act.

3. By requiring union representatives to provide 2-days advance notice before visiting the cafeteria while imposing no such requirement on other visitors to the cafeteria, and by prohibiting union representatives from distributing literature in the cafeteria while allowing the distribution of other nonunion material, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent violated Section 8(a)(1) of the Act, it shall be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]