Allina Health System d/b/a Abbott Northwestern Hospital *and* Minnesota Nurses Association

Allina Health System d/b/a Mercy Hospital *and* Minnesota Nurses Association

North Memorial Healthcare d/b/a North Memorial Medical Center *and* Minnesota Nurses Association

Methodist Hospital, Park Nicollett Health Services *and* Minnesota Nurses Association

Healtheast d/b/a Healtheast Care System *and* Minnesota Nurses Association

Allina Health System d/b/a Unity Hospital *and* Minnesota Nurses Association

Allina Health System d/b/a United Hospital *and* Minnesota Nurses Association. Cases 18–CA–16051–1, –2, –9, –10, –11, –12, and –13

October 29, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND MEISBURG

On August 2, 2002, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondents filed exceptions and a brief in support of those exceptions. The General Counsel filed a brief in opposition to the Respondents' exceptions and cross-exceptions and a brief in support of those cross-exceptions. The Charging Party filed a brief in support of the judge's decision. The Respondents filed a reply 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 briefs[1] and has decided to affirm the judge's rulings, findings, and conclusions, as modified below, and to adopt the recommended Order as modified and set forth in full below.[2]

I.

The Minnesota Nurses Association (the Union) has represented nurses for decades at Abbott Northwestern Hospital, Mercy Hospital, North Memorial Medical Center, Methodist Hospital, United Hospital, HealthEast Care System, and Fairview (Fairview Riverdale and Fairview Southdale). Generally, each hospital is a single bargaining unit. However, for many years, the hospitals negotiated with the Union as part of a multiemployer bargaining group.

Nurses in the Minneapolis area commonly worked for more than one hospital. Because of the severe nursing shortage, all the hospitals were chronically understaffed. In order to deal with the shortage, the hospitals all utilized temporary nurses from staffing agencies. Many nurses who were regularly employed at one hospital would register with a staffing agency to pick up additional shifts at other hospitals.

In preparation for the 2001 negotiations, all of the hospitals abandoned the multiemployer bargaining group format. Instead, the hospitals formulated a coordinated bargaining plan. Included in the coordinated bargaining was Unity Hospital, whose nurses were not organized.[3] Pursuant to this plan, the hospitals bargained separately, but closely coordinated their strategy. They formed an advisory committee through which they shared information and formulated common goals for the negotiations. The goal of their strategy was to obtain common results, especially on economic issues. Each hospital, however, remained free to settle on individual terms.

The members of the advisory committee agreed to help each other withstand a strike, if one occurred. As part of their common strategy, the advisory committee members agreed that if the Union struck any of them, the other members would refuse to employ any of the striking nurses during the strike.[4]

The hospitals negotiated separately with the Union during the spring of 2001. In mid-May, North Memorial signed an agreement with the Union. The agreement included a "me-too clause" on wages. Pursuant to the "me-too clause," North Memorial agreed to match the highest wage rate agreed to by any of the other hospitals. The Union gave notice to Abbott Northwestern, Mercy, Methodist, HealthEast, United, and Fairview of its intent to strike. By the strike deadline, all the hospitals but Fairview had reached agreements with the Union. The agreements (including the one at North Memorial) all included no-strike/no-lockout clauses. In addition, they did not provide for wage re-openers. The Union commenced a strike at Fairview on June 3.

Following the onset of the strike, the hospitals, including Unity, contacted their temporary staffing agencies and instructed them not to refer for temporary assign-

[1] The Respondents have requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] We shall modify the judge's recommended Order in accordance with *Ferguson Electric*, 335 NLRB 142 (2001), and to conform to the violations found. We shall also substitute Apps. B, C, E, F, and G to conform to our Order.

[3] Unity, along with Abbott Northwestern, Mercy, and United, are Allina hospitals.

[4] There is no allegation that this common strategy was unlawful.

ments any striking Fairview nurses.[5] A number of Fairview nurses contacted temporary staffing agencies following the commencement of the strike. The temporary agencies repeatedly told the applicants that they could not place any striking nurses who did not meet the 3-month tenure criterion.

The temporary agencies sent several striking nurses on assignments during the strike who did not meet the 3-month criterion. The hospitals refused to allow the striking nurses to work. The hospitals sent them home and threatened to fire the temporary agencies that supplied them in contravention of the hospitals' policy. At least one nurse applied directly to a hospital for work during the strike. The hospital required, as a condition of employment, that the nurse present proof that he had resigned from Fairview.

II.

The complaint alleged that the Respondents violated Section 8(a)(3) and (1) of the Act by refusing to consider or hire for temporary employment nurses employed by Fairview *because they were on strike* and by informing nurses employed by Fairview that they would not hire them *because they were on strike*.

The judge found that the Respondents' refusal to employ the striking nurses solely because they were on strike violated Section 8(a)(3) and (1). He rejected the Respondents'argument that their refusals to hire were lawful because they were not based on any antiunion animus, but rather were for the purpose of supporting their coordinated bargaining partner and advancing their own economic interests. The judge found that the Respondents were motivated by antiunion animus. The judge then made individual findings regarding each alleged act of discrimination.

The Respondents except, contending that because their policy of refusing to hire striking nurses constituted a legitimate economic weapon, the judge erred in finding it unlawful absent a finding of an unlawful intent. The Respondents argue that they were not motivated by antiunion animus. Instead, they contend that their only interest in adopting their refusal-to-hire policy was to engender a favorable economic outcome, akin to employers who lock out their employees. The Respondents also except to several of the judge's specific 8(a)(3) findings. They assert that the judge erroneously failed to require that the General Counsel affirmatively prove that the alleged discriminatees would have accepted employment had it been offered.

[5] If a striking nurse worked at a given hospital on a regular basis during the past 3 months, the nurse could continue to work for the hospital on that basis.

For the following reasons, we affirm the judge's finding that the Respondents' refusal to hire the striking applicants violated Section 8(a)(3) of the Act. Consequently, we also affirm the judge's finding that the Respondents violated Section 8(a)(1) by informing the Fairview nurses that they would not hire them because they were on strike. We find merit, however, in some of the Respondents'exceptions regarding individual allegations of discrimination and dismiss the corresponding complaint allegations.

III.

Section 8(a)(3) makes it an unfair labor practice for an employer to engage in "discrimination with regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization." As described, the Respondents readily admit that they refused to consider for hire or hire the Fairview nurses because they were on strike, and, indeed, the Respondents expressly told the nurses as much.

The Respondents, however, have raised the defense that their admitted discrimination against the Fairview strikers did not violate the Act because it was motivated only by a desire to support their coordinated-bargaining partners and to protect their economic interests. We find no merit in the Respondents' argument, for the following reasons.

As the judge did, we consider the Respondents' argument under *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 32 (1967). There, the Supreme Court held that "once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is on the employer to establish that he was motivated by legitimate objectives." 388 U.S. at 34 (emphasis in original).

Here, the Respondents' admitted refusal to consider for hire or hire the Fairview nurses because they were engaged in a protected strike clearly "could have adversely affected employee rights to some extent." It therefore was the Respondents' burden to establish that they had a legitimate and substantial business justification for their conduct. See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 380–381 (1967). The Respondents failed to carry this burden.

The Respondents, joined by our dissenting colleague, claim that they had a legitimate and substantial business justification for their conduct based on the possibility that, had the Respondents employed the striking Fairview nurses, the nurses might have been able to remain on strike for a longer period of time and thereby might have been able to negotiate higher wage rates at Fairview. The Respondents posit that, had this chain of events played out, it would have adversely affected their ability

to retain or hire nurses at lower contract rates, particularly given the nursing shortage in the relevant labor market. Under these circumstances, the Respondents contend, they were justified in refusing to hire the Fairview strikers, analogizing their conduct to a lockout under *American Ship Building v. NLRB*, 380 U.S. 300 (1965).

We reject this analogy and find that the Respondents' asserted concerns do not constitute a legitimate and substantial business justification for their discrimination against the Fairview nurses. Whatever the Respondents' legitimate economic interests were, they had been resolved through collective bargaining with the Union. The Respondents were not parties to the labor dispute between Fairview and the Union. The unionized Respondents freely abandoned multiemployer bargaining with the Union in favor of individual bargaining.[6] Each unionized Respondent thereby limited the scope of its dispute with the Union to their bilateral negotiations, and each successfully concluded its negotiations with the Union.

The only purpose of the Respondents' refusal to hire the striking Fairview nurses at that point was to influence the outcome of the ongoing dispute between Fairview and the Union. In effect, the Respondents expanded this bilateral labor dispute by introducing a new front of economic warfare. This conduct cannot be reconciled with the Act's objective of encouraging collective bargaining to reduce industrial strife.

This point is highlighted in *David Friedland Painting Co.*, 158 NLRB 571 (1966), enfd. 377 F.2d 983 (3d Cir. 1967). There, the Board adopted the judge's decision finding that the respondent unlawfully laid-off union-represented employees because their sister local union had struck an association (of which the respondent was not a member) of the respondent's competitors. In so doing, the Board rejected the respondent's claim that its actions were justified because it could be affected economically by the outcome of the contract negotiations between the association and the sister local union:

> Respondent was seeking to intrude in a labor dispute not its own, involving a union other than the one with which it was then in an untroubled relationship, for the reason that a settlement of the labor dispute favorable to that union could have an economic effect upon it. To allow this collateral or indirect interest in a labor dispute to be deemed a legitimate business interest sufficient to serve as justification for a lockout of Respondent's own employees is to arrive at a far-reaching result never intended by the Supreme Court in *American Ship Building*. It would lead to a proliferation of the use of the lockout so as to render it lawful in any situation where the employer making use of it against members of a certain union could arguably be affected economically by the outcome of particular negotiations between that union and another employer. It would be an invitation to industrial chaos rather than to industrial stability which the Act is designed to foster (emphasis added).

David Friedland Painting, 158 NLRB at 578. If permitted, the Respondents' use of economic weapons to influence the dispute between Fairview and the Union would lead to a similarly unacceptable expansion of labor disputes at the expense of industrial stability.

If the Respondent hospitals (other than nonunion Unity) wanted to protect themselves from the consequences of what any other area hospital might agree to, a mechanism existed (and, with the Union's consent, still exists) that would allow them to accomplish what they wanted in terms of mutual self-protection. The Respondents had only to remain in their longstanding multiemployer bargaining relationship with the Union, but each of them deliberately chose to withdraw from the multiemployer unit in the period from 1995 to 1998, thus, creating the competitive individual bargaining situation from which the Respondents now seek relief. This is one more reason not to permit their dispute-widening conduct here, even if motivated by common economic concerns.[7]

We disagree with our dissenting colleague's view that the Union was responsible for expansion of the Fairview labor dispute because the striking employees sought jobs with the Respondents. The Union did not use any economic weapons against the Respondents. The Fairview strikers asked only that the Respondents treat them in a nondiscriminatory fashion, as required by Section 8(a)(3).[8] If hired, their income could well have permitted them to remain on strike longer, possibly facilitating a settlement more favorable to the Union, but this potential effect falls far short of proving that the Union expanded its dispute with Fairview to encompass the Respondents.

[6] Respondent Unity did not have a relationship with the Union at all.

[7] Cf. *Longshoremen ILA (Lykes Bros. Steamship Co.)*, 181 NLRB 590 (1971), enfd. 443 F.2d 218 (1971), where the Board found several union respondents violated Sec. 8(b)(3), after they reached agreement for multiemployer bargaining units of longshoremen, by continuing to strike and refusing to sign the new contract until the employers reached agreement on a contract for a separate unit of clerks and checkers. The refusal to hire by the Respondent hospitals in this case represents a comparable effort to extend their bargaining power and influence beyond the bounds of the established bargaining units.

[8] Contrary to our dissenting colleague's suggestion, the Respondents would not have been "helping" the Union. The Respondents would only have been complying with Federal labor law by refraining from disadvantaging the strikers because of their protected union activity.

More importantly, the dissent's argument has no obvious limitation. Although this case involves employers in a coordinated bargaining group, the dissent's logic would effectively permit any employer, or at least any employer who reasonably feared an adverse impact on its business as the result of another employer's higher wage settlement with a union, to discriminate against job applicants solely because they were engaged in a protected economic strike against that other employer.[9] We cannot reconcile this result with the Act's prohibition of discrimination against persons who engage in protected concerted activity, including a lawful economic strike.

In addition, we find the use of the refusal to hire, as an economic weapon cannot be condoned as legitimate in the absence of negotiations between the Respondents and the Union.[10] The Respondents were not members with Fairview of a multiemployer bargaining group, were not engaged in collective bargaining with the Union at the time they refused to consider or hire the Fairview nurses, and were not subject to the threat that the Union could strike or use other economic weaponry against them with respect to wages or other issues in the Fairview negotiations. Of course, Unity's employees were not even represented by the Union.

The Respondents contend they are entitled to wield an economic weapon even though not in support of any bargaining position taken by them in negotiations with the Union. We disagree. While the Supreme Court has admonished that the Board cannot function "as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands,"[11] "the Board is only forbidden to pass judgment on a particular economic weapon if that weapon is 'used in support of genuine negotiations.'"[12] As previously stated, none of the Respondents were engaged in negotiations with the Union and they had no bargaining positions to support. In individual contracts for separate bargaining units, the Respondents and the Union reached agreement on wages and other terms and conditions of employment, without reservation of the right to reopen negotiations in the event the Union and another employer negotiated higher wage rates. We find the Respondents, having concluded their own negotiations, have no legitimate justification for disrupting the peaceful relations thereby established with the Union by using the refusal-to-hire weapon to coerce the Union and its employee supporters in negotiations with another employer.[13]

[9] See *David Friedland Painting Co.*, supra. We disagree with our colleague that the cited case is not controlling because it was decided before the Board's decision in *Harter Equipment*, where the Board held that the employer lawfully locked out and temporarily replaced its employees in support of the employer's position in a bargaining dispute with the union representative of those employees. The Board applied principles articulated by the Supreme Court in *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown*, 380 U.S. 278 (1965); and *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963). Each of those cases involved Board consideration of an asserted legitimate employer interest in defense of an action that had a discriminatory impact on the exercise of protected concerted activity. See also *NLRB v. Truck Drivers Local 449 (Buffalo Linen)*, 353 U.S. 87 (1957). The employer in *David Friedland Painting* relied on these cases in defense of its lockout, and both the Board and the third circuit found them to be distinguishable because the employer was not in bargaining negotiations and was not concerned about advancing its own bargaining position. Nothing in *Harter Equipment* suggests that this distinction is no longer valid.

[10] Our dissenting colleague asserts that under *Harter Equipment*, 280 NLRB 597, 600 fn. 9 (1986), affd. sub nom. *Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987), the Respondents must only establish that their justification was nonfrivolous. However, *Harter Equipment* only applied its nonfrivolous standard to the "substantial" aspect of the *Great Dane* test. Thus, an asserted justification may be substantial but still not cognizable as "legitimate." Here, as discussed above, the Respondents' justification contravenes statutory policy by threatening disruption of labor relations stability and the collective-bargaining process and, thereby, is not legitimate.

[11] *American Ship Building v. NLRB*, 380 U.S. 300, 317 (1965), quoting from *NLRB v. Insurance Agents (Prudential Insurance Co.)*, 361 U.S. 477, 497 (1960).

[12] *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 414 (D.C. Cir. 1996), quoting from *NLRB v. Katz*, 369 U.S. 736, 747 (1962) (emphasis added by D.C. Cir.). See also *Highland Superstores, Inc.*, 314 NLRB 146 (1994) (employer lockout unlawful because taken in retaliation against protected handbilling rather than in support of employer's bargaining position).

[13] Cf. *Standard Oil Co.*, 137 NLRB 690 (1962), enfd. 322 F.2d 40 (6th Cir. 1963), where the Board held that respondent unions in coordinated bargaining with *Standard Oil* violated Sec. 8(b)(3) by refusing to sign negotiated agreements at plants in Cleveland and Lima, Ohio, until the employer and one of the unions reached final agreement at a Toledo plant. The Board found that the unions had imported an extraneous issue (the Toledo bargaining) into the previously concluded bargaining situations at the Cleveland and Lima plants, much like the Respondent hospitals in this case have done by making the Fairview negotiations an issue after concluding their own negotiations with the Union. We note that the Sixth Circuit, in agreeing with the Board in *Standard Oil*, rejected the unions' reliance on *Insurance Agents* with the following observation: "In that case it was claimed that the union sponsored concerted on-the-job activities by its members of a harassing nature to interfere with the employer's business for the purpose of putting economic pressure on the employer to accede to the union's demands. The court held that economic pressure of this nature was not inconsistent with good-faith bargaining between the employer and the union. These harassing activities were going on during bargaining between the employer and the union. *They involved the parties to the negotiations and not parties negotiating on a separate contract*." 322 F.2d at 45 (emphasis added).

Our dissenting colleague argues that the Respondents' agreement not to hire strikers was lawful at its inception and, therefore, its implementation must be lawful. The lawfulness of the agreement at its inception, when all members of the coordinated bargaining group were beginning negotiations and faced the possibility of selective strike actions by the Union, is not at issue here. We address only the legality of the Respondents' refusal to hire after they completed their own separate negotiations and entered into contracts containing no-strike provisions with the Union.

We emphasize the limited nature of our decision in this case. Today, we hold only that employers who, like the Respondents, are not involved in collective bargaining may not violate the Section 7 rights of individuals who are engaged in a strike against another employer who is engaged in collective bargaining, where the substantial and legitimate interest asserted is an interest in the terms and conditions agreed to by the other employer. To hold otherwise would endorse the expansion of labor disputes and the accompanying use of economic weapons in an unprecedented manner.[14]

Having found that the Respondents failed to prove a substantial and legitimate justification for their discriminatory refusal-to-hire or consider-for-hire striking Fairview nurses, there is no need to reach the issue whether this discriminatory policy was "inherently destructive" within the meaning of *Great Dane*. For the foregoing reasons, we agree with the judge that the policy violated Section 8(a)(3) and (1) of the Act.

IV.

The Respondents, in the alternative, argue that even if their categorical refusal to consider or hire the striking Fairview nurses was unlawful, they have valid defenses specific to several of the discriminatees. We find merit to several of the Respondents' exceptions.[15]

We reverse the judge and dismiss the allegation that Respondent United unlawfully refused to consider or hire Christine Navratil. The record shows that Navratil only applied for positions through the Nursefinders temporary agency and that United did not use Nursefinders to place temporary nurses during the relevant time period. Similarly, we reverse the judge and dismiss the allegations that Respondents United, Mercy, and Unity unlawfully refused to consider or hire Gwen Friedlund because the record shows that Friedlund only applied for positions through the Firstat temporary agency and that United, Mercy, and Unity did not use Firstat during the relevant time period.

We also reverse the judge's finding that Respondent North Memorial unlawfully refused to consider or hire Diane Fischer. The complaint does not allege this violation. We also reverse the judge and dismiss the allegation that North Memorial unlawfully refused to consider or hire Charlenea Bryant-Wolf. The record shows that shortly before Bryant-Wolf was scheduled to work a shift at North Memorial, the temporary agency that had secured the shift for her informed her that North Memorial had cancelled her shift. There is no evidence in the record that North Memorial cancelled Bryant-Wolf's shift because she was a striker or that anyone at North Memorial even knew that the temporary agency had referred a striker. Moreover, when the temporary agency immediately offered Bryant-Wolf additional shifts at North Memorial, she refused them. At the hearing, Bryant-Wolf admitted that she was not particularly interested in working during the strike. Accordingly, the General Counsel failed to prove that North Memorial refused to hire Bryant-Wolf because she was a striker.[16]

ORDER

A. Respondent Allina Health System d/b/a Abbott Northwestern Hospital, Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that it will not consider for temporary employment, and will not employ temporarily, employees because they are strikers or are on strike against another employer.

(b) Refusing to consider for temporary employment, refusing to hire for temporary employment, or otherwise discriminating against Leslie Stoner, Gwen D. Friedlund, Allison Pennington Haddon, Lorrie LaForge, or any other employee because of participation in a strike in support of the bargaining proposals and positions of Minnesota Nurses Association, or any other labor organization.

(c) 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) Make Leslie Stoner, Gwen D. Friedlund, Allison Pennington Haddon, and Lorrie L. LaForge 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.

(b) Preserve and, within 14 days of a request, or 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

[14] Because of the facts of this case, and the arguments made by the General Counsel and the Respondent, we need not address here whether an employer, in a situation like the Respondents' could articulate an interest which, although aligned with the interest of the struck employer, was not inextricably intertwined with the terms and conditions to be agreed to in collective bargaining by the struck employer. Here, the Respondents' avowed reason for its discriminatory conduct was so inextricably intertwined.

[15] We also find merit in the General Counsel's exception to the judge's apparently inadvertent failure to find unlawful Respondent HealthEast's refusal to consider or hire Cheryl Grote.

[16] Bryant-Wolf's testimony that she was not really interested in working during the strike also requires that we reverse the judge and dismiss the allegation that Respondent HealthEast unlawfully refused to hire Bryant-Wolf.

security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amounts of backpay due under the terms of this Order.

(c) Within 14 days from the date of this Order, remove from its files any reference to the refusals to consider for temporary employment and the refusals to hire for temporary employment Leslie Stoner, Gwen D. Friedlund, Allison Pennington Haddon, and Lorrie L. LaForge during June 2001, and within 3 days thereafter notify each of them in writing that this has been done and that those refusals to consider for temporary employment and temporarily hire will not be used against any of them in any way.

(d) Within 14 days after service by the Region, post at its Minneapolis, Minnesota office and place of business, copies of the attached notice marked "Appendix A"[17] Copies of the notice on forms provided by the Regional Director for Region 18, after being signed by its duly authorized representative, shall be posted by Allina Health System d/b/a Abbott Northwestern Hospital 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 it 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, it has gone out of business or closed its Minneapolis office and place of business, Allina Health System d/b/a Abbott Northwestern Hospital shall duplicate and mail, at its own expense, copies of the notice to all current employees and former employees employed by it at its Minneapolis office and place of business at any time since June 6, 2001.

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by Maxim Healthcare Services, Intellistaff Healthcare, and Firstat Nursing Services, if willing, at all locations where notices to their employees are customarily posted.

(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 it has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint, as amended, in Case 18–CA–16051–1 be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein.

B. Respondent Allina Health System d/b/a Mercy Hospital, Coon Rapids, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that it will not consider for temporary employment, and will not employ temporarily, employees because they are strikers or are on strike against another employer.

(b) Refusing to consider for temporary employment, refusing to hire for temporary employment, or otherwise discriminating against Rebecca Wegner or any other employee because of participation in a strike in support of the bargaining proposals and positions of Minnesota Nurses Association, or any other labor organization.

(c) 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) Make Rebecca Wegner whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

(b) Preserve, and within 14 days of a request, or 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 the records if stored in electronic form, necessary to analyze the amounts of backpay due under the terms of this Order.

(c) Within 14 days from the date of this Order, remove from its files any reference to the refusal to consider for temporary employment and the refusal to hire for temporary employment Rebecca Wegner, and within 3 days thereafter, notify Wegner in writing that this has been done and that the refusal to consider for temporary employment and temporarily hire will not be used against her in any way.

(d) Within 14 days after service by the Region, post at its Coon Rapids, Minnesota office and place of business, copies of the attached notice marked "Appendix B."[18] Copies of the notice on forms provided by the Regional Director for Region 18, after being signed by its duly authorized representative, shall be posted by Allina Health System d/b/a Mercy Hospital 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 it to ensure

[17] 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."

[18] See fn. 17, infra.

that the notices are not altered, defaced, or covered by another material. In the event that, during the pendency of these proceedings, it has gone out of business or closed its Coon Rapids office and place of business, Allina Health System, d/b/a Mercy Hospital shall duplicate and mail, at its own expense, copies of the notice to all current employees and former employees employed by it at its Coon Rapids office and place of business at any time since June 4, 2001.

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by Favorite Nurses-Favorite Temps and Nursefinders, if willing, at all locations where notices to their employees are customarily posted.

(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 it has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint, as amended, in Case 18–CA–16051–2 be, and it is, dismissed insofar as it alleges violations of the Act not found herein.

C. Respondent North Memorial Healthcare d/b/a North Memorial Medical Center, Robbinsdale, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist

(a) Telling employees that it will not consider for temporary employment, and will not employ temporarily employees because they are strikers or are on strike against another employer.

(b) Refusing to consider for temporary employment, refusing to hire for temporary employment, or otherwise discriminating against Marie Madsen, Kathy Smedstad, Laura Schuerman, Leslie Stoner, Ed Moeller, Christine Navratil, Allison Pennington Haddon, or any other employee because of participation in a strike in support of the bargaining proposals and positions of Minnesota Nurses Association, or any other labor organization.

(c) 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) Make Marie Madsen, Kathy Smedstad, Laura Scherman, Leslie Stoner, Ed Moeller, Christine Navratil, and Allison Pennington Haddon 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.

(b) Preserve, and within 14 days of a request, or 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 the records if stored in electronic form, necessary to analyze the amounts of backpay due under the terms of this Order.

(c) Within 14 days from the date of this Order, remove from its files any reference to the refusals to consider for temporary employment and the refusals to hire for temporary employment Marie Madsen, Kathy Smedstad, Laura Schuerman, Leslie Stoner, Ed Moeller, Christine Navratil, and Allison Pennington Haddon, and within 3 days thereafter, notify each of them in writing that this has been done and that the refusals to consider for temporary employment and temporarily hire will not be used against any of them in any way.

(d) Within 14 days after service by the Region, post at its Robbinsdale, Minnesota office and place of business, copies of the attached notice marked "Appendix C."[19] Copies of the notice on forms provided by the Regional Director for Region 18, after being signed by its duly authorized representative, shall be posted by North Memorial Healthcare d/b/a North Memorial Medical Center 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 it 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, it has gone out of business or closed its Robbinsdale office and place of business, North Memorial Healthcare d/b/a North Memorial Medical Center shall duplicate and mail, at its own expense, copies of the notice to all current employees and former employees employed by it at its Robbinsdale office and place of business at any time since May 25, 2001.

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by VitaSTAFF Nursing Services, Professional Resources Network, Nursefinders, and Firstat Nursing Services, if willing, at all locations where notices to their employees are customarily posted.

(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 it has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint, as amended, in Case 18–CA–16051–9 be, and it is, dismissed insofar as it alleges violations of the Act not found herein.

[19] See fn. 17, infra.

D. Respondent Methodist Hospital, Park Nicollet Health Services, St. Louis Park, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that it will not consider for temporary employment, and will not employ temporarily, employees because they are strikers or are on strike against another employer.

(b) Refusing to consider for temporary employment, refusing to hire for temporary employment, or otherwise discriminating against William Weber, Teresa Weidenbacher, Kathy Holm, Laura Schuerman, Jill Moy, Mary Hanger, Ed Moeller, Leslie Stoner, Cheryl Grote, Allison Pennington Haddon, or any other employee because of participation in a strike in support of the bargaining proposals or positions of Minnesota Nurses Association, or any other labor organization.

(c) 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) Make William Weber, Teresa Weidenbacher, Kathy Holm, Laura Schuerman, Jill Moy, Mary Hanger, Ed Moeller, Leslie Stoner, Cheryl Grote, and Allison Pennington Haddon 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.

(b) Preserve, and within 14 days of a request, or 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 the records if stored in electronic form, necessary to analyze the amounts of backpay due under the terms of this Order.

(c) Within 14 days from the date of this Order, remove from its files any reference to the refusals to consider for temporary employment and the refusals to hire for temporary employment William Weber, Teresa Weidenbacher, Kathy Holm, Laura Schuerman, Jill Moy, Mary Hanger, Ed Moeller, Leslie Stoner, Cheryl Grote, and Allison Pennington Haddon, and within 3 days thereafter notify each of them in writing that this has been done and that the refusals to consider for temporary employment and temporarily hire will not be used against any of them in any way.

(d) Within 14 days after service by the Region, post at its St. Louis Park, Minnesota office and place of business copies of the attached notice marked "Appendix D."[20] Copies of the notice on forms provided by the Regional Director for Region 18, after being signed by its duly authorized representative, shall be posted by Methodist Hospital, Park Nicollett Health Services 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 it 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, it has gone out of business or closed its St. Louis Park office and place of business, Methodist Hospital, Park Nicollett Health Services shall duplicate and mail, at its own expense, copies of the notice to all current employees and former employees employed by it at its St. Louis Park office and place of business at any time since June 7, 2001.

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by Intrepid U.S.A. Inc. d/b/a/ New Horizons Home Care and Nursing Services, VitaSTAFF Nursing Services, Professional Resources Network, Nursefinders, and Firstat Nursing Services, if willing, at all locations where notices to their employees are customarily posted.

(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 it has taken to comply.

E. Respondent HealthEast d/b/a HealthEast Care System, Maplewood and St. Paul, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that it will not consider for temporary employment, and will not employ temporarily, employees because they are strikers or are on strike against another employer.

(b) Refusing to consider for temporary employment, refusing to hire for temporary employment, or otherwise discriminating against Leslie Stoner, Allison Pennington Haddon, Stephanie Schaan, Cheryl Grote, or any other employee because of participation in a strike in support of the bargaining proposals and positions of Minnesota Nurses Association, or any other labor organization.

(c) 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) Make Leslie Stoner, Allison Pennington Haddon, Stephanie Schaan, and Cheryl Grote whole for any loss

[20] See fn. 17, infra.

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.

(b) Preserve, and within 14 days of a request, or 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 the records if stored in electronic form, necessary to analyze the amounts of backpay due under the terms of this Order.

(c) Within 14 days from the date of this Order, remove from its files any reference to the refusals to consider for temporary employment and the refusals to hire for temporary employment Leslie Stoner, Allison Pennington Haddon, Stephanie Schaan, and Cheryl Grote, and within 3 days thereafter notify each of them in writing that this has been done and that the refusals to consider for temporary employment and temporarily hire will not be used against any of them in any way.

(d) Within 14 days after service by the Region, post at its Maplewood and St. Paul, Minnesota offices and places of business, including specifically St. John's Hospital, St. Joseph's Hospital, and Bethesda Rehabilitation Hospital, copies of the attached notice marked "Appendix E."[21] Copies of the notice on forms provided by the Regional Director for Region 18, after being signed by its duly authorized representative, shall be posted by HealthEast d/b/a HealthEast Care System 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 it 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, it has gone out of business or closed any of its Maplewood or St. Paul offices and places of business, HealthEast d/b/a HealthEast Care System shall duplicate and mail, at its own expense, copies of the notice to all current employees and former employees employed by it at the facility, or facilities, that has, or have, gone out of business or closed at any time since June 7, 2001.

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by VitaSTAFF Nursing Services, Nursefinders, and Firstat Nursing Services, if willing, at all locations where notices to their employees are customarily posted.

(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 it has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint, as amended, in Case 18–CA–16051–11 be, and it is, dismissed insofar as it alleges violations of the Act not found herein.

F. Respondent Allina Health System d/b/a Unity Hospital, Fridley, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that it will not consider for temporary employment, and will not employ temporarily, employees because they are strikers or are on strike against another employer.

(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 after service by the Region, post at its Fridley, Minnesota office and place of business, copies of the attached notice marked "Appendix F."[22] Copies of the notice on forms provided by the Regional Director of Region 18, after being signed by its duly authorized representative, shall be posted by Allina Health System d/b/a Unity Hospital and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily placed. Reasonable steps shall be taken by it to ensure that the notices to employees are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, it has gone out of business or closed its Fridley office and place of business, Allina Health System d/b/a Unity Hospital shall duplicate and mail, at its own expense, copies of the notice to all current employees and former employees employed by it at its Fridley office and place of business at any time since June 4, 2001.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by Nursefinders, if willing, at all locations where notices to its employees are customarily posted.

(c) 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 it has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint, as amended, in Case 18–CA–16051–12 be, and it is hereby, dismissed insofar as it alleges violations of the Act not found herein.

[21] See fn. 17, infra.

[22] See fn. 17, infra.

G. Respondent Allina Health System d/b/a United Hospital, St. Paul, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that it will not consider for temporary employment, and will not employ temporarily, employees because they are strikers or are on strike against another employer.

(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 after service by the Region, post at its St. Paul, Minnesota office and place of business, copies of the attached notice marked "Appendix G."[23] Copies of the notice on forms provided by the Regional Director for Region 18, after being signed by its duly authorized representative, shall be posted by Allina Health System d/b/a United Hospital 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 it 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, it has gone out of business or closed its St. Paul office and place of business, Allina Health System d/b/a United Hospital shall duplicate and mail, at its own expense, copies of the notice to all current employees and former employees employed by it at its St. Paul office and place of business at any time since June 6, 2001.

(b) Sign and return to the Regional Director sufficient copies of the notice for posting by Nursefinders and Firstat Nursing Services, if willing, at all locations where notices to their employees are customarily posted.

(c) 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 it has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint, as amended, in Case 18–CA–16051–13 be, and it hereby is, dismissed insofar as it alleges violations of the Act not found herein.

MEMBER LIEBMAN, concurring.

Like Member Meisburg, I subscribe to the majority opinion, finding that certain of the Respondents' hospitals violated Section 8(a)(3) of the Act when they refused to hire Fairview Hospital's nurses for available temporary jobs because the nurses were engaged in a strike against Fairview Hospital. "The Board has recognized that the right to seek interim employment is a vital adjunct to the exercise of the right to strike and is itself protected activity." *Zimmerman Plumbing & Heating Co*., 339 NLRB 1302, 1304 (2003), citing *Christie Electric Corp.,* 284 NLRB 740, 759 (1987). I write separately to express my view that the Respondents' conduct here was inherently destructive of the nurses' Section 7 rights.

In *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), the Supreme Court summarized its earlier opinions[1] dealing with employer motivation in 8(a)(3) cases. The Court identified two categories of cases: (1) cases where employer conduct has only a "comparatively slight" impact on employee rights, such that, if the employer proves a "legitimate and substantial business justification" for the conduct, then a violation may be found only if the General Counsel establishes improper motive; and (2) cases where employer conduct is "so 'inherently destructive of employee interests' that it may be deemed proscribed without need for proof of an underlying improper motive." Id. at 33–34. The Court made clear that, in the latter category, the fact that the employer may have business justifications for its conduct is not necessarily a defense. Id. The "Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." Id.

For the purposes of its analysis, the majority opinion in essence assumes that the impact of the Respondents' conduct was "comparatively slight" and then correctly finds that the Respondents did not establish a legitimate business reason for their refusal to hire the striking Fairview nurses, which accordingly was unlawful. Thus, the majority did not need to reach the question whether the conduct was inherently destructive of employee rights. However, I would go further.

The Respondent blacklisted the nurses because they were engaged in lawful strike activity. This conduct was inherently destructive of the nurses' right to strike—one of the most fundamental Section 7 rights and one expressly protected by the statute. See *NLRB v. Erie Resistor Corp.*, supra 373 U.S. at 234–235.[2] Only the rare

[23] See fn. 17, infra.

[1] *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965), *NLRB v. Brown*, 380 U.S. 278 (1965), and *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

[2] The Supreme Court and the Board have always been vigilant in safeguarding the right to strike. See, e.g., *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (employer unlawfully refused to consider for hire former strikers); *Handy Andy, Inc.*, 313 NLRB 616 (1993), enfd. in pertinent part, sub nom. *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334 (D.C. Cir. 1995) (same); *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393 (1998), enfd. mem. 215 F.3d 1327

employee would strike, knowing not only that she could be permanently replaced by her own employer, but also that other employers in the same industry could legally refuse to hire her, simply because she was a striker. In my view, the need to protect the nurses' basic right to strike outweighs whatever legitimate business interest the Respondents may have had in making common cause with the struck employer. I would find a violation on that basis, as well as for the reasons explained in the majority opinion.

MEMBER MEISBURG, concurring in part.

For the reasons set forth in the majority opinion, I join Member Liebman in finding that certain of the Respondent hospitals violated the Act when they refused to hire another hospital's nurses for available temporary jobs because the nurses were engaged in a strike against their employer. I write separately to emphasize my additional concern about the Respondents' defense of their action.

For nearly 60 years it has been the statutory policy of the United States to place limits on the scope of labor disputes and to provide protections to neutral parties from involvement in matters that do not directly pertain to their own labor relations. Statutory language, and most of the case law interpreting it, focus on the circumscription of secondary *union* activity, but the same fundamental policy "of shielding unoffending employers *and others* from pressures and controversies not their own"[1] should inform our assessment of the legality of an employer's use of coercive weaponry to pursue secondary objectives that affect the statutory rights of employees.

In my view, the Board should not recognize the legitimacy of the Respondents' defense in this case, because to do so would broaden permissible economic pressure in a primary economic dispute in a way that would likely obscure, in future cases, the traditional boundaries between permissible primary conduct and impermissible secondary conduct. If the Board were to recognize the interest asserted by the Respondents here as justification for their refusal to hire employees engaged in concerted protected activity, it would risk significantly expanding the current limits of primary economic pressure, and thereby expose to economic injury employers, unions, and employees with no direct involvement in the primary bargaining dispute.

Essentially, what we hold here today is this: An employer (Employer A), who is not engaged in active collective bargaining with a union, may not violate the Section 7 rights of individuals who are engaged in a strike against another employer who is engaged in collective bargaining (Employer B), where the only justification asserted by Employer A is its interest in the terms and conditions agreed to by Employer B in bargaining. To hold otherwise would permit Employer A to make common cause with Employer B, outside the accepted structure of multiemployer bargaining, and thereby perhaps endorse the expansion of labor disputes in a way that is contrary to our national policy favoring the limitation of labor disputes to the primary parties.[2]

CHAIRMAN BATTISTA, dissenting.

Contrary to my colleagues, I disagree with the judge's finding that the Respondents violated Section 8(a)(3) of the Act by refusing to hire the striking Fairview nurses during their strike.

I.

With the exception of Unity, all of the Respondents were longtime members of a multiemployer bargaining group. By 1998, the multiemployer group had disbanded. During the 1998 negotiations, some employers reached higher wage agreements than others.

As the Respondents approached the 2001 negotiations, the Minneapolis area was in the midst of a severe nursing shortage. The Respondents competed against each other for nurses. Any increase in wages at one hospital required a similar rise at the other hospitals in order for them to remain competitive in the labor market.

In order to ameliorate this situation, the Respondents changed the structure of their bargaining for the 2001 round of negotiations. They agreed on the need to coordinate their bargaining strategy. The higher wage rates of some employers had put great pressure on the others during the term of the 1998 agreements. The parties wanted to avoid replicating that situation. As a result, the parties created a coordinated bargaining group. The purpose of the group was to advance the members' interest in achieving common terms concerning economic and major noneconomic matters. Relatedly, another purpose of the group was to develop a plan to assist any member

(6th Cir. 2000) (employer unlawfully refused to employ substitute pressmen because they were on strike against another employer); *Grand Rapids Press*, 325 NLRB 915 (1998), enfd. mem. 208 F.3d 214 (6th Cir. 2000) (same).

[1] *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951) (emphasis added).

[2] The dissent states that I would "forbid an employer from protecting its own interest simply because that interest is *related to the events* in another employer's unit." (Emphasis added.) Putting aside whether I would forbid an employer to do that, the Respondent's actions here are not simply "related to the events" in another employer's unit. Rather, the Respondent—in refusing to consider or hire the striking nurses—admittedly intended to assist the struck employer in resisting the nurse's bargaining demands. The fact that the Respondent thought it would benefit as a result does not validate its conduct.

in weathering a strike. The members were particularly concerned that the Union would engage in selective strikes against some of the hospitals, and the strikers would then obtain temporary employment at the other hospitals, thus, prolonging their ability to continue the strike. The coordinated bargaining partners therefore agreed that, in the event of a strike against any one of them, the others would not hire striking nurses. The Respondents believed that such a strategy would help a struck hospital to resist demands for higher wages. As discussed, higher wages at one hospital would mean that the others could lose qualified nurses.

The Respondents maintained the goals of their coordinated bargaining plan throughout the 2001 negotiations. Shortly before the 1998 contracts were to expire, all the Respondents except Fairview reached and signed agreements with the Union. The Union struck Fairview. As previously agreed, the Respondents refused to hire any striking Fairview nurses during the strike. The Respondents did not take any action against their own nurses.

II.

I agree with my colleagues in the majority that the Supreme Court's decision in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), provides the appropriate analytical starting point. As the majority states, the Supreme Court held that the General Counsel need not adduce independent proof of antiunion animus in 8(a)(3) cases in two circumstances: (1) where the employer's conduct is inherently destructive of employees' rights and (2) where the employer's discriminatory conduct has only a comparatively slight impact on employees' rights, but the employer fails to prove that it had a "legitimate and substantial business justification" for such conduct. Id. at 34. My colleagues conclude that this case presents the second situation. I disagree. The Respondents have proved a legitimate and substantial business justification for their refusal to hire the striking Fairview nurses.

No party disputes that the Minneapolis area was in the midst of a severe nursing shortage at the time of the events. The Respondents provided ample evidence that their ability to retain sufficient nurses to fill their patients' needs was directly linked to the wages paid to nurses at each of the other institutions. The Respondents' uncontradicted testimony was that the Respondents directly competed with each other for nurses, and that a wage increase at one hospital would put "extreme pressure" on the others. Indeed, the judge found that "there was no evidence to the contrary."

Moreover, there is no dispute on the other key facts underlying the Respondents' justification for their refusal to hire the striking nurses. Thus, the striking Fairview nurses' ability to procure temporary employment would significantly assist them in sustaining a strike. It is beyond dispute that the longer the strike went on, the greater would be the pressure on Fairview to accede to the Union's demands, including demands for higher wages. In light of this concern, the Respondents did not wish to do anything to assist the Union in its strike against Fairview. For, a union victory at Fairview, i.e. a high wage agreement at Fairview, would inevitably lead to a loss of nurses to Fairview. Indeed, this concern was a primary reason for the cooperative arrangement among the hospitals. If there were a strike against one of them, the others did not wish to aid that strike by hiring the strikers.

Significantly, there is no contention that the arrangement was unlawful. Accordingly, I fail to see how the implementation of the arrangement was unlawful. The fact that the dispute and strike were ultimately confined to one employer did not mean that the plan was no longer operative. There was nothing in the plan to indicate that it was confined to a situation where all employers remained in dispute with the Union. The plan said that a strike at *any* employer would call for a nonhiring of strikers by the others. And, as discussed, a primary reason for the plan continued, even though all employers had settled except one.[1]

I recognize that the economic dispute for the Respondents was over. However, that did not diminish the concern set forth above. Nor did it take away the prime reason for the arrangement as described above. Although the Respondents had made their deal with the Union, there remained the danger that Fairview would be forced to settle for a higher wage package. The Respondents did not wish to help the Union achieve that goal. To do otherwise would force a Hobson's choice on each Respondent if the Union settled for higher wages at Fairview—either risk the loss of qualified nurses to Fairview or raise their own wage rates above those they already had reached in the negotiations with the Union. Faced with spiraling health care costs and a nursing shortage, neither was an enviable prospect.

[1] The majority questions the relevance and legality of the arrangement after the dispute with others had been resolved. The relevance is that the legitimate and substantial interest that rendered the arrangement lawful at its inception remained unchanged throughout the relevant time period. It is true that, at the arrangement's inception, each of the Respondents had an interest in securing the support of its coordinated bargaining partners in case it became a strike target. However, that was not the Respondents' only interest at the arrangement's inception. Because of the severe nursing shortage, from the outset, the Respondents were vulnerable to wage pressure from high wage settlement at any of the hospitals, regardless of the status of the Respondents' own negotiations. Since such an interest was lawful at the outset and that interest continued, the majority does not adequately explain how the arrangement became unlawful.

My colleagues contend that all of the Respondent's economic interests were resolved in bargaining with the Union. However, as shown above, this could not be true. The Respondents had an economic interest in the bargaining at Fairview, and this interest obviously could not be resolved in the Respondent-Union bargaining.

The Respondents' justification for their action therefore was clearly substantial. As the Board has held, "substantial," in this context, means nonfrivolous. See *Harter Equipment*, 280 NLRB 597, 600 fn. 9 (1986), affd. sub nom. *Operating Engineers Local 825 v. NLRB*, 829 F.2d 458 (3d Cir. 1987). Given the shortage of nurses in the area and the competitive market for these scarce nurses, the Respondents' interest easily met that standard. As to whether the interest is "legitimate," it is clear to me that a hospital's interest in retaining its skilled nurses is not an unlawful one.

My colleagues say that the Respondents could have protected themselves by retaining the multiemployer bargaining that once existed. That may be true, but it does not follow that this is the *only* way they could protect themselves. *Great Dane* requires only that there be a legitimate and substantial reason for the action. It does not require that this action be the only way that an employer can defend itself.

The majority contends that its decision will not compel the Respondents to "help" the Union because it only requires that the Respondents forbear from violating the law. The majority's reasoning is tautological. The Respondents' conduct here is unlawful only because the Board says it is. The parties did not dispute the factual foundation of the Respondents' assertion that a finding of a violation would compel them to assist the Union, i.e. that hiring the striking Fairview nurses will allow the nurses to sustain the strike for a longer period and that a longer strike will lead to higher wages at Fairview. Contrary to the majority's insinuation otherwise, the judge found that there was no dispute on this foundation.

The majority relies heavily on the Board's decision in *David Friedland Painting Co., Inc.*, 158 NLRB 571 (1966). *David Friedland*, however, is distinguishable. In that case, the employer took the initiative by laying off its own employees because they were members of a local that was a sister to a local with a labor dispute elsewhere. 158 NLRB at 575–576. Here, the Respondents did not take any action against their own employees, but rather refrained from aiding another employer's employees. Moreover, *David Friedland* was also decided prior to the Board's decision in *Harter Equipment*, in which, as discussed above, the Board held that to be substantial, an employer's interest need only be nonfrivolous. Thus, *David Friedland* does not address a critical determination at issue in this case—whether the Respondents' interest in the Fairview labor dispute meets the Board's definition of substantial. Under these circumstances, I do not believe that *David Friedland* is controlling.

The majority argues that to recognize the Respondents' legitimate interest here would require the Board to permit discrimination against any striking job applicants. I disagree. My conclusion is limited to facts of the instant case. Here, the Respondents were coordinated bargaining partners with the struck employer. They formulated the plan to support each other in the case of a strike against any one of them. No one has alleged that the plan was unlawful. There was undisputedly a tight labor market. The Respondents here took action to protect their self interests. That does not mean that any and all employer responses to strikes at other institutions in different circumstances would be lawful.

Contrary to my colleagues in the majority, I do not agree that the Respondent's conduct was illegitimate because it attempted to influence events at another employer's workplace or that it "introduc[ed] a new front of economic warfare." The Respondents' conduct and motivation were wholly focused on their own primary interests. They made decisions about whom to hire at their own facilities in order to serve their own interest in retaining their own employees and controlling their own costs. The Respondents did not put pressure on Fairview to alter its behavior in order to serve the Respondents' interests. Nor did the Respondents take action against their own employees as a means of exerting pressure on the Fairview nurses.

Similarly, the Respondents did not reach out to enmesh themselves in the Fairview dispute. The Fairview strikers themselves brought the dispute to the Respondents by seeking temporary employment. The Fairview strikers essentially asked the Respondents to aid them in weathering the strike by ameliorating the pain that usually accompanies employees' decision to strike—that is, the loss of wages for the duration of a strike. Thus, the Respondents were faced with a choice between assisting the Union in bringing about an economic outcome that would be to the Respondents' own detriment *or* acting in their own economic self-interest by refusing to temporarily hire the strikers. The Respondents made the latter choice. There is nothing unlawful in that choice. The Respondents have simply defended against the initiative of the striking nurses to ameliorate the negative effects that the strike had on them and to thereby enhance their use of the strike weapon.

My colleagues say that the Board is not the arbiter of the use of an economic weapon. I agree. However, it is

my colleagues, not I, who are condemning the employer's "weapon" as unlawful.

Finally, each of my colleagues adds a rationale to the majority rationale. Neither of these rationales has majority support. In any event, neither rationale is valid. Member Meisburg would forbid an employer from protecting its own interest simply because that interest is related to the events in another employer's unit. The argument has no merit. Under *Great Dane*, the employer's interest need only be substantial and legitimate. There is nothing in *Great Dane* to suggest that the employer's interest is illegitimate simply because it is tied to external events.[2]

Member Liebman asserts that she agrees with the majority that this case is properly analyzed under *Great Dane* as a case with a comparatively slight effect on employees' Section 7 rights. She also, however, asserts in her concurrence that she would find that the Respondents' conduct was inherently destructive of employees' rights.

Initially, I note that the General Counsel did not allege the "inherently destructive" theory of violation, and he did not litigate or brief the case on that basis. Further, the Respondents' conduct did not unduly burden the striking Fairview nurses' right to strike. A loss of pay is a risk attendant to the exercise of the right to strike, and the employees were seeking to avoid that risk. The Respondents simply were unwilling to help them in their effort to avoid the risk. Indeed, the Respondents' conduct did not even preclude the striking Fairview nurses from earning an income during the strike. They were free to seek employment with any hospital that was not a part of the coordinated bargaining group. Accordingly, I fail to see how the Respondents' refusal to hire the striking nurses during the strike was inherently destructive of their right to strike.

Therefore, I would reverse the judge and dismiss the complaint.

APPENDIX B

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 tell you that we will not consider employees for temporary employment, and will not hire employees temporarily, because they are strikers or are on strike against another employer.

WE WILL NOT refuse to consider for temporary employment, refuse to hire for temporary employment, or otherwise discriminate against Rebecca Wegner, or any other employee, because of participation in a strike in support of the bargaining proposals and positions of Minnesota Nurses Association, or any other union.

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

WE WILL make Rebecca Wegner whole for any loss of earnings and other benefits resulting from our unlawful refusals to consider her for temporary employment and from our unlawful refusals to hire her for temporary employment during June 2001, less any net earnings, plus interest.

WE WILL remove from our files any reference to the unlawful refusals to consider for temporary employment and to the unlawful refusal to hire for temporary employment Rebecca Wegner and WE WILL, within 3 days thereafter notify her in writing that this has been done, and that those unlawful refusals, to consider her for temporary employment and to hire her for temporary employment, will not be used against her in any way.

ALLINA HEALTH SYSTEM D/B/A MERCY HOSPITAL

APPENDIX C

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

[2] The distinction between primary and secondary activity is based on Sec. 8(b)(4)(B), a provision obviously not involved herein. In any event, as shown, the Respondents here had a primary interest in retaining nurses.

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell you that we will not consider employees for temporary employment, and will not hire employees temporarily, because they are strikers or are on strike against another employer.

WE WILL NOT refuse to consider for temporary employment, refuse to hire for temporary employment, or otherwise discriminate against Marie Madsen, Kathy Smedstad, Laura Schuerman, Leslie Stoner, Ed Moeller, Christine Navratil, Allison Pennington Haddon, or any other employee, because of participation in a strike in support of bargaining proposals and positions of Minnesota Nurses Association, or any other union.

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

WE WILL make Marie Madsen, Kathy Smedstad, Laura Schuerman, Leslie Stoner, Ed Moeller, Christine Navratil, and Allison Pennington Haddon whole for any loss of earnings and other benefits resulting from our unlawful refusals to consider them for temporary employment and our unlawful refusals to hire them for temporary employment, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful refusals to consider for temporary employment and to the unlawful refusals to hire for temporary employment Marie Madsen, Kathy Smedstad, Laura Schuerman, Leslie Stoner, Ed Moeller, Christine Navratil, and Allison Pennington Haddon, and WE WILL within 3 days thereafter notify each of them in writing that this has been done, and that those unlawful refusals, to consider any of them for temporary employment and to hire any of them for temporary employment will not be used against any of them in any way.

NORTH MEMORIAL HEALTHCARE D/B/A NORTH MEMORIAL MEDICAL CENTER

APPENDIX E

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 tell you that we will not consider employees for temporary employment, and will not hire employees temporarily, because they are strikers or are on strike against another employer.

WE WILL NOT refuse to consider for temporary employment, refuse to hire for temporary employment, or otherwise discriminate against Leslie Stoner, Allison Pennington Haddon, Stephanie Schaan, Cheryl Grote, or any other employees, because of participation in a strike in support of bargaining proposals and positions of Minnesota Nurses Association, or any other union.

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

WE WILL make Leslie Stoner, Allison Pennington Haddon, Stephanie Schaan, and Cheryl Grote whole for any loss of earnings and other benefits resulting from our unlawful refusals to consider them for temporary employment and our unlawful refusals to hire them for temporary employment, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful refusals to consider for temporary employment and to the unlawful refusals to hire for temporary employment Leslie Stoner, Allison Pennington Haddon, Stephanie Schaan, and Cheryl Grote, and WE WILL within 3 days thereafter notify each of them in writing that this has been done, and that those unlawful refusals, to consider any of them for temporary employment and to hire any of them for temporary employment, will not be used against any of them in any way.

HEALTHEAST D/B/A HEALTHEAST CARE SYSTEM

APPENDIX F

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 tell you that we will not consider employees for temporary employment, and will not hire employees temporarily, because they are strikers or are on strike against another employer.

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

ALLINA HEALTH SYSTEM D/B/A UNITY HOSPITAL

APPENDIX G

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 tell you that we will not consider employees for temporary employment, and will not hire employees temporarily, because they are strikers or are on strike against another employer.

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

ALLINA HEALTH SYSTEM D/B/A UNITED HOSPITAL

Timothy B. Kohls and *Nicole Burgess-Peel*, for the General Counsel.

Paul J. Zech and *Thomas R. Trachsel (Felhaber, Larson, Fenlon & Vogt, P.A.),* of Minneapolis, Minnesota, for the Respondents.

Phillip I. Finkelstein, of St. Paul, Minnesota, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Minneapolis, Minnesota, on November 5–7, 2001.[1] On September 10 the Regional Director for Region 18 of the National Labor Relations Board (the Board) issued an Order consolidating cases, consolidated complaint, and notice of hearing, based on seven unfair labor practice charges,[2] each of which was filed on June 15, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record,[3] on the briefs that have been filed, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

From the perspective of the General Counsel and the Union—Minnesota Nurses Association, a labor organization within the meaning of Section 2(5) of the Act—this case presents relatively straightforward issues. On June 3 registered nurses (RNs) employed full time by Fairview Southdale Hospital and Fairview University Medical Center-Riverside Campus (Fairview) commenced a strike in support of bargaining proposals and positions, occurring during negotiations for a new contract between the Union and Fairview. Fairview, six of Respondents, and other hospitals in the Minneapolis-St. Paul metropolitan area each employ full-time RNs. Due to a shortage of RNs in that metropolitan area, however, each one augments its fulltime staff of RNs with temporarily-employed RNs, most obtained from temporary staffing agencies, as described in subsection B below.

Once the Fairview strike began, and throughout its duration until June 30, each of Respondents refused to consider for hire, and refused to hire, for temporary employment any of the striking Fairview RNs. The consolidated complaint, as amended, alleges that Respondents violated Section 8(a)(3) and (1) of the Act by that conduct. In addition, it alleges that various statements made to employees—essentially, that strikers would not

[1] Unless stated otherwise, all dates occurred during 2001.

[2] Against Allina Health System d/b/a Abbott Northwestern Hospital (Respondent Abbott Northwestern) in Case 18–CA–16051–1; against Allina Health System d/b/a Mercy Hospital (Respondent Mercy) in Case 18–CA–16051–2; against North Memorial Healthcare d/b/a North Memorial Medical Center (Respondent North Memorial) in Case 18–CA–16051–9; against Methodist Hospital, corrected during hearing to Methodist Hospital, Park Nicollett Health Services, (Respondent Methodist) in Case 18–CA–16051–10; against HealthEast d/b/a HealthEast Care System (Respondent HealthEast) in Case 18–CA–16051–11; against Allina Health System d/b/a Unity Hospital (Respondent Unity) in Case 18–CA–16051–12; and, against Allina Health System d/b/a United Hospital (Respondent United) in Case 18–CA–16051–13. Collectively they are referred to as Respondents.

[3] The joint motion to amend transcript and the joint motion to further amend transcript are granted.

be considered for temporary employment and would not be temporarily employed, because they were strikers or were on strike at Fairview—independently violated Section 8(a)(1) of the Act, because such statements naturally tended to interfere with, restrain, and coerce employees in the exercise of their statutory right to engage in strikes in support of their bargaining agents' proposals and positions during contract negotiations.

Most of the facts are either admitted or, at least, uncontested. The shortage of RNs in the Twin Cities metropolitan area obliged each of Respondents to augment their full-time complement of RNs during June. During the strike at Fairview each of Respondents temporarily employed RNs, for the most part on a day-by-day basis. There is no argument concerning the fact that the striking Fairview RNs had been qualified to perform temporary employment at any of Respondents. But Respondents refused to temporarily employ, and to consider for temporary employment, any of those striking Fairview RNs. The strike at Fairview lasted until it and the Union reached agreement on terms for a collective-bargaining contract. The strike ended on June 30. Those facts would seem to support the discriminatory motivation allegations of the complaint.

Still, Respondents point to certain additional facts and contend that the refusals to consider for temporary employment, and to temporarily employ, striking Fairview RNs were allowed under the Act, as a means for achieving coordinated bargaining objectives, as enunciated most particularly in *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965), and in *Evening News Assn.*, 166 NLRB 219 (1967), affd. sub nom. *Newspaper Drivers & Handlers Local 372 v. NLRB*, 404 F.2d 1159 (6th Cir. 1968), cert. denied 395 U.S. 923 (1969). Thus, in their amended answer, Respondents urge that they had been "privileged to refuse to hire striking Fairview RNs and to refuse to place striking Fairview RNs supplied by temporary staffing agencies, as a result of the coordinated nature of the bargaining between the hospitals." From that premise, in connection with the above-mentioned allegations of Section 8(a)(1) of the Act, Respondents contend affirmatively, "Because . . . Respondents were privileged to refuse to hire and place striking RNs . . . they were privileged to communicate any policy or practice to that effect to employees and applicants." Respondents deny that their refusals to consider for temporary employment, and to temporarily employ, striking Fairview RNs during June had been motivated by any hostility toward those RNs for striking or, more broadly, toward exercise by employees of their statutory right to strike in support of their bargaining agent's proposals and positions during contract negotiations.

I reject those defenses, as discussed more fully in section II, infra. As shown by the undisputed testimony of employees, described in subsections E through H below, employees were told no more than that striking Fairview RNs would not be considered for temporary employment, and would not be temporarily employed, by Respondents because they were on strike at Fairview. Not once was any explanation advanced to an employee concerning coordinated bargaining, or about preserving an overall bargaining position agreed on by all Twin Cities metropolitan area hospitals engaged in bargaining with the Union. Viewed from employees' perspective, therefore, consideration for employment and employment was being denied for no reason other than exercise of the statutory right to strike in support of a bargaining agent's bargaining proposals and positions.

With respect to the discriminatory motivation allegations, as also discussed more fully in section II, infra, the instant case presents a very different situation than the quite limited ones involved in *American Ship Building Co. v. NLRB*, supra, and in *Evening News Assn.*, supra. Despite the coordinated goals which were agreed upon by all hospitals, each hospital or hospital system bargained separately with the Union. Each was free to adjust and modify the coordinated goals, to achieve agreement with the Union. More importantly, Respondent Unity's employees are not represented by any union; it was not engaged in any collective-bargaining negotiations. By June 3 all other Respondents had reached agreement with the Union on final terms for collective-bargaining contracts. As of that date there was no impasse between the Union and any of Respondents. And there was no prospect of a strike at any of Respondents, much less any prospect of a whipsaw strike, as covered in *NLRB v. Truck Drivers Local 449 (Buffalo Linen)*, 353 U.S. 87 (1957). Finally, not one of Respondents actually locked out its own employees represented by the Union. Instead, each one of them continued operations with its own full-time RNs represented by the Union, while selectively denying consideration for temporary employment, and selectively denying temporary employment, only to RNs who had exercised their statutory right to strike in support of their bargaining agent's contractual demands. In short, this case does not present a lockout situation. Collectively, those facts so distinguish the instant case from *American Ship Building* and *Evening News*, and the rationale underlying those holdings, that the only thing left is an unlawful refusal to consider for hire, and to hire, employees because they were engaging in a strike against their own employer. Such conduct violates Sections 8(a)(3) and (1) of the Act.

B. Respondents and Their Temporary Staffing Agencies

As is evident from the case caption, there are seven Respondents. Each is alleged and admitted to be a Minnesota corporation operating an acute care hospital or hospitals in Minnesota at all material times. Respondent Abbott Northwestern has its office and place of business in Minneapolis. Respondent Mercy has its office and place of business in Coon Rapids. Respondent North Memorial has its office and place of business in Robbinsdale. Respondent Methodist has its office and place of business in St. Louis Park. Respondent Unity has its office and place of business in Fridley. Respondent United has its office and place of business in St. Paul. Respondent HealthEast has offices and places of business in Maplewood and St. Paul, and operates three acute hospitals: St. John's Hospital, St. Joseph's Hospital, and Bethesda Rehabilitation Hospital.

Respondents further admit that, at all material times, each has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Those ultimate admissions are based on admitted factual allegations, with respect to each, that, in the course and conduct of the above-described business operations during calendar year 2000, each

of the seven Respondents received gross revenues from all sales or performance of services in excess of $500,000 and, in addition, purchased goods and services valued in excess of $50,000 which each received at its respective Minnesota facility or facilities directly from suppliers located outside the State of Minnesota.

As must also be evident from the case caption, four of Respondents are owned and operated by Allina Health System (Allina): Respondents Abbott Northwestern, Mercy, Unity, and United. Actually, Respondent Abbott Northwestern and the Phillips Eye Institute are operated by Allina as one organization structure, but at two separate locations in downtown Minneapolis. Moreover, while Respondents Mercy and Unity are located on separate campuses—Coon Rapids, in the case of the former; Fridley, in the case of the latter—Allina considers them as one organization for internal purposes. Thus, the two have a single board of governors, one medical staff with one medical staff executive committee, and one management leadership team. On the other hand, the separate campuses of each are located approximately 10 to 15 miles apart and, of significance to this proceeding, those two hospitals do not share staff RNs—the RNs employed fulltime by each of them. Furthermore, as must further be evidence from the caption, Respondent Methodist is a part of the Park Nicollett Health Services hospital system.

As mentioned in subsection A above, each of the seven Respondents, as well as other Twin Cities metropolitan area hospitals, has its own staff of full time—and, also, part time and casual—RNs. But, as in most areas of the country, there is a shortage of RNs in that metropolitan area. Thus, some fulltime RNs at one or another hospital also work part time or temporarily at hospitals other than the ones at which they are regularly employed, obviously during hours that do not conflict with their fulltime or regular job. Some obtain part-time or temporary employment directly with one or more hospitals, for which those RNs are not regularly employed. For the most part, however, temporary employment is secured through temporary staffing agencies. Even a cursory review of General Counsel's Exhibits 2–8 reveal that a relatively large number of those agencies exists. Eight are involved in the consolidated complaint's allegations: Maxim Healthcare Services (Maxim), VitaSTAFF Nursing Services (VitaStaff), InteliStaf Healthcare (InteliStaf), Intrepid U.S.A., Inc. d/b/a New Horizons Home Care & Nursing Services (New Horizons), Favorite Nurses-Favorite Temps (Favorite Nurses), Firstat Nursing Services (Firstat), Nursefinders, and Professional Resource Network, Inc. (PRN).

There is an admitted allegation that all eight of those agencies supplied "employees, including registered nurses, to fill temporary and/or *permanent* vacancies" (underscoring supplied). However, officials of four agencies each testified that her agency supplies only temporary employees. Thus, Firstat Director of Nursing and Administrator Jane Hauan testified, "We are a temporary nursing agency. We supply hospitals, long term care facilities, assisted livings with temporary nurses, RN's [sic], LPN's [sic], CAN's [sic] and health aides." Similarly Wendy Crow, branch director of the St. Paul and Bloomington offices of Nursefinders, testified, "We send nurses, RN's [sic] and LPN's [sic] and nursing assistants, out to hospitals, nursing homes and clinics throughout the metro area on a temporary basis." Likewise, "New Horizons Nursing Service is a temporary nursing agency," testified Director-Branch Manager Barbara Heinz. And Staffing Coordinator Joanne R. Blizen of PRN testified, "We are a temporary staffing agency," and, during cross-examination she reaffirmed—"Correct"—that "PRN only provides temporary RN's [sic]" and—"Correct"—that it "doesn't place permanent for permanent hire at any of the hospitals[.]"

Apparently, the temporary staffing agencies have contracts with the hospitals and health care providers, to supply temporary employees. It further seems that, in an ongoing effort to secure temporary help, particularly RNs, Respondents each resort to more than one of the temporary staffing agencies. For each Respondent, however, the complaint lists only a limited number of those agencies as joint employers and agents of the particular Respondent referred to in a given allegation. With some exceptions, set forth as follows, Respondents admit the alleged relationships, particularly the joint employer and agency relationships, for RNs referred by those agencies.

For example, the complaint alleges that "[a]t all material times, and particularly during June, 2001, [the named one of Respondents] has requested that [the named temporary staffing agencies] . . . supply it with registered nurses on a temporary basis." Maxim, InteliStaf, Nursefinders, and Firstat are alleged in connection with Respondent Abbott Northwestern. Respondents admit the allegations for Maxim, InteliStaf, and Firstat, but deny having "request[ed] and/or need[ed] temporary RNs supplied by Nursefinders during the relevant time period including the month of June 2001." Of course, that somewhat begs the question. The fact that no referrals were needed during a particular month, of itself, does not mean that there was no contract for referrals and that referrals were not made pursuant to such a contract during other months. Even so, Nursefinders Branch Director Wendy Crow, appearing as a witness for the General Counsel, did not include Respondent Abbott Northwestern among her enumeration of hospitals with which Nursefinders had a contract: "Methodist, Mercy, Unity, HealthEast which includes St. Joe's, St. John's and Bethesda." Furthermore, RN Cheryl Grote, also a witness for the General Counsel, testified that she had been told by Nursefinders' Bloomington Staff Manager Sarah Nietfeld, as the two discussed locating temporary employment for Grote, that Nursefinders "did not have a contract with Abbott and so that wasn't an option" for temporary employment for Grote through Nursefinders.

The complaint alleges that Respondent Mercy requested temporary RNs from Favorite Nurses, Nursefinders, and Firstat at all material times, particularly during June. Respondents admit that Respondent Mercy made such requests of Favorite Nurses and Nursefinders, but "denies that it requested and/or used temporary RNs [sic] supplied by Firstat during the relevant time period including the month of June 2001." In fact, General Counsel's Exhibit 3, invoices to Respondent Mercy from temporary staffing agencies for June, contains no Firstat invoices sent to Respondent Mercy for temporary RN work during June. Of course, that does not establish unequivocally that Respondent Mercy and Firstat were not parties to a con-

tract for temporary RN referral, nor that RNs were not referred by Firstat to Respondent Mercy during other months. But, no evidence was presented to show either of those facts.

The complaint alleges that, at all material times, particularly during June, Respondent Unity requested temporary RNs from Nursefinders and Firstat. Respondents admit that such requests had been made of Nursefinders, but deny those "allegations as the relate to Firstat, since Firstat did not supply any temporary RNs during the relevant time frame." In fact, General Counsel's Exhibit 7, the June invoices from temporary staffing agencies for employees referred by it to Respondent Unity, do not contain any invoice from Firstat.

As to three of the other Respondents, the amended answer admits the consolidated complaint's allegations regarding supplying RNs on a temporary basis. "At all material times and particularly during June," Respondent North Memorial sought RNs for temporary employment through VitaStaff, PRN, Nursefinders, and Firstat; Respondent Methodist sought RNs for temporary employment through New Horizons, VitaStaff, PRN, Nursefinders, and Firstat; and, Respondent HealthEast sought RNs for temporary employment through VitaStaff, Nursefinders, and Firstat.

In addition to the above-described allegations concerning the referral relationships between each of those six Respondents and the named temporary staffing agencies, the complaint also alleges that, in each instance, each of those six Respondents "shared and codetermined matters governing essential terms and conditions of employment of the temporary registered nurses supplied by" the named agencies. Respondents admit those allegations, but only with respect to the agencies from which admittedly each sought temporary RN-referrals during June.

Based on those admitted allegations, Respondents also admit that they had been "joint employers of temporary registered nurses supplied to" each of them by the temporary staffing agencies which made such referrals during June. Thus, by way of illustration, Respondents admit that Respondent Abbott Northwestern had been a joint employer of temporary RNs referred to it by Maxim, InteliStaf, and Firstat, though obviously not Nursefinders. And Respondents further admit that, with respect to each of them, the respectively named temporary staffing agencies had been agents of that particular Respondent, within the meaning of Section 2(13) of the Act, based upon the relationship between them. Thus, by way of illustration, it is admitted that at all material times VitaStaff, PRN, Nursefinders, and Firstat had been agents of Respondent North Memorial in connection with temporary RNs referred to the latter by the former. Similarly, New Horizons, VitaStaff, PRN, Nursefinders, and Firstat had been agents of Respondent Methodist in connection with temporary RNs referred to it by those agencies. And VitaStaff, Nursefinders, and Firstat had been agents of Respondent HealthEast in connection with temporary RNs referred to the latter by the former.

Those admissions of joint employer and agency status are not unqualified, however. In a seeming effort to avoid responsibility for statements made by their joint employers and agents, Respondents deny liability "for any statements made by employees or agents of any temporary staffing agency and, further, den[y] that any statements made by employees or agents of any temporary staffing agency can be used to support an inference relating to . . . hiring or staffing policies" of Respondents Abbott Northwestern, Mercy, Unity, North Memorial, Methodist, or HealthEast. This effort to have it both ways is discussed in section II, infra.

As to Respondent United, Respondents deny in their entirety the like joint employer and agency allegations pertaining to it. That is, in contrast to the other six Respondents, Respondents deny the allegation that, "[a]t all material times, and particularly during June 2001, Respondent United has requested that Nursefinders and Firstat . . . supply it with registered nurses on a temporary basis," deny the allegation that Respondent United "has shared and codetermined matters governing essential terms and conditions of employment of the temporary registered nurses supplied by those entities," and deny the allegation that Nursefinders and Firstat have been joint employers with, and statutory agents of, Respondent United. No question that Respondent United, like the other six Respondents, has obtained temporary RNs from temporary staffing agencies, as shown by the June invoices collected in General Counsel's Exhibit 8. On the other hand, no question that not among those invoices is any from either Nursefinders or Firstat.

One final point must be taken into account when considering the relationship between Respondents and temporary staffing agencies. There is no evidence that any of Respondents—or, for that matter, any other hospital—conducts any sort of independent qualification-assessment of temporary RNs referred to it by those agencies. Instead, it is the agencies which conduct such assessments of RNs whom they then refer to Respondents and the other hospitals, in response to requests for referral of temporary RNs.

For example, Branch Director Wendy Crow testified that RNs applying for employment with, and temporary referral by, Nursefinders submit applications, are interviewed concerning their specialties, and are tested "specific to their . . . job knowledge" and "to make sure that they . . . know the job." Then, whenever a hospital calls with a request for a particular category of RN—medical-surgical, emergency room, intensive care—Nursefinders would refer the appropriate RN or RNs, based upon its own qualification-assessment. In like vein, Director of Nursing and Administrator Hauan testified that whenever RNs apply for employment with Firstat, their applications are reviewed for experience, references are contacted and licensing confirmed, and competency testing is administered. At the conclusion of that process, she further testified, "if they are qualified they are then placed on our employment" roster and "facilities call us and give us their needs for the times and we match them up with who we have available" in the particular specialty—"CU nurse" or "OB-GYN-OB nurse"—needed by the requesting institution.

Similar hiring and referral procedures were described by Branch Manager Brenda Rasmussen of InteliStaf ("we usually have a meeting to determine what availabilities there are from the hospital orders and then they are placed"), by Director-Branch Manager Heinz of New Horizons ("depending upon the need of that particular facility matching up with the skills of that employee"), and by PRN Staffing Coordinator Blizen ("I

look for a position for them . . . or the hospital would call us looking for nurses and then I would find a nurse to match that need"). There is no evidence whatsoever of any occasion on which any one of Respondents had ever conducted its own separate assessment of qualifications for an RN referred temporarily by any one of the temporary staffing agencies. So far as the record discloses, determinations of qualification are left entirely to the agencies and Respondents accept without reservation RNs referred to them by those agencies for temporary employment. Of course, presumably were a particular RN to fail to perform satisfactorily, then the hospital would request that that RN not again be referred. But, there is no evidence of any such situation ever occurring.

C. Bargaining History

As pointed out already, to the extent pertinent here, RNs referred by one or another temporary staffing agency are fulltime employees of one or another Twin Cities hospital, such as Fairview and Respondents. Registered nurses employed by Respondent Unity have never been represented by the Union. Conversely, RNs working at Fairview and other Twin Cities hospitals, including the other six Respondents, have been represented by the Union in "nine RN bargaining units for decades," the parties stipulated. Thus, they further stipulated, RNs at Respondents Mercy, United, North Memorial and Methodist have been historically represented in separate bargaining units. Respondent HealthEast RNs at St. Joseph's Hospital, St. John's Hospital and Bethesda Rehabilitation Hospital have been represented historically in a single overall bargaining unit, encompassing all three of those hospitals. According to Rebecca J. Strange, division vice president for human resources and labor relations for Allina hospitals and diversified businesses, RNs at Respondent Abbott Northwestern and at the Phillips Eye Institute had been historically represented in separate bargaining units, but became a single bargaining unit—including RNs employed regularly and full time at both Respondent Abbott Northwestern and Phillips Eye Institute—"I think in the 1998 negotiations." Accordingly, by the time of the hearing in the instant proceeding, regular and fulltime RNs for six of the Respondents have been represented by the Union in six separate bargaining units.

Of course, the seventh of Respondents, Respondent Unity, employs RNs who have never been represented by the Union—a fact that tends to detract somewhat from Respondents' defense about having to bar from employment, and consideration for employment, striking RNs, as a means of furthering the goals of coordinated bargaining. Respondent Unity never was involved in bargaining, coordinated or otherwise, with the Union for its regular fulltime and part-time or casual RNs.

With respect to Fairview, when the June 3 to 30 strike occurred, RNs it employed at Fairview Southdale Hospital and at Fairview University Medical Center-Riverside Campus had been represented by the Union in a single, overall bargaining unit. Two other hospitals were involved in 2001 negotiations, though neither is alleged to have committed any unfair labor practices: Children's Hospitals and Clinics-Minneapolis and, secondly, Children's Hospitals and Clinics-St. Paul. RNs at each are represented by the Union in separate bargaining units. Apparently, neither Children's Hospital rejected temporary employment of striking Fairview RNs or, at least, never had the opportunity to do so.

As pointed out above, the parties stipulated that "for decades" the Union had represented RNs employed at Respondents Abbott Northwestern, Mercy, United, North Memorial, Methodist and HealthEast, as well as those employed at Fairview and at the two Children's Hospitals. Historically, negotiations between the Union and those hospitals had been conducted on a multiemployer basis. According to Attorney Thomas Vogt, who has been representing health care employers since 1966—and whose testimony concerning negotiations is the most complete and knowledgeably-based of all witnesses—negotiations for the hospitals had been conducted by successive multiemployer associations: Twin City Hospital Association, then Health Manpower Management, Incorporated, then Health Employers, Incorporated, and now Minnesota Hospital and Health Care Partnership (MHHP). However, by the time of the 1995 negotiations that situation began to change.

According to Vogt, Respondent Methodist "withdrew from the association, the labor aspects of it, and also multiemployer bargaining . . . prior to the '95 negotiations." After those negotiations were completed and contracts reached, he further testified, "the Allina and the hospitals that were part of the Allina system [Respondents Abbott Northwestern, Mercy, United and the Phillips Eye Institute] withdrew from the multi employer group." Consequently, "going in to the 1998 negotiations the bargaining structure changed," Vogt testified.

"Allina was bargaining separately. Methodist was bargaining separately," he testified, while "the remaining members of MHHP would be bargaining separately although they would be represented in the bargaining by the association, MHHP," and "their bargaining . . . would be coordinated and conducted by MHHP as the bargaining representative." In the end, Allina agreed to collective-bargaining contracts, for its owned and operated facilities, that differed from the contracts reached by the other hospitals. Most specifically, Vogt testified, "Allina ended up with a higher pay scale," and that "created concerns from a competitive standpoint," eventually becoming "an issue in the 2001 negotiations because they were above the other hospitals."

The duration of all of the 1998 collective-bargaining contracts were the same. That is, the parties stipulated that they "were all effective by their respective terms from 6/1/98 through 5/31/01." In the late summer of 2000 the hospitals began to plan their negotiating strategy for successive collective-bargaining contracts.

D. The 2001 Negotiations

The labor relations aspect of MHHP is handled through its "sub corporation," as Vogt put it, Labor Relations Board, Incorporated (LRB). For the 2001 hospital negotiations, LRB "act[ed] as the coordinator," he testified, for all of the hospitals that would be negotiating, both the remaining MHHP members and those which were no longer members: Respondent Methodist and the Allina-system hospitals. Respondent North Memorial's vice-president of human resources, James White, testified that LRB "was designed to set the overall strategy for the nego-

tiations and it identify [sic] areas that we wanted to have common . . . understanding and maybe common results." However, common results were not a given consequence of the intended negotiations.

None of Respondents and the other negotiating hospitals was any longer negotiating on a multiemployer basis. Each would be bargaining separately for a contract to succeed the 1998-2001 one to which it was a party with the Union. There is no allegation that any of Respondents did so in bad faith during the ensuing winter and spring negotiations. What is important to this proceeding is the manner in which they chose to conduct their separate negotiations. In that respect, two areas are significant.

First, with regard to the substance of their negotiations, the hospitals attempted to formulate "a coordinated bargaining plan," Vogt testified, "on wage issues and all of the cost issues," as well as for major non-economic issues. Thus, during separately conducted negotiations they would be advancing "common demands and [take] action to ensure common demands [were] achieved," recognizing that each hospital was free to work out its own separate agreements with the Union for an overall collective-bargaining contract. For example, percentage increases were agreed on among the hospitals for wage increases, though Respondent North Memorial, according to Vice President of Human Resources White, "took the position that moving North Memorial to parity with Allina, which is roughly a 1 percent increase for us, should not be part of the parameter discussion as far as we were concerned."

Still, regardless of disparities in outcomes, the hospitals shared information with each other about the status of each's negotiations, as the negotiations were progressing. They did that during regularly conducted meetings, commencing even before negotiations began, under the auspices of an advisory or steering committee, including both MHHP hospitals and non-MHHP hospitals, as well as through LRB for MHHP hospitals.

Underlying the above-described approach to 2001 negotiations was the undisputed and commonsense fact that agreements at one hospital would inherently affect employment terms at others. For example, Allina Vice President Strange testified "that whatever one [hospital] did from an economic standpoint very quickly whether or not there was a contract opening to do so . . . became the expectation of others," and, in fact, Allina, itself, had sometimes re-opened collective-bargaining contracts during their terms "to make financial or other adjustments in order to remain competitive in the marketplace." Similarly, Respondent North Memorial Vice President of Human Resources White testified, "I know how competitive this market is. We are always under pressure from the economics of trying to compete [with] each other for a shortage of nurses," with the result that, "[a]nything that would drive the labor rate up in one institution the other institutions would be under extreme pressure to follow and so that's a given. We've had to do that in job after job." There is no evidence to the contrary.

The second significant area of the hospitals' negotiating strategy pertained to reaction should a strike occur at one or more of the hospitals. In essence, the advisory or steering committee members were concerned that a strike might be called against one hospital—or, at least, less than all of them—and the striking RNs might then seek temporary employment at non-struck hospitals, either directly or through temporary staffing agencies. As a result, the committee-members felt, any such strike could be prolonged because striking RNs would continue to receive income, from ongoing temporary employment at nonstruck hospitals, and be able to continue striking. That could compel the struck hospital(s) to agree to terms exceeding goals set by the coordinated group, and, in turn, compel nonstruck hospitals to agree to those same terms exceeding coordinated goals, to remain competitive.

"Any strike of course involves economic pressures both ways and to the extent that you provide employment for someone that is on strike it may well lengthen the strike," explained Vogt, by "eas[ing] the pressure . . . on the employees that are on strike," and enabling them to remain on strike longer than might otherwise be the fact. In like vein, Respondent HealthEast's vice president of human resources, Virginia Sullivan, testified, "We could in essence be funding the strike, allowing it to go longer, more extended strike." Park Nicollett Health Services Director of Employment, Employee and Labor Relations Dee Spalla testified, "[O]ur interests were that nurses get back to the bargaining table if they are on strike because we felt it was imperative that settlements be reached that were similar in economic scope so that they didn't disadvantage Methodist Hospital in recruitment and retention issues." No one challenges the legitimacy with which Respondents harbored those concerns.

Against the background of those concerns, the advisory or steering committee agreed not to temporarily employ, and not to consider for temporary employment, RNs who were on strike at one or more of the other hospitals involved in the coordinated-bargaining group. That agreement extended both to striking RNs who applied directly to nonstruck hospitals for temporary employment and, in addition, to ones who were also employees of temporary staffing agencies that attempted to refer striking RNs to nonstruck hospitals. Moreover, as planning progressed, the committee members also agreed that neither would nonstruck hospitals accept striking RNs for permanent employment, unless those RNs or their struck employer-hospital supplied proof that those striking RNs were no longer employed by their former now-struck employer. "Yes. That was a policy that they adopted," Vogt agreed, when asked whether committee members all agreed "that they wouldn't hire striking nurses at any of the hospitals should a strike occur?"

Initially, Vogt expressed uncertainty about whether that policy encompassed striking RNs referred by temporary staffing agencies: "I can't remember that that was specifically discussed but the principle would have been exactly the same." Later, however he agreed—"That's correct"—that the hospitals "would exclude [striking RNs] from applicant pools including the temporary nurses that the hospitals got through temporary employment agencies?" Allina Vice President for Human Resources Strange agreed; "It's a very tight marketplace but we were not interested in people that were looking either through a temporary agency or as an independent contractor on their own of working temporarily for us." More specifically, Respondent HealthEast Vice President of Human Resources Sullivan testi-

fied that it was "correct" that "we had a policy not to . . . place temporary agency nurses that were striking RN's [sic] from Fairview."

Furthermore, testified Strange, "[W]e talked about and agreed upon before we would hire someone on a permanent basis we wanted to see some kind of proof that their intent was indeed a genuine long term desire to work for our organization and the only way we felt we could achieve that was through a letter of resignation to Fairview." Similarly, Allina Vice President Strange authored guidelines, dated June 7, stating in pertinent part, "If a nurse applicant lists [Fairview] as their current employer, ask for written evidence or verification that they have permanently resigned their position," and "a resignation letter," of itself, does not satisfy that requirement. There is no evidence that such a requirement had ever been imposed by any of Respondents prior to commencing the 2001 negotiations. In fact, Strange admitted explicitly that it never had been a requirement.

Negotiations proceeded separately until mid-May. By then, all of the hospitals and the Union agreed to conduct joint meetings, to attempt to reach resolution on four major issues. Two such meetings were conducted. The effort was unsuccessful for the most part. But, it did lead Respondent North Memorial and the Union to eventually reach tentative agreement, during subsequent separate negotiations, on terms for a contract. That tentative agreement was reached on May 15 or 16. It was ratified by Respondent North Memorial's RNs on May 17. The only point of significance about that agreement, for the instant proceeding, is that, as Vogt testified, "It was a so-called me too agreement where North agreed that they would match the highest salary proposal that was negotiated at any of the other facilities that were engaged in the bargaining."

Nevertheless, Vogt pointed out, Respondent North Memorial continued to remain "part of the coordinated bargaining plan. They participated in the discussions that were taking place. They briefed every one on the settlement that had taken place there, their rationale, and continued to be a part of . . . the Labor Relations Board and the bargaining process." The obvious reason for Respondent North Memorial's continued interest, testified Vogt, was "the ultimate wage scale that North had was going to be determined on the basis of what someone else did in the other bargaining that was going on."

The other hospitals continued to bargain separately. As May progressed to conclusion, each made a final offer to the Union. In turn, the Union served notice on all of intent to strike. As to that, it should not escape notice that there is no evidence whatsoever that the Union intended to engage in a whipsaw or selective strike against only some hospitals. Nor, so far as the record shows, did any of the hospitals harbor a belief that the Union might resort to whipsaw strikes.

Before the strike deadlines, agreements were reached on terms for collective-bargaining contracts between the Union and all hospitals, still negotiating separately, save for Fairview. Thus, tentative agreement between Respondent HealthEast and the Union occurred on May 30; it was ratified by Respondent HealthEast's RNs on May 31. Tentative agreements for Respondents Abbott Northwestern, Mercy, United, and Methodist were reached on June 1; each of those agreements were ratified on June 2, except for Respondent Methodist's agreement which was ratified on June 3.

That left Fairview. Its RNs had rejected its final offer. As set forth above in subsection A, a strike began there on June 3. Continued negotiations led to tentative agreement on June 23. That tentative agreement was ratified by Fairview's RNs on June 25. The strike ended on June 30. Efforts by some of the striking Fairview RNs to obtain temporary employment at Respondents, during June, has led to the unfair labor practice charges and allegations of the consolidated complaint.

E. Allina Owned and Operated Respondents' Alleged Unfair Labor Practices

There is virtually no dispute about what occurred in connection with some of the striking Fairview RNs' efforts to obtain temporary employment during June. A few made direct overtures for temporary employment directly to one or another of Respondents. Most made efforts to obtain temporary employment through one or another of the temporary staffing agencies. Various statements were made to those striking Fairview RNs, as well as to other employees, concerning the reasons for not temporarily employing them, and for not considering them for temporary employment. Again, sometimes those statements were made directly by admitted agents of one or another Respondent. Most were made by personnel of temporary staffing agencies. They are attributed to Respondents by the complaint under the joint employer and agency allegations, admitted as to all Respondents except for Respondent United.

As stated in subsection B, above, Allina owns and operates Respondents Abbott Northwestern, Mercy, Unity, and United. Allina Vice President Strange sent e-mails to all Allina-owned and operated facilities, most particularly to Respondents Abbott Northwestern, Mercy, Unity, and United. Those e-mails are dated June 7, 4 days after the Fairview strike had commenced. Each begins by making reference to a morning meeting of "representatives from all of the unionized metro hospitals," presumably the advisory or steering committee described in subsection D, above. At that meeting, the e-mails recite, those representatives "discussed how we were handling issues when they come up regarding the hiring/use of nurses who are currently on strike at one of the two Fairview facilities." They continue by instructing the recipient-officials in "guidelines that we in Allina are to be using during this time period." In short, Respondents Abbott Northwestern, Mercy, Unity, and United were all issued the same instructions for handling applications for temporary employment by, and referrals for temporary employment of, striking Fairview RNs.

Strange states in her e-mail that, with respect to striking Fairview RNs already regularly working and scheduled for work at an Allina-owned and–operated hospital, "We cannot refuse to schedule them at all," but nothing requires "us to schedule them as much as they request to be scheduled." So, with regard to those striking RNs, e-mail recipients are instructed to audit the number of "shifts per pay period or per month they tend to usually work for us," and to, then, "Make every attempt NOT to schedule them for more shifts than their usual pattern."

The e-mail next addresses RNs referred by temporary staffing agencies. "Ask each agency to NOT send us any nurses who are currently on strike," and "require also that they only send nurses who have worked for a minimum of at least 3 months, as many of the striking nurses have only recently signed up as agency staff." "If the agency refuses, avoid the use of that agency to the extent we can," continues the e-mail, and, "If an agency nurse actually arrives to work a shift and it is learned that she currently is a striking nurse, contact the agency and ask for a replacement." In sum, there can be no question that Allina was instructing Respondents Abbott Northwestern, Mercy, Unity, and United to "NOT" consider for temporary employment striking Fairview RNs recently employed by temporary staffing agencies and, further, to "NOT" consider employing previously-referred striking Fairview RNs beyond their past pattern of employment, even though those RNs might be available for extra work and even though one or more of those Respondents might have need for extra RNs.

In connection with the instructions for temporary RNs from temporary staffing agencies, quoted in the immediately preceding paragraph, Strange made mention of one of two defenses that were only lightly touched in the evidence. In the end, both amount to no more than strawmen—defenses that sound impressive, but which have not been shown to have actually motivated refusals to temporarily employ, or refusals to consider for temporary employment, striking Fairview RNs.

In her e-mail Strange states, "Having a nurse currently on strike working on one of our units side-by-side with our nurses who may or may not have wanted to go on strike themselves certainly provides an opportunity for the creation of disruptions or uncomfortableness for staff, patients, or families within our patient care environment." Now, at no point did Vogt, White or Strange, herself, provide any testimony about potential "disruptions or uncomfortableness" having been even mentioned during discussions by the advisory or steering committee, nor during discussions by the LRB. So far as the particularized evidence shows, that had not been a concern in formulating the hospitals' planned response to a strike at one or more of them. Moreover, while testifying, Strange never explained where she got the idea to express such a concern in her June 7 e-mail nor, more importantly, never gave any testimony that would supply the least legitimate basis for expressing such a "disruptions or uncomfortableness" concern. In short, so far as the evidence shows, that had not been a concern of the advisory or steering committee, nor of the LRB. So far as the record discloses, it had been no more than some sort of afterthought thrown into the June 7 e-mail by Strange to justify the instructions she was issuing to Allina-owned and–operated hospitals.

More is involved, in connection with Strange's asserted "disruptions or uncomfortableness" concern, than solely the lack of any evidence to support legitimacy of her e-mail assertion about it and the absence of any evidence that it had been any concern of the advisory or steering committee, or of the LRB. Advancing it as a basis for barring striking employees from temporary employment, and from consideration for temporary employment, contravenes a basic statutory right, in addition to the statutory right to strike. In effect, Strange was advancing workplace discussion of statutorily protected activity as the very reason for barring strikers from consideration for temporary employment and from temporary employment, so long as they remained on strike. But, preventing workplace discussion among employees of statutorily protected activity is prohibited by a series of Supreme Court decisions.

The Court has viewed workplaces as locations "uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees." *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, 325 (1974). Obviously, such dissemination would encompass discussions among employees about bargaining then in progress and the wisdom or lack of wisdom of striking in support of a bargaining agent's proposals and positions. The right of employees to engage in such dissemination among themselves exists no less, as a general proposition, where their employer is a hospital or other health care institution. See *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978). In short, depriving employees of consideration for employment, and of employment, to prevent discussions among them of statutorily protected activities, of itself, violates the Act.

Of course, employers may impose legitimate restrictions whenever exercise of the statutory right to exchange views disrupts production of discipline. See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945). But, Respondents presented no evidence showing that, as of June 7, there was any reason to even suspect that temporarily-employed striking Fairview RNs would disrupt production or discipline at any of Respondents, should those RNs be considered for temporary employment and employed temporarily during June. Speculation simply does not trump the statutory right of employees to discuss their bargaining representative, and striking and alternatives to striking in support of its bargaining proposals and positions.

Another component of Strange's June 7 e-mail involved RNs who chose to apply directly to one of Allina's hospitals for permanent employment. No such situation is included among the complaint's allegations, all of which involve applications and referrals for temporary employment. Still, it is worth noting that Strange issued an instruction that, should a striking Fairview RN apply to an Allina hospital for employment, "Ask for written evidence or verification that they have permanently resigned their position" at Fairview and, "only proceed to hire the applicant if they have permanently resigned their position from Fairview and if they genuinely are the best candidate for the position." The latter criterion was not novel. As pointed out near the end of subsection D, above, Strange admitted that the former criterion was novel. Nonetheless, she did advance a facially neutral defense to justify that particular instruction: "We also have no interest in going through the time, expense, and effort of orienting someone to hire them on a temporary basis, *even as a casual*, since they are likely to return to their former employer once the strike is over, given that they then maintain their seniority, benefit longevity, etc." (Emphasis added.) Two points are important in connection with that instruction and explanation.

First, there really is no challenge to Respondents' testimony about extent of investment of time and money in orienting and

training their own, directly hired, new employees. It is no more than common sense for an employer not to want to hire someone, train them and, then, have them quit. The testimony revealed a genuine concern about that happening, should striking Fairview RNs be hired by one or another of Respondents. That is, there was concern that those employees would be hired and begin orientation and training, but quit and return to employment with Fairview once the strike there ended. No one can sensibly argue that that is not a legitimate concern. But, it does not extend to temporarily employed or casually employed RNs.

Second, as even a cursory review of the record reveals, many RNs employed full time by Fairview, as well as at other Twin Cities metropolitan area hospitals, augment their incomes with temporary part-time or casual work at other Twin Cities health care facilities, including hospitals. Obviously, that part-time or casual work does not interfere with their full-time jobs. That is, they work full time for Fairview, for example, and part time or on an on-call basis elsewhere. So, as a matter of logic, even if trained and oriented in another hospital's operations, to work there part time or on a casual basis during the Fairview strike, it does not follow that a striking Fairview RN would not continue working part-time or on a casual basis after the Fairview strike, just as RNs, who had been working both full-time and part-time casual jobs before the strike, had been doing. And concern about training and orientation has no place whatsoever in connection with RNs referred by temporary staffing agencies.

As described at the end of subsection B, above, it is the temporary staffing agencies which evaluate and test the qualifications of RNs they hire and, then, refer. Once referred, there is no evidence that those RNs undergo any qualification assessments, repeated in full by health care institutions to which they are referred. Rather, those institutions accept the screening already performed by the temporary staffing agencies.

It does appear that at least some of Respondents do conduct some orientation and testing even for RNs referred by temporary staffing agencies. However, there is no evidence that whatever orientation is provided for referred RNs is anywhere as extensive as that provided for RNs actually hired by Respondents or other hospitals. To the contrary, the evidence shows that orientation for RNs referred by temporary staffing agencies is relatively brief in duration. For example, RN Lorri L. LaForge testified that Respondent "Abbott Northwestern also has a pretty extensive entry when you start there as a temporary nurse. They make you take a few little tests and you need to complete their compliances." How "extensive"? "I mean you need to arrive an hour before your shift," she explained, "to take a test for them," and to "show all your credentials, Xerox copy everything, and then they have to make sure you pass everything before you go to your unit."

Inherently, "an hour" hardly seems to involve "the time, expense, and effort" involved for an RN, or any other employee, being directly hired by Respondent Abbott Northwestern. If its orientation for temporary RNs is regarded as comparatively "pretty extensive"—an explanation never refuted by any other evidence—it follows that there is no basis for inferring that testing and orientation of temporarily-referred RNs at any of the other Respondents is an involved and prolonged process. Indeed, examination of the numbers of June referrals revealed by General Counsel's Exhibits 2–8, alone, is a strong indication that testing and orientation of referrals by temporary staffing agencies could hardly be so extensive as to involve the "time, expense, and effort" on the part of Allina-owned and–operated hospitals, described by Strange for direct hires, nor on the part of any of the other Respondents.

1. Unlawful conduct attributed to Respondent Abbott Northwestern

For Respondent Abbott Northwestern, the complaint enumerates a series of allegedly unlawful statements, all attributable to temporary staffing agency personnel, as opposed to statutory supervisors or agents employed directly by Respondent Abbott Northwestern. The complaint further lists six striking Fairview RNs who were not considered for hire and were not hired on a temporary basis, for no reason other than that each had been a striking Fairview RN: Chris Navratil on June 6, Leslie Stoner on June 7, Allison Pennington on June 8, Diane Fischer and Lorrie L. LaForge on June 11, and Gwen Friedlund on an unknown June date. Of course, it follows from what has been said above about the instructions in Strange's June 7 e-mail that, as striking Fairview RNs, none of those employees were regarded by Respondent Abbott Northwestern as eligible for consideration for temporary employment, or as temporarily employable, by it during June. That ineligibility-conclusion is but reinforced by review of the undisputed testimony concerning what had occurred during June in connection with Respondent Abbott Northwestern.

Fairview operating room RN Christine Navratil testified that she had not been an employee of temporary staffing agency Nursefinders prior to the strike. But, on June 6 she called that agency and spoke with Nursefinders St. Paul and Bloomington Branch Director Wendy Crow. "I told her that I was looking for employment in a hospital preferably working evenings or nights," testified Navratil, and "she asked me if I was a striking nurse." When Navratil replied in the affirmative, she testified that Crow said "unfortunately . . . a lot of hospitals were not hiring striking nurses at the time," and "named a bunch of hospitals," one of which was Respondent Abbott Northwestern. Navratil acknowledged that she never thereafter filled out a Nursefinders job application. But, she further testified that, given what Crow had said, she saw no purpose for doing so. "I didn't feel there was a purpose," testified Navratil, because, "I wanted hospital work and the hospitals that she rattled off . . . seemed like they were every hospital in the city and I just truthfully remember hanging up the phone and thinking we are screwed. I mean we have no job." In short, she viewed any pursuit of employment through Nursefinders as a futile act. On the other hand, as pointed out in subsection B, above, it is undisputed that there was no contract between Nursefinders and Respondent Abbott Northwestern, for referrals by the former to the latter.

Also seeking employment through Nursefinders was psychiatric RN Diane Fischer. Only Respondent Abbott Northwestern and North Memorial, aside from Fairview, have psychiatric units, so far as the record discloses. Fischer testified that on Monday, June 4, she spoke with both Wendy Crow and Nursefinders Staff Manager Miranda Hanson about obtaining

temporary employment at one or both of those hospitals' psychiatric units. According to Fischer, Crow said "that none of the hospitals were hiring striking [Union] nurses," and that Fischer's only option would be Regions, a non-union facility.

Having heard nothing further from Nursefinders, Fischer again made contact with it on Monday, June 11. She asked why she had not received any calls and, further, "which hospitals can I not work at?" Wendy Crow replied, "several," but when Fischer "pressed the issue," by asking for names of hospitals," Crow "said that was private property" and all she would say was that Allina had communicated that it was "not accepting striking nurses."

As with Navratil, Fischer was never referred to Respondent Abbott Northwestern during the June 3 to 30 Fairview strike. No question that Respondent Abbott Northwestern temporarily employed RNs during that strike. Invoices included in General Counsel's Exhibit 7 show a number of RN-referrals for temporary employment at Respondent Abbott Northwestern between those dates. Yet, the problem for the allegations concerning refusal to consider for temporary employment, and refusal to temporarily employ, Navratil and Fischer is that it is uncontested that Nursefinders had no employment-referral contract with Respondent Abbott Northwestern. So far as the evidence shows, such contracts are an integral component of temporary staffing agencies' referral arrangements with Twin Cities health care institutions, including Respondents. Therefore, there is no basis for concluding that Navratil and Fischer had unlawfully been deprived of employment, and of consideration for employment, with Respondent Abbott Northwestern.

Absence of a referral-contract is not a problem in connection with Maxim, InteliStaf, and Firstat, all of whom Respondents admit were joint employers and agents of Respondent Abbott Northwestern, given the arrangements between it and those agencies described in subsection B above. Emergency Department RN Leslie Stoner testified that while taking her examination, as part of the employment application process for Firstat, she heard about "certain hospitals that weren't accepting striking nurses." Afterward, she spoke about that subject with Day-Shift Staffing Coordinator Carl Johnson, explaining to him that she was "currently on strike" at Fairview. Johnson gave her a list of hospitals to which she could not be referred, including Respondent Abbott Northwestern, and another list of four hospitals that Fairview strikers "were allowed to work at." Stoner was never referred by Firstat to Respondent Abbott Northwestern, even though Firstat made six referrals of RNs to Respondent Abbott Northwestern during June.

Critical Care RN Gwen D. Friedlund testified that on Sunday, June 3, the day the Fairview strike commenced, she had been referred by Firstat to Respondent Abbott Northwestern for Monday, June 4. While working there that day, she received a message to call Firstat's other day shift staffing coordinator, Rochelle Crow. When she placed that call, testified Friedlund, Crow asked, "had I told anybody that I was a striking nurse," and, when Friedlund replied in the negative, Crow said, "Good. Don't tell anybody. Finish up your shift and get the heck out of there." According to Friedlund's uncontroverted testimony, Crow added, "[I]f they found I was a striking nurse they would relieve me on the spot and . . . [Firstat] could lost [sic] their contract with Abbott if they found out that they sent me there."

Friedlund further testified that she inquired if she could be scheduled in the future at Respondent Abbott Northwestern. She testified that Rochelle Crow responded, "Absolutely not. I could not work at any contract hospital," and explained that, "[T]he only reason I had gotten that [June 4] shift was it had been scheduled on a Sunday evening and the scheduler . . . working that evening didn't know what was going on and that I shouldn't have been allowed to work there." In fact, Friedlund was not again referred to Respondent Abbott Northwestern during the Fairview strike, though General Counsel's Exhibit 7 reveals that Respondent Abbott Northwestern accepted referrals of other RNs during June.

There is no allegation that heart center RN Ed Moeller had been unlawfully denied temporary employment by Respondent Abbott Northwestern. But, it is alleged, in essence, that he had been unlawfully told that he could not work at any hospital affiliated with Allina because he was on strike. In fact, during a telephone conversation around June 14 with an employee of Firstat regarding employment at Respondent North Memorial, as described more fully in subsection F below, Moeller testified that he had asked about employment at Respondent Abbott Northwestern, pointing out that it was "a contract hospital," as was Respondent North Memorial. According to Moeller, the unidentified employee asked why he was "telling them you are a striking nurse"; Moeller replied "[T]hey asked me. I can't lie."

As to Maxim, Flying Squad Department RN Allison Pennington, by the hearing, Haddon testified that she had sought and obtained employment with Maxim on June 5. "They assigned me the 8th, 9th and 10th of June night shifts with Abbott in the intensive care unit," she testified. She was instructed to be there at 10 p.m. for the 11 p.m. shift, "for an orientation," Haddon testified. However, "around 9 p.m. on June 8 someone from Maxim called me," she testified, "and said the staffing office at Abbott had called them and said they were canceling me for that night and the next two shifts . . . because they wouldn't accept striking nurses from Fairview." Maxim was unable to locate alternative employment for Haddon from June 8–10. And she was not again referred to Respondent Abbott Northwestern, even though Maxim did refer RN Renne Powell to it on June 11, 20, 21, and 25–27, as well as a second RN (Maula Goines) on June 21. Of course, as discussed above, in addition, other temporary staffing agencies were also referring RNs to Respondent Abbott Northwestern during June.

The sixth RN alleged to have been discriminated against by Respondent Abbott Northwestern is Lorrie L. LaForge. It is alleged that she had been denied temporary employment on about June 11. In addition to Fairview, LaForge was an employee of InteliStaf, for temporary employment. Its branch manager is Brenda Rasmussen.

LaForge had been referred to Respondent Abbott Northwestern for a night shift on June 10. She actually worked that shift in the telemetry unit. As she was leaving, she testified, the charge nurse said "they would have availability that night and probably the rest of the week, and she wanted me to notify

InteliStaf [sic] . . . to come back to her, to her unit." That did not occur, however.

Seemingly on June 11, Rasmussen was telephoned by Linda Arvidson, Respondent Abbott Northwestern's float pool manager and an admitted statutory supervisor and agent of Respondent Abbott Northwestern. According to Rasmussen's uncontested testimony, Arvidson "was upset because we had placed a striking nurse" or, at least, an RN who might be one, given that LaForge's CPR card revealed that the course had been given at Fairview. Rasmussen testified that "in [Arvidson's] mind that determined that [LaForge] must be a striking nurse," and Arvidson said that "she thought they had made it known previously verbally to us as an agency that they were not taking striking nurses and as such this person should not have been placed."

Both Rasmussen and LaForge testified that, during an ensuing telephone conversation, the former told the latter that Respondent Abbott Northwestern did not want LaForge to return to work. LaForge testified that Rasmussen had said that Respondent Abbott Northwestern "was asking if I was a striking nurse or not," and, when LaForge confirmed that she was, said "in light of that that they would not take me because I was a striking nurse and she said she could send me to a different hospital." In addition, Rasmussen testified that she had told LaForge that InteliStaf "can't condone that behavior" by Respondent Abbott Northwestern, and that she (Rasmussen) would be willing to continue referring LaForge there, if LaForge wanted to pursue that course. However, continued Rasmussen, "[T]he risk is if we send you there they have told us they will send you home which then you would call me up . . . and want another shift," but "for me to do that there must be a time frame available to do that and if she is calling me at the last minute I may not be able to find her a shift." Seemingly, LaForge was not willing to make cannon fodder of herself, by pursuing such a course and ending up with neither employment by Respondent Abbott Northwestern nor any other hospital on a particular day.

Rasmussen of InteliStaf was not the only temporary staffing agency representative who described instructions from Respondent Abbott Northwestern not to refer striking Fairview RNs. firstat's director of nursing and administration, Hauan, testified that, during a telephone conversation on June 15, Arvidson said that Respondent Abbott Northwestern "did not want Firstat to send them any nurses who were on strike," and "did not want Firstat to send any nurses that had not been to Abbott before." Of course, that instruction would naturally cut off striking Fairview RNs, such as Stoner, who became employed by Firstat, or by any other temporary staffing agency, on or after June 3, when the strike at Fairview began.

Hauan further testified that when she asked about "nurses who were on strike that had already been placed at" Respondent Abbott Northwestern and had worked shifts there, Arvidson first said that none of them were eligible to return. Then, testified Hauan, Arvidson added "that no nurse who had not been placed by Firstat prior to the strike could come back. Or could be shifted there." Hauan promptly wrote a letter to Arvidson confirming those instructions: "Per our conversation, you stated that it is the intent of Abbott Northwestern Hospital to only utilize nurses from Firstat Nursing Services, whom have already been to ANW previous to the [Union] Nursing Strike." So far as the record reveals, Arvidson never wrote back, or otherwise communicated, that Hauan's written confirmation was not a correct recitation of Respondent Abbott Northwestern's intentions.

Barbara Heinz, director-branch manager for New Horizons, testified that, during a telephone conversation, Arvidson had said that it would be alright to refer a striking RN who had worked in the past on a regular basis for Respondent Abbott Northwestern, but only "as long as I kept within the same number of days that she had previously worked per week. Not to exceed that." As set forth in the preamble to this subsection, such an instruction is consistent with one of the instructions issued by Strange. In addition, testified Heinz, "I do believe that she did make mention that if they had not worked at that hospital before that they probably wouldn't be a good candidate." In fact, they absolutely would not be a candidate, and would not be considered for employment, under the instructions in Strange's June 7 e-mail.

2. Unlawful conduct attributed to Respondent United

As set forth in subsection B, above, Respondent United is owned and operated by Allina. It also is the one respondent which denies that it had a joint employer relationship with alleged temporary staffing agencies—Nursefinders and Firstat—as well as being the one respondent to deny any agency relationship with either of those two agencies. What is clear from the compilation of June invoices for temporary referrals to it (GC Exh. 8), however, is that Respondent United does obtain temporary referrals, including of RNs, from temporary staffing agencies: Favorite Nurses, New Horizons, and InteliStaf, among them. Yet, in contrast to Respondent Northwestern, no evidence was developed that Respondent United did not have referral-contracts with Nursefinders and Firstat. At no point did Respondents actually contend that no such contracts existed, as had been the fact with Respondent Northwestern.

As amended during the hearing, to delete the name of one alleged discriminatee, the complaint alleges that Respondent United refused to temporarily employ, and refused to consider for temporary employment, three of the RNs named in subsection E,1, above, in connection with Respondent Abbott Northwestern: Navratil, Fischer, and Friedlund. It also alleges unlawful statements attributable to Respondent United through representatives of temporary staffing agencies, though not through any supervisor or agent directly employed by Respondent United.

Described in subsection E,1, above is a June 6 telephone conversation between striking Fairview RN Navratil and Nursefinders Branch Director Wendy Crow. As described in greater detail there, Crow had named for Navratil a number of hospitals that would not accept Fairview RNs for temporary employment, so long as those RNs were on strike. Navratil testified that Respondent United had been one of the hospitals that Crow had named. As a result, as also pointed out in subsection E,1, above, Crow's statements caused Navratil to abandon any further effort to obtain temporary employment through Nursefinders at the named hospitals.

Fischer was told by Wendy Crow that Allina hospitals were not accepting striking nurses, as set forth in greater detail in subsection E,1, above. So, to the extent that Respondent United is owned and operated by Allina, it would be encompassed by that statement by Crow. However, any allegation that Fischer had been discriminated against by Respondent United encounters a fundamental problem.

Fischer testified, "I'm a psychiatric nurse" and "not every hospital has a psychiatric unit so [her opportunity for referral for temporary employment is] limited from that standpoint." In fact, she identified only Respondents Abbott Northwestern and North Memorial as operating psychiatric units. There is no evidence that one exists at Respondent United and, based upon Fischer's testimony, it is a fair inference that a psychiatric unit does not exist there. Accordingly, there is no basis for concluding that Respondent United had unlawfully refused to temporarily employ her, nor unlawfully refused to consider her for temporary employment. There was no position in which Fischer was seeking to become temporarily employed by Respondent United.

As also described in section E,1, above, striking Fairview RN Friedlund sought June temporary employment through Firstat. During a June 4 telephone conversation, occurring while she was at Respondent Abbott Northwestern, she was told by Firstat Day Shift Staffing Coordinator Rochelle Crow that she (Friedlund) "could not work at any contract hospital," because she was "a striking nurse". Of course, Respondent United is a "contract hospital," though there is no evidence that it had been named specifically during the telephone conversation between Friedlund and Rochelle Crow. Still, Respondent United was one of the Allina hospitals instructed by Strange not to accept striking Fairview RNs.

3. Unlawful conduct attributed to Respondent Mercy

Two of the three alleged discriminatees at Respondent Mercy—Diane Fischer and Gwen Friedlund—were striking Fairview RNs who, so far as the record discloses, did not actually seek temporary employment at Respondent Mercy. Beyond that, as discussed in subsections E,1 and 2, above, Fischer was seeking employment in a psychiatric unit. There is no evidence that Respondent Mercy operates such a unit and, to the contrary, it is a fair inference, from Fischer's testimony, that it does not do so.

Nonetheless, Respondents admit that Respondent Mercy obtains temporary RNs through, inter alia, Nursefinders and, further, that the two are joint employers and that Nursefinders is an agent of Respondent Mercy. Fischer was told by Wendy Crow of Nursefinders on June 4 "that none of the hospitals were hiring striking [Union] nurses," and on June 11 that Allina had communicated that it was "not accepting striking nurses." Since Respondent Mercy is owned and operated by Allina, and inasmuch as Crow's statements to Fischer essentially track the instructions to Allina hospitals in Strange's June 7 e-mails, Crow's remarks to Fischer leave for consideration the issue of whether they interfered with, restrained, and coerced employees in the exercise of statutory rights, an issue discussed in section II, infra.

Friedlund was told by Firstat's Rochelle Crow on June 4 that she "could not work at any contract hospital," as discussed in subsections E,1 and 2, above, in the process of being told to finish up her shift at Respondent Abbott Northwestern "and get the heck out of there." Friedlund had been seeking additional temporary employment during June.

Invoices for temporary RNs employed during that month by Respondent Mercy (GC Exh. 3) show that InteliStaf, Favorite Nurses, Nursefinders, and New Horizons had referred RNs to Respondent Mercy throughout that month. But, Wendy Crow of Nursefinders testified that Ruth Keizer of Respondent Mercy had "told us that Mercy would not be accepting any striking nurses." Moreover, "A few days later Sharon Carlson called," testified Wendy Crow, "want[ing] to make sure that I . . . was aware that they were not accepting . . . striking nurses." Of course, those statements are perfectly accurate accounts of instructions received by Respondent Mercy and other Allina hospitals in Strange's June 7 e-mails. Those instructions were reinforced by certain other remarks made by officials of Respondent Mercy, especially those made in connection with the third striking Fairview RN alleged to have been discriminated against by Respondent Mercy.

Vice President of Nursing Kathy Wilde and Float Pool Manager Karen Strauman-Raymond is each an admitted statutory supervisor and agent of Respondent Mercy. The amended answer admits that on June 5 Wilde "left separate voice mail messages for between one and three RNs employed by Respondent Mercy, in which she advised those RNs that Respondent Mercy would not be using striking nurses that were working through temporary agencies." The parties stipulated that the recipients of those messages were LouAnn Uhr and Rozann Bridgeman, employees of Respondent Mercy and, also, elected tri-chairs of the Union's committee.

Those voice-mail messages had been one consequence of a stipulated incident involving striking Fairview RN Rebecca Wagner. She had been referred to Respondent Mercy by Favorite Nurses to work a shift on June 5. But, before the shift began, she revealed that she was a striking Fairview RN and she was sent home. More specifically, according to the stipulation, "Wegner made a statement that revealed that she was a striking Fairview nurse," and Strauman-Raymond overheard that statement. The latter "pulled Wegner aside and advised her that striking RNs working for temporary agencies would not be placed at Allina hospitals. Wegner was, therefore, not allowed to work the shift, and she left the facility." Obviously, temporary employment had been available for Wegner at Respondent Mercy. Else, she never would have been referred there by Favorite Nurses. She was preparing to commence a shift there. So far as the evidence discloses, she could have worked that shift, had Strauman-Raymond, an admitted statutory supervisor and agent of Respondent Mercy, not learned that Wegner was a striking Fairview RN.

4. Unlawful conduct attributed to Respondent Unity

Two points bear repeating in connection with Respondent Unity. First, as described in subsection B, above, it and Respondent Mercy are considered one organization or business unit within the Allina system. Second, as mentioned in subsec-

tion C, above, Respondent Unity's RNs are not, and never have been, represented by the Union. It is a nonunion hospital. Thus, it had no direct coordinated bargaining position to protect. Its only actual interest in that bargaining, and in the treatment of striking Fairview RNs, was derived from being part of the Allina system and, more specifically, from being paired with Respondent Mercy as a single organization or business unit.

In addition to certain allegedly unlawful statements, it is alleged that Respondent Unity unlawfully refused to hire for temporary employment, and refused to consider hiring for temporary employment, four striking Fairview RNs: Diane Fischer, Gwen Friedlund, Vicki Drake, and Marie Madsen.

Throughout June Respondent Unity temporarily employed an ongoing series of RNs, as is shown by the invoices collected in General Counsel's Exhibit 7. It obtained those RNs from InteliStaf, Favorite Nurses, Nursefinders, New Horizons, and Med Staff, Inc. Thus, there can be no dispute about the fact that temporary work for RNs had been available during June at Respondent Unity.

As already covered in this subsection, Fischer had been seeking temporary employment in a psychiatric unit. She never claimed that Respondent Unity operated such a unit. To the contrary, so far as the record shows, there was no such unit at Respondent Unity. In consequence, as with Respondents United and Mercy, there is no evidence that Respondent Mercy had available the type of work that Fischer had been seeking during the Fairview strike.

On the other hand, as set forth in subsection E,1, above, critical care RN Friedlund had been told on June 4, by Rochelle Crow of Firstat, to "get the heck out of" Respondent Abbott Northwestern, for no reason other than that she "was a striking nurse" and "could not work at any contract hospital" which, of course, Respondent Unity is not. Even so, there is no dispute that Allina Division Vice President Strange's June 7 e-mail instructions had applied as much to Respondent Unity's operations, as to those of unionized Allina-owned and –operated hospitals. Beyond that, Respondents Mercy and Unity are treated as a single organization or business unit within Allina. Nothing in the record provides a basis for concluding other than that Keizer and Carlson's remarks to Wendy Crow, described in subsection E,3, above, applied with equal force to Respondent Unity, as well as to Respondent Mercy.

As to alleged discriminatees Drake and Madsen, a different situation is presented than with regard to alleged discriminatees who sought temporary June employment through temporary staffing agencies. Both applied directly to Respondent Unity for temporary June employment. Thus, Madsen testified that she spoke with "[t]he individual who hires RN's [sic] within [Respondent Unity's] facility," whose name Madsen did not recall. According to Madsen, she said that she "was a striking nurse" who worked at Fairview and "was inquiring if they were hiring nurses temporarily during the strike." In response, she further testified, that unidentified individual "said no," and, "That they would not be hiring striking nurses."

Similarly, Drake testified that she had seen a Sunday, June 10 newspaper advertisement, stating that Respondent Unity was offering "a sign-on bonus" for applicants whom it hired. Next day, she testified, she telephoned Respondent Unity and ended up speaking with someone whose "name was Kelly I believe." After saying that she as "looking for employment," and saying that she "was working at Fairview," Drake testified that Kelly "said they were not hiring striking nurses."

One perhaps relatively minor problem with Drake's account is that there is no evidence that Respondent Unity employed anyone by the name of Kelly during June. That point was made specifically in the amended answer. So, clearly the General Counsel and Union were on notice before the hearing that there was an issue regarding "Kelly." Human Resources Generalist Caity Eggen testified that she was familiar with the individuals who worked in the human resources department for Respondents Mercy and Unity, but none were, or are, named Kelly. No effort was made to show the contrary to have been the fact. Nevertheless, the telephone remarks described by Drake are consistent with the June 7 e-mail instructions issued to Allina-owned and–operated hospitals. Thus, other than the name of the person who spoke with Drake, the message was an accurate reflection of instructions to Respondent Unity.

On the other hand, Eggen also testified that Respondent Unity "didn't have any temporary openings" during June. She further testified that Respondent Unity had not sought to hire any RNs for temporary positions during that month, regardless of whether an RN-applicant was or was not on strike. No evidence was presented to contradict any aspect of her testimony. That is, there is no evidence that Respondent Unity, itself, had directly hired an RN on a temporary or casual basis during June. There is no evidence that Respondent had "any temporary openings" during that month.

True, Drake had testified about "an ad in the Sunday paper June 10th," in which Respondent Unity had sought applications. Yet, she conceded that she did not "recall" what kind of nurses Respondent Unity had been seeking through that advertisement. The advertisement appeared in a newspaper published only a few months before the hearing. Newspapers ordinarily maintain "morgues" of past editions. Yet, no advertisement was produced at the hearing. Given the absence of any evidence that applicants for temporary positions were sought by the June 10 advertisement, and given Eggen's uncontradicted testimony that Respondent Unity had no openings for temporary RN-hires during June, and did not itself hire any temporary RNs during that particular month, a preponderance of the evidence fails to establish that there had been openings for which Madsen and Drake could have been hired, regardless of what had been said to each one by personnel of Respondent Unity.

F. Unlawful Conduct Attributed to Respondent North Memorial

Throughout June Respondent North Memorial obtained temporarily-employed RNs through temporary staffing agencies, as shown by review of the invoices collected in General Counsel's Exhibit 4: from Medical Staffing Network, Nursefinders, Firstat, VitaStaff, Interim Supplemental Staffing, InteliStaf, Favorite Nurses, New Horizons, and PRN. With respect to those agencies, the complaint focuses on VitaStaff, PRN, Nursefinders, and Firstat, in connection with Respondent North Memorial. Moreover, as ultimately amended, it lists nine strik-

ing Fairview RNs as alleged discriminatees in connection with Respondent North Memorial: Laura Schuerman, Kathleen Smedstad, Leslie Stoner, Teresa Weidenbacher, Cissy Bryant-Wolf, Allison Pennington, Marie Madsen, Cris Navratil, and Ed Moeller. It also alleges a number of statements, some by officials of Respondent North Memorial and most by representatives of temporary staffing agencies, which allegedly violated Section 8(a)(1) of the Act.

As to the statements by officials of Respondent North Memorial, the parties stipulated that, on or about May 25, a three-page memorandum from Chief Executive Officer Scott Anderson—an admitted statutory supervisor and agent of Respondent North Memorial—was distributed to "the majority of employees employed by North Memorial at is [sic] Robbinsdale, Minnesota acute care hospital." In general, that memorandum explained the then-existing bargaining situation and the possibility of a "Metro-Wide Work Stoppage." It then listed a series of questions, and answers to those questions, posed as a result of the bargaining situation and strike possibility. One of those questions was, "Will North Memorial hire RNs from striking hospitals?" The answer recited by the memorandum to that question is, "It is not our intent to hire nurses who are on strike at other hospitals, or to hire other employees who have been temporarily laid off from other facilities."

In fact, Respondent North Memorial had already communicated some aspects of its position to its six human resources representatives, employees of Respondent North Memorial who recruit employees for it, and, possibly also, to its two human resources coordinators, who provide administrative support to those six representatives. A memorandum, dated May 24, was distributed to each of the representatives and, possibly also, to the two coordinators. That memorandum had been written by Peggy Reimer, Respondent North Memorial's human resources manager and, the parties stipulated, a statutory supervisor and agent of Respondent North Memorial. The memorandum's subject was hiring guidelines during a strike by the Union.

It first instructs recipients to tell applicants who only want to work during the strike, "We are pursuing candidates that are looking for permanent employment first," and invite applicants to apply for such positions. Should one or more of them apply for permanent employment, the memorandum continues, "Log these applicants on the attached log sheet," but, "*Slow* the process down," by telling them, "Things are in neutral," or "Other things are going on," or "with summer vacations we are scheduling less." Of course, the allegations of discrimination do not extend to permanent applicants. The issue for each of the above-named discriminatees is whether Respondent North Memorial, as well as all other Respondents, refused to consider for temporary employment, and refused to temporarily employ, striking Fairview RNs, because they were engaging in a strike in support of the their bargaining agent's contract position at Fairview.

As to that, PRN Staffing Coordinator Blizen testified that, during May, "Linda and it may be Ferguson" of Respondent North Memorial had "advised me not to place striking nurses at their hospital." During a later conversation with "Linda," which may have been during the strike at Fairview, Blizen testified that "she stated that they would accept striking nurses if they had worked there [at Respondent North Memorial] in the past," thereby eliminating from consideration, for temporary employment through PRN, RNs who became employed by PRN during the Fairview strike or in anticipation of that strike.

Turning to what had been said to Nursefinders, the one instance where there is some indication of possible impropriety by a striking Fairview RN at a nonstruck hospital involved a Nursefinders-referred RN. Wendy Crow of Nursefinders testified that, "during the strike," she had been contacted by "somebody from staffing" at Respondent North Memorial, "but I don't have a name." Nursefinders had sent a striking Fairview RN to Respondent North Memorial for temporary employment. Seemingly, that RN had been allowed to start working there. The person who contacted Crow, she testified, complained that that RN "was discussing the strike with North Memorial's employees and upsetting them," specifically by saying such things as, "We are going to get more than you guys because you settled early," testified Crow. As a result, she further testified, she was told that Respondent North Memorial "did not want that particular nurse back and that they would from then on not be taking any striking nurses."

That was not Respondent North Memorial's last word to Nursefinders on the subject. "A few days later," testified Wendy Crow, "the same person" from Respondent North Memorial called and "said just to let you know we are not accepting anyone from your agency unless they have been with you for three months."

No firsthand evidence was presented concerning whatever comments had actually been made by the RN about whom Respondent North Memorial complained to Wendy Crow. Facially, comments about getting a better contract, by not settling too early, hardly seem to rise to the level of misconduct that would strip an employee of the statutory protection for discussion of union-related subjects at the workplace, as described in the beginning of subsection E above. Even assuming that that one RN's comments did rise to the level of misconduct in the course of engaging in statutorily-protected activity, without more, that hardly serves as a basis for depriving other striking employees of their statutory rights to be hired and to engage in discussion of union-related subjects at the workplace.

Even "acts of violence on the part of individual strikers are not chargeable to other union members in the absence of proof that identifies them as participating in such violence" (footnote omitted), *Coronet Casuals, Inc.*, 207 NLRB 304, 305 (1973). See discussion, *Altorfer Machinery Co.*, 332 NLRB 130, 141 (2000), and cases cited therein. There is no evidence here that any other striking Fairview RN ever taunted any nonstriking RN from another hospital. There is no evidence of a plan by striking Fairview RNs to engage in any misconduct. Most significantly, Wendy Crow identified the RN, about whom Respondent North Memorial had complained, as Anna Selnick. She is not alleged as a discriminatee.

In sum, there is no firsthand evidence of strike misconduct or statutorily-improper comments by Selnick. There is no evidence that any other striking Fairview RN made even similar remarks to a nonstriking RN. There is no evidence of any plan by striking Fairview RNs to engage in improper or disruptive conduct. Selnick is not alleged as a discriminatee. The very

best that can be said, from Respondent North Memorial's perspective, is that whatever occurred had been an isolated incident. It is not sufficient to give rise to a cognizable justification for barring other striking Fairview RNs from being temporarily employed during June because they were on strike.

Striking Fairview operating room RN Marie Madsen testified that she had telephoned Respondent North Memorial during the first week of the strike—on June 4, 5, or 6—and had asked to speak to whoever was in charge of hiring. She was transferred to someone whose name she did not recall. Madsen testified that she told that person that "I was a striking nurse and . . . was inquiring if they were hiring during the strike." She further testified that she had been "told that they would not be hiring striking nurses."

She also testified that it might have been that unidentified individual from Respondent North Memorial who further said "because they were a contract hospital," that "it has been decided that they would not be hiring striking nurses during the strike." In fact, it seems likely that those remarks had been made to Madsen during her telephone conversation with Respondent North Memorial's hiring official. The only other possibility for someone having made such a remark, she testified, had been during her subsequent telephone conversation with a representative of Respondent Unity, as described in subsection E,4, above. However, Respondent Unity is not a "contract hospital," and so, none of its representatives were likely to claim that "they were a contract hospital".

As described above, PRN Staffing Coordinator Blizen testified that she had been told by Linda, whose last name Blizen did not recall, but believed to be Ferguson, "not to place striking nurses at their hospital," and, later, that Respondent North Memorial "would accept striking nurses if they had worked [at Respondent North Memorial] in the past." Striking Fairview recovery room RN Kathy Smedstad, who had also been employed for temporary work by PRN for a year and a half before the strike, testified that, during a telephone conversation about rescheduling a shift, she had asked Blizen to check with Respondent North Memorial about working a shift there. "She put me on hold," testified Smedstad, and when she came back on the line, Blizen said, "That's interesting. Unless you have worked here before North Memorial is not taking striking nurses." Despite her length of employment with PRN, Smedstad testified, "I did not receive any shifts from then on out" at Respondent North Memorial.

On June 7 striking Fairview heart center RN Laura Schuerman told Blizen that she "was willing to work at North Memorial," but, testified Schuerman, Blizen "said that North Memorial wasn't taking any nurses who had not worked there through an agency before the strike began." Of course, that also is consistent with what Blizen testified that she had been instructed by Linda of Respondent North Memorial.

Similarly, striking Fairview newborn intensive care RN Teresa Weidenbacher was told by Blizen that Respondent North Memorial "was still accepting nurses who had been there previously but would not take someone who was going there new," Weidenbacher testified. Weidenbacher had not previously worked there. And at no point did Respondents present any evidence that there had been some legitimate, job-related distinction between RNs employed by them before the strike and those newly employed during the strike. Even so, during redirect examination Weidenbacher gave testimony that obliterated any possibility of her being found a discriminatee in connection with Respondent North Memorial. She was asked specifically if she "would . . . have taken a shift at North Memorial if one had been available at that point," and she answered unequivocally, "No."

Described in subsection E,1, above is a conversation that occurred between striking Fairview emergency department RN Leslie Stoner and Firstat day shift Staffing Coordinator Carl Johnson. During it, Johnson gave Stoner a list of hospitals at which Stoner "wouldn't work" because she was on strike. One of the hospitals Johnson listed was Respondent North Memorial.

In like vein, striking Fairview heart center RN Ed Moeller testified that when Firstat suggested that he be referred to a shift at Respondent North Memorial, he "asked them if they would call North Memorial first before" he went there and was sent home, as had by then already happened to him at Respondent Methodist, as described in subsection G, below. Moeller testified that he explained to the person at Firstat, who is left unidentified, that Respondent North Memorial is "a contract hospital and I didn't relish going all over to those places and then not being able to work," and the Firstat person said, "I will get back to you and he did." When he did, testified Moeller, he said, "[Y]ou are right, they will not hire you," after which he suggested Respondent Abbott Northwestern, as described in subsection E,1, above.[4]

Efforts of Christine Navratil and Diane Fischer to obtain temporary employment through Nursefinders have been discussed, in part, in subsection E, above. Navratil was considering employment by Nursefinders, so that she could obtain temporary employment during the strike. But, after she told Nursefinders' branch director, Wendy Crow, that she (Navratil) was a striking nurse, Crow said that "a lot of hospitals were not hiring striking nurses at that time." Crow "named a bunch of hospitals," testified Navratil, one of which was Respondent North Memorial. As a result, she further testified, Navratil felt it would be futile to apply for employment with Nursefinders: "I just truthfully remember hanging up the phone and thinking we are screwed. I mean we have no job."

Fischer, it should be remembered, is a psychiatric RN who was seeking temporary work in a psychiatric unit. Such a unit is operated by Respondent North Memorial, as mentioned in section E,1, above. As also set forth there, she had spoken both with Nursefinders' branch director, Wendy Crow, and its staff manager, Hanson, on June 4 about referral for temporary employment to the psychiatric units of Respondents Abbott Northwestern and North Memorial. Crow had said then "that none of the hospitals were hiring striking [Union] nurses," testified Fischer. Fischer pursued the issue on June 15. She testi-

[4] In his prehearing affidavit, Moeller had stated that the above-quoted conversation had pertained to Respondent Abbott Northwestern. He testified credibly, however, that he had confused the two hospitals and that the above-quoted conversation had actually pertained to Respondent North Memorial.

fied that she went to Nursefinders and asked Crow, "What did you find out" about temporary employment in a psychiatric unit. According to Fischer, Crow responded "that North Memorial is not taking any Minnesota striking nurses either."

Left for consideration, are two striking Fairview RNs who sought temporary employment at Respondent North Memorial through VitaStaff: Allison Pennington Haddon and Charlenea Bryant-Wolf. Both of them spoke about that with Brad McClintock, the owner of VitaStaff. Pennington testified that McClintock had told her "that there would be possibilities at North Memorial," but later indicated that he had contacted Respondent North Memorial and "that they were also not taking striking nurses."

Bryant-Wolf testified that McClintock had hired her, as a VitaStaff RN, "probably the second week in June," and "told me that he wouldn't have a problem placing me." She further testified that "a couple days later" McClintock called and "asked me if I was interested in working a 3 to 11 shift at North Memorial and I told him that I was." However, "about 1 o'clock in the afternoon," testified Bryant-Wolf, she received another call from McClintock who said "that I was not needed for the 3 to 11 and he asked me if I was interested in working . . . 7 p [m] to 7 a [m] or 11 to 7 the same day and I told him no."

A subsequent conversation, testified Bryant-Wolf, began with McClintock telling her that he had placed a striking Fairview RN at Respondent HealthEast, but someone from there had called "that morning because this nurse had divulged that she was a striking nurse and that they would no longer accept her." According to Bryant-Wolf, McClintock complained "that if we continued to tell people that we were striking nurses that he would not be able to place us and he would lose his contract with those hospitals." He offered, she further testified, to "place me at North Memorial and . . . at Healtheast but . . . I had to keep my mouth shut about being a striking nurse." In fact, Bryant-Wolf testified, McClintock "asked me if I would fill out a new application" for VitaStaff so that "if the hospital came back to him . . . he could say it doesn't say that on her application." To her credit, apparently Bryant-Wolf declined that offer to, in effect, falsify her application to pull VitaStaff's chestnuts out of the fire.

Now, there is no direct evidence that Bryant-Wolf's second week of June scheduled referral to Respondent North Memorial had been canceled because she was then a striking Fairview RN. Yet, Respondent North Memorial never presented any evidence concerning its motivation for that cancellation. And any inference, supplied for Respondent North Memorial, that it had no need for an RN runs into a significant obstacle. As pointed out above, invoices for temporary June referrals to Respondent North Memorial are collected in General Counsel's Exhibit 4. The second week of June extends from Sunday, June 10 through Saturday, June 16. During that week, according to the invoices, Respondent North Memorial temporarily employed three temporary RNs (Jennifer Aanenson, Pam Graft and Darla McGrath) referred by VitaStaff on a total of 6 days. On a total of 5 days it employed three RNs (Anna Selnick, Shirl Lachapelle, and Candace Crook) referred temporarily by Nursefinders. On 7 days it temporarily employed RNs temporarily referred by Interim Supplemental Staffing. On 9 days it employed RNs temporarily referred to it by InteliStaf. On 17 occasions during that week it temporarily employed RNs referred by Favorite Nurses. On 21 occasions it temporarily employed RNs referred to it during that week by New Horizons. A total of 16 RNs were temporarily referred to Respondent North Memorial during that week by PRN. Similar figures are revealed from a review of the invoices for the following week. Collectively, they remove any possible argument that Respondent North Memorial had no need for Bryant-Wolf as a temporary RN during the second week of June. The totality of all those invoices also remove any basis for a contention that Respondent North Memorial had no need for temporary RNs during June.

G. Unlawful Conduct Attributed to Respondent Methodist

The parties stipulated that on May 29 Respondent Methodist sent copies of a letter to New Horizons, VitaStaff, PRN, Nursefinders, and Firstat. To the extent pertinent, that letter informed those temporary staffing agencies that, "All RNs that you provide must *not* be a [Union] nurse from another [Union] represented hospital. We expect that you will honor this." At the time the letter had been sent to those agencies, there was no agreement on contract terms for any of Respondents, save Respondent North Memorial, and each of those six other Respondents had received strike notices.

The letter was signed by Scheduling Coordinator Bobbi J. Hoebelheinrich, whom the parties stipulated is neither a statutory supervisor nor agent of Respondent Methodist. However, the letter was sent by her at the direction of Susan Henderson, nurse manager-float pool, who is an admitted statutory supervisor and agent of Respondent Methodist. Henderson testified that, as of May 29, "we were anticipating that our hospital would be striking and many of the other hospitals would be also on strike. So we . . . had a desire not to have any [Union] nurses from any other represented hospitals who were striking work at Methodist." That, of course, is perfectly consistent with the coordinated bargaining decisions made by the advisory or steering committee and by LRB, as described in subsection D, above.

By June 3, of course, all of Respondents had reached final agreement with the Union on contractual terms. Once that occurred, testified Henderson, "Bobbi Hoebelheinrich . . . and I called all the [temporary staffing] agencies that we use and that we had sent this [May 29] letter to and let them know that . . . we would not be able to use the striking nurses from the Fairview system" only. It seems logical that Henderson would have done that herself in some instances and, further, that she would have delegated that responsibility to Hoebelheinrich in other instances. However, Hoebelheinrich did not appear as a witness, though there was no evidence or representation that she was not available to testify about agencies that she had assertedly contacted. Her nonappearance turned out to be significant. At least one temporary staffing agency may not have been contacted with the revised message described by Henderson.

Wendy Crow of Nursefinders testified that she had been called by Hoebelheinrich during late May and that Hoebelheinrich had said "that Methodist would not be accepting—as

of June 1st Methodist would not be accepting any [Union] nurses." "Yes, it did," answered Crow, when asked whether that instruction had remained in effect throughout the strike.

Henderson was asked specifically about that testimony by Wendy Crow. "No, that's not true," she answered. Yet, asked whether she or Hoebelheinrich had spoken to Wendy Crow, Henderson equivocated: "I'm not sure who—I didn't document who called who," but she still asserted, "We called all the outside pool agencies that we had sent this letter to and let them know that we . . . were only not wanting to take the striking nurses from the Fairview system." Even so, Henderson never did claim that she had been the one to purportedly convey such a message to Wendy Crow or Nursefinders. Obviously, Hoebelheinrich never testified that she had done so.

There is testimony that Director of Nursing Bev Levens had reported by e-mail "that all the staffing agencies had been contacted regarding the three month requirement," discussed below. However, that testimony was provided by Park Nicollett Health Services Director Dee Spalla, not by Levens. And Spalla conceded that she was "not" exactly aware of who Levens had actually called or, even, when she would have called any temporary staffing agencies. The record is left, therefore, with Wendy Crow's testimony, uncontested with particularity, that Nursefinders had been left to operate through June under instructions communicated by Respondent Methodist's May letter: "All RNs that you provide must *not* be a [Union] nurse from another [Union] represented hospital."

Indeed, as late as June 5 or 6 Respondent Methodist appears to have been continuing to struggle to refine its policy toward striking Fairview RNs. Arthur R. LaPoint is its vice president of human resources. On June 5 he sent an e-mail, concerning "RN hiring-important," to various officials, including Spalla. In pertinent part, that e-mail states, "I want to reiterate that we should be very careful not to hire nurses that are participating in the work interruption at Fairview. I'm going to be getting more information about the legal limits of this policy tomorrow. In the meantime, please make no decisions about hiring Fairview Nurses, even if they are resigning their positions at Fairview."

Spalla testified that she "manage[s] human resource representatives, employment assistants, the manager of employee relations and the manager of work force development," which includes Respondent Methodist's "nine recruiters." As to them, Spalla testified that, "The two that primarily do the recruiting at Methodist Hospital are Kristine Bohl and T.T. Wen Welborn," whose actual titles, like that of all recruiters, are "human resource representative." Bohl was alleged to be a statutory supervisor and agent of Respondent Methodist; those allegations are denied.

In reaction to LaPoint's June 5 e-mail, Spalla testified that she issued her own e-mail, on June 7, that "superseded his e-mail of June 5th." The e-mail instructs recipients to "note the following regarding any Fairview RNs who may be looking for either a regularly scheduled job or a *casual* job while on strike." (Emphasis added.) In point 1 that follows, Spalla directs that, "We will not hire any nurses who work for FV [Fairview] while the nurses are on strike for *any position*." (Emphasis added.) That last underscored portion plainly shows that Respondent Methodist, like the other Respondents, was unwilling to even consider striking Fairview RNs for any temporary position so long as they were on strike. The first underscored portion creates some doubt about the reliability of some of Spalla's testimony.

According to her, "there were not" any temporary RN positions available for direct hire by Respondent Methodist during the strike. She buttressed that testimony by explaining that "the orientation process and the hiring process is very, very costly and minimally even an experienced nurse is going to take a full month of full time orientation" to become proficient at Respondent Methodist. Yet, the first underscored portion of her June 7 e-mail, quoted in the immediately preceding paragraph, refers to "casual" positions; that seems a needless remark if there truly had been no temporary positions for which Respondent Methodist would be planning to hire applicants during June. Beyond that, Spalla acknowledged that Respondent Methodist "did use temporary staffing" during the strike.

It should be remembered that Twin Cities RNs not uncommonly worked full time at one hospital and part time or temporarily at another during the same overall period. Thus, continuing to work full time at, for example, Fairview would not necessarily bar an RN from continuing to work temporarily at, for example, Respondent Methodist. In short, the orientation and hiring process was not inherently wasted, when considering striking Fairview RNs for direct temporary employment.

Furthermore, point three of Spalla's e-mail raises some further doubt about the genuineness of her claim that Respondent Methodist was not directly hiring casual or temporary RNs for no reason other than orientation and hiring costs and duration. Point 3 pertains to casual nurses from Fairview whom Respondent Methodist already employed. Presumably, those were part-time RNs who had already been through the hiring and orientation process at Respondent Methodist. Thus, there would be no further cost to, or effort on the part of, Respondent Methodist by utilizing those past-employed part-time or casual RNs more fully during June. Yet, in her e-mail, Spalla displayed unwillingness to utilize those RNs, already oriented and through the hiring process, to any extent beyond that to which they had been employed by Respondent Methodist: "If the FV nurse is already a casual or very PT employee of PNHS [Park Nicollett Health Service], the hours worked at PN must be limited to what they would normally work. Managers must be advised that they should not be given any additional hours."

In sum, in contrast to the situation at Respondent Unity discussed in section E,4, above, there is considerable objective basis for doubting the reliability of any testimony that Respondent Methodist had not been directly hiring part-time, casual or temporary RNs during June.

Point 2 of Spalla's e-mail directs, "If the nurse states that he/she has resigned from FV, the resignation and effective date must be verified with the FV HR department. We will not hire any RNs who resign from regular positions at FV but remain on call." Spalla claimed that she had been "a poor communicator" with regard to that direction. She testified that her "intention" had been "simply to say that we would consider hiring any Fairview nurse," but Respondent Methodist would be imposing "the requirement . . . that they would need to resign from their position at Fairview." Yet, there is no evidence that Respon-

dent Methodist had ever previously required proof of resignation at prior employment, to be considered for employment by it. Beyond that, Respondent Methodist was not simply satisfied with a verified resignation from Fairview's employment. To be hired permanently, a Fairview RN also had to refrain from "remain[ing] on call" at Fairview.

The final point in Spalla's e-mail instructs, "When using staffing agencies, the agencies should be advised that we will not accept any RN who has not worked for the agency for at least 3 months." Inherently, that instruction bars, from consideration for temporary employment at Respondent Methodist, any striking Fairview RN who became employed by a temporary staffing agency in anticipation of, or during, the strike at Fairview. In fact Spalla admitted as much. She testified that, by that instruction, she had intended "to mirror what other hospitals were doing," by "not accepting nurses from agencies who were striking nurses who just signed up with the agencies because they were on strike and needed to supplement their income," with the ultimate objective being to get striking RNs "back to the bargaining table if they are on strike because we felt that it was imperative that settlements be reached that were similar in economic scope so that they didn't disadvantage Methodist Hospital in recruitment and retention issues."

The question of whether or not Respondent Methodist had truly been unwilling to hire temporary or casual employees, altogether, during June arises because of the experiences of some striking Fairview RNs, each of whom applied directly to Respondent Methodist for employment. For example, striking Fairview senior intensive treatment program RN William Weber testified that he lives near Respondent Methodist and decided to seek employment there, after the strike had begun. He spoke with someone in business resources, he believed it was Human Resource Representative Bohl who, as described above, was operating under direct instructions from Spalla regarding hiring. He told her that he "was actually interested in whatever they had," whether temporary or permanent position, testified Weber, and Bohl asked about his present employment situation.

When he told her that he "worked at Fairview Riverside she asked me if I was on strike," Weber testified. He continued by testifying that he responded in the affirmative and Bohl replied, "That she wouldn't hire me, that I'd have to terminate at Fairview. That the hospitals had an agreement that they would not hire striking nurses." Weber agreed that his prehearing affidavit makes no mention of Bohl having said Respondent Methodist was not hiring striking nurses. Yet, he testified that he recalled that it "came up in out conversation," and "had to have come from her because I had no indication from anywhere that hospitals were not hiring because we were on strike." That is not an inherently implausible explanation. There is no evidence regarding the circumstances of the taking of Weber's affidavit and, consequently, no basis for concluding that an omission of part his conversation with Bohl would naturally show that such a statement could not have been made by her. In fact, such a remark by Bohl corresponds to the above-quoted first part of Spalla's June 7 e-mail and, as well, to the coordinated bargaining agreement among the hospitals, as described in subsection D above. Weber appeared to be testifying candidly and I credit his testimony that Bohl had said "Hospitals had an agreement that they would not hire striking nurses."

A somewhat more involved situation arose for striking Fairview newborn or neonatal intensive care RNs Weidenbacher and Kathy Holm. Through PRN, the temporary staffing agency that also employed her, Weidenbacher had worked at Respondent Methodist in the past, in its "newborn intensive care unit called a level 2 nursery and I work just exclusively there," she testified. Timesheets reveal that she had worked three shifts during May at Respondent Methodist. A fourth timesheet shows that Weidenbacher also working an 8-1/2-hour shift there on June 11.

That came about, testified Weidenbacher, after she had sought "a lot more hours full time" from PRN. According to her, she was ultimately scheduled by Staffing Coordinator Blizen to work a shift in Respondent Methodist's newborn intensive care unit on Friday, June 15. Before that date arrived, however, Weidenbacher directly contacted Respondent Methodist for possible earlier employment. "I called and talked to a nurse called Chris," she testified, to "let her know that I would be available . . . and to keep me in mind if they were short staffed."

She missed an opportunity to do so on June 10, when she arrived home too late to respond timely to a message to take a 3 p.m. shift that day at Respondent Methodist. However, Weidenbacher testified, "on the 11th they called again just an hour before the shift began . . . because they had an emergency, an ill call, and were down staffed." In essence Respondent Methodist had directly contacted an RN about temporary employment.

Still, Weidenbacher told the charge nurse who called to clear the referral through PRN. Blizen approved it. After she arrived at Respondent Methodist, and had picked up her security badge, Weidenbacher testified that she overheard a staff nurse asking evening Charge Nurse Michelle Gransey why Weidenbacher was being allowed to work. According to Weidenbacher, she also overheard Gransey respond to the nurse that there was "an ill call one hour before the shift," and that "they were short shift for that night."

According to Weidenbacher, Gransey asked whether Weidenbacher "was too tired to work a double shift," and the latter promised to "get back to [Gransey] when the shift progressed a little." That request gave Weidenbacher an idea. "Then I happened to remember a fellow nurse . . . who also worked for PRN and that she would probably like to get some extra hours because of the strike," she testified. "That was Kathy Holm." Not only did Weidenbacher inform Gransey about Holm's possible availability, but Weidenbacher called Holm, making her aware of the need that night at Respondent Methodist for neonatal intensive care nurses.

Holm had worked temporarily, through PRN, at Respondent Methodist, without complaint, since 1999. After Weidenbacher's call, Holm telephoned PRN and spoke with "whoever [was] answering the phones that night," she testified, mentioning the neonatal RN-shortage that night at Respondent Methodist. However, testified Holm, the person to whom she spoke replied, "Well I have a memo saying we are not supposed to send Methodist any striking nurses." When Holm said "my coworker is there right now," she testified that the unidentified

person said, "I don't know what to say. I'm kind of caught in the middle. All I know is Joanne [Blizen] has left a note saying we cannot send any striking nurses to Methodist." Thus, Holm was never referred to Respondent Methodist.

At some point thereafter that same evening, Weidenbacher testified that she was informed by Gransey that Holm "had been refused because she was a Fairview striking nurse," and that left Gransey without any other nurses for the unit. In fact, so far as the evidence shows, the shortage led to a drastic result. No one contested Weidenbacher's testimony that Respondent Methodist eventually "closed the newborn nursery where the mothers who are sick and tired and want to put their babies in the nursery for a while. They went without that nurse that evening."

The above-described situation had repercussions beyond only Holm being denied temporary employment at Respondent Methodist. Weidenbacher testified that Gransey "did say that just recently one of the staff nurses on the unit had gotten reamed out for letting a Fairview nurse slip by and work," and that employment of striking RNs "would not be allowed and I would not be allowed to return." "I mean I asked if I would be able to come back" testified Weidenbacher, and, "She said no."

Weidenbacher finished her June 11 shift. Next morning, she testified, she was telephoned by Blizen. Blizen said, according to Weidenbacher, "I am very sorry you got through. I know you weren't supposed to be working there. It just slipped my mind when you called," adding, "You won't be able to go back there and I'm going to have to cancel you for this coming Friday because Methodist is not hiring any striking nurses," even ones "who have been previously with them." Blizen also said, "[I]f one of us slipped through again that Methodist was refusing to pay [PRN] for us," Weidenbacher testified. June 11 was the last date on which Weidenbacher worked for Respondent Methodist, though the invoices in General Counsel's Exhibit 5 show that a number of other RNs worked temporarily for it after that date.

Also seeking work through PRN was striking Fairview heart center RN Laura Schuerman. She had been canceled by Hennepin County Medical Center for a scheduled 3 p.m. shift. So, she testified that she told Blizen that she (Schuerman) "would be willing to work somewhere else if she could please try and re-book me." Schuerman testified that when she suggested referral to Respondent Methodist, Blizen said that "Methodist wasn't taking any striking nurses at all," not even ones whom had worked there through PRN before the strike began. Schuerman further testified that, on the following day, she asked Blizen "if she could tell me who was directing her to not—Where the direction was coming from as to not taking striking nurses, was it coming from the agency or was it coming from the hospitals themselves." According to Schuerman, Blizen replied, "[T]hat was the direction of the hospitals, that it wasn't their agency making those decisions."

Another striking Fairview RN who was able to obtain a day's work at Respondent Methodist, during the Fairview strike, was neonatal intensive care unit RN Jill Moy. New Horizons had been referring her for approximately 2-1/2 years, "mostly at Methodist," she testified, without incident or complaint about her work there. New Horizons Staffing Coordinator Sherry Klecker referred Moy to Respondent Methodist for a night shift on Monday, June 4 and, testified Moy, "I did work it." However, Moy testified that when she contacted Klecker "a couple days later," for another referral there, Klecker "told me at that time that she could not place me at Methodist any more because Methodist will not pay . . . New Horizons for my time." The record is quite specific with regard to the origin of that statement by Klecker.

New Horizons Director-Branch Manager Heinz, Klecker's supervisor, testified that "one of our nurses did work at" Respondent Methodist and, in turn, that she (Heinz) had received a telephone call from Nurse Manager Henderson of Respondent Methodist. According to Heinz, Henderson "let me know that over . . . a particular weekend, we in fact had sent her a nurse from a striking hospital and that if this would happen again they would not be liable for payment of that person's work." It seems that Henderson was referring to Moy.

Of course, Moy had worked on a Monday, not a weekend day. Yet, it cannot be said, at least on this record, that Respondent Methodist's referral-request had not been placed over the weekend for the Monday work to which Moy was referred. Significantly, Heinz' description of Henderson's warning—"not be liable for payment of that person's work"—is consistent with what Klecker then told Moy: "Methodist will not pay . . . New Horizons for my time." Furthermore, the above-described June 11 remark by Gransey to Weidenbacher—"just recently one of the staff nurses on the unit had gotten reamed out for letting a Fairview nurse slip by and work"—may well have pertained to Moy's June 4 temporary employment at Respondent Methodist.

Significantly, the incident involving Moy had occurred before Spalla issued her above-described June 7 e-mail. Point #3 of that e-mail allows previously-referred striking RNs to continue working for Respondent Methodist, albeit "limited to what they would normally work," and "not be[ing] given any additional hours." But, there is no evidence that Respondent Methodist had earlier informed its personnel that striking Fairview RNs who had worked previously at Respondent Methodist, such as Moy, would be allowed to continue temporary employment there, albeit with limitation.

Striking Fairview oncology RN Mary Hanger testified that New Horizons had scheduled her for a shift at Respondent Methodist on Tuesday, June 5. Before she could report, however, Hanger testified that "Methodist Hospital canceled my shift," even though she had worked at Respondent Methodist, through New Horizons, prior to the strike. "I wasn't told anything," she testified, respecting the reason for the cancellation. Given the events described in the immediately preceding paragraphs, particularly Henderson's warning to Heinz, it is a fair inference that, like Moy, temporary work at Respondent Methodist was prevented for Hanger because it did not want to consider for temporary employment, or to temporarily employ, striking Fairview RNs. That inference is reinforced by Hanger's testimony concerning what she had been told when she contacted Firstat on June 7 about employment. According to Hanger, she asked Coordinator Paula Bachinski "if Methodist Hospital was not accepting striking nurses and she said yes,

that's true that they were not accepting striking nurses for work there."

For her part, Bachinski testified that, "some time in June," she had spoken with a staffing coordinator at Respondent Methodist name Nicole, with whom Bachinski had spoken before. When she asked about referring an RN there, testified Bachinski, Nicole "asked me if that employee was a striking nurse." Bachinski testified that she answered that she did not know and was told by Nicole, "[I]f I could not reassure her that that employees was not a striking nurse that she would not staff that person."

It is alleged that two striking Fairview RNs were denied temporary employment, and consideration for temporary employment, when Firstat sought to refer them to Respondent Methodist. Striking Fairview heart center RN Ed Moeller testified that he actually had received a 3 to 11 shift-referral to Respondent Methodist for June 13, had reported there, and had been assigned to a Kelly—heart monitors—unit. Before he could begin working, however, he was told by an unknown woman, "You have been canceled. Report back down to the staffing office." When he reported there, he testified, "a different lady" asked if he "was a strike nurse from Fairview." He answered in the affirmative and testified that the woman "said we do not hire or allow strike nurses to work here."

As had Moy's above-described referral by New Horizons, Firstat's referral of Moeller drew a reprimand of the temporary staffing agency by Nurse Manager Henderson. Firstat Staffing Coordinator Johnson testified that Henderson had called and "said that she was very upset that we sent that person," whom Johnson identified as having been Moeller. According to Johnson, Henderson continued by saying, "she didn't appreciate us sending somebody who was striking at the time and that . . . Methodist didn't want to support the strike in any way."

The other alleged discriminatee from Firstat is striking Fairview emergency department RN Leslie Stoner. As already discussed in subsection E,1, above, she testified that, on June 7 as she applied for employment by Firstat, Staff Coordinator Johnson had listed hospitals that would not accept her for referral because she was a striker. One of them was Respondent Methodist, she testified. Nevertheless, she was able to obtain one referral there during the Fairview strike.

That had been, "I believe it was the 20th of June," Stoner testified. However, she further testified, when she arrived in "the emergency department one of the other nurses who happened to be from Fairview Southdale," whose union sympathies were not explored during the hearing, eventually told Stoner and "also another nurse, Rebecca Davidson . . . that we could not do any nursing until certain people decided whether or not it was acceptable for us to be there." "After about an hour," according to Stoner, "we were allowed to work the shift," but, "I was never called back for work." No evidence was presented that would show that Stoner had engaged in any impropriety during that shift. Obviously, she was capable of performing the RN-work for Respondent Methodist.

The final two alleged discriminatees, in connection with Respondent Methodist, are striking Fairview heart center RN Cheryl Grote and already-encountered flying squad critical care RN Allison Pennington Haddon. The latter testified that VitaStaff Owner McClintock had initially said "[T]here would be possibilities" for her to be referred to Respondent Methodist. However, after indicating to her that he had contacted Respondent Methodist, she was not referred there. She testified that McClintock "mentioned that they [Respondent Methodist] were also not taking striking nurses.

Grote had applied for employment with Nursefinders in anticipation of the strike. She was hired by it for temporary referral. But, when the strike began, and she called Nursefinders to report "I had lots of hours available," Grote testified that Bloomington Staffing Manager Sarah Nietfeld said that Grote would not be able to go to Respondent Methodist "because I was a striking nurse."

Without prolonging this decision further, the temporary employment situation at Respondent Methodist can be summed up by simply saying that it employed numerous RNs, referred for temporary employment during June, as review of General Counsel's Exhibit 5 discloses.

H. Unlawful Conduct Attributed to Respondent HealthEast

Respondent HealthEast, it should be remembered, operates three hospitals—St. John's Hospital, St. Joseph's Hospital, and Bethesda Rehabilitation Hospital—which are encompassed by its collective-bargaining relationship with the Union for RNs. During June, all three of those hospitals temporarily employed RNs referred by temporary staffing agencies, as shown by the invoices compiled in General Counsel's Exhibit 6. But, it is alleged, three striking Fairview RNs—Allison Pennington Haddon, Stephanie Schaan, and Charlenea Bryant-Wolf—were not among them, because those three RNs had been on strike during June. They sought temporary employment through VitaStaff. It is further alleged that, through Firstat, Respondent HealthEast unlawfully refused to consider for temporary employment, and unlawfully refused to temporarily employ, striking Fairview emergency department RN Leslie Stoner. Finally, it is alleged that Respondent HealthEast refused to consider for temporary employment, and to temporarily employ, striking Fairview heart center RN Cheryl Grote, through Nursefinders.

As described in subsection E,1, above, on June 7, after she had finished the application process at Firstat, Stoner had spoken to Day-Shift Staffing Coordinator Johnson. She told him that she was "currently on strike" at Fairview. He gave her a list of hospitals to which she could not be referred, because she was then on strike. Among the names he enumerated to Stoner were "Bethesda, St. Joe's, and St. John's," she testified.

Allison Pennington Haddon testified that, "after the 8th, 9th, and 10th" of June, she had contacted owner McClintock of VitaStaff and he said "that there would be possibilities [for referral] at . . . St. Joseph's . . . specifically." On June 12 McClintock offered her a 7 p.m. shift-referral to St. Joseph's Hospital. However, he made that offer at 6:30 p.m., too late for Pennington to arrive there on time, given the length of driving time from her home in Brooklyn Park.

McClintock called her later that same evening and offered Pennington a night shift at St. Joseph's. She accepted and arrived for work "about 12:30" a.m. In fact, she did work that shift. As she did so, she testified, she was told by Nursing Supervisor "Patty," last name unknown, that "they've been short

on that floor, glad to have the help especially on night shifts and thought that there would be future possibilities there." Regardless of whether or not "Patty" was or was not a statutory supervisor or agent of Respondent HealthEast, no evidence contradicts her factual remarks to Pennington concerning the work situation. But, Pennington was never referred again to St. Joseph's Hospital during the strike. "After that night Brad from VitaStaff called me and said I could not—no longer work at St. Joe's until after the strike," testified Pennington.

Striking Fairview intensive care unit RN Stephanie Schaan testified that, on Monday, June 18, McClintock "called to confirm my availability that evening" for a shift at St. John's Hospital and, later on that same day, told her "that he was going to contact St. John's and he would call me back when he . . . got their answer." Approximately 10 minutes later, she continued, he again called "and said the first thing they asked him is if I was a striking nurse." According to Schaan, McClintock told her that he had answered in the affirmative, adding that she "was willing to work ICU and telemetry," but was told "they would have to check on it and get back to him." Once more, testified Schaan, she was called by McClintock, "between 9 and 9:30," and he "said that he was told that they would not take me for the night shift." She further testified that the reason given to her by McClintock had been that, "I was on strike. That they wouldn't accept striking nurses."

Charlenea Cissy Bryant-Wolf's situation was discussed to an extent in subsection F, above, in connection with Respondent North Memorial. She had been scheduled to work there by McClintock, but had been canceled, as "not needed," before she could report there for work. In a later conversation, McClintock complained about not being able to place RNs who "continued to tell people that [they] were on strike," and appealed for her to "fill out a new application," omitting any reference to her employment at Fairview.

During that later conversation, testified Bryant-Wolf, McClintock said that "he could place [her] at . . . Health East but . . . I had to keep my mouth shut about being a striking nurse," inasmuch as "he had had a call from Health East that morning because [another Fairview] nurse had divulged that she was a striking nurse and that [Respondent HealthEast] would no longer accept her." Bryant-Wolf declined to fill out an, in effect, falsified application. And she was never referred to Respondent HealthEast hospital during June.

The final striking Fairview RN, alleged to have been discriminated against by Respondent HealthEast, is heart center RN Cheryl Grote. She sought referral through Nursefinders. Its Branch Director Wendy Crow testified about a "last week in May" conversation between "my staffing manager" and Barb Whalen. Crow did not "know [Whalen's] specific title but she is normally the one that we negotiate the [temporary staffing] contracts with." New Horizons Director-Branch Manager Heinz testified that Whalen's "position is that of a contact if you will with the agencies that Health East works with throughout the metro" Twin Cities area. Obviously, insofar as referrals were concerned, Whalen spoke for Respondent HealthEast.

As to the substance of Whalen's statements to Nursefinders' staffing manager, Wendy Crow testified that Whalen had said "that she trusted that we would not be sending any striking nurses to any of the Health East facilities." That instruction remained in force throughout the strike, testified Crow. Thus, it is not surprising that when Grote called Nursefinders about referrals, she was told by Bloomington Staffing Manager Sarah Nietfeld that, "I would not be able to go to St. Joe's . . . because I was a striking nurse."

To be sure, the "staffing manager," to whom Wendy Crow referred, was never called as a witness to give firsthand testimony about what Whalen had said, though there was neither evidence nor representation that that staffing manager was not available as a witness. Still, Wendy Crow's description of what Whalen had said is consistent with what Respondent had been telling the temporary staffing agencies during June about referrals of striking Fairview RNs, as described throughout this Section. Moreover, Crow's account, of what the staffing manager had reported Whalen having said, is consistent with Heinz' testimony about what she, personally, had been told by Whalen: that "it wouldn't be appropriate to send people from other striking hospitals" to Respondent HealthEast.

II. DISCUSSION

Among others, Section 7 of the Act guarantees employees the rights to assist labor organizations, to bargain collectively through representatives of their own choice, and to engage in concerted activities for the purpose of collective bargaining. By this stage in the law's evolution, no one can argue with any persuasion that those general statutory rights do not encompass the more specific right of employees to engage in strikes as a means of supporting and advancing the collective-bargaining proposals and positions of their designated collective-bargaining representatives.

The right to strike is not solely one that Congress has conferred in the interest of employees who choose to engage in strikes. It is a right which also promotes "the practice and procedure of collective bargaining," a statutory objective set forth in Section 1 of the Act, as a means for eliminating obstructions to the free flow of commerce. "Collective bargaining, with the right to strike at its core, is the essence of the federal scheme." *Motor Coach Employees v. Missouri*, 374 U.S. 74, 82 (1963). Therefore, "solicitude for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system." *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233–234 (1963). In sum, the Act protects employees when they engage in strikes to support their bargaining agents' negotiating positions and, in addition, the Act promotes the right to strike as a means for furthering the ultimate objective of eliminating obstructions to commerce, through collective bargaining.

To be sure, like other rights guaranteed by Section 7 of the Act, the right to strike is not without limitation. Most significantly in the context of the instant case, "there is nothing in the statute which would imply that the right to strike 'carries with it' the right exclusively to determine the timing and duration of all work stoppages." *American Ship Building Co. v. NLRB,* supra, 380 U.S. at 310. Nevertheless, given the Court's above-stated explication of the integral role of strikes in the overall

collective-bargaining process, great care must be exercised in evaluating any arguments advanced to justify particular conduct that would inherently limit exercise of employees' right to engage in strikes. Indeed, Congress has explicitly instructed that such care be exercised. Section 13 of the Act states, "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right."

Against the background of those underlying general principles, there simply is no room under the Act for allowing statutory employers to discriminate against employees for no reason other than that those employees are on strike. Especially is that so whenever striking employees are applying to be hired. Section 8(a)(3) of the Act prohibits specifically "discrimination in regard to hire," and "[d]iscrimination against union labor in the hiring of" employees, when aimed at interfering with, impeding, or diminishing the effectiveness of their strikes against other employers, "undermines the principle which . . . is recognized as basic to the attainment of industrial peace." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941). The Act draws no distinction between employees applying for permanent jobs and employees applying for temporary or casual positions. The same level of statutory protection applies to employees in both categories.

Nevertheless, Respondents contend that the Act allowed them to refuse to hire the striking Fairview RNs, under the principles enunciated in *American Ship Building Co. v. NLRB,* supra, and in *Evening News Assn.,* supra. Whatever the merit of that contention under Section 8(a)(3) of the Act, as discussed below, the fact remains that the statements made to employees by some of Respondents and, for the most part, by representatives of temporary staffing agencies, as described throughout section I,E, through G, supra, independently violated Section 8(a)(1) of the Act.

As to that, Respondents contend, as set forth in section I,A, supra, that "they were privileged to communicate any policy or practice to that effect [that the refusals to consider for hire and to hire arose from coordinated bargaining] to employees and applicants." The problem with that argument is that there was no such communication to any employee of such a "policy or practice," in any of the numerous statements described in Section I,E through H, supra. In essence, employees were told merely that striking RNs would not, and were not, being hired because they were on strike or because they were strikers. But, in not one of those conversations was anything said to any of those employees about coordinated bargaining or, specifically, the relationship between not considering for temporary hire, or temporarily hiring, striking RNs and the coordinated bargaining objectives or plans of Respondents. The omission is significant.

As set forth above, the Act protects the right of employees to strike, both in the direct interest of statutory employees and, also, in the direct interest of furthering the collective-bargaining process. To tell an employee-applicant that she/he is being excluded from consideration for hire, and from being hired, for no reason other than that the employee is on strike or is a striker, is to say something that has a natural tendency to interfere with, restrain, and coerce employee-applicants in the continued exercise of the statutory right to engage in a strike in support of her/his bargaining agent's proposals and positions during collective bargaining. *Lin R. Rogers Electrical Contractors*, 328 NLRB 1165, 1166–1167 (1999); *NLRB v. Lucy Ellen Candy*, 517 F.2d 551, 552 (7th Cir. 1975).

After all, nothing in the Act withdraws its protection from striking employees simply because they seek employment elsewhere during their strike. To the contrary, Section 8(a)(3) of the Act prohibits specifically "discrimination in regard to hire," and "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute" is included expressly in the definition of "employee" set forth in Section 2(3) of the Act. There is simply no room for an argument that strikers seeking employment during their strike are somehow regarded differently under the Act—are relegated to second-class status—than are other employees who happen not to be striking when they file employment applications with employers. It violates Section 8(a)(1) for an employer to tell an employee-applicant that she/he will not be considered for employment and will not be hired for no reason other than that she/he has engaged, or is engaging, in a strike elsewhere.

To be sure, assuming arguendo that Respondents' refusal to hire striking Fairview RNs had been lawful, the outcome might be different had Respondents chosen to explain more fully why they would not hire, and consider for hire, striking Fairview RNs—had chosen to explain the coordinated bargaining situation to employee-applicants, instead of saying simply that they would not be hired because they were strikers or were on strike. Then, the refusals would have been placed for employees in the overall context in which Respondents contend justifies those refusals and the statements to employees about the refusals to consider for hire and to hire. That did not occur.

One might argue that so prolonged an explanation to employees has no precedent under the Act. That would be an incorrect argument. For example, it is unlawful for an employer to tell employees that scheduled wage or benefit increases are being withheld or, even, postponed for no reason other than a pending representation election or, more broadly, an organizing campaign that is in progress. See, e.g., *Gossen Co. v. NLRB*, 719 F.2d 1354, 1356-1357 (7th Cir. 1983); *Plasticrafts, Inc. v. NLRB*, 586 F.2d 185, 188–189 (10th Cir. 1978); *Free-Flow Packaging Corp. v. NLRB*, 566 F.2d 1124, 1129 (9th Cir. 1978). For, it has long been held, "the vice involved in . . . the unlawful refusal to increase situation is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge." *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970).

A contrary result occurs, however, whenever the employer accompanies its announcement to employees, that it is withholding scheduled wage or benefit increases because of a scheduled representation election, with the explanation that it is merely attempting to avoid the appearance of improperly influencing the outcome of that election and, regardless of its outcome, the scheduled increases will be implemented following the election. See, e.g., *Green Valley Grocery Outlet*, 332 NLRB 1449, 1451 (2000). Addition of the explanation nullifies

the unfair labor practice that would otherwise be found based upon a terse announcement that scheduled wage and/or benefit increases are being withheld because of a scheduled representation election.

In like vein, it violates the Act to interrogate employees about their union activity. However, if that is done to verify a union's claim of majority status or to prepare defenses for litigation, and so long as that purpose is explained to employees, they are told that they do not need to participate in an interview, and they are assured that reprisals will not be visited upon them for nonparticipation or for answers given, then the explanation nullifies the unlawfulness that might otherwise flow from the interrogation. See, e.g., *Complas Industries, Inc.*, 255 NLRB 1416 (1981).

Similarly, accepting for purposes of 8(a)(1) analysis the legitimacy of Respondents' motivation for the alleged violations of Section 8(a)(3) of the Act, there were no explanations to any employee of the relationship between strikers and coordinated bargaining goals and implementing actions by Respondents. Employees were told only that strikers would not be considered for temporary employment, nor hired for temporary employment, because they were strikers or were on strike. As discussed above, such statements, shorn of any further explanation, violate Section 8(a)(1) of the Act, because they naturally tend to interfere with, restrain, and coerce exercise by employees of the statutorily-protected right to engage in a strike in support of their bargaining agent's collective-bargaining proposals and positions. It matters not under Section 8(a)(1) of the Act that there had been no actual intention to accomplish those purposes by statements made to employees. "The Board and the courts have long held that the test of unlawful interference, restraint, or coercion does not turn on the employer's motive, or on actual effect." *Lee Lumber & Building Material*, 306 NLRB 408, 409 (1992). However, Respondents advance still one additional defense in connection with the unlawful statements that striking employees would not be considered for temporary employment, and would not be temporarily employed, because they were strikers or were on strike.

Even cursory review of the events described in section I,E, through H, supra, show that, for the most part, those statements had been made by representatives of temporary staffing agencies, rather than by supervisors and agents of Respondents. In the Amended Answer, to the extent pertinent, Respondents deny "liability for any statements made by employees or agents of any temporary staffing agency, and further den[y] that any statements made by employees or agents of any temporary staffing agency can be used to support an inference relating to [Respondents'] hiring or staffing policies." In other words, Respondents argue, the temporary staffing agencies were on their own, in connection with any statements their employees or agents made about not considering for hire, and about not hiring, striking Fairview RNs, insofar as positions at Respondents were involved. Yet, that is hardly a plausible defense in the circumstances presented here.

In the first place, there were instances where statutory agents and supervisors of one or another of Respondents actually made such remarks directly to employees. For example, as described in section I,E,3, supra, Respondent Mercy's vice president, Wilde left voice mail messages for between one and three RNs, employees of Respondent Mercy and members of the Union's committee, saying "that Respondent Mercy would not be using striking nurses that were working through temporary agencies." Described in that same section is Float Pool Manager Strauman-Raymond's statement to striking Fairview RN Wegner that "striking RNs working for temporary agencies would not be placed at Allina hospitals." Chief Executive Officer Anderson notified Respondent North Memorial's employees that, "It is not our intent to hire nurses who are on strike at other hospitals," as described in section F, supra.

Secondly, Respondents each obtained temporary RNs through temporary staffing agencies. And with regard to particular staffing agencies named for each of them, Respondents admit, for the most part, that those named temporary staffing agencies are statutory agents of the particular Respondents to which those admissions extend. Of course, that admitted agency extends specifically to the agencies obtaining, screening and referring temporary employees, particularly RNs, to the Respondents with which that agency relationship admittedly exists. Now, "a statement by a party's agent . . . concerning a matter within the scope of the agency . . . made during the existence of the relationship," is "not hearsay" under Fed.R.Evid. Rule 801(d)(2)(D). Instead, it constitutes an admission by the party whose agent made that statement. Therefore, to the extent that Respondents admit the allegations that named temporary staffing agencies were one or another's agents, statements by representatives of those agencies, concerning hiring of temporary RNs, are statements that are attributable to those Respondents.

Beyond that, thirdly, Respondents can hardly deny that, as part of their coordinated bargaining plan, they decided not to accept for employment, both directly and through temporary staffing agencies, any RNs from members of the coordinated group where a strike was in progress, as described in section I,D, supra. That decision was communicated to the temporary staffing agencies, as described throughout section I,E through H, supra. Those agencies served as gatekeepers for RN-referrals to Respondents, including Respondent United, as shown by General Counsel's Exhibit 8. Therefore, viewing the matter from the perspective of RNs employed by temporary staffing agencies, those agencies spoke with apparent authority when making statements about qualifications and acceptability of types of RNs who could and could not be referred to Respondents with whom those agencies had referral contracts.

Indeed, all of the statements made by temporary staffing agency personnel to RNs, immediately before and during the Fairview strike, were correct reflections of what those agencies had been told by one or another of Respondents: striking RNs would not be considered and would not be accepted for temporary employment. Accordingly, the situation is not simply one where temporary staffing agency personnel spoke with apparent authority. In fact, their statements about consideration for hiring and hiring of striking RNs were rooted accurately in what those agencies had been told by Respondents.

In sum, temporary staffing agencies screened and referred RNs for temporary employment with Respondents. Respondents made the appropriate agencies, with which they did busi-

ness, aware that striking RNs would not be considered or accepted for temporary employment. It had to be perfectly foreseeable to Respondents that such statements would be communicated by the agencies to striking RNs, whenever the latter were told that they could not be referred to one or another of Respondents.

In fact, it is difficult to accept that Respondents did not want the agencies to communicate that message to striking Fairview RNs. After all, Respondents wanted the RNs to understand that they had only limited opportunity to support themselves during a strike and would be best advised to return to the bargaining table and reach agreement with Fairview. In any event, when told that they were not being considered for temporary employment at, and would not be employed by, Respondents, the RNs naturally had to understand that it was Respondents who had made that decision, not the temporary staffing agencies which had nothing to gain by not referring qualified RNs, striking or otherwise, to their client-hospitals. Therefore, I conclude that statements to RNs by temporary agency personnel, concerning Respondents' refusal to consider striking Fairview RNs for temporary employment, and to temporarily employ them, are attributable to the appropriate Respondents. By those statements, Respondents violated Section 8(a)(1) of the Act.

Turning, finally, to the alleged violations of Section 8(a)(3) of the Act, as set forth above that subsection of the Act forbids expressly "discrimination in regard to hire . . . to . . . discourage membership in any labor organization." Denial of employment, and of consideration for employment, for no reason other than that employee-applicants are striking in support of their bargaining agent's bargaining proposals and positions, tend naturally to deter those employees' statutory right to strike in support of their bargaining agent's contract proposals and positions. In turn, that discourages those employees' support for their bargaining agent. As a result, such denial of employment, and of consideration for employment, inherently undermine the policies and purposes of the Act, as described at the beginning of this section.

Even so, pointing especially to the decisions in *American Ship Building Co. v. NLRB,* supra, and *Evening News Assn.,* supra, Respondents argue that the Act allowed them to discriminate in hiring against the striking Fairview RNs, because Respondents sought to accomplish no more than to preserve objectives laid down as part of the coordinated bargaining plan, described in section I,D, supra, and to aid Fairview in resisting demands that, if agreed upon, might exceed the coordinated bargaining goals.

A careful reading of those two cases, as well as of others following them, reveals some language that, taken in isolation, seems to support Respondents' argument. "Thus, we cannot see that the employer's use of a lockout solely in support of a legitimate bargaining position is in any way inconsistent with the right to bargain collectively or with the right to strike," *American Ship Building*, 390 U.S. at 310, given that "there is nothing in the Act which gives employees the right to insist on their contract demands, free from the sort of economic disadvantage which frequently attends bargaining disputes" (id. at 313), and the further fact that "there is nothing in the statute which would imply that the right to strike 'carries with it' the right exclusively to determine the timing and duration of all work stoppages." (Id. at 310.) In like vein, where a "lockout was preponderantly designed to force the Union to accept the Company's bargaining proposals," *Evening News Assn.,* supra, 166 NLRB at 221, it cannot be said to violate the Act, because such a lockout is "grounded upon a very real, direct, and immediate bargaining motivation in its own behalf." (Id. at 222.) Yet, a careful reading of those two cases also demonstrates that isolated phrases and scraps of sentences cannot simply be lifted out of context and, then, applied broadly to myriad situations.

Both the Supreme Court in *American Ship Building* and the Board in *Evening News* were quite explicit in pointing out that those decisions were limited. "What we are here concerned with is the use of a temporary layoff of employees solely as a means to bring economic pressure to bear in support of the employer's bargaining position, after an impasse has been reached. This is the only issue before us and all that we decide." *American Ship Building Co. v. NLRB,* supra, 380 U.S. at 308. "Our determination is based on the facts of this case and is not meant to suggest either that all supportive lockouts are lawful, or that all lockouts which are intended to pressure a union into accepting an employer's legitimate proposals are necessarily lawful." *Evening News Assn.,* supra, 166 NLRB at 222. The fact is that there are significant differences between what had been done by the employers in those cases and, in contrast, the course pursued by Respondents in the instant one.

First and foremost is the fact that the instant case does not present a lockout situation. None of Respondents locked out the permanent and temporary, part-time or casual RNs whom they directly employed. Instead, they selectively excluded certain employee-applicants of another, separate employer—striking Fairview RNs—from temporary employment, and from consideration for temporary employment, so long as their strike continued, during a month when each of Respondents was accepting referrals of other employee-applicants for temporary employment. Yet, in *American Ship Building*, the Court quite plainly equated an employer's lockout with its layoff of its own employees: "Whether an employer commits an unfair labor practice . . . when he temporarily lays off or 'locks out' his employees during a labor dispute to bring economic pressure in support of his bargaining position." (380 U.S. supra at 301–301.) "When work . . . was completed on April 15, the News notified some of its employees that they should not report for work until further notice," the Board likewise stated in *Evening News*, 166 NLRB at 220. Thus, Respondents are attempting to justify their selective refusals to hire, and to consider for hire, striking employee-applicants, by pointing to cases where the employers involved had laid off, and consequently locked out, employees which those very employers employed.

No one could plausibly argue that the Act allows employers to selectively lay off and lock out only employees who advocate a strike in support of bargaining proposals made, and positions taken, by their bargaining agent during negotiations with their employer. Such selectivity, based on activity protected by Section 7 of the Act, would clearly interfere with . . . impede [and] diminish . . . the right to strike," contrary to Section 13 of the Act. In turn, such a selective layoff and lockout would frustrate, if not destroy, "the process of collective bargaining,"

American Ship Building, 380 U.S. at 309, by allowing employers to selectively layoff and lockout employees on the basis of their sympathies for supporting their collective-bargaining agent during bargaining. In fact, the Supreme Court specifically exempted from its holding in *American Ship Building* situations where "the employer locked out only union members, or locked out any employee simply because he was a union member." (Id. at 312.)

Here, Respondents pursued the same sort of selectivity, only through their hiring processes. Throughout the Fairview strike, they accepted temporary referrals from temporary staffing agencies, excluding only one category of employee-applicants: those who were striking in support of the Union's bargaining at Fairview. The significance of exercise of that statutory right is discussed above. The policies and purposes of the Act are compromised by such conduct, since strikers are naturally deterred from continuing to support their bargaining agent, upon learning that they are being barred from employment for engaging in such a strike. Conversely, Respondents were able to continue their operations without any of the detriment that a lockout might entail. For, they were not locking out RNs they employed, in contrast to the situations in *American Ship Building* and in *Evening News*. Thus, there is a significant difference between the situations in those, and similar, cases and the one presented here.

Secondly, layoff-lockout was not the only equation drawn by the Court and the Board in those cases, and ones that follow them. "The correlative use of the terms 'strike' and 'lockout' in" certain sections of the Act was pointed out in *American Ship Building*, 380 U.S. at 315. In *Evening News*, the Board pointed out that, "Teamster President Hoffa had explicitly threatened a strike against the News, armed at the time with a strike authorization by the Teamsters membership against both papers." 166 NLRB at 222. Indeed, the Supreme Court pointed out that it was the existence of the very right to strike that did not "'carr[y] with it' the right exclusively to determine the timing and duration of all work stoppages." 380 U.S. at 310. Accordingly, the right of employers to lockout employees, in support of those employers' bargaining positions, is one which arose only in situations where there was a possibility that those locking-out employers confronted the plausible possibility of strikes by their employees. That simply was not the situation presented to Respondents by June 3, when the Fairview strike began.

RNs employed by Respondent Unity, of course, were not represented. At no point had it been confronted with the least possibility that its RNs might go on strike. It had no bargaining relationship with the Union and engaged in no bargaining with it. As to the other six Respondents, at one time each one had confronted the possibility of a strike called by the Union, in the course of bargaining for a collective-bargaining contract. By June 3, however, that possibility had been erased for all of those other six Respondents. Each of them had reached agreement with the Union; each of those agreements had been ratified by the RNs covered by those agreements. One aspect of each of those six agreements was no-strike and no-lockout provisions. In sum, as of June 3, and afterward, none of Respondents confronted the possibility of a strike. So there was no basis for concern on the part of any of Respondents about their own RNs determining "the timing and duration of [any] work stoppages." *American Ship Building*, 380 U.S. at 310.

Third, as of June 3 there was no bargaining impasse, surely at Respondent Unity, but also at the other six Respondents. Yet, as quoted above, the Supreme Court specifically spoke of allowing lockouts in bargaining situations "[a]fter an impasse has been reached." (Id. at 308.) Obviously, bargaining agents do not need to wait for impasse to call strikes. Yet, as pointed out in the immediately preceding paragraphs, by June 3 none of Respondents confronted the possibility of a strike. No impasses existed in any of their bargaining. All—save, of course, Respondent Unity which was not party to a bargaining relationship for its RNs—had reached agreements on terms for contracts and those agreements had been ratified. Absence of impasse serves to further distinguish the instant case from those presented in *American Ship Builders* and *Evening News*.

Finally, for the most part, as of June 3 none of Respondent can be said to have possessed any "real, direct, and immediate bargaining," *Evening News Assn.,* supra, 166 NLRB at 222, interest in the Fairview bargaining and its outcome. Certainly, each of them, including Respondent Unity, could justifiably be concerned with an outcome that so exceeded wages and benefits being paid by Respondents that, as competitors for recruitment and retention of RNs, Respondents might have to begin paying more than newly agreed-upon contractual levels. Indeed, some might even be obliged to re-open the newly agreed-upon contracts. Even so, Respondents' positions were no different from that of any employer in an "industry," using the terminology of Section 1 of the Act, where its competitor or competitors might reach contractual agreement on wage and benefit levels exceeding that of the employer. Nothing in the Act, and no decision under it, has privileged such an employer to discriminate against striking employees of competitors, then-engaged in negotiations, as a means for compelling those striking-employees to accept less generous wages and benefits than they are seeking through their strike.

The simple fact is that, during June, Respondents were engaging in a form of secondary activity. They chose to involve themselves in a labor dispute between the Union and Fairview, by barring the latter's striking RNs from temporary employment, and from consideration for temporary employment, to support Fairview's bargaining positions. Yet, no one can plausibly contend that Respondents, or any of them, could have demanded that they be allowed to participate in Fairview's negotiations with the Union, as a means for ensuring that Fairview did not reach agreements that exceeded coordinated bargaining objectives. Barring striking Fairview RNs from temporary employment, and from consideration for temporary employment, in the final analysis amounted to no more than a parallel avenue for Respondents to enmesh themselves in the Union's negotiations with Fairview. True, Fairview might agree to terms that someday might oblige one or more of Respondents to have to raise contractual levels, or existing levels in the case of Respondent Unity, to attract and retain RNs, even to reopen portions of their then-newly-negotiated contracts. But, someday did not constitute a direct and immediate situation during June. In fact, it might not even constitute a real

possibility, depending upon the type of agreement Fairview eventually did reach with the Union.

Whatever may be said about the other Respondents, they point to the me-too agreement between the Union and Respondent North Memorial, as described in section I,D, supra. In essence, they argue, that agreement surely created a "real, direct, and immediate" interest for Respondent North Memorial in the outcome of the Fairview negotiations. But, that simply does not follow. In the first place, the me-too agreement pertained only to "the highest salary proposal," according to Vogt. There is no evidence showing that negotiations between Fairview and the Union had reached an impasse confined only to salaries or wages. To the extent that their impasse concerned other bargaining subjects, Respondent North Memorial had no "real, direct and immediate" stake in them. Yet, its refusal to temporarily employ, and to consider for temporary employment, supported all aspects of Fairview's bargaining positions. And even as to salaries and wages, certainly Respondent North Memorial could not have demanded to be included in the Fairview negotiations, to support its position under the me-too provision. Neither should it have been able to reach out and support its position by barring striking Fairview RNs from temporary employment and from consideration for temporary employment.

In the final analysis, Respondent North Memorial purchased labor peace for itself—exemption from being subjected to a strike—by making a deal that led to a final agreement. That allowed it to continue operating free from any type of work stoppage. The deal was partially based upon a contingency: salary outcomes at other hospitals then engaged in negotiations. Respondent North Memorial did not have to agree to such a provision. Having done so, it ceased to be a player and relegated itself to the sidelines as a spectator. Having done that, it was no longer allowed under the Act to continue being a participant, as a secondary in a labor dispute in which it was not involved. Any direct and immediate interest it had in that dispute was no more than the consequence of an agreement which it had voluntarily made, as part of a collective-bargaining contract that Respondent North Memorial had negotiated. As a consequence, its role became passive, rather than active.

In sum, the direct holdings of *American Ship Building Co.* and *Evening News*, and their progeny, do not apply to the situation presented here. That leaves for consideration the issue of whether they should be extended to a situation presenting coordinated bargaining until all members of the coordinated group have reached final agreement. Had Respondents locked out their RNs in support of Fairview, that would more closely parallel what occurred in those cases. After all, nothing in the Act prohibits specifically lockouts and, as pointed out in *American Ship Building*, there is language that does support the propriety of lockouts under the Act.

In contrast, there is specific language in Section 8(a)(3) that prohibits employers from discriminating against employees through refusals to hire. Moreover, as discussed at the beginning of this section, striking is an integral component of the Federal scheme of collective bargaining. Thus, to allow Respondents to discriminate against the striking Fairview RNs, by refusing to temporarily employ them and to consider them for temporary employment, would be contrary to an express statutory prohibition and, in the process, would place a heavy burden on the statutory right to strike—interfering with, impeding and diminishing the role of that statutory right in the overall statutory scheme of collective bargaining.

In addition, to license the challenged hiring actions of Respondents under the Act would be to allow employers to make private arrangements, among themselves, without consent by the affected employees and their bargaining agents. After all, multiemployer bargaining requires consent by the bargaining agent to bargaining on such a basis. "The test to be applied in assessing the status of . . . a multiemployer unit . . . is whether the members of the group have indicated from the outset an unequivocal intention to be bound in collective bargaining by group rather than individual action, and whether the union . . . has been notified of the formation of the group . . . and has assented and entered upon negotiations with the group representative." (Footnote omitted.) *Weyerhaeuser Co.*, 166 NLRB 299 (1967). While such consent is not necessarily required for coordinated bargaining, it should not escape notice that not only did the Twin Cities hospitals not bargain through a group representative, but each hospital or hospital-system engaged in individual bargaining and was free to reach whatever agreement it wished, even one which ignored the group goals of the coordinated group.

More importantly, once each reached agreement with the Union, there was no longer any threat of a strike. Each one's direct and immediate interest in reaching agreement had been satisfied. Nothing in the Act, and in Board and judicial interpretation of its provisions, supply any interest for such an employer in continuing to operate, while at the same time discriminatorily refusing to hire, and to consider for hire, striking employees of other group-member employers who continue to bargain. To allow such action is to rewrite an express statutory prohibition.

Still, Respondents have one more string to their bow of defenses. In *FES*, 331 NLRB 9 (2000), the Board imposed a three-element test for evaluating allegations of refusal to hire and of refusal to consider for hire. The first two are obviously met here: during June each of Respondents had concrete plans to hire, and did hire, temporary RNs and, secondly, it is uncontested that striking Fairview RNs had the experience, training, and qualifications to perform temporary RN duties at each of Respondents, save for the limited exceptions enumerated below. The third element is "that antiunion animus contributed to the decision not to hire the applicants." Id. at 12. Respondents point to the absence of any evidence that any one of them had been maliciously motivated against Fairview RNs for striking or, more generally, against the concept of employees striking in support of their bargaining agent's proposals and positions during negotiations.

No question that animus must be shown to establish a violation of Section 8(a)(3) of the Act: "to set forth a violation under Section 8(a)(3), the General Counsel is required to show by a preponderance of the evidence that animus against protected conduct was a motivating factor in the employer's conduct." *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). And no question that, historically, there has been a tendency to confine the definition of animus to hostility or maliciousness. Indeed, it usually is the situation that respondents found to violate Section 8(a)(3) of the Act did harbor hostility or maliciousness toward statutorily pro-

tected activities and employees who engaged in it. However, the fact is that so-confined a definition no longer comports with the Supreme Court's more-recent definition of animus.

"We do not think that the 'animus' requirement can be met only by maliciously motivated, as opposed to assertedly benign (though objectively invidious) discrimination." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269–270 (1993). To be sure, that was not a case arising under the Act, nor even a labor case. Even so, that portion of *Bray* did involve an assertion of discrimination. Over the last 30 years, a greater number of protected classes have emerged, with accompanying prohibitions of discrimination against them because of their protected status. As a result, there has been during that period an understandable effort to align the methodology for evaluating allegations of all types of discrimination. See, e.g., *Schaeff Inc. v. NLRB*, 113 F.3d 264 fn. 5 (D.C. Cir. 1997). So, methodological analysis in one area of discrimination cannot simply be ignored whenever allegations of other types of discrimination, including under the Act, are addressed. Certainly, nothing inherent in the Act or its interpretation precludes the "motivated by a purpose (malevolent or benign)" definition of animus from application when evaluating discrimination allegations under the Act. After all, "a piece of fruit may well be bruised without being rotten to the core." *Cooper v. Federal Reserve Branch of Richmond*, 467 U.S. 867, 880 (1984).

Here, Respondents had an overall objective which is allowable under the Act and can only be relegated to the category of benign: they sought to coordinate their bargaining so that common goals could be achieved to the extent possible, through individual bargaining. Nothing in the Act prohibits parties—employers or unions bargaining simultaneously for employees of more than one employer in an industry—from using that approach to bargaining. Rather than attempting to accomplish that through such allowable action as lockout, however, Respondents agreed to single out strikers and refuse to hire, and to consider them for hire, so long as they remained on strike against one or more of the coordinated group. Had there been a whipsaw strike or had none of Respondents reached agreement with the Union, refusals to hire and to consider for hire might have been allowable, although it is important to keep in mind the narrowness of the Supreme Court's and Board's holding, as quoted above. Those are situations that need not be resolved, for the situation here is entirely different.

Respondent Unity had no bargaining relationship. All other Respondents had reached agreement with the Union. No longer were any of them confronted with a strike situation. While each has relatively long-term concerns about possible contract terms to which Fairview might agree, none any longer had a real, direct and immediate interest in the bargaining outcome between the Union and Fairview. Hiring discrimination is prohibited expressly by the Act. Therefore, while the ultimate objective of coordinated bargaining goals is benign, the challenged actions taken by Respondents, discrimination only against employees striking in support of their bargaining agent's proposals and positions during negotiations, were not benign. They engaged in activity prohibited expressly by the Act.

In the context presented by the instant case, there is no statutorily countenanced collective-bargaining policy that would justify disregarding that express statutory prohibition. Inherently, Respondent's actions frustrated, and had the potential to destroy, "the process of collective bargaining." *American Ship Building Co. v. NLRB,* supra, 380 U.S. at 309. Any statutory legitimacy for those actions is outweighed by the inherent harm to statutory protection granted employees and the collective-bargaining process. Therefore, I conclude that by refusing to consider striking Fairview RNs for temporary employment and, further, by refusing to temporarily employ them, for no reason other than that they were on strike at another employer, during a period when each of Respondents was temporarily employing numerous other RNs in positions for which no one contends that any of the striking Fairview RNs were not qualified, Respondent violated Section 8(a)(3) of the Act.

That conclusion is not without exception concerning some of the alleged discriminatees. As set forth in section I,E,1, supra, Nursefinders had no contract to refer temporary RNs to Respondent Abbott Northwestern. So far as the evidence shows, Nursefinders did not intend to refer anyone to Respondent Abbott Northwestern without such a contract. Christine Navratil and Diane Fischer contacted only Nursefinders for employment at Respondent Abbott Northwestern. Thus, there is no basis for concluding that Respondent Abbott Northwestern refused to consider for temporary employment, or to temporarily employ, either Navratil or Fischer. In addition, Fischer sought temporary employment as a psychiatric nurse. But, Respondents United, Mercy and Unity did not operate psychiatric units. So, there is no basis for concluding that any one of them refused temporary employment to Fischer for the position in which she was seeking to be temporarily employed during the Fairview strike. Further, no evidence tends to contradict the credible testimony that Respondent Unity was not directly hiring part-time or casual nurses during June, in contrast to the unreliable like account in connection with Respondent Methodist, as described in section I,G, supra. Both Vicki Drake and Marie Madsen applied directly to Respondent Unity for temporary employment. Inasmuch as there is nothing contradicts the evidence that Respondent Unity was not directly hiring part-time or casual employees during June, there were no positions available there for either Drake or Madsen. Finally, Teresa Weidenbacher admitted that she would not have accepted employment at Respondent North Memorial, even had it been offered to her, as described in section I,F, supra. Therefore, I shall dismiss these particular discrimination allegations with regard to those striking Fairview RNs.

CONCLUSIONS OF LAW

1. Allina Health System d/b/a Abbott Northwestern Hospital has committed unfair labor practices affecting commerce by refusing to consider for temporary employment and by refusing to temporarily employ, during June 2001, Leslie Stoner, Gwen D. Friedlund, Allison Pennington Haddon, and Lorrie L. LaForge because each of them was on strike against another employer, in violation of Section 8(a)(3) and (1) of the Act, and by telling employees that strikers would not be considered for temporary employment, and would not be temporarily employed, because they were participating in a strike against another employer, in violation of Section 8(a)(1) of the Act. However, it has not been

shown to have violated the Act by discriminating against Christine Navratil or Diane Fischer.

2. Allina Health System d/b/a Mercy Hospital has committed unfair labor practices affecting commerce by refusing to consider for temporary employment and by refusing to temporarily employ, during June 2001, Gwen D. Friedlund and Rebecca Wegner because each of them was on strike against another employer, in violation of Section 8(a)(3) and (1) of the Act, and by telling employees that strikers would not be considered for temporary employment, and would not be temporarily employed, because they were participating in a strike against another employer, in violation of Section 8(a)(1) of the Act. However, it has not been shown to have violated the Act by discriminating against Diane Fischer.

3. North Memorial Healthcare d/b/a North Memorial Medial Center has committed unfair labor practices affecting commerce by refusing to consider for temporary employment and by refusing to temporarily employ, during June 2001, Marie Madsen, Kathy Smedstad, Laura Schuerman, Leslie Stoner, Ed Moeller, Christine Navratil, Diane Fischer, Allison Pennington Haddon, and Charlenea Bryant-Wolf because each of them was on strike against another employer, in violation of Section 8(a)(3) and (1) of the Act, and by telling employees that strikers would not be considered for temporary employment, and would not be temporarily employed, because they were participating in a strike against another employer, in violation of Section 8(a)(1) of the Act. However, it has not been shown to have violated the Act by discriminating against Teresa Weidenbacher.

4. Methodist Hospital, Park Nicollett Health Services has committed unfair labor practices affecting commerce by refusing to consider for temporary employment and by refusing to temporarily employ, during June 2001, William Weber, Teresa Weidenbacher, Kathy Holm, Laura Schuerman, Jill Moy, Mary Hanger, Ed Moeller, Leslie Stoner, Cheryl Grote, and Allison Pennington Haddon because each of them was on strike against another employer, in violation of Section 8(a)(3) and (1) of the Act, and by telling employees that strikers would not be considered for temporary employment, and would not be temporarily employed, because they were participating in a strike against another employer, in violation of Section 8(a)(1) of the Act.

5. HealthEast d/b/a HealthEast Care System has committed unfair labor practices affecting commerce by refusing to consider for temporary employment and by refusing to temporarily employ, during June 2001, Leslie Stoner, Allison Pennington Haddon, Stephanie Schaan, and Charlenea Bryant-Wolf because each of them was on strike against another employer in violation of Section 8(a)(3) and (1) of the Act, and by telling employees that strikers would not be considered for temporary employment, and would not be temporarily employed, because they were participating in a strike against another employer, in violation of Section 8(a)(1) of the Act.

6. Allina Health System d/b/a Unity Hospital has committed unfair labor practices affecting commerce by refusing to consider for temporary employment and by refusing to temporarily employ, during June 2001, Gwen D. Friedlund because she was on strike against another employer, in violation of Section 8(a)(3) and (1) of the Act, and by telling employees that strikers would not be considered for temporary employment, and would not be temporarily employed, because they were participating in a strike against another employer, in violation of Section 8(a)(1) of the Act. However, it has not been shown to have violated the Act by discriminating against Diane Fischer, Vicki Drake, or Marie Madsen.

7. Allina Health System d/b/a United Hospital has committed unfair labor practices affecting commerce by refusing to consider for temporary employment and by refusing to temporarily employ, during June 2001, Christine Navratil and Gwen D. Friedlund because each of them was on strike against another employer, in violation of Section 8(a)(3) and (1) of the Act, and by telling employees that strikers would not be considered for temporary employment, and would not be temporarily employed, because they were participating in a strike against another employer, in violation of Section 8(a)(1) of the Act. However, it has not been shown to have violated the Act by discriminating against Diane Fischer.

REMEDY

Having concluded that each of Respondents has engaged in unfair labor practices, I shall recommend that each one be ordered to cease and desist therefrom and, further be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, each of Respondents shall be ordered to make whole the employees named for it in the Conclusions of Law above for any loss of earnings and other benefits suffered as a result of the discrimination against her or him, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be paid on amounts owing, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Each of Respondents also shall, within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to consider for temporary employment and the unlawful refusals to temporarily employ each of the employees named for it in the Conclusions of Law above and, within 3 days thereafter, notify that employee or those employees in writing that this has been done and that those refusals will not be used against her/him in any way. Finally, because almost all of the unlawful discrimination involved temporary staffing agencies, each of Respondents shall sign and return to the Regional Director for Region 18 sufficient copies of the notice, which each of Respondents is posting, for posting by the temporary staffing agencies, they being willing, involved in its refusal to consider for temporary employment and to temporarily employ striking RNs, as described with specificity in the Order.

[Recommended Order omitted from publication, except appendices A and D.]

APPENDIX A

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 tell you that we will not consider employees for temporary employment, and will not hire employees temporarily, because they are strikers or are on strike against another employer.

WE WILL NOT refused to consider for temporary employment, refuse to hire for temporary employment, or otherwise discriminate against Leslie Stoner, Gwen D. Friedlund, Allison Pennington Haddon, Lorrie L. LaForge, or any other employee, because of participation in a strike in support of bargaining proposals and positions of Minnesota Nurses Association, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights protected by the National Labor Relations Act.

WE WILL make Leslie Stoner, Gwen D. Friedlund, Allison Pennington Haddon, and Lorrie L. LaForge whole for any loss of earnings and other benefits resulting from our unlawful refusals to consider them for temporary employment and from our unlawful refusals to hire them for temporary employment during June 2001, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful refusals to consider for temporary employment and to the unlawful refusals to hire for temporary employment Leslie Stoner, Gwen D. Friedlund, Allison Pennington Haddon, and Lorrie L. LaForge, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done, and that those unlawful refusals, to consider any of them for temporary employment and to hire any of them for temporary employment, will not be used against any of them in any way.

ALLINA HEALTH SYSTEM D/B/A ABBOTT NORTHWESTERN HOSPITAL

APPENDIX D

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 tell you that we will not consider employees for temporary employment, and will not hire employees temporarily, because they are strikers or are on strike against another employer.

WE WILL NOT refuse to consider for temporary employment, refuse to hire for temporary employment, or otherwise discriminate against William Weber, Teresa Weidenbacher, Kathy Holm, Laura Schuerman, Jill Moy, Mary Hanger, Ed Moeller, Leslie Stoner, Cheryl Grote, Allison Pennington Haddon, or any other employee, because of participation in a strike in support of bargaining proposals and positions of Minnesota Nurses Association, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of your rights protected by the National Labor Relations Act.

WE WILL make William Weber, Teresa Weidenbacher, Kathy Holm, Laura Schuerman, Jill Moy, Mary Hanger, Ed Moeller, Leslie Stoner, Cheryl Grote, and Allison Pennington Haddon whole for any loss of earnings and other benefits resulting from our unlawful refusals to consider them for temporary employment and our unlawful refusals to hire them for temporary employment during June 2001, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful refusals to consider for temporary employment and to the unlawful refusals to hire for temporary employment William Weber, Teresa Weidenbacher, Kathy Holm, Laura Schuerman, Jill Moy, Mary Hanger, Ed Moeller, Leslie Stoner, Cheryl Grote, and Allison Pennington Haddon, and WE WILL within 3 days thereafter notify each of them in writing that this has been done, and that those unlawful refusals, to consider any of them for temporary employment and to hire any of them for temporary employment, will not be used against any of them in any way.

METHODIST HOSPITAL, PARK NICOLLETT HEALTH SERVICES