Eagle Comtronics, Inc. *and* Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC. Case 3-CA-9436

August 18, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS ZIMMERMAN AND HUNTER

On April 9, 1981, Administrative Law Judge Arline Pacht issued the attached Decision in this proceeding. Thereafter, the General Counsel, the Charging Party, and Respondent filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings,[1] findings,[2] and conclusions [3] of the Administrative Law Judge, as modified herein, and to adopt her recommended Order, as modified.

During preelection meetings with employees, Respondent's labor relations manager, Edward Heinrich, discussed, *inter alia*, the status of economic strikers. Heinrich's testimony indicated that he told employees that, in the case of an economic strike, strikers "could be replaced with applications on file."[4]

Although finding that Respondent did not intend to threaten employees by discussing the replacement of economic strikers, the Administrative Law Judge nonetheless concluded that Respondent thereby violated Section 8(a)(1) of the Act. The Administrative Law Judge observed that, while Respondent had mentioned its right to replace economic strikers, it had failed to inform its employees of their rights to reinstatement as vacancies became available. According to the Administrative Law Judge, this failure to assure employees of their rights might lead employees to believe erroneously that their jobs would be permanently forfeited. The Administrative Law Judge therefore concluded that the failure to advise the employees fully of their rights as economic strikers violated the Act. We do not agree.

The issue posed in this case is the degree of detail required of an employer who informs employees that they are subject to replacement in the event of an economic strike. It is well established that, when employees engage in an economic strike, they may be permanently replaced.[5] Of course, "permanent replacement" does not mean that a striking employee is deprived of all rights. Specifically, striking employees retain the right to make unconditional offers of reinstatement, to be reinstated upon such offers if positions are available, and to be placed on a preferential hiring list upon such offers if positions are not available at the time of the offer.[6] However, the Board has long held that an employer does *not* violate the Act by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike. The Board has held that such comments do not constitute impermissible threats under Section 8(a)(1), or objectionable conduct in an election.[7] Unless the statement may be fairly un-

[1] The General Counsel has excepted to the Administrative Law Judge's failure to correct the record as allegedly requested in the General Counsel's motion to correct the record. In the absence of opposition thereto, and because such corrections do not affect the outcome of the instant proceeding, we grant the General Counsel's motion and, accordingly, the record stands corrected.

[2] The General Counsel and the Union have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

[3] In agreeing with the Administrative Law Judge that Respondent did not unlawfully threaten employees with loss of their Christmas bonus, we rely on her credibility resolutions, and therefore find it unnecessary to pass on her further comment that Respondent should not be held accountable for speech "which at most created a minor ambiguity." We also adopt the Administrative Law Judge's findings and conclusions concerning the "vague" and "murky" testimony about the alleged promise of benefits. However, we do not adopt her observation that "If anything, such comments [on benefits] fall into the nature of harmless campaign rhetoric."

We agree with the Administrative Law Judge's conclusion that Respondent's conduct of the mock election violated the Act under the standards of *Struksnes Construction Co., Inc.*, 165 NLRB 1062 (1967). In so doing, we disagree with her conclusion that Respondent did not create a coercive atmosphere. Rather, we note that Respondent had committed several unfair labor practices prior to the mock election, and some of its supervisory and managerial personnel were present during much of the voting. Further, we do not condone the use of copies of the Board's sample ballot in a mock election.

Although we agree with the Administrative Law Judge's conclusion that a bargaining order is not warranted here, we do not rely on her statement that the passage of 2 years between the violations and the prospective holding of a new election mitigated the coercive impact of several of Respondent's unfair labor practices. Nor do we rely on her conclusion that the Charging Party's withdrawal of its representation petition meant that the mock election could not have served to undermine the Union's majority status.

[4] The Administrative Law Judge found, and we agree, that testimony by an employee that Heinrich told employees that "if the Union got in . . . there was a certain period of time we'd be allowed to go on strike, and after that time there was a number of people that needed jobs, and anytime his door was open to them," was entirely consistent with Heinrich's version of events as recounted above. Accordingly, we have accepted Heinrich's testimony about what he said as accurately reflecting his comments to employees about some of the possible consequences of strikes.

[5] *The Laidlaw Corporation*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1969). Cf. *N.L.R.B.* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

[6] *Laidlaw, supra*, 171 NLRB at 1369-70; *Fleetwood Trailer, supra.*

[7] *Mississippi Extended Care Center, Inc., d/b/a Care Inc., Collierville*, 202 NLRB 1065 (1973).

derstood as a threat of reprisal against employees or is explicitly coupled with such threats, it is protected by Section 8(c) of the Act. Therefore, we conclude that an employer may address the subject of striker replacement without fully detailing the protections enumerated in *Laidlaw*, so long as it does not threaten that, as a result of a strike, employees will be deprived of their rights in a manner inconsistent with those detailed in *Laidlaw*. To hold otherwise would place an unwarranted burden on an employer to explicate all the possible consequences of being an economic striker. This we shall not do. As long as an employer's statements on job status after a strike are consistent with the law, they cannot be characterized as restraining or coercing employees in the exercise of their rights under the Act.[8]

In the instant case, Respondent informed employees only that they could be replaced by applicants on file. Such a statement, simply describing an employer's legal prerogative, does not contravene any *Laidlaw* rights, but, indeed, is entirely consistent with the law. Respondent was not required to delineate more specific rights. Accordingly, we reverse the Administrative Law Judge's conclusion that Respondent violated Section 8(a)(1) by its statement in this regard.

AMENDED CONCLUSIONS OF LAW

Substitute the following for the Administrative Law Judge's Conclusion of Law 4:

"4. Respondent has violated Section 8(a)(1) of the Act by promising employees future benefits, that is, a clambake; by impliedly threatening a delay in the receipt of improved insurance benefits; and by conducting an unlawful poll to ascertain employees' union sentiments."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Eagle Comtronics, Inc., Clay and Baldwinsville, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as modified below:

1. Delete paragraph 1(c) of the Administrative Law Judge's recommended Order.
2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

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

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT do anything that interferes with, restrains, or coerces you with respect to these rights.

WE WILL NOT promise you future benefits to forestall your union activities.

WE WILL NOT impliedly threaten you with a delay in receiving insurance benefits.

WE WILL NOT conduct unlawful polls of our employees to determine their union sympathies or desires.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in the National Labor Relations Act.

EAGLE COMTRONICS, INC.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge: Upon a charge filed on November 19, 1979, by Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC (hereinafter the Union), a complaint was issued on January 8, 1980, and reissued as amended on June 24, 1980. The amended complaint alleges that Respondent Eagle Comtronics, Inc., through its officers, violated Section 8(a)(1) of the National Labor Relations Act, as amended (the Act), and unlawfully refused to bargain with the Union. Respondent's timely answers denied any wrong-

[8] *Care Inc., Colliersville, supra.* The cases relied on by the Administrative Law Judge are not to the opposite, and are readily distinguishable from the instant case. In both *George Webel d/b/a Webel Feed Mills & Pike Transit Company*, 217 NLRB 815 (1975), and *Hicks-Ponder Co., A Division of Blue Bell, Inc.*, 186 NLRB 712 (1970), enfd. 458 F.2d 19 (5th Cir. 1972), the respondent went beyond informing the employees of the risk of being permanently replaced by telling them they would permanently *lose* their jobs.

doing. A hearing on this matter was held in Syracuse, New York, on January 5, 6, and 7, 1981.

Upon the entire record in this proceeding, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. AS TO JURISDICTION

The Business of Respondent

Respondent, a New York corporation, is engaged in the manufacture, sale, and distribution of cable television components and related products at its plants located in Baldwinsville and Clay, New York. Annually, in the course and conduct of its business, Respondent purchases, transfers, and delivers to its Baldwinsville and Clay plants goods, products, and materials valued in excess of $50,000 which were transported to said plants directly from States other than the State of New York. I find that Respondent is an employer within the meaning of Section 2(2) and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

Issues

The specific issues presented in this case are:

A. Whether a majority of Respondent's employees designated the Union as their duly authorized collective-bargaining agent.

B. Whether, subsequent to the Union's bargaining demand, Respondent impliedly threatened its employees with plant closure, a delay in the receipt of insurance benefits, and a reduction of other benefits; suggested they would be replaced by job applicants during a strike; promised them future benefits; and unlawfully polled them by conducting a mock election.

C. Whether Respondent's commission of the unfair labor practices outlined above were so pervasive and egregious as to negate the possibility of a fair election and to warrant the issuance of a bargaining order.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Union's Campaign*

Respondent's work force of 257 employees was distributed between its Baldwinsville and Clay facilities in northern New York State. With one exception, the unfair labor practices described in the complaint were alleged to have occurred at the Clay plant.[1]

On May 19, 1979,[2] eight employees, all of whom worked at the Clay facility, met with several union representatives to discuss organizing Respondent's employees. On that occasion, the group received authorization cards and were instructed on the appropriate means to solicit signatures.

Over the next several weeks, the employees distributed authorization cards to their coworkers and then returned signed cards to the union agents. By May 29, 129 executed authorization cards were in the Union's possession. By June 4, 144 employees had signed cards. Of this total which the General Counsel offered into evidence, Respondent objected to only 3 cards signed by persons who it contended were no longer in its employ on the date the Union claimed a majority, and another 27 cards on the grounds that the signatures arguably were not genuine. After comparing the signatures on the challenged cards with business records bearing valid signatures of the employees in question, I authenticated and admitted into evidence all but four of the cards in this latter group.[3] Even without the cards of the 7 challenged individuals, I find that 137 other employees, a clear majority, signed valid single-purpose cards designating the Union as their representative for purposes of collective bargaining by June 4, 1979.[4]

On that date, the Union requested recognition from Respondent both orally and in writing for a unit comprised of all production and maintenance employees at both the Baldwinsville and Clay facilities. Shortly thereafter, Respondent stipulated to a consent election under the Board's auspices which was scheduled for July 12.

B. *The Company's Response*

Between June 18 and July 12, in an effort to counteract the Union's influence, Respondent embarked on a counteroffensive. At the outset, Company President Alan Devendorf and Labor Relations Manager Edward Heinrich mapped out the basic strategy of its campaign with the advice of counsel. An early judgment was made not to involve low-level supervisory staff in their activity and a list of do's and don'ts was distributed to them. Apparently these admonitions were effective for no supervisor was accused of misconduct throughout the preelection campaign.

Respondent's antiunion campaign was two-pronged, consisting of mailings to the employees and a series of in-plant group meetings with assemblies of workers from each of the three shifts at the Clay factory.

The format for each meeting was essentially the same: During the course of the shift, the employees would congregate at a cleared space at the end of a working area adjacent to the executive offices. Working from an outline or sketchy notes which were reviewed in advance by counsel, Heinrich, as the principal spokesman, opened

[1] The complaint incorrectly alleged that the misconduct took place at the Baldwinsville, rather than the Clay, factory. At the hearing, I granted the General Counsel's motion to amend the complaint and correct this error. Baldwinsville employees did participate, however, in the mock election. See *infra*.

[2] Unless otherwise noted, all events occurred in 1979.

[3] The propriety of proving the authenticity of union authorization cards in the manner indicated above has been approved by the Board in *Heck's Inc.*, 166 NLRB 186 (1967).

[4] The cards read: "I hereby accept membership in the . . . Union of my own free will and do hereby designate said . . . Union as my representative for purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment."

meetings with prepared comments. Occasionally Devendorf would intercede with remarks of his own. A question-and-answer period followed. On occasion, the meetings concluded with employees clustered in small groups raising further questions with Devendorf or Heinrich.

It was during these meetings, five or six in number,[5] that the conduct occurred which the General Counsel alleges was violative of Section 8(a)(1) of the Act. Twelve employees were called to present evidence in support of the Government's case-in-chief but their testimony left much to be desired. They did not describe the meetings fully and demonstrated little ability to recall precisely the contents or the context of the discussions at the meetings. All too frequently, the witnesses remembered only fragments of discussions, and seemed to suffer from an inability to distinguish their own assumptions and impressions from recollections of what management actually said. With these infirmities in mind, the evidence bearing on the 13 allegations in the complaint is evaluated below.

C. *Alleged Threats of Plant Closure*

Three counts in the complaint concern alleged threats of plant closure. The first of these, set forth in paragraph VI(a), attributes to Devendorf a threat purportedly made to first-shift employees that, since the Company was young, it would probably go under if the Union prevailed.

The General Counsel adduced evidence from six employees assigned to the first shift, five of whom offered no testimony which could be held to substantiate the above allegation. Indeed, Cecilia Gallagher, a member of the Union's organizing committee, testified in a manner which repudiated the charge of wrongdoing by Respondent. She stated that, when employees asked Devendorf if the plant might close, he responded on more than one occasion that "he certainly hoped not." Other first-shift employees, Diane Shortsleeve and Arlene Mourey, could recall no statements by company officials bearing on plant closure.[6] Similarly, second-shift employees Dawn Morgan and Shirley Mouk agreed, after reviewing their prehearing affidavits, that management representatives made no statements about possibly closing the plant should the Union succeed.[7] In fact, far from threatening employees with plant closure, another second-shift employee, Monica Hart, elicited a guarantee from management that the Company would take no reprisals against employees engaged in union activity. Thus, she stated that, after Heinrich assured assembled employees that they would be protected if they opposed the Union, she asked whether those who favored the Union would be similarly safeguarded. Heinrich responded that no one would be fired for supporting the Union, that "it was illegal to be fired for Union activity." Given the above evidence, there is no basis for finding that Respondent violated Section 8(a)(1) of the Act by threatening first- or second-shift employees with plant closure. Accordingly, I conclude that paragraph VI(a) of the complaint should be dismissed.

Paragraph VI(g) of the complaint further avers that Heinrich impliedly threatened third-shift employees that the plant would shut down and be moved to another State if the Union won the election. This allegation apparently stemmed from the testimony of former employee Daryl Rathbun, who asserted that Heinrich said "they could shut the doors . . . but they would not be able to open another plant in New York State, they would have to move out of state."

However, Rathbun was confused about the dates he worked on various shifts. The record shows that Rathbun was assigned to the first shift for 6 weeks following his date of hire on May 23, and thereafter was transferred to the second shift for at least the balance of the preelection period. Thus, he was in no position to attest to any speeches made to the third shift. More significantly, no other witness, regardless of shift, corroborated Rathbun's testimony that the Company threatened to move to another State. What Rathbun may have picked up were portions of a dialogue which ensued when an employee asked if the Company had a plant in Virginia. Devendorf replied that the Company previously owned a plant in Virginia and was working on the possible purchase of land in that State. After making this statement, he added that the Company had just made a substantial commitment of funds to purchase and renovate the Clay plant. The import of Devendorf's comments had to be obvious: Respondent would hardly shut its doors after having recently made a significant investment in its present site.

I do not believe Rathbun was engaged in purposeful misrepresentation; rather, his testimony exemplifies a weakness common to the accounts of many witnesses in this case. He heard only partial conversations and converted the fears and rumors which were abounding in the plant into a false reality.

Paragraph VI(g) also imputes to Heinrich a threat ostensibly made to third-shift employees to close the plant and reopen with new employees.

Third-shift employees Annette Wallen and Virginia Richardson[8] testified in support of this allegation, but discrepancies in their accounts cast serious doubt on the accuracy of their recollections.

[5] Although the record is somewhat ambiguous in this regard, it appears that at least three meetings with each shift were conducted during the preelection period on June 18 and July 5 and 10. Another meeting was held on July 11, the day after the Union withdrew its petition for an election. The last gathering may have been when employees participated in the mock election on July 12. However, some employees had the impression that the meetings were far more numerous than the five or six (per shift) which Respondent admitted.

[6] The remaining employees clearly identified as having worked on the first shift, Charlotte Johnston and Patricia McClellan, were not questioned about threatened plant closure. Although Daryl Rathbun was assigned to the first shift throughout most of the preelection period, his testimony is discussed in connection with par. VI(g) of the complaint since he offered evidence which closely tracked the threatening language alleged therein.

[7] Although par. VI(a) of the complaint refers solely to a threat made to first-shift employees, I have considered testimony elicited from witnesses assigned to other shifts since that testimony was closely related to the merits of the allegation and the issue was fully litigated. I have followed the same practice with respect to the other allegations in the complaint. See *Justak Brothers and Company, Inc.*, 253 NLRB 1054 (1981).

[8] Respondent disbanded its third shift in November 1979, offering all the employees on that shift the option of transferring to other shifts.

According to Wallen, Devendorf asserted during a meeting in the first week of June that "he would let everybody go and start all over again . . . they had enough applications to do it, three, four hundred." However, the allegation in the complaint attributes the threat to Heinrich, not to Devendorf, and there were no company meetings during the first week of June. Moreover, no reference to such a threat appears in Wallen's prehearing statement although she was interviewed by a Board investigator at a time when the events in question should have been much fresher in mind than by the date of the hearing.

Richardson testified with some hesitation that, at a meeting at which employees were shown drawings of competitive products produced in Taiwan, Heinrich said "something to the effect that if the Union got in, they had enough applications on file, they had over 1500 applications that they could close the plant." On cross-examination, Richardson appeared even more uncertain than she had been during her direct testimony. Repeatedly, she responded to efforts to prod her recollection by answering, "I can't remember. . . ." Like Wallen, she acknowledged an omission in her prehearing affidavit: It made no mention of plant closure in connection with the Union. Given both Wallen's and Richardson's inability to recali with any specificity the contents of management's alleged threats and the lack of uniformity between their accounts, their testimony cannot be relied upon to sustain a violation of the Act. Moreover, viewing the record as a whole, I find it highly improbable that management would exercise prudence and restraint while addressing the first and second shifts and then throw caution to the wind by threatening the third shift with plant closure. Therefore, I conclude that paragraphs VI(g) and (h) of the complaint are unsupported and should be dismissed.

D. *Threats of Job Loss*

Paragraph VI(f) of the complaint accuses Respondent of threatening to replace second-shift employees with applicants on file in order to forestall and discourage their union activities.

The only second-shift employee to have any recollection of management statements bearing on the replacement of workers was Dawn Morgan.[9] However, her testimony deviated substantially from the language set forth in the complaint for she recalled that, when management alluded to hiring new applicants, it was in connection with a discussion of replacing striking employees.

Specifically, Morgan related, ". . . there was a time when he said . . . if a union got in . . . there was a certain period of time we'd be allowed to go on strike, and after that time there was a number of people that needed jobs, and anytime his door was open to them."

First-shift employees Gallagher and Mourey also remembered that references to hiring job applicants arose in the context of a discussion concerning strikes. Gallagher, in particular, testified that, when an employee asked whether the Company could hire other people in the event of a strike, management's response was that there were occasions when replacements could be hired, but "he didn't think it would come to that."

Heinrich's testimony is consistent with the recollections of the Government's witnesses. He explained, ". . . we talked about economic strikers. And that question came up about economic strikers. And at that point I did very clearly state that in the case of an economic strike . . . present employees could be replaced with applications on file."

I am convinced that Heinrich did not intend to convey a threat in discussing the replacement of economic strikers. He made no reference to the inevitability of a strike, did not infer in any way that the Company would use its power to bring about such a result, and did not affirmatively state that striking employees would be permanently replaced. On the other hand, he made no effort to advise the assembled workers of their right to reinstatement as vacancies arose, in accordance with applicable law. See, e.g., *George Webel d/b/a Webel Feed Mills & Pike Transit Company*, 217 NLRB 815, 818 (1975); *Hicks Ponder Co., A Division of Blue Bell, Inc.*, 186 NLRB 712, 726 (1970), affd. 458 F.2d 19 (5th Cir. 1972). Without such assurances, employees might well have been led to believe that if a strike occurred their jobs would be forfeited permanently. Therefore, notwithstanding the intentions of Respondent's officials, I conclude that the failure to fully advise employees as to their rights in the event of an economic strike violated Section 8(a)(1) of the Act.

E. *Threats To Withhold Benefits*

1. The Christmas bonus

Three allegations in the complaint concern purported threats by Respondent to reduce or postpone employee benefits to forestall or discourage their union activities. The first of these, contained in paragraph VI(b), accuses Devendorf of threatening first- and third-shift employees with a loss of benefits due to legal fees the Company had to divert to counteract union activities.

The General Counsel's witnesses' ability to recall what management may have said with reference to the above allegation was singularly flawed. For example, Mourey's hazy recollection was that Devendorf said something "about hiring lawyers and that the lawyers are paid out of the Company profits, and the Christmas bonus also came out of the Company profits." Hart also testified that "somebody made a statement . . . that legal fees were coming out of the Company's profits." Gallagher added that, after employees divided into small groups at one of the meetings, Devendorf stated that "it would cost a lot of money for lawyers, and they have to have lawyers, these aren't his exact words, but he said something to this effect; came out of the profit of the Company and that is where our Christmas bonus came from, too."[10] Devendorf attempted to fill in the gaps created

[9] Other second-shift employees, Hart and Mouk, made no discussion bearing on replacing employees with applicants on file.

[10] Neither of the two third-shift employees who served as witnesses in this case mentioned any linkage between legal fees and a Christmas bonus reduction.

by the witnesses' faulty memories. Devendorf explained that he and Heinrich were joined by Respondent's counsel at group meetings where he explained that all benefits were derived from the profits an organization makes; that, in addition to paying legal fees related to the union campaign, the Company also was involved in two significant lawsuits which could affect its fortunes. During the course of this meeting an employee asked counsel what his hourly fees were. Beyond this, Devendorf adamantly denied making any statement either expressly or by implication that the Christmas bonus would be reduced by virtue of legal fees arising out of contesting the Union.

Even taking the employees' statements alone, there is insufficient evidence to warrant a finding that Devendorf unlawfully threatened the work force with a loss of benefits. I find it a strained interpretation to read into any of the testimony reviewed above a threat to do away with the Christmas bonus. Devendorf's comments were merely factual statements, the truth of which were beyond dispute. It does a disservice to Respondent's employees to suggest that they were incapable of assessing for themselves the validity of their employer's remarks; but if some persons chose to see sinister implications in the speech, which at worst created a minor ambiguity, Respondent should not be held accountable.

2. The minimum wage

Paragraph VI(e) of the complaint charges Respondent with impliedly threatening a reduction in wages by telling its employees that the minimum wage would be used as a base from which the Company would start negotiations.

Two employees, Gallagher and Mourey, offered relatively consistent testimony as to this allegation. Both of them related, in essence, that employees asked the Company's officials whether they would be put back to minimum wage. Initially, Gallagher recalled that Heinrich said employees could lose instead of gain during negotiations. After reviewing her prehearing affidavit, she added that Heinrich denied that they would be put back to minimum wage while negotiations were going on, but that everything was negotiable. Mourey was more precise. She testified that, in addressing a question, Respondent's counsel explained that "no one actually goes back to minimum wage, it was just a starting point for negotiations." She specifically recalled that company representatives stated that, as a result of negotiations, employees could wind up with more, the same, or less.

Here, too, Heinrich and Devendorf were in a position to give a more lucid picture of the discussions involving the minimum wage.[11] Devendorf explained,

> . . . the question came up about the negotiation process. A number of our people have never been involved with the Union. We tried to explain what some of the processes were that you would go through. And one of those was what happened at the table after . . . the union were selected and certified. . . . In connection with the negotiating process . . . Mr. O'Hara [Respondent's counsel] talked about the status quo . . . that during that period of negotiations status quo would have to be held as far as any existing benefits . . . that the only constraints that either party would have would be either State or Federal laws that would prohibit you from dropping below or going over. In other words, the minimum wage was then brought up as an example . . . . And it is possible that we would start our negotiations from that point. . . .

He further recalled that, when a question arose relating to the minimum wage, counsel responded that "whatever they had now would not be affected in any way through the negotiations . . . that the negotiations could wind up where they could either get more or less money . . . or the same."

The Board takes the position that a coercive statement, such as the one attributed to Respondent in paragraph VI(e) of the complaint, may or may not be objectionable depending on the context in which it was made. Where the statement can be construed as a threat that the employer will unilaterally discontinue benefits prior to negotiations, or adopt a repressive bargaining posture designed to force a reduction of existing benefits for purposes of penalizing the employees for choosing a collective-bargaining representative, the Board will find a violation. On the other hand, if the thrust of the employer's comment is that designation of the union will not automatically secure increases in wages and benefits and that any reduction in wages or benefits will occur only as a result of the normal give and take of collective bargaining, then no violation will be found. *General Electric Company*, 246 NLRB 1103 (1979); *Madison Kipp Company*, 240 NLRB 879 (1979); *Plastronics, Inc.*, 233 NLRB 155 (1977); *Coach and Equipment Sales Corp.*, 228 NLRB 440 (1977).

Applying the standards articulated in these cases to the facts in the present matter, I find nothing in either the employees' or Respondent's accounts which would establish an unfair labor practice. The most that can be said is that Respondent's agents advised the employees of the realities of the collective-bargaining process including the possibility that benefits could be lost as well as gained. But at no time did company officials suggest that they would adopt an intransigent posture during negotiations or threaten employees that their pay would be reduced to the miminum wage. Indeed, they indicated that benefits might be realized as a result of the collective-bargaining process. By no stretch of the imagination can it be said on the basis of the remarks reported here that a violation of the Act occurred.

[11] I do not mean to imply that the employees were less credible witnesses than were management officials, only that their recollection of events seemed more severely impaired. This may be understandable considering the workers' apparent naivete about collective bargaining, the fact that many of the allegedly threatening remarks were in response to individual questions posed by employees at rather large assemblies, and that the witnesses were testifying about circumstances which occurred almost 2 years prior to the instant hearing. In contrast, even taking into account a tendency to present one's testimony in the best light, the company officials were bound to have a better recollection of these meetings since they prepared for each one, reviewed their remarks with counsel beforehand, and discussed many of the same topics at three meetings for every one such meeting attended by the witnesses.

3. Insurance benefits

In paragraph VI(c), Heinrich also is accused of impliedly threatening employees with a delay in receiving insurance benefits.

In support of this contention, first-shift employee Gallagher testified briefly that Heinrich, referring to a piece of union literature he had in hand, told the employees that he was prevented from meeting with the insurance company as planned, "because of this Union nonsense." Second-shift employee Shirley Mouk also remembered that Heinrich referred to the cancellation of an insurance meeting caused by the Union's "bullshit." Another second-shift employee, Hart, recalled with greater clarity that, just after the Union withdrew from the election, Heinrich called another meeting and, obviously angered by a letter which the Union had mailed to all employees, yelled at the group that he had to cancel an insurance meeting which was designed to obtain better benefits for them.

Heinrich conceded he was irritated on receiving a copy of the Union's parting salvo and spent the better part of the day with Devendorf and counsel discussing how to react to it. They agreed that a response should be made and consequently canceled a meeting which had been scheduled to select a new group health insurance plan. At meetings with each shift, Heinrich admitted that, out of vexation with the union literature, he told the employees he was compelled to cancel an insurance meeting. However, he denied suggesting that benefits would be delayed thereby.

Although Heinrich's outburst came after the Union had withdrawn its petition for an election, a respondent's postelection conduct may be unlawful nevertheless where it is designed to give it an advantage in the event of future union activity. See *Raley's, Inc.*, 236 NLRB 971, 983 (1978).

Here, even in the absence of an express assertion, employees easily could construe Heinrich's comments to mean that insurance benefits would be postponed. Indeed, Heinrich surely understood the implications of his remark for why else would Heinrich have seen fit to announce the cancellation of the insurance meeting at three separate sessions with the employees. Respondent had a number of options less threatening than the one it chose: It could have addressed employees on the day following the planned insurance meeting, refrained from referring to that meeting, or simply have reassured the employees that the insurance meeting soon would be rescheduled. Instead, Respondent's remarks had the reasonably foreseeable effect of transferring to the Union blame for a delay in arranging improved insurance benefits and conveying to the employees the disadvantages of continued union support. At the very least, Respondent must be held liable for creating uncertainty and perhaps apprehension where none needed to exist. By so doing, Respondent violated Section 8(a)(1) of the Act.

4. Promise of benefits

Paragraph VI(d) alleges that Heinrich promised future benefits to first- and third-shift employees to forestall their union activities.

The only concrete evidence bearing on this allegation concerns a clambake which Respondent held for its employees in August, several months after the union campaign terminated.[12]

Gallagher testified that, at one of the group meetings, an employee who apparently had heard rumors about a forthcoming clambake questioned Heinrich as to whether there was going to be such an event. He stated he could not respond because to do so would be considered a bribe. Gallagher further related that, after the union election was canceled, Heinrich announced that a clambake would be held and that it was indeed the surprise the employees had heard about.

Hart recalled references to the clambake in a somewhat different manner. She recalled that, prior to the mock election, a management official announced there would be a surprise but he could not announce what it was. Subsequently, Heinrich informed the employees that the surprise was a clambake for which each employee was to receive two free tickets valued at $34 for the pair.

Heinrich denied that he made any statement, either expressly or by implication, about the clambake during the campaign period. However, although he may not have specifically mentioned the word "clambake," several employees did recollect some reference by management to a future event, the details of which the Company mysteriously could not reveal. Heinrich did concede that the decision to hold the clambake came during the course of the union campaign, a decision which he stated would have occurred regardless of the Union's presence on the scene.

It is a time-honored principle that an employer confronted with a union organizational campaign is bound to proceed with the granting or withholding of benefits in the same manner he would have had the union not been present. See, e.g., *Gold Circle Department Stores, etc.*, 207 NLRB 1005, 1014 (1973). Here, given Respondent's acknowledgment that its decision to go forward with the clambake was firm. it had no reason to postpone announcing the event and allowing it to linger as a surprise, unless it wished to present the Union as an obstacle preventing the employees' realization of benefits. This is precisely what the law proscribes and, therefore, Respondent's allusions to a surprise constitute as implied promise of a future benefit in violation of Section 8(a)(1).

5. The mock election

The last allegation of the complaint set forth in paragragh VI(i) charges Respondent with unlawfully polling its employees by means of a mock election.

On July 9, members of the organizing committee advised the Union's business agent that Respondent's campaign had seriously undermined the employees' prounion sympathies and jeopardized its chances of winning the

[12] Several employees offered very vague testimony that company officials frequently would make statements such as their hands were tied, or that the Union could make promises while they could not. Annette Wallen referred to a conversation in which management mentioned "a package deal" which could not be explained to the employees. Such evidence is too murky and generalized to prove that unlawful promises of benefits were made. If anything, such comments fall into the realm of harmless campaign rhetoric.

election scheduled for July 12. The following day, July 10, the Union formally withdrew its petition for the election. On the same date, management relayed the information to its employees and decided to go forward with mock elections on July 12.

The evidence surrounding the conduct of these elections was abundant. Employees from all three shifts at the Clay facility and from the Baldwinsville plant were permitted to participate on a noncompulsory basis. Employees from each shift were selected to play the roles of official observers at the polls;[13] a ballot box was constructed by Devendorf and set upon a table in the area of the plant where the group meetings had been conducted. The ballot provided to each voter was an exact reproduction of the Board's notice of election; that is, it was imprinted with the words "National Labor Relations Board" at the head of the paper, over which the word "Sample" was stamped in large letters. Empty squares labeled "yes" or "no" appeared midway down the sheet which was otherwise blank. As ballots were handed out, the individual's name was checked against the *Excelsior* list of eligible employees.[14] Little effort was made by the employees or the Company to ensure the secrecy of the balloting. Further, Devendorf and Heinrich were present during much of the voting, sometimes standing nearby or leaning against a wall approximately 6 feet away from the ballot box, or on other occasions wandering through the voting area on the way to and from their offices. The results of the election, a lopsided 186 to 8 against the Union, were posted the next day.

The Board has ruled in *Struksnes Construction Co., Inc.*, 165 NLRB 1062 (1967), that the polling of employees is lawful as long as the following standards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority; (2) this purpose is communicated to the employees; (3) assurances against reprisals are given; (4) balloting is secret; and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

Contrary to Respondent's assumption, the fact that the poll of its employees was conducted after the election petition was withdrawn does not insulate it from a duty to comply with the dictates of *Struksnes*. See *Helena Laboratories Corporation*, 228 NLRB 294 (1977). In evaluating the manner in which this poll was conducted, I conclude that Respondent did not comply with the *Struksnes* criteria.

At the outset, Respondent contends that *Struksnes* is inapplicable to an election which is prompted by employee requests and is employee-conducted. However, Respondent's prepared outline listing the points which were to be raised at the July 10 meeting has a notation that the employees were to be asked if they desired a mock election. I infer from this that, if the employees had not initiated the proposal for such an election, Respondent had every intention of doing so. More importantly, Respondent cannot disclaim responsibility for and involvement in the conduct of the election when the record establishes that management arranged the polling place, fashioned the ballots, prepared the ballot box, provided the *Excelsior* list, permitted employees time off from work to vote, and hovered nearby during the balloting. Thus, it was in large measure an employer-sponsored poll and the way in which it was handled must be measured against the *Struksnes* standards.

Accordingly, I agree with the General Counsel that, once the Union had withdrawn from the election, Respondent's purpose could not have been to assess the validity of a claimed majority. In all likelihood, Respondent's motive was to rub salt into the wounds of the Union's adherents and convince them of the futility of continued support for the Union should it renew its organizational efforts. If these were Respondent's motives, it failed to communicate them to the employees. The employees may have been assured during the preelection period that they would suffer no reprisals for union activity, but similar guarantees were not extended to protect their participation in the mock election. Further, although the employees did not take precautions to keep their ballots secret, the conditions under which the voting was conducted afforded them little privacy. The employees might well have believed that any effort to conceal their ballots would be regarded as suspect in light of management's hovering presence throughout much of the balloting.

As to the final *Struksnes* criterion, while Respondent's representatives engaged in some relatively minor unfair labor practices during the preelection period, I do not hold them responsible for creating a coercive atmosphere. If employees were apprehensive and insecure, it must be attributed to their own fears nurtured by the rumors which were flooding the plant. By July 12, the employees understood full well that it was not a genuine Board-conducted election in which they were participating. Not one of the employees who testified in this case had the slightest belief that the election was bona fide or was misled into believing that the election was Board-sanctioned simply because the Agency's sample ballot was utilized. The use of the Board's sample ballot in these circumstances is not proscribed where it has been in no way altered in form or content and has led no one to assume that the Board lent its name or prestige to any party. Compare *Allied Electric Products, Inc.*, 109 NLRB 1270, 1272 (1954), with *GAF Corporation*, 234 NLRB 1209 (1978). Notwithstanding Respondent's innocence in this respect, there is sufficient evidence of its failure to observe the other *Struksnes* standards to conclude that its conduct of the mock election violated Section 8(a)(1) of the Act.

6. A *Gissel* order is unwarranted

The General Counsel urges that a bargaining order is necessary in this case to remedy the coercive effects of Respondent's severe and substantial unfair labor practices. Under the standards enunciated in *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575 (1969), rehearing

[13] On one shift, a supervisor acted as an observer.

[14] Several witnesses who were members of the original organizing committee noted that at the time of the elections their names were crossed out on the *Excelsior* list. Although this is somewhat suspicious, there was no evidence that these employees were discriminated against in any way. Therefore, I decline to speculate as to why their names were so marked.

denied 396 U.S. 869, the Supreme Court has affirmed the Board's authority to issue a bargaining order where an employer's misconduct has been so outrageous and unfair or so extensive and pervasive as to undermine the union's majority strength and impede the election process. However, where the unfair labor practices are so minor as to have only a minimal impact on the election machinery, a bargaining order will not be sustained. *Gissel Packing Co., supra* at 1447-48. With these considerations in mind, I am persuaded, based on my review of the totality of Respondent's conduct, that a bargaining order is unwarranted here.

Of the 13 allegations of unlawful practices set forth in the complaint, 4 were found to have merit. Thus, as I concluded above, Respondent violated Section 8(a)(1) of the Act by promising its employees a surprise clambake; by failing to assure the workers that in the event of a strike they would not be permanently replaced but would have a right to reinstatement; by implying there would be a delay in the receipt of improved insurance benefits; and by conducting an unlawful poll. Although these infractions affected large segments of the work force and cannot be regarded as isolated, I do not regard them as so serious or of such a lasting quality as to withstand correction through the Board's traditional remedies.

It is true that Respondent hinted that a surprise would be forthcoming in the midst of the preelection period and that it was widely understood that the surprise was a clambake. However, the employees subsequently learned that the monetary value of the fete was $34. It is extremely doubtful that, in the event of another election some 2 years after the fact, the employees' sympathies either for or against a union could be swayed by the price of two tickets to a clambake.

Similarly, there will be at least a 2-year hiatus between the time the implied threat to delay insurance benefits occurred and the conduct of any subsequent election. This passage of time is sufficient to cure any coercive impact that threat may have had. In the interim, Respondent may have arranged for a new group insurance plan. If so, the employees will be in a position to determine whether benefits were actually delayed and whether Respondent's implied threat was little more than an idle remark made in the heat of the moment. Further, they will be capable of fairly appraising the value of the benefit against the advantages of unionization.

In failing to advise the employees of their right to reinstatement in the event of layoffs due to a strike, management officials at no time suggested that a strike was inevitable or that it would pursue a course of action which might bring about such a result. Their sin was one of omission rather than commission and is one which can readily be corrected through the posting of a Board notice which properly advises employees of their rights.

The mock election was conducted after the Union withdrew from the election and therefore it cannot have served to undermine the Union's majority. Moreover, the employees had no illusions they were participating in a Board-conducted election. Therefore, they have no reason to assume that, if another election were properly conducted under the Board's auspices, the same conditions would prevail.

In sum, Respondent's unfair labor practices primarily took the form of oral statements containing veiled allusions. This is the kind of conduct which should be dissipated easily with a carefully worded notice and the passage of time. Further, this misconduct took place during the course of what was a hard fought but generally lawful campaign on the Company's part. There were no threats of reprisal for union activity; the complaint is noticeably barren of any allegations of discriminatory discharges; there were no findings of threatened plant closure, no outright threats of job loss, no stripping away of benefits, no efforts to solicit or redress employee grievances, no accusations of unlawful interrogations, and no promises of wage increases. In other words, none of the flagrant transgressions which the Board and the courts have regularly regarded as justification for the issuance of a bargaining order were committed here. See, e.g., *N.L.R.B.* v. *Jamaica Towing Inc.*, 602 F.2d 1100 (2d Cir. 1979); *Faith Garment Company, Division of Dunhall Pharmaceutical, Inc.*, 216 NLRB 299 (1979), affd. 630 F.2d 630 (8th Cir. 1980).

I conclude, therefore, that Respondent's violations fit into the category of conduct described in *Gissel Packing Co., supra*, as having only a "minimal impact on the election machinery" which should not preclude the holding of a fair election after imposition of the Board's traditional remedy. See *Lasco Industries, Inc.*, 217 NLRB 527 (1975); *Tennessee Shell Company, Inc.*, 212 NLRB 193 (1974); *Green Briar Nursing Home, Inc.*, 201 NLRB 503 (1973).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By June 4, 1979, the Union was designated by a majority of Respondent's employees at the Baldwinsville and Clay plants as their representative for purposes of collective bargaining.

4. Respondent has violated Section 8(a)(1) of the Act by promising employees future benefits, that is, a clambake; by impliedly threatening a delay in the receipt of improved insurance benefits; by failing to advise workers of their right to recall in the event they were replaced during a strike; and by conducting an unlawful poll to ascertain employees' union sentiments.

5. Respondent did not violate Section 8(a)(1) of the Act by threatening plant closure, a loss of jobs by replacing employees with applicants on file, a loss of benefits due to expenditures for legal fees to contest the Union, or a reduction in pay by bargaining from a minimum wage base.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that it be required to

cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[15]

The Respondent, Eagle Comtronics, Inc., Clay and Baldwinsville, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Promising its employees future benefits to forestall their union activities.

(b) Impliedly threatening its employees with a delay in receiving insurance benefits.

(c) Failing to advise employees of their right to reinstatement as vacancies arise, in the event of an economic strike.

(d) Conducting unlawful polls of its employees' union sympathies and desires.

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

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

(a) Post at its facilities in Clay and Baldwinsville, New York, copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the complaint be dismissed insofar it alleges violations of the Act not specifically found.

[15] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[16] In the event that 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."