KEZI, Inc., a subsidiary of Chambers Communications Corp. *and* American Federation of Television and Radio Artists, AFL–CIO. Case 36–CA–6006

October 31, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On October 18, 1989, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision.

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

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

At issue are the Respondent's exceptions to two findings of the judge. First, the Respondent excepts to the judge's finding that the Respondent violated Section 8(a)(1) of the Act by circulating a memorandum to employees telling them that it planned to implement a 401K pension plan that excludes employees from coverage if they are members of a collective-bargaining unit for which retirement benefits were the subject of good-faith bargaining. Second, the Respondent excepts to his finding that the Respondent violated Section 8(a)(5) by withdrawing recognition on the basis of an employee petition that was tainted by the foregoing 8(a)(1) conduct. We find merit to the exceptions and, accordingly, dismiss the complaint.

I. FACTUAL FINDINGS

In 1988, the Respondent engaged in a series of bargaining sessions for the purpose of negotiating an initial collective-bargaining agreement with the Union. There is no allegation of any misconduct on the part of the Respondent during these seven sessions, which spanned the period February 10 to October 18, 1988.[2] The next bargaining session was scheduled to occur January 30, 1989.[3]

During the 1988 negotiating sessions, the topic of retirement benefits had been broached on several occasions. At the start of negotiations, no pension or other retirement benefits were accorded the Respondent's employees, and the Union initially proposed that unit employees be included in the Union's retirement plan. At the time, the Respondent requested that the Union provide it with information on this retirement program, and mentioned that it was investigating and considering the implementation of an employee stock option plan (ESOP). The next substantive reference to any retirement plan was made at the August 12, 1988 bargaining session. At that session, the Respondent announced that it had formulated an ESOP, the specifics of which were then discussed by the Union and the Respondent. In this session, the Union indicated that it would drop its proposal that unit employees be included in the union retirement plan, provided that the Respondent included the union employees in any ESOP or other retirement plan that it instituted. At the next session, however, on August 25, 1988, the Respondent retracted its intention to adopt an ESOP, explaining that its decision was based on tax reasons. It also indicated, on inquiry, that it was not then considering a 401K plan, and the Union stated that if the Respondent did not formulate a retirement plan, the Union might have to reconsider its plans. This apparently was the last reference to pension benefits made during the negotiation sessions.

On December 19, 1988, the Respondent held its annual Christmas party for both unit and nonunit employees, a majority of whom attended. At this party Carolyn Chambers, the president of the Respondent's corporate parent, announced that the Respondent was working on a benefits plan to be implemented in the next few months. She said the Respondent hoped it would include, among other things, a 401K plan. No further details were provided at the time.

On January 12, 1989, the Respondent issued a memorandum to employees which provided additional information on the benefits plan. The memorandum stated, among other things, that the Respondent would offer a 401K pension plan, for which the Respondent would provide some matching funds, and the plan would have some eligibility requirements. This memorandum prompted several employees to make inquiries regarding what was meant by ''eligibility requirements.'' As a result of these inquiries, the Respondent, on January 13, 1989, issued a second memorandum to employees, which stated in relevant part:

> Some questions have arisen as to the eligibility requirements for the 401K plan. The plan will exclude the following: . . . Employees who are members of a collective bargaining unit with whom retirement benefits were the subject of good-faith bargaining.

[1] No exceptions were filed to the judge's dismissal of certain complaint allegations.

[2] We note that the Respondent's prior withdrawal of recognition of the Union in July 1986, found by the Board to have been a violation of Sec. 8(a)(5) and (1) at 286 NLRB 1396 (1987), has not been alleged by the General Counsel to have adversely affected the 1988 negotiations or otherwise been implicated in the issues presented in this case.

[3] As the result of a scheduling conflict, a planned November 22, 1988 session was canceled. The parties were unable to find a mutually agreeable date for a meeting in December 1988.

A unit employee provided the Union with copies of those two memoranda on January 19, 1989. On January 25, 1989, the Union sent a letter to the Company which expressed its understanding ''that these [401K] benefits are not being extended to the members of the AFTRA bargaining unit because such benefits are subject [to] good-faith bargaining.'' The letter asked that the Union be provided full details about the plan at the next bargaining session.

While this was going on, employee Jim Yocum was circulating a petition to remove the Union as the unit employees' bargaining representative.[4] Another employee, Janice Salvador, notified the Union of this, and Salvador also posted a notice on behalf of the Union. The notice claimed that circulation of the petition was the direct result of the exclusion of ''union members'' from the 401K plan; but it emphasized that ''union members'' were bargaining for their own plan.

After a majority of unit employees signed Yocum's petition, Yocum gave it to the assistant station manager, who then turned it over to the general manager. On January 27, 1989, 3 days before the next bargaining session, the Respondent withdrew recognition of the Union, relying on the receipt of the petition. The 401K plan was implemented March 1, 1989.

II. DISCUSSION

Our disagreement with the judge's conclusion rests principally on our disagreement with his reading of the description in the memorandum of the 401K plan's eligibility requirements. The judge construed it as telling employees that ''if their representative chose to bargain about retirement benefits, then they would be excluded from coverage under Respondent's 401K pension plan.'' On the contrary, we do not read the language in question as signifying that merely *choosing* to bargain on this topic would automatically cut off retirement benefits. Rather, we find that the language excluding from the 401K plan ''employees who are members of a collective bargaining unit with whom retirement benefits *were* the subject of good-faith bargaining'' (emphasis supplied) indicates that the exclusion of unit employees is triggered only by the completion of good-faith bargaining—not by the mere commencement of bargaining on this topic. Thus, unlike cases in which language describing retirement benefits has been found unlawful, here the Respondent made the unit employees aware that they would be eligible for this 401K plan prior to negotiations and that before they can be excluded from the 401K plan, there must have been full good-faith negotiations about retirement benefits between their representatives and the Respondent. We therefore find that this language expressly anticipates that retirement benefits for unit employees will be determined through the normal processes of collective bargaining, and that a resulting collective-bargaining agreement would set forth the terms of any pension coverage. In the course of such bargaining the parties might agree to include the unit employees in the 401K plan, establish a separate but substantively identical 401K plan, or establish an entirely different retirement plan for them. The Board has not hesitated to find eligibility language lawful when, as here, it indicates that pension benefits for unionized employees are subject to negotiation but does not suggest that employees are automatically and irrevocably foreclosed from inclusion in a particular plan simply because they have a union bargaining on their behalf.[5]

We further find that events preceding and following the Respondent's issuance of the memorandum support the conclusion that the language in question was not an unlawful attempt to threaten employees with loss of benefits because they were represented by a union. During the bargaining that did occur between the parties, the Respondent readily agreed to the inclusion of unit employees in the ESOP retirement program it initially had attempted to develop; and the Union's own response to the memorandum indicated that it understood that the unit employees were not being irrevocably closed out of pension coverage but rather that this was still a subject for negotiation.[6] Although in the previous August the Respondent had indicated it was not then considering a 401K plan, nothing in the record suggests that, if the decertification petition had not intervened to bring a halt to negotiations, the Respondent, at the next bargaining session after the issuance of the memorandum, would have rejected out of hand any proposal to include the unit employees either in the 401K plan it did finally develop or in some similar plan.

[4] There is no allegation that the Respondent acted unlawfully with respect to the circulation of the petition.

[5] *Lynn-Edwards Corp*., 290 NLRB 202, 203–204 (1988); *Handleman Co*., 283 NLRB 451 (1987); *Sarah Neuman Nursing Home*, 270 NLRB 663, 680–681 (1984). Chairman Stephens also relies on his concurring opinion in *Lynn-Edwards Corp*., 282 NLRB 52 (1986).

This case is therefore distinguishable from *Niagara Wires*, 240 NLRB 1326 (1979), in which the exclusionary language did not expressly contemplate good-faith bargaining over pension benefits, and *Bendix-Westinghouse Automotive Air Brake Co*., 185 NLRB 375–376, 377 (1970), in which the employer conditioned participation in the plan on the union's *waiver* of bargaining over such coverage. This case is also distinguishable from *Solo Cup Co*., 176 NLRB 823 (1969), in which the Board held that an employer could not lawfully announce to its unrepresented employees that they would automatically forfeit their participation in a current profit-sharing plan if they later became subject to any collective-bargaining agreement providing retirement benefits. The Board emphasized that it was concerned with the impact of such an announcement on ''employees' initial decision to engage or not to engage in concerted activities directed toward collective bargaining.'' Id. at 824. It did not address the question, presented here, respecting the effect of eligibility language on employees who have had no existing benefits to lose and who have a collective-bargaining representative who is free to bargain with the employer over such benefits.

[6] Indeed, had the Respondent acted unilaterally to put the unit employees in the plan and take that subject off the negotiating table, it would have violated Sec. 8(a)(5) and (1) of the Act by failing to give the Union an opportunity to bargain over the subject.

In sum, we find that the language used by the Respondent to describe the eligibility provisions in the forthcoming 401K plan did not violate Section 8(a)(1) of the Act. In view of the General Counsel's sole reliance on the alleged illegality of the 401K plan's eligility provisions to establish that the petition to remove the Union as the unit employees' collective-bargaining representative was tainted, we find the petition was not tainted by any unlawful misconduct. We therefore also find that the Respondent was justified in withdrawing recognition of the Union by relying on the fact that a majority of the unit employees had signed the petition clearly stating that they no longer wished to be represented by the Union. Accordingly, we shall also dismiss the General Counsel's allegations that the Respondent's withdrawal of recognition from the Union violated Section 8(a)(5) and (1).

ORDER

The complaint is dismissed.

Linda J. Scheldrup, for the General Counsel.
Douglas S. Mitchell, Esq. (Cass, Scott, Woods & Smith), of Eugene, Oregon, for the Respondent.
Jonathan Dunn-Rankin, of San Diego, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Eugene, Oregon, on June 8, 1989. On March 22, 1989, the Regional Director for Region 19 of the National Labor Relations Board (the Board), issued a complaint and notice of hearing, based upon an unfair labor practice charge filed on January 31, 1989, and amended on March 1, 1989, alleging violations of Section 8(a)(1) and (5) 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 upon the entire record, upon the briefs that were filed, and upon my observation of the demeanor of the witnesses, I make the following findings of fact and conclusions of law.

I. JURISDICTION

At all times material, KEZI, a subsidiary of Chambers Communications Corp. (Respondent), has been a State of Oregon corporation, with an office and place of business in Eugene, Oregon, where it engages in the business of operating a commercial television station. In the course and conduct of those business operations during the 12-month period preceding issuance of the complaint, a representative period, Respondent derived gross revenues in excess of $500,000 and, during that same period, sold and shipped goods or provided services in excess of $50,000 in value to customers outside of Oregon or to customers within Oregon, each of whom engaged in interstate commerce by other than indirect means and, additionally, purchased and caused to be transferred and delivered to its Oregon facilities goods and materials valued in excess of $50,000 that originated from outside Oregon. Therefore, I conclude, as admitted in the answer, that at all times material, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all times material, American Federation of Television and Radio Artists, AFL–CIO (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

The sequence of events in this case commences with issuance of the Decision and Order in *KEZI-TV*, 286 NLRB 1396 (1987). In that case, the Board concluded that Respondent had withdrawn recognition unlawfully from the Union as the exclusive collective-bargaining representative of employees in the following appropriate bargaining unit:

> All employees employed by the Respondent at its Eugene, Oregon facility who are employed in the following job classifications: anchor, sports director, assistant sports director, weatherman, reporter, producer, news photographer/editor, newstape manager, teleprompter operator, maintenance supervisor, maintenance engineer, technical director, record engineer, videotape engineer, production coordinator, producer/director, director, production assistant, artist, EEP photographer, account executive, national/regional salesperson, promotion manager, and film director, but excluding all office clerical employees, guards and supervisors as defined in the Act.

As a result, to the extent pertinent here, Respondent was ordered to cease and desist from continuing to withdraw recognition from the Union and, affirmatively, to bargain in response to the Union's request to do so.

So far as the record in this case discloses, Respondent complied fully with the Board's Order. Negotiating sessions were conducted on February 10 and 11, March 10, May 4, August 12 and 25, and October 18, 1988. There is no allegation that Respondent violated the Act in any respect regarding the manner in which it conducted bargaining at those sessions. The next negotiating session, after the one on October 18, 1988, was scheduled for January 30, 1989. However, 3 days before that date, Respondent notified the Union that recognition of its representative status again was being withdrawn. Respondent took this action on the basis of a petition, concededly signed by a majority of the unit's employees and reciting that ''the undersigned no longer wish to be represented by [the Union].''

There is no allegation that Respondent acted unlawfully in connection with the circulation of that petition. That is, it is not alleged that Respondent assisted in its actual preparation and circulation. Rather, the complaint alleges that the petition was tainted by actions that Respondent undertook ''without prior notice to the Union'' and, in one instance, without having first proposed the subject matter to the Union during negotiations. These allegedly unlawful acts were an announce-

ment that Respondent intended to implement a ''Cafeteria Plan'' health, welfare, and pension program for all employees, including those in the above-described bargaining unit; an announcement describing the details of that plan; and, an announcement that employees represented by the Union would be excluded from participation in a 401K pension plan that would be made available to all other employees employed by Respondent.

For the reasons set forth post, I conclude that Respondent did violate Section 8(a)(1) of the Act by announcing that represented employees would be excluded from participation in the 401K plan if their representative bargained about retirement benefits. Furthermore, Respondent violated Section 8(a)(5) and (1) of the Act when it withdrew recognition from the Union on the basis of the employee petition that was tainted, and in fact generated, by that unlawfully announced eligibility restriction. However, the evidence does not establish that Respondent violated the Act in any other manner alleged in the complaint.

B. *Evidence*

Chambers Communications Corp. employs over 200 employees in facilities located in several western States. Located at Coburg Road in Eugene are its direct mail facility, its 800-number facility, and the home offices of its cable corporation, as well as the commercial television station that is Respondent. Roughly equal numbers of unit and nonunit employees work in these operations at the Coburg Road location. None of them have been covered recently by a pension program. A majority of them were participating in the Select Care Health Maintenance Organization that was available to all employees at Coburg Road when bargaining commenced in February 1988.

During the two bargaining sessions conducted during that month, there was but cursory discussion of health and retirement benefits. The Union proposed that the unit employees be included in its health and retirement plans, but requested information about the Select Care program, as well as about a Phoenix Mutual Plan that was coming into existence. In turn, Respondent requested information regarding the Union's health and retirement programs. Moreover, the negotiators for Respondent announced that it was investigating and considering instituting an employee stock option plan (ESOP).

Apparently the information requested by the Union had been provided by the negotiating session conducted on March 10. At least, the Union's principal negotiator, National Representative Jonathan Dunn-Rankin, testified that the parties began discussing the Select Care program during that session. However, there was no discussion of the ESOP, which Respondent was still considering, nor, so far as the record discloses, about the Union's health and retirement programs. In fact, Dunn-Rankin acknowledged that by the time of the negotiating session on May 4, 1988, he had not obtained the information about those plans that Respondent had requested almost 3 months earlier. As a result, at that session, Respondent suggested that discussion of health benefits be deferred. Similarly, it suggested that there be no discussion of retirement plans, because Respondent had nothing to present regarding an ESOP.

At the negotiating session on August 12, 1988, Respondent announced that it had formulated an ESOP that would be implemented retroactively. There followed a discussion of defined benefits versus defined contributions plans. During the course of that discussion, 40lK plans were raised as a topic by Dunn-Rankin, although there is no evidence regarding specifically what had been said about such plans. According to Dunn-Rankin, he had been asked if he was dropping his proposals for the Union's health benefits and retirement plans. He testified that he had replied that he would do so if Respondent continued its health plan and included the unit employees in any ESOP or other retirement plan that it instituted. Bruce Liljegren, Respondent's general manager, testified that, from this meeting onward, it had been his understanding that the Union would go along with the benefits provided by Respondent. Indeed, Liljegren testified, without contradiction, that, ''we had been told all along that there was no problem with a benefit package, that, you know, the [U]nion wanted benefits that were comparable to what other employees had.''

However, at the next negotiating session, on August 25, 1988, Respondent announced that it was not going to adopt an ESOP due to certain changes that it had discovered in the Tax Reform Act of 1986. Dunn-Rankin inquired if Respondent had given any consideration to a 401K plan, but was told that one was not being considered for various reasons, not the least of which was that such a plan was ''top heavy.'' Liljegren acknowledged that, at this meeting, Dunn-Rankin had said that he might have to reconsider the Union's plans if Respondent did not formulate a retirement plan.

The final meeting occurred on October 18, 1988. The parties reviewed all proposals and counterproposals. However, there was no particular discussion of health benefits nor of retirement programs, so far as the evidence shows. Another meeting was scheduled for November 22, 1988, but was canceled due to a conflict in the schedule of Respondent's principal negotiator. A date during the following month was offered as an alternative, but that conflicted with Dunn-Rankin's schedule. As a result, the next mutually acceptable meeting date was January 30, 1989.

Carolyn Chambers, president of Chambers Communications Corp., testified that, over time, there had been ''requests from employees for various and sundry things that we didn't provide'' and, also, that something needed to be done to contain medical plan costs. At a meeting of managers—those supervising unit as well as nonunit employees—in November 1988, she announced that she was considering instituting a cafeteria benefits plan and asked for the managers' opinions regarding how such a program would be received by the employees. Apparently, their reactions were favorable, for Chambers testified that during the early part of the succeeding month, Respondent investigated ''what the costs and what the various things that could be offered would be for us and how we could put it together and just in general trying to find out what could be offered and what we felt we could handle.''

Respondent's annual Christmas party was conducted on December 19, 1988. All Coburg Road employees were invited to attend and, according to Liljegren, a majority of them did so. By that date, testified Chambers, ''We, in our mind, had decided what we thought we would offer, but we hadn't definitively because we had not received back our information on [plan options].'' During the party, she acknowledged that she had announced to the employees that Re-

spondent was working on a cafeteria plan that it planned to implement within the next few months, early in 1989, and ''that it would include the health benefits and hopefully the long term disability and a 401K plan.''

Called as a witness by Respondent, graphic artist Dean McGuire testified that, while he had not been at the Christmas party, this announcement became quite a topic of discussion among the employees afterward,'' because people over the years have been wanting some change in the benefits package that we had, and this was—appeared to be a big change.'' Similarly, Account Executive Jim Yocum testified that Chambers' announcement had generated ''a lot of excitement, enthusiasm. It was something that we were all excited about then.''

Chambers testified that, at the time of her announcement, she had known that she could not implement any plan prior to March 1, 1989, because ''we were busy in the process of putting all these things together, and we knew that we wouldn't possibly have everything finally formulated until that time.'' However, by January 12, 1989, the situation had progressed. For, on that date, a memorandum from her was posted in the lunchroom at the Coburg Road facility, stating:

> As announced at the Christmas party, the Company is starting a new flexible benefits plan, more commonly known as a cafeteria plan. This is where you select the benefits you wish. The Company will provide a monthly spending allowance and you select which items you wish to buy. Additionally, you can take advantage of a voluntary salary reduction program so that you can spend your pre-tax money to purchase more of these items.
>
> They will be as follows:
>
> Two medical plans: A $100.00 deductible or a $500.00 deductible. Each employee must purchase a medical plan unless proof of coverage is presented from another source (such as coverage by spouse).
>
> Dental
>
> Long Term Disability
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> Supplemental Life
>
> Dependent care
>
> 401-K Pension Plan: This is a retirement type plan and will have some matching funds from the company. There will also be some eligibility requirements.

Yocum testified that the memorandum led to discussions among the employees, because they did ''not know what it really meant for sure and who was eligible and who wasn't.'' Similarly, Janice Salvador, senior producer for the 5:30 newscast, testified that the memorandum generated, ''A lot of interest. More questions were raised because of this memo than were answered because of the memo.'' In fact, Liljegren testified that because of employee questions about the ''eligibility requirements'' portion of the memorandum, a second memorandum to employees from Chambers was prepared and posted on January 13, 1989. It recites:

> Some questions have arisen as to the eligibility requirements for the 401K plan. The plan will exclude the following:
>
> 1. Employees with less than one year of service with KEZI.
>
> 2. Employees who have not yet reached their 21st birthday.
>
> 3. Employees who are members of a collective bargaining unit with whom retirement benefits were the subject of good-faith bargaining.
>
> Additionally, SelectCare will continue to be offered as a third medical plan option.

Yocum, Salvador, and McGuire each testified that the second memorandum occasioned considerable discussion among the employees, especially with respect to the third exclusion.

At no point did Respondent provide notice to the Union regarding its intention to institute a cafeteria benefit plan, including a 401K pension plan. Liljegren, the only official of Respondent who testified concerning this particular point, acknowledged that he was aware that the Union had the right to bargain about any cafeteria plan before it could be implemented for unit employees. However, he explained that he had not felt it necessary to communicate to the Union what he had learned at the managers' meeting in November 1988, because ''there was no reason in my opinion to, as it was simply a discussion item at that point.''

In point of fact, in mid-January 1989, the Union did learn about Respondent's intentions. Salvador, who had been serving as Dunn-Rankin's main contact person at Respondent, telephoned him after she had seen the first memorandum. Although he was not then available, she left a message on his answering machine describing the memorandum. After she saw the second memorandum, she wrote him a letter and included with it copies of the two memoranda. After returning her call and after receiving the copies of the memoranda on January 19, 1989, Dunn-Rankin drafted a letter to Respondent's counsel and mailed it on January 25, 1989. Its text reads:

> It has come to my attention that the company in a memo to its employees has announced several new health and retirement benefits including medical, dental, long-term disability, supplemental life, and dependent care benefits in the health area and a 40l(k) pension plan.
>
> However, I further understand that these benefits are not being extended to the members of the AFTRA bargaining unit because such benefits are subject of good-faith bargaining.
>
> This is to request that you provide full details of these new benefit plans being offered to employees outside the bargaining unit when we meet at 9:00 a.m., Monday, January 30, 1989, in your office.
>
> I am also holding Tuesday, January 31 open for continued negotiations as we discussed by telephone when we rescheduled the negotiations.

So far as the record discloses, Dunn-Rankin did not otherwise try to contact Respondent and, most particularly, did not protest implementation of the plans described in the memoranda.

Meanwhile, Yocum—who had circulated the petition that had occasioned Respondent's withdrawal of recognition that, in turn, led to the complaint and Board Order in 286 NLRB 1396—decided to prepare and circulate another petition withdrawing support from the Union. He testified that he ''had

been thinking about it for the last couple of years, ever since the first one, and people would come up to me and say, Jim, are you going to do another petition and this type of thing,'' and ''I just finally decided, well, things were a little bit slow for me, you know, so I—people were asking me to get started, so I decided to go ahead and do it.'' Although he was motivated principally by his personal belief that representation was not necessary for the employees in his department, Yocum acknowledged that possible exclusion from the 401K plan was ''certainly an influence there.'' In fact, before beginning to circulate the petition, he had told Salvador that he intended to do so, explaining, she testified,

> that he was concerned about being left out of a retirement plan because he was a union member. He said retirement was important to him, and he was angered that management had done this. He said that he has lost time and interest—he was the initial person responsible for the first decertification drive. He said he has lost time and interest to do such a thing and wanted to know if I would be interested in decertifying, starting a decertification petition. I said no, and at that point he said, ''well, I want a retirement plan. What is the situation with the union? Where are we at?'' And I said ''we have a meeting in a couple of weeks,'' and he said, ''well, I'm curious to know where we stand on the bargaining. If I don't see any headway there, I'm going to start a decertification plan, because I want my retirement benefits.'' I, at that point, said I'd get back to him after I talked to Jonathan.

Salvador telephoned Dunn-Rankin and described what she had been told by Yocum, explaining that, by that time, Yocum was circulating the petition to oust the Union as the employees' representative. Dunn-Rankin told her to advise the employees that he would be available to talk to interested members on January 30, 1989, when he came to Eugene to resume negotiations. After this conversation, Salvador prepared an ''AFTRA NOTICE'' that she posted on January 24 or 25, 1989. That notice recites:

> AFTRA Representative Jonathan Dunn-Rankin will be in town next week Monday-Tuesday, Jan 30–31 to meet with KEZI management and to talk with interested union members about the latest issues.
>
> There is currently a DECERTIFICATION DRIVE underway at KEZI. The drive was the direct result of union members being EXCLUDED from KEZI's 401-K pension plan. The reason for the exclusion is union members are bargaining for their OWN RETIREMENT PLAN THROUGH A.F.T.R.A.
>
> BEFORE YOU SIGN THE DECERTIFICATION AGREEMENT get the facts.
>
> Meet with Jonathan Dunn-Rankin at 7:00 p.m. Monday, January 30th at the Lobby Bar in the Eugene Hilton. Don't blindly sign anything!
>
> BARGAINING WILL RESUME NEXT WEEK. IF NO PROGRESS IS MADE, WE'LL NOTIFY YOU OF THE NEXT ACTION PLANNED BY UNION MEMBERS EAGER TO RECEIVE THAT LONG-AWAITED CONTRACT!

However, as noted in section III,A, supra, before the date of the next negotiating session, a majority of the bargaining unit employees signed Yocum's petition. Six of the signers, in addition to Yocum, were called as witnesses. Each one testified that for some time he had not been interested in continued representation by the Union. Of course, as set forth above, some of them also testified that they had been pleased at what had been announced at the Christmas party and in the memoranda.

Yocum delivered the signed petition to Assistant Station Manager Dave Larson who, in turn, informed Liljegren about it. Once Respondent ascertained that it had been signed by a majority of the unit employees, Liljegren notified Dunn-Rankin that Respondent was withdrawing recognition of the Union. When he testified, Liljegren claimed that he had taken this action on the basis both of the petition and, also, of statements by nonsigning unit employees to the effect that they did not favor continued representation by the Union. However, Liljegren did not identify these employees and no nonsigning employee was called to corroborate his testimony concerning these purported statements. Indeed, other than stating that there had been ''several'' nonsigning employees who had voiced that sentiment, Liljegren did not specify the precise number of employees who assertedly had done so. Moreover, in his letter to Dunn-Rankin confirming Respondent's withdrawal of recognition, Liljegren made no mention of any basis for doing so other than receipt of the petition:

> As our attorney informed you on Friday, we received an unsolicited petition from employees in the bargaining unit. A majority of the employees signed the petition reflecting their wish that they not be represented by the American Federation of Radio and Television Artists. Therefore, we will no longer recognize AFTRA as the representative of our employees and will no longer engage in collective bargaining with AFTRA.

Ultimately, the cafeteria benefits plan, including the 401K plan, was implemented on March 1, 1989.

C. *Analysis*

The ultimate allegation in this case is that Respondent unlawfully withdrew recognition from the Union on the basis of a petition that was tainted by prior unfair labor practices. Where an employer engages in conduct that causes employee disaffection from their bargaining representative,

> decertification petitions will be found to have been tainted by the employer's unfair labor practices and the latter, consequently, will be precluded from relying on the tainted petition as a basis for questioning the union's continued majority status and withdrawing recognition from that labor organization.

Hearst Corp., 281 NLRB 764, 764 (1986). Inasmuch as there is no evidence that Respondent engaged in the actual preparation or circulation of the petition, the penultimate question is whether it engaged in unfair labor practices that caused employee disaffection with the Union and thereby tainted the petition prepared and circulated by Yocum.

To establish that Respondent did so, the General Counsel points first to the announcement of a cafeteria benefits plan and argues that Respondent engaged in direct dealing and

bad-faith bargaining by announcing that plan to employees, before notifying and according the Union an opportunity to bargain with it. Yet, ''failure to give notice to the [bargaining representative] is not, in the current state of the law, in and of itself a breach of the bargaining duty.'' *Medicenter Mid-South Hospital*, 221 NLRB 670, 677 (1975). Instead, so long as ''a union had actual notice of an employer's intentions at a time when there was sufficient opportunity to bargain prior to implementation of the change, the employer may not be faulted for failing to afford formal notification.'' Id.

Here, there is no evidence that contradicts the testimony that, at the time that Chambers announced the plan at the Christmas party, she had known that the plan could not be implemented until at least March 1, 1989—more than 2 months after that announcement. Similarly, there is no evidence contradicting Liljegren's testimony that he knew that the Union had a right to bargain about application of the cafeteria plan's benefits to unit employees. Nor is there evidence showing that Respondent would have been unwilling to bargain about application of that plan to unit employees—at least prior to Respondent's receipt of the employee petition that placed in issue the Union's continued representative status. Indeed, in his letter of January 25, 1989, Dunn-Rankin acknowledged his understanding of Respondent's willingness to do so. Further, that letter, as well as Salvador's testimony, establishes that the Union learned of the plan in sufficient time to bargain about it before its projected implementation date of March 1, 1989. Consequently, viewed from the perspective of Chambers' announcement in mid-December 1988, there is no basis for concluding that Respondent had been unwilling, nor that the Union had lacked sufficient opportunity, to bargain about the cafeteria plan before its planned implementation date.

Of course, the foregoing doctrine of *Medicenter Mid-South Hospital*, and its application in subsequent cases, arise in the context of allegedly unlawful unilateral changes. In contrast, Respondent's cafeteria benefits plan announcement is alleged to constitute direct bargaining. Yet, the ultimate allegation in *Medicenter* and its progeny was a violation of Section 8(a)(5) of the Act. In that context, the doctrines of unilateral change and direct bargaining are closely related, since an employer's announcement of changed benefits can form the basis for both theories of violation of Section 8(a)(5) of the Act. ''It is well settled that the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated.'' *Pergament United Sales*, 296 NLRB 333–334 (1989). In fact, the Board displays no particular reluctance to do so. See, e.g., *Advertiser's Mfg. Co.*, 294 NLRB 740 (1989). Given that disposition, it seems unlikely that the Board simply would have dismissed the 8(a)(5) allegations in those cases under the unilateral change doctrine, completely ignoring the direct dealing doctrine, if, in fact, the Board felt that the direct dealing doctrine could apply to the announced changes that led to litigation of those cases.

Furthermore, a review of cases involving the direct dealing doctrine discloses that the doctrine is not applied blindly to every situation where an employer announces wage and benefit changes to represented employees. In general, as the Board pointed out in *United Technologies Corp.*, 274 NLRB 609, 610 (1985),

> there may be some risk that direct communication between an employer and its employees which bears on the bargaining process may be perceived by some as an attempt to undermine the statutory collective-bargaining representative. However, we are convinced that the benefits to be derived from free, noncoercive expression far outweigh such speculative concerns.

Thus, to conclude that direct dealing has occurred, there must be factors present other than a simple communication from employer to employee. ''For, dealing directly with employees constitutes an attempt to undermine the Union's status as exclusive representative and as such cannot help but prevent and inhibit the parties from reaching agreement.'' *Tarlas Meat Co.*, 239 NLRB 1400, 1400 (1979). Accordingly, the core issue here is whether Respondent's announcement, in the circumstances in which it was made, was intended, or naturally tended, to undermine the Union's status as the exclusive representative of that portion of the employee complement for whom it served as bargaining agent.

Significantly, the announced plan was not restricted to unit employees; it applied to all of the employees of Chambers Communications Corp. It is not disputed that its unrepresented employees exceeded the number of represented ones. Indeed, the number of unrepresented employees working at Coburg Road was roughly equal to the number of unrepresented ones. Moreover, no evidence was presented to show that a cafeteria benefits plan had been a program particularly desired by unit employees. True, the cafeteria benefits plan had been formulated in response to employee requests for benefits not provided by Respondent. But, so far as the record discloses, represented employees had not been the ones to approach Respondent directly regarding benefits. To the contrary, so far as the evidence shows, the represented employees would have had no need to approach Respondent about their benefits, since their bargaining agent was negotiating with Respondent.

It also is significant that had the announced cafeteria plan been confined to unrepresented employees, the General Counsel probably would have alleged, as has been done with the 401K plan, that Respondent was depriving unit employees of benefits solely on the basis of their continued selection of a bargaining agent. Of course, it can be argued that Respondent could have escaped such a dilemma by affording prior notice to the Union of the projected cafeteria benefits plan. Yet, as discussed above, absence of notice prior to an announced change is not a violation of Section 8(a)(5) of the Act where, as here, the bargaining agent becomes aware of the change in sufficient time to bargain, and the employer is willing to engage in bargaining, about it.

Furthermore, absent in this case are any of a number of factors that ordinarily accompany conclusions that unlawful direct bargaining has occurred. For example, neither during the Christmas party announcement nor in the memoranda did Respondent disparage the Union or its proposals. There is no evidence that Respondent denied that Union's rightful role as the represented employees' collective-bargaining agent. Respondent did not solicit represented employees' opinions regarding the cafeteria benefits plan. Nor did it suggest that

they should take action pertaining to the course of negotiations or with respect to continued representation. Moreover, the record is devoid of evidence, and the General Counsel does not contend, that Respondent has been engaging in unlawful conduct during negotiations, had been seeking to alter its bargaining relationship with the Union, had been pursing an overall strategy to frustrate the bargaining process, or generally had been attempting to eliminate the Union as the bargaining agent of the represented employees. Indeed, the Christmas party announcement and the memoranda did not occur in a context of surrounding unfair labor practices. In short, there is no evidence that Respondent was seeking to circumvent the bargaining process through its announcements.

Of course, within a month of the Christmas party announcement, Yocum was circulating, and employees were signing, a petition to eliminate the Union's bargaining authority. Yet, there is no evidence that Respondent either intended or foresaw that such a course would be pursued by any of its employees as a result of announcing the cafeteria benefits plan. To the contrary, as shown by the testimony of Yocum and other employees reproduced in section III,B, supra, in fact it was not the cafeteria plan that led to circulation of the petition, but rather it was generated and supported by announcement of the restricted eligibility for participation in the 401K pension plan.

Finally, as pointed out in section III,B, supra, it is not disputed that Respondent's negotiators had been told that the Union sought benefits comparable to those received by Respondent's other employees.[1] Obviously, that did not constitute a waiver of the Union's statutory right to bargain concerning benefit programs. On the other hand, it does tend to undermine any argument that, in announcing the cafeteria benefit plan to employees before notifying the Union about it, Respondent should have been aware that it was acting in derogation of its bargaining obligation. For, the plan contemplated the very uniformity of application sought by the Union. Moreover, in his letter of January 25, 1989, Dunn-Rankin voiced no protest about either the announcement or substance of it. To the contrary, he acknowledged that he understood that Respondent stood willing to bargain regarding application of the plan's benefits to unit employees—an obligation that Liljegren testified that Respondent understood that it must, and had been prepared to, satisfy.

In sum, a preponderance of the evidence does not establish that, in announcing the cafeteria benefits plan, Respondent had been attempting to undermine the Union's representative status through direct communication with the employees that it represented. Nor, in the circumstances, is that a consequence that would tend naturally to flow from the particular announcement made by Respondent to its represented and unrepresented employees. Therefore, I conclude that the General Counsel has not established that Respondent engaged in unlawful direct dealing with its employees, nor that it engaged in bad-faith bargaining, by its announcement to employees of a cafeteria benefits plan.

A contrary conclusion is warranted as a result of the third exclusion from the 401K plan, set forth in the memorandum of January 13, 1989. Underlying this issue is the potential tension created between two basic principles. On the one hand, ''[t]he Act does not impose upon an employer the obligation to grant or confer upon represented employees the right to receive . . . benefits solely on the basis that like benefits were conferred elsewhere.'' *B.F. Goodrich Co*., 195 NLRB 914, 915 (1972). See also *Shell Oil Co*., 77 NLRB 1306, 1310 (1948); *Chevron Oil Co*., 182 NLRB 445, 449–450 (1970). On the other hand, ''an employer withholding pay raises and/or benefits from employees who . . . have chosen a union as their bargaining representative, has violated the Act if the employees otherwise would have been granted the pay raises and/or benefits in the normal course of the employer's business.'' *Florida Steel Corp*., 220 NLRB 1201, 1203 (1975), enfd. 538 F.2d 324 (4th Cir. 1976).

The Board has resorted to the bargaining process as the vehicle for relieving whatever seeming conflict is created by the tension between these two principles. For example, as the Board stated in *Empire Pacific Industries*, 257 NLRB 1425 (1981):

> Thus, where an employer grants a benefit to a group of unrepresented employees, if the benefit is a mandatory subject of bargaining which is not specifically covered by the represented employees' collective-bargaining agreement and has not been clearly and unmistakably waived by the union, the employer is obligated to bargain with the union concerning the implementation of this benefit for the represented employees.

As a result, an employer's announcement of wage or benefit improvements for only unrepresented employees does not violate the Act, so long as represented employees are made aware ''that coverage for represented employees [is] subject to negotiations and, thus, [does] not automatically withdraw or completely foreclose coverage for such employees.'' *Lynn-Edwards Corp*., 290 NLRB 202, 204 (1988).

That, in effect, awareness-of-represented requirement can be satisfied either by the words, themselves, of the employer's announcement or, also, by the circumstances in which it is made. For example, in *Handleman Co*., 283 NLRB 451 (1987), the employer's ESOP encompassed, to the extent pertinent here, only employees ''not covered by a collective bargaining agreement entered into by the Company unless such agreement, by specific reference to the Plan, provides for coverage under the Plan.'' In concluding that there was no violation of the Act, the Board pointed out that the ''exclusionary language . . . indicates that coverage for the [represented] employees is subject to negotiations,'' thereby ''allowing the parties to agree to continued coverage or not.'' (Id. at 452.)

An example of represented employee awareness arising from the circumstances in which the announcement was made occurred in *A.H. Belo Corp*., 285 NLRB 807 (1987). There, the employer instituted a sick-pay plan that excluded participation by employees covered by collective-bargaining

[1] At the meeting on August 25, 1988, Dunn-Rankin said that he ''might'' have to reconsider the Union's position, and repropose the Union's benefit and retirement programs. However, there is no evidence that he followed through on that statement by actually renewing his withdrawn proposals for those programs. Moreover, his possible reconsideration had been predicated upon failure by Respondent to formulate a retirement program. Of course, the 40lK plan was included among the benefits of the cafeteria plan and, as discussed infra, Respondent was willing to negotiate about extending its coverage to unit employees. Accordingly, there is no basis for concluding that Respondent likely would have anticipated objection from the Union regarding the cafeteria benefits plan.

contracts. However, the announcement of that plan occurred in the context of a history of various sick-pay plans for unrepresented employees and, further, in the context of a lengthy history of unsuccessful, though not unlawful, negotiations for a similar plan for represented employees. As a result, represented employees were aware that, ''The status quo, therefore, was that at least some of the nonunit employees had sick-pay plans, and the unit employees (who had been represented by the Union since 1980) did not.'' (Id. at 808.) Inasmuch as there was no allegation of bad-faith bargaining concerning sick pay, and as there was no allegation that the announcement had been used to defeat the bargaining agent, the Board concluded that there was no violation of Section 8(a)(1) of the Act.

In the instant case, neither circumstance is present. With regard to the wording of the announcement, in *Handleman Corp*., supra, the announcement stated specifically that the represented employees could be covered by the ESOP if there was agreement to include them as a result of bargaining. Similarly, in *Lynn-Edwards Corp*., supra—where the ESOP, itself, provided that ''no employee covered by a collective bargaining agreement . . . shall become a Participant in the Plan, provided that retirement benefits of said class of Employees was the subject of good faith bargaining . . ., and said Employee's retirement benefits are being funded pursuant to said collective bargaining agreements''—the Board concluded that the language was not unlawful because it did not automatically preclude represented employees from participation in the ESOP:

> Rather, it provides that the benefits may only be terminated if two conditions are met. First, retirement benefits for the covered employees must be the subject of good-faith bargaining. Second, the employees' retirement benefits must be funded pursuant to the collective-bargaining agreement. Thus, the employee's participation in the Respondent's ESOP continues throughout the negotiation process and is discontinued *only* in the event that a new retirement plan is funded through the agreement. Finally, we note that the Respondent and the Union under this scheme maintain the option, through good-faith negotiations, to either continue coverage for employees under the Respondent's ESOP, or to negotiate for the substitution of a different plan, which may include stock ownership features. [Id. at 203.]

Yet, in that very case, the Board also concluded that the eligibility description of the ESOP in the handbook and summary plan description did violate the Act. That description recited that eligibility for participation in the ESOP was available to ''[a]ll full-time employees, except those covered by collective bargaining agreements.'' The Board concluded that, absent accompanying language specifically assuring employees of possible coverage through the bargaining process, so terse a description suggests automatic deprivation of ESOP participation for represented employees. In reaching that conclusion, the Board relied upon, and thereby reaffirmed, the rationale articulated 10 years earlier in *Niagara Wires*, 240 NLRB 1326 (1979). In that case, the pension plan language at issue recited, ''To be eligible you must be employed by the Company and your employment must not be subject to the terms of a collective-bargaining agreement.'' In concluding that this language violated the Act, the Board reasoned that it, ''contain[s] no language regarding eligibility other than that which automatically excluded unit employees from coverage as soon as a collective-bargaining agreement is negotiated on their behalf.'' (Id. at 1328.)

So, too, in the instant case, in the memorandum of January 13, 1989, there is no language specifically assuring employees of possible coverage under whatever collective-bargaining contract Respondent negotiates with the representative of those who have, or do in the future, select a bargaining agent. Moreover, unlike unrepresented employees, there is no assurance that represented employees would, or will, be covered by the 401K plan while bargaining is in progress. To the contrary, the memorandum's language is virtually the same as that found unlawful in *Niagara Wires* and in *Lynn-Edwards Corp*. The only effective difference is that in those cases, the plans cut off coverage for employees where a collective-bargaining contract existed. Respondent's restriction advances the exclusion by a step, for represented employees are excluded once bargaining about retirement benefits occurs, regardless of whether or not a contract is achieved and, indeed, regardless of whether or not agreement is reached at all on the terms for a retirement program.

Of course, in her notice posted on January 24 or 25, 1989, Salvador told represented employees that they were being excluded from the 401K plan because the Union was bargaining for its own plan. However, that statement cannot serve as a repudiation or clarification of the exclusion in the memorandum posted by Respondent almost 2 weeks earlier. Salvador was not an official of Respondent. There is no evidence that employees would have believed that she had special access to information concerning Respondent's intentions. So far as the employees were concerned, her statements merely were her own opinion. Moreover, Salvador's announcement hardly serves to cure the unlawful aspect of the eligibility restriction in Respondent's memorandum of January 13, 1989. For, it does no more than tell the represented employees that they are being excluded from 401K plan coverage solely because their bargaining agent has chosen to bargain for its own retirement plan. It does not assure the employees that coverage under Respondent's 401K plan can be the subject of negotiation. Yet, that ''distinction is a critical one.'' *Handleman Co*., supra.

The coercive impact of the eligibility restriction is not nullified or mitigated by Respondent's actual intention to bargain about inclusion of the represented employees in the 401K plan. Nor, for that matter, is it nullified by Dunn-Rankin's letter of January 25, 1989, in which he stated that he understood that Respondent intended to bargain about inclusion of those employees. Of course, in the absence of any evidence that Respondent actually refused to bargain about inclusion of represented employees in the 401K plan—at least, before the Union's majority status was put in issue—there is no basis, under principles similar to those governing disposition of the cafeteria benefits plan, for concluding that Respondent violated Section 8(a)(5) of the Act merely because it announced its intent to institute a 401K plan before notifying the Union of that intention. However, there is no evidence that Respondent divulged to employees its actual intention to bargain with the Union about possible inclusion of represented employees in that plan. Nor is there evidence

that Dunn-Rankin's understanding of that intention was disclosed to the employees. Accordingly, it cannot be said that Respondent's undisclosed intention, and Dunn-Rankin's understanding of it, generated employee awareness that nullified the coercive impact of the third eligibility restriction announced in the memorandum of January 13, 1989. Cf. *Dallas Morning News*, supra.

In sum, although an employer is not obliged to extend to represented employees benefit improvements accorded to unrepresented ones, neither can it deprive represented employees of otherwise employerwide benefit improvements simply because they have chosen to be represented. Here, Respondent's employees were told only that if they chose representation, or continued representation, and if their representative chose to bargain about retirement benefits, then they would be excluded from coverage under Respondent's 401K pension plan. In so doing, Respondent interfered with, restrained, and coerced its employees in the exercise of their rights to become represented, and to bargain collectively through that representative, thereby violating Section 8(a)(1) of the Act.

As set forth above, in withdrawing recognition from an incumbent representative, employers are precluded from relying upon decertification petitions tainted by unfair labor practices. Here, as the testimony described in section III,B, supra, discloses, the petition withdrawing employee support for the Union was prepared and circulated as a direct result of Respondent's memorandum announcing that represented employees would be excluded from participation in the 401K plan. No clearer illustration of that fact could exist than Yocum's remarks to Salvador. In fact, the petition was not prepared and circulated until after Respondent had announced the eligibility restrictions on participation in the 401K plan. True, the implication of some employees' testimony was that the announced restriction did not influence their decision to sign the petition, because they did not desire representation by the Union—and had not desired it for a long time. Yet, the number of employees who so testified were but a small fraction of those who had signed Yocum's petition. An employer cannot evade the natural consequences of its unfair labor practices simply because a relative handful of employees may not have been actually coerced by what was said to them by that employer. Not only would such an approach destroy uniform application of legal principles by making their application contingent upon the reaction of each employee-listener, it also would generate the very type of ''needless and unreliable inquiry'' that the Supreme Court cautioned against with respect to scrutinizing employees' motives for signing authorization cards in *NLRB v. Gissel Packing Co*., 395 U.S. 575, 608 (1969).

As set forth in section III,B, supra, despite the vague testimony that, in deciding to withdraw recognition, Liljegren had relied upon nonpetition-signers' expressions of dissatisfaction with the Union, the evidence shows that, as recited in his letter to Dunn-Rankin, Liljegren withdrew recognition solely on the basis of the petition prepared and circulated by Yocum. Because of its prior unfair labor practice, and the direct effect of that unfair labor practice on the preparation and circulation of the petition, Respondent was precluded from relying on that petition as a basis for withdrawing recognition from the Union. Therefore, I conclude that in doing so, Respondent violated Section 8(a)(5) and (1) of the Act.

Conclusion of Law

KEZI, Inc., a subsidiary of Chambers Communications Corp. committed unfair labor practices affecting commerce by announcing that excluded from eligibility in its 401K pension plan would be ''Employees who are members of a collective-bargaining unit with whom retirement benefits were the subject of good faith bargaining,'' in violation of Section 8(a)(1) of the Act, and by thereafter withdrawing recognition from American Federation of Television and Radio Artists, AFL–CIO, as the representative of employees in an appropriate bargaining unit, in violation of Section 8(a)(5) and (1) of the Act, but did not violate the Act in any other respect alleged in the complaint.

Remedy

Having found that KEZI, Inc., a subsidiary of Chambers Communications Corp. engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to amend any existing documents describing its 401K pension plan so as to eliminate therefrom any language which indicates that employees are excluded automatically from coverage if they are members of a collective-bargaining unit for which retirement benefits were the subject of good-faith bargaining. In addition, it shall be ordered to recognize and bargain with American Federation of Television and Radio Artists, AFL–CIO, as the representative of employees in the appropriate bargaining unit.

[Recommended Order omitted from publication.]