Bon Appetit Management Co. *and* Service Employees' International Union, Local 50, AFL–CIO.
Cases 14–CA–25308 and 14–RM–712

August 10, 2001

DECISION, ORDER, AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On February 1, 2000, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent-Employer filed exceptions, supporting brief and a reply to the General Counsel's answering brief. The General Counsel filed an answering brief.

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

The National Labor Relations Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision, Order, and Certification of Results of Election.

The judge found that the Respondent violated Section 8(a)(1) of the Act by interrogating an employee about the employee's union membership, activities, and sympathies, and by threatening that employee with a decrease in wages if she chose to be represented by the Union.[3] We agree with the judge's finding, for the reasons set forth in his decision.

The judge also sustained union election Objection 1, alleging noncompliance with *Excelsior*[4] list requirements, and Objection 4,[5] alleging that the foregoing unfair labor practice interfered with the election. As more fully set forth below, we disagree. Stated briefly, we find that Objection 1 lacks merit and that the unfair labor practice cited in Objection 4 does not rise to the level of conduct affecting the election. Accordingly, we overrule the Union's objections and issue a Certification of Results of Election.

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

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

[3] There were no exceptions to the judge's recommended dismissal of the remaining unfair labor practice allegations.

[4] *Excelsior Underwear,* 156 NLRB 1236 (1966).

[5] The judge recommended overruling the Union's remaining election objections. There were no exceptions to this recommendation.

The Objections

Objection 1

In its Objection 1, the Union contends the Employer did not timely provide the Region with a voter eligibility list which satisfied the requirements of the Board's *Excelsior* rule.

The judge found that the September 29, 1998 list, which the Employer timely provided the Region, identified eligible voters by their address, last name, and first name initial, rather than by their address and complete first and last names as required in *North Macon Health Care Facility,* 315 NLRB 359 (1994). The judge further found that the Employer provided the Region with a corrected list on September 30, 1998, which included employees' first names. As to this corrected list, the judge found that the Employer supplied it to the Region 1 day after the deadline, and 9 days before the election. The judge additionally found that the Union received the corrected list late in the afternoon of September 30, and that the unit was a large one (approximately 200 employees). He acknowledged that the vote was not close.[6] Similarly, the judge acknowledged that the Employer offered to delay the election for a sufficient amount of time to cure any claimed prejudice to the Union arising from its late receipt of the revised list.

Under these facts, the judge concluded that the Employer had engaged in objectionable conduct. Although the judge determined that the Employer's omission of first names from the September 29 eligibility list was an inadvertent error, he found that the Employer's good faith was irrelevant. He then concluded that the timely filed September 29 list did not satisfy *Excelsior* requirements, and that the September 30 corrected list likewise did not substantially comply with the *Excelsior* rule. On the latter point, the judge particularly relied on the facts that: the unit was large and spread over several locations; the corrected list was not provided to the Region at least 10 days before the election, as specified in the Board's Casehandling Manual (Part Two, Representation Proceedings, Sec. 11302.1); and the Union was not required to postpone the election in order to correct the Employer's error. Accordingly, the judge recommended setting aside the election.

The Employer excepts, arguing that the omission of first names from the September 29 list was due to inadvertent error, and that there is no evidence that the Union was prejudiced as a result of this technical defect or by the slight delay in receiving the corrected list. The Employer also notes that since the Board's Casehandling

[6] The Union received 21 votes, compared to 123 against it, and there were 17 nondeterminative challenged ballots.

Manual anticipates that the Region will send the *Excelsior* list to unions by certified mail, rather than fax, the Union likely received the corrected September 30 list as soon or sooner than it would have received the September 29 list, had it been mailed. The Employer further argues that it offered to delay the election in order to cure any claimed prejudice, but the Union refused its offer, and the Region did not take the lead by postponing the election. Arguing for the application of a "rule of reason," the Employer argues that Objection 1 should be overruled. Under the particular circumstances of this case, we find merit in the Employer's exceptions.

The relevant inquiry in cases where there has been a delay in providing the *Excelsior* list is whether the delay interfered with the purposes behind the *Excelsior* rule, i.e., to provide employees with the full opportunity to be informed of the arguments concerning representation, "by giving unions the right of access to employees that employers already have, thus enabling employees to hear not just the employer's views, but also the union's arguments in support of unionization." *Special Citizens Futures Unlimited,* 331 NLRB 160 (2000). In this respect, whether the Employer acted in good faith and in substantial compliance with the *Excelsior* rule is "not the relevant inquiry,"[7] rather, it is whether "the purposes behind the *Excelsior* requirement of providing employees with a full opportunity to be informed of the arguments concerning representation have been frustrated." Id.

In this case**,** when all of the facts are considered, we cannot say that the important statutory goal set forth in *Excelsior*, of providing the opportunity for employees to be fully informed about the arguments concerning representation, has been frustrated. The facts in this case are markedly different from the facts in *Special Citizens Futures Unlimited,* supra, where the Board found that the purposes behind *Excelsior* were frustrated. In that case, the Regional Office delayed mailing the letter informing the employer that the election agreement was approved, and thus the employer had only 1 day to submit its *Excelsior* list. Thus, the employer did not submit its list until after the close of business on the due date, which was a Friday, and the regional office was not able to fax it to the union's counsel until the following Monday, 3 days later. The first list provided by the employer set forth only employees' last names and initials. Although the employer submitted a corrected list, the regional office did not submit it to the union's counsel until the next day, and never informed him that it was intended to supersede the original list. Thus, the union's counsel never forwarded it to the union's organizing staff for use in the campaign. And because of the regional office delays in transmitting the list, the union's counsel did not have a complete and accurate list until several days after the employer submitted its original list to the region. Id.

In contrast, in this case, although the original list supplied by the Employer did not contain full first names of employees, as required by *North Macon,* supra, this mistake was corrected the next day, and the Regional Office immediately faxed a corrected list to the Union. The Union had full use of this list to communicate with unit employees for only 1 day less than if the Employer's original, timely list had been complete and accurate. In addition, the employee vote against representation was not close. Under these circumstances, we conclude that the minimal delay in providing the Union with a complete and accurate list did not interfere with the purposes behind the *Excelsior* rule. Accordingly, we overrule this objection.[8]

Objection 4

In its Objection 4, the Union contends that the election should be set aside based on the same misconduct that is found to have violated Section 8(a)(1). This 8(a)(1) conduct consists of the Employer's supervisor, John Turner, asking employee Edna Wade—during the critical period—how she was going to vote in the election and stating that, if Wade voted for the Union, her pay would be cut. The judge found that this conduct was objectionable as well as unlawful under Section 8(a)(1) as an unlawful interrogation and threat to reduce Wade's benefits.

In its exceptions, the Employer contends that Turner never interrogated or threatened Wade. It further contends that even had it violated Section 8(a)(1), as alleged, this conduct did not disrupt the laboratory conditions of the election. Specifically, the Employer argues that Turner's allegedly unlawful statements were made by a low-level supervisor to a single employee, 2 to 3 weeks prior to the election, and at a site that was not "the locus of management authority." The Employer further notes that the unit was large (approximately 200 employees), the statements were not disseminated, and the vote mar-

[7] Compare, *Woodman's Food Markets,* 332 NLRB (2000) (discussing "substantial compliance" test when names of eligible voters are omitted from *Excelsior* list).

[8] In reaching this determination, we recognize that the Employer's initial list was incomplete and did not substantially comply with the *Excelsior* requirements, as set forth in *North Macon Health Care Facility,* supra. Had the case stopped at this point, it may well be that a new election would have been directed, even had the error been inadvertent rather than intentional, and even had the Union neither claimed nor established prejudice. We further recognize that had the Employer merely provided a correct, but untimely, list, a different result might obtain. Nor would the fact that the Employer offered to postpone the election, standing alone, necessarily nullify the Union's objection. As discussed, however, this case is in a different posture.

gin was such that the comments could not have affected the results of the election.

We find merit to the Employer's exceptions. Although, as found above, the Employer violated Section 8(a)(1) during the critical period, we do not find that this conduct warrants setting aside the election. "[I]t is the Board's usual policy to direct a new election whenever an unfair labor practice occurs during the critical period since '[c]onduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election'."[9] [Emphasis in original.] The only exception to this policy is "where the misconduct is de minimis: 'such that it is virtually impossible to conclude' that the election outcome has been affected."[10] In determining whether misconduct could have affected the results of the election, the Board has considered the number of violations, their severity, the extent of dissemination, and the size of the unit.[11] Other factors the Board considers include the "closeness of the election, proximity of the conduct to the election date, [and the] number of unit employees affected." *Detroit Medical Center,* 331 NLRB 878 (2000) (citations omitted). Thus, in *Coca-Cola Bottling Co.,* 232 NLRB 717, 718 (1977), the Board declined to set aside the election despite 8(a)(1) violations consisting of interrogations affecting 2 employees out of a unit of 106 employees.[12]

Here, the Employer engaged in the above described 8(a)(1) conduct involving, as found by the judge, a supervisor "low in the management hierarchy" and one employee, 2 weeks prior to the election. The incident occurred at the employee's regular work station, rather than "in a locus of management authority." Given the isolated nature of the misconduct, especially in the context of the large size of the unit, the lack of evidence of any dissemination, and the sharply lopsided vote, we find it "virtually impossible" to conclude that the Employer's 8(a)(1) conduct could have affected the results of the election. Accordingly, we shall overrule Objection 4.

Having concluded that the Union's Objections 1 and 4 lack merit, we shall certify the results of the election.

AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law 4 and renumber the subsequent paragraph.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Bon Appetit Management Co., St. Louis, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Service Employees' International Union, Local 50, AFL–CIO and that it is not the exclusive representative of these bargaining unit employees.

CHAIRMAN HURTGEN, concurring.

I agree with the result reached by my colleagues, but I differ with them in one respect. My colleagues appear to draw a distinction between compliance with the substantive requirements of the *Excelsior* list and compliance with the timeliness of that list. In their view, substantial compliance will satisfy the former but not the latter. In my view, the distinction is not valid. The issue is whether there has been substantial compliance *with the Excelsior rule*.[1] The rule includes the time requirements. In the instant case, there was substantial compliance with these requirements. The Employer filed a timely list on September 29 which, through inadvertence [and not bad faith], failed to comply with *North Macon*;[2] this mistake was immediately corrected; the Union was faxed the corrected list on September 30, 9 days before the election rather than the required 10 days; the Employer offered to postpone the election to compensate for the Union's delay in receiving the corrected list; the Union rejected this offer; there was neither claim nor evidence that the Union was prejudiced by the delay—indeed, it successfully communicated with employees using the corrected list; and the employees vote was lopsided against union representation.

In these circumstances, there was substantial compliance with the rule. In addition, applying my colleagues' test, the purposes of the rule have been satisfied.

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[9] *Clark Equipment Co.,* 278 NLRB 498, 505 (1986), quoting *Dal-Tex Optical Co.,* 137 NLRB 1782, 1786 (1962).

[10] *Sea Breeze Health Care Center,* 331 NLRB 1131 (2000), quoting *Super Thrift Markets,* 233 NLRB 409 (1977). Member Hurtgen does not pass on whether the "virtually impossible" standard is the correct one.

[11] *Super Thrift Markets,* supra. See also *Caron International*, *Inc.,* 246 NLRB 1120 (1979).

[12] This case is distinguishable from *Spring Industries,* 332 NLRB (2000), where the Board majority found that threats of plant closure required setting aside an election because such threats were presumed to have been disseminated among unit employees. Such presumption does not apply to the instant threat made to one employee to reduce her wages.

Chairman Hurtgen, who dissented in *Spring Industries,* would not presume dissemination of any threats but would look to the actual record facts. Here, the facts show that the threat of a wage reduction was not disseminated.

[1] See *Telonic Instruments,* 173 NLRB 588 (1968).

[2] *North Macon Health Care Facility,* 315 NLRB 359 (1994)..

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Alan S. Garber, Esq. (The Garber Law Firm), of Alameda, California, for the Respondent.
Michael T. Finneran, Esq. (Wilburn, Suggs & Watkins), of St. Louis, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. In this matter, unfair labor practice allegations in Case 14–CA–25308 have been consolidated with objections to the conduct of an election in Case 14–RM–712. I find that Bon Appétit Management Co. (the Respondent or the Employer) unlawfully interrogated an employee about the employee's union membership, activities, and sympathies, and unlawfully threatened an employee with a decrease in wages if employees chose union representation, but did not violate the Act in other ways alleged in the complaint. I also find that Respondent engaged in certain objectionable conduct, and recommend that the Board set aside the representation election conducted on October 9, 1998, and direct that a new election be conducted.

Procedural History

In June 1998, Respondent began operating food service facilities at Washington University in St. Louis, Missouri. Previously, the Marriott Company had operated these facilities, and the Charging Party, Service Employees International Union, Local 50, AFL–CIO (the Union) had represented a unit of food service workers.

When Respondent took over operation of the food services facilities, its representatives interviewed and hired job applicants, including a number of the employees who had worked for Marriott Company at the same location. However, the complaint in this case does not allege that Respondent meets the legal definition of successor, and similarly, does not allege that Respondent had an obligation to recognize and bargain with the Union.

On September 3, 1998, after the Union sought to represent a unit of food service employees similar to the unit it had represented when Marriott Company operated the facilities, Respondent filed a petition with the St. Louis Regional Office of the National Labor Relations Board (the Board) in Case 14–RM–712.

On October 2, 1998, the Union filed the original unfair labor practice charge in Case 14–CA–25308. It alleged that Respondent had interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act. More specifically, it alleged that Respondent's supervisors had questioned employees about how they intended to vote in the representation election, and had informed employees "that scheduled and promised raises could not be given during the organizing campaign."

Pursuant to a Stipulated Election Agreement, the Board conducted an election on October 9, 1998, in the following appropriate collective-bargaining unit:

> All full time and regular part–time food service employees and drivers employed by the Employer at its Washington University facility, EXCLUDING office clerical and professional employees, casual, on call temporary and student employees, guards and supervisors as defined in the Act.

At the conclusion of the election, the tally of ballots showed the following results:

Approximate number of eligible voters	186
Void ballots	0
Votes cast for Service Employees' International Union, Local 50, AFL–CIO	21
Votes cast against participating labor organization	123
Valid votes counted	144
Challenged ballots	17
Valid votes counted plus challenged ballots	161

The number of challenged ballots was not sufficient to affect the results of the election. However, on October 15, 1998, the Union filed timely objections.

On November 16, 1998, the Union amended its charge against the Respondent in Case 14–CA–25308. The amendment added the allegation that Respondent had told its employees that wages would decrease if employees chose to be represented by a labor organization.

On November 17, 1998, the Regional Director for Region 14 of the Board, on behalf of the General Counsel, issued a complaint against Respondent in Case 14–CA–25308. Respondent filed a timely answer to the allegations in this complaint on December 3, 1998.

On November 19, 1998, the Regional Director issued an order, granting the Union's request to withdraw one of its objections in Case 14–RM–712, and consolidating the remaining six objections in that case with the unfair labor practice allegations in Case 14–CA–25308.

On February 10, 1999, the General Counsel, by the Regional Director for Region 14, amended the complaint in Case 14–CA–25408. On February 22, 1999, Respondent filed a timely answer to this amendment to the complaint.

On March 11 and 12, 1999, I heard the consolidated cases in St. Louis. Thereafter, the parties filed briefs, which have been considered carefully.

FINDINGS OF FACT

I. STATUS OF THE PARTIES

As alleged in the complaint and admitted by Respondent, I find that the Union filed the original charge in Case 14–CA–25308 on October 3, 1998, and that a copy was served by regular mail on Respondent on October 7, 1998. Similarly, I find that the Union filed an amended charge in Case 14–CA–25308 on November 16, 1998, and served it by certified mail on Respondent on November 17, 1998.

Respondent has also admitted that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of Act. I so find.

Paragraph 4A of the complaint alleges that certain individuals are supervisors of the Respondent within the meaning of

Section 2(11) of the Act, and its agents within the meaning of Section 2(13) of the Act. Respondent has admitted these allegations. Accordingly, I find that, at all material times, the following persons were supervisors and agents of Respondent: Tom Bergin (general manager of St. Louis operations); Robert J. Mansco (initially, as general manager of the "Bear's Den" cafeteria and later, as manager of another dining facility also located at Washington University); Diane E. Paisley (director of employee services); Ralph K. Pfremmer (food and beverage director for the South Campus area at Washington University); John Turner (unit manager at "Cafe Olin," also called the "Olin Cafeteria" at Washington University); Roland Ybarra (food and beverage director for the North Campus area at Washington University).

Paragraph 4B of the complaint alleges that at all times material, Carlos Rojas has been an agent of Respondent within the meaning of Section 2(13) of the Act. Respondent's answer admits this allegation, and I so find.

Paragraph 4C of the complaint alleges that "at all material times Charlie, whose last name is presently unknown" to the Regional Director "has been an agent of Respondent within the meaning of Section 2(13) of the Act." Respondent's answer denies this allegation. Based on the record as a whole, I find that the General Counsel has not proved this allegation.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. Complaint Paragraph 5A

Complaint paragraph 5A alleges that about "September 30, 1998, at Respondent's St. Louis facility, Respondent, by Food and Beverage Manager Pfremmer, told an employee that Respondent could not give employees raises before the Board election."

To prove this allegation, the Government called Marva Louise Tate, who had worked for Marriott when that company was operating the dining facilities at Washington University. As Respondent prepared to take over the food service operations, Tate applied for a job.

According to Tate, she attended a job interview with one of Respondent's managers, Robert Mansco, in June 1998. She testified that Mansco offered her a job as head baker in one of the facilities, but she then told him she could not bake "from scratch," a requirement for that position. In Tate's words, Mansco responded, "[W]ell, okay, then I will make you head cashier in the Bear's Den."

Tate testified that Mansco said that the cashier position only paid $9 per hour, but then told her "we evaluate our workers and at three months you will be evaluated and you will get a raise at that time." According to Tate, 4 or 5 days after the interview with Mansco, she went to work for Respondent.

Mansco's testimony conflicts with Tate's. He denied conducting a job interview with Tate, although he admitted interviewing other applicants. However, both Tate and Mansco agree that during the first months of her employment, Mansco was Tate's supervisor.

Mansco testified that he recalled Tate "vividly" and that his relationship with her was "adversarial initially" but got better over time. He denied ever telling Tate that she would get more money after 90 days of employment or after her 90-day evaluation. "In a real world context," Mansco explained, "[Y]you know who your adversaries [are] so you don't say anything to them."

For two reasons, I do not credit Mansco's testimony where it conflicts with that of Tate. According to Tate, Mansco made the statement that she would get a raise after 3 months during a job interview before Respondent hired her. At that time, Mansco would not have known that Tate would have the "adversarial" attitude he described. Indeed, if she had displayed such an attitude during the job interview, it seems unlikely that Respondent would have hired her. Mansco's explanation, that "you know who your adversaries are" and therefore keep quiet, would not apply to the statements he made during the job interview.

Moreover, Mansco's testimony on direct examination admitted that when he interviewed prospective employees, he did allude to the possibility of a raise after 90 days.

> Q. Was there any discussion about what would happen to their pay at the end of 90 days?
>
> A. Well, it was pretty generic and the generic part of it was simply this. There were no guarantees, but excellence might be rewarded, so that was essentially it.

Telling a potential employee that, although there were no guarantees "excellence might be rewarded" after 90 days, in the context of what would happen to the employee's pay, certainly holds out the possibility of a raise. Further, it associates the prospect of a raise with the 90-day job evaluation.

According to Tate, when she did not receive an evaluation after 90 days, she asked Mansco about it, but he told her that he was being promoted and was not her manager anymore. She brought up the matter with a manager named "Ralph," whose last name she could not pronounce. Based on the entire record, I find that this person was Ralph K. Pfremmer, food and beverage manager for the South Campus area.

Tate testified that she asked Pfremmer "when would I be getting an evaluation and that I was told that I would be evaluated and given a three month's raise. And he said at that time that they were not going to be giving out any evaluations because of the election that was coming up with Local 50 and they would not be giving any raises because the Labor Board would frown on it as being a bribe."

Pfremmer's testimony contradicts Tate's. When asked by Respondent's counsel whether Tate ever asked him for a raise during the time period July 1 to September 30, 1998, Pfremmer answered as follows:

> A. Whether or not she asked for a raise, I assume she was asking for an evaluation. They were in the 90-day orientation time at the time, so if she had asked me I would have responded that after her 90 days she would get an evaluation for her 90-day period, orientation period.
>
> Q. You never told her that she would receive a raise?
>
> A. No, because it is not the way we did it.
>
> Q. Did she tell you that she was promised a raise after 90 days?
>
> A. No.
>
> Q. Did any employees ask you if they would get a raise after 90 days?

A. You know, I think I was asked from time to time, when do I get a raise, Ralph, when do I get a raise? I wasn't the one that did the evaluations oftentimes, but I would respond by a 90-day period you are going to receive an evaluation and it doesn't necessarily mean you are going to get an increase.

Although Pfremmer testified on direct examination that Tate never told him she had been promised a raise, on cross-examination it became clear that he had little recollection of his conversation with her.

Q. Is it your testimony that you are not sure if Ms. Tate asked you about a raise?

A. She very well could have. I interpreted her question, if she were to ask it—

Q. What did she ask you?

A. I don't remember exactly what she asked me. I remember some dialogue with some employees, they were asking about evaluations.

To the extent that Pfremmer's testimony conflicts with Tate's, I do not credit it. Pfremmer did not appear to have a clear memory of the conversation with Tate. The conditional nature of his testimony—that *if* Tate had asked him for a raise, he *would have* responded that after 90 days, she would receive an evaluation—suggests that it is not very reliable.

Moreover, Pfremmer's testimony that "[w]hether or not she asked for a raise, I assume she was asking for an evaluation" is puzzling. Pfremmer did not explain why, if Tate asked him one question, he would assume that she was really asking another question. Such an assumption does not make sense, and raises further doubts about Pfremmer's reliability as a witness. For these reasons, where Pfremmer's testimony conflicts with Tate's, I credit Tate's.

Therefore, I find that, about September 30, 1998, Pfremmer told Tate that because of the union representation election, Respondent would not be giving any raises "because the Labor Board would frown on it as being a bribe."

Respondent contends, in effect, that it gave the new employees no reason to associate the 90-day evaluations with the possibility of raises. Respondent's director of employee services, Diane Paisley, testified that the initial 90 days of employment constitute a probationary period, and supervisors evaluate employees at the end of this period to determine whether they will be retained, not to determine whether the employee's pay should be increased. She further testified as follows:

Q. Are they promised an increase in pay at any time?

A. No.

Q. Are they promised in an increase in pay at any time—90 days or at any time?

A. No.

Noting that its employee handbook mentions the possibility of a raise after 1 year of employment but contains no statement that employees would or could receive a raise after the first 3 months on the job, Respondent argues that employees had no reason to believe their pay might increase after their 90-day evaluations. For the following reasons, I do not find Respondent's argument persuasive.

First, Paisley was not in a position to know what interviewers actually said to job applicants. She works at Respondent's headquarters in Menlo Park, California, not in St. Louis.

Second, the fact that the Respondent's employee handbook does not mention that employees could receive a raise after 90 days does not rule out that possibility. Its silence on the subject would not lead employees to believe that they were ineligible for raises after the first 3 months, particularly if a supervisor had informed them of that possibility. In other words, nothing in the employee handbook would call into question a supervisor's statement that an employee would be eligible to receive a raise after that worker's 90-day evaluation.

Third, the general manager of the Respondent's operations at Washington University, Thomas Bergin, testified that although there is no company policy regarding pay raises after 90 days, "there may be merit increases" for exemplary employees. Bergin's testimony is consistent with the information which Manager Mansco provided to Wade at the time she was hired. Mansco testified that during the hiring process, he told the new employees that there "were no guarantees, but excellence might be rewarded." Thus, employees clearly knew that there was a possibility of a pay increase after the 90-day evaluation.

Finally, it should be noted that the complaint does not allege that Respondent had failed to give employees raises it had promised them. Similarly, the General Counsel does not seek an order that Respondent grant the employees 90-day raises retroactively. The General Counsel does not even seek an order requiring Respondent to decide whether each employee should receive a raise based upon that employee's 90-day evaluation.

Rather, the Government only alleges that Respondent interfered with, restrained, and coerced employees in the exercise of protected rights by telling them, in effect, that they would not receive raises after 90 days because of the upcoming representation election. On this issue, whether Respondent customarily did or did not grant raises after 90 days is beside the point.

An employer's policy and past practice in granting pay increases become central when the Government alleges that the employer has withheld a raise for an unlawful reason, such as to discourage union activity. But the complaint in this case does not allege such a violation. Respondent's official policy regarding the timing of pay increases has less relevance to the question presented here: What did Respondent tell employees about pay raises during the meetings it conducted before the election?

Stated another way, what the Respondent told new employees about the timing of pay increases neither proves nor disproves what the Respondent later said during employee meetings before the election. At most, evidence concerning Respondent's announced pay raise policy only relates to the expectations the employees had.

Conceivably, such evidence might be relevant to determining the coercive impact of a statement that raises had been postponed because of the upcoming representation election. In other words, it could be argued that if an employee believed that he could not receive a raise until he had worked for Respondent a year, he would not be coerced when told that he would not receive a raise after only 3 months.

The record here does not support such an argument. No evidence suggests that Respondent told new employees that they would *not* be eligible for a raise after 90 days.

Very significantly, Paisley's own testimony undercuts the argument that employees had no reason to associate the 90-day evaluation with an opportunity to receive a pay increase. Specifically, Paisley testified as follows during cross-examination:

> Q. Did you tell as best you can recall what you actually told the employees?
>
> A. Yes, I told them that we had spoken with our attorneys and they had suggested that it would be better for us to suspend the evaluation period at this time because if we were to go ahead and give a merit increase for someone who deserved it, it would be considered a bribe and they would file an unfair labor practice charge against us. So we were going to suspend this until after the election.

If the Respondent's own attorneys believed a 90-day evaluation could result in a merit increase—and according to Paisley's testimony, they did—then it is quite reasonable to assume that the employees believed the same thing. Certainly, the record gives no reason to conclude that Respondent would tell its lawyers one thing and its workers another.

Paisley's testimony leads to the conclusion that Respondent did not suspend the 90-day evaluations because these evaluations were bad per se, but because they could result in pay raises. As a high-ranking human resources official at Respondent's home office, Paisley certainly should know. If Respondent itself considered a 90-day evaluation to be a predicate to a merit pay increase, its argument to the contrary is not very persuasive.

The portion of Paisley's testimony quoted above also bolsters Tate's version of her conversation with Pfremmer. The words which Tate attributed to Pfremmer are remarkably similar. According to Tate, Pfremmer explained that "they would not be giving any raises because the Labor Board would frown on it as being a bribe." Those words echo Paisley's explanation that "if we were to go ahead and give a merit increase for someone who deserved it, it would be considered a bribe."

The evidence clearly establishes that Respondent advised Tate, before she began work, that she would be evaluated after 3 months and, depending on her work performance, Respondent might give her a raise. The evidence also establishes that after Tate had worked for 3 months, Pfremmer told her that Respondent was not giving out evaluations "because of the election that was coming up with Local 50" and that Respondent "would not be giving any raises because the Labor Board would frown on it as being a bribe." I so find.

The Board's general rule is that an employer's legal duty during a preelection campaign period is to proceed with the granting of benefits just as it would have done had the Union not been on the scene. See, e.g., *American Telecommunications Corp.*, 249 NLRB 1135 (1980). If an employer withholds wage increases or accrued benefits because of union activities, and so advises employees, it violates the Act. *Liberty House Nursing Home*, 236 NLRB 456 (1978). However, where employees are told that expected benefits are being deferred pending the outcome of an election to avoid the appearance of election interference, the Board will not find a violation. *Reno Hilton Resorts*, 320 NLRB 197 (1995), citing *Truss–Span Co.*, 236 NLRB 50 (1978).

That principle applies here. In effect, Respondent told employees that it postponed their 90-day evaluations because, in view of the upcoming election, the Board would consider any resulting raise to be a "bribe." This message is equivalent to a statement that expected benefits were being deferred to avoid the appearance of election interference.

I recommend that the allegations in complaint paragraph 5A be dismissed.

B. Complaint Paragraph 5B

Complaint paragraph 5B alleges that during the period September 26 through October 7, 1998, at employee meetings at its St. Louis facility, Respondent, "by Director of Employee Services Paisley and agents Rojas and Charlie, told employees there would be no evaluations or raises until after the Board election."

Witness Rose Marie Nance, an employee of Respondent, attended an employee meeting on September 26, 1998, conducted by persons who identified themselves as "Carlos" and "Michael." Nance testified that the employees asked when they would get a pay raise, and "Michael" replied, "that they couldn't give a raise at that time because the election was going on and it looked like they were being bought or bribing the employees so wasn't anyone getting a raise at that time."

Nance testified that employees also asked when they would get a pay raise at a second employee meeting which Nance attended before the election. This second meeting took place on October 1, 1998. Although the first meeting had taken place at a food service facility called "Ike's Place," employees went to a different location, Freeman's Lounge, for the second meeting.

According to Nance, employees again asked when they would be receiving raises. She quoted "Michael" as answering that no one could get a raise at that time, "because it would look like they were being bribed so you couldn't get—so you had to wait for—until the—the election was over."

Employee Ben Stewart corroborated Nance's testimony, quoting Michael as stating that "they couldn't give an evaluation at this time and raises because it would be considered as a bribe."

Respondent's director of employee services, Diane Paisley, testified that she and Carlos Rojas were both in the room the first time employees asked about when they would receive raises. On this occasion, they replied that they would ask, presumably meaning that they would ask higher management, and would get back to the employees.

According to Paisley, the next time the subject of raises came up at one of the employee meetings, she answered by saying, "[W]e are going to take the conservative route and wait till after the election." As quoted above, she further explained that granting a merit increase would be considered a bribe and that "they," presumably meaning the Union, would file an unfair labor practice charge.

It is clear that, in making this statement to employees, Paisley was acting as an agent of Respondent within the meaning of

Section 2(13) of the Act. Before conveying this information to employees, she had conferred with counsel, and, in fact, told the employees that "we had spoken with our attorneys" about the matter, the "our" plainly referring to Respondent.

Respondent required its employees to attend these meetings while on working time. Clearly, they would view Paisley as Respondent's spokesperson. I find that she had both the actual and apparent authority to speak on behalf of Respondent, and was acting as its agent.

Carlos Rojas did not testify and neither did the person identified in the complaint as "Charlie." Another spokesman at the employee meetings, a man identified as "Michael," did testify. He gave his name as Michael Dana Penn, and his occupation as "human resources labor relations consultant." At hearing, the parties stipulated that Penn was an agent of Respondent within the meaning of Section 2(13) of the Act, and I so find.

Penn described himself as an independent contractor retained by the Respondent to hold meetings with employees; at these meetings, he explained the election procedure to employees and presented the Respondent's position regarding unionization. He met with groups of about 20 employees at a time, and held three rounds of meetings. Each employee attended three separate meetings.

It appears that Penn did not attend all of the meetings. He was not present the first time an employee asked about a pay raise, but Paisley and Rojas, who conducted that meeting, told Penn about it later. Penn testified that this question prompted a discussion with the Respondent's lawyer:

> A. We then had a discussion—when I say we, including counsel, including you, Mr. Garber, Diane, Carlos and I, to discuss exactly what the company's strategy should be.
>
> . . . .
>
> Q. You said once this inquiry came up there was a discussion between you and corporate management and counsel. Tell me, as a person who has been in this field for almost twenty years and have had a great deal of experience in labor campaigns, what was your professional opinion as to what the company should do or how they should respond to these questions?
>
> A. My professional opinion during and after the discussions was that we needed to preserve the laboratory conditions during the campaign, that if we went ahead and did actual carrying out the performance evaluations and if someone were to be let go or disciplined in any way that ended up being a union supporter or if somebody who had gone above and beyond the call of duty were given an increase, that that would be considered as a bribe and that it would almost assuredly bring a ULP. It was my opinion that we should take the high road, the more conservative approach, since there was no guaranteed increase anyway and wait and do the evaluations after the election since it was so close to the election, anyway.
>
> . . . .
>
> Q. You said a little while ago that in some of these employee meetings these questions came up to you and how did you respond to these employees during the meetings?
>
> A. Well, in fact, pretty much as I have just explained here. In fact, went into a fair amount of detail in stating to the employees that, No. 1, company policy was that there would be evaluations at the end of the orientation period, not pay increases. That because of the nearness to the election the company did not want to take any action that would prejudice the outcome of the election and therefore the evaluations would be done after the election took place.

Here, the testimony of witnesses called by both sides has painted a consistent picture. I find that during the meetings before the election, employees asked when they would get raises. In response, speakers for the Respondent answered that they could not give raises at that time because it might be considered a "bribe." On occasion, a company spokesperson might reply to the question concerning wages by stating, as Penn testified, that evaluations would not be conducted until after the election to avoid prejudicing the outcome. In context, this statement conveyed essentially the same message, because the employees understood that evaluations came before raises.

For the same reasons discussed above regarding complaint paragraph 5A, I find that the Respondent's statements do not violate the Act. *Reno Hilton*, supra, 320 NLRB 197, *Truss–Span Co.*, supra, 236 NLRB 50. I recommend that the allegations in complaint paragraph 5B be dismissed.

C. Complaint Paragraph 5C

Complaint paragraph 5C alleges that about October 2, 1998, at Respondent's St. Louis facility, Respondent, by Manager Turner (i) interrogated an employee about the employee's union membership, activities, and sympathies and (ii) threatened an employee with a decrease in wages if employees chose to be represented by the Union.

Employee Edna Wade testified that a couple of weeks before the election, she was working as a cashier when a supervisor, Joan Turner, approached and asked Wade how she was going to vote in the representation election. Wade replied that she didn't know yet. According to Wade, the supervisor also said that if Wade voted for the Union, her pay would be cut, but did not explain this statement or specify how large the cut would be.

Turner specifically denied ever asking Wade about her union sympathies and also denied telling Wade that if she voted for the Union, her pay would be cut.

Based on my observations of the witnesses, I have some concern about the reliability of Wade's memory. On the other hand, Turner's responses during cross-examination undercut her credibility. At one point, Turner denied ever talking about the Union with Wade. However, she then stated that Wade talked about the Union briefly but that "I just listened." Turner then admitted she told some employees that she would consider support for the Employer to be the same as support for her.

These shifts damage Turner's credibility to a greater extent than Wade's apparent memory problems cast doubt on her veracity. Any hesitation displayed by Wade in recalling facts reasonably may be attributed to a desire to remember what happened as clearly as possible and to testify truthfully.

Turner's reluctance in admitting she talked with employees about the Union cannot easily be attributed to an effort to be exact.

Therefore, I credit Wade rather than Turner. I find that on about October 2, 1998, or shortly before that date, Turner did interrogate an employee about union activities, and did threaten the employee with a reduction in wages if the employee voted for the Union, as alleged in complaint paragraph 5C.

I will evaluate the interrogation using criteria applied by the Board in *Rossmore House,* 269 NLRB 1176 (1984). The record does not disclose a history of discrimination against employees because of their union activities. In this instance, the questioner was low in the management hierarchy and she interrogated Wade at Wade's workstation, not in a locus of management authority. The record does not indicate that the questioning took place in an atmosphere of unnatural formality. These factors weigh against a finding that the interrogation was coercive and therefore violative.

From the record, it is difficult to determine whether Wade replied to the question truthfully. Wade's answer, that she did not know yet how she would vote, can best be described as noncommittal. This factor weighs neither for nor against finding a violation.

On the other hand, the fact that Turner also threatened Wade with a reduction in wages creates the impression that Turner was seeking to know how Wade would vote so she could impose discipline for voting the wrong way. Applying the Board's objective standard, I find that the coupling of the question and the threat reasonably would have an intimidating and coercive effect on the voter.

The seriousness of this coercion outweighs the other factors, discussed above, which did not militate toward finding a violation. How an employee will vote in a representation election is both sensitive and private, and lies at the core of Section 7 rights. When a supervisor asks an employee how she will vote, and threatens a reprisal in virtually the same breath, there can be no doubt that these statements interfere with, restrain, and coerce that employee in the exercise of protected rights. I find that Respondent violated the Act as alleged in complaint paragraph 5C.

D. Complaint Paragraph 5D

Complaint paragraph 5D alleges that on October 7, 1998, at Respondent's St. Louis facility, Respondent, by St. Louis General Manager Bergin, told an employee there would be no raises given during the time period surrounding the Board election.

Employee Edna Wade testified that about 2 days before the election, she encountered Manager Bergin in the hallway and asked him when she would be getting a raise. According to Wade, Bergin said that there would not be any raise until after the election.

Wade also testified that in a meeting shortly before the election, Bergin made a similar statement, that there would be no raises until after the election.

Initially, Wade testified that no one explained to her, at any time, why the employees would not receive raises before the election. However, on further examination, Wade testified that she did not remember.

Bergin testified that in the days before the election, he never had a one-on-one meeting with Wade with respect to employee evaluations or wages. It is not clear from Bergin's testimony whether, during an employee meeting, he said that there would be no raises before the election. His testimony on direct examination indicates that someone told employees that there would be no evaluations before the election, but is unclear as to who made that statement.

> Q. So the evaluations were then suspended pending the election?
>
> A. They were. In one of the sessions it came out that we told the employees that we would do the evaluations, that we had the process begun and were ready to continue when we got time.
>
> Q. It would as soon as the election was over?
>
> A. Correct.

Bergin's testimony on cross-examination acknowledges that he was the person who made the "in process" statement to employees:

> Q. So then in another meeting that you had which you refer to as a 24-hour meeting that you conducted?
>
> A. Correct.
>
> Q. That is where you told employees that you were going to give them evaluations?
>
> A. Well, it was at the end of the meeting and they said, are we going to get our evaluations? I said, we are in the process.

Based on my observations of the witnesses, I credit Wade rather than Bergin. Although Wade did not know the exact date of her hallway conversation with Bergin, this uncertainty does not cast doubt on her testimony about the substance of the conversation.

Cross-examining Wade, Respondent sought to establish that the conversation with Bergin could not have taken place at the time Wade testified, when she was on the way to the employee meeting at which Bergin spoke. However, Bergin's testimony about the time of this meeting is confusing.

To explain an apparent inconsistency between his testimony and his pretrial affidavit, Bergin drew a distinction between the meeting he referred to as the "24-hour meeting" and the other employee meetings Respondent held before the election, meetings which Bergin referred to as "campaign meetings." According to Bergin, there were about 30 of these other meetings. But then, Bergin referred to a meeting which was "a combination of the last 30 period meetings and the 24–hour meeting."

Although Bergin's explanation may have extricated him from a conflict between his testimony and his pretrial affidavit, it caused some confusion about the scheduling of the various meetings. In view of this confusion, I must reject Respondent's claim that it was impossible for Wade to have met Bergin in the hallway at the time she said that meeting took place.

Wade's recollection may not have been eidetic, but it was certainly credible. She attributed to Bergin a statement about company policy which was, in fact, an accurate description of company policy. Wade quoted Bergin as telling her that there would not be any raises before the election. Uncontroverted

evidence establishes that the Respondent had made exactly this decision, and had communicated it to the employees.

There is also a conflict as to what Bergin told employees at the meeting 2 days before the election. Bergin only admitted telling employees that there would be no evaluations before the election. However, to some extent, his testimony lacked the directness and simplicity which gave Wade's account the ring of truth.

Crediting Wade's testimony, I find that Bergin did tell her, on about October 7, 1998, that she would not receive a raise before the representation election. Further, I credit Wade's testimony that, in an employee meeting on about October 7, 1998, Bergin told employees that there would be no raises before the election.

Because Wade testified that she did not remember whether employees were given an explanation for postponement of the evaluations and possible raises, I do not rely on her testimony with respect to this issue. The overwhelming weight of evidence indicates that during the employee meetings, Respondent's representatives did explain that it was deferring the evaluations and possible raises because, if given before the election, the Board might consider it a "bribe." I find that to be the case.

Whether Bergin gave Wade such an explanation during the one-on-one meeting in the hallway is more difficult to determine. Wade testified that he did not explain the reason for the delay in evaluations and possible raises. Bergin denied having such a conversation at all, and I believe his failure to recall it results from its brevity. To Bergin, busy with other things, it was not memorable.

Wade initiated the conversation with Bergin in the hallway when she was leaving work. I find that it consisted of a short question about whether or not the employees would be getting raises before the election, and an equally short answer as both Bergin and Wade hastened to their destinations. Considering the brevity of this encounter, it is likely that Bergin did not offer an explanation, and I find that he did not.

However, Respondent required the employees, including Wade, to attend the meetings at which its representatives did give the explanation described above. These meetings were close in time to the casual conversation Wade and Bergin had in the hallway. Therefore, I do not conclude that Bergin's failure to include an explanation when he answered Wade's question in the hall conveyed any sense of retaliation against the Union for filing the representation petition. Similarly, I cannot find that Begin's hurried "no," in response to Wade's question, placed blame on the Union for the delay.

Therefore, I conclude that Respondent did not violate Section 8(a)(1) of the Act, as alleged in complaint paragraph 5D. I recommend that these allegations be dismissed.

III. OBJECTIONS TO THE ELECTION

A. Objection 1

Objection 1 states, in pertinent part, that the Employer "provided to the Union a list of employees in the bargaining unit which listed only last names within the applicable period."

For clarity, it is helpful to begin with a brief summary of Board policies. In *Excelsior Underwear*, 156 NLRB 1236 (1966), the Board established a rule requiring an employer to file with the Regional Director an election eligibility list containing the names and addresses of all eligible voters within 7 days after approval by the Regional Director of an election agreement or after a direction of election. If the payroll period for eligibility purposes is subsequent to the election agreement or direction of election, the list must be filed within 7 days after the close of the determinative eligibility period.

To be timely, the eligibility list ("*Excelsior*" list) must be received by the Regional Director within the required time; no extension of time is granted except in extraordinary circumstances. Failure to comply with this rule is deemed interference with the election and a ground, on proper objection, for invalidating the election.

Although the submission of an inaccurate, incomplete, or late list may provide a basis for invalidating an election, it nonetheless depends on the specific factual circumstances. The Board has stated that there is "nothing in *Excelsior* which would require the rule stated therein to be mechanically applied." *Telonic Instruments, Inc.*, 173 NLRB 588 (1968). The Board stated later, in *Ponce Television Corp.*, 192 NLRB 115, 116 (1971), that it was not its policy "to vest the Employer with unlimited discretion with respect to the content of the eligibility list."

With respect to Objection 1, the Employer denied that it had engaged in objectionable conduct. However, it does not dispute certain facts.

Uncontroverted evidence establishes that the Employer initially submitted to the Regional Office an *Excelsior* list which identified the employees by last name but provided only an initial instead of a first name. This list was timely. In fact, the Employer submitted it on the last day for timely filing, September 29, 1998.

However, the failure of this list to include first names made it incomplete. Compliance with the *Excelsior* rule requires that the employer provide the full first and last name of the employees. *Laidlaw Waste Systems*, 321 NLRB 760 (1996), *North Macon Health Care Facility*, 315 NLRB 359 (1994), and *Weyerhaeuser Co.*, 315 NLRB 963 (1994). Therefore, I find that the Employer did not submit a timely *Excelsior* list which complied with the Board's requirements.

After the Regional Office notified the Employer that the *Excelsior* list omitted first names, the Employer sent the Board's Regional Office a corrected list by facsimile. The Regional Office received this corrected list on September 30, 1998, a day after it was due. The Union's director of organizing, Charles Hatcher, credibly testified that the Union received the corrected list, by facsimile from the Regional Office, late in the afternoon on September 30, 1998.

The Employer also offered to postpone the date of the election so that the Union would have the names and addresses of eligible voters for additional time. However, as the Union's director of organizing testified, it declined this offer.

The Employer contends that it omitted the first names by mistake, and no evidence contradicts this assertion. All the circumstances, and particularly the speed with which the Employer provided a corrected list, discussed below, persuades me

that the omission of first names from the initial list was an inadvertent error.

Notwithstanding this factual determination, to the extent that an employer's good faith or bad faith is relevant, the omission of first names from the *Excelsior* list creates, in effect, a presumption of bad faith which precludes a finding of substantial compliance with the Board's requirements. Thus, in *North Macon Health Care Facility*, supra, the Board stated, "[W]e shall view the submission of an *Excelsior* list containing only last names and first initials as evidence of a bad-faith effort to avoid the obligations the *Excelsior* rule imposes."

In the same decision, the Board also stated, "[W]e hold that an employer's failure to provide the full first and last names of employees is a deviation from the Board's policy that an employer must 'substantially comply' with the *Excelsior* rule and tends to interfere with a free and fair election." See also *Laidlaw Waste Systems,* supra, and *American Biomed Ambulette, Inc.*, 325 NLRB 911 fn. 3 (1998) (Board found it "unnecessary to pass on the hearing officer's finding that the employer acted with bad faith or gross negligence in failing to provide a complete and accurate list of eligible voters").

Therefore, I find that the Employer's submission of the incomplete *Excelsior* list on September 29, 1998, did not constitute substantial compliance with the Board's *Excelsior* rule. The Employer did comply with the rule when it submitted a corrected list on September 30, 1998, a day after the deadline. Accordingly, I must decide whether this untimely submission of the *Excelsior* list constitutes substantial compliance with the Board's requirements.

In *Pole-Lite Industries, Ltd.*, 229 NLRB 196 (1977), the Board found that the employer had substantially complied with the *Excelsior* requirement even though the *Excelsior* list had been submitted 3 calendar days and 1 working day late. In *Auntie Anne's*, 323 NLRB 669 (1997), the employer submitted the *Excelsior* list 12 days late. The Board set aside the election and directed that a new election be held.

In the present case, the Employer submitted the corrected *Excelsior* list, containing both first and last names of employees on September 30, 1998, 1 day after it was due, and 9 days before the election. The Union received it late in the afternoon of the same day.

In *Alcohol & Drug Dependency Services*, 326 NLRB 519 (1998), the Board stated that "the relevant inquiry is whether the delay—however caused—interfered with the purpose behind the *Excelsior* requirements of providing employees with a full opportunity to be informed of the arguments concerning representation, so that they can fully and freely exercise their Section 7 rights. *Mod Interiors* [324 NLRB [163] (1997)]. Here, we find that the delays, which resulted in the Union's receiving the list only 5 days before the election, interfered with this purpose. . . . In reaching this result, we also rely on the facts that unit employees are dispersed over five locations, the unit is relatively large, and the vote was extremely close." (Footnotes omitted.)

In the present case, the unit, consisting of 186 eligible voters, also is relatively large, and employees work at a number of different locations in and around the Washington University campus. These factors are similar to *Alcohol & Drug Dependency Services*, supra. Unlike that case, the vote was not "extremely close." The Union received 21 votes, compared to 123 against it.

Here, the Region and the Union received the corrected list 9 days before the election, rather than 5 days as in *Alcohol & Drug Dependency Services*, supra. However, under the Board's policy, as articulated in Section 11302.1 of its Casehandling Manual [Part Two, Representation], an election may not be held sooner than 10 days after the Regional Director has received the *Excelsior* list. See *Mod Interiors*, 324 NLRB 163 (1997).

Additionally, I reject the Employer's argument that the Union waived its right to receive the *Excelsior* list on time rather than a day late. In making this argument, the Employer notes that it offered to postpone the election so that the Union would have the *Excelsior* list for a longer time, and that the Union rejected this offer. The Union is not required to agree to a change in the date of the election to correct the Employer's error.

In sum, I cannot conclude that the Employer substantially complied with the Board's *Excelsior* requirement. I recommend that the Board set aside the October 9, 1998 election, and direct that a new one be conducted.

B. Objection 2

Objection 2 states, in pertinent part, that the Employer "provided to the Union, a day late, a list of employees which contained the names of seventeen (17) supervisors, at least twelve (12) persons not employed by the Employer at the time and at least twenty five (25) incorrect addresses. The Employer's failure to provide a reasonably accurate list was an intentional or reckless disregard for the requirement to provide such a list." The Employer denied these allegations.

The allegation that the Employer provided the *Excelsior* list "a day late" has been discussed above. Because the *Excelsior* list was untimely, I have recommended that the Board set aside the election and direct a new one.

Apart from the issue of timeliness, Objection 2 contains three other allegations. For clarity, each of these allegations will be discussed individually. In examining the first allegation, that the *Excelsior* list included the names of 17 supervisors, it may be noted that the burden of proving supervisory status rests on the party asserting such status.

To prove supervisory status, the Union offered into evidence a copy of the *Excelsior* list which union director of organizing, Hatcher, had highlighted to indicate the individuals he considered to be supervisors. On voir dire concerning this list, Hatcher testified, in part, as follows:

> Q. [By Mr. Garber]: Mr. Hatcher, who informed you that—I take it all the ones that are in blue, you were informed were supervisors?
>
> A. Correct.
>
> Q. And who is that informed you?
>
> A. Well, it would be a combination of Marva Tate, Edna Wade and Ben.
>
> Q. And did you explain to them to—strike that. Did they inform you as to whether or not they know what the definition of a statutory supervisor is?

A. Correct.

Q. They did tell you that they knew that definition?

A. No. They indicated that these people were supervisors based on the inf— based on the criteria that we set out for them.

Q. And what was that criteria?

A. And that criteria was the right to hire, fire, discipline and schedule workers.

Q. Any other criteria?

A. No.

Q. And did you attempt to verify any of this information with the Company as to what the duties of these people were?

A. No, I did not.

Q. Okay. Did you speak with any of these people who you have listed in blue to determine exactly what their duties are?

A. Not personally, no, sir.

It appears clear that the only information supporting the Union's assertions of supervisory status came to union organizer, Hatcher, from Tate, Wade, and "Ben" (presumably meaning Ben Stewart). Although Tate, Wade, and Stewart were witnesses and were examined by the Union's counsel, they did not give testimony concerning the duties or authority of the individuals asserted to be supervisors.

I sustained the Employer's objection to the Union's highlighted list identifying the purported supervisors, and excluded it from evidence. The highlighted list constituted only an expression of Hatcher's opinion, but the record contains no evidence to support that opinion.

Based on the entire record, I find that the Union has not met its burden of proving that any individual on the *Excelsior* list is a supervisor within the meaning of the statute. I recommend that this portion of Objection 2 be overruled.

Next, Objection 2 alleges that the Employer included in the *Excelsior* list the names of at least 12 persons who were not its employees. The record does not support this allegation, and I recommend that this portion of Objection 2 be overruled.

Finally, Objection 2 alleges that the *Excelsior* list included "at least twenty five (25) incorrect addresses." At hearing, the Union presented evidence regarding six addresses it asserted were incorrect. It introduced evidence regarding six envelopes which the Postal Service returned to the Union as undeliverable.

The first envelope was addressed to employee Mary Sims. However, the address given on the *Excelsior* list, and appearing on the envelope, was the same address Sims listed on her employment application as her present and permanent address.

A second employee, Larry McLemore, listed one address on his employment application as his "present address" and another address on the same street as his "permanent address." The *Excelsior* list did not report either of these addresses. Although it correctly identified the street, it gave his house number as "5116" rather than the correct "5716."

There is no evidence, however, to indicate that the Employer intended to give an incorrect address. I believe it is likely that the incorrect street number probably resulted from a misreading of the number "7" as the number "1."

The third employee was Thomas Biehler. The Union addressed the envelope to "P.O. Box 65," which was the address shown on the first *Excelsior* list, which only listed employees' first initials and not their first names. The corrected *Excelsior* list gave Biehler's address as "P. O. Box 652," which matches the address shown on Biehler's job application.

There is no evidence that the Employer deliberately gave an incorrect address on the first *Excelsior* list. It is also unclear why the Union addressed the envelope to *Thomas* Biehler, which indicated that it had relied on the corrected *Excelsior* list, but used the post office box shown on the first *Excelsior* list. This envelope bears a postmark of October 3, 1998, 3 days after the Union received the corrected *Excelsior* list.

The fourth employee was Montoi Lane. The address shown on the returned envelope, the address on the *Excelsior* list, and the address given on Lane's job application are all the same. It is possible that Lane moved without notifying the Employer, or that the Employer did not use the most recent address for Lane shown in its files. However, there is no evidence that the Employer knowingly listed an incorrect address for Lane on the *Excelsior* list.

The fifth employee is Darren Brooks. The *Excelsior* list gives the same address for Brooks as shown on his W-4 form, a street address with the house number "5969." However, the Union's envelope bears the house number "595<u>5</u>9." I believe it likely that the Union made a typographical error in addressing the envelope to Lane.

The sixth employee is Michael Berkowitz. The *Excelsior* list gives a street address for him, followed by the city and state of St. Paul, Minnesota. However, the Union addressed the letter to Berkowitz at the same street address, but in St. Louis, Missouri. Although the *Excelsior* list gave the zip code as "55105," the Union used a St. Louis zip code, "63104."

As evidence of Berkowitz' correct address, the Employer submitted a copy of one of Berkowitz' personal checks, used for drafts on his account at a St. Paul, Minnesota bank. The check shows the same address given for Berkowitz on the *Excelsior* list.

I find that the Union has established that the *Excelsior* list contained an incorrect address for one employee, Larry McLemore. However, I do not find that the *Excelsior* list gave an incorrect address for a second employee, Thomas Biehler, because the corrected *Excelsior* list showed the right address for Biehler and the Union possessed this list at the time it mailed the letter to Biehler.

No evidence establishes that the addresses given on the *Excelsior* list for the other four employees were incorrect. To the contrary, the Employer presented credible evidence showing that it relied on job applications or other records which presumably would give correct addresses.

Considering the relatively short time period between the hiring of these employees and the preparation of the *Excelsior* list, I find that it was reasonable for the Employer to rely on these records. In other words, I find no evidence that the Employer prepared the list with an intent to mislead the Union, and no evidence that the Employer acted with gross negligence.

At hearing, the Union also attempted to show that the *Excelsior* list did not include the names of all employees who should have been eligible to vote. However, the Union did not file a timely objection to this effect, and in any event, the record does not establish that the Employer excluded any eligible employees from the list.

In sum, I find that the Union has failed to prove the allegations in Objection 2 and that the evidence presented to support this objection does not establish a basis for setting aside the election. See *Women in Crisis Counseling*, 312 NLRB 589 (1993).

I recommend that Objection 2 be overruled.

C. Objection 3

The Union's third objection alleges, in pertinent part, that the Employer "withheld evaluations and raises which were promised to employees and were scheduled pursuant to the Employer's employment policy. The Employer misrepresented to employees that it was unable to provide evaluations or raises until after the election if the Union was defeated but, that in the event of a Union win, evaluations and raises would have to wait until negotiations with the Union were completed."

The Employer's statements to employees concerning the scheduling of their evaluations have been discussed above. Objection 3 embraces these statements, but goes beyond them to allege that the Employer made statements linking a union victory with a wait of unknown duration while the parties negotiated a collective-bargaining agreement.

For the reasons discussed above, I have found that the Employer did tell employees that it was deferring the 90-day evaluations, and the raises which could follow some of the evaluations, because it would be considered a "bribe" by the Board. I have also concluded that these statements do not interfere with, restrain, or coerce employees in violation of Section 8(a)(1) of the Act, and have recommended that such allegations be dismissed.

Conduct may warrant setting aside a representation election even if the conduct is not an unfair labor practice. However, I do not conclude that either the delay in evaluations and possible raises or the Employer's explanation for this delay constitutes objectionable conduct. See *Kauai Coconut Beach Resort*, 317 NLRB 996 (1995) ("an employer may tell employees that expected benefits are to be deferred pending the outcome of an election in order to avoid the appearance of election interference").

The record does not support a finding that the Employer presented employees with the choice of evaluations and raises should the Union lose the election versus a delay should the Union win. No credible evidence establishes that the Employer made such a statement.

I recommend that Objection 3 be overruled.

D. Objection 4

Objection 4 alleges that the Employer's supervisors interrogated employees as to their support for the Union. As discussed above in connection with complaint paragraph 5C, I have found that about 2 weeks before the election, a supervisor did interrogate an employee, Edna Wade, and threatened a reduction in wages if she voted for the Union.

Such conduct is objectionable, as well as a violation of Section 8(a)(1) of the Act. I recommend that Objection 4 be sustained. Further, I recommend that the Board set aside the election and direct a new one.

E. Objection 5

Objection 5 alleges that the Employer removed prounion information from public bulletin boards. The record includes evidence relating to two separate bulletin boards, one in the building in which Marva Tate works, called the Wohl Center, and the other in the building in which Edna Wade works, which houses the School of Business Administration. I will discuss them separately.

Tate's assignment entailed operating a cash register at a facility called the "Bear's Den." She testified that there is a bulletin board near the cash register she operates and that, to the best of her knowledge, Washington University owns this bulletin board but does not restrict who may post notices on it.

Before the election, Tate noticed that someone had posted on the bulletin board a sheet stating, "Union, Yes." She testified that she also saw the manager of the Bear's Den, named "Amy," and the assistant manager of the Bear's Den, named "John," remove the prounion literature from the bulletin board.

However, Tate's testimony on cross-examination raises doubts as to how much she actually saw, and how much she simply assumed to have happened. According to Tate, an employee named Pam advised McAdams that there were nion leaflets on the bulletin board in the hall outside the Bear's Den, and McAdams went out of the Bear's Den. The following excerpt of her testimony establishes that although Tate went out in the hall to see what McAdams was doing, she did not get close enough to see whether the material removed consisted of prounion leaflets:

> Q. Did you watch her?
>
> A. I watched her after she got out and she was talking to John and her and John went to the bulletin boards. But at that time they had the board covered. I couldn't see what they were taking off.
>
> Q. So you don't know what they were taking off?
>
> A. No, nothing except they took off the papers and then down the hall they went and talked to two ladies that were there.
>
> Q. You did not see what they took off the bulletin board?
>
> A. No, I am just going by what Pam said that the Union was putting up leaflets.
>
> Q. Okay. But you didn't see—you never saw them take any Union leaflets off the board, did you?
>
> A. I saw her take papers off the board, yes.
>
> Q. But you don't know what those papers were?
>
> A. No, but I assume they were the Union leaflets.

Although Tate's testimony does not establish what the manager removed from the bulletin board, the manager herself admitted removing prounion material on one occasion on the day before the election. Amy McAdams, testified that the union

posters appeared the day before the election. She admitted that she removed them and threw them away, but stated that 10 to 15 minutes later, the posters "reappeared," presumably meaning that someone posted new ones. McAdams testified that after the posters "reappeared," she did not take them down, and did not see anyone else associated with the Employer taking them down.

Tate's testimony, quoted below, is somewhat different:

> Q. After you saw Amy remove the flyers from the bulletin board, did they reappear?
>
> A. Yes.
>
> Q. And did they subsequently come down again?
>
> A. They were always going up and coming down.
>
> Q. And how long did that go on?
>
> A. Well, I couldn't really say offhand how often it did but I know they would put them up and they would take them down.
>
> Q. Are you talking a period of two days, three days?
>
> A. I would say within three days, yes. It was before the election.

Considered carefully, this portion of Tate's testimony does not conflict with McAdams' claim that she only removed posters once, and did not do so again after new posters appeared on the bulletin boards. Tate only stated that the posters "were always going up and coming down" but did not identify who took them down.

However, it is still necessary to resolve a credibility conflict because other parts of Tate's testimony do conflict with other evidence. For example, Tate's testimony that the prounion material appeared on the bulletin board 2 or 3 days before the election is not consistent with McAdams' statement that the prounion material appeared on the bulletin board the day before the election.

Where Tate's testimony conflicts with that of McAdams, I credit McAdams' version, which I find more reliable. It simply is not clear from the record how much Tate actually observed, and how much she filled in based on her assumptions or upon information given to her by others. I believe the following excerpt of Tate's testimony illustrates that uncertainty:

> Q. And you didn't go out in the hall to see if they were covering up any—any of these student—the other flyers that were on the bulletin boards that you could not see from your vantage point, correct?
>
> A. No, I didn't because when she removed them, there was a blank space there unless she took down what was up on there, it wasn't covering anything up.

In this testimony, Tate appears to be stating that, although she did not go out in the hall to look, there was a blank space on the bulletin board where the prounion material had been. Because she did not observe what was on the bulletin board, her testimony about a blank space suggests conjecture.

In sum, I find that McAdams' testimony is more reliable than Tate's. For that reason, I credit McAdams.

McAdams' testimony establishes that once, she removed prounion material from the bulletin board, that 10 to 15 minutes later, someone else posted more prounion material on the bulletin board, and that she did not remove it. Notwithstanding Tate's testimony that prounion material was "always going up and coming down," the record does not establish that the Employer's agents did the removing.

The bulletin boards served other groups on the University's campus. In examining Tate, the Union's attorney referred to the bulletin board as a "general purpose bulletin board for the use of students and other people." He asked Tate if the bulletin board was for the general use of either students or employees of Washington University and Tate answered, "To my knowledge, yes."

Bon Appétit employees are neither students nor employees of Washington University. Rather, they work for a contractor of the University. It does not appear that the Employer used this bulletin board as a means of communicating with Bon Appétit employees.

The record does not establish who removed the prounion material on occasions apart from the instance when McAdams was involved, or why. Conceivably, the students or employees who relied on the bulletin board may have removed materials which obscured postings of interest to them. But such speculation is not necessary. The evidence simply does not establish that, apart from the occasion involving McAdams, the Employer's agents ever removed prounion material from these bulletin boards in the Wohl Center.

The second part of Objection 5 concerns a bulletin board at another location, the building in which the School of Business Administration is located. Edna Wade is one of Respondent's cashiers. From her work station in the food facility in the University's business school building, Wade can see a large bulletin board. She testified that the University made the bulletin board available to students and faculty, but she did not believe that employees of the Employer could use it.

According to Wade, 2 days before the election, Union Organizer Sharon Nelson posted a "vote yes" card on the bulletin board. She further testified that the "vote yes" notice remained on the bulletin board about 10 days, and then one of Respondent's supervisors, Olin Cafeteria Manager Joan Turner, took it down. Turner specifically denied removing union material from the bulletin board.

Although I credited Wade's testimony, rather than Turner's, in addressing the allegations in complaint paragraph 5C, I do not find Wade's testimony regarding Objection 5 equally reliable. It is well established that the trier of fact may accept as trustworthy part of a witness's testimony but reject other portions of it. *Southeastern Motor Truck Lines*, 113 NLRB 1122 (1955); *Edwards Transportation Co.*, 187 NLRB 3 (1970). In such a case, though, it is particularly important to explain the reasons for such credibility choices.

On direct examination by the Union, Wade testified as follows concerning when the prounion literature was posted:

> Q. Okay. In the days before the election, did you ever have occasion to notice any literature promoting Local 50 on that bulletin board?
>
> A. Yes.
>
> Q. And did you see it go up?
>
> A. Yes.

Q. When did that happen?
A. Two days before the election.

Additionally, Wade testified, both on direct and cross-examination, that she saw Union Organizer Sharon Nelson post the union material on the bulletin board. But contrary to Wade, Nelson testified that she never posted any union literature, but instead relied on others to do so.

As a union organizer, it was not in Nelson's interest to contradict Wade's testimony. The fact that Nelson gave such testimony, even though detrimental to the Union's case, persuades me that she was telling the truth. But Nelson's testimony cannot be reconciled with Wade's testimony that she *saw* the union literature go up, and that Nelson posted it. I must conclude that Wade's testimony on this point is incorrect.

Additionally, Wade's testimony at trial differs from her own pretrial affidavit concerning how long the prounion material remained on the bulletin board. At trial, she testified as follows:

Q. From the time that you saw that piece of literature put up on the bulletin board, did it remain there—
A. No.
Q. —until the election?
A. No.
Q. How long was it there?
A. Maybe ten days.
Q. And what happened then?
A. My manager took it down.
Q. And who is that?
A. Joan Turner.
Q. And you witnessed her take it down?
A. Yes.
Q. And did you see what she did with it?
A. No.

In comparison, Wade's pretrial affidavit states that "[o]n the same day that Bus. Agent Sharon Nelson posted some pro–Union flyers I saw Joan Turner remove Nelson's flyers and threw them away. This occurred a couple of days before the election." Thus, Wade's pretrial affidavit differs from her testimony regarding how long the prounion material was posted, and also regarding whether Wade saw what Turner did with it. Considering that Wade's testimony about this matter conflicts both with her pretrial affidavit and with the testimony of Union Organizer Nelson, I do not find it to be trustworthy.

Moreover, even if credited, Wade's testimony does not support the objection. According to Wade, Nelson posted the prounion material 2 days before the election, and Turner removed it 10 days later, in other words, 8 days after the election. Such removing of prounion material more than a week after the election could not affect the outcome of the election, and would not constitute a meritorious objection to the way the election was conducted.

On this point, it is true that Wade's pretrial affidavit states that Turner removed the union flyers a couple of days before the election. However, that statement conflicts with Wade's testimony at trial.

In sum, I do not credit this portion of Wade's testimony. I find that the Union has not established that the Employer removed union literature from the bulletin board at the location where Wade worked.

The credited evidence establishes that one of the Employer's managers removed prounion material from a bulletin board on one occasion the day before the election, and that someone posted other prounion material on this bulletin board 10 to 15 minutes later. I do not believe that this one occurrence compromised the laboratory conditions necessary for the election. Therefore, I recommend that Objection 5 be overruled.

F. Objection 6

Objection 6 alleges that the Employer distributed on election day a leaflet promising benefits to employees.

Employee Marva Tate testified that when she reported to work on the day of the election, October 9, 1999, she found a copy of a letter "To All Bon Appétit Employees" lying on the counter near her cash register. This document, signed by General Manager Tom Bergin, is in evidence as Charging Party's Exhibit 1. It states as follows:

> As you get ready to vote in this very important election, and in response to Don Rudd's letter to Diane Paisley, I want to provide you with some assurances for our future, within the limits of what the law permits.
>
> 1) I GUARANTEE that NO ONE will ever be fired or disciplined for their activities in support of the union.
>
> 2) I GUARANTEE that I will continue to work closely with our managers in order to improve our current methods of communication with our employees.
>
> 3) Realizing that the issues of wages and benefits are of the highest priority for everyone, I am committed and GUARANTEE that Bon Appétit will always try to pay fair and competitive wages in line with our industry, in accordance with our company's financial ability and based upon the performance of each individual employee.
>
> 4) I GUARANTEE that here at Bon Appétit all employees will be treated with respect, taking into account the dignity of each individual.
>
> 5) Finally, I GUARANTEE to work as hard as I can everyday to continue to lead this Company in a direction that allows us to prosper in business and to keep providing you with a safe, decent and honorable job which helps you to meet your obligations to yourselves and your families.
>
> I hope that you will give us a chance to meet these GUARANTEES and to work together with you, directly, for a better future.
>
> Thank you
>
> [signed]
>
> Tom Bergin
> General Manager

Employee Edna Wade received a copy of this letter in the mail, but could not recall the date of receipt. Crediting Tate's testimony, I find that at least some employees received Bergin's letter on October 9, 1998, the day of the election.

The letter does not promise any quantifiable benefit, such as a specific wage increase. It does not even promise a tangible benefit, such as a wage increase or improved health insurance,

in general terms. Rather, it promises that the Employer "will always try to pay fair and competitive wages."

It appears that this statement falls somewhere between the statement made by the employer in *Noah's New York Bagels*, 324 NLRB 266 (1997), asking employees for a "second chance," and the employer's promise in *American Freightways,* 327 NLRB 832 (1999), to "look into the problems" and "fix them." Although the Board did not find the statement objectionable in *Noah's New York Bagels*, supra, it did find that the statement in *American Freightways* warranted setting the election aside.

In this latter case, the Board distinguished the "second chance" statement in *Noah's New York Bagels*, supra, because it fell short of promising to address or remedy any particular grievance identified by the employees. In contrast, the panel majority in *American Freightways* found that the employer's promise to "look into the problems" and "fix them" was focused on specific complaints identified by the employees in group meetings. Concluding that there was nothing vague or uncertain about the employer's promise to fix the problems, the panel majority found this statement to be an express promise to grant employees a significant element of what they were seeking to obtain through union representation.

In the present case, as in *American Freightways*, the employees identified a specific problem, the absence of pay raises, during meetings with management representatives. (However, in the present case, the record does not establish that the Employer solicited grievances; rather, it appears that the employees brought up the subject of pay raises rather spontaneously.)

Unlike *American Freightways,* the Employer here did not promise to "look into" specific problems raised by the employees and "fix them." Instead, the Employer only promised to *try* to pay "fair and competitive wages." I conclude that this statement falls short of an express promise to grant employees a pay raise.

I do not find that any of the other "guarantees" or promises in Bergin's letter constituted an express promise to remedy a specific grievance raised by the employees during their meetings with management representatives. Bergin's letter promised that he would not discriminate against employees because of their union activities, but that statement amounted to no more than a promise to obey the law. In keeping that promise, the Employer would grant the employees no benefit that they did not have already.

Bergin also promised to work closely with managers to improve communications with employees, and that all employees would be treated with respect. Improved communication and respect certainly may be among the goals which employees would seek to achieve by selecting a union to represent them. However, the record does not establish that, in the meetings with management, employees voiced significant concerns about such matters.

The last guarantee in Bergin's letter simply amounts to a promise that Bergin will work hard to be a good manager. There is no evidence, however, that employees were concerned about Bergin's efforts as a manager or sought union representation because of such concerns.

In sum, I conclude that the facts of the present case bring it within the domain of the *Noah's New York Bagels'* precedent, and that *American Freightways* is inapposite. I find that Bergin's letter to employees did not make an express promise of benefits to employees which would warrant setting aside the election. Therefore, I recommend that Objection 6 be overruled.

Summary of Findings and Recommendations Regarding Objections

With respect to the allegations raised in Objections 2, 3, 5, and 6, I find that the Union has not established that the Employer engaged in objectionable conduct. However, I find that the Union has established that the Employer did engage in certain objectionable conduct alleged in Objections 1 and 4. Therefore, I recommend that the Board set aside the election of October 9, 1998, and direct that a new representation election be conducted.

CONCLUSIONS OF LAW

1. The Respondent, Bon Appétit Management Co., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Charging Party, Service Employees International Union, Local 50, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent violated Section 8(a)(1) of the Act by interrogating an employee about the employee's union membership, activities and sympathies, and by threatening an employee with a decrease in wages if the employee chose to be represented by the Union.
4. Respondent engaged in conduct which affected and interfered with the outcome of the election held on October 9, 1998, requiring that the election be set aside.
5. Respondent did not violate the Act in other ways alleged in the complaint.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices and conduct affecting the results of the election, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, as set forth in the recommended Order below.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Bon Appétit Management Co., St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union membership, activities and sympathies.

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Threatening employees with a decrease in wages or other benefits should they choose a Union to represent them.

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

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

(a) Within 14 days after service by the Region, post at its facilities in St. Louis, Missouri, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 2, 1998.

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

[2] If this Order is enforced by a judgment of the 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."

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees about their union membership, activities, or sympathies.

WE WILL NOT threaten employees with a decrease in wages if employees chose to be represented by a union.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

BON APPÉTIT MANAGEMENT CO.