The Earthgrains Company *and* International Brotherhood of Electrical Workers Local Union 776. Cases 11–CA–18295, 11–CA–18339, and 11–RC–6327

December 3, 2001

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On December 1, 1999, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

Contrary to our dissenting colleague, we affirm the judge's finding that Respondent's senior vice president, Talmadge Miles, violated Section 8(a)(1) of the Act by threatening the Respondent's maintenance employees with denial of a planned wage increase if the Union won the representation election.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard 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.

The Respondent argues that some of the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we find that the Respondent's contentions are without merit.

[2] In the absence of exceptions, we adopt pro forma the judge's recommended dismissals of the following 8(a)(1) allegations: (1) that on March 19 Supervisor Eric Antley threatened employees with job loss and solicited grievances and promised to remedy them; (2) that Senior Vice President Talmadge Miles threatened employees with loss of benefits and promised that things would get better if the employees did not select the Union; (3) that on March 23 Supervisor Gene Rodoski threatened employees with loss of benefits and working conditions; and (4) that the Respondent announced a new pension plan and 401(k) plan to discourage support for the Union.

There are also no exceptions to the judge's recommendation not to grant a bargaining order remedy under the circumstances of this case. We adopt that recommendation. Consequently, we find it unnecessary to pass on the judge's discussion of whether and when the Union achieved a card majority.

[3] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.,* 335 NLRB 142 (2001), and we have conformed his notice to his Order.

A. Background

On December 22, 1998, and again on January 27, 1999,[4] before learning of any union organizational activity, the Respondent informed its employees in writing that it was "currently reviewing all wage rates for a planned increase in the new fiscal year which begins in April." In early March, the Respondent first became aware of its employees' organizational activities when the Union demanded recognition as the collective-bargaining representative of the Respondent's maintenance employees. The Respondent refused the Union's demand, and a representation election was scheduled for April 21.

In the meantime, however, on March 19 and 22, Supervisor Eric Antley unlawfully told several maintenance employees, in one-on-one meetings, that because of the union activity they would not receive the planned April wage increase. Also, in employee group meetings held on March 22 and 23, Plant Manager David Maxwell unlawfully told the maintenance employees that the *production* employees would be receiving their planned wage increases on April 4, but that the maintenance employees would not, assertedly because the Union could then accuse the Respondent of trying to "buy votes" and could file unfair labor practice charges against the Respondent. Additionally, on March 22 and 23, Maxwell unlawfully told the maintenance employees that they would get the planned wage increases if the Union was defeated in the election, but that the increases were "something that would have to be negotiated" if the Union won. Finally, the maintenance employees were in fact unlawfully denied the April 4 wage increase.

On April 16, the Respondent's senior vice president, Talmadge Miles, addressed maintenance employees and stated that "there were no promises period," and that, if the Union were voted in, "everything is negotiable from that point." The judge concluded that Miles' statement threatened the loss of benefits as it confirmed Plant Manager Maxwell's earlier unlawful statements that, if the employees selected the Union as their collective-bargaining representative, they would not receive a previously scheduled wage increase and the wage increase would have to be negotiated. We agree with the judge.

B. Analysis and Conclusion

Under well-established precedent, statements by employer representatives that bargaining will start "from ground zero" or that the parties will "bargain from scratch" violate Section 8(a)(1) "if, in context, they reasonably could be understood by employees as a threat of loss of existing benefits and leave employees with the

[4] All dates are 1999 unless otherwise stated.

impression that what they may ultimately receive depends upon what the union can induce the employer to restore." *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), enfd. 679 F.2d 900 (9th Cir. 1982). [Citations omitted.]

Similarly, in *Advo System, Inc.,* 297 NLRB 926 fn. 3 (1990), the Board found that an employer had threatened to withhold a scheduled wage increase in violation of Section 8(a)(1) where, in response to an employee asking about the increase, the employer's director of branch operations stated that if the union was elected "everything would be negotiable."

In this case, Senior Vice President Miles' statements that "there were no promises period," and that if the Union won the election "everything is negotiable from that point" cannot be examined in isolation, as our dissenting colleague proposes. Rather, these remarks are given context by the Respondent's other unlawful conduct leading up to them.

Against that backdrop of ongoing unlawful conduct, it would be entirely reasonable for the maintenance employees to construe Miles' remarks as simply the latest in the series of unlawful threats of denial of the wage increase, thus "leav[ing] employees with the impression that what they may *ultimately* receive depends upon what the union can induce the employer to *restore*. *Taylor-Dunn Mfg. Co.,* supra [emphasis added]. We therefore find, in agreement with the judge and contrary to our dissenting colleague, that Miles' remarks violated Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Boards adopts the recommended Order of the administrative law judge and orders that the Respondent, The Earthgrains Company, Orangeburg, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(b).

"(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

IT IS FURTHER ORDERED that the election held on April 21, 1999, is set aside and that the case is remanded to the Regional Director for Region 11 to conduct a new election when he deems appropriate.

[Direction of Second Election omitted from publication.]

CHAIRMAN HURTGEN, dissenting in part.

Contrary to my colleagues, I would find that Senior Vice President Talmadge Miles' statements to the maintenance employees that "there were no promises period," and that, if the Union were voted in, "everything is negotiable from that point," did not violate Section 8(a)(1).

The complaint alleged that on April 16, 1999, Miles "[t]hreatened [Respondent's] employees with loss of benefits and working conditions because of their union activities." The judge found that Miles' statement violated the Act because it "confirmed [Plant Manager David] Maxwell's statement that, if the employees selected the Union, they would not receive the withheld wage increase and it would become negotiable." However, the statements of Maxwell and Miles are not interrelated; each stands on its own.

In meetings on March 22 and 23, Plant Manager Maxwell told the maintenance employees that they would not receive the wage increase that the other employees would receive on April 4, but that the Company could give them the increase if the Union were defeated. Maxwell further stated that the increase would become negotiable if maintenance employees elected the Union.

About 3 weeks later, on April 16, Senior Vice President Miles addressed the maintenance employees. Some of the witnesses testified that Miles had said that the benefit package was all negotiable, or that the employees "may not have a benefit package tomorrow," or that, if the Union guaranteed anything "it won't be what you have now."

On the other hand, some witnesses testified that Miles did not say anything about losing benefits. Miles testified that he told the employees that if the Union made them any promises or guarantees, they should get it in writing. He repeatedly testified that he told the employees that neither the Company nor the Union could guarantee or promise anything, that, "if the Union were voted in, everything was negotiable from that point forward, or going forward." There is no indication in Miles' testimony that he linked this statement to the wage increase or any other specific term or condition of employment.

The judge refused to rely on the testimony of these various witnesses. The judge noted that virtually all of that testimony was "elicited pursuant to either leading questions or [sic] general denials." Instead, the judge found that Miles' statement confirmed the earlier statement of Maxwell. I disagree. The two statements were different. Miles told the employees that "there were no promises, period," and that if the Union was voted in "everything is negotiable from that point." Maxwell said that, "if the employees selected the Union as their collective bargaining representative, they would not receive the

withheld wage increase and it would become negotiable." Thus, I do not agree that Miles' statement was a confirmation of the one made by Maxwell. Unlike Maxwell, Miles expressly disavowed a promise and he made no threat.

The General Counsel has the burden of showing that Miles' statements violated Section 8(a)(1). See generally, *Grouse Mountain Associates II*, 333 NLRB 1322, 1323 (2001). I note that the statements that Miles "admitted" are not unlawful. Thus, the Board stated in *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980):

> It is well established that "bargaining from ground zero" or "bargaining from scratch" statements by employer representatives violate Section 8(a)(1) of the Act *if, in context*, they reasonably could be understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore. *On the other hand, such statements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations.* [Citations omitted.] [Emphasis added.]

Here, the judge did not rely on testimony regarding any other part of Miles' speech. He specifically did not credit testimony that Miles directly threatened the loss of benefits. Miles' testimony, taken as a whole, shows that he was clearly referring to the normal give and take of negotiations. Thus, I find that there is no reason to link Miles' otherwise lawful statement to Maxwell's unlawful statements. Under these circumstances, the General Counsel did not carry his burden of proof. I thus do not find that Miles' statement violated Section 8(a)(1).[1]

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 coercively interrogate you concerning your union activities and sympathies.

WE WILL NOT impose a gag rule prohibiting, during work time, all discussion about unions while not prohibiting discussion about other nonwork topics during working time.

WE WILL NOT forbid the personal possession of union literature on the job.

WE WILL NOT advise you that the wearing of union insignia violates plant rules.

WE WILL NOT threaten you with loss of benefits and loss of favorable working conditions because you engage in activities on behalf of International Brotherhood of Electrical Workers Local Union 766.

WE WILL NOT advise you that a wage increase is being withheld because of your union activities

WE WILL NOT promise you a wage increase if you repudiate the Union.

WE WILL NOT withhold wage increases from you because of your union activities.

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

WE WILL make whole our maintenance employees for any loss of pay and benefits they suffered as a result of our discriminatory withholding from them of the wage increase granted to our production employees in April 1999, plus interest.

THE EARTHGRAINS COMPANY

Donald R. Gattalaro, Esq., for the General Counsel.
Joan M. Canny and *Lance A. Bowling, Esqs.,* for the Respondent.
Donald R. Cockcroft, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was heard in Orangeburg, South Carolina, on September 13 and 14 and 20 through 22, 1999,[1] pursuant a consolidated

[1] Concerning an unrelated matter, I find it unnecessary to rely on the judge's suggestion, in discrediting the testimony of Supervisor Eric Antley, that Antley's testimony regarding a March 19, 1999 meeting with employee Johnnie Crider, was internally inconsistent. I note that the judge also relied on Antley's demeanor, as well as on "mutually corroborative testimony" from various employees contradicting Antley in making this credibility resolution.

[1] All dates are 1999 unless otherwise indicated.

complaint that issued on July 27.[2] The complaint alleges various violations of Section 8(a)(1) of the Act and the discriminatory withholding of a wage increase in violation of Section 8(a)(1) and (3) of the Act. The complaint requests that the remedy include a bargaining order and alleges violation of Section 8(a)(5) of the Act as a result of Respondent's refusal to recognize the Union. On July 28, 1999, the Regional Director issued an order that directed a hearing on objections in Case 11–RC–6327 and consolidated that case for hearing with the unfair labor practice cases. Respondent's answer denies all violations of the Act.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, The Earthgrains Company, is a Delaware corporation, engaged in the production and nonretail sale of baked goods at various locations including its facility at Orangeburg, South Carolina, at which it annually receives goods and materials valued in excess of $50,000 from points located outside the State of South Carolina and from which it annually sells and ships products valued in excess of $50,000 directly to points located outside the State of South Carolina. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that International Brotherhood of Electrical Workers Local Union 776, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Procedural Matters

Counsel for Respondent objected to the receipt of various documents in the formal papers including the affidavit of service of the amended charge in Case 11–CA–18339, which reflects service by ordinary mail rather than certified mail. Notwithstanding Respondent's answer, which admits receipt of the charges, counsel represented that she had not received this document. The hearing was in recess from September 14 until September 20. On resumption of the hearing on September 20, counsel represented that subpoenas had been served upon two Regional Office personnel to compel their testimony regarding this and other matters reflected on the affidavits of service. Counsel for the General Counsel orally moved to quash the subpoenas citing the absence of permission for agency employees to testify as required by Section 102.118(a)(1) of the Board's Rules and Regulation as well as the absence of relevance since the answer acknowledged receipt of the charges. Counsel for Respondent objected to the oral motion to quash. Counsel for the General Counsel requested 5 days to submit a written motion. Counsel for Respondent expressed opposition to granting 5 days to file a petition to revoke. I called counsel for Respondent's attention to *Buckeye Plastic Molding*, 299 NLRB 1053 (1990), in which the charge had not been served in a timely manner but in which a complaint had issued within the 10(b) period. The Board held that, in the absence of a claim of prejudice, service of the complaint within the 10(b) period satisfied the service requirements of the Act. In the instant case, the complaint issued on July 27 and the earliest substantive allegation of the complaint is March 2, well within the 6-month 10(b) period. In view of the foregoing, I granted the General Counsel's motion to quash the subpoenas, noting specifically that, under *Buckeye Plastic Molding*, any irregularities regarding service of the charge ceased to be relevant. There is no evidence of any prejudice in this case. The complaint placed Respondent on notice of the allegations to which it must present a defense. Id. at 1060. With regard to my granting an oral motion to quash, the Board's Rules and Regulations, Section 102.35(6), grant to administrative law judges, inter alia, the authority to regulate the course of the hearing. Counsel for Respondent had both objected to the oral motion to quash and expressed opposition to granting counsel for the General Counsel time to submit a written petition to revoke. Pursuant to my authority to regulate the course of the hearing, I granted the General Counsel's oral motion to quash in order to avoid any further delay in the hearing. See *Shaw Industries,* 255 NLRB 877 fn. 1 (1981), and *G. W. Truck*, 240 NLRB 333 fn. 1 (1979).

Immediately prior to the close of the hearing, counsel for Respondent, citing Section 102.118(c) of the Board's Rules and Regulations, requested the statements of any witnesses that Respondent had called. Counsel argued that, since this was a consolidated proceeding, she was entitled to any statements in the possession of the General Counsel regardless of who had called the witness.[3] I denied the request, stating that I considered Section 102.118(c) to be subsumed by Section 102.118(b) in consolidated proceedings. My research subsequent to the hearing has disclosed no authority that specifically addresses this issue. Nevertheless, I adhere to my ruling since the only purpose for the production of statements pursuant to Section 102.118 is for cross-examination. At the time counsel made her request, the last witness had been excused.

B. Background

On August 19, 1998, Respondent acquired the Palmetto Baking Company in Orangeburg, South Carolina, from Southern Bakeries. David Maxwell, a 13-year employee of Earthgrains, was transferred to the facility as plant manager. In September 1998, Respondent advised employees of various benefits provided by Earthgrains, including a 401(k) plan.

In November 1998, employee Dannie Dukes contacted the Union regarding representation of Respondent's maintenance employees at the Orangeburg bakery. The Union held its first

[2] The charge in Case 11–CA–18295 was filed on March 23 and was amended on April 26. The charge in Case 11–CA–18339 was filed on May 5 and was amended on May 11.

[3] Counsel had asked one of Respondent's witnesses if he wanted a copy of the questionnaire regarding the union authorization card that he had signed. Insofar as affiants are routinely provided copies of statements they provide to the General Counsel when they request a copy in writing, I directed counsel for the General Counsel to provide a copy if he received a written request. The witness executed such a request and the questionnaire was provided.

meeting, attended by six maintenance employees, on November 24, 1998. Thereafter the Union held meetings in December, February, March, and April.[4] There is no evidence contradicting Plant Manager Maxwell's testimony that Respondent did not learn of this union organizational activity until he received the Union's demand for recognition, which he believes was March 6.

On December 22, 1998, Respondent posted a notice that advised its employees that it was raising the starting wage rate and progression for employees in their first year of employment. The notice also states, "We are currently reviewing all job rates for a planned increase in the new fiscal year which begins in April. This adjustment will take into account increases in inflation as well as the recently announced increase in the insurance co-pay." On January 10, Respondent posted its wage rates reflecting the new progression. It also reflected the rates for A, B, and C mechanics. Some questions arose regarding these, and, as a result, Maxwell met with maintenance employees sometime in January. In the course of the meeting, Maxwell advised the maintenance employees that Earthgrains did not give incentive raises, that the Company gave cost of living raises. On January 27, Maxwell wrote a memorandum to all employees concerning wages that included the following statement: "We are currently reviewing all wage rates for a planned increase in the new fiscal year which begins in April."

On March 2, by certified mail, the Union requested recognition. A petition for an election was filed on Monday, March 8. By letter dated March 9, Respondent refused to recognize the Union. On March 16, the Union and Respondent entered into a Stipulated Election Agreement. On March 19, Supervisor Eric Antley spoke individually with all of the employees under his supervision except Dannie Dukes. Many of the 8(a)(1) allegations in the complaint arise from comments attributed to Antley in these meetings. On March 22 and 23, Plant Manager David Maxwell informed the maintenance employees that they would not receive a 70-cent-per-hour increase that, on April 4, was being granted to Respondent's production employees.

On April 13, Human Relations Director Ron Cox explained Respondent's pension plan to all employees. On April 16, Senior Vice President Talmadge Miles came to the Orangeburg facility from Atlanta and held a meeting in which he spoke to the maintenance employees.

On April 21, the representation election was held with 2 votes being cast for representation and 16 being cast against representation. The Union filed timely objections to the election on April 23.

[4] The reporter's inadvertent inclusion among the rejected exhibits of R. Exh. 36 which reflects attendance at these meeting is corrected. The exhibit was received.

C. The 8(a)(1) Allegations[5]

1. Supervisor Eric Antley

a. Facts

Antley is supervisor of the six maintenance employees who work on Respondent's midnight shift, from midnight until 8 a.m. On March 15, employee Dannie Dukes had solicited Antley to sign a union authorization card. On March 18, Antley received three pages of "talking points" and was directed to speak about the Union individually with each employee under his supervision except for Dannie Dukes. He did so on March 19. Although Antley initially testified that he simply read the talking points to each employee with whom he spoke, the record establishes, and Antley admitted, that on occasion he did deviate from the script he had been provided. The talking points state the agreed date and times of the representation election and express Respondent's opposition to the Union.

About 2:20 a.m., Antley informed employee Charles Free that he wanted to have an individual talk with each employee. Free went into the office where only he and Antley were present. In the course of their meeting, Antley told Free that the employees "really didn't need a Union," that there was nothing a Union could do but make him pay union dues. Antley stated that, if the employees did select the Union as their collective-bargaining representative, "we probably would lose everything that we already had with Earthgrains as far as 401(k) or benefit packages." He mentioned strikes, noting that the Union could not force Earthgrains to do anything. Antley stated that Earthgrains could bring in people from "around the country" and, according to Free, said if things worked out well with them "that we could possibly lose our jobs." Antley informed Free that the maintenance employees would not receive a raise on April 1 "because we were Union active and the Union may see that as a bribe." He cautioned Free about talking about the Union stating that "we better not be caught talking union on the job. The only place that we could talk about it would be in the canteen or out of our work place."

Employee Johnnie Crider had openly displayed on his tool cart a "facts" book given to him by the Union. At the outset of his meeting, Antley told Crider that he was "real disappointed in me personally for starting something like this." He asked Crider what he thought the Union could do for him, and what kind of problems had caused the employees to take "such drastic measures." Crider answered that all of the employees were having problems with insurance, that none of the providers wanted to accept them. He also noted that he was at top pay, with no possibility of advancement. Antley responded that top pay was top pay and that, in order to make more money, Crider would have to seek other employment. He stated that he would take the insurance problems Crider had mentioned to higher management and "see what they thought." Antley referred to existing benefits, stating that, if the employees were represented by the Union, their insurance and pay would be "whatever the Union could get us, [b]ut he could almost guarantee it

[5] Counsel for the General Counsel, in his brief, has moved to withdrawn an allegation of interrogation attributed to Supervisor Joe Jamison and the complaint paragraph referring to not voting in the election being considered a vote for the Union. The motion is granted.

wouldn't be what the rest of the bakery got." Antley mentioned strikes, noting that Earthgrains would fly people in from other bakeries to work during a strike, "and if things worked out and the people liked it, that we might not have a job to come back to." Antley informed Crider that the maintenance employees would not receive "the cost of living raise that we were supposed to get the first of April, that we wouldn't be getting it due to the union activity." He stated that the only way the maintenance employees would get the raise after April 21, the date of the representation election, was "[i]f the Union wasn't voted in, then Earthgrains could give us our cost of living raise." Antley informed Crider that "it was illegal to have Union literature on the job" and that Crider was to have his union literature "out before that morning, before people started coming in on the dayshift." He also told Crider that employees "couldn't talk about the Union during work hours, only during breaks." Crider protested that he thought that was wrong, that he had heard differently. Antley responded that he was just repeating what the lawyers had told him. Respondent had not previously prohibited the discussion of any subject while employees were working.

Antley began his conversation with employee Paul Jennings by explaining that he was supposed to talk with him about the Union. Antley informed Jennings that the Union could not do anything for the employees and that all benefits, "the 401(k) and things," that, if the Union came in, Earthgrains would have to "go through the Union." In the course of the conversation Antley asked Jennings what he though about the Union, "he asked me my opinion on it." Jennings answered that he had never worked with a union and that a union man had given him some flyers to read. Antley replied that "they are supposed to do that." Antley asked if there was anything Jennings had to say, and Jennings stated that he was concerned whether "we would get our raise." Antley responded that the Company would not be able to give employees a raise on April 1, that to give the raise would be like "driving us to vote against the Union."

Antley informed employee Sheck Nettles that Earthgrains "didn't want a Union in the bakery, and anybody involved with the Union in part or whole would have no further advancement or increase in pay if they were in any way connected with the Union." He went on to state that the plant was going to receive an increase of 70 cents per hour "but anyone involved in part or whole in the Union would not receive this increase." Although the General Counsel began his direct examination of Nettles by calling his attention to April 1, there is no evidence of any meeting with Antley on April 1. The meeting with Antley occurred before Maxwell told the employees "the same thing," that the wage increase was being withheld. The meeting with Maxwell occurred on March 22 or 23. Antley included Nettles when he named the employees with whom he spoke on March 19. I find that Antley spoke with Nettles on March 19.

The fifth maintenance employee with whom Antley spoke, Fielding Bolton, was called as a witness by Respondent. He was asked no questions regarding his meeting with Antley.

Dukes was not included in the meetings of March 19. On March 22, Antley called Dukes to the office and informed him of the date of the upcoming election. He also advised him that the maintenance employees would not receive a raise on April 1 because of the petition, "[b]ecause the Union would file charges against the bakery for saying they were try [sic] to bribe the employees . . . to not vote for the Union." Antley stated that the employees could lose their benefits and pay raise, that everything was negotiable. Antley concluded the conversation by telling Dukes that "if the Union was voted out, then the raise would be given."

Following the representation election, on May 4, Antley came to Dukes when he was working in the boiler room. Antley asked what was "this" about the Union. Dukes asked him what he was talking about and Antley responded, "[A]bout the objections to the election." Dukes said, "Okay." Antley explained that people were asking him why Dukes "did this," and that he was telling them he did not think Dukes "was able to do it." Dukes confirmed that Antley was correct. Antley, referring to the objections, asked, "What is in these charges?" Dukes replied that he did not know, he had not seen them. Antley then told Dukes that he "must know more about this" than he was claiming. Dukes replied that he did not, that it was out of his hands, that two union representatives had asked his opinion of the election, and he had told them. On May 5, Antley told the maintenance employees that objections to the election had been filed and they would not receive their raise "until this issue was settled."

Antley, on direct examination, denied that he deviated from the talking points dated March 18. He was then asked by counsel for Respondent, "Did you tell employees anything else during your meeting in which you reviewed these talking points?" Antley answered, "No sir." Notwithstanding this denial, only four questions later, counsel asked:

> Q. Directing your attention again to the time period that you were utilizing these talking points to talk to your employees on your shift. Did you discuss with Johnnie Crider during that period of time the handing out of Union materials in the plant?
>
> A. Yes, I did.
>
> Q. During that same period of time did you also discuss with Johnnie Crider talking about non-work issues during work time in the plant?
>
> A. I sure did.
>
> Q. What did you tell Mr. Crider?
>
> A. I told him that he couldn't do it. Work time is work time. I mean, it clearly states that in the handbook. I mean, I would go out and they would be in a huddle . . . with these pamphlets and all, that's totally against Company policy. That's what he was told, he could not do it on his work hours. And that was the end of that.

The handbook to which Antley referred appears to be the handbook of Respondent's predecessor. The predecessor's supervisory manual contains a valid rule prohibiting solicitation during working time, "the time an associate is expected to be working," and distribution during working time in a working area.[6]

[6] The reporter's inadvertent inclusion among the rejected exhibits of R. Exh. 34 which reflects this rule is corrected. The exhibit was received.

Antley appeared more intent on giving answers that he perceived to be in Respondent's best interest rather than in listening and responding to the questions he was being asked. Antley denied mentioning the wage increase in the March 19 meetings, testifying that the wage increase was the subject of a later list of talking points. When asked by counsel for the General Counsel where the talking points referred to not talking about the Union or having union literature on the job, Antley responded, "We had more talking points than this." He could not recall when he received the additional talking points but knew it was not "in this first week." No document reflecting those additional talking points was produced. Antley acknowledged that he "may" have told Crider that he was disappointed in him, explaining that he was "surprised" that Crider would be "gullible and buy into something like this," that he thought Crider "was smarter than this." Thereafter, he incredibly asserted that "I didn't know his [Crider's] stance [on the Union]." I do not credit Antley. His demeanor was unimpressive. Contrary to his assertion that he did not deviate from the talking points, I find, consistent with the credible testimony of the employees with whom he spoke, that Antley did deviate from the talking points.

The mutually corroborative testimony of Free, Crider, Jennings, and Nettles confirms that Antley did inform each of these employees on March 19 that the maintenance employees would not be receiving a wage increase.[7] Rather than restricting his comments to the talking points, Antley tailored his comments to each employee. Thus, he made no comment regarding advancement to Crider, who was making top pay, but he specifically informed Nettles that involvement with the Union meant no further advancement.

b. Analysis and concluding findings

The complaint alleges that Respondent unlawfully interrogated employees concerning their union activities, sympathies, and desires on March 19. The evidence supports this allegation. If Respondent had simply been seeking to advise these employees of the date of the election and Respondent's opposition to the Union, as reflected on the talking points, Antley could simply have gathered the employees together and read them the talking points in less than 5 minutes. The purpose of Antley's individual meetings with each employee was to seek to determine which employees supported the Union. Dukes, who had previously asked Antley to sign a card, was excluded from the meetings. The remaining employees were called individually to the locus of authority, the office, by Antley. Crider, who had displayed union literature, was informed that Antley was disappointed in him because of his involvement in the Union and then was interrogated regarding the reasons the employees had taken "such drastic measures." The expression of disappointment in Crider by his direct supervisor, although not itself violative of the Act, establishes the coercive nature of the meeting.[8] There is no evidence that Paul Jennings had openly expressed any support for the Union. Antley apparently was not able to discern Jennings' sympathies and, therefore, asked Jennings what he though about the Union, "[H]e asked me my opinion on it." Antley's interrogation, by probing Crider to determine the reason that the employees were engaging in organizational activity and by seeking to determine the sympathies of Jennings who had not publicly exhibited support for the Union, was coercive and violated Section 8(a)(1) of the Act. *Action Auto Stores*, 298 NLRB 875, 895, 901 (1990), enfd. mem. 951 F.2d 349 (6th Cir. 1991).

The complaint alleges that Respondent, on March 19, implemented an unlawful no-solicitation rule by prohibiting discussion of the Union and an unlawful no-distribution rule by prohibiting the possession of union literature. Respondent argues that the no-solicitation and no-distribution rules of its predecessor, which it contends were still in effect, were valid. I agree. The evidence, however, establishes that Antley went far beyond those rules. Although concerned about employees "huddling up," he did not request that they not huddle up; he promulgated a gag rule prohibiting any conversation about the Union as established by the credible testimony of Free and Crider. Respondent had never previously restricted the subjects of conversation in which employees were permitted to engage when working. Antley did not request that Crider not distribute union literature in working areas; he informed him that it was illegal to have union literature on the job and directed him to have all union literature in his possession "out before . . . morning." I find that the foregoing prohibitions that were specifically restricted only to union conversations and the possession of union literature violated Section 8(a)(1) of the Act. *Emergency One, Inc.,* 306 NLRB 800, 806 (1992).

The complaint alleges that Antley threatened employees with job loss on March 19. The evidence on this point is the testimony of Free and Crider who were told by Antley that, if the Union went on strike, Earthgrains would fly in replacement workers. Antley's comments were made in the context of an economic strike in support of bargaining demands. See *Novi American*, 309 NLRB 544, 545 (1992). Neither Free nor Crider testified to any threat of discharge. Although Free testified that Antley said that the employees could "possibly lose our jobs," I find that this testimony reflected his subjective understanding rather than the statement that Antley actually made. Crider recalled Antley stating that the employees "might not have a job to come back to." Antley's statement that, in the event of a strike, Earthgrains would obtain replacement workers who might remain, if they "liked it," did not threaten any action by Respondent inconsistent with the continued status of strikers as employees. Cf. *Larson Tool & Stamping Co.*, 296 NLRB 895 (1989). I shall recommend that this allegation be dismissed.

Antley's statement to Free, on March 19, that, if the employees did select the Union as their collective-bargaining representative, "[W]e probably would lose everything that we already had with Earthgrains as far as 401(k) or benefit packages," constituted a threat of loss of benefits and less favorable working conditions in violation of Section 8(a)(1) of the Act as alleged in the complaint. Similarly, although Antley stated to Crider that the employees' benefits would be "whatever the Union could get us," his additional comment that "he could almost guarantee it wouldn't be what the rest of the bakery got"

[7] Crider, Jennings, and Free all executed affidavits on March 24. The affidavit of Jennings dated March 24 was used to refresh his recollection regarding certain comments by Antley.

[8] The General Counsel's motion to amend the complaint in this regard is denied.

constituted a threat. *Montfort of Colorado*, 298 NLRB 73, 85 (1990), enfd. in relevant part and remanded 965 F.2d 1538 (10th Cir. 1992). Antley also threatened Nettles with loss of benefits and less favorable working conditions when he told him that employees connected with the Union would "have no further advancement or increase in pay." Nettles credibly explained, regarding the progression of mechanics to grades A, B, and C, that Antley informed him that he "would not be increase[d] for the other as long as [he] was involved with the Union." Antley, on March 22, threatened loss of benefits in violation of Section 8(a)(1) of the Act when he told Dukes that his pay raise would be negotiable if the employees selected the Union.

The complaint allegations relating to the solicitation of grievances and promise to remedy them by Antley on March 19 is predicated on the testimony of Crider who, in response to Antley's coercive interrogation, stated his concerns regarding Respondent's pay structure and insurance. Antley informed Crider that if he desired to make more money he would have to change jobs and that he would report Crider's concern regarding insurance to higher management and "see what they thought." These responses could hardly have given Crider any reason to believe that either of his problems would be resolved favorably. I shall recommend that the allegations regarding solicitation of grievances be dismissed.

The complaint alleges that Respondent, through Antley on March 19 and 22, threatened employees with loss of wages because of their union activities and, on March 22, promised its employees an increase in pay if they did not support the Union. Antley told Free that the maintenance employees would not receive the raise "because we were Union active and the Union may see that as a bribe;" he told Crider that "the cost of living raise that we were supposed to get the first of April, that we wouldn't be getting it due to the Union activity;" and he told Nettles that "anyone involved in part or whole in the Union would not receive this increase." On March 22, he informed Dukes that the maintenance employees would not receive the increase "[b]ecause the Union would file charges against the bakery . . . saying they were try[ing] to bribe the employees . . . to not vote for the Union." He also promised an increase if employees did not support the Union by telling Dukes that "if the Union was voted out, then the raise would be given." The foregoing comments by Antley violated Section 8(a)(1) as alleged in the complaint.[9] *AutoZone, Inc.,* 315 NLRB 115, 123 (1994), enfd. mem. 83 F.3d 422 (6th Cir. 1996).

The complaint alleges that Antley engaged in interrogation on May 4 and, on May 5, threatened that the wage increase would be withheld until the objections to election were resolved. Antley had previously unlawfully informed the employees that the wage increase was being withheld because of their union activity. His statement that the increase would continue to be withheld "until this issue was settled" violated Section 8(a)(1) of the Act. Although his initial conversation regarding what Dukes knew about the objections to the election may not have been coercive, it became so when, after Dukes responded that he did not know what was in the objections, Antley accused him, stating that he "must know more about this." Antley's probing regarding Dukes' involvement in the filing of objections violated Section 8(a)(1) of the Act.

2. Plant Manager David Maxwell

a. Facts

In meetings with each shift of maintenance employees on March 22 and 23, Plant Manager Maxwell "basically read" a script to the maintenance employees that informed them that the production employees would receive a wage increase on April 4, but that the raise would not be given to the maintenance employees. The script then states:

> Because of the union election scheduled for our maintenance employees for April 21, 1999, we cannot give those employees a pay increase because the Union could accuse the Company of trying to buy votes and could file charges against the company with the Labor Board. That is why we cannot give you a pay increase at this time.
>
> Once the election is over, if the union is defeated we can give you a pay increase just like our other employees here. If the union is voted in, however, your pay is something that would have to be negotiated.

Maxwell swore that the language appearing on the script "fairly and accurately" reflected what he communicated to the employees.

Maxwell also stated, informally, that "his hands was tied because the Company lawyer said for him not to give us our raise and that if he did it would be condoning it, condoning the Union to come in."

On April 13, when introducing Human Resources Manager Ron Cox, Maxwell repeated that the maintenance employees would not receive the raise because of the impending election, that it would "look like he was trying to bribe us not to vote for the Union."

b. Analysis and concluding findings

The complaint alleges that Maxwell threatened employees with loss of benefits and loss of a pay increase because of their union activities and promised an increase in pay if they did not support the Union. When an employer decides to postpone the granting of wages or benefits that would otherwise have been granted to employees in a unit in which an election petition has been filed, its communications regarding that decision must advise employees that the action was taken only to avoid interference with the election. Thus, the employer must assure the affected employees that (1) the benefits will be granted regardless of the election results, (2) the "sole purpose" of the postponement "is to avoid the appearance of influencing the election outcome," and (3) the "onus for the postponement" is not placed upon the union. *Atlantic Forest Products*, 282 NLRB 855, 858 (1987); *AutoZone*, supra at 122. Maxwell's comments fail all three criteria. Rather than take the responsibility for its

[9] Respondent's motion to dismiss the allegations relating to March 22 because Dukes testified that the statements were made on March 21 is denied. The complaint alleges that the violation occurred "on or about" March 22. March 22 was a Monday. I find that the statements were made early Monday morning after Duke reported to work at midnight.

action by advising the employees that the "sole purpose" in its action was to avoid interference with the election, Respondent sought to shift employee dissatisfaction to the Union by stating that it was denying them the wage increase "because the Union could accuse the Company of trying to buy votes and could file charges." Any doubt that this was Respondent's intention is erased by the simultaneous promise that, if the employees rejected the Union, they would receive the increase. Instead of assuring the employees that the wage increase would be granted regardless of the election outcome, Maxwell informed the employees that selection of the Union would result in their pay being "negotiated." Similar statements were condemned in both *Atlantic Forest Products*, supra at 858–859 and *AutoZone*, supra at 123. Respondent, by advising its employees that they would not receive the wage increase because of potential action the Union might take placed the onus for its action upon the Union. Promising the increase upon the rejection of the Union violated Section 8(a)(1) of the Act. Respondent, by informing the employees that the predetermined increase that they would receive if they rejected the Union would be negotiable if they selected the Union as their collective-bargaining representative, threatened employees with loss of benefits in violation of Section 8(a)(1) of the Act. Compare *Atlantic Forest Products*, supra at 858–859 and *Ansul Inc.*, 329 NLRB 935 (1999).[10] Similarly, Maxwell's repetition on April 13 that the wage increase would be withheld without simultaneously assuring the employees that they would receive it threatened loss of benefits in violation of Section 8(a)(1) of the Act. The allegations that Maxwell threatened loss of the wage increase is subsumed in these findings of threats of loss of benefits.

3. Director of sanitation Gene Rodoski

a. Facts

On March 22, Dukes was wearing an IBEW hat.[11] Sanitation Manager Gene Rodoski noticed the hat and initiated a conversation by asking Dukes where he could get a union jacket. Dukes replied that, if Rodoski would sign up for the Union, he would make sure that he received one. Rodoski stated that he would not be able to wear it. Dukes asked why, and Rodoski responded, "[T]here's a thing in the handbook, you can't wear advertisements." Dukes commented that Rodoski had better get rid of his Earthgrains shirt. Rodoski amended his prior comment by stating, "[O]utside your uniform." Dukes stated that he would wear his IBEW hat. Rodoski testified to bakery rules prohibiting wearing pins and stickers that could contaminate the product, but he admitted that Dukes was wearing a union hat, not a union pin. He did not deny telling Dukes that he could not wear advertising. Rather he testified that, when he started in the plant employees could not "wear slogans and stuff," and that, "[t]o this day they don't do it . . . it's kind of an unwritten law." He did not deny observing employees wearing hats provided to them by vendors that advertised the products supplied by those vendors.

On March 23, Rodoski told Free that there had been a strike at a unionized bakery at which he had worked. He stated that it was a long strike and that, by the time it was over, they changed the name of the bakery and those that were on strike were out of a job. Rodoski did not state that he lost his job. On cross-examination, the General Counsel established that Rodoski had lost a job when the bakery at which he was working closed; however, it was never established that this related to the same incident about which Rodoski spoke with Free.

b. Analysis and concluding findings

"It is well established that an employee has the protected right to wear union insignia while at work. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). The Board has held that, in the absence of 'special circumstances,' the prohibition by an employer against the wearing of union insignia violates Section 8(a)(1) of the Act." See, e.g., *Ohio Masonic Home*, 205 NLRB 357 (1973), enfd. mem. 511 F.2d 527 (6th Cir. 1975)." *Demuth Electric,* 316 NLRB 935 (1995). Here, as in *Demuth Electric,* the employee was not specifically directed to remove the hat. Nevertheless, Rodoski's comment suggested that, if he did not do so, he could "suffer adverse consequences" and "risked employer retaliation." By informing Dukes that his wearing a union hat violated a rule regarding advertising, when employees were permitted to wear hats reflecting the names of various suppliers, I find that Respondent violated Section 8(a)(1) of the Act.

The complaint alleges that Rodoski threatened loss of benefits and working conditions on March 23. The remarks that Free recalled threaten neither. There is no evidence that Rodoski's remarks to Free with regard to what happened at an unnamed bakery were inaccurate. I shall recommend that this allegation be dismissed.

4. Talmadge Miles

a. Facts

Senior Vice President Miles came to the Orangeburg facility and addressed the maintenance employees on April 16. Miles spent much of his time talking about his background, emphasizing that he was from the area. Miles acknowledges that he told the employees that "there were no promises period," and, if the Union was voted in, "that everything is negotiable from that point." Dukes acknowledged that Miles placed his comments regarding the employees' current benefit package in the context of negotiations. Miles told the employees that, if they rejected the Union, "in the next few months things will get better." Although Dukes recalled Miles stating that April 21 could change

[10] In *Ansul Inc.*, the employer advised its employees that it was concerned than any announcement "might be viewed as an effort to influence the outcome of the NLRB election" and that, in order to avoid "even the appearance of such an effort, we have decided to postpone an announcement." There was no mention of vote buying or potential charges by the union. The final sentence of the announcement did not threaten loss of benefits; it assured that the results of its wage review would be announced after the election and that the employer would do so "regardless of the outcome of the election." Citing *Uarco, Inc.*, 169 NLRB 1153, 1154 (1968), the Board held that the employer's statement "clearly states that the reason for the postponement was to avoid the appearance of tainting the election, and it explains that the [r]espondent will announce the results of the review regardless of the outcome of the election."

[11] Dukes placed this conversation on the same day as his conversation with Antley, March 21. Respondent's motion to dismiss this allegation that occurred "on or about" March 22 is denied.

the destiny of the Company and employees, Miles denied using the word destiny. The General Counsel notes that certain witnesses agreed that Miles made various comments, and Respondent notes that other witnesses denied that Miles made specific comments. I place no reliance on that evidence, virtually all of which was elicited pursuant to either leading questions or general denials.

b. Analysis and concluding findings

The complaint alleges that Miles threatened employees with loss of benefits and promised that things would get better if the employees did not select the Union. Miles' statement that things would get better contained no promise of any specific improvement. Such generalized statements have been held to "be within the limits of permissible campaign propaganda." *Noah's New York Bagels*, 324 NLRB 266 (1997). I shall recommend that this allegation be dismissed. Miles' admission that he told the employees that "there were no promises period," that if the Union was voted in "that everything is negotiable from that point" confirmed Maxwell's statement that, if the employees selected the Union as their collective-bargaining representative, they would not receive the withheld wage increase and it would become negotiable. In so doing, Miles did threaten the loss of a benefit in violation of Section 8(a)(1) of the Act.

5. The pension plan

a. Facts

Jeffery Goerke, Respondent's director of human relations for a number of bakeries in the southeast, including Orangeburg, testified that Earthgrains has a corporatewide pension plan for nonunion facilities pursuant to which it makes an annual $2000 contribution for each employee. In late 1998, Goerke had "vague" discussions regarding implementing the corporate pension plan at facilities that Earthgrains had recently acquired. Early in 1999, a corporate decision was made to implement the plan retroactively to April 1, 1998, the beginning of the Earthgrains fiscal year, at all these facilities. Goerke documented the date of this decision through a letter to employees dated January 28 and an e-mail from corporate headquarters in St. Louis, Missouri, dated January 29, confirming that the letter was being sent to all affected employees. The letter describes the plan in summary form including the benefit of $2000 for each year of service and retroactivity to April 1, 1998. The General Counsel presented no evidence contradicting Goerke's testimony that the initial announcement of this benefit occurred in late January, prior to the filing of the petition. There is no evidence that any consideration regarding the pension plan related to employee union activity. There is no evidence that any term of the plan explained by Ron Cox, the Orangeburg human relations director, on April 13 was different from the terms set out in the letter of January 28.

b. Analysis and concluding findings

A respondent does not commit an unfair labor practice by publicizing an existing benefit of which employees are unaware. *Weathershield of Connecticut*, 300 NLRB 93, 96–97 (1990). In the instant case, the pension plan had actually been previously announced. Respondent's explanation of this plan in April does not alter the fact that it was an existing, albeit not fully understood, benefit. I find no violation of the Act as a result of Respondent's April 13 explanation of the pension plan it had announced in January. I shall recommend that this allegation be dismissed.

D. The Withheld Wage Increase

1. Facts

On December 22, 1998, Respondent posted a notice to employees at Orangeburg stating that it was "currently reviewing all job rates for a planned increase in the new fiscal year which begins in April." Maxwell's January 27 memorandum repeated this announcement.

In January, Maxwell was "in the midst of budgeting for the next fiscal year." He did not have the authority to adjust wages "without approval at several different levels." Senior Vice President Miles acknowledged that the wage increase for employees at Orangeburg would have had to be approved by him and then forwarded to Director of Human Relations Goerke who would also have to approve the increase. It would then be acted upon by the corporate compensation group. Although Goerke identified corporate e-mail establishing the date that the pension plan was implemented, he was asked no questions about the wage increase, and he presented no documents reflecting his approval of it. No evidence was presented establishing the date of corporate approval of the increase. Respondent's failure to present any evidence on this issue suggests that such evidence would reveal that the wage increase was approved prior to Respondent's receipt of the Union's demand for recognition. Even if the increase was approved after the demand for recognition, there is no evidence that the corporate approval was for other than a 70-cent-per-hour increase for all Orangeburg employees.

Respondent normally makes corporatewide adjustments in wages for nonunion facilities at the beginning of its fiscal year on April 1, resulting in an adjustment effective either the last few days of March or the first few days of April. Employees testified that Respondent's predecessor at Orangeburg had adjusted wages at different times, from as early as March to as late as June. Maxwell testified that the predecessor's adjustment in 1998 had been made on June 5, 1998, but there is no evidence that he communicated this to anyone. Although Miles implied that Respondent sought to continue the existing wage adjustment practices at facilities acquired by Respondent, he acknowledged that he was unaware of what the wage increase practice had been at Orangeburg. There is no evidence that any management official at any level above Maxwell was aware of, or considered, the wage increase history at Orangeburg when determining to grant the increase effective April 4, at the beginning of Respondent's fiscal year. The production and maintenance employees at Orangeburg had, in the past, been treated the same. Consequently, the March announcement of the granting of the April wage increase to Respondent's production employees established the expectation that the maintenance employees would be treated in the same manner.

Respondent adduced no evidence regarding the making of the decision not to grant the wage increase to maintenance em-

ployees. Maxwell told the maintenance employees that they would not receive the increase, "because the Union could accuse the Company of trying to buy votes and could file charges against the Company with the Labor Board." Although he read from a script, Maxwell did not deny that he also told the employees that "his hands were tied because the Company lawyer said for him not to give . . . [the] raise." Respondent presented no evidence regarding the truth or falsity of this hearsay statement and, therefore, I make no finding regarding it. Thus, the record is devoid of any probative evidence regarding the making of the decision to deny the increase or the decision to inform the maintenance employees that they would receive the increase if the Union lost the election but that it would be negotiable if they selected the Union as their collective-bargaining representative.

On March 19, prior to Maxwell's formal announcement, Antley told Free that the maintenance employees would not receive the raise "because we were Union active and the Union may see that as a bribe;" he told Crider that "the cost of living raise that we were supposed to get the first of April, that we wouldn't be getting it due to the Union activity;" and he told Nettles that "anyone involved in part or whole in the Union would not receive this increase." On March 21, he informed Dukes that the maintenance employees would not receive the increase "[b]ecause the Union would file charges."

2. Analysis and concluding findings

An employer's obligation with regard to wage increases during a representation campaign is to proceed as it would have proceeded without regard to union considerations. *Pennsylvania Gas & Water Co.*, 314 NLRB 791, 793 (1994), enfd. 61 F.3d 895 (3d Cir. 1995).

Respondent argues that it was privileged to withhold the wage increase in the instant case since the employees had only been informed that Respondent "planned to increase pay sometime in the company's new fiscal year." It contends that the wage increase had not been "preordained" by "unmistakable promise or fixed cycle." Citing *Great Atlantic & Pacific Tea Co*., 192 NLRB 645 (1971), Respondent argues that the withholding of benefits that had not been "finally formulated prior to the preelection period" does not violate the Act. There is, in this case, no evidence that the increase had not been finally formulated. Respondent did not examine its witnesses on this issue. Respondent's announcements in December and January establish that the wage increase at Orangeburg was a "planned increase." A wage increase had been promised, although the specific date thereof had not been stated. Production and maintenance employees at Orangeburg had, in the past, been treated the same. Consequently, the March announcement of the granting of an April wage increase to production employees established the expectation that the maintenance employees would be treated in the same manner.

Even if I were to accept Respondent's argument that the wage increase was not "preordained," Respondent was still obligated to proceed as it would have proceeded. When "a systemwide increase is put in effect in a manner free from union considerations, the withholding of that increase at a . . . unit undergoing union organization is not necessary to avoid risking unlawful interference. . . . This is so because the systemwide application does what a regular pattern of wage increases does in other circumstances—provides the evidence necessary to demonstrate that the increase was given free from union . . . considerations." *Associated Milk Producers*, 255 NLRB 750, 751 (1981). Notwithstanding the foregoing principle, the Board recognizes that a Respondent may be concerned that it would be unable "to substantiate its claim that the increases it gave are the same as they would have been in the absence of the petition." *H.S.M. Machine Works*, 284 NLRB 1482, 1484 (1987). Thus, the Board "has fashioned a limited exception to the employer's duty to act as if the petition had not been filed: The employer may withhold the increases provided it truthfully tells its employees that it has merely postponed or deferred the increases and that it has done so only to avoid the appearance that it interfered with the election. The purpose of these precautions is to avoid placing the onus for the employer's decision on the union." Id. I reject Respondent's argument that it was not obligated to assure the employees that the increase would be granted regardless of the outcome of the election. Even if the increase was not "preordained," *H.S.M. Machine Works* requires that the employees be told that the increase "has merely [been] postponed or deferred."

The record herein establishes that the increase was preordained. In December and January, Respondent informed its employees that it was reviewing all wage rates for a "planned increase" that would be implemented "in the new fiscal year which begins in April." Respondent historically makes its wage adjustments at the beginning of each fiscal year. There is no probative evidence that the history of wage increases given by Respondent's predecessor at Orangeburg played any part in the determination of when to implement the 1999 wage increase. In granting this "planned increase" at the beginning of the fiscal year, Orangeburg was treated in the same manner as Respondent's other bakeries. The statements of Antley and announcement by Maxwell confirm that the maintenance employees would have received the same increase as the production employees in the absence of their union organizational activity. Thus, even if the wage increase for the maintenance employees had not been "preordained," it became so the moment Respondent announced that it would be given to the production employees because the production and maintenance employees at Orangeburg had, in the past, been treated the same with regard to general wage increases.

Having made the decision not to grant to its maintenance employees the wage increase they otherwise would have received, Respondent was obligated to follow the clearly established guidelines set out in numerous cases regarding the manner in which it communicated its decision not to grant the increase. Thus, the Respondent was required to "'[make] clear' to employees that the adjustment would occur whether or not they select[ed] a union, and that the 'sole purpose' of the adjustment's postponement [was] to avoid the appearance of influencing the election's outcome. In making such announcements . . . an employer must avoid attributing to the union 'the onus for the postponement of adjustments in wages and benefits,' or 'disparag[ing] and undermin[ing] the [union] by creating the impression that it stood in the way of their getting planned

wage increases and benefits.'" *Atlantic Forest Products*, 282 NLRB 855, 858 (1987). In the instant case, Supervisor Antley specifically placed the onus for the withholding of the wage increase upon the employees' union activity. Maxwell informed the employees that "if the union is defeated we can give you a pay increase just like our other employees here." Maxwell did not inform the employees that the increase had "merely [been] postponed or deferred"; he informed them that, if the Union prevailed, the increase became negotiable. Miles told the employees that, if they selected the Union, "everything was negotiable." Maxwell stated that "the Union could accuse the Company of trying to buy votes and could file charges," thus placing the "onus for the postponement" on a potential act that the Union might take. Respondent never took the responsibility for its action by advising the employees that the "sole purpose" in its action was to avoid interference with the election. *Borman's Inc.*, 296 NLRB 245, 248 (1989).

In assessing the foregoing evidence under the analytical framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), I find the 8(a)(1) violations found herein establish Respondent's animus towards the employees' union organizational activity. The statements of Antley and Maxwell establish that the union activity of the maintenance employees was the motivating factor for the withholding of the wage increase. *Manno Electric*, 321 NLRB 278 (1996). Respondent has not rebutted the General Counsel's prima facie case. If Respondent had proceeded as if no petition had been filed, the maintenance employees would have received the increase at the same time as the production employees. Respondent, rather than attempting to avoid interfering with the election, sought to use the withheld wage increase to assure the defeat of the Union. Respondent held the increase before the employees as a carrot if they rejected the Union. Instead of assuring the employees that the raise would be granted regardless of the outcome of the election, it informed them that, if they selected the Union as their collective-bargaining representative, it was negotiable. Such manipulation is additional evidence of Respondent's unlawful motive. *Pennsylvania Gas & Water Co.*, supra at 793. The record establishes, and I find, that Respondent discriminatorily withheld the 70-cent-per-hour wage increase from its maintenance employees because of their union activity. In so doing, Respondent violated Section 8(a)(1) and (3) of the Act.

E. The 8(a)(5) Allegation

1. Appropriate unit

Respondent's brief argues that the record contains no evidence from which I can determine the appropriate bargaining unit, but does not mention that it entered into a Stipulated Election Agreement in Case 11–CA–6327. The Board has specifically held that a respondent agrees that the unit is appropriate by entering into a Stipulated Election Agreement. *Wintz Distributing Co.*, 317 NLRB 284 fn. 1 (1995). Furthermore, any question regarding the appropriateness of the unit could and should have been raised in the representation proceeding. *Playhouse Square Foundation*, 291 NLRB 995 fn. 1 (1988). I find the following unit, consisting of 18 employees on March 2 and 19 employees after March 5, to be appropriate:

> All full time and regular part time maintenance department employees, including mechanics, lead mechanics, maintenance department plant clerical employees, and painters employed by the Employer at its Orangeburg, SC, facility; excluding all other employees, office clerical employees, and guards, professional employees and supervisors as defined in the Act.

2. Card majority

"[E]mployees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 606 (1969). An employee's subjective understanding regarding his signing a single purpose authorization card does not negate the designation established by his signature. Id. at 608. Numerous cases have held that the mention of an election does not affect the validity of a single purpose card. *Levi Strauss & Co.*, 172 NLRB 732, 733 (1968). The authorization cards herein are single purpose cards. At the top, in capital letters and bold type, is the designation "AUTHORIZATION FOR REPRESENTATION." Immediately under this language is the following statement: "I authorize a local union of the International Brotherhood of Electrical Workers, to represent me in collective bargaining with my employer." There is no probative evidence that any employee herein was told that the sole purpose of the card was for an election. Representations that cards would remain "secret" and that the signer could vote "either way" in any election do not invalidate the designation established by a single purpose card. *Gissel*, supra at 584 fn. 5.

Although Respondent objected to receipt of 7 of the 11 authorization cards admitted into evidence, the record establishes that each card bears the signature of the individual who purported to sign it. In its brief, Respondent attacks the validity of five cards.

Robert Brown, Johnnie Crider, Dannie Dukes, Charles Free, Paul Jennings, and Sheck Nettles attended the first union meeting, which was held on November 24, 1998. Each of them signed a union authorization card at this meeting. The card of each of these employees, except for Free, reflects the date November 24. Free's card incorrectly reflects that it was signed on November 23, 1998, but Free testified that he did sign the card at that meeting. Respondent does not contest the validity of the card signed by Jennings. Regarding that card, I credit only his initial testimony that he read the card. I find the foregoing authorization cards to be valid designations of the Union.

Fielding Bolton's authorization card is dated December 29, 1998. Dukes testified that he filled out the information on the card at Bolton's request and that Bolton appeared to read the card and signed the card in his presence. Dukes told Bolton that the card was "[f]or the IBEW to represent us at bargaining." Bolton testified that he signed the card at a union meeting at a motel. When asked if he read it he answered, "Well, I don't know how good I could." When the question was repeated, he replied, "Not really read it all that good, no. I just—you know—everybody was signing so they said you had to sign one, you know, if you attended the meeting." If "everybody

was signing," Bolton would have filled out his own card. Although there had been a union meeting on December 22, 1998, there is no evidence that there was a union meeting on December 29. Employees who attended union meetings were asked to sign a "Sign-in Sheet" reflecting their attendance. Bolton signed this sheet reflecting his attendance at meetings on February 4 and April 16. I find that this sheet, not the authorization card, was the document that "everybody was signing." The information upon the card is in handwriting other than Bolton's, thus corroborating Dukes' testimony that he filled out that information at Bolton's request. I credit Dukes testimony that he told Bolton the card was "[f]or the IBEW to represent us at bargaining." I find that Bolton read and signed the card designating the Union as his collective-bargaining representative. Thereafter he attended two union meetings. He never sought to rescind his card. I find that this card constitutes a valid designation of the Union.

Kenneth Carroll signed a union authorization card dated March 2. On February 18, Carroll had tendered an unsigned card to Union Representative Howard Wessinger at a union meeting. Carroll asserted that Dukes had given him that card and informed him that he needed to sign it in order to "go to a [union] meeting." Even if I were to credit that testimony, which I do not, Carroll signed a roster reflecting his presence at the meeting, and his name appears on the sign-in sheet of February 18. He admitted that, at that meeting, Wessinger and other representatives of the IBEW explained that, if they had 50 percent plus one card, "they could use the card to demand recognition from the Company," that the Company could refuse the demand, and that, if the Company refused, "they [the Union] could use the card to get a Labor Board election." Following Carroll's attendance at that meeting, Duke testified that he presented him with the unsigned card he had turned in at the meeting and asked if he had intended not to sign it. Carroll responded that he had intended to sign it and did so. Carroll testified that the card Dukes presented him was not the same card. On cross-examination, The General Counsel asked Carroll if Dukes told him it was a different card. Carroll responded, "He just said it was another card, you need to sign it. You failed to sign the other card." The General Counsel then asked, "That's all he told you?" Carroll answered, "That's it." Regardless of whether the card that Dukes presented to Carroll on March 2 was the same card or a different card, there was no misrepresentation. The use to which the Union intended to put the card was explained at the meeting prior to his signing the card. I find Carroll's card to be a valid designation of the Union.

John Fort signed a union authorization card on February 26, purportedly in response to aggravation by employee Johnny Crider. The record establishes three conversations between these two employees, but no aggravation. In the first, Fort expressed to Crider his disappointment regarding Respondent's insurance. Fort acknowledges that Crider was "trying convince me that the Union would be a very good thing." In the second, Fort testified that Crider told him that signing the union card was "getting it started. In other words, kind of like getting the ball rolling. We could vote for it [if] we wanted to, we didn't have to. . . . [A]ll they'[re] doing was getting it started. Getting the Union started to coming into the plant." During the third conversation, Crider presented Fort with a card. Fort expressed misgivings, stating, "I don't believe I want to do nothing like this." Crider responded that it did not mean anything "except just to get the Union started." Fort testified that Crider stated, "You won't hear about it again, and nobody will never know nothing about it but me and you." I do not credit the latter portion of this statement. It was obvious that Crider was soliciting on behalf of the Union and would report his successful solicitation of Fort. Although Fort completed a questionnaire on which he checked the "yes" box in response to the question as to whether he read the card, at the hearing he claimed that he only read the portion of the card that he filled out, i.e., name, address, etc. I do not credit this testimony. Fort read the card and knew that, by signing the card, he was authorizing the Union to represent him. He expressed his ambivalence about taking this action, stating he unsure about "wanting to do nothing like this." I find that Fort read the entire card and sought reassurance from Crider that, despite having signed the card, he could vote in any manner that he desired. Crider gave him that assurance, and Fort signed the card. I find that Fort's card constitutes a valid designation of the Union.

Anthony Glover signed an authorization card dated March 5. He acknowledges filling out the personal information on the card. Dukes testified that he filled in Glover's department and job. Glover denies reading the card, which, in bold capital letters at the top states "AUTHORIZATION FOR REPRESENTATION." Although Glover asserts that Dukes told him that the card was "to like go to a meeting and stuff," he later altered this testimony, stating that Dukes told him to "fill out the card and we'll be going to a meeting." Dukes recalled that Glover asked him for a card, filled it out and signed it in his presence, and returned it to him. Glover testified that, about a week later, he "had second thoughts" and told Dukes to "hold up on it," referring to the card. He claims he took this action because he thought a union meeting about which he had not been notified had been held. He initially testified that, when he told Dukes to "hold up on it," Dukes told him that he would let him know more about meetings. Later, when I asked him about Dukes' response, he testified that Dukes simply said, "Fine." I find Glover's testimony incredible. Glover's unimpressive demeanor and altered phrasing convince me that he was well aware that the card that he signed on March 5 was something far different from a ticket of admission to a union meeting. There would be no reason to tell Dukes to "hold up on" an unused meeting admission ticket. Glover acknowledged that he never asked for the return of his authorization card. I find that it constitutes a valid designation of the Union.

Thomas Polk signed a union authorization card on February 10. He testified that, after having a "little dispute about pay raises and stuff," he approached Dukes, whom he described as "the representative of the Union," and that Dukes told him "to sign this card, that I could go to a [union] meeting. Dukes recalls discussing wanting representation by the IBEW with Polk. Polk took a union authorization card from Dukes and delivered the signed card to him the next day. I do not credit Polk's denial that he kept the card overnight, nor I do credit his assertion that he did not read the card. The union's sign-in sheets reveal that Polk attended union meetings on February 18 and March

17 and 26. The February 18 meeting was the meeting at which union officials explained the manner in which the Union intended to use the cards. Following that meeting, Polk began wearing union insignia at work. He ceased supporting the Union after the meeting on March 26 because he decided that the Union was not going to help him or his family. Earlier in that week, Maxwell had advised the maintenance employees that they would not be getting the raise being granted to Respondent's production employees. I find that the card signed by Polk constitutes a valid designation of the Union.

I find that all of the 11 authenticated authorization cards constitute valid designations of the Union and that this number constitutes a majority in the appropriate unit, which consisted of 18 employees on March 2 and 19 employees on March 5 and thereafter.

3. The bargaining order

The General Counsel and the Charging Party seek the remedy of a bargaining order. There is no evidence of typical "hallmark violations" such as discharges, threats of closure, or the grant of significant benefits. Thus, at best, this case falls into the "Category II" cases which the Supreme Court described in *Gissel* as those "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." In cases of the second category, a bargaining order should issue where the Board finds that "the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." *Gissel*, supra, 395 U.S. at 613, 614–615.

In *Times Wire & Cable Co.*, 280 NLRB 19 (1986), the Board refused to adopt the administrative law judge's recommended remedy of a bargaining order and directed a third election. Prior to the first election, the respondent committed numerous 8(a)(1) violations, including threats of plant closure. The union won the election, and the respondent filed objections. The union, in order to avoid delay, agreed that certain objections be sustained and that a second election be held. The union lost this election and filed objections and unfair labor practice charges. The administrative law judge found, and the Board agreed, that the respondent had unlawfully threatened plant closure, coercively solicited employees to revoke union authorization cards, and failed to grant a general wage increase. The withholding of the wage increase was the only violation that occurred between the first and second election. In refusing to impose a bargaining order the Board stated that the withholding of the wage increase "even in light of the violations occurring before the first election, cannot be viewed in these circumstances as being sufficiently serious to justify the imposition of bargaining," and goes on to find that the Board's traditional remedies and a third election would enable employees to express their true sentiments. In that case, the respondent had, some 5 months later, granted the increase, but not retroactively. The respondent was ordered to make whole the employees by retroactive payment of the increase.

In the instant case, there are no discharges, threats of closure, or solicitation to revoke union authorization cards. The vast majority of threats regarding loss of benefits relate to Respondent's statements that the increase was being withheld because of the employees' union activities and that, if the Union won the election, the increase would be negotiable. An election is the preferred method of resolving questions concerning representation. *Sunbeam Corp.*, 287 NLRB 996, 999 (1988). The Respondent herein did grant the wage increase, albeit not retroactively, in June, some 2 months after it was withheld. *Times Wire & Cable Co.* involved conduct far more coercive than the conduct in this case and the withholding of the wage increase was for 5 months. In view of the foregoing, I find that the traditional remedies of posting an appropriate notice and making whole the employees for the failure to grant the wage increase in April will enable a fair election to be conducted.

F. The Objections

I have found that, after the petition was filed and prior to the election, the Respondent engaged in violations of Section 8(a)(1) and (3) of the Act. This conduct parallels various objections to the election filed by the Union. Respondent's statements that the maintenance employees' wage increase would be withheld because of their union activities violated Section 8(a)(1) of the Act and the withholding of the wage increase violated Section 8(a)(1) and (3) of the Act. This is alleged as objectionable conduct in Objection 1. Respondent, in violation of Section 8(a)(1) of the Act, advised its employees that receipt of their wage increase was dependent upon defeat of the Union. This is alleged as objectionable conduct in Objection 2. Respondent unlawfully prohibited conversation about the Union and prohibited possession of union literature. Although there is no evidence of a specific threat of discipline as alleged in Objections 4 and 5, those objections do allege the restrictions that I have found violated the Act. Antley's statement to Nettles regarding no further advancement, his statement to Free regarding probably losing everything, and his statement to Crider that he could almost guarantee that the maintenance employees would receive less constituted threats of loss of benefits and favorable working conditions in violation Section 8(a)(1) of the Act. Objections 7 and 9 refer to statements that employees' organizational activity would result in less pay and lost benefits. Objection 10 refers to the questioning of employees regarding their participation in union activity, and I have found that Antley interrogated employees Crider and Jennings on March 19 in violation of Section 8(a)(1) of the Act.

I find the foregoing violations of the Act that occurred during the critical preelection period and that correspond to the Union's objections interfered with the employees' free choice.

CONCLUSIONS OF LAW

1. By coercively interrogating employees, imposing a gag rule prohibiting discussion about unions, forbidding possession of union literature, advising employees that wearing union insignia violated plant rules, threatening loss of benefits and less favorable working conditions because employees engaged in union activity, advising employees that a wage increase was being withheld from them because of their union activities, and

promising employees a wage increase if they repudiated the Union, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By withholding the wage increase of April 4 from employees in the collective-bargaining unit which was the subject of the petition and election in Case 11–RC–6327 because of their union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily withheld a wage increase from employees in the collective-bargaining unit which was the subject of the petition and election in Case 11–RC–6327, it must make them whole for any loss of earnings and other benefits from April 4 until the increase was granted, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, The Earthgrains Company, Orangeburg, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning their union activities and sympathies.

(b) Imposing a gag rule prohibiting, during working time, all discussion about unions while not prohibiting discussion about other nonwork topics during working time.

(c) Forbidding the personal possession of union literature on the job.

(d) Advising employees that wearing union insignia violated plant rules.

(e) Threatening employees with loss of benefits and less favorable working conditions because of their union activities.

(f) Advising employees that a wage increase was being withheld from them because of their union activities.

(g) Promising employees a wage increase if they repudiated the Union.

(h) Withholding a wage increase from its employees because of their union activities.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Make the employees in the collective-bargaining unit which was the subject of the petition and election in Case 11–RC–6327 whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facility in Orangeburg, South Carolina, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon 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 March 19, 1999.

(d) 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election is set aside and Case 11–RC–6327 is severed from Cases 11–CA–18295 and 11–CA–18339 and remanded to the Regional Director to conduct a second election when he deems the circumstances permit a free choice.

[12] 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.

[13] 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."