Jensen Enterprises, Inc. ***and*** **Southwest Regional Council of Carpenters, United Brotherhood of Carpenters & Joiners of America.** Cases 28–CA–17401 and 28–RC–5972

July 31, 2003

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On May 31, 2002, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

1. We affirm the judge's finding that the Respondent, through its agent and labor consultant Michael Penn, violated Section 8(a)(1) by informing employees that if the Union was voted in, wages would be "frozen" during negotiations and they "shouldn't expect to get any increases in wages or benefits until collective bargaining had concluded." We agree with the judge that Penn's statement amounted to a threat of loss of benefits if the employees selected the Union as their bargaining representative.

The record reflects that the Respondent had a practice of granting predetermined wage increases during the first year of employment. It also had a practice of granting merit increases that were discretionary as to amount. The Respondent's merit increase program consisted of appraising every employee annually on the employee's anniversary date, considering each employee for a merit increase, and granting an increase to employees who received a satisfactory performance appraisal. Penn's statement that wages would be frozen until collective bargaining had concluded threatened to discontinue these customary periodic increases if the Union was voted in.

It is settled law that when employees are represented by a labor organization their employer may not make unilateral changes in their terms and conditions of employment. See *NLRB v. Katz*, 369 U.S. 736, 747 (1962). This duty to maintain the status quo imposes an obligation upon the employer not only to maintain what it has already given its employees, but also to implement benefits that have become conditions of employment by virtue of prior commitment or practice. *Alpha Cellulose Corp.*, 265 NLRB 177, 178 fn. 1 (1982), enfd. mem. 718 F.2d 1088 (4th Cir. 1983). Periodic wage increases become conditions of employment if they are "an established practice . . . regularly expected by the employees." *Daily News of Los Angeles*, 315 NLRB 1236 (1994), enfd. 73 F.3d 406 (D.C. Cir 1996).

Accordingly, following its employees' selection of an exclusive bargaining representative, an employer may not unilaterally discontinue a practice of granting periodic wage increases. By withholding customary increases during the potentially long period of negotiations for an agreement covering overall terms and conditions of employment, an employer, in effect, changes existing terms and conditions without bargaining to agreement or impasse, in violation of Section 8(a)(5).

Hence, an employer's statement that wages will be frozen until a collective-bargaining agreement is signed violates Section 8(a)(1) of the Act if the employer has a past practice of granting periodic wage increases. See, e.g., *Illiana Transit Warehouse Corp.*, 323 NLRB 111, 113–114 (1997); *299 Lincoln Street, Inc.*, 292 NLRB 172, 174 (1988); *More Truck Lines*, 336 NLRB 772, 773–775 (2001), enfd. 324 F.3d 735 (D.C. Cir. 2003). Such an announcement suggests to employees that the employer intends to unilaterally take away benefits and require the union to negotiate to get them back.

The Respondent contends that it does not have a past practice of granting periodic wage increases. However, the Respondent's general manager, Kurt Jensen, testified, "There is some set raises, when a person is first hired, during their first year. . . . The only other time is basically tied into a review. You have your review at six months, and then one year, and one year annually after that." He testified further that it is the Respondent's practice to give pay increases after each merit review if the review is satisfactory and the employee has demonstrated the job skills required to advance to the next pay range. Accordingly, we find that the record amply supports the judge's finding that the Respondent had a practice of granting periodic increases.

Likewise, we find no merit in the Respondent's contention that its periodic wage increases were "purely discretionary" and, therefore, could not be provided during contract negotiations without violating the duty to maintain the status quo. As noted above, the record reflects

[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.

that the Respondent had a practice of granting some increases during the first year that were fixed both as to timing and amount. Moreover, the Board with court approval has consistently found that merit increase programs like the Respondent's are a term and condition of employment notwithstanding the element of discretion retained by the employer in setting the amount of such raises. *Daily News of Los Angeles*, supra.[2] As the Board stated in *Oneita Knitting Mills*, what is required in such circumstances "is a maintenance of preexisting practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted." 205 NLRB 500 fn. 1 (1973).

Accordingly, if the Union won the election, the Respondent could not lawfully discontinue either its practice of granting predetermined wage increases during the first year or its practice of granting merit increases, until it bargained to agreement or impasse with the Union. Penn's statement, however, makes clear that the Respondent intended to unilaterally freeze wages at their current levels without regard to any right employees may have had under existing policies or practices to receive periodic wage increases. Thus, we agree with the judge that Penn's statement amounted to a threat to unilaterally deprive employees of benefits because they supported the Union, in violation of Section 8(a)(1).[3]

2. The judge found that the Respondent violated Section 8(a)(1) by promulgating and enforcing a rule against talking about the Union during working time, while allowing the discussion of other nonwork-related subjects. We agree.

Approximately 1 month before the election, employees Francisco Monzon and Luis Vasquez were summoned to a meeting with Plant Manager Bart Black, General Manager Kurt Jensen, and Supervisor Al Brown. During the meeting, Black reprimanded the two employees for talking about the Union during working time and threatened them with suspension if they continued to do so. Black testified that he spoke to the two employees because employee Wilfredo Ponce had complained that they were talking to him about the Union during working time.

As found by the judge, the record shows that the Respondent allowed discussion of other nonwork-related subjects during working time. Thus, employee Domingo Oliva testified that employees were allowed to discuss "[a]nything we wanted to as long as we keep on working." He further testified, however, that his supervisor told him, "[Y]ou can't talk about the Union or things against the Union in working hours." In addition, Kurt Jensen candidly testified, "Its pretty obvious that people are going to probably be talking during work times . . . . [P]eople are going to talk at work, you know, but . . . at that particular time, we were trying to keep the talk and the discussion about the Union stuff down to a minimum because the place was so stirred up."

It is settled law that an employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to other subjects not associated or connected with their work tasks. However, an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work, particularly when the prohibition is announced or enforced only in response to specific union activity in an organizational campaign. *Willamette Industries*, 306 NLRB 1010, 1017 (1992); *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986).

In agreement with the judge, we find meritless the Respondent's contention that the rule was necessary to address complaints by employee Wilfredo Ponce about Vasquez' and Monzon's persistent attempts to discuss the Union with him while he was working. The rule was overly broad for this purpose. It was not limited to union talk directed at Ponce. Nor was it limited to union talk that was harassing to the point of losing the Act's protection[4] or disruptive to the employees' work. Rather, Black promulgated a general ban on discussion of all union-related topics during working time.

We also reject the Respondent's argument that the rule promulgated by Black prohibited only union solicitation as opposed to mere discussion about union topics, and therefore that it was lawful, in the absence of evidence that the Respondent allowed other similar solicitation during working time. Black told Vasquez and Monzon not to "talk about the Union" during working time and the Respondent has presented no evidence that it clarified the ban to make clear that it intended to prohibit only union solicitation.

[2] Like the Respondent's program, the merit increase program in *Daily News* was fixed as to timing, i.e., annually on or about the anniversary of the employee's date of hire, but discretionary in amount. Further, the increase could range from no increase to a substantial raise, depending upon the employee's evaluation.

[3] In the absence of exceptions, we adopt the judge's finding that Penn did not threaten employees with the loss of their 401(k) plan if the Union won the election. Had this finding been before us, however, we would not rely on the judge's finding that Penn, as an experienced labor relations consultant, was unlikely to have made "such transparently unlawful statements."

[4] In his testimony, Black acknowledged that no one raised the subject of harassment during the meeting with Monzon and Vasquez.

3. The Petitioner filed 43 objections to the election. Prior to the hearing, the Regional Director approved the Petitioner's request to withdraw Objections 1 through 5, 7, 9 through 11, 13 through 20, 23, 26 through 29, and 34 through 43. The judge recommended that the Petitioner's Objections 6, 8, 32, and 33 be sustained, and the remaining objections be overruled. Absent exceptions, we adopt pro forma the judge's recommendation that Objections 12, 21, 22, 24, 25, 30, and 31 be overruled. We also adopt the judge's recommendation that Objections 8, 32, and 33 be sustained, and we affirm his conclusion that the Respondent's unlawful and objectionable conduct warrants setting aside the election.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Jensen Enterprises, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the election held in Case 28–RC–5972 is set aside and that the case is remanded to the Regional Director for Region 28 to conduct a new election when the Regional Director deems the circumstances permit the free choice of a bargaining representative.

[Direction of Second Election omitted from publication.]

Joel C. Schochet, Esq., for the General Counsel.
Dwight L. Armstrong, Esq., of Irvine, California, for the Respondent.
Gerald V. Selvo, Esq., of Los Angeles, California, for the Charging Party.

[5] Because we are adopting the judge's recommendations to sustain Objections 8, 32, and 33 and to set aside the election on the basis of conduct that was the subject of those objections and the Respondent's other critical period unfair labor practices, we find it unnecessary to pass on whether the judge, in his consideration of the allegation contained in Objection 6, correctly found that the objection was coextensive with the complaint allegations concerning the Respondent's promulgation and enforcement of a discriminatory no-talking rule. We note, however, that even assuming the promulgation and enforcement of the no-talking rule was not alleged as objectionable conduct, this does not prevent its consideration in resolving the questions raised as to the propriety of the election. As the Board stated in *White Plains Lincoln Mercury*, 288 NLRB 1133, 1138 (1988), "a 'meritorious objection' is anything that would justify setting aside the election, whether that misconduct was raised by the union in its objections or was discovered subsequently by the Agency's own procedures."

Chairman Battista does not pass on these observations or on Objection 6.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Las Vegas, Nevada, on March 12–15, 2002. The Southwest Regional Council of Carpenters, United Brotherhood of Carpenters & Joiners of America (the Union, the Petitioner, or the Charging Party) filed an original, first amended, and second amended unfair labor practice charge in this case on August 27, September 13, and October 31, 2001, respectively.[1] Based on that charge as amended, the Regional Director for Region 28 of the National Labor Relations Board (the Board) issued a complaint on October 31. The complaint alleges that Jensen Enterprises, Inc. (Respondent or Employer)[2] violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.[3]

Pursuant to a petition filed by the Union on May 30, in Case 28–RC–5972 and following a Decision and Direction of Election issued by the Regional Director for Region 28 on August 3, an election by secret ballot was conducted on August 30. The tally of ballots reflected that of 81 ballots cast, 21 had been cast for representation by the Petitioner, 43 had been cast against such representation, and 17 ballots were challenged. Challenges were not sufficient in number to affect the results of the election. On September 6, the Petitioner filed timely objections to conduct affecting the results of the election. Thereafter, on December 13, the Regional Director for Region 28 issued an order consolidating the objections with the complaint allegations for purposes of trial and resolution before an administrative law judge.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel, counsel for the Respondent, and counsel for the Charging Party, and my obser-

[1] All dates are in 2001 unless otherwise indicated.

[2] At the hearing, counsel for the General Counsel amended all the formal papers to reflect the correct name of the Respondent. All parties stipulated that the correct name of the Respondent was Jensen Enterprises, Inc.

[3] In answering par. 1(c) of the complaint, the Respondent contends that it did not have an opportunity to respond to the second amended charge prior to the issuance of the complaint. This, it alleges, is a contravention of the Board's Rules and Regulations and required due process. However, the Respondent fails to explain how the issuance of the complaint on the same date as the filing and service of the second amended charge either deprived it of due process or violated any of the Board's Rules and Regulations. The Respondent neither cites case law nor any specific rule or regulation. In my view, there was nothing inherently improper about the complaint issuing on the same date that the second amended charge was filed and served. As the Respondent has had the opportunity at the hearing to defend against any allegations raised in the second amended charge and included in the complaint, it has not been prejudiced.

vation of the demeanor of the witnesses,[4] I now make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent is a Nevada corporation, with an office and place of business in Las Vegas, Nevada, where at all times material it has been engaged in the manufacture of precast concrete products and the delivery and installation of such products. During the 12-month period ending August 27, the Respondent, in the course and conduct of its business operations, purchased and received from enterprises operating within the State of Nevada goods and materials valued in excess of $50,000, each of which enterprises purchased and received these goods and materials directly from points outside the State of Nevada. Further, during the same period of time, the Respondent, in conducting its business operations, derived gross revenues therefrom in excess of $500, 000.

Accordingly, I conclude that the Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the parties stipulated, and I find that at all times material the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The principal unfair labor practice issues in this proceeding can be broadly categorized as follows: (1) whether professional labor relations consultants retained by the Respondent to represent its interests in the pending election made unlawful statements and threats to employees; (2) whether certain supervisors interrogated employees, made unlawful threats, and unlawfully disciplined employees; and (3) whether the Respondent promulgated and discriminatorily enforced a no-solicitation rule. This conduct is alleged in the complaint to constitute a violation of Section 8(a)(1) of the Act, with the disciplining of employees alleged to also constitute a violation of Section 8(a)(3) of the Act. (The issues regarding the objections to the election will be discussed in a later section of this decision.)

B. Facts and Analysis

1. Background

The Respondent manufactures, delivers, and installs precast concrete products such as underground electric utility boxes, transformer pads, septic tanks, catch basins, and a variety of related products. It is a family owned business, founded by Don Jensen, the owner and chief executive officer. The Employer operates a number of facilities in Nevada and California, with the Las Vegas facility operated under the direction of General Manager Kurt Jensen, the son of the owner. The Las Vegas facility is the only facility involved in the current proceedings. Other managers working at the facility include Bart Black, plant manager; Jim Andon, production supervisor; Al Brown, cover shop supervisor; and Jose Ruelas, drycast supervisor.[5]

Over the past 3 years, the Respondent and the Union have been involved in a series of legal proceedings, some involving the Board. An earlier election petition was filed on July 7, 1999, followed by a series of unfair labor practice charges filed against both the Union and the Respondent. Additionally, actions have been filed in Federal court seeking relief against both the Union and the Employer. Apparently, certain of these actions were still pending at the time of the hearing in the current proceeding. In any event, I do not believe these other proceedings have any direct bearing on the events at hand. The matters before me must rise or fall on their own merit.

The current representation petition in Case 28–RC–5972 was filed on May 30. In order to have its interests represented during the election campaign, the Respondent had earlier retained the services of a labor relations consulting firm, Labor Relations Services, Inc. Three consultants from that firm, Michael Penn, Steve Beyer, and Rita Aguilar, were actively involved in the campaign, with Penn acting as the principal advisor.[6] At various times during the preelection period, and even earlier while the first petition was pending, the consultants met with the Respondent's managers to provide training on "dos and don'ts" in organizing campaigns, good employee relations, and best practices. Additionally, the labor consultants held an extensive series of meetings with groups of employees on different topics in an effort to prepare them to vote in the representation election. Of course, the purpose of the campaign from the Respondent's standpoint was to convince the employees to vote against union representation. That was the mission of the consultants.

A significant number of the employees in the petitioned-for unit[7] spoke Spanish as their primary language and were either bilingual, English and Spanish, or monolingual in Spanish. A

[4] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

[5] The parties stipulated that during the time period of May 30 through August 30, Donald Jensen, Kurt Jensen, Bart Black, Jim Andon, Al Brown, and Jose Ruelas were supervisors within the meaning of the Act. I find them to be supervisors at all material times.

[6] The parties stipulated that during the time period in question, while meeting with the Respondent's employees, any statements made by Michael Penn to employees were attributable to the Respondent. To this extent, the parties stipulated that Penn was an agent of the Respondent within the meaning of the Act.

[7] The unit found appropriate by the Regional Director included:

> All full-time and regular part-time production and maintenance employees, including forklift drivers, working foremen and temporary agency employees employed by the Employer at its Las Vegas facility.

Truckdrivers were specifically excluded, however, a number of them ultimately voted under challenged ballot.

smaller number of employees were monolingual in English. The employee meetings conducted by the consultants prior to the election were monolingual, conducted in either English or Spanish, with the employees apparently grouped together depending, in part, on their primary language. Both Michael Penn and Rita Aguilar are fluent in the Spanish language.[8]

Just prior to the commencement of the 24-hour period before the election, both Don Jensen and Kurt Jensen gave speeches to an assembled group of employees. The complaint alleges that certain statements contained in these "24-hour" speeches were unlawful. Likewise, it is alleged that during the preelection period individual supervisors and labor relations consultant Michael Penn made unlawful statements to employees, and that several employees were unlawfully disciplined. Further, it is alleged that the Respondent's supervisors promulgated and unfairly enforced an unlawful no-solicitation rule.

The Respondent's defense is premised on the contention that its campaign was waged by very experienced professional labor relations consultants. All three consultants, and Michael Penn in particular, had extensive experience and credentials in the field of labor relations. Throughout the preelection period, and even earlier, the consultants held multiple meetings with the Respondent's supervisors in an effort to make them advocates for the Employer's position in the election, without their committing unfair labor practices. The consultants distributed literature to the managers, the so called "do's and don'ts," which were intended to explain to them just what they should and should not do during an election campaign. Also, in multiple meetings with employee groups, the consultants attempted to convince the employees to vote against representation by means of oral persuasion, written handouts, and written material projected on a screen or wall.

I am of the opinion that in general, the consultants tried to avoid the commission of unfair labor practices. Similarly, it was their job to manage the election campaign, defeat the Union, and have the supervisors avoid committing unfair labor practices. However, as will be detailed below, I am also of the view that despite the professional nature of the campaign, mistakes were made, and numerous unfair labor practices were committed. As has been said many times before, "the best laid plans of mice and men often go astray."[9]

2. Alleged threats by Al Brown in the first half of May

Testifying on behalf of the General Counsel was former employee Aaron Jett. Jett began his employment with the Respondent in February 2001 as a temporary employee, was converted to permanent employee 90 days later, and quit his employment in September 2001. He testified that in May 2001 Supervisor Al Brown told him that the "union buster" said that employee Joel Gomez was "a problem" because of his support for the Union. Allegedly, Brown told Jett that he was going to fire Gomez. Gomez was fired later that week. According to Jett, he knew Gomez was a supporter of the Union. Further, he testified that his reference to "union buster" was meant to identify labor consultant Michael Penn. It is the position of the General Counsel that the statement allegedly made by Brown to Jett was intended to threaten Jett, a union supporter, with an unspecified reprisal as well as possible discharge for continuing to support the Union.

On cross-examination, Jett acknowledged that towards the end of his employment with the Respondent, Al Brown had placed him on 90 days' probation and suspended him for a day because of excessive absences and tardiness. He admitted that one of the main reasons he quit his employment was because he was "tired of taking shit" from Al Brown, who he characterized as a "backstabber" and liar. Jett apparently thought that Brown would unfairly discipline him for "any little thing." Jett admitted being a union supporter, and acknowledged that at some point Brown had complained to him that Gomez was a slow worker.

Al Brown testified that he has been employed by the Respondent for more than 5 years and is presently classified as the cover shop supervisor. According to Brown, he fired Joel Gomez because of poor production. He testified, as did a number of other employees, including Roy Cairnes and Jimmy Ray Gathrite, that Gomez' production went down over a period of time. Further, Brown testified that he did not know whether Gomez was a union supporter or not, and he denied ever having a conversation with Jett where he told him that Gomez was being fired because of his support for the Union.

In my view, Aaron Jett was not a credible witness. Although he quit his employment with the Respondent, clearly he was having serious disciplinary problems at the time. He obviously does not like Al Brown, having characterized him as a backstabber and liar. It would seem to me that as a disgruntled former employee, he would have a motive to testify untruthfully in an effort to make Brown look bad and get back at the Employer. Also, the alleged conversation simply does not have a "ring" of authenticity to it. I seriously doubt that a supervisor would have any such conversation with a production employee where he would tell the employee what a labor consultant had allegedly told the supervisor in confidence. On the other hand, I found Al Brown, at least in this instance, to be credible. His testimony that Gomez' production had gone down was supported by the testimony of several nonsupervisory employees. His demeanor while testifying was one of quiet resolve, as opposed to Jett's demeanor, which seemed edgy and hostile. Between the two men, Brown was certainly more credible than Jett.

Therefore, regarding the allegations in paragraphs 5(a)(1) and (2) of the complaint that in the first half of May Al Brown threatened employees who supported the Union with unspecified reprisals and discharge, I find no credible evidence that any such threats were ever made. Accordingly, I shall recommend dismissal of these allegations of the complaint.[10]

[8] Michael Penn in particular is an expert in the Spanish language with outstanding credentials. Among others, he has a bachelor's degree in Spanish and a master's degree in Latin American Literature, Spanish linguistics, from UCLA. He has taught Spanish at UCLA.

[9] Author Robert Burns.

[10] Counsel for the General Counsel withdrew pars. 5(b)(1) and (2) of the complaint.

3. Alleged threat by Al Brown on May 29

Former employee Mario Mendoza testified on behalf of the General Counsel. He had been employed by the Respondent from May 29, 2001, through February 12, 2002, at which time he quit his employment. Initially, he was hired as a temporary employee and subsequently became permanent. Mendoza testified that on his first day on the job he was cautioned by Supervisor Al Brown not to talk with any "union people," and further warned that Mendoza would be "watching" him. Brown testified that he never had any such conversation with Mendoza, either on his first day on the job or at any time.

Mendoza testified in a reasonably credible manner. As noted above, I also found Brown to be generally credible. However, regarding this particular conversation, I believe that the surrounding circumstances support Mendoza's testimony. Mendoza's first day on the job, May 29, was the day before the current petition was filed. This was clearly a period of much tension at the facility, with supervisors likely on edge. Further, I believe that Brown's comments were an attempt on his part to explain to a new employee about the Respondent's no-solicitation policy. However, as I will set forth in much detail later in this decision, the problem was that the Respondent's supervisors, including Brown, were badly confused about the substance of such a policy. Because of his confusion, Brown made a statement to Mendoza, which in the form alleged by Mendoza obviously constituted an unlawful threat.

Additionally, Brown must have known from Mendoza's first day on the job that Mendoza was a union supporter. As counsel for the Respondent pointed out to Mendoza on cross-examination, the picture taken of Mendoza on his first day of employment for his personnel file showed him wearing a union T-shirt. This further establishes the likelihood that Brown would have said something to him about the Union on that date, as alleged by Mendoza. Mendoza credibly testified that he wore a union T-shirt on subsequent days as well. This basically unchallenged testimony simply proves the incredible nature of Brown's contention that Mendoza did not hold himself out to be a union supporter. I wonder whether Brown did not actually have Mendoza confused with some other employee when Brown testified that the only conversation that he had with Mensoza about the Union occurred when Mendoza approached him and allegedly said that he was procompany and wanted no part of the Union.

Having concluded that Mario Mendoza testified credibly, I find that Al Brown unlawfully threatened an employee with unspecified reprisals on May 29, as alleged in paragraph 5(c) of the complaint. Further, I find this conduct to constitute a violation of Section 8(a)(1) of the Act.

4. Alleged threat by Al Brown in the first half of June

Aaron Jett testified that in June Al Brown told him that if the Union won the election the employees would lose "all" their benefits, and specifically mentioned the 401(k) plan. Jett alleged that Brown said the plan would be lost because the Union would want to put the employees in the Union's own "insurance plan." According to Brown, he did not answer employee questions about the 401(k) plan, preferring instead to refer the employee to Michael Penn or the human resources person. Brown candidly testified that he was afraid of "saying the wrong thing" about the plan, as he was of the belief that certain employees were trying to "bate" him. Rather than make a mistake, he would refer the employee to someone who was more knowledgeable about the plan.

Counsel for the General Counsel has alleged that a number of the Respondent's supervisors and agents threatened the employees with loss of the 401(k) plan if the Union won the election. I will deal with each of these allegations later in this decision. However, regarding the alleged statement by Al Brown, I am of the view that no such threat was ever made. As I have explained above, I found Aaron Jett to be an incredible witness. On the other hand, I found Brown to be generally credible. His explanation that he referred questions about the 401(k) plan to Michael Penn or human resources was certainly reasonable, considering the somewhat complicated issue of whether the employees would retain the Employer's plan in the event of a union victory in the election. In viewing Brown's demeanor while testifying, he appeared to me to be the sort of person who was likely to be circumspect in his response to questions for which he was not sure about the answer. Accordingly, I found his testimony to be inherently plausible.

Therefore, regarding the allegation in paragraph 5(d) of the complaint that in the first half of June Al Brown threatened employees with loss of benefits if they selected the Union as their representative, I find no credible evidence that any such threats were ever made. Accordingly, I shall recommend dismissal of this allegation of the complaint.

5. Alleged threat by Al Brown in the last half of June

The last allegation from former employee Aaron Jett involves a conversation with Al Brown, which Jett claims took place at the Fort Las Vegas casino in June. Jett testified that he was socializing with Brown at the casino when Brown warned him that if he "kept hanging around Javier, [he] would end up just like Joel." According to Jett, the Javier referred to by Brown was a very active, open union supporter who Brown had seen with Jett. The reference to Joel was to the person Brown had allegedly fired because of his union support, Joel Gomez. Al Brown denied that any such conversation with Jett ever occurred.

Once again, I credit Al Brown over Aaron Jett. As explained above, Jett had a strong dislike for Brown, referring to him as a backstabber and liar. It is clear to me that Jett had a perceived grievance against the Respondent and in particular Al Brown. Further, I believe that Jett used the hearing as an opportunity to seek retribution against both the Respondent and Brown by fabricating the incident in question. I am of the opinion that the conversation never occurred. Al Brown's quiet, resolute demeanor was such that I do not believe that he would have been careless enough to make such statements to an employee. It is significant to note that in neither this instance, nor in any other alleged instance involving Aaron Jett, did any employee come forward to support Jett's contentions.

Therefore, regarding the allegation in paragraph 5(e) of the complaint that in the last half of June Al Brown threatened employees who supported the Union with discharge, I find no credible evidence that any such threat was ever made. Accord-

ingly, I shall recommend dismissal of this allegation of the complaint.

6. Alleged interrogation by Jose Ruelas in the last half of June

Two witnesses for the General Counsel, Braulio Gomez and Mario Mendoza, testified that Supervisor Jose Ruelas questioned them about their union activities and support. Ruelas denied any such conversations. Gomez testified on direct examination that in mid-June Ruelas asked him if he supported the Union, and essentially repeated the question some 20 times. On cross-examination, Gomez testified that during the summer 2001, Ruelas asked him different questions about the Union as many as 20 times, and told Gomez why the Union would not be good for the employees. However, Gomez also admitted on cross-examination that he had worn a union T-shirt for 2 years, long before Ruelas ever allegedly asked him whether he supported the Union. He acknowledged that Ruelas knew that he was a union supporter before asking him questions about his support for the Union but, nevertheless, he insisted that Ruelas continued to ask questions about his support for the Union.

The testimony of Braulio Gomez makes very little sense. Between direct and cross-examination, he repeatedly contradicted himself as to what Ruelas did or did not ask him about the Union. Of course, it is simply illogical that knowing Gomez was a union supporter, Ruelas would continue to ask him if he was still supporting the Union, up to 20 times, and at a time when Gomez was continuing to wear a union T-shirt. Further, although Gomez testified that a number of other employees (Erasmo Llerenas, Anibal Alcivar, Juan del Rio, and Domingo Oliva) overheard these conversations, when testifying, none of these employees could recall any such conversations.

In an effort to rehabilitate his witness, counsel for the General Counsel asked Gomez on redirect examination what other union matters Ruelas discussed with him. Gomez responded that Ruelas also inquired about union meetings and what topics union officials discussed at those meetings. However, rather than rehabilitate him, this testimony only made it more apparent that Gomez was fabricating his testimony as he went along. He was forced to admit on re-cross-examination that the affidavit which he gave to the Board during the investigation of this case made no mention of any alleged questions from Ruelas about union meetings or what topics were discussed at such meetings. Certainly, had there been any conversations like this with Ruelas, they would have been included in Gomez' affidavit. In my view, Braulio Gomez was a totally incredible witness whose testimony was unworthy of belief.[11] However, the issue of employee Mario Mendoza's testimony was not so easily resolved. As was noted earlier in this decision, I found Mendoza to be a credible witness, as his testimony related to a conversation with Supervisor Al Brown. On the current question, Mendoza testified that a couple of weeks before the election, Jose Ruelas asked him who he was going to vote for. He alleged that employee Anibal Alcivar overheard the conversation.

Ruelas' demeanor while testifying displayed a quiet, calm manner that seemed very natural, at least regarding his denial that he ever had any conversation with either Gomez or Mendoza about their union activities or support. While both Ruelas and Mendoza seemed generally credible, the deciding factor was the testimony of Anibal Alcivar who Mendoza alleged witnessed the conversation. Alcivar, appearing as a witness on behalf of the Respondent, testified that he had never overheard any conversation between Ruelas and Mendoza about the Union. Accordingly, I credit the testimony of Jose Ruelas over that of Braulio Gomez and Mario Mendoza.

Therefore, regarding the allegation in paragraph 5(f) of the complaint that in the last half of June Jose Ruelas interrogated employees about their union membership, activities, and sympathies, I find no credible evidence that any such interrogation ever occurred. Accordingly, I shall recommend dismissal of this allegation of the complaint.

7. Alleged interrogation, promise of a wage increase, and more favorable working conditions by Jim Andon on July 23

Former employee Marvin Poncé was employed by the Respondent for approximately 3 years until his discharge in August 2001. He was terminated for failing a drug test, and in his testimony did not deny having marijuana in his system at the time of the test. Poncé testified that while employed by the Respondent, he attended union meetings and sometimes wore a union T-shirt. According to Poncé, 2 days before he took the drug test he was approached during his morning break by Supervisor Jim Andon who asked him how he felt about the Union, and whether he had decided who he was going to vote for. Poncé responded that he didn't know yet. Further, Andon told Poncé that he did not believe that the Union would be good for the employees. Following lunch that same day, Andon again approached Poncé and asked him whether he had thought more about the election. Poncé indicated that he had not, at which point Andon said that he should think some more about it. Poncé testified that Andon added that Poncé should vote for the Employer and that if he did so that Poncé would get "a bigger crane." According to Poncé, who sometimes operated a small crane, he would be paid more money if assigned to operate a larger, 25-ton crane.

Jim Andon, the Respondent's production supervisor, denied that he asked Poncé, or any other employee, how he was going to vote in the election. He testified that the labor consultants had instructed him that such questions would be illegal and, so, he knew not to ask. Further, Andon denied telling Poncé that if he voted for the Employer he would get a bigger crane to operate, more money, or words to that effect. Andon testified that for the most part he did not discuss the Union or the election with the employees, and referred such questions to the labor consultants.

In my view, Jim Andon was not a credible witness. He seemed nervous while testifying, more so than would be normal for a witness. His answers were all very short and seemed well

[11] It should be noted that Braulio Gomez testified at an earlier unfair labor practice hearing with the same parties. However, at that hearing he testified under the assumed name of John Arellano. According to Gomez, he had previously been living and working in the United States illegally under the name of John Arellano.

prepared and unnatural. Further, I do not believe his contention that he basically referred all questions about the Union or the election to the labor consultants. Similarly, I do not accept his defense that he was well trained and knew not to say certain things. Mistakes happen, and I am of the belief that Andon made some. While Andon's demeanor did not impress me, I found Marvin Poncé to be a truthful witness. He was candid about being fired for failing a drug test, and did not appear to have any particular hostility towards the Respondent. He was clear in his contention that Andon asked him how he was going to vote, and offered him the benefit of a bigger crane for voting for the Respondent. His testimony was inherently plausible and had a "ring" of authenticity to it. I credit the testimony of Poncé over that of Andon.

Therefore, I find that on July 23, Jim Andon interrogated Marvin Poncé about how he was going to vote, promised him a bigger crane (more favorable working conditions), and impliedly promised him a wage increase (which came with operating a bigger crane) if he voted against the Union. Further, I find this conduct as alleged in paragraphs 5(g)(1) and (2) of the complaint to constitute a violation of Section 8(a)(1) of the Act.

8. Alleged threat of loss of benefits by Michael Penn on July 27

Counsel for the General Counsel contends that at various employee meetings conducted by Michael Penn prior to the election Penn threatened employees with the loss of predetermined wage increases and of the existing 401(k) plan if the Union should win the election. While the parties disagree as to whether the conduct complained of violates the Act, there is little disagreement as to the words that were spoken. The issue in dispute is primarily a legal question, rather than a question of fact. Credibility is not a significant issue.

Regarding the issue of wage increases, Kurt Jensen testified that the Respondent has had a practice of giving "set raises, when a person is first hired, during [the] first year." Further, he testified that "a raise is basically tied into [a] review." An employee has a "review at six months, and then one year, and one year annually after that." According to Jensen, the only other time that an employee would get a wage increase would be when an employee changes job classifications, or if an employee's performance has been so excellent that he moved into a new category or group.

Michael Penn testified that following the filing of the petition the labor consultants held meetings with small groups of employees beginning in June and continuing through August 28, 2 days before the election. He testified that during these meetings he told the employees that if the Union won the election and the parties entered into collective bargaining that, "everything remains status quo." Further, he said the employees "should not look forward to any increases in wages and benefits, but the Company was also prohibited by law from taking away even one penny in wages and benefits during collective bargaining negotiations." Penn acknowledged using the word for "frozen, *congelado*" to explain the concept to the Spanish-speaking employees. On cross-examination, Penn reiterated that he told employees "if the Union wins the election they shouldn't expect to get any increases in wages or benefits until collective bargaining had concluded." He repeated that he also said "it was prohibited by law [for] the Company to take away any wages and benefits during collective bargaining negotiations." The testimony of numerous employee witnesses was, for the most part, in agreement with this testimony of Michael Penn.

In my opinion, Penn's statement that wages would be "frozen" if the Union won the election, whether it was said in English or Spanish, would be understood to mean that employees would not receive the periodic increases that they otherwise would receive. Specifically, Penn never informed the employees that the predetermined wage increases customarily utilized by the Respondent were to remain intact during negotiations. Clearly, this would leave them with the opposite impression.

The Board has held that the duty to maintain the status quo imposes an obligation upon the employer not only to maintain what it has already given its employees, but also to implement benefits that have become conditions of employment by virtue of prior commitment or practice. *More Truck Lines,* 336 NLRB 772 (2001), citing *Alpha Cellulose Corp.,* 265 NLRB 177, 178 fn. 1 (1982). In *More Truck Lines,* the employer told its employees that if they voted for the teamsters union, the contract with the incumbent union would be null and void, wages would be "frozen" and employees would be denied their annual increases. The Board found that the annual increases were a reasonable expectancy of the employment relationship and, thereby, held that the threat to freeze wages was a violation of Section 8(a)(1) of the Act. Similarly, in *Illiana Transit Warehouse Corp.,* 323 NLRB 111 (1997), the employer told employees that wages would be "frozen" during negotiations. This was found by the Board to constitute an unlawful threat of loss of benefits and less favorable treatment if the union won the election. Recently, in *K-Mart Corp.,* 336 NLRB 455 (2001), the Board stated that "it is well settled" that during an election campaign the employer's obligation is to adhere to established practices as if the union were not on the scene.

In *Liberty Telephone & Communications,* 204 NLRB 317 (1973), the Board held that "terms and conditions of employment" are not fixed by rigid formulas or stipulations but, rather, it is the "normal foreseeable expectations" arising out of the employment relationship which constitute the terms and conditions of employment. Anticipated wage increases, like the anticipated reviews and wage increases at the Respondent, constitute such "terms and conditions of employment." Id. Here, the Respondent's employees expected reviews and periodic wage increases 6 months from the date of hire, at 1 year from the date of hire, and then annually thereafter. This was a term and condition of the employees' employment. As they had a "reasonable expectancy" of such periodic wage increases by virtue of their employment relationship, Penn's statement that their wages were "frozen" was a threat to deprive them of such wage increases. Id.

Michael Penn should have informed the Respondent's employees that the Employer would maintain the periodic wage increases during negotiations, as they constituted existing terms and conditions of employment. By failing to do so, his statement that wages would be "frozen" during negotiations was a threat to the employees of a loss of benefits if they selected the

Union as their bargaining representative. His words were clear and unambiguous, whether given in either English or Spanish. Although the complaint alleges that this threat occurred "on or about" July 27, the evidence is undisputed that Penn made identical statements on multiple occasions to groups of employees from June through August 28. Therefore, I conclude that each such statement constitutes a separate violation of Section 8(a)(1) of the Act.

Regarding the issue of the Respondent's 401(k) plan, it is the Respondent's position that the plan's summary description prevents the employees from participation in both the 401(k) plan and the Union's pension plan. Michael Penn testified that in his various meetings with employees he explained how the Respondent's existing 401(k) plan worked, and how it differed from a union pension plan. Among the topics discussed was employee eligibility to participate in the Respondent's plan. The summary plan description provides for eligibility to participate in the plan and has a provision dealing with employees who are lawfully excluded from the plan as follows:

> 3.1 Excluded Employees
>
> The following Employees are excluded from participation in the Plan: Union Employees who are a part of a collective bargaining unit recognized as such by the Employer, and with whom retirement benefits have been the subject of good faith bargaining or to which the Employer is making contributions pursuant to a collective bargaining agreement. 0[R. Exh. 26, p. 4.]

According to Penn, the above language was shown to the employees exactly as it appears in the 401(k) plan document itself. Using overhead transparencies and handouts, Penn explained to the assembled employees, in either English or Spanish, the differences between the Respondent's plan and a union pension plan. While certain employees testified that Penn said that they would lose their 401(k) plan if the Union won the election, or words to that effect, I do not believe Penn spoke any such words. I accept Penn's testimony as to what he had to say about the Respondent's plan. He is, of course, a very experienced labor relations consultant, and I do not believe that he would have made any such transparently unlawful statements to groups of employees. The confusion by employees as to what was said, whether in English or Spanish, was caused I believe simply by the relatively complex nature of the subject being discussed. Having credited Penn's version of what he said regarding the 401(k) plan, the only question remaining is whether Penn's statement was unlawful. I conclude that it was not.

In his posthearing brief, counsel for the Respondent cites a section of the Internal Revenue Code for the proposition that the code permits the exclusion of union represented employees from an employer's 401(k) plan, as long as retirement benefits have been the subject of good-faith negotiations or are provided for in the collective-bargaining agreement.[12] Neither counsel for the General Counsel nor counsel for the Union has alleged that on its face there is anything improper about the exclusion language in the Respondent's 401(k) summary plan description. To the contrary, counsel for the General Counsel merely argues that Penn should have explained a series of contingencies to the employees. According to the General Counsel, these would include the possibility that the summary plan description could be amended to permit union represented employees to participate in both the 401(k) plan and the Union's pension plan, or the possibility that the Union and the Respondent might negotiate a new 401(k) plan.

In my view, the Respondent was not responsible for explaining every possible contingency to the employees. With the use of graphics, Michael Penn carefully explained to assembled employees the differences between the Respondent's 401(k) plan and the Union's pension plan. He further explained that under the existing language in the summary plan description, employees could not participate in both the Respondent's plan and the Union's pension plan. There was nothing deceitful about Penn's statements, and he did not tell the employees that if the Union won the election they would lose their 401(k) plan, or words to that effect. In fact, the subject was complicated enough without adding more confusion in the minds of the employees by raising contingencies that might never happen.

Therefore, I conclude that Michael Penn did not threaten employees with loss of their 401(k) plan. However, as noted above, I find that on various dates during June, July, and August, Penn threatened employees with the loss of periodic wage increases if they selected the Union as their bargaining representative. Further, I find this conduct as alleged in paragraph 5(h) of the complaint to constitute a violation of Section 8(a)(1) of the Act.

9. Alleged statements by Michael Penn concerning the futility of selecting the Union, on dates between June and August

Two witnesses called by the General Counsel, Jose Ramirez and Javier Aceves, testified that Michael Penn said that the Respondent would never sign a contract with the Union, or words to that effect. According to Ramirez, a union supporter and current employee of the Respondent, at a meeting of assembled employees, Penn said that if the Union wins the election that the Employer "will never sign a contract with the Union." Allegedly, Penn went on to say that the Respondent would "sit down and negotiate with the Union in good faith, but that [the Respondent] never was gonna accept—sign a contract with the Union." On cross-examination, Ramirez acknowledged that Penn said that in negotiations the Respondent did not have to agree to proposals that were not in its best interest, but that it would negotiate in good faith. Javier Aceves, a union supporter and current employee of the Respondent, testified that Penn said if the Union wins the election that "Mr. Jensen will fight with his attorney." Allegedly, Penn also said that "it would be difficult for the Company to accept a contract from the Union, and possibly that they will never accept it."

Michael Penn denied ever saying that the Respondent would never sign a contract with the Union, or words to that effect. He testified that he was certain he had never made such a statement "because it would be an unfair labor practice to do so, and it's kind of basic—you know, basic labor relations 101." In my opinion, Penn's denial is credible. I simply do not

[12] Internal Revenue Code § 410(b)(3)(A).

believe that an experienced labor relations consultant, such as Penn, would in the presence of assembled employees make such a statement which would constitute an obvious, blatant unfair labor practice. Both Ramirez and Aceves seemed badly confused and did not hold up well under cross-examination. Penn credibly testified that he informed the employees at various meetings "that there is no legal time limit on the negotiations," but that both sides had an obligation to "bargain in good faith." These are subtle concepts, and it is not surprising that they may have confused Ramirez and Aceves who, of course, are not labor relations experts. However, I did not get the sense that either Ramirez or Aceves were intentionally fabricating their testimony.

It is, of course, perfectly lawful to explain to employees that during collective-bargaining negotiations, the employer does not have to agree to proposals, that the negotiation process may be difficult or that after negotiations, a contract might not be reached. *Fern Terrace Lodge of Bowling Green*, 297 NLRB 8 (1989); and *General Electric Co.*, 332 NLRB 919 (2000). In my view, Michael Penn was doing nothing more than explaining how the collective-bargaining process works, when he made the statements of which the General Counsel complains. Or though, as pointed out, I do not believe that he said that the Respondent would not sign a contract with the Union, or words to that effect.

Therefore, regarding the allegation in paragraph 5(i) of the complaint that between June and August Michael Penn informed employees that it would be futile for them to select the Union as their bargaining representative, I find no credible evidence that any such statements were ever made by Penn. Accordingly, I shall recommend dismissal of this allegation of the complaint.

10. Allegation that in August Bart Black promulgated and enforced an overly broad and discriminatory no-solicitation rule

There was much confusion among the Respondent's supervisors, as expressed by their testimony at the hearing, as to whether the Respondent had a no-solicitation rule and, if so, exactly what it prohibited. Kurt Jensen testified that there was no written rule regarding solicitation on the Respondent's property. Never the less, there was apparently at least some type of an oral rule or policy. Employees Francisco Javier Monzon and Luis Vasquez testified that in August they were both called to a meeting in the lounge area with Kurt Jensen, Bart Black, and Al Brown. Apparently, a fellow employee had complained about Monzon and Vasquez, who were prounion, talking to him about the Union while he was working. According to Vasquez, he knew there was a rule against talking about the Union on work time, but that it was permitted to talk about the Union on breaktime or lunchtime. Both men testified that Bart Black threatened to suspend them if they continued the activity. The Respondent's witnesses deny making any such threats, however, the issue of alleged threats to discipline will be considered later in this decision.

In any event, the Respondent's witnesses acknowledged that Monzon and Vasquez were spoken to because of the employee complaint. Bart Black testified that there was a written no-solicitation policy, "there's a memo, a handout. I don't remember how long ago I seen it. It was quite a long time ago."[13] According to Black, the policy against talking to another employee while working applied to any matter, other than work related matters. However, this was clearly not the understanding of other supervisors. Kurt Jensen was certainly being much more candid when he testified that "[i]t's pretty obvious that people are going to probably be talking during work times. The only reason we talked to Francisco and Luis was because we actually had someone come forward and complain about it." His candor continued as he testified, "[W]e were trying to keep the talk and discussion about the Union stuff down to a minimum because the place was so stirred up at the time."

In my view, the testimony of Supervisor Jose Ruelas was clearly the most refreshingly candid and realistic regarding the degree to which the no-solicitation policy was actually enforced. He testified that employees "are not supposed to talk when they are working, but there is some tolerance. For example, if I see that they've been talking for about 15 minutes, then I have to get after them. But let's say if they ask what time is it or what did you bring for lunch and stuff like that, we have to give them some tolerance."

It is fairly clear that the Respondent's supervisors all pay at least "lip service" to the unwritten no-solicitation policy, with enforcement varying greatly from one supervisor to another. However, it is equally clear to me that when it came to the Union management was much stricter in enforcing the policy, as is apparent from the meeting the three supervisors had with employees Vasquez and Monzon. In fact, it does appear that the only real consistency in the policy was that employees who violated it by talking about the Union would face counseling and possible discipline.

The Board has held that an employer violates the Act when it prohibits employees from discussing union related matters while allowing the discussion of other nonwork-related subjects. Such a rule is discriminatory in its application. *McGaw of Puerto Rico, Inc.*, 322 NLRB 438, 449 (1996), enfd. 135 F.3d 1 (1st Cir. 1997). The Board Rule is that an employer may forbid employees to talk about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to all other subjects not associated or connected with their work tasks. However, an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work, particularly when the prohibition is announced or enforced only in response to specific union activity in an organizational campaign. *Williamette Industries*, 306 NLRB 1010, 1017 (1992); and *Orval Kent Food Co.*, 278 NLRB 402, 407

[13] The only written reference to solicitation is found in the labor relations consultants' guide for managers entitled, "Organizing Campaigns-What Management Can Do." Number 19 of that document read as follows: "Insist that any solicitation of membership or discussion of union affairs be conducted outside of employees' working hours." (R. Exh. 2.) Apparently this document was only intended for supervisory use. However, I would merely note that if promulgated or implemented as written, the policy would likely be overly broad and unlawful on its face as it prohibits protected activity not merely on "working time," but on "working hours."

(1986). Certainly, counseling employees Vasquez and Monzon or threatening them with discipline for violating the no-solicitation rule when talking about the Union, while failing to treat employees in a similar manner for violating the rule when talking about other matters unrelated to work, constituted an unlawful discriminatory application of the rule. *Litton Microwave Cooking Products*, 300 NLRB 324, 325, 343 (1990).

The Respondent's contention that the supervisors were merely responding to a harassment complaint from an employee is, in my opinion, disingenuous. There was no evidence offered by the Respondent that any similar counseling of employees had ever occurred where the subject of the complaint concerned something other than the Union. The act of "harassment" was principally the conversation between two pro-union employees and a coworker, Wilfredo Ponce, who apparently was not interested in discussing the Union with them. Had the subject of the conversation been other than the Union, I am of the opinion that it is highly unlikely that it would have necessitated counseling by three supervisors, including the general manager of the facility. As has been noted, the Board has held that an employer may not lawfully prohibit employees from discussing unionization during working time if the employer does not prohibit other worktime discussions. *Frazier Industrial Co.*, 328 NLRB 717 (1999); and *Teksid Aluminum Foundry*, 311 NLRB 711, 713 (1993). Again, in this case, this establishes a discriminatory application of the Respondent's no-solicitation policy. *Southwest Gas Corp.*, 283 NLRB 543 (1987). It is simply unrealistic to believe that employees while working did not discuss nonwork-related matters among themselves.[14] Clearly they did, and yet only when the subject was the Union was there apparently a problem. The enforcement of the no-solicitation policy in this way was discriminatory and unlawful under existing Board law.

Therefore, I find that in August Bart Black promulgated and enforced a discriminatory no-solicitation rule by prohibiting employees from talking about the Union on worktime while allowing other nonwork-related discussions by employees. Further, I find this conduct as alleged in paragraph 5(j) of the complaint to constitute a violation of Section 8(a)(1) of the Act.[15]

11. Alleged promise of improved benefits and working conditions by Jim Andon on August 27

As noted earlier, Mario Mendoza was employed by the Respondent from May 29, 2001, until February 12, 2002. He was a temporary employee who was ultimately made permanent. Typically, temporary employees are converted to permanent after a 3-month period. Mendoza testified that a couple of days before the election, Supervisor Jim Andon told him and four other temporary employees that "if we vote for the Company, we can get raises and become permanent." Mendoza was a union supporter and testified that he had worn a union T-shirt as early as the first day on the job. He knew at the time he was hired that he would likely be made permanent after 3 months which, in fact, he was. The conversation with Andon about being made permanent occurred about 2 weeks before he was converted to permanent status.

Jim Andon denied that he had any such conversation with Mendoza. As he did throughout his testimony, Andon basically denied discussing the Union with any employees, and claimed that he referred all such questions to the labor relations consultants. However, for the reasons set forth in detail above, I continue to find Andon to be an incredible witness. The Respondent's contention that Andon was too well trained by the labor consultants to commit unfair labor practices was simply not supported by the record. As has been noted above, I have concluded that Andon engaged in a number of unfair labor practices. Andon's testimony continued its incredible nature as he testified that, while he did not mention the Union to Mendoza, "just out of the blue," Mendoza came up to him and said, "don't worry, boss. I'm going to vote for the Company." This testimony makes no sense, as Mendoza was a well-known union supporter who regularly wore a union T-shirt.

I have previously found Mario Mendoza to be a generally credible witness. I continue to believe him to be so. His testimony seems to me to be inherently plausible. The timing of the alleged conversation supports Mendoza's contention that it occurred. What better time to raise the issue of conversion to permanent status than just shortly prior to the end of the 3-month temporary period, when it certainly would have been on the minds of the temporary employees. The fact that employees did not typically get a raise at the 3-month conversion period, does not establish that Andon would not have made such a statement in an attempt to induce Mendoza and other temporary employees into voting against the Union. I believe that this was exactly what Andon was attempting to do. It certainly would have been logical for Mendoza and other temporary employees to assume that Production Supervisor Andon had the authority to both make them permanent and give them a raise. After all, he was promising to do just that, if they would merely vote against the Union.

Therefore, I find that on August 27 Jim Andon promised employees improved benefits and working conditions if they rejected the Union as their bargaining representative. Further, I find this conduct as alleged in paragraph 5(l) of the complaint to constitute a violation of Section 8(a)(1) of the Act.

12. Alleged promise of improved benefits and working conditions by Kurt Jensen and Donald Jensen on August 29

The General Counsel has alleged that just prior the commencement of the 24-hour period before the election that both Kurt Jensen and Donald Jensen in captive-audience speeches to assembled employees said that if given "another opportunity," the Respondent would ensure "that things would be better." A number of employees testified that the two Jensens made such statements in their respective 24-hour speeches. It is alleged that these statements constitute a promise of improved benefits and working conditions in violation of the Act.

For the most part, the evidence is undisputed that the Jensens read their 24-hour speeches and, according to the testimony of the Jensens, read them word for word as written. Michael Penn had written the speeches, and great care had apparently gone

[14] Employee witness Domingo Oliva testified that employees could discuss "[a]nything we wanted to as long as we keep on working."

[15] Counsel for the General Counsel withdrew par. 5(k) of the complaint.

into the crafting of these speeches. This is one area of the case where I am willing to accept the Respondent's contention that experienced labor relations consultants made the commission of an unfair labor practice highly unlikely. Both Kurt and Don Jensen impressed me as generally credible individuals who for the most part tried to avoid the commission of an unfair labor practice. The safest way to do this was certainly to simply read the prepared speeches verbatim. I believe this is exactly what they did. Both Jensens testified that not only did they read their respective speeches verbatim, but that they paused periodically so that Michael Penn could translate their statements into Spanish for the benefit of those employees who were not fluent in English. As was previously noted, Penn was an expert in the Spanish language with outstanding credentials.

Having concluded that the Jensens read their speeches verbatim, and further believing that Michael Penn accurately translated the speeches into the Spanish language, the only issue remaining is whether anything contained within the speeches is unlawful. The two speeches plus the Spanish language translations were admitted into evidence. (R. Exhs. 28, 29, 30, and 31.) I have carefully examined both of the English language speeches as given by Kurt and Don Jensen, and I am of the opinion that nothing unlawful is contained in either speech. The speeches were clearly drafted to avoid the commission of an unfair labor practice.

Don Jensen's speech reminds employees on two separate occasions that, "Federal labor law does not permit us to made you promises about wages and benefits during the campaign" and "the law prohibits me from making any promises." Attached to Don Jensen's speech was a "guarantee sheet" which Jensen also read verbatim and which was handed out to employees in both English and Spanish. (R. Exh. 1.) This sheet is really nothing more than a guarantee to comply with the law. I am of the belief that the employee witnesses who testified that there were other references which were not contained in the written speeches were simply giving their own meaning to the words being spoken. In the final analysis, the words as written and spoken are the best evidence.

In the view of the undersigned, the two 24-hour speeches given by the Jensens constituted perfectly lawful statements. The Board has held that generalized expressions in campaign speeches or handouts that ask for "another chance" or for "more time" constitute lawful campaign propaganda. Such statements fall short of promising to address or remedy any particular grievances identified by employees. *Noah's New York Bagels*, 324 NLRB 266, 267 (1997); and *National Micronetics*, 277 NLRB 993 (1985). These statements by the two Jensens are within the limits of permissible campaign propaganda, as any references to an "opportunity" or being given a "chance" are too general to be considered an unlawful promise of improved benefits or working conditions.

Therefore, regarding the allegation in paragraph 5(m) of the complaint that on August 29 Kurt Jensen and Donald Jensen promised employees improved benefits and working conditions if they rejected the Union as their bargaining representative, I find no credible evidence that any such statements were ever made. Accordingly, I shall recommend dismissal of this allegation of the complaint.

13. Alleged verbal reprimands issued to Javier Monzon and Luis Vasquez in August

As was discussed earlier in this decision, during the first half of August employees Francisco Javier Monzon and Luis Vasquez were called to the Respondent's lounge area to discuss an accusation by fellow employee Wilfredo Ponce that they had been talking to him about the Union while he was working. Present for the Respondent were Supervisors Kurt Jensen, Bart Black, and Al Brown. The undersigned concluded above, that in counseling Monzon and Vasquez, the Respondent was promulgating and discriminatorily enforcing an unwritten no-solicitation rule against speaking about the Union on worktime. Further, the General Counsel alleges that the supervisors threatened Monzon and Vasquez with suspension should they repeat the conduct in question. Monzon testified on direct examination that Bart Black warned him that a suspension would result from a further violation of the no-solicitation policy. However, on cross-examination he acknowledged that the affidavit that he gave to the Board during the investigation of this matter made no mention of any alleged threat to suspend. He explained that he was upset the day he gave his affidavit and simply forgot to mention it. In any event, he does not claim that he was suspended for the conduct complained about, but merely orally reprimanded. Vasquez' testimony supports Monzon in the claim that Black threatened to suspend the men for the complained of conduct. But, as with Monzon, Vasquez admits that the only action taken against them was a verbal reprimand.

The three supervisors all deny that there was any mention of suspension during this meeting. However, in my opinion, the matter of whether the employees were threatened with a suspension or not is really a nonissue. While there clearly was no suspension, it does appear that both Monzon and Vasquez received a verbal reprimand. Their personnel files apparently contain no reference to any discipline having been given them as a result of the counseling. However, Kurt Jensen testified that an oral reprimand that is not reduced to writing and, therefore, not placed in an employee's personnel file might still be considered in the employee's evaluation. As he testified that a periodic pay raise is in part based on an employee's evaluation, it is clear that being issued an oral reprimand may potentially effect whether the employee receives a pay increase. Accordingly, the Respondent's oral reprimands issued to Monzon and Vasquez for violating the unlawfully promulgated and enforced rule against speaking about the Union on worktime had a potential effect on their terms and conditions of employment. *Frazier Industrial Co.*, 328 NLRB 717 (1999).

Therefore, I find that during the first half of August, the Respondent issued verbal reprimands to Francisco Javier Monzon and Luis Vasquez for violating the discriminatory no-solicitation rule prohibiting employees from talking about the Union during worktime. Further, I find this conduct as alleged in paragraphs 6(a), (b), and (c) of the complaint to constitute a violation of Section 8(a)(1) and (3) of the Act.

IV. THE OBJECTIONS TO THE ELECTION

The Petitioner filed objections to the election, many of which are coextensive with the allegations of the complaint. The Peti-

tioner urges that I also find certain conduct that is not coextensive with any complaint allegation to be objectionable.[16]

Objection 6: This objection essentially alleges that on June 21 employee "Francisco Javier" was reprimanded because he talked to a fellow employee about the Union in violation of a no-solicitation rule which was discriminatorily applied to union supporters. For all practical purposes, this objection mirrors the unfair labor practice allegations found in paragraphs 5(j) and 6(a), (b), and (c) of the complaint. As is set forth in detail above, I found that the Respondent violated Section 8(a)(1) of the Act when during the first half of August it unlawfully promulgated and enforced a rule against speaking about the Union on worktime; and violated Section 8(a)(1) and (3) of the Act when it issued verbal reprimands to Francisco Javier Monzon and Luis Vasquez for violating the rule. Accordingly, I find merit to this objection.

Objection 8: In this objection, the Petitioner alleges that on June 22 Supervisor Jim Andon asked temporary employees if they were supporting the Union. For the most part, this objection mirrors the unfair labor practice allegation found in paragraph 5(g)(1) of the complaint. As is reflected above, I found that on July 23 Supervisor Jim Andon interrogated employee Marvin Poncé about his support for the Union in violation of Section 8(a)(1) of the Act. Accordingly, I find merit to this objection.

Objection 12: The Petitioner alleges in this objection that the Respondent permitted three antiunion employees to campaign against the Union on July 16, during "working hours." There was no complaint allegation similar to this objection. In any event, there is insufficient evidence to support this claim. To begin with, permitting employees to solicit during "working hours" is clearly not a problem. The evidence established that employees without interference from management were permitted to campaign both for and against the Union during their breaktime and lunchtime. It was only when the Respondent promulgated and discriminatorily enforced a no-solicitation rule against speaking about the Union during "working time" that it violated the Act.

Further, while a number of employee witnesses testified that antiunion employees were able to campaign during work, it is unclear whether this was during their breaktime and lunchtime or while they were actually working. Even if these employees were campaigning during "worktime," there is insufficient evidence to establish that the Respondent's supervisors or agents were aware that this was happening. Following a letter sent to the Respondent by Union Organizer Carlos Leyva on July 26, which accused the Respondent of discriminatory application of the no-solicitation rule,[17] the Employer took action to ensure that there was no campaigning during "worktime." Kurt Jensen testified that he and Supervisor Jim Andon cautioned the named employees about campaigning during "worktime," but he alleged that other than the union organizer's letter, management had no reason to believe that the named employees had actually violated the rule. Accordingly, as there is insufficient evidence to support this objection, I recommend that it be overruled. However, this in no way alters my finding above that the Respondent did violate Section 8(a)(1) of the Act by promulgating and discriminatorily enforcing an unwritten no-solicitation rule against speaking about the Union on worktime; and did violate Section 8(a)(1) and (3) of the Act by reprimanding two employees for violating that rule.

Objection 21: It is alleged in this objection that Michael Penn informed employees on July 30 that if the Union won the election that the Respondent would cancel the 401(k) plan then in effect. This objection mirrors, in part, the unfair labor practice allegation found in paragraph 5(h) of the complaint. As is set forth in detail above, I found that on multiple occasions from June through August 28 Penn violated the Act by informing groups of the Respondent's employees that if the Union won the election that wages would be "frozen" during negotiations. However, I also found that Penn did not threaten employees with the loss of their 401(k) plan. Accordingly, I recommend that this objection be overruled.

Objection 22: By this objection, the Petitioner contends that on July 30, labor relations consultant Steve Beyer threatened employees that if the Union won the election the Respondent would "cancel" the 401(k) plan then in effect. There was no complaint allegation similar to this objection. Beyer was one of the three consultants utilized by the Respondent in representing its interests in the election campaign. While the complaint does not mention Beyer, it is clear to me from the testimony that he was an agent of the Respondent within the meaning of Section 2(13) of the Act in the same way and to the same extent that the parties stipulated that Michael Penn was an agent of the Respondent. Employee witness Marvin Poncé testified that Beyer discussed the differences between the Union's pension plan and the Respondent's 401(k) plan and Beyer's belief that the Respondent's plan was better. However, Poncé did not claim that Beyer said anything would happen to the 401(k) plan if the Union won the election, except that the parties would engage in negotiations. No witness testified that Beyer said or even implied that with the Union victorious in the election that the Respondent would "cancel" the existing plan, and Beyer denied making any such statement. There is no evidence to support this objection. Accordingly, I recommend that this objection be overruled.

Objections 24 and 25: In these objections, the Petitioner alleges that on August 2 and 5, Michael Penn told employee members of the Union's organizing committee that Donald Jensen was very "mad" because of the union activity and that he would never sign a contract. There was no complaint allegation similar to these objections in that the complaint does not allege that Penn referred to Jensen as being "mad." However, the unfair labor practice allegation found in paragraph 5(i) of the complaint does allege that Penn told employees that it would be futile for them to select the Union. No witness testified that Michael Penn said that Donald Jensen was "mad," or words to that effect. However, employee witnesses Javier Aceves and Jose Ramirez did testify that Michael Penn said that the Respondent would not "accept" a contract with the Union, or similar words. Aceves also alleged that Penn said that

[16] The Petitioner has withdrawn the following numbered Objections 1, 2, 3, 4, 5, 7, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 23, 26, 27, 28, 29, 34, 35, 36, 37, 38, 39, 40, 41, 42, and 43.

[17] R. Exh. 35.

if the Union wins the election that "Mr. Jensen will fight with his attorney." Both Aceves and Ramirez seemed to me to be badly confused and contradicted themselves on these points and several others. They did not hold up well under cross-examination. On the other hand, Michael Penn credibly testified that he made no such statements, and for the reasons set forth above in detail, I credit his denial. I previously found this unfair labor practice allegation to be without merit. Accordingly, I recommend that this objection be overruled.

Objection 30: By this objection, the Petitioner alleges that on August 15, Michael Penn informed a group of employees that Jensen will not sign a contract with the Union, has better lawyers than the other side, and when the employees get tired of waiting, the union campaign will fall apart. This objection essentially mirrors the unfair labor practice allegation found in paragraph 5(i) of the complaint, which accused Penn of informing employees that it would be futile for them to select the Union as their representative. For the reasons set forth in detail above, I found this unfair labor practice allegation to be without merit. Accordingly, I recommend that this objection be overruled.

Objection 31: In this objection it is claimed by the Petitioner that on August 16, Supervisor Jim Andon asked employee Mario Mendoza whether he was supporting the Union or the Employer. There is no complaint allegation that specifically accuses Andon of interrogating Mendoza about his union sympathies. However, in complaint paragraph 5(l) it is alleged that on August 27, Andon promised employees improved benefits and working conditions if they rejected the Union as their bargaining representative. As is described in detail above, I found that on August 27, Andon promised a number of temporary employees, including Mario Mendoza, raises and conversion to permanent employee status if they would vote against the Union. This conduct, I concluded was a violation of Section 8(a)(1) of the Act. However, it is sufficiently separate and distinct from the interrogation as alleged in this objection to not be considered coextensive. There was no evidence offered to establish specifically that Andon had interrogated Mendoza about his union sympathies. Accordingly, I recommend that this objection be overruled.

Objection 32: The Petitioner contends in this objection that on August 17, Michael Penn threatened employees that if the Union won the election "everything" would be "frozen" and that employees would lose their paid time off. There was no evidence offered to establish that Penn, or any other agent or supervisor of the Respondent, made any threat to eliminate employees' paid time off. However, so far as this objection alleges a threat to freeze "everything," it does mirror complaint paragraph 5(h), which alleges that on July 27, Penn threatened employees with a "loss of benefits" for supporting the Union. As note in detail above, I found that on various dates during June, July, and August, Penn threatened employees with the loss of "periodic wage increases" if they selected the Union as their representative, in violation of Section 8(a)(1) of the Act. To the extent that it is coextensive with that complaint allegation, I find merit to this objection.

Objection 33: By this objection, the Petitioner alleges that on August 17, Michael Penn threatened employees with a "loss of benefits." I am of the view that this objection is essentially a repetition of a claim made in Objection 32. As I have said, this threat is coextensive with complaint paragraph 5(h), which alleges the threat of a "loss of benefits." My finding, as mentioned above, was that Penn's threat to employees of the loss of their "periodic wage increases" was a violation of Section 8(a)(1) of the Act. Accordingly, I find merit to this objection.

The unfair labor practices committed by the Respondent, as I found, almost all occurred during the critical period between the filing of the petition and the election.[18] It is well settled that conduct during the critical period that creates an atmosphere rendering improbable a free choice warrants invalidating an election. See *General Shoe Corp.*, 77 NLRB 124 (1948). Such conduct is sufficient if it creates an atmosphere calculated to prevent a free and untrammeled choice by the employees. As the Board stated, in election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly as ideal as possible, to determine the uninhibited desires of the employees. Id.

As found by me, the Respondent has committed numerous and significant unfair labor practices during the critical period, which unfair labor practices also constituted objectionable conduct. The Board has traditionally held that conduct violative of Section 8(a)(1) and, in some cases, Section 8(a)(3) of the Act is also conduct that interferes with the exercise of a free and untrammeled choice in an election. *Dal-Tex Optical*, 137 NLRB 1782 (1962); and *IRIS U.S.A., Inc.*, 336 NLRB 1013 (2001). None of the unfair labor practices committed by the Respondent would constitute a de minimis exception to that general proposition as recognized by the Board. *Bon Appetit Management Co.*, 334 NLRB 1042 (2001); and *Caron International, Inc.*, 246 NLRB 1120 (1979).

I conclude that the unfair labor practices committed by the Respondent during the critical period constituted objectionable conduct that interfered with the free choice of employees in the election. Such conduct constitutes grounds for setting aside the election. As I have said, those unfair labor practices were numerous and significant. They included multiple threats to eliminate benefits, specifically periodic wage increases; promulgating and enforcing a discriminatory no-solicitation rule; verbally reprimanding two employees for violating that rule; promising employees a wage increase, improved benefits, and more favorable working conditions; and interrogation. This unlawful and objectionable conduct was of such significance as would clearly have had a tendency to seriously inhibit the employees' willingness to engage in union activity, and would likely have created an atmosphere unconducive to a free and untrammeled choice by the employees. The Employer's conduct destroyed the laboratory conditions required by the Board. Therefore, I recommend that the election be set aside and a new election conducted.

[18] The one exception was the unfair labor practice committed by Supervisor Al Brown when he threatened Mario Mendoza with unspecified reprisals for engaging in union activity on May 29, the day before the petition was filed.

CONCLUSIONS OF LAW

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

2. The Union, Southwest Regional Council of Carpenters, United Brotherhood of Carpenters & Joiners of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act.

(a) Threatening employees who support the Union with unspecified reprisals.

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

(c) Promising employees a wage increase and more favorable working conditions if they ceased supporting the Union.

(d) Threatening employees with a loss of benefits, specifically periodic wage increases, if they selected the Union as their bargaining representative.

(e) Promulgating and enforcing a discriminatory no-solicitation rule by prohibiting employees from talking about the Union during worktime, while allowing other nonwork-related discussions by employees.

(f) Promising employees improved benefits and working conditions if they rejected the Union as their bargaining representative.

4. By the following acts and conduct the Respondent has violated Section 8(a)(1) and (3) of the Act.

(a) Issuing verbal reprimands to employees Francisco Javier Monzon and Luis Vasquez for violating the discriminatory no-solicitation rule prohibiting employees from talking about the Union during worktime.

5. By the conduct set forth in Conclusions of Law 3(b)–(f) and 4(a), above, the Respondent has illegally interfered with the representation election conducted by the Board in Case 28–RC–5972. Accordingly, I recommend that the election be set aside and a new election be conducted at a time and date to be determined by the Regional Director for Region 28.

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 issued discriminatory verbal reprimands to its employees, Francisco Javier Monzon and Luis Vasquez, my recommended Order requires the Respondent to inform them in writing that the unlawful conduct will not be used as a basis for personnel actions against them.[19] *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). Further, the Respondent having promulgated and enforced an unwritten discriminatory no-solicitation rule, my recommended Order requires the Respondent to inform its employees in writing that it will not prohibit them from talking about the Union during worktime, while allowing other nonwork-related discussions by its employees. Finally, the Respondent shall be required to post a notice that assures the employees that it will respect their rights under the Act.

Additionally, as indicated above, I have found that the Respondent engaged in objectionable conduct affecting the results of the election in Case 28–RC–5972. I recommend, therefore, that the election in this case held on August 30, 2001, be set aside, that a new election be held at a time to be established in the discretion of the Regional Director, and that the Regional Director include in the notice of the election the following:

NOTICE TO ALL VOTERS

> The election of August 30, 2001, was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' free exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this Notice of Election. All eligible voters should understand that the National Labor Relations Act gives them the right to cast ballots as they see fit and protects them in the exercise of this right free from interference by any of the parties.[20]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

The Respondent, Jensen Enterprises, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees who support the Union with unspecified reprisals.

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

(c) Promising employees a wage increase and more favorable working conditions if they ceased supporting the Union.

(d) Threatening employees with a loss of benefits, specifically periodic wage increases, if they selected the Union as their bargaining representative.

(e) Promulgating and enforcing a discriminatory no-solicitation rule by prohibiting employees from talking about the Union during worktime, while allowing other nonwork-related discussions by employees.

(f) Promising employees improved benefits and working conditions if they rejected the Union as their bargaining representative.

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

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

[19] The evidence established that the personnel files of Monzon and Vasquez contained no reference to the reprimands. Accordingly, there are no documents to expunge.

[20] *Lufkin Rule Co.*, 147 NLRB 341 (1964).

[21] 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.

(a) Within 14 days from the date of this Order, notify employees Francisco Javier Monzon and Luis Vasquez in writing that the discriminatory verbal reprimands issued to them will not be used as a basis for personnel actions against them.

(b) Within 14 days from the date of this Order, notify its Las Vegas, Nevada facility employees in writing that it will not prohibit them from talking about the Union during worktime, while allowing other nonwork-related discussions by its employees.

(c) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 28, 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 May 29, 2001.

(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 be dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the Regional Director for Region 28 shall set aside the representation election in Case 28–RC–5972, and that a new election be held at a time to be established in the discretion of the Regional Director.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten our employees with reprisals for supporting the Southwest Regional Council of Carpenters, United Brotherhood of Carpenters & Joiners of America (the Union) or any other union.

WE WILL NOT question our employees about their union membership, activities, and sympathies.

WE WILL NOT promise our employees a wage increase and more favorable working conditions if they cease supporting the Union.

WE WILL NOT threaten our employees with loss of benefits, specifically periodic wage increases, if they select the Union as their bargaining representative.

WE WILL NOT establish and enforce a rule prohibiting our employees from talking about the Union during worktime, while allowing other nonwork-related discussions by our employees.

WE WILL NOT promise our employees improved benefits and working conditions if they reject the Union as their bargaining representative.

WE WILL notify employees Francisco Javier Monzon and Luis Vasquez that the verbal reprimands we unlawfully issued to them for talking about the Union during worktime will not be used as a basis for personnel actions against them.

WE WILL notify our employees that we have no objection to them talking about the Union during worktime, as long as we allow other nonwork-related discussions by our employees.

JENSEN ENTERPRISES, INC.