Best Products Co., Inc. *and* United Food and Commercial Workers Union, Local No. 197, affiliated with United Food and Commercial Workers International Union, AFL-CIO. Cases 32-CA-2910 and 32-RC-1104

October 29, 1981

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On May 15, 1981, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Best Products Co., Inc., Stockton, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

IT IS FURTHER ORDERED that the election conducted herein on September 11, 1980, in Case 32-RC-1104 be, and it hereby is, set aside, and that said case be, and it hereby is, remanded to the Regional Director for Region 32 for the purpose of conducting a new election at such time as he deems appropriate.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

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

Although the Administrative Law Judge relied, in part, on *Essex International, Inc.*, 211 NLRB 749 (1974), which has since been overruled by *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB No. 47 (1981), in finding that Respondent violated Sec. 8(a)(1) of the Act by prohibiting employees from gathering outside the store on their own time, it is clear that Respondent violated the Act under either standard.

DECISION AND REPORT ON POST-ELECTION OBJECTIONS

STATEMENT OF THE CASE

RICHARD J. BOYCE, Administrative Law Judge: This consolidated matter was heard before me in Stockton, California, on January 29, 1981.

The charge in Case 32-CA-2910 was filed on July 28, 1980, by United Food and Commercial Workers Union, Local No. 197, affiliated with United Food and Commercial Workers International Union, AFL-CIO (herein the Union). The complaint which issued on September 12 was amended during the hearing and alleges that Best Products Co., Inc. (herein Respondent), committed certain violations of Section 8(a)(1) of the National Labor Relations Act, as amended.

An election in Case 32-RC-1104 was held on September 11, 1980, among the full-time and regular part-time employees in Respondent's Stockton store. It derived from a petition filed by the Union on June 30, 1980, and a Stipulation for Certification Upon Consent Election approved on July 22. The initial tally was 32 for and 33 against representation, with 2 challenged ballots.

The Union filed objections to conduct allegedly affecting the outcome of the election on September 16. On October 29, the Regional Director issued his Report and Recommendations on Challenged Ballots and Objections recommending that one of the challenged ballots be opened and counted and concluding that the status of the other challenged voter and the objections issues could best be resolved after a hearing.

On November 19, the Board issued its Order adopting the Regional Director's recommendation and conclusions. The one challenged ballot, accordingly, was opened and counted on December 12, resulting in a revised tally of 32 for and 34 against representation, with 1 challenged ballot—that of Virginia Klopstock, Respondent's sales training coordinator.

By order dated January 6, 1981, the Regional Director consolidated the objections and complaint matters herein for hearing and decision, stating that it would "not be necessary to litigate" Klopstock's eligibility, her ballot no longer being determinative.

I. JURISDICTION

Respondent is a Virginia corporation engaged in the operation of a chain of discount department stores, including one in Stockton. The Stockton store realizes annual gross revenues in excess of $500,000, and annually takes delivery from outside the State of California of goods valued in excess of $50,000.

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

II. LABOR ORGANIZATION

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

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *David Meanor*

1. Allegations

The complaint alleges that David Meanor, the manager of the housewares department and an admitted supervisor, violated Section 8(a)(1) on or about July 16, 1980, by threatening an employee with the loss of her position and with the loss of various benefits, including seniority rights and privileges, should the Union be voted in; and by telling the employee that Respondent would not sign a bargaining agreement, meaning that the employees "would inevitably have to go on strike," if the Union were voted in.

2. Evidence

These allegations concern a conversation in mid-July between Meanor and Virginia Klopstock.[1]

Klopstock's version. Klopstock testified that she was walking through the housewares department when Meanor, noting her unsmiling countenance, asked what was wrong. She denied that anything was wrong, but Meanor persisted, asking, "Is it the union thing?" Klopstock conceded that she was troubled by the union situation. Meanor suggested that they "go upstairs and talk about it." Klopstock assented, and they went upstairs to the tag room.

In the tag room, Meanor asked if Klopstock had "any questions." She replied, "You tell me why shouldn't I want the Union." Meanor answered that, "personally," he did not think the Union would benefit the employees as much as they thought it would, elaborating that there would be "a lot of hidden things" that the employees probably did not know about. He particularized that, while they might get a pay raise, they would lose benefits elsewhere "to make up for it"; that they would "lose all [their] seniority" and would "start from scratch" as concerns seniority; that, "if you want a day off . . . you won't be able to get it off if the schedule is already posted," whereas, "the way it is now . . . [you] just go up to your manager and ask him and they can arrange it with no problem"; and that they would not "be able to sit here and talk like this anymore, because there's a third party that you'll have to go through, and that'll be the union representative."

Klopstock asked how all this would happen. Meanor said that it would be "step by step"; that winning the election "doesn't guarantee you anything." He continued that, if Respondent should "say no" to the Union's bargaining demands, the Union then would "order" the employees "to go on strike," and they would have no choice but to comply. Meanor added:

> You have to go on strike, and while they're on strike, the Company will not close. They will rehire people to fill your position, send you a letter telling you that your position's been filled and that they do not have to hire you back.

Klopstock asked, "Well, then, what's the point of all this?" Meanor remarked, "Yeah, what's the point?" To Klopstock's asking how he knew these things, Meanor said his brother had been in a union. Meanor concluded the exchange by telling Klopstock "just to keep it between us."

Meanor's version. Meanor, although conceding that he did not remember "this particular conversation . . . really well," testified at length about it. While professing concern that Klopstock looked "upset or tense," Meanor averred that the conversation was initiated by Klopstock saying that she had "some things to talk about" and asking if he "would talk with her." He assented, after which, in the tag room, she raised the recent discharge of three employees. She voiced concern that management could "arbitrarily" discharge people, opining that union representation would give greater job security. Meanor responded that a union would not have made "any difference whatsoever" in the cases she had cited.

Klopstock then remarked that she did not understand "the union situation," that she felt she was being judged "a union person unfairly," and that she was "being picked on" as a result. Meanor assured her that she was not being picked on, and invited her to "come talk to" him whenever she had "any problems."

Meanor described "the negotiation process," explaining that, once the Union "was voted in . . . everything from that point was negotiable, that benefits could be changed"; that, "depending on the contract, [you] could get more, [you] could get less." The main point I was trying to get across to her." Meanor testified, [was] that nothing was definite." Asked by Respondent's counsel if he said in this context that the employees "would start from scratch on all their benefits," Meanor implied that he did, answering, "And they have." He denied saying, however, that any negotiated raise might be at the expense of other benefits.

After describing the bargaining process, Meanor asserted that, regardless, he did not "see how the Company could pay or do more for the Stockton employees . . . , without doing it for the entire Company." "Fairness," he went on, was "what it was all about . . . and that wouldn't happen if we paid the Stockton employees more than Sacramento."

Meanor denied speculating whether Respondent would agree to the Union's demands—"I had no way of knowing"; and denied saying that the employees "would have to go on strike" should agreement not be forthcoming. He admittedly told Klopstock, though, that "if for some reason" there were not an agreement, "that's when you hear of strikes," and that the Union would do "whatever they had to if it came to an impasse." He continued that in the event of a strike Respondent would have "the

[1] Respondent challenged Klopstock's ballot on the ground that, as sales training coordinator, she is a confidential employee. Respondent's counsel stated on the present record, when Respondent rested, that "we have never abandoned our position that Mrs. Klopstock is a confidential employee." As earlier noted, that issue has been excluded from those to be litigated herein in the context of the representation case. Nor need it be resolved in the context of Respondent's alleged unfair labor practices. Assuming without deciding that Klopstock is a confidential employee, she nevertheless is entitled to the protections of the Act under prevailing Board law. *Intermountain Rural Electric Association*, 253 NLRB 1133 (1981), and cases cited. Respondent expressly disavowed any contention that Klopstock is a statutory supervisor.

right to . . . hire replacements," and that those striking "could be permanently replaced."

Meanor denied speaking of the "hidden problems" that go with union representation, only to concede that he told Klopstock of his own "not very good" experiences with a union. He noted, in this regard, that it was "very easy" to arrange a day off as things were, but that with a union in the picture "you worked the schedule." He added that with a union management and the employees would not be able to discuss things "like we [are] doing now."

3. Conclusions

To the substantial degree that their stories diverge, Klopstock is credited. Her recital was richly detailed, internally consistent, and altogether believable. Meanor, apart from admitting that he did not recall the exchange "really well," betrayed a discrediting penchant to be evasive and unresponsive.

Meanor, by juxtaposing the ideas that there would be a strike if Respondent said "no" to the Union's demands; that considerations of "fairness" made it impossible for him to "see how the Company could pay or do more for the Stockton employees . . . without doing it for the entire Company"; that, should there be a strike, the strikers' positions would be filled and Respondent would not "have to hire [them] back"; and, in summary, that there was no "point" to it all, that a strike would be likely if not inevitable were the Union voted in, that those striking would lose their jobs, and that the organizational undertaking in general was a futility. It is concluded that Meanor, by so doing, violated Section 8(a)(1).[2]

It also is concluded that Meanor violated Section 8(a)(1) by saying that, among the "hidden things" about representation, the employees would "start from scratch" as concerns seniority, work schedules would be rigidly binding, and the employees no longer would be able to talk directly with management. The evil of these remarks is their implication that unionization alone would have the stated effects.[3]

It is concluded, finally, that Meanor's comment was not unlawful that the employees would lose benefits elsewhere "to make up for" any wage increases that representation might bring. Meanor plainly was referring to the workings of the bargaining process, and, as the Board has stated:

> An employer is free to indicate to his employees what the possible result of bargaining may be, and to call their attention to the possibility or even probability that certain existing benefits may be traded away for others.[4]

[2] *Richard Tischer, Martin Boder and Donald Connelly, Sr., a limited partnership d/b/a Devon Gables Nursing Home; Richard Tischer, Martin Bader and Donald Connelly, Sr., a limited partnership d/b/a Devon Gables Lodge & Apartments*, 237 NLRB 775, 776 (1978); *Four Winds Industries, Inc.*, 211 NLRB 542 (1974); *Tommy's Spanish Foods, Inc.*, 187 NLRB 235 (1970).

[3] *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969); *Sportspal, Inc.*, 214 NLRB 917 (1974); *Stumpf Motor Company, Inc.*, 208 NLRB 431 (1974).

[4] *Stumpf Motor Company, supra*, 208 NLRB 432.

B. *Terry Sauer (1)*

1. Allegation

The complaint alleges that Terry Sauer, a manager trainee in the toy department,[5] violated Section 8(a)(1) on about July 18, 1980, by prohibiting employees from meeting and speaking with one another during nonwork times and in nonwork areas, to discourage their support of the Union.

2. Evidence

Kevin Sullivan, a sales counselor in the housewares department, testified that he and two coworkers, Gary Petitt and Don Winget, had gathered outside the toy department exit after work on July 18, "trying to decide what [they] were going to do" with their evening. This was their usual after-work practice. A sidewalk about 10 feet wide led from the exit, and they were seated on a planter along the edge of the walk. Sullivan continued that, after they had been there "about 15 minutes," Sauer came out and announced that he would "have to break [them] up," explaining: "I'm sorry, but I was told that

[5] The parties are in disagreement over Sauer's status. The General Counsel contends that Sauer was a supervisor; or, even if not, an agent of Respondent. Respondent argues that he was neither. The ranking person in each of the store's departments is a departmental manager. Beneath the manager in some departments are an assistant manager, who is concededly a supervisor, and a manager trainee. The toy department, at most if not all relevant times, did not have an assistant manager, meaning that it wae run by the manager—a Mrs. Allen—and by Sauer, as manager trainee. The department had about seven employees beneath those two.

The store is open from 10 a.m. to 9 p.m. weekdays, from 10 a.m. to 6 p.m. on Saturdays, and from noon to 5 p.m. on Sundays. Allen and Sauer alternated weekends running the toy department; and worked separate but overlapping shifts during the week, one opening the department in the morning and staying into the afternoon, the other reporting in the afternoon and closing the department at night. In Allen's absence, which also included a week or more when her daughter was ill, Sauer was in command of the department, accountable only to Michael Ebbensteiner, the overall showroom manager, whom Sauer labeled as his "boss."

Aside from the regularly recurring instances in which Sauer was the ranking person present in the department, it is uncontroverted that he attended weekly meetings of assistant managers and manager trainees (the managers attended weekly meetings at other times so that the departments would never be without leadership); shared an office with Allen; did not punch a timeclock, unlike the general run of employees; authorized the acceptance of customer checks and employee use of the departments' telephone; had the authority to give warnings, to permit employees to report late or leave early, and to grant days off; prepared department work schedules; assigned employees from task to task; sometimes evaluated job performance; participated with Allen in the interview of prospective employees; and made notations on timecards, enabling payment for extra hours.

Virginia Klopstock, one of whose duties is to teach new hires "how they are to respond to their managers," testified that Sauer in addition had authority to request that employees work extra hours and overtime; and Gary Petitt, a toy department employee, testified that Sauer in fact made such requests of him "on different occasions." Sauer's denial that he had such authority was unconvincing. As is elsewhere noted, he was not an impressive witness.

Finally, Klopstock credibly testified that she instructed the new hires whom she trained, that managers, assistant managers, and manager trainees were all managers in their departments, all to be accorded the "same respect."

It is concluded from this aggregate of circumstances that Sauer indeed was a supervisor and agent, and that his conduct therefore is binding on Respondent. *Osco Drug, Inc., a wholly owned subsidiary of Jewel Food Companies, Inc.*, 237 NLRB 231, 233-234 (1978).

any more than three employees in any one place at a time were to be considered a conspiracy."

With that, Sullivan went on, he and his companions "just laughed a little bit, got up, and left." He testified that they continued this practice to gather at the same place after work, hearing nothing further from Sauer.

Petitt, a sales counselor in the toy department, corroborated Sullivan in all significant respects. Sauer denied ever speaking to employees in this manner outside the building. offering that he once "had to ask" Sullivan, who was soliciting for the Union in the store while off duty, "to let the employees that were on duty do their work, and . . . to talk to them during their breaks or off-duty hours." Sauer denied ever using the word "conspiracy"—"I wouldn't use the word 'conspiracy."

3. Conclusions

Sullivan and Petitt are credited, as against Sauer's denial, that this incident occurred and was as they recalled. Both were persuasively cogent and forthright in their presentations; whereas, Sauer not only was unresponsive and evasive on frequent occasion but unconvincing in overall demeanor.

Given the surrounding context of a union campaign and the assorted other unfair labor practices found herein, it is concluded that Sauer's dispersal of the three employees on the stated ground that they were "considered a conspiracy" was meant to interfere with and restrain them in their exercise of organizational rights, violating Section 8(a)(1). It is further concluded that, regardless of motive, Sauer's prohibition against the employees' gathering outside the store on their own time, there being no showing of a valid business justification, was in the nature of an unlawfully broad ban on solicitation.[6]

C. *Annette Menius*

1. Allegations

The complaint alleges that Annette Menius, the assistant manager of the housewares department and an admitted supervisor, violated Section 8(a)(1) on or about July 24, 1980, by interrogating an employee concerning his union sentiments, by imparting to the employee "the impression that Respondent had engaged in surveillance of" some of the employees' union activities, and by telling the employee that Respondent "would force a 'stalemate' in bargaining with the Union and that employees would inevitably have to go on strike."

2. Evidence

These allegations concern a conversation on or about July 24 between Menius and Kevin Sullivan, previously identified as a sales counselor in the housewares department.

Sullivan's version. Sullivan testified that after he and Menius had finished discussing another matter, Menius asked, "What do you think about the union campaign?" Sullivan replied that he not only was "in favor of it" but was "working on the campaign."

Menius then showed Sullivan a list of those in the department, with an "X" or "O" designation behind each of about 14 names. After explaining that the designations signified who was prounion and who was procompany, and that the list was being prepared for John Case, regional personnel manager, and Michael Ebbensteiner, showroom manager. Menius asked Sullivan if the designations were accurate. He demurred that he preferred not to answer.

At this point, according to Sullivan, he told Menius that "there was the possibility" that he would file an unfair labor practice charge against her for instituting a conversation with him about the Union. She said that she had done "nothing illegal," then stated:

> If the Union was voted in and it came to negotiations . . . the Company would stalemate such negotiations and force the employees out on strike . . . .

Menius added that the strikers "would then be replaced"; and that Respondent, because of its wealth, "could outlast [the employees] on any strike."

Sullivan countered that Respondent "could not force us legally out on strike"—rather, that that would be the employees' "own personal choice"; and related his understanding of the distinction between economic and unfair labor practice strikers as concerns susceptibility to permanent replacement.

Menius also said, per Sullivan, that Respondent would try to schedule as many as possible of the procompany employees to work the day of the election, leaving off schedule as many as possible of the prounion people.

Menius' version. Menius testified that she and Sullivan "just sort of drifted into the talk about the Union," and that she said:

> [I]f it got to the negotiation table, there could be possibility, I guess, that if the Company and the labor union could not come to an agreement on various terms or what-not, they—it would be kind of like a dead-end thing and there could be the possibility of a strike.

Menius testified elsewhere that Sullivan "raised the subject" of a possible strike, remarking that any strike "would have to be voted on by the employees"; and, at another point, that she could not "really say for sure" whether he or she first broached the subject.

In any case, according to Menius, Sullivan exclaimed, after she had expressed herself as above set forth, that she had "committed a ULP," whereupon he departed and the exchange ended.

Menius denied asking Sullivan about his union sentiments, explaining that his feelings were apparent from the prounion T-shirt he was wearing; or that she said anything about rigging work schedules on election day; or that she mentioned Respondent's having the economic resources to withstand any strike.

Menius denied, finally, that she showed Sullivan a list of employees' names on which their union sympathies

[6] Cf. *K.W. Norris Printing Co.*, 232 NLRB 985 (1977); *Essex International, Inc.*, 211 NLRB 749 (1974).

were denoted. On examination by counsel for the General Counsel, however, she grudgingly admitted that Case and Ebbensteiner had directed the several department managers to "figure out who might be for the Union, and who might be against it"; that she had kept a list indicating whom she thought was of which persuasion; and that she went over the information on that list with Meanor, who was her immediate superior, and with Case and Ebbensteiner.

3. Conclusions

To the considerable extent that their versions conflict, Sullivan is credited. His demeanor and the substance of his testimony suggested both competence and conscientiousness under oath, whereas Menius was often evasive and generally unconvincing.

It is concluded that Menius interrogated Sullivan in violation of Section 8(a)(1) by inquiring of his thoughts "about the union campaign" and by asking him if the designations on her list were accurate;[7] that she imparted the impression of surveillance, further violating Section 8(a)(1), by showing and explaining the list to him;[8] and that she committed yet another violation of that section by remarking that Respondent "would stalemate" bargaining, thereby forcing a strike and causing the strikers to be replaced, which conveyed the notion that representation would be both pointless and destructive of job security.[9]

D. *Terry Sauer (2)*

1. Allegation

The complaint alleges that Sauer, previously identified as a manager trainee in the toy department, violated Section 8(a)(1) on July 25, August 2, and two other dates in July or August 1980 by interrogating employees concerning their and their coworkers' union sentiments.

2. Evidence

Gary Petitt, previously identified as a sales counselor in the toy department, testified of "a couple of" conversations with Sauer concerning the Union. The first, took place in the department manager's office towards the end of July. In it, Sauer asked Pettit how the Union "was going"; Pettit replied that it was "still going strong;" and Sauer then asked Petitt's opinion on why the Union "came in."

The second conversation, as recalled by Petitt, occurred in the same office around the "beginning of August." Petitt testified that Sauer, remarking that he had not heard too much about it of late, asked if the Union was dying down. Petitt assertedly answered that the cause had lost a number of people, but that its proponents were trying to get them back.

Mary Avila, also a sales counselor in the toy department, testified that she had "several" conversations with Sauer about the Union, "starting around July." Avila related that in one such conversation, at the customer service desk on July 25, Sauer asked if she wanted to go into the office with him and talk about the Union. To her negative answer, Sauer reportedly said that he was supposed to talk to all the employees and get their opinion of the Union.

Avila responded, so she said, that Sauer already knew her opinion, prompting Sauer to state that he was not going to use "the propaganda" he had been told to use. Avila persisted that she did not "want to discuss it," and Sauer allegedly said: "Let me say just one more thing. . . . [I]f you do not vote, it'll be a vote for the Union."

Sauer, while not addressing these particular pieces of testimony, denied generally that he ever questioned anyone about the Union—"No, sir, we were instructed not to."

3. Conclusions

Petitt and Avila are credited that Sauer made the remarks attributed to him. Sauer, as previously mentioned, was unconvincing both in testimonial content and demeanor. Petitt and Avila, in contrast, came across as sincere and capable witnesses.

It is concluded that Sauer violated Section 8(a)(1) by asking Petitt how the Union "was going," why it "came in," and if it "was dying down.[10] It also is concluded that Sauer in effect interrogated Avila about her union sympathies by the combination of his asking her if she wished to talk to him about the Union and telling her that he was supposed to obtain the employees' "opinion of the Union"; and that he thereby further violated Section 8(a)(1).

E. *Terry Sauer (3)*

The complaint alleges that Sauer violated Section 8(a)(1) on about August 2, 1980, by threatening an employee "with the inevitability of a strike and loss of employment" should the Union be voted in.

2. Evidence

Kevin Sullivan, previously identified as a sales counselor in the housewares department, testified that on August 2 while on vacation he went to the store to see when Gary Petitt would be getting off. Sullivan was wearing a prounion T-shirt. According to Sullivan, Sauer came up to him and remarked, "Don't you like working for the Company?" Sullivan assertedly replied that he did, whereupon Sauer stated that. "if the Union was voted in," Respondent "would force" the employees "out on strike" and they "wouldn't be coming back."

Sauer further stated, as Sullivan recalled, that he would "really miss" working with him and his coworkers, because they were a "great group"; and that "even if the Union lost the election" the employees "could still possibly lose" their jobs, for Respondent "would not forgive and forget."

Petitt was present during this exchange, according to Sullivan. Petitt corroborated Sullivan in this regard, and

[7] E.g., *PPG Industries, Inc., Lexington Plants Fiber Glass Division*, 251 NLRB 146 (1980); *Didde-Glaser, Inc.*, 233 NLRB 765 (1977).

[8] *Tipton Electric Company, and Professional Furniture Company*, 242 NLRB 202 (1979).

[9] See fn. 2, *supra*.

[10] See fn. 7, *supra*.

with respect to the salient substantive features of Sullivan's recital.

Sauer denied participation in any incident of this character—"No, sir, we were instructed not to mention anything of that nature."

3. Conclusions

For reasons earlier stated, Sullivan and Petitt are credited that Sauer bespoke himself as they described. It is concluded that Sauer, by indicating that a strike necessarily would follow from Respondent's bargaining posture, with attendant job loss to the strikers, conveyed the idea that representation would be at once a futility and a peril; and that he consequently violated Section 8(a)(1).[11]

F. *Michael Ebbensteiner*

1. Allegation

The complaint alleges that Ebbensteiner, previously identified as the showroom manager, an admitted supervisor, violated Section 8(a)(1) on and after June 24, 1980, by engaging in surveillance of the employees' union activities.

2. Evidence

The Stockton store has a single small lunchroom. It has food and drink vending machines, a refrigerator, a microwave oven, a few tables and chairs, a stereophonic radio, and sometimes a television set; and is for the use of both management and rank-and-file personnel. Some make purchases there and leave; others spend their breaks and/or lunch periods there. The weight of evidence indicates that it receives considerably more use from rank-and-file personnel than from management.

Ebbensteiner's office is down the hall from the lunchroom. Virginia Klopstock testified that, when the lunchroom door is open, lunchroom conversations can be clearly heard in Ebbensteiner's office.

Before the union campaign the lunchroom door was propped open most, if not all, of the time. With the campaign's onset, employees gathering in the lunchroom routinely closed the door so that their discussions of issues relating to the campaign would not carry outside. Just as routinely, the door would be reopened from the outside. Klopstock, who had a desk a few feet from the door, testified that the door was closed and opened in this manner "sometimes 10 times a day"; that it "got to be a game"; and that those recurrently opening the door were Ebbensteiner and his secretary, Joyce Davis.

Klopstock further testified that she once told Ebbensteiner that the employees were "upset about" the continued reopening of the door, and that he responded that he liked the door open "to hear the music." Before the campaign, according to Klopstock, Ebbensteiner sometimes turned off the radio in the lunchroom, presumably because it disturbed him.

Kevin Sullivan testified that when Joyce Davis once opened the door during the campaign she commented that she had been told that the door "must remain open." Sullivan also testified that he once complained to John Case, the regional personnel manager, about the "problems with the door"; and that, while Case said he would "check on it," nothing changed.

Gary Petitt corroborated Klopstock that the door "generally" stayed open before the campaign; and that, though it was frequently closed by the employees during the campaign, "it would always get opened again." Petitt, however, could not identify those opening it—"I've never seen anybody come out and open it.

Neither Ebbensteiner nor Davis testified.

3. Conclusions

It is inferable from the recitals just set forth, particularly Klopstock's, and absent testimony to the contrary, that Ebbensteiner was behind the recurrent opening of the door. And, while it might be speculated that his purpose was to ensure that the room's intended use not be subverted by a certain employee faction, neither he nor anyone else offered testimony giving substance to such speculation.

The further inference necessarily follows that Ebbensteiner's purpose was to eavesdrop, and to impart the impression that he was eavesdropping, on the employees' discussions of the Union. It is concluded, therefore, that Ebbensteiner violated Section 8(a)(1).

CONCLUSIONS OF LAW

As previously concluded, Respondent violated Section 8(a)(1) by:

1. Imparting to its employees the impression that should the Union be voted in a strike was likely if not inevitable; that those striking would lose their jobs; and that the organizational undertaking in general was a futility.

2. Stating or implying to an employee that unionization would result in the employees' "starting from scratch" as concerns seniority, in work schedules becoming rigidly binding, and in the employees' no longer being able to talk directly with management.

3. Forbidding three employees from gathering outside the store on their own time, thereby issuing what amounted to an overly broad no-solicitation rule.

4. Interrogating employees about their opinions concerning the Union, and about their and their coworkers' union sympathies.

5. Imparting to its employees the impression that their union activities were under surveillance, and in fact engaging in surveillance of such activities.

THE OBJECTIONS

The several instances of misconduct above found occurred during the "critical period" after the June 30, 1980, filing of the election petition. It is concluded that this misconduct is sufficient to overturn the election.

[11] See fn. 2, *supra*.

ORDER[12]

The Respondent, Best Products Co., Inc., Stockton, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Imparting to its employees the impression that, should the Union be voted in, a strike is likely if not inevitable; that those striking will lose their jobs; and that the organizational undertaking in general is a futility.

(b) Stating or implying to its employees that unionization will result in their "starting from scratch" as concerns seniority, in their work schedules becoming rigidly binding, and in their no longer being able to talk directly with management.

(c) Forbidding employees from gathering outside the store on their own time, thereby issuing an overly broad no-solicitation rule.

(d) Interrogating employees about their opinions concerning the Union, and about their and their coworkers' union sympathies.

(e) Imparting to employees the impression that their union activities are under surveillance, and in fact engaging in surveillance of such activities.

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

2. Take this affirmative action:

(a) Post at its store in Stockton, California, copies of the notice which is attached and marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the election of September 16, 1980, be set aside and a new election directed.

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

[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."