

Bauer Welding and Metal Fabricators, Inc. and District Lodge No. 77, International Association of Machinists and Aerospace Workers, AFL-CIO.
Case 18-CA-6957

29 February 1984

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS ZIMMERMAN, HUNTER, AND DENNIS

On 19 May 1983 Administrative Law Judge Robert A. Giannasi issued the attached supplemental decision on remand. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the supplemental decision and record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions.²

ORDER

The National Labor Relations Board hereby reaffirms its Order previously issued on 18 May 1981, and orders that the Respondent, Bauer Welding and Metal Fabricators, Inc., Mounds View, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the original Decision and Order in this proceeding (256 NLRB 39 (1981)).

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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We adopt the judge's conclusions that the several incidents of alleged coercion did not interfere with employee free choice in the election. In so doing, we emphasize that, while we do not condone conduct of the type described in the objections, we find that in the totality of the circumstances here such conduct is insufficient to warrant setting aside the election. In agreeing with the judge that the parking lot incident involving employee Philippi did not constitute objectionable conduct, Members Hunter and Dennis find it unnecessary to rely on the judge's discussion of agency but rely solely on his finding that the incident in any event was isolated and remote in time.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge: This case was tried in Minneapolis, Minnesota, on December 14, 1982, pursuant to an order of the Board dated September 17, 1982, directing a hearing required by the United States Court of Appeals for the Eighth Circuit.

On April 28, 1982, the court of appeals, one judge dissenting, issued a decision¹ denying enforcement of a Board order² finding that Respondent had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Charging Party Union (the Union) which had been certified by the Board as having won a representation election. The certification was dated August 26, 1980, and the Board's bargaining order was dated May 18, 1981. The court considered Respondent's objections to the election, which had been rejected without a hearing, and remanded the proceeding to the Board for "an evidentiary hearing on the coercion and misstatement issues only."

The first issue remanded for hearing involves a two-page handout distributed by the Union to Respondent's employees. The first page of the handout, after warning that employers typically resort to threats to discourage unionization, stated as follows:

On the next page you will find a reproduction of a letter signed by a Chairman of the NATIONAL LABOR RELATIONS BOARD. Please note (in the second paragraph) that an employer *cannot* close down the plant because the Union has established its majority status and bargaining rights.

Further, please note that an employer *cannot* reduce wages or take away benefits such as insurance and pensions. **DON'T BE FOOLED BY COMPANY RUMORS!!!** [Emphasis in original.]

The second page of the handout was a copy of a letter, dated July 22, 1964, written by then Board Chairman Frank McCulloch which stated as follows:

As a general proposition, an employer cannot reduce wages or take away any insurance or other benefits, or close down the plant because the union has established its majority status and bargaining rights. Neither can he threaten to do so if the union wins an election. Such conduct would be in direct contravention of the underlying principles of the National Labor Relations Act, which our Board enforces. [Emphasis deleted.]

The court rejected the contention that the statements concerning the closing of the plant were misrepresentations but held that the unqualified statement that "an employer *cannot* reduce wages or take away benefits" was "not an accurate statement of the law," because such reductions are permissible where they are the result of good-faith bargaining and no mention of this possibility appeared in the handout or the letter. The court ordered a hearing on the materiality of the "misstatement" as well as the opportunity of Respondent to rebut it.

The court also directed a hearing on certain issues of alleged coercion raised by Respondent, specifically whether the election was tainted by the Union's mailing of letters to supervisors erroneously advising them that violations of the Act could lead to criminal penalties and

¹ 676 F.2d 314 (1982).

² 256 NLRB 39 (1981).

by alleged threats to an employee by another prounion employee concerning the signing of a union authorization card. The court also ordered a hearing "on the other alleged incidents of coercion."

Based on the entire record in this proceeding and the briefs of the parties, and giving full consideration to the demeanor of the witnesses who testified herein and the manner in which they testified, I find and conclude that the alleged misconduct did not preclude a fair and free election and therefore the election of March 20, 1980, was valid. In support thereof, I make the following

FINDINGS OF FACT

I. THE UNION HANDOUT

The union handout specifically under consideration herein was either the first or one of the first distributed by the Union in its campaign. It was distributed in mid-January 1980, according to Respondent's then personnel manager, Thomas Kranz. The handout will be referred to by its apparent title, the "Bombs Away" handout. The election itself was held on March 20, 1980. The Union won the election by a vote of 32 to 20. There were no challenged ballots.

At the time of the decisions of the Board and the Court, the applicable legal principle was the so-called *Hollywood Ceramics* rule. *Hollywood Ceramics Co.*, 140 NLRB 221 (1962), reaffirmed, after an intervening turn of policy, in *General Knit of California*, 239 NLRB 619 (1978). That rule provided that an election would be set aside if a party's misrepresentation involved a substantial departure from the truth and was made at a time when the other party could not make an effective reply, such that the misrepresentation could reasonably be expected to have a significant impact on the election. *Hollywood Ceramics*, above, 140 NLRB at 224. On August 4, 1982, the Board issued its decision in *Midland Life Insurance Co.*, 263 NLRB 127 (1982). In *Midland*, the Board decided to return to the policy articulated in *Shopping Kart Food Market*, 228 NLRB 1311 (1977), which enjoyed a brief life span between *Hollywood Ceramics* and *General Knit*. Thus the Board now declines to entertain objections based on misrepresentations unless the material involves forged documents or the alteration of official Board documents. In *Midland* the Board also specifically considered the question of whether the new rule should be given retroactive effect. The Board concluded that the rule should be applied to "all pending cases in whatever stage." *Midland*, supra at 133 fn. 24, quoting from *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006-07 (1958).

In *Midland* the Board took note of criticisms of its *Hollywood Ceramics* rule and, in particular, of an empirical study of Board elections which concluded that few employees are influenced significantly by campaign materials. After weighing the costs and benefits of close regulation of campaign propaganda, the Board held that it would no longer probe into the truth or falsity of parties' campaign statements. Thus, the Board determined that it would intervene only in cases "where a party has used forged documents which render the voters unable to recognize the propaganda for what it is" or "when an

official Board document has been altered in such a way as to indicate an endorsement by the Board of a party to the election." *Midland*, supra at 133 fn. 25. The Board explained that its new rule

. . . is a clear, realistic rule of easy application which lends itself to definite, predictable, and speedy results. It removes impediments to free speech by permitting parties to speak without fear that inadvertent errors will provide the basis for endless delay or overturned elections, and promotes uniformity in national labor law by minimizing the basis for disagreement between the Board and the courts of appeals. Weighing the . . . *Shopping Kart* rule against the possibility that some voters may be misled by erroneous campaign propaganda, a result that even *Hollywood Ceramics* permits, we find that the balance unquestionably falls in favor of implementing the standard set forth in *Shopping Kart*. [Id. at 132.]

A threshold question in this proceeding is whether the Board's determination to apply its *Midland* rule retroactively to all pending cases applies as well to the instant case which is on remand from the court of appeals. It is true that the court of appeals, in its opinion, applied the Board's *Hollywood Ceramics* rule because that was the rule then in existence. In view of the discretion accorded to Board rules governing representation cases, it is likely that the court would also give deference to *Midland* if a case came before it for review under that rule. In this case, however, the court has already reviewed the matter under the *Hollywood Ceramics* rule. While the question of which rule to apply on remand is ultimately for the Board or the court itself to resolve, I believe that, in the unique circumstances of this case, the better course for me is to apply the *Hollywood Ceramics* rule as the law of the case.³

Turning to the question of whether the Union's statement that an employer cannot reduce wages or take away benefits, together with the McCulloch letter, had a significant impact on the election sufficient to warrant its being set aside, I apply the *Hollywood Ceramics* rule and I find that the statement did not preclude a free and fair election.

The Bombs Away handout must be considered in context. It was the opening salvo in the campaign. It specifically stated that employers typically threaten employees to discourage the election of unions. The handouts specifically refer to the McCulloch letter which states that "an employer cannot reduce wages or take away any insurance or other benefits . . . because the union has established its majority status and bargaining rights. Neither can he threaten to do so if the union wins an elec-

³ It seems plain to me that, under the *Midland* rule, the statement found by the court to be inaccurate would not require that the election be overturned. Respondent argues to the contrary, contending that, by attaching the McCulloch letter to its handout, the Union in effect altered an official document so as to compromise the Board's neutrality. I disagree. There was no alteration of a Board document in this case and the court specifically found that use of the letter did not compromise the Board's neutrality (676 F.2d at 321).

tion" (emphasis added). The McCulloch letter thus conditions the prohibition against employer action to situations based on retaliation or discrimination against employees for selection of a union. The Union's handout likewise focused on possible retaliation. Nothing in the handout or McCulloch's letter even suggested what would happen if and when the Union won bargaining rights or what would happen during negotiations. This was not the focus of the Union's handout which, as the Bombs Away caption suggests, was an effort to open the campaign by reassuring employees that the employer could not lawfully retaliate against them for supporting the Union.

The court directed that other union handouts be considered in evaluating the materiality of the contested statement. When the other handouts are considered—not only those of the Union, but also those of Respondent, it becomes clear that the court's concern, namely, that the Union's statement failed to mention that wages and benefits could be reduced after good-faith bargaining, did not preclude a free election. This is because the other handouts make quite clear that wages and benefits would be subject to the negotiating process, and, as Respondent's campaign literature and its officials' campaign statements made clear, could even be lowered after negotiations.

Unlike the contested handout, other union handouts did discuss what the Union might obtain for employees after bargaining should it obtain representation rights. Naturally, the Union promised it would win better wages and benefits. This is expected election-type rhetoric. Indeed, in one leaflet, the Union "guarantee[d]" that present wages and benefits "will not be reduced or abolished unless such reduction or abolition is acceptable to a majority to negotiate with the *IAM* in good faith after a majority of the workers voting in the NLRB secret ballot election vote in favor of the *IAM*," and that "the company is required to sign an *IAM* contract once such contract has been negotiated." Another union handout emphasized the importance of having a written contract to protect wages and benefits. Still another cited Labor Department statistics which showed that the earnings of union represented workers were greater than nonrepresented workers. Another handout, apparently in response to campaign charges by Respondent, stated that "a work stoppage is *not* the only answer when the *IAM* and the company cannot reach agreement. *MEDIATION* is the alternative." This handout also quoted a nostrum that "Collective bargaining is an indispensable ingredient of a free industrial society."

The Bombs Away handout was distributed early in the campaign. Then Personnel Manager Tom Kranz testified that, throughout the campaign, he made efforts to rebut the claim of employees that they could not lose anything by selecting the union to represent them. Indeed, after the distribution of the Bombs Away handbill, Respondent's officials held a meeting about the handbill and discussed how to respond to it. There was a written response distributed by Respondent specifically addressed to the Bombs Away handout. As Kranz testified, in the written response, "[W]e said that they—there were any number of ways that things could happen during negotiations. Things could stay the same; or things could—

wages or benefits could go down, or they could go up. We didn't [sic] that they would always go up." It is also apparent from the record that Respondent held meetings with employees on the issue of what would happen to wages and benefits after the Union came on the scene.

I now turn to an analysis of Respondent's other campaign material. Exhibit 16 attached to the Regional Director's Report on Objections contains letters to employees dated February 14 and 21, and March 7, 14, and 17, 1980. All were distributed after the Bombs Away handout. Some of the letters contain attachments. It is clear that, in this material, Respondent not only answered the Union's campaign statements, but it also addressed the issue which concerned the court.

In the attachment to the February 14, 1980 letter, titled "Information fact sheet No. 1," Respondent stated, "If the Union wins the election, it only means that Bauer Welding must recognize the Machinists as your representative. The law does not require Bauer Welding to agree to anything that it does not feel is in the best interest of the company and its employees. There is no law that forces us to agree with any demand of the union." In the same document Respondent answered the question, "Can the union guarantee any better wages or benefits than we have now?" by stating "No. The Union would like you to believe that they can increase your wages by a dollar an hour and vastly increase paid holidays and other benefits. The absolute truth of the matter is that the union can't guarantee you anything. Wages and other benefits are all negotiable items and the company is not required to make any concessions to the union. It is simply required to bargain in good faith." Respondent also stated that the union was free to make "whatever promises it wants because they don't have the power to actually implement those promises unless the company agrees to do so. The law prohibits employers from making promises about wages and benefits during a campaign because the employer does not have the power to increase wages and benefits." Finally, Respondent stated as follows:

If the union can't get what they want during negotiations they could [sic] do one of three things:

1. They could walk away and disclaim any interest in representing you.
2. They could agree to accept whatever the company had offered, if anything.
3. They could call a strike.

Respondent then suggested that the Union would have to strike to get its way.

Other campaign material distributed by Respondent made the same point. On February 21, 1980, Respondent emphasized, "*All the union can do is ask*" (emphasis in original). The March 7, 1980 letter refers to an earlier occasion wherein employees "had the opportunity to see how your wages and benefits stack up with those paid to employees who are members of the Machinists Union." On March 14, 1980, Respondent emphasized that "*No one can make Bauer Welding agree to any demand or make any concessions to the union—not a mediator, not an*

arbitrator. If Bauer Welding and the union can't reach an agreement through negotiations, there is no contract. The National Labor Relations Act guarantees employers this right." (Emphasis in original.)

In view of the above, I find that the misstatement in the Bombs Away handout, taken together with the McCulloch letter, could not reasonably be expected to have a significant or material impact on the election. To the extent that the handouts failed to mention the possibility of a loss of benefits after good-faith bargaining, the subsequent handouts of both the Union and Respondent focused on the issue of what would happen after negotiations and those handouts completely corrected whatever impact flowed from the omission in the Bombs Away handout. These subsequent handouts and responses by Respondent all took place after the distribution of the Bombs Away handout. The election was some 2 months later. In these circumstances, I cannot conclude that any employee reasonably could have believed that Respondent could not reduce benefits after engaging in good-faith bargaining negotiations or that Chairman McCulloch's letter said as much.

Respondent also relies on certain testimony which it asserts shows that employees believed that there was no way they could lose by having a union represent them. For example, Respondent's former personnel manager, Tom Kranz, testified that the "gist" of his conversations with two employees concerning the Bombs Away handout was that "there was no way they could lose by having a union represent them. They felt that they would only gain more benefits and wages." He also testified generally about other conversations not directly related to the Bombs Away handout where employees expressed similar views. Kranz further testified that he attempted to rebut the claims that "they could not lose, they could only gain" of the employees to whom he spoke. Kranz told them that "in negotiations, if it came to that, things could stay the same; they could go down, as far as wages and benefits; or they could increase." General Foreman Charles Matson also testified that he spoke to several employees who referred to the McCulloch letter. He could not remember the details of the conversations, but he stated the "basic gist of all of them was that they could only gain, they could not lose." Matson told these employees and others who made similar statements that everything was negotiable.

Respondent seeks to counter the evidence that Kranz and Matson were able to tell employees that wages and benefits would not be increased and that after negotiations they might even be lowered. Respondent relies on Matson's testimony that he felt employees believed his arguments at first but that they did not later in the campaign. I find this a meaningless piece of testimony for, if the McCulloch letter had any impact at all, it would have been shortly after its distribution. Later in the campaign the two sides exchanged essentially truthful salvos on the issue of wages and benefits after negotiations which the employees could clearly assess for themselves. Kranz' feeling that the employees were not convinced by his responses is of the same character. It is not the type of objectively based testimony which can be utilized in

determining whether the responses were sufficient to correct the apparent misstatement of the Union.

The above testimony is of questionable reliability because of its subjective and conclusory character. It attempts, through Respondent's own supervisors, to plumb the feelings of employees some 2 years after a secret-ballot election. The Board normally makes its determination whether to set aside an election "on an objective basis—i.e., on whether the alleged misconduct would reasonably tend to prevent the holding of a fair and free election—rather than on the subjective statements of the employees as to whether they were 'coerced' or 'misled' into voting as they did." *Litton Industrial Products*, 221 NLRB 700, 708 (1975), enf. denied on other grounds 543 F.2d 1085 (4th Cir. 1976) and cases there cited. Cf. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 608 (1969).

More importantly, perhaps, the testimony of Kranz and Matson does not shed light on whether the employees were misled by the misstatement which concerned the court. Only if employees believed that Respondent could not lawfully reduce benefits after bargaining in good faith would the misstatement have operated to have an undue impact on the election. None of Respondent's testimony establishes this fact, particularly since the supervisors answered the employees' remarks by making the same statements Respondent made in meetings, in campaign speeches, and in its literature, to the effect that wages and benefits would be the subject of negotiations and could even be lowered.

Likewise insufficient to show that the Union's misstatement misled employees into believing that the Union could get increased benefits without negotiations or that benefits could not be decreased after negotiations is the testimony of the three employee witnesses on this point. None of the testimony shows that the Union's misstatement precluded a free election.

Only one employee, Richard McIver, was able to directly relate his testimony to the Bombs Away handout. In response to questions by Respondent's counsel, McIver testified that he and other employees discussed the Bombs Away handout and that he believed the Union's statement that Respondent could not reduce wages and benefits. On cross-examination, however, McIver made it quite clear that he understood that the Union's promises, including those involving wages and benefits, were matters which were negotiable and that there was a chance that the Union would not obtain the wages and benefits it sought. Indeed, McIver was one of the two employees whom Personnel Manager Kranz specifically identified as having discussed the Bomb Away handout with him. Kranz testified that he told McIver that all matters were negotiable and that benefits could even be lowered after negotiations.

Employee John Wolyniec testified that he saw the Bombs Away handout at a union meeting. He also testified that he had conversations with several employees wherein someone said that "we can't lose anything," but that none of these conversations involved the Bomb Away handout. He could not remember names of employees or details of any of these conversations. Wolyniec's testimony on this point was so vague and general

that I cannot justify basing findings of fact on it. Nor do I consider reliable his subjective and conclusory testimony that he did not believe Respondent's officials who told employees "at meetings and through literature that the Union's statement that wages and benefits could not be reduced was not true." He testified that he did not believe Respondent's remarks because of "what I read there, you know, coming down from some court." When asked what court, he answered, "National Relations Board, right?" and then gave an affirmative response to a leading and conclusory question. This testimony seemed to me, based on the demeanor of the witness and his responses, to have been tailored to meet Respondent's litigation theory. Wolyniec seemed also to be a very pliable witness. He testified that he read the Bombs Away handout at a union meeting and that, at one of the meetings, union organizer Mike Woltz stated that Respondent could not take away current benefits. On cross-examination, he testified he was unsure whether he received the handout in the mail and admitted that Woltz said that Respondent could not take away benefits "just because" employees "voted for a Union." Wolyniec was the type of witness who would respond favorably to whoever was questioning him. I did not find him to be a reliable witness and I cannot credit any of his testimony.

Employee Robert Lichtenberg testified that he could not remember any conversations about the Bombs Away handout, but he did remember speaking to employees, only one of whom he could specify, who said "we have everything to gain and nothing to lose." Lichtenberg was unable to put the specific conversation or any of the others in context. I cannot regard his testimony reliable on this point.

In summary, I found little in the testimony of the two management officials and the three employee witnesses which would establish, on an objective basis, that the Union's misstatement had a significant impact on the outcome of the election. None of the testimony suggests that the employees believed that the Union would gain increased benefits without negotiations or that Respondent could not reduce benefits after bargaining in good faith. In these circumstances, I find that the misstatement in the Bombs Away handout did not have a material or significant impact on the election.

In any event, it is clear on this record that, to the extent that there was any implication that benefits and wages could not be reduced even after good-faith bargaining, Respondent had ample opportunity to, and actually did, effectively reply to the misstatement. I am aware of the court's concern as to "whether Bauer could ever effectively or credibly rebut a misstatement buttressed by a document such as Chairman McCulloch's letter." However, after full consideration of the campaign literature—all of which postdated the Bombs Away handout, I conclude that the employees were not misled into believing that wages and benefits could not be decreased after good-faith bargaining. Moreover, it is clear on this record that Respondent's officials, through meetings, distribution of literature, and numerous contacts with employees, specifically rebutted the misstatement. They told employees that anything could happen after negotiations, including a decrease in wages and ben-

efits. It was also specifically mentioned that the law did not require Respondent to agree to anything. Respondent thus has not shown that the employees here were so naive as to believe that union promises would not be met with employer resistance in negotiations.

Respondent also contends that nothing it could have done would have rebutted the misstatement because it was enhanced by the McCulloch letter. In support of this contention, Respondent cites and relies on *Thiokol Chemical Corp.*, 202 NLRB 434 (1973). That case does not support Respondent's position because it is distinguishable on its facts.

In *Thiokol*, the Board set aside an election because an employer used an out-of-date Board document which misstated the reinstatement rights of economic strikers. The employer chose to reprint a 1962 document on this point rather than a 1970 document which superseded the earlier document and expressed the current state of the law. The reprint was mailed to employees 9 days before the Board election. The Board rejected the view that the employer's conduct was simply a misrepresentation subject to correction if there was an opportunity to reply. It emphasized that the case involved the use of an official Board document which, because it was out of date, misstated the applicable law. Here, unlike in *Thiokol*, the McCulloch letter was accurate as far as it went. It failed simply to mention the contingency of what could happen after negotiations. Moreover, the record in this case clearly shows that the parties had 2 months—as opposed to 9 days in *Thiokol*—to join campaign issues after the McCulloch letter was distributed. In that 2 months the parties did address the issue not covered in the McCulloch letter. Finally, the court's decision makes clear that use of the McCulloch letter did not compromise the Board's neutrality (676 F.2d at 321). It was this factor which caused the Board in *Thiokol* to reject the contention that the case before it simply involved a misrepresentation under *Hollywood Ceramics* and was thus subject to correction by the other side. Accordingly, I do not believe that *Thiokol* compels a finding, in the instant case, that Respondent could not effectively counter the Union's misstatement.

Far from supporting Respondent's position, consideration of the *Thiokol* case points to the propriety of upholding the election in this case. For in the very same type of issue as was involved in *Thiokol*—the significance of election campaign statements concerning the reinstatement of strikers—the Board has refused to set aside elections where the employer's explanations fall short of setting forth all possible conditions and alternatives. For example, in *Care Inc.*, 202 NLRB 1065 (1973), the Board was faced with an election objection that an employer had told employees that, if they struck, they could be permanently replaced—which was true—but failed to tell them also that if such eventually occurred they would have certain reinstatement rights and that their rights in an unfair labor practice strike would be even greater. The Board reversed the administrative law judge who had overturned the election on the basis of the objection. As the Board stated in another case of this type, an employer may address the subject of striker replacement

without fully detailing the protections and rights enumerated in relevant cases so long as it does not threaten a deprivation of those rights. "To hold otherwise would place an unwarranted burden on an employer to explicate all the possible consequences of being an economic striker." *Eagle Comtronics, Inc.*, 263 515, 516 (1982). Accordingly, it appears to me that the instant case is closer to *Care Inc.* and *Eagle Comtronics* than it is to *Thiokol*. The Union's misstatement here was one of omission and the omission was fully dealt with by the Respondent in the statements of its officials and in its campaign literature. None of the employees could have been misled as to what might happen after good-faith bargaining.⁴

II. THE ALLEGED COERCION ISSUES

Respondent argues that certain letters sent by the Union to its supervisors during the election campaign were coercive and required that the election should be set aside. I disagree.

The letters were sent on or about February 5, 1980, and received by February 11. They stated, in general terms, the nature of the election campaign and set forth certain sections of the Act which prohibited coercion against employees. The letters also stated that "you are being compelled to commit acts of improbity" and went on to point out that violations of the Labor Act are punishable by a fine of not more than \$5000 or by imprisonment of not more than a year. This was clearly erroneous since the Act's sanctions are remedial and not criminal.⁵

Union organizer Mike Woltz testified that the letters were written because it had been reported to him that Respondent's officials were committing unfair labor practices. Charges to this effect were in fact filed on March 5, 1980, and a complaint issued. The matter was settled and the settlement agreement contained a nonadmissions clause. There is also testimony that several employees talked to supervisors both before and after they received the letters. These conversations dealt with the fact that supervisors were going to receive such a letter, questions as to whether they had received such letters, and what the supervisors thought of the letters.

The record also reveals that, within a day or two of receipt of the letters, Respondent called a meeting of supervisors where Vice President and General Manager Gary Bauer, as well as Respondent's labor attorney, spoke to supervisors about the letters. Respondent's higher management specifically countered and corrected the erroneous statement in the letters. According to Bauer, "We discussed those assertions [that there could be fines and jail sentences for violations of the Act] and

⁴ The remaining cases cited by Respondent are also distinguishable because they involved not misstatements by virtue of an omission of qualifying principles but actual misrepresentations of legal principles. Moreover, the circumstances were more compelling for overturning the elections. In *Southwest Latex Corp.*, 175 NLRB 1 (1969), *K-F Products*, 170 NLRB 366 (1968), and *Lake Superior District Power Co.*, 239 NLRB 1275 (1979), the misrepresentations were made 1 or 2 days before the election at a time when the employer had no opportunity to reply. Here, the misstatement occurred 2 months before the election.

⁵ Perhaps the letter intended a reference to Sec. 12 of the Act which provides for the above penalties where a "person" willfully resists or interferes with Board agents in the performance of their duties.

we informed them that the assertions were false. That those were criminal penalties and they could not [sic] imposed on supervisors for unfair labor practices."

I fail to see how the letters could have had any significant impact on the election. They were addressed to supervisors and, to the extent that the misstatement had any restraining effect on their participation on behalf of management in the campaign to defeat the Union, it was dissipated by the meeting in which higher officials, including a labor lawyer, corrected the misstatement. Moreover, several supervisors testified that they continued thereafter to campaign on behalf of Respondent's position, consistent with instructions from higher officials and Respondent's labor counsel. Nor was there any evidence that employees were influenced in any way by the fact that such letters were sent to supervisors.

In connection with Respondent's contention concerning the letters to the supervisors, Respondent cites the testimony of Supervisor Jack Schauls who told of an incident where he was approached by employee Richard McIver. McIver accused Schauls of lying to employees in the course of his antiunion campaigning. He told Schauls to "walk the middle of the road" during the campaign because, if the Union won the election, it would "try to get rid of some of the troublemakers." Schauls testified that he believed the union supporters would try to pressure Respondent to fire him if the Union won the election. Schauls also testified that he spoke to management officials about this fear, although he did not remember the details of any such conversation. He was, however, assured by management officials that the Union's letter warning of criminal penalties for unfair labor practices committed by supervisors was erroneous.

Nothing in Schauls' testimony compels a finding that McIver's remarks had a significant impact on the election. First of all, McIver was not shown to be a union agent. Secondly, there is no evidence that voting employees know of or were affected by this incident. See *NLRB v. Southern Paper Box Co.*, 506 F.2d 581, 585 (8th Cir. 1974). Finally, it is hard to believe that McIver or anyone else would be able to carry out a threat to get a supervisor fired because he was supporting his employer too strongly in an election campaign in which the employer's intent to defeat the possibility of union representation was clearly stated and publicized. Indeed, if Schauls valued his job, he might well have campaigned even harder to defeat the Union.

Other allegations of coercion on the part of the Union are likewise not sufficient to show a significant impact on an election which the Union won by a margin of over 3-to-2.

There was, for example, an allegation that employee Dennis Philippi was coerced early in the campaign to sign a union authorization card. The evidence is as follows: One day, at the plant, Philippi was handed a union card by employee Gary Daiker who asked him to sign it. Philippi promised to do so, but he apparently did not sign the card at that time. Later, on January 23, Philippi attended a union meeting. Near the end of the meeting, Daiker called out, "Hey, Philippi, are you going to sign

a card now?" Philippi was then handed a card by employee Richard McLellan and signed it. After the meeting, Philippi went out to the parking lot and prepared to go home. It was about 6 o'clock and "very dark," according to Philippi. Philippi testified that he was approached by several employees, including Daiker. Daiker poked his finger at Philippi and said "he [Philippi] better have meant it by signing that card." Philippi at first testified that he could not remember whether the other employees said anything; later he testified they "just said they hoped I meant [sic] by signing the cards." The other employees were identified as McLellan, Pete Madison, and Mark Robbins. The incident in the parking lot lasted 2 or 3 minutes.

In answer to a leading question, Philippi testified that he was worried during the confrontation because of Daiker's reputation which other employees testified was that of a violent or volatile person. Actually, Philippi testified that he had had a "run in" with Daiker at work about a year before the election. Philippi testified as follows about this "run in":

A. Well, one day he shot a paperclip into my back and I told him what I thought about him. And he says, Oh, don't get your feathers all ruffled, or I'll take care of you. So I just walked away and got lost.

Philippi reported the January 23 parking lot incident to Personnel Manager Kranz. There is no evidence that Daiker or any of the other prounion employees harassed or even spoke with Philippi during the remaining 2 months of the campaign. Philippi specifically stated that he had no "run ins" with Daiker after the parking lot incident.

Respondent alleges that Daiker and the other employees involved in the parking lot incident had a "special relationship" with the Union because they attended special meetings with union organizer Woltz wherein he discussed the union campaign and gave them literature to distribute at the plant. The evidence on this point, which Respondent alleges either established an agency status or otherwise binds the Union for the conduct of these individuals, is as follows: Employee Richard McLellan, one of the employees present during the parking lot incident and one of those who attended the special meetings, testified that he and Mark Robbins attended most of the meetings. He also testified that "whoever cared to attend" did so, and several other employees, including Madison and Daiker, attended these meetings. Daiker attended "at least one of them." McLellan actually signed two letters sent to Respondent which dealt with the union campaign. These letters, which were on plain paper and signed by McLellan speaking as an employee, were typed at the Union's office and seemed to have been composed with at least the concurrence of union organizer Woltz. McLellan was also employed after the election as a paid union picket for a few hours on one occasion.

The above evidence does not establish the agency status of any of the employees who were present during the parking lot incident. The testimony concerning the

participation of the employees other than McLellan in the special meetings with Woltz is devoid of any detail. There is no evidence of what they did on behalf of the Union. Nor was McLellan's role that of an agent. He did participate in the election campaign on behalf of the Union. But this evidence does not make him a union agent. He was simply a prounion employee campaigning for the Union's position. His job as a paid picket for the Union took place after the election. Even assuming, however, that McLellan was an agent of the Union for some purposes, there is no evidence that he did or said anything to Philippi in the parking lot which could be construed as binding the Union. Philippi did not specifically identify McLellan as having said anything. Daiker, who was pinpointed by Philippi as having made a remark and poked his finger at Philippi, attended only one of the special meetings, but there is no evidence that he did or said anything as a result of his attendance at any of the special meetings which would justify considering him as a spokesman for the Union. The testimony that Daiker handed Philippi a union card at work is hardly evidence of agency status. There was no evidence that Daiker was viewed as a union agent by employees. Indeed, the testimony of several employees concerning his unsavory reputation rather establishes him as an independent sort of free spirit who could not have been considered as a spokesman for anyone in the election campaign.

Even apart from the attenuated connection between the Union and the employees named above, however, I do not believe that the parking lot incident interfered with the election which was held some 2 months later. Daiker's statement to the effect that Philippi better have meant it when he signed a union card is not the type of statement which could reasonably be interpreted as a threat of physical retaliation. Philippi's card was not necessary since the Union had already filed a valid election petition; and he was free to vote as he wished in the secret-ballot election. Standing alone, Philippi's testimony that he felt intimidated is not the type of objective evidence which would justify overturning the election. In any event, even if the statement could be deemed to be coercive, its effect was not significant or lingering in terms of precluding a free election. Daiker and Philippi had had a run-in prior to the election and Daiker was drinking the night of the parking lot incident. The incident itself lasted only 2 or 3 minutes. I view Daiker's remark as that of a tipsy union supporter who was simply, but crudely, trying to hold Philippi to his apparent commitment to the Union. The incident, moreover, was an isolated one. Daiker never spoke to Philippi again in the remaining 2 months of the campaign. Nor is there any evidence that any of the other prounion employees present during the parking lot incident thereafter spoke to Philippi about the Union. Finally, there is no specific evidence that the parking lot incident was widely known or that it played any significant role in the election. Philippi did not testify that he discussed the incident at the plant with any employees. He did tell Personnel Manager Tom Kranz and Kranz testified that this matter came up in his conversations with "four or five" employees.

Kranz, however, was unable to identify such employees, and he did not tell how the subject came up or what was said. Nor did he testify whether he or the employees initiated the matter. It is thus difficult to see how what appears to have been an isolated confrontation between employees early in the campaign could be translated into a union-sponsored threat to coerce employees to vote for it. See *NLRB v. Southern Paper Box Co.*, above⁶

Philippi also gave hearsay testimony that, after the election, his wife received two anonymous telephone calls, one of which suggested that Philippi would need dental insurance. I cannot rule that these calls had any impact on the election because they came after the election, they were the subject of hearsay testimony, and there is no evidence which could identify the callers or link them to the Union.⁷

The last incident of alleged coercion is a charge that union organizer Woltz threatened employee Robert Lichtenberg at a union meeting. Lichtenberg testified that, at the meeting, Woltz stated, "Here is a man, we can go up one side of him and down the other, but we are not going to do this." Lichtenberg testified that Woltz was not looking at him when the remark was made and he was not sitting close to Woltz, but that he felt that, since he was the only employee at the meeting who had not attended other meetings, the remark was addressed to him. Lichtenberg could not remember the date of the meeting, but he stated that it took place before the election. On cross-examination, Lichtenberg admitted that, after the meeting, he went up to Woltz and engaged him in a conversation, but that he did not ask Woltz about the statement which he believed was addressed to him. Lichtenberg, who was an election observer on behalf of Respondent, was unable to place the alleged threatening statement in context. He could not recall what was said before and after the statement. Nor could he recall his conversation with Woltz after the meeting.

Woltz denied making the statement attributed to him by Lichtenberg. He testified that Lichtenberg asked some questions at the meeting and that Lichtenberg also came up to him after the meeting and asked more questions. Woltz answered the questions and had a "lengthy conversation" with him. The conversation was cordial and Woltz believed that he might have persuaded Lichtenberg to vote "yes" instead of "no" in the election. Woltz was not cross-examined on this point.

I credit the testimony of Woltz on this issue. He testified in much greater detail concerning the meeting which Lichtenberg attended than did Lichtenberg, and, in my view, he testified honestly and candidly. Lichten-

berg, on the other hand, was unable to put the alleged threat by Woltz in context. Nor could he remember anything about his subsequent conversation with Woltz. Lichtenberg admittedly mentioned nothing in that subsequent conversation about the alleged threatening statement which was made during the meeting. It is uncontroverted that the subsequent conversation was a cordial one and Lichtenberg's testimony is not corroborated. I therefore do not find Lichtenberg's testimony as reliable as that of Woltz. In any event, the alleged threat was not a significant act of coercion nor was it shown to have impacted on the election. Even under Lichtenberg's version, Woltz said that Lichtenberg was not going to be attached—if indeed that is what was meant by going "up one side of him and down the other"; and Lichtenberg himself admitted that Woltz did not look or gesture at him when he made the statement. Finally, not one employee other than Lichtenberg testified about this incident or its effect and Lichtenberg obviously stood firm in his rejection of the Union notwithstanding Woltz' remarks because he acted as Respondent's observer in the election of March 20.

III. CONCLUSION

The court, in its decision, cautioned that the totality of the circumstances must be considered in determining whether a fair and free election was held, citing its decision in *NLRB v. Van Gorp Corp.*, 615 F.2d 759 (1980), and *NLRB v. Payless Cashway Lumber Store*, 508 F.2d 24 (1974). In order to comport with the views of the court, I shall consider the evidence in this case in light of the decisions in the cited cases.

In *Van Gorp*, the court reversed a Board finding that an election was fairly held because there was a "last minute" union misrepresentation on the eve of the election and four separate incidents of coercion by prounion employees, including threats to break "windows" and "arms" and one physical assault where the prounion employee threatened to set fire to another employee's car or house or harm his family. The court also observed that the election was a close one. In *Payless*, only one incident of coercion was involved. The court reversed the Board and required the overturning of an election where a local mayor made a statement at an election eve union meeting that a certain person had better favor the union or his tires would be slit.

The instant case does not fall into the category of cases cited by the court as requiring the overturning of an election. Here the misstatement occurred some 2 months before the election and was followed by clarifying statements from both sides. The election was not close. The employees selected the Union by a wide margin. Moreover, there was only one incident of apparent coercion involving one employee, Philippi, and that incident also took place some 2 months before the election. The remaining alleged incidents of coercion either did not occur or were not addressed to employees. Nor did the conduct herein approach, in any way, the severity of the conduct discussed in *Van Gorp* or *Payless Cashway*. The record in this case does not show that the Union's efforts created "an atmosphere of fear and re-

⁶ In my view, the remark which took place inside the union meeting prior to Philippi's signing of a union card could in no way be considered coercive. Nor was it shown to have had any impact on the election.

⁷ At p. 141 of the transcript it is erroneously reflected that I stated, in reference to the above hearsay report of anonymous phone calls, that "I won't strike it because I ran into the regional director and discussed that." The transcript reference is erroneous. I did not say at the hearing that I discussed this matter with the Regional Director and I did not. The statement in the transcript should read something to the effect that "I read that in the report of the regional director. He discussed that." Page 8 of the Regional Director's report does indeed discuss the hearsay account and the next sentence in the transcript makes clear that I was referring to a report which is in evidence.

praisal such as to render a free expression of choice impossible." *NLRB v. Griffith Oldsmobile*, 455 F.2d 867, 870 (8th Cir. 1972), quoted in *Van Gorp.*, above, 615 F.2d at 764.

I therefore conclude that the totality of the circumstances in this case militates against overturning the elec-

tion of March 20, 1980. I find that a free and fair election was held and that the Board's certification and its subsequent bargaining order were proper and should be reaffirmed.