

**Agri-International Inc., a Wholly Owned Subsidiary of Gold Kist, Inc. d/b/a Golden Poultry Co. and UFCW District Union 433, affiliated with UFCW International Union, AFL-CIO-CLC**

**Agri-International Inc., a Wholly Owned Subsidiary of Gold Kist, Inc. d/b/a Golden Poultry Co. and District Union 433, affiliated with U.F.C.W. International Union, AFL-CIO-CLC, Petitioner. Cases 10-CA-18359 and 10-RC-12589**

13 August 1984

**DECISION, ORDER, AND  
CERTIFICATION OF RESULTS OF  
ELECTION**

**BY MEMBERS ZIMMERMAN, HUNTER, AND  
DENNIS**

On 11 October 1983 Administrative Law Judge Hutton S. Brandon issued the attached decision. The Respondent and the General Counsel each filed exceptions and a supporting brief,<sup>2</sup> and the General Counsel and the Union filed answering briefs.

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, and conclusions only to the extent consistent with this Decision, Order, and Certification of Results of Election.

The judge found that the Respondent became a successor to Swift and Company at the Douglas, Georgia plant 20 January 1982.<sup>3</sup> The judge further found that the Respondent violated Section 8(a)(5) of the Act by refusing to recognize the incumbent Union; that it thereafter violated Section 8(a)(1) of the Act by making implicit promises of unspecified benefits and by threatening employees with the futility of selecting the Union as their bargaining representative and the inevitability of strikes; and that said conduct as well as a mass interrogation of employees by the Respondent's supervisors interfered with the election held 27 May. We agree with the judge regarding the Respondent's status as a successor employer. However, for reasons given below, we do not agree that the Respondent engaged in any unlawful conduct or interfered with the election.

1. As indicated by the judge, the Respondent on 15 January and thereafter declined the recognition request of the Union which had a collective-bar-

<sup>1</sup> The judge found, and the record shows, that despite the slight difference in name the same Union is involved in both cases.

<sup>2</sup> The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>3</sup> All dates below refer to 1982.

gaining agreement with the Respondent's predecessor for the 2-year period ending 1 February. The Union subsequently filed a representation petition for the production and maintenance employees 26 March, a Stipulation for Certification Upon Consent Election was approved 16 April, and the election at the end of May was lost by the Union.<sup>4</sup>

The Respondent presented its position through Jerry Cox, its general manager, and James Perdue, its director of employee and labor relations, who conducted a series of meetings with the employees in the 3 weeks before the election.

The first of these meetings took place about 7 May when Cox, who was put in charge of the Douglas plant, explained that it was his objective to make profitable that facility which had been losing money under Swift's operation. Cox stated further that the Respondent had to "structure [the plant] conservatively in such a way that its chances of surviving were greatest" and that "if we do not succeed here and go out of business this plant will never be reopened." Cox then emphasized the importance of the Company and the employees working together and asked the employees to "see the situation through without a union" in order to provide "a chance to succeed and you won't be sorry."

In his second speech 14 May, Cox pointed out that economics and productivity determined pay and benefits and that the Respondent's plan was to make "positive changes" in that regard so as to bring the Douglas plant in line with the Respondent's other plants.

The judge found that, standing alone, Cox's plea to the employees for a chance to have his program succeed without the Union did not constitute objectionable conduct. However, the judge linked that plea to Cox's plan to make changes as soon as practical on the basis of productivity. In finding that these statements, when taken together, constituted implied promises of benefits if the employees rejected the Union, the judge failed to take into account the context in which they were made. It is clear that the Respondent, which took over an unprofitable plant, acted in legitimate fashion as a business enterprise by asking for the cooperation of the employees, with whom it had no previous relationship, to increase productivity so as to make the plant an economically viable operation. This in turn would open up the possibility of pay and benefits comparable to those of the Respondent's other plants. That Cox's statements were permissible ex-

<sup>4</sup> The tally of ballots showed that, of approximately 352 eligible voters, 158 voted for and 172 against the Union, with 1 void ballot and 4 challenged ballots.

pressions of concern about achieving success with its acquisition of a hitherto financially ailing facility is evident from the remainder of Cox's second speech which, as the judge correctly found, was neither objectionable nor unlawful. Thus, Cox continued to stress the Respondent's business interests by making it plain that "in running the plant" he would agree only to those things which he felt were beneficial to the survival of the plant. Accordingly, we find, contrary to the judge, that the Respondent through Cox legitimately sought the cooperation of the employees to assure the survival of the plant to the mutual advantage of both management and the employees. We therefore perceive no justification for the judge's finding that the Respondent expressly or impliedly conditioned any possible increases in pay and benefits on the employees' rejection of the Union.<sup>5</sup>

2. As noted above, Perdue held meetings 19 May in which he stated that as the director of labor relations he would bargain in good faith with the Union if it was selected by the employees as their representative, but he would "do nothing to hurt our chances of survival" and would not let the Union "push us around." Perdue also made a slide presentation of strike action by the Union against the Respondent's other plants and some Georgia employers and referred to the occurrence of strike violence, plant closures, and loss of jobs. In this connection, Perdue expressed the view that "a strike could well kill this plant" because its only customer might then turn elsewhere permanently for a more reliable source of supply. Perdue then explained that he related the "cold, hard facts" concerning the adverse impact of strikes by the very Union involved here "not because strikes are inevitable, but because having no strike is certainly not inevitable either."

As noted above, the judge found that Perdue's speech, when considered in the context of the Respondent's other conduct, namely, the speeches of Cox, unlawfully threatened the futility of union selection and the inevitability of a strike and also created an atmosphere of coercion which interfered with the election. In making these findings, the judge improperly rejected as unworthy of serious consideration Perdue's qualifying or disclaiming statements to the effect that a strike was not inevitable and that he would bargain in good faith with the Union if it was selected by a majority of the

employees as their representative. The judge also failed to take into account the Respondent's protected right under Section 8(c) of the Act<sup>6</sup> to set forth its opinion based on demonstrable facts as to the possibility of a strike and its consequences. Contrary to the judge, the Respondent was under no obligation to shield its employees from the "cold, hard facts" concerning the detrimental effects of past strikes by the Union. Not only did the Respondent legitimately attempt to persuade the employees to vote against the Union by describing the latter's strike history, but Perdue also clearly and equivocally stated as an integral part of his speech the Respondent's willingness to bargain in good faith with the Union and the fact that strikes are by no means inevitable. Accordingly, we conclude that Perdue's speech did not exceed the bounds of permissible campaign conduct.<sup>7</sup> We therefore find that Perdue's speech neither violated the Act nor interfered with the election.

3. As indicated above, the judge also dealt with the interrogation of many employees by a number of supervisors 14 May. On learning of this admittedly coercive conduct 4 days later, Cox posted on company bulletin boards and mailed to all employees a disavowal notice spelling out employee rights under the Act and pledging that employees would not in the future be asked how they were going to vote. On the same day, the Respondent directly communicated in detail the contents of the notice at group meetings on each shift. At these meetings, each supervisor involved in the unlawful conduct individually came forward before the group and announced, "I understand and commit to the principles set forth in the notice."

The judge found, and we agree, that by such actions the Respondent effectively repudiated the supervisors' conduct and consequently did not violate Section 8(a)(1) of the Act.<sup>8</sup> However, the judge

<sup>6</sup> Sec. 8(c) provides in pertinent part as follows: "The expressing of any views, argument, or opinion, or the dissemination thereof . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of the Act, if such expression contains no threat of reprisal or force or promise of benefit."

<sup>7</sup> *Daniel Construction Co.*, 264 NLRB 569 (1982); *Butler Shoes New York*, 263 NLRB 1031 (1982).

The following cases cited by the judge are inapposite: *Grove Valve & Regulator Co.*, 262 NLRB 285 (1982), in which the employer emphasized the inevitability of a strike and threatened the loss of strikers' jobs and plant closure in the context of other 8(a)(1) violations; *Liquid Transporters, Inc.*, 257 NLRB 345 (1981), in which the employer created the impression that the loss of jobs would be the direct result of unionization of its employees; and *General Dynamics Corp.*, 250 NLRB 719 (1980), in which the employer left no doubt that bargaining would be futile. Member Dennis does not reach the question whether these cases were correctly decided.

<sup>8</sup> Indeed, the judge stated, "[I]t is difficult to perceive what more Respondent could have done to repudiate the unlawful questioning by its supervisors." JD, slip op. at 23.

<sup>5</sup> *Viacom Cablevision*, 267 NLRB 1141 (1983).

The judge erred in relying on *Royal Petroleum Co.*, 243 NLRB 508 (1979), in which the Board found objectionable a "give us a chance" statement because it was made in the context of other objectionable conduct, including promises of benefit. We deem that case inapposite in view of our finding here that there were no concomitant promises of benefit or other objectionable conduct.

reasoned that the repudiation, while sufficient to avoid a finding of violation of the Act, did not provide a sufficient lapse of time to dispel any lingering vestiges of coercion and hence interfered with the employees' free choice in the election. We deem that reasoning to be faulty. If, as the judge correctly concluded in dismissing the 8(a)(1) allegation, the Respondent effectively disseminated and communicated to its employees its strong disavowal of the interrogation and gave assurances that there would be no repetition of conduct interfering with the exercise of the employees' Section 7 rights, it follows that in wiping the slate clean by its disavowal the Respondent restored in timely fashion the laboratory conditions which permitted the holding of a valid election. We therefore find, contrary to the judge, that as a result of the Respondent's disavowal the interrogation did not interfere with the election.

4. We turn now to the question whether the Respondent, whose campaign conduct did not violate Section 8(a)(1) of the Act or interfere with the election, has as a successor employer an obligation to bargain with the Union despite its defeat in the election. It is well established that a successor's obligation to bargain with an incumbent union is based on a rebuttable presumption of the latter's majority status.<sup>9</sup> That presumption may be overcome by proof that a union did not enjoy majority status at the time of the successor's refusal to bargain. As the Respondent did not engage in any unlawful or objectionable preelection conduct, we find that the valid election herein constituted proof that the Union in fact did not possess majority support and that consequently the Respondent had no bargaining obligation.<sup>10</sup>

In view of the foregoing, we conclude that the Respondent did not interfere with the election or violate Section 8(a)(1) and (5) of the Act. We shall therefore certify the results of the election and dismiss the complaint.<sup>11</sup>

### ORDER

The complaint is dismissed.

<sup>9</sup> See *Grico Corp.*, 265 NLRB 1344 (1982); *Merchants Delivery Service*, 230 NLRB 290, 295 (1977); *Barrington Plaza*, 185 NLRB 962 (1970), enf. denied on other grounds 470 F.2d 669 (9th Cir. 1972).

<sup>10</sup> See *Irving Air Chute Co.*, 149 NLRB 627 (1964), in which the Board found, inter alia, that in the absence of meritorious objections it would not grant a bargaining order with respect to a labor organization which loses an election.

<sup>11</sup> In light of this conclusion, Member Dennis finds it unnecessary to pass on the issues whether the Union's demand for recognition continued until after the Respondent became a successor to Swift and whether the Respondent ever rejected that demand. Since Member Hunter finds that the Union failed to attain majority status, he does not pass on the above issues.

### CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots votes have not been cast for UFCW District Union 433, affiliated with UFCW International Union, AFL-CIO-CLC, and that it is not the exclusive representative of these bargaining unit employees.

MEMBER ZIMMERMAN, dissenting.

For the reasons set forth in the judge's decision, I find that the Respondent violated Section 8(a)(1) by implicitly promising its employees benefits and by threatening them with the futility of selecting the Union and with the inevitability of strikes—all to discourage employee support for the Union. Consequently, I agree with the judge that the election was tainted and that its results cannot serve to rebut the presumption of the Union's majority status. Accordingly, I would find, as the judge did, that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union. In making these findings, I find it unnecessary to pass on the issue of whether the supervisory interrogations of employees on 14 May 1982 were adequately remedied by the subsequent notice posted by the Respondent.

### DECISION

#### STATEMENT OF THE CASE

HUTTON S. BRANDON, Administrative Law Judge. This case was heard at Douglas, Georgia, on July 27-29, 1983. The charge in Case 10-CA-18359 was filed by UFCW District Union 433, affiliated with UFCW International Union, AFL-CIO & CLC (the Union) on July 14 1982,<sup>1</sup> and a complaint and notice of hearing issued thereon on September 2, alleging violations of Section 8(a)(1) of the National Labor Relations Act, by Agri-International Inc., a Wholly Owned Subsidiary of Gold Kist, Inc., d/b/a Golden Poultry Co. (Respondent or the Company). An amended complaint issued on June 13, 1983, alleging that Respondent also violated Section 8(a)(5) of the Act.

The pleading with respect to Case 10-RC-12589 reflect that the petition was filed by the Union on March 26, that a Stipulation for Certification Upon Consent Election was approved on April 16, and that an election was held in the stipulated appropriate unit<sup>2</sup> on May 27.

<sup>1</sup> All dates hereinafter are in 1982 unless otherwise stated.

<sup>2</sup> The stipulated unit which is also set forth in the amended complaint and which I find herein to be an appropriate one for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act is: "All production and maintenance employees, including plant clerical employees and truck drivers at the Employer's Douglas, Georgia, feed mill and poultry processing facilities, excluding office clerical employees, quality assurance employees, guards and supervisors as defined in the Act."

Of approximately 352 eligible voters 158 valid votes were cast for, and 172 against, the Union with 1 void ballot and 4 challenged ballots which were not determinative. The Union on June 1 filed objections to the election and on July 21 the Regional Director for Region 10 of the National Labor Relations Board, the Board, issued a report on objections finding Objections 2 and 4 raised material and substantial issues which could best be resolved at a hearing. On August 10 the Board adopted the Regional Director's findings and issued an order directing hearing. Concluding that the objections were coextensive with certain allegations in the original complaint in Case 10-CA-18359 the Regional Director on December 21 issued an order consolidating Case 10-RC-12589 with Case 10-CA-18359 for hearing.

The cases present issues with respect to whether Respondent engaged in violations of Section 8(a)(1) of the Act or otherwise engaged in conduct providing a basis for valid objections to the election by: (1) threatening in speeches to employees that it would be futile to join or select the Union; (2) threatening employees in speeches that it would reduce benefits by commencing bargaining from the minimum wage or negotiate less benefits for employees than they then enjoyed; (3) threatening employees with plant closure and the inevitability of strikes and violence if they selected the Union to represent them; (4) promising its employees improved benefits if they rejected the Union; and (5) interrogating its employees concerning their union membership, activities, and desires. The alleged violation of Section 8(a)(5) in the amended complaint raises the issue of whether Respondent's conduct warrants the entry of a bargaining order based on a presumption of the Union's majority status flowing from its status as bargaining representative of employees of Respondent's predecessor, a majority of whom compose the employee complement hired by Respondent.

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

#### FINDINGS OF FACT

##### I. JURISDICTION

Respondent is a Georgia corporation with an office and place of business located at Douglas, Georgia, where it is engaged in the processing of poultry and feed. During the calendar year preceding issuance of the complaint Respondent sold and shipped from its Douglas, Georgia plant finished products valued in excess of \$50,000 directly to customers located outside the State of Georgia. The complaint alleges, Respondent through its answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The complaint further alleges, Respondent also admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICES AND OBJECTIONABLE CONDUCT

### A. Material Facts

#### 1. Respondent's status as a successor to Swift & Company and the Union's efforts to seek recognition

The parties entered into a stipulation that on January 20, 1982, Respondent and Swift & Company, herein Swift, closed on an agreement of sale for the purchase by Respondent of Swift & Company's Douglas, Georgia facility including the production equipment, inventory, and other assets of the plant. Swift, whose employees in a production and maintenance unit had been represented by the Union and covered by a collective-bargaining agreement effective from February 5, 1979, to February 1, 1982, ceased operation of its Douglas facility on January 15 and terminated its employees. Respondent, beginning on or about January 20, engaged in the same business operations as Swift at the same location, providing the same services to substantially the same customers, and employing as a majority of its employees employees who previously worked for Swift in the production and maintenance unit.

The complaint as amended alleges, and Respondent in its answer denies, that Respondent was a successor of Swift at the Douglas facility. Respondent did not argue the point in its brief and cited no authority which would reflect that based on the foregoing facts Respondent was not Swift's successor. The traditional standard utilized by the Board in determining successorships is whether there is "a substantial continuity in the employing industry." See *Jeffries Lithograph Co.*, 265 NLRB 1499 (1982); *Aircraft Magnesium*, 265 NLRB 1344 (1982); *Premium Foods*, 260 NLRB 708 (1982), enfd. 113 LRRM 3261 (9th Cir. 1983). The burden is on the General Counsel to establish the continuity of the employing enterprise. Where there is such continuity there is a presumption that the majority status of a union under the predecessor, as shown by a collective-bargaining agreement, continues under the successor unaffected by the change in ownership *Aircraft Magnesium*, supra. Factors considered in determining successorship are continuity in: (1) business operations; (2) physical plant; (3) work force; (4) jobs and working conditions; (5) supervisors; (6) machinery, equipment, and methods of production; and (7) products and services. Not all these factors are necessary for a finding of a continuation of the employing industry, hence successorship. *Georgetown Stainless Mfg. Corp.*, 198 NLRB 234 (1972).

Based on the stipulated facts set forth above I have no difficulty in concluding that Respondent was a successor to Swift. I conclude that the employing industry was basically unchanged by the change in ownership. There was a slight hiatus of about 5 days between the time Swift ceased operations and Respondent began them. Such a hiatus is immaterial, however, because it was of such short duration that it could have had no impact on the former Swift employees' expectations of rehiring. Accordingly I conclude that Respondent was a successor of

Swift, so that a legal basis exists for the presumption that the Union's majority status at Swift continued under Respondent.<sup>3</sup>

John Lee, secretary-treasurer and business manager of the Union, testified that having heard that Respondent was in the process of purchasing Swift he telephoned James Perdue, Respondent's director of labor relations, on January 14 or 15. Perdue acknowledged to Lee that Respondent's board of directors would be meeting within a week to decide whether to go through with the purchase of Swift. Lee testified he told Perdue that the Union was the certified bargaining agent at Swift and they desired to be recognized as the bargaining agent upon Respondent's purchase of Swift. According to Lee, Perdue responded that he felt Respondent would recognize the Union as the bargaining agent upon the employment of over 50 percent of Swift's employee force.

Perdue in his testimony for Respondent admitted the telephone conversation with Lee, but denied any specific request by Lee to meet and bargain with the Union. Rather, according to Perdue, after discussing the pending purchase of Swift, Lee referred to the expiring collective-bargaining agreement with Swift and said he would like to know who he would be negotiating with or words to that effect. Perdue assertedly responded that there was no point in discussing bargaining since Respondent did not know if it would have any employees in Douglas. The conversation closed with Lee asking Perdue to let him know something as soon as he heard anything.

Lee's testimony regarding his request of Perdue was clear and unambiguous and impressed me as credible. Moreover, it appears to be supported by a letter of Perdue to Lee dated January 15 in which Perdue stated an obvious response to Lee's call:

This letter is being sent to you as a courtesy to inform you that Gold Kist Inc., is in the process of purchasing the assets of Swift Independent Packing Company operations in Douglas, Georgia. We are not agreeing to assume the collective-bargaining agreement you have with Swift, nor are we agreeing to recognize you as the bargaining representative of our employees.

Perdue did not specifically deny Lee's testimony regarding recognition of the Union upon Respondent's hiring over 50 percent of Swift's work force.

The next communication between Respondent and Lee took place on January 29 according to Lee. Lee testified Perdue telephoned him on that date and advised him that Respondent was experiencing financial difficulties and would be seeking concessions from the Union where the Union was recognized by Respondent at other of its plants.<sup>4</sup> Perdue reported he had met with Roy Williams,

<sup>3</sup> The record herein reflects that many of Swift's employees had authorized union dues checkoff, and that of the 352 unit employees on Respondent's payroll ending April 23 (the *Excelsior* list) 270 had been former Swift employees who had authorized the checkoff of dues while last employed at Swift.

<sup>4</sup> It is undisputed that Respondent and other locals of the Union had collective-bargaining agreements covering employees in Respondent's fa-

a district director of the Union, and the "question" about Douglas, Georgia, came up. Lee testified that Perdue then "indicated" Respondent would recognize the Union at Douglas upon hiring more than 50 percent of Swift's old employees, but then inquired of Lee's opinion about a union authorization card check. Lee indicated his willingness to undergo a card check and suggested a local minister. Apparently, no decision was reached on the matter, however.

Lee testified he next talked to Perdue on February 4 when Perdue called Lee and told him he had not gotten the concessions from Williams that he had sought. Perdue then "indicated" that Respondent would not cooperate with the Union in Douglas and would "fight" the Union in Douglas as a result of not getting cooperation.

Perdue acknowledged only the February 4 conversation with Lee. He admitted that he had sought some economic concessions from Williams concerning a wage increase for Trussville, Alabama, employees of Respondent which was to be effective on January 31. To this end Perdue met with Williams and another union official on February 1. Perdue found the Union's proposals on conditions of any concession to be unacceptable. One such condition proposed by Williams, according to Perdue, was that Respondent recognize the Union at Douglas on the basis of a card check. Perdue made no response to the Williams proposal in this regard. Thereafter, Perdue made the February 4 call to Lee, related his unsuccessful attempt to get concessions from Williams, and reported to Lee Williams' suggestion about a card check at Douglas. Perdue testified that while he and Lee discussed who might be appropriately used to conduct a card check at Douglas no conclusions were reached and no arrangements were made for a card check. Perdue specifically denied that he told Lee that he would have to fight the Union at Douglas in view of Williams' failure to grant Respondent concessions at its Trussville plant. On the other hand, however, he admitted that he told Lee, in effect, that Williams had defecated in his outstretched hand and someday Perdue would fling it back on him.

Lee impressed me as an honest and sincere witness. However, his testimony at some points was hesitant and equivocal, and he exhibited uncertainty in recall regarding dates and the full content of all his conversations with Perdue. Perdue exhibited more certainty in his recall, but on cross-examination he was on occasion coy and evasive. Some truth may be found in the testimony of both men. However, although I have credited Lee regarding the content of his first call to Perdue, because of Lee's uncertainty regarding the next call, I conclude that there was no call from Perdue to Lee on January 29. There would apparently be no purpose for such a call since Perdue was seeking concessions at that point in time from Williams rather than Lee. Moreover, while Lee testified that Perdue in that call referred to having met with Williams, such a meeting did not take place until February 1. Accordingly, it is more likely that

cilities at Live Oak, Florida; Durham, North Carolina; Jasper, Texas; Trussville, Alabama; and Athens, Georgia.

there was only one call to Lee, the one on February 4, as Perdue claimed, and after Perdue's meeting with Williams.

I also find it unlikely and do not credit Lee's further testimony that Perdue stated in either a January 29 call or the February 4 call that Respondent would recognize the Union at Douglas on hiring 50 percent of Swift's employees. Based upon the stipulation of the parties herein, Respondent on January 20 had already hired a majority of Swift's employees. Thus, notwithstanding the uncontradicted testimony of Lee regarding an identical remark by Perdue on January 15 before employees had been hired, it is improbable that Perdue on February 4 would have expressed a willingness to recognize the Union based on a condition which had already been met. Moreover, the expression of such a willingness would have made superfluous any discussion of the conduct of a card check which both witnesses agree was part of the conversation.

Finally, Perdue's version of his remarks to Lee about Williams' response to Perdue's outstretched hand strikes me as more accurate than Lee's. It would appear unreasonable for Perdue to advise Lee that Respondent was going to "fight" the Union at Douglas at the same time he was discussing with Lee, and not specifically rejecting, a card check. Accordingly, I find and conclude that Perdue did not state that Respondent was going to fight the Union at Douglas because of Williams' rejection of Respondent's requested concessions at other locations. This conclusion, however, is not dispositive of Respondent's obligation to recognize and bargain with the Union under the Act which might otherwise attach by virtue of its status as a successor to Swift.

Lee testified that he was unaware of the legal principles involving successorships when Respondent purchased Swift. Presumably, therefore, he was unaware of any obligations on the part of Respondent to recognize the Union when a majority of its employee complement was composed of employees of Swift who were represented by the Union. Accordingly, beginning around January 29 the Union undertook an authorization card signing campaign among Respondent's employees. By letter dated March 22 Lee advised Perdue that the Union had been requested "by what is believed to be a majority" of the company's employees in the Douglas plant hatchery and feed mill to "recognize" the Union as the collective bargaining agent for wages, benefits, and "other conditions of employment." The letter further advised that the Union was filing a "petition for representation" with the Board.

Following the filing of the petition, Lee along with union representatives Charles Arlove and Chuck Williams met with Respondent's attorney, James Edwards, and reached an agreement regarding the conduct of the election and the unit in which the election was to be held. Although the Union had represented the hatchery employees at Swift upon Edwards' objection to their inclusion in the unit on the basis of their alleged agricultural employee status, the Union agreed to their exclusion.<sup>5</sup>

<sup>5</sup> According to Lee, the hatchery employed approximately 35-40 employees. I find, as argued by the General Counsel, this unit change leav-

As already noted the election was held on May 27. The Union lost, also as noted. The conduct of Respondent which the General Counsel contends violated Section 8(a)(1) of the Act, and the Union contends interfered with the election, must now be considered followed by the General Counsel's and Union's arguments regarding the alleged 8(a)(5) violation.

## 2. The speeches of Jerry Cox and James Perdue

Respondent General Manager C. Jerry Cox admittedly conducted a series of mini-meetings with employees beginning about May 6. The complaint alleges that Cox in his speeches to employees promised employees improved benefits if they rejected the Union as collective-bargaining representative.<sup>6</sup> To establish this allegation the General Counsel relied upon the testimony of three of Respondent's employees, Ethel Hamilton, Minnie Carter, and Fisher Pope.

Hamilton testified that Larry Paulk, then plant manager for Respondent and formerly plant manager for Swift, introduced Cox to a group of about 15 or 20 employees including Hamilton at a meeting to which the employees had been called in the main plant conference room. Before introducing Cox, however, Paulk stated, according to Hamilton, that all the Swift plants had closed down because of the Union except for the broiler plant, and there had been no one to pick up the broiler plant except for Respondent. Cox then began his remarks. According to Hamilton, Cox stated he had come to Douglas to help them, but he could not help them if they had outside help. He compared the plant with another plant in town which had higher wages and whose employees were not represented by a union. Cox asked the employees to give him a chance and stated that if the Union was voted in, the doors of Respondent might have to close and the employees would be without jobs. He added that if the employees did not vote the Union in he would promise them that when the Company started making a profit the employees would start getting better benefits. Cox was asked how long that would take, and he replied that it would be 2 to 6 months.

Hamilton also testified regarding an additional speech by Cox a few days after the first speech and in the same place to a similar small group of employees including Hamilton. In this meeting Cox had 156 \$1 bills hung around the room representing an employee's union dues for a year. She could recall nothing particular about the meeting except Cox's remarks about dues being raised nationwide.

There was a third meeting conducted by Cox and attended by Hamilton about which Hamilton testified. She related that the third meeting occurred about a week

ing a complement of 350 employees in the production and maintenance unit was irrelevant and immaterial to Respondent's successorship to Swift. See *Maintenance Inc.*, 148 NLRB 1299 (1964). I further find such unit change has no impact upon any obligation of Respondent to recognize and bargain with the Union under the circumstances of this case including Respondent's failure to claim that any of its actions herein were affected by the unit change or other unit considerations.

<sup>6</sup> The allegations are coextensive with the Union's objection 4 which asserted that Respondent "attempted to and did destroy conditions by which a fair election could be held."

prior to the election, and in the meeting Cox talked about bargaining, and stated if the Union were elected he would be the one to do the bargaining, that the employees would not get anything the Company was not able to give them, that even if the Company had to bargain with the Union they did not have to come to any "decision," that they could bargain for a year and referred to a company in Valdosta where the union and employer bargained for a year and the employees got mad and threw the union out.

Finally, at an even later meeting, Cox showed employees television tapes of a newscast reporting union violence and strikes and showing bombings and killings. Hamilton related that union people were the cause of this, that U.F.C.W. was responsible for some it, and asked why the employees wanted these people in the plant.

Minnie Carter testified regarding a meeting she attended along with about 20 other employees 2 to 3 weeks before the election at which Cox spoke. She said Cox had one dollar bills hung around the room and Cox said that this was the amount of money they would have at the end of the year instead of giving it to the Union. Cox further stated that if the employees put their trust in him he could give them more benefits later adding that the Union did not have anything to give the employee and if they got anything it would come from the Company. Carter further vaguely testified that Cox said "something" about strikes in different places, and how people go out on strikes and are replaced, and they would lose their jobs. Further, "something" was said "about the Teamsters affiliating with the Mafia, or something, you know, violence, striking, and things like that."

Pope's testimony was generally consistent with Carter's. He related the first meeting he attended at which Cox spoke was the meeting where the dollar bills were posted around the room. Cox stated that the money could be theirs if the Union did not come in and that all the Union wanted was the employees' money. Next Cox showed the employees some films about people losing their jobs and stated that a lot of people lost their jobs when they went on strike and he said it had happened in other places. Cox further stated, Pope claimed, that there could be a strike at the Company if the Union was voted in, and he said there was violence in other places during strikes.

Pope testified concerning an additional meeting conducted by Cox which Pope claimed took place several days after the first one. In this meeting Cox showed films "about different things happening in different places, about the Union, voting and fighting and stuff." While Cox made comments in addition to showing the films Pope could not recall what he said. Pope could not recall Cox stating in any meetings Pope attended that the employees would receive more benefits if there were no union.

Cox, testifying for Respondent, specifically denied the remarks attributed to him by Hamilton, Carter, and Pope. He acknowledged that he conducted group meetings with small groups of employees on four different occasions, during which he spoke to employees about the Union. The first group of meetings took place on about

May 6 with subsequent meetings taking place about May 14, 21, and 25. Although he conceded that Paulk talked briefly at the first meetings on May 6, he denied that Paulk stated that Swift closed because of the Union. After verbally outlining what he stated to employees at the May 6 meeting, he identified a prepared text of his remarks which he testified he followed word for word even though he did not specifically read the entire speech. That portion he did not read, Cox testified, he memorized and related from the prepared text. Similarly, Cox identified written remarks he delivered to employees on May 14, and testified he followed the written remarks insofar as practical in the same manner as in the prior speech but using visual aids displaying news articles, excerpts from Board and court decisions, and wage comparison data.

With respect to Perdue the complaint alleged that, in a speech to employees about May 20, Perdue threatened employees that it would be futile to join or select the Union since Respondent would not grant employees benefits additional to those it was willing to give anyway, threatened employees that Respondent would reduce benefits by starting any bargaining with the Union at minimum wage, and threatened employees with plant closure and the inevitability of strikes if the Union was selected as the employee bargaining representative.<sup>7</sup> The General Counsel relied on Hamilton, Carter, Pope, and two other employees, Willie Williams and Nathaniel Dunnom, to establish the allegations.

Respondent concedes Perdue gave a speech to employees in a series of meetings with small groups of employees on May 19. Hamilton testified that Perdue, using a projector and slides, talked to employees about strikes. More specifically, Hamilton related that Perdue showed a picture of an old bus which he called "Old Faithful" and which he stated he used to transport striker replacements across a picket line at one of Respondent's plants. Perdue stated, according to Hamilton, that if the Union were voted in at Douglas a strike was a possibility, and added that strikers did not get any benefits. Perdue went on to stress the fact that if employees went on strike they could be permanently replaced. He also talked about houses being burned during strikes and about a crippled man making deliveries across a picket line who was beaten by strikers and later died.

In her testimony Carter related that at the Perdue speech which she attended Perdue told employees he hoped he would not have to sit down and bargain with the Union, that bargaining could last a year and they still would not have a contract. Perdue added that he would give employees more or better benefits later, but he would not want anyone to try to make him give employees anything. Perdue, still according to Carter, also said that if he had to go to the bargaining table he could start off bargaining at "minimum wages." With respect to strikes Perdue showed a picture of a bus and explained how it was used to carry nonstrikers and how it pushed a car aside to cross a picket line. There was further showing by Perdue of newspaper clippings about strikes

<sup>7</sup> These allegations are also coextensive with the Union's Objection 4.

and violence associated therewith such as car and home bombings. Finally, Perdue displayed a list of 87 employees at another of Respondent's plants with check marks by the names of those employees who were replaced and unable to get their jobs back at the conclusion of a strike.

Elements of the testimony of Hamilton and Carter found support in the testimony of Dunnom. Thus, Dunnom testified that in Perdue's speech Perdue showed a bus taking "strikers" from one place to another and related that the bus had hit a car carrying strikers. With respect to the listing of replaced strikers at Valdosta, Dunnom related Perdue showed the replaced strikers with an x by their name and stated John Lee was representing these people and did not any one of them get their jobs back.

It was Pope's testimony that Perdue in the speech to his group stated that if the Union was voted in the Company would negotiate in good faith but added that he could not guarantee that they would reach an agreement. Further in this regard Perdue stated that negotiations would not start from the employees' present pay and explained that it could "go down" to minimum wage. Pope confirmed that Perdue spoke also of strikes and showed slides of strike violence, fighting, and riots. Perdue described his experience of driving a bus transporting non-strikers during a strike and colliding with a car of strikers. Finally, Perdue pointed out that strikers could possibly be replaced. Asked by an employee if the plant would close in the event of a strike Perdue responded that it was a possibility. Pope testified that he asked Perdue what employees would get if the Union were not voted in and Perdue replied that he could not give Pope an answer and told him to ask someone in the hatchery.<sup>8</sup>

Williams testified that Perdue told his group that if they voted for the Union the only thing the Union had against the Company was a strike, but that the Union could not force the Company to do anything. In connection with a strike Perdue stated that the Company would keep working with nonstrikers and bring in chickens from other places the Company ran or it could go out of business. Further in connection with the subject of strikes, Perdue showed newspaper clippings of strike violence involving shootings and one killing of a trucker in North Carolina.

While Perdue in his testimony for Respondent admitted to the meetings with employees on May 19, he specifically denied the remarks attributed to him by the foregoing witness. He conceded, however, that he did discuss strikes, showed transparencies of newspaper articles, and did refer to some strike violence. Perdue testified that he closely followed a written speech during his talks to the employees and that written speech as well as copies of the transparencies shown by Perdue were received in evidence herein. Perdue related that he specifically read to employees those underlined portions of his speech which related to the particular transparencies which were being shown. Perdue admittedly had shown

<sup>8</sup> Pope related that he subsequently asked someone at the hatchery and was told by an unidentified employee that hatchery employees got an extra holiday. No other record evidence substantiates any difference in benefits existing between hatchery and plant employees.

a transparency listing Valdosta, Georgia employees with an x by the name of such employees who had struck and been replaced. His written remarks reflect that about 87 such employees had never returned to work at any time after the strike concluded. It was conceded by Perdue that more than half of his speech to employees on May 19 was devoted to the subject of strikes. The transparencies shown clearly emphasized strike violence and the replacement of employees. However, Perdue's written version of his speech clearly pointed out that replaced strikers remained employees of the Company and were "similar to laid off employees" who could get back into the company if and when permanent replacements left.

Although only briefly alluded to in the written version of his speech Perdue confirmed that he talked about "Old Yellow" in his remarks to the employees. He explained to them that Old Yellow was a bus which he had personally driven while transporting nonstrikers across a picket line, and he related how strikers beat on the bus and threw rocks and sticks at it while it was crossing the picket line. Perdue further related to the employees about the bus having a collision with an automobile driven by strikers who tried to block the bus at a time when it had no passengers and was being driven back to a storage area.<sup>9</sup>

Credibility of the various witnesses is important to resolution of the allegations of the complaint. Cox generally impressed me as a credible witness with good recall and obvious sincerity. Although as noted, Perdue exhibited some coyness in testifying he appeared to have a good recall of his speech and the union campaign generally. I believe he was truthful. Moreover, Cox and Perdue were corroborated by employees Fernell Carter, Mary Jane Goolsby, Sandra Chaney, Marilyn Gaskie, and Cora Mizell. All these employees testified they attended the speeches of Cox and Perdue, and with the exception of Fernell Carter they identified the written remarks of both Cox and Perdue as the remarks, to their recollection, that were made by Cox and Perdue in their speeches. Although one may entertain suspicions above the ability of employees to identify the entire content of rather lengthy employer speeches delivered more than a year earlier, the Respondent's employee witnesses conveyed an overall impression of sincerity in their testimony. In addition, from other records received in evidence it appears that at least Fernell Carter and Mizell had formerly been union members while employed at Swift and, thus, could not be suspected of bias against the Union. Indeed, Fernell Carter was even a former steward for the Union.

The General Counsel's witnesses, on the other hand, exhibited some confusion in recall which is not surprising considering the number of speeches to which they were subjected. As a group the General Counsel's employee witnesses were not impressive. Hamilton was particularly unimpressive as a witness. She testified in a somewhat hesitant manner at times, and at other times she testified as if she had memorized what she was to testify to rather

<sup>9</sup> Apparently, the use of "Old Yellow" is chronicled in *Gold Kist, Inc.*, 245 NLRB 1095 (1979).

than from a present recollection. On cross-examination she appeared defensive and belligerent. Finally, Hamilton had given a written statement regarding Cox's speeches to Respondent's attorney prior to the hearing. In that statement she attributed to Cox none of the remarks she testified about herein. In fact in that statement she denied that Cox had said that the "people would receive more if they rejected the Union," and added that if Cox had made such a remark it would have stuck in her mind.

Minnie Carter also had an unimpressive recall. She appeared tentative, uncertain, and lacking in conviction in her testimony. Pope was hesitant and at times vague on cross-examination. Williams' testimony was very brief and largely consistent with Perdue's testimony, and the written version of Perdue's speech. Dunnom's testimony also was not inconsistent with Perdue's or Perdue's written version of his speech. Finally, it is to be noted that the General Counsel's witnesses were never confronted with the written versions of Cox's and Perdue's remarks, and thus, did not specifically deny that the language in such versions was not in fact the language used in the speeches.

Considering all the foregoing, and keeping in mind the tendency of witnesses in general to testify as to their impressions or interpretations of what they heard rather than attempting a verbatim account, as well as the tendency of a speaker testifying about his own remarks to relate what was said or intended in more explicit language than that actually used, I find and conclude that the testimony of Cox and Perdue, supported by the written versions of their speeches, is more accurate, credible, and reliable. I therefore credit their testimony regarding their respective speeches where it contradicts that of other witnesses.

Crediting Cox and Perdue does not resolve the issue of whether their admitted comments violated Section 8(a)(1) or otherwise constituted objectionable conduct. Their comments require close scrutiny. Such scrutiny provides no support for the contention that Respondent threatened that bargaining would start from minimum wage. Rather it was made clear that benefits could go up or down as a result of bargaining. Such a statement was truthful and amounted to nothing more than a noncoercive expression of opinion. See *Brooks Bros.*, 261 NLRB 876 (1982). Accordingly, I find no merit to the complaint allegation that Respondent violated Section 8(a)(1) by threatening to start negotiations from minimum wage. Further examination of the speeches of Cox and Perdue reflect that they were hard-hitting and forcefully delivered at the repeated small group meetings of employees. But the Board has held that "[a]ny party to an election has a right to conduct a vigorous campaign in support of its position, including the utilization of individual and group meetings with employees." *St. Francis Hospital*, 263 NLRB 834 (1982). The Board has further refused to find that employer statements which individually are not objectionable become objectionable by virtue of their repetition. *Id.* See also *Blue Cross of Kansas City*, 259 NLRB 483 (1981). And the Supreme Court has stated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), "[a]n employer is free to communicate to his employees any of his general views about unionism or any of his

specific views about a particular union, so long as the communications do not contain a 'threat or reprisal or force or promise of benefit.'"

Considering Cox's speeches first it must be noted that his first speech on May 6 or 7 was a brief one describing how he came to Douglas and explaining that Respondent had to structure Respondent at Douglas "conservatively in such a way that its chances of surviving were greatest," but reminding employees that "if we do not succeed here and go out of business this plant will never be reopened." Cox explained what factors he had found in the Swift operation which he did not like and sought to change. Cox stated that he was attempting to make the plant a "we" company and emphasized the importance of working together. Cox further asked employees to "give this situation [the plant's operation without a union] a chance to succeed and you won't be sorry."

He cautioned employees that union bosses from the north wanted to suck blood money out of the employees as they had in the past and concluded the speech stating:

I'm counting on you not to let them do it. And I'm urging you as strong as I know how to let us continue our program here to its conclusion before you even consider giving the union bosses from up north the opportunity to get in your wallet again. You owe yourself that much.

As can be seen, the speech was an aggressive one. While Cox asked for a chance for his program to succeed prior to employees selecting the Union, such request does not constitute objectionable conduct. The Union in its brief cites *Royal Petroleum Corp.*, 243 NLRB 508 (1979), to support the proposition that an employer's suggestion that employees wait a year before voting the union in constitutes objectionable conduct. The Union would apply this precedent to Cox's speech as well as to the suggestions of the supervisors to employee Dunnom as set forth, *infra*, so as to qualify those statements as objectionable conduct. I find *Royal Petroleum* applicable here. In that case the Board found that a "give us a chance—try it in a year" statement was objectionable because, in the context of other objectionable conduct including promises of unspecified benefits, it conveyed a promise of future benefits if the employees rejected the union. In the instant case not only does Cox's speech set forth that the employees will not be sorry if they give Respondent a chance, but considered in context with remarks in his second speech, an implicit promise of benefit becomes clearer. Thus, in his second speech in which he emphasized that economics and productivity determined employee pay and benefits Cox stated:

Now as I told you our pay and benefits here are not the best in the Gold Kist organization but remember our plan is to make positive changes here as soon as practical to bring this plant into the main stream of Gold Kist so far as pay and benefits are concerned.

The employees asked to give Respondent a "chance" were not likely to overlook the implications that Re-

spondent would make their wait worthwhile by bringing them into the "mainstream" of Respondent's overall pay and benefits programs. It is easy to understand how some of the General Counsel's witnesses interpreted Cox's remarks as promise of subsequent benefits if they rejected the Union. I conclude therefore that these portions of Cox speeches constituted an implied promise of benefits which violated Section 8(a)(1) of the Act. I also find that Cox's comments, in this regard a fortiori, constituted objectionable conduct which interfered with the election.

Examination of the remainder of Cox's second speech reveals, in my view, no objectionable or unlawful material. Thus, Cox reviewed Respondent's obligations under the Act with emphasis on Section 8(d) and that portion which states that neither party to negotiations is required to agree to a proposal or to make a concession. Cox asserted that, "in running this plant," he would agree to only those things which he felt were beneficial to the survival of the plant. He went on to point out that it was not true that bargaining began with what employees had and went up. Rather, he explained there was no assurance that wages would be increased by bargaining and cited Board cases where bargaining had resulted in reduced wages and benefits. However, he told employees not to misunderstand him, adding "I am not saying that you would necessarily lose," but pointed out the final result would be determined by negotiation, and that getting a union did not necessarily mean employees would get more or less. Cox referred to union dues checkoff as a likely bargaining object of the Union for which the Union might trade employee benefits, but again remarked that "No one knows what will happen." The Board has found statements similar to those contained in Cox's speech not to constitute objectionable conduct. See *St. Francis Hospital*, supra; *Brooks Bros.*, 261 NLRB 876 (1982); *Robert Bosch Corp.*, 256 NLRB 1036 (1981). I find these portions of Cox's speeches do not constitute objectionable conduct.

Perdue's speech was even more hard-hitting than Cox's, and he put heavy emphasis on strikes and strike violence. Moreover, the speech does not appear to have been responsive to any campaign claims or assertions by the Union regarding strike action.

Perdue's speech started with an explanation of his function as director of labor relations, and he stated that Respondent would have its own personnel manager at Douglas and its own personnel department "to see that everybody stays reasonably happy." He explained that bargaining with a union if one were selected would be one of Perdue's functions but followed that with an assertion that he, following Cox's guidelines, would not "let this union push us around at all." However, he added:

I would bargain, if it becomes necessary, in good faith. If we get a contract—fine. If we don't get a contract—fine. To me it makes no difference; but either way, I would do nothing to hurt our chances of survival.

Perdue went on to state that:

The Union, of course, might try to push us for their own selfish motives or through bad judgment, like

they have at countless other places throughout the country by calling you out on strike, but that might be a mistake on its part.

Thereafter Perdue began a slide presentation of strike action by the Union at other employers in Georgia. These slides consisted of graphic newspaper accounts of arson connected with a strike of the Union in Thomasville, Georgia. Perdue pointed out that as a result of the strike "permanent replacements were hired and many, many strikers were not able to come back to work when the strike was over and could only come back when openings occurred," and "many have as yet not returned and may not even seek to return at this point." Perdue observed:

The violence, the burning of homes, the smashing of car windows, tacks in driveways, threatening phone calls—all the things that you have probably never seen first-hand, and I would assume never want to see, happened right here in our backyard.

Perdue then talked about a strike in Buford, Georgia, and projected a newspaper account of a year-old strike by the Union which was also accompanied by striker replacements and violence including tires flattened, and car windows smashed. Following this Perdue remarked:

So, as you can see, it would be foolish for you to think we could never have a strike here, even though we are in the State of Georgia, since history has shown that the UFCW Union will call a strike and will call a strike in which all honesty has led to violence and destruction many times in the past.

Thereafter, Perdue went into the likely effect of a strike on Respondent, on the pay of union officials, and on the pay of employees. With regard to the latter Perdue pointed out that the pay for strikers stopped and that they could receive no unemployment compensation under Georgia law. He then proceeded into the rights of replaced strikers accurately stating such rights, after which he expressed the hope the employees had a clearer understanding of how they would be affected by a strike at the Company. Perdue said he was informing employees of the "cold, hard facts" he believed the employees should be aware of "not because strikes are inevitable, but because having no strike is certainly not inevitable either."

At this point Perdue explained Respondent's position on strikes as being opposed to them but not afraid of them. He cited Swift as being a company which had given in to the Union's demands ultimately causing plant closure and loss of jobs. Emphasizing again Respondent's tough stand, he proceeded into Respondent's strike experience at other locations including Canton, Georgia. There it was said Respondent came within an eyelash of closing the plant down for good. Also, according to Perdue's remarks:

After the strike, there were only about two dozen employees called back [out of the 135 original complement]. Not because anyone was trying to punish

them, but simply because there wasn't any work to do.

Bringing the point even closer to home Perdue told the employees:

1 Along this same line, what would a strike do here? Hopefully nothing, but an effective strike could kill the goose tht lays the golden egg so to speak, in that this plant only has one customer . . . and if that customer were to leave us, I do not know how, try as we may, that we could find sufficient work for this plant to keep it open. That's a sobering thought and one that we all need to keep in the forefront of our minds. The short of it is, a strike could well kill this plant.

There followed detailed accounts by Perdue of strikes sustained by Respondent in plants in Calhoun, Georgia; Durham, North Carolina; and Live Oak, Florida. The violence in these strikes was referred to as well as the fact that strikers were replaced and "no longer had their jobs." As already mentioned a list of Live Oak employees was shown by Perdue with those replaced as a result of the strike having checkmarks by their names.

Perdue concluded his speech stating that he was not trying to scare or frighten employees but he wanted them to know the facts and to not allow them to know it would be unfair to the employees. He described the leadership of the Union as irresponsible and he saw "no reason whatsoever that anyone . . . would want to bring in people that have shown themselves to be irresponsible and foolhearty [sic] with other people's fate as in the past."

Perdue's speech in my view closely parallels the speeches of the employer considered by the Board in *General Dynamics Corp.*, 250 NLRB 719, 722-723 (1980), and found to be beyond the bounds of permissible campaign speech. Here there is the same heavy emphasis on strikes, strike violence, the loss of jobs by the strikers, and the possibility of a permanent plant closure in the event of a strike. This clearly created an atmosphere of fear on the part of the employees, and Respondent's association of the Union with the strike activity and violence had an obvious impact. The ultimate message could hardly be missed by employees and that message was that severe and adverse consequences would be a direct result of unionization. That message was coercive and prevented, I conclude, the employees from exercising their free choice in the election. See *Liquid Transporters*, 257 NLRB 345 (1981).

To be sure, Perdue did include qualifying or disclaiming statements in the speech. Thus, he suggested that perhaps a strike was not inevitable, but threw in that having no strike was not inevitable either. Given Perdue's expressed tough bargaining stance and his assurances that he and Respondent would not be "pushed around" an unsophisticated employee would most likely conclude, as I conclude Perdue intended, union selection would be futile and even if the Union were elected a strike was more probable than not. Certainly Respondent ran the risk of this interpretation. As stated by the Board

in *Turner Shoe Co.*, 249 NLRB 144 (1980), quoting from *Georgetown Dress Corp.*, 201 NLRB 102, 116 (1973):

Communications which hover on the edge of permissible and the [im]permissible are objectionable as "[i]t is only simple justice that a person who seeks advantage from his elected use of the murky waters of double *entendre* should be held accountable therefor at the level of his audience rather than that of sophisticated tribunals, law professors, scholars of the niceties of labor law, or 'grammarians'."

It is true that Perdue claimed in the speech that he would bargain in good faith. But that claim was overshadowed by Perdue's tough bargaining stance revealed in his assertion that Respondent would not be pushed around, the emphasis on strikes with the suggestion the Union was not only prone to strikes but to violent strikes, the implication that there would be a strike if the Union was elected, and the conclusory assertion of the "sobering thought" to be kept in the "forefront" of employee minds that "a strike could well kill this plant." Thus, the expression of the intention to bargain in good faith considered in the context of the speech as a whole and considered with Respondent's other coercive conduct does not insulate Respondent from the coercive effect of the speech. Considering the foregoing, I conclude that, in context, Perdue's speech did threaten the futility of union selection and the inevitability of a strike. By these threats Respondents, I conclude, violated Section 8(a)(1) of the Act as alleged. I also find that the speech created an atmosphere of coercion which interfered with the election process. See *Grove Valve & Regulator Co.*, 262 NLRB 285 (1982). I therefore find merit to the Union's Objection 4.

### 3. The alleged interrogation of Nathaniel Dunnom

Dunnom had been employed by Swift prior to employment by Respondent. Moreover, he had been a night shift steward for the Union while employed by Swift. He testified he had supported the Union in its campaign at Respondent by encouraging employees to vote for the Union.

Dunnom testified that on May 26 he talked to Richard Duane Elrod, night-shift superintendent for Respondent, in Dunnom's work area. According to Dunnom, Elrod asked him how he felt about the Union, and Dunnom replied that he thought they needed the Union. Elrod next inquired what Dunnom thought about Cox, and Dunnom responded that he thought Cox sounded like a nice person. Elrod then asked why they did not give Cox a chance, and if things did not go all right they could vote the Union in next time and adding that they would be better off without the Union. Dunnom could recall nothing further about the conversation.

It was also Dunnom's testimony that, on the same day as his conversation with Elrod, Dunnom also had a conversation with Lemuel Horton, Respondent's employee relations manager, at Dunnom's work area. Horton asked Dunnom how he felt about the election. Dunnom answered that he thought they needed a union.

Lastly Dunnom testified that still on the same day as the conversations with Elrod and Horton he was approached at his work station by Tommy Rigdon, then a second-shift supervisor. Rigdon asked Dunnom about the Union and how Dunnom felt about it. The remainder of the conversation, as Dunnom related it, was identical to the conversation with Elrod related above.

The General Counsel and the Union contend that the questions of Elrod, Horton, and Rigdon constituted unlawful interrogation in violation of Section 8(a)(1) of the Act, as alleged in the complaint. Respondent relies on the testimony of the three supervisors to rebut the allegation. Thus, Elrod acknowledged that he talked to Dunnom, but placed the conversation on May 25. He admittedly inquired of Dunnom what he thought about Cox but specifically denied that he asked Dunnom how he felt about the Union or remarked to Dunnom that the plant would be better off without a union. Elrod testified that he was aware at the time of the conversation that Dunnom had been a union steward, and he was also aware that Respondent had at that time taken specific steps to remedy supervisory interrogation of employees discussed infra.

Horton likewise denied he asked Dunnom how he felt about the election although admittedly talked to Dunnom 2 to 3 days before the election. Horton denied asking Dunnom about his thoughts of Cox and, instead, testified that it was Dunnom who asked him questions about Cox. Horton conceded that he told Dunnom that he hoped everybody gave Cox a chance to see what he could do.

Tommy Rigdon, while generally displaying a poor recall, admitted that he talked to Dunnom a day or two prior to the election but denied discussing the union situation with Dunnom. He also denied asking Dunnom about the election or how Dunnom intended to vote.

Weighing the testimony of Dunnom on one hand with that of Elrod, Horton, and Rigdon on the other I credit the latter. Dunnom appeared confused at times and contradicted himself on some points. Thus, on cross-examination he testified, contrary to his testimony on direct, that Elrod asked him how he was going to vote. That claim was contradicted further by a written statement (given Respondent's counsel prior to the hearing) in which he said Elrod had not asked him how he was going to vote. Moreover, he did not in that statement attribute to Elrod any question about how he felt about the Union. The testimony of Elrod, Horton, and Rigdon, was straightforward and, based on my perception, honest. Rigdon in particular had no reason to prevaricate in his denials since he had been terminated by Respondent in March 1983 and would therefore have no interest in giving testimony beneficial to Respondent.

Furthermore, it strains credulity that in a unit of over 350 employees the 3 supervisors would pick out a former union steward, and thus a likely union supporter, to inquire of him about his union inclinations. Credulity is strained to the point of complete disbelief in light of Respondent's vigorous efforts to dispell the effects of some admittedly coercive interrogation which had occurred only a few days earlier as discussed below. Accordingly, I find Elrod, Horton, and Rigdon did not unlawfully in-

terrogate Dunnom in violation of Section 8(a)(1) and I shall therefore recommend that the complaint allegations based on Dunnom's testimony be dismissed.

#### 4. The alleged mass interrogation

In addition to the alleged coercive interrogation of Dunnom the complaint alleges that Respondent through nine named supervisors and Superintendent Larry Paulk unlawfully interrogated employees concerning their union membership activities and desires. This same conduct is coextensive with the Union's Objection 2 to the election. The facts on which the allegation is based are found in the written stipulation of the parties as follows:

4. On or about May 14, 1982, approximately 75 out of approximately 200 employees on the first shift were questioned by supervisors Pete Peterson, Bennie Lee Jandrain, James Threat, Herschell Smith, Oscar McNeese, James Wright, James Sretchen, Lavern Johnson, and Dewey Chaney concerning their vote in the election scheduled for May 27, 1982, and their responses were recorded. If called to testify, these supervisors would testify that company officials asked them and they did destroy any records of employee responses.

5. The above supervisors listed in Paragraph No. 4, if called to testify, would testify that their questioning of employees was at the direction of supervisor Larry Paulk who would testify that at the time that Mr. Paulk gave these instructions, he was unaware that such interrogation was unlawful.

6. Although a number of employees on the first shift were questioned by the supervisors stated in Paragraph No. 4, not all employees on the first shift were questioned and no employees on second or third shift or the Feed Mill were questioned on May 14, 1982.

The facts on which Respondent bases its defense to the illegality of the interrogation were also stipulated by the parties. Thus, it was stipulated that:

7. Upon learning of the events of May 14, 1982, General Manager Jerry Cox took the following action:

(a) All Supervisors and Management personnel were explicitly informed that conduct such as that engaged in on May 14, 1982, was unlawful under the National Labor Relations Act. They were further informed that Section 7 of the Act gives employees the right to form, join or assist unions, to bargain collectively, and to engage in concerted activity.

(b) On May 18, 1982, a notice was posted on all Company bulletin boards including the Feed Mill and Hatchery disavowing the conduct of May 14, 1982, pledging that such conduct would not happen again, and informing employees of their rights. A copy of this notice is attached to this stipulation as Exhibit A. This notice remained posted at the plant for sixty (60) days. In addition, copies were mailed

to the Union and to the Regional Office of the National Labor Relations Board.

(c) In addition to posting the disavowal notice on May 18, 1982, Dr. Jerry Cox, General Manager, and the Respondent's highest official at Golden Poultry, called a group meeting of all employees on each shift and read the notice (Attachment A) aloud.

Although no employees at the Feed Mill were interrogated, since employees at the production plant had friends and relatives who worked at the Feed Mill, Dr. Cox met with all Feed Mill employees on May 18, 1982, and read the notice aloud to all of these employees.

(d) During the meeting of all first shift employees in the break room at the plant on May 18, 1982, after reading the notice (Attachment A) aloud, Dr. Cox asked each supervisor who participated in the interrogation on May 14, 1982, to come individually to the front of the meeting. When each supervisor came forward individually, Dr. Cox asked the supervisor, "Do you understand and commit to the principles set forth in this notice?" Each supervisor responded aloud, "I understand and commit to the principles set forth in this notice."

(e) A copy of the Notice (Attachment A) was mailed on May 29, 1982, to all employees of Golden Poultry in Douglas, Georgia, including the employees in the Feed Mill and Hatchery.

Attachment A referred to in the stipulation is captioned "Notice to Employees" and constitutes what Cox told the employees starting from acknowledgment that at Paulk's direction named supervisors had asked employees how they were going to vote in the election. The notice continues with an assertion that Paulk had not realized such questioning was unlawful under the Act, expresses regret about the matter, and gives assurance that it will not occur again. It goes on to outline employee rights under the Act, asserts that Respondent recognizes these "sacred rights," and pledges that it will not ask how employees are going to vote and that it would not "in any other manner" interfere with employee rights under the Act. The notice concludes with the assertion that it would be posted on all bulletin boards for 60 days and that copies of the notice, signed by Cox, were being mailed to the Board's Regional Office in Atlanta, to the Union, and to each employee.

The General Counsel and the Union assert that Respondent's efforts to repudiate the unlawful conduct flowing from its questioning of the employees was insufficient and inadequate to preclude the finding of 8(a)(1) violation and the entry of an appropriate order by the Board. In this regard, the General Counsel argues that Respondent's repudiation was incomplete and ineffective, and that Respondent failed to comply with its own notice when it subsequently interrogated Dunnom. The Union in its brief argues, in effect, that Respondent planned and intended to violate the Act through its questioning of employees with the anticipation that it could exculpate itself with the Notice, and that in view of this "sophisticated scheme" its efforts to repudiate the

conduct should be held invalid. In arguing that it had effectively repudiated its unlawful conduct Respondent relies on *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), and *Broyhill Co.*, 260 NLRB 1366 (1982).

In *Passavant* the Board set forth the standards to be utilized in considering whether an employer has effectively repudiated its unlawful conduct so as to avoid the finding of a violation of the Act based on such conduct. These standards were stated at 138-139 as follows:

To be effective, however, such repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." *Douglas Divison, The Scott & Fetzer Company*, 228 NLRB 1016 (1977), and cases cited therein at 1024. Furthermore, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. *Pope Maintenance Corporation*, 228 NLRB 326, 340 (1977). And, finally, the Board has pointed out that such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights. See *Fashion Fair, Inc., et al.*, 159 NLRB 1435, 1444 (1966); *Harrah's Club*, 150 NLRB 1702, 1717 (1965).

More recently, in *Broyhill*, supra, the Board in applying the *Passavant* standards concluded that an employer had effectively disavowed unlawful conduct of a supervisor even though the disavowal notice was not posted until about 5 weeks after the unlawful conduct and the supervisor involved was not specifically named in the notice. In reaching its conclusion, the Board observed that Respondent did all it reasonably could do to disavow the unlawful conduct of its supervisor and pointed out as a matter of apparent policy that "Such voluntary action by employers should be encouraged by this Board." *Broyhill*, supra, at 1367.

Apply the *Passavant* standards to the instant case it is difficult to perceive what more Respondent could have done to repudiate the unlawful questioning by its supervisors. Since I have earlier found herein that Respondent did not unlawfully interrogate Dunnom it appears that every *Passavant* standard was followed in Respondent's efforts to repudiate the interrogation of its supervisors. Indeed, a notice provided for in a Board order could not have been more clearly drawn to remedy the specific conduct involved nor, under normal procedures, could it be more effectively disseminated and communicated to the employees.

The General Counsel's contention that the repudiation was incomplete was based on the premise that employees were not told in the repudiation that their recorded answers given during the interrogation were destroyed. While the parties stipulated that the supervisors would testify that any records of employee responses resulting from the interrogation were destroyed, a canvass of the record does not reflect that employees were ever told or otherwise knew that their responses were recorded. Accordingly, the absence of a reference in the notice to a

destruction of records is immaterial and does not adversely impact on its effectiveness.

The General Counsel's argument with respect to the ineffectiveness of the notice appears to be based on a concern that the full 60-day posting period was not complied with before the election. This argument, however, obviously goes to the effectiveness of the repudiation as it is related to the election, not the effectiveness in precluding the entry of a Board order based on a finding of a violation of Section 8(a)(1) of the Act.

With respect to the Union's argument that Respondent followed a "sophisticated scheme" to violate the Act through the interrogation, there is little record support. The Union's theory is based on undisputed record evidence that Respondent, prior to the polling directed by Paulk, had advised its supervisors, presumably including Paulk, against threatening, interrogating, promising, or surveilling employees in connection with their union activity. Thus, the Union argues that Paulk, knowing interrogation of employees was unlawful, went ahead and did it anyway to accomplish coercion and then to avoid the consequences through the repudiation. There is a substantive difference, however, between knowing that it is unlawful to interrogate employees about their union activities and knowing that it is unlawful to poll employees regarding their intended vote in an election which Respondent through Paulk did. The coercive effect may be the same in each case, but in the absence of evidence that Respondent gave specific instructions to its supervisors regarding polling I am not prepared on this record to conclude that Paulk understood that there was no legal distinction between interrogation and polling.

The Union appears in its brief to attach some significance to the fact the *Broyhill* decision issued 5 days after the Union had filed its petition herein. It contends that *Broyhill* was a model for Respondent's planned interrogation and its subsequent "Notice." No doubt *Broyhill* was a consideration in Respondent's repudiation efforts, but the evidence in no way suggests that the issuance of *Broyhill* provided a basis for, or sparked, any planned interrogation. As already noted the standards for determining the effectiveness of repudiations of past violations was set forth in *Passavant* 4 years prior to *Broyhill*.

In any event, under the circumstances of this case, it is difficult to understand what unlawful and lasting coercion Respondent could have hoped to accomplish when it so quickly followed the polling with a notice as complete and detailed as the one herein. I conclude that Respondent's notice and its actions in communicating the context of the notice to employees clearly complied with all the *Passavant* standards, and that it effectively repudiated the violation inherent in the otherwise coercive questioning of employees. Accordingly, I would find no violation of Section 8(a)(1) of the Act based on such questioning and I shall recommend that the complaint allegation on this point be dismissed.

The absence of a finding of an 8(a)(1) violation on the mass interrogation is not dispositive of the Union's election objection based on the same conduct. "The test of conduct which may interfere with the 'laboratory conditions' for an election is considerably more restrictive than the test for conduct which amounts to interference,

restraint, or coercion which violates Section 8(a)(1).' *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786-1787 (1962). Accordingly, there remains the question of whether by the same repudiation Respondent removed the polling as an act of interference which destroyed the laboratory conditions necessary for a valid election. As the Union's brief points out, that which would violate Section 8(a)(1) of the Act a fortiori interferes with the exercise of a free and untrammelled choice in an election. *Playskool Mfg.*, 140 NLRB 1417 (1963). This policy is not without exception, however, and the recognized exception is found where the violations "are such that it is virtually impossible to conclude that they could have affected the results of the election." *Enola Super Thrift*, 233 NLRB 409 (1977). "In determining whether a violation could have affected the results of an election [the Board has] considered 'the number of of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors.'" *Custom Trim Products*, 255 NLRB 787 (1981). In the instant case, of course, the interrogation here extended to 20 percent of the unit employees and, by virtue of Respondent's "Notice" it was brought to the attention of all the unit employees. However, while serious, the interrogation was not accompanied by threats or other coercion violative of Section 8(a)(1). The remaining and dominant "relevant factor" is Respondent's repudiation of the unlawful conduct. Although Respondent's notice was complete and fully disseminated to employees it was posted less than 10 days prior to the election. The Board as a standard policy requires that its remedial notices be posted for a period of 60 days as a necessary means of dispelling and dissipating the unwholesome effects of a respondent's unfair labor practices. "[T]he 60-day posting requirement is not to be taken lightly or whittled down as the purpose of the notice is to provide sufficient time to dispel the harmful effects of Respondent's discriminatory conduct." *Chet Monez Ford*, 241 NLRB 349, 351 (1979). See also *Robertshaw Controls Co.*, 263 NLRB 958 (1982).

Respondent's notice and efforts to repudiate its own misconduct, while sufficient to avoid a finding of a violation of the Act based on such conduct, should be accorded no greater vitality or validity than a Board remedy in providing time in which to dispel the harmful effects of misconduct. Moreover, although argument may be made that full dissemination of the contents of Cox's announcements of the matter and the mailing of the notice to employees should serve to shorten the time period for remedial effect and posting, the posting for only 9 days before the election, I find, hardly provides a sufficient lapse of time to dispel any lingering vestiges of coercion in the minds of employees flowing from the mass interrogation. Under these circumstances it is not impossible to conclude that Respondent's interrogation interfered with the election. Moreover, any uncertainty in this regard should be resolved against the one whose conduct caused the problem. Accordingly, I conclude that Respondent's efforts to voluntarily remedy its coercive interrogation were insufficient to preclude its conduct from interfering with the employees' free and untrammelled choice in the

election. I thus find merit to the Union's Objection 2 to the election based on this conduct of Respondent.

##### 5. The appropriateness of a bargaining order

Based on the proposition that Respondent was a successor to Swift the complaint alleges that the Union was the representative of a majority of Respondent's employees in the appropriate unit, and that Respondent's refusal to recognize the Union on and after January 15, when considered with the other violations of the Act alleged in the complaint, constituted a violation of Section 8(a)(5) of the Act. Both the General Counsel and the Union, recognizing that an election has taken place, argue that because of Respondent's objectionable conduct the election must be set aside and a *Gissel*<sup>10</sup> bargaining order issued.<sup>11</sup> With the election set aside, and to establish the Union's majority status as a basis for the bargaining order, the General Counsel and the Union would rely on the presumption of the Union's majority status flowing from Respondent's status as a successor to Swift where the Union was the recognized bargaining agent and had an effective bargaining agreement at the time of Respondent's purchase.<sup>12</sup> In seeking this result the General Counsel and the Union urge that by proceeding to the election in this case, in the face of what appeared to be an unlawful refusal to bargain, the Union did not waive its right to invoke its representative status on the successorship basis. The Board's decision in *Bernel Foam Products Co.*, 146 NLRB 1277 (1964), is cited in support of this proposition. In *Bernel Foam* the Board held that a union faced with a choice of filing a refusal-to-bargain charge or proceeding to the normally quicker and less expensive means of obtaining recognition, an election, is not compelled to an "irrevocable option." There, the Board stated at 1280, 1281:

The fact that in an election a vote favorable to the union may obviate for it the necessity for pursuing the unfair labor practice route does not, in our view, warrant requiring that the union forfeit the right to request that the effect upon it of the employer's unlawful conduct be rectified when it develops that such conduct has been sufficiently onerous to interfere with the election and to cause a substantial deterioration in the union's status.

<sup>10</sup> *NLRB v. Gissel Packing Co.*, supra.

<sup>11</sup> More specifically the Union asserted in its brief that "Gissel is pertinent as an example of the type of misconduct warranting a bargaining order regardless of the basis for the Union's claim of majority status prior to the election." And the General Counsel would also appear to invoke the standards set forth in *Gissel* by asserting in his brief that "a fair second election could not be held."

<sup>12</sup> As the Board stated in *Aircraft Magnesium*, 265 NLRB 1344, 1346 (1982), "A union is not required to substantiate anew its majority status when a successor assumes an employer's business. Rather, successor employer is obligated to bargain with the exclusive representative of the employees acquired from the predecessor unless it demonstrates either that the representative no longer enjoys majority support on the date of its refusal to bargain or that it has a good-faith doubt of the representative's continued majority status." (Footnotes omitted.) Thus, in a successorship situation a union is entitled to a presumption that it has majority support. *Raymond Convalescent Hospital*, 216 NLRB 494 (1975); *Barrington Plaza and Tragview, Inc.*, 185 NLRB 962 (1970), enfd. 470 F.2d 669 (9th Cir. 1972).

In addition, where the conduct engaged in is found to be of a type which makes a fair election impossible the election is set aside and regarded as a nullity. There is absolutely no basis for holding the participating union alone bound by an election which has been declared a nullity. Either the election is not a nullity or the union is not bound thereby. To hold, as our dissenting colleague would, that by participating initially in an ultimately void election the union irrevocably committed itself to the representation proceeding and, therefore, may seek a remedy only in another election, overlooks the fact that an election is not a remedy either in statutory concept or in reality.

The Board's decision in *Bernel Foam* was reaffirmed in *Irving Air Chute Co.*, 149 NLRB 627 (1967), which made it even more clear that a bargaining order could be imposed only where the election has been set aside on the basis of meritorious objections to the election. *Bernel Foam* was cited with apparent approval in *Gissel*, supra at 615, and remains viable Board law.

Respondent defends against a bargaining order initially on the premise that it committed no violations of the Act and engaged in no objectionable conduct which would warrant setting aside the election. These points have already been decided against Respondent.

Respondent would further argue that there could have been no 8(a)(5) violation before the election because the Union never requested bargaining at a time after Respondent had hired a majority of Respondent's employees. This point too must be decided against Respondent, for Perdue, in his letter of January 15, said Respondent was not agreeing to either assume Swift's agreement with the Union or to recognize the Union as bargaining representative of Respondent's employees. True, Respondent's did not have as a majority of its employees former Swift employees, or in fact any employees at all, until January 20. But in view of Perdue's letter any further express union request for recognition would have been futile. And, in any event, the request for bargaining and recognition which I have found Lee made on January 15 must be regarded as a continuing one. See *Aircraft Magnesium*, 265 NLRB 1344 (1982); *Williams Energy Co.*, 218 NLRB 1080 (1975). Thus, the request was outstanding as of January 20.

Respondent next argues that, even assuming its status as a legal successor to Swift, and further assuming a valid demand for recognition by the Union, a bargaining order is not appropriate here because the Union chose to proceed to an election which it lost thereby rebutting any presumption of majority status to which it might otherwise be entitled on a successorship premise. In taking this position Respondent would distinguish *Bernel Foam* on the basis that in that case the Union relied on authorization cards to establish its majority status, and then only after conduct by the employer which made a "fair election impossible." Respondent argues that the Board's use of the word "nullity" in reference to an election interfered with by the employer in *Bernel Foam* was implicitly restricted to situations where a fair rerun was impossible, so that the Union was entitled to a bargaining

order based on proving its majority status through cards notwithstanding the results of the election. Respondent then argues that "When an employer's conduct interferes with an election but is insufficient to preclude a fair rerun election the results of the election are a nullity only in the sense that they are not conclusive on the question of representation." Under these circumstances, according to Respondent, the results of the election stand to rebut any presumption of majority status that the Union may have enjoyed prior to the election. Thus, it is argued, assuming that Respondent interfered with the initial election, only a rerun election is the proper.

I find no merit to Respondent's argument that the election rebuts the presumption of the Union's majority status. An election tainted by Respondent's misconduct signifies nothing conclusive as to employee desires for union representation.

Rather, I conclude that because Respondent engaged in unlawful conduct which warranted setting aside the election the Union was freed to pursue and litigate the legality of Respondent's initial refusal to recognize and bargain with the Union under the principles of *Bernel Foam* and *Irving Air Chute*.

In reaching this conclusion I find it unnecessary to assess Respondent's unlawful conduct which interfered with the election under the standards set forth in *Gissel*, supra.<sup>13</sup> I find *Gissel* distinguishable and inapposite to the case sub judice. First of all in this regard, *Gissel* involved establishment of a union's majority status through union authorization cards.<sup>14</sup> The instant case does not for the Union's status here is based upon a presumption. Secondly, *Gissel* involved initial recognition of a union. The instant case does not, for the Union here was recognized by Respondent's predecessor and its representative status derives from Respondent's successorship status. Thirdly, the focus of *Gissel* was upon provision of a bargaining order remedy for unlawful employer conduct which precluded the holding of a fair election. Here there is no reason to be more concerned with the employer's conduct that impact on the election than the unlawful conduct of the employer which necessitated resort to the election process in the first instance as the speediest and most inexpensive alternative to the unfair labor practice route for the Union to secure recognition.<sup>15</sup>

<sup>13</sup> In *Gissel* the Court measured employer unlawful conduct which would justify a bargaining order remedy in accordance with three standards: (1) "outrageous" and "pervasive" unfair labor practice which would warrant entry of a bargaining order without regard to a union's majority status; (2) less pervasive unfair labor practices which nonetheless have a tendency to undermine majority strength and impede the election process, therefore warranting the entry of a bargaining order where the Union's majority status is otherwise established; (3) minor or less extensive unfair labor practices which have little impact on the election machinery and which would not warrant entry of a bargaining order.

<sup>14</sup> While under *Gissel* a union's majority status might be established by means other than cards in the normal situation to which *Gissel* applies, resort to an election is forced by an employer who does nothing more than lawfully initially refuse to recognize a union or the basis of cards. See *Sumner & Co. v. NLRB*, 419 U.S. 301 (1974). In the case sub judice if Respondent was obligated to recognize and bargain with the Union by virtue of Respondent's status as a successor to Swift, Respondent could not lawfully have insisted upon an election.

<sup>15</sup> While it may be argued that *Gissel* modified *Bernel Foam*, which was, like *Gissel*, a card case, to the extent that *Gissel* standards are imposed in determining the appropriateness of a remedial bargaining order

The Board has also indicated that *Gissel* standards are not necessarily applicable to cases involving an employer's unlawful refusal to recognize a union or unlawful withdrawal of recognition from a union. Thus, in *Automated Business Systems*, 205 NLRB 532 (1973), the Board considered the legality of an employer's withdrawal of recognition from an incumbent union followed by an election held pursuant to a decertification petition. The employer was found to have interfered with the election by engaging in various unfair labor practices. It was only after the Board concluded that the withdrawal of recognition was not unlawful that it determined that the case was analogous to an original organization case to which *Gissel* standards would be applicable. Thereafter, applying *Gissel* and measuring the employer's unfair labor practices which interfered with the election under *Gissel* standards, the Board concluded that the employer's conduct met the second *Gissel* standard warranting the entry of a remedial bargaining order. In so concluding the Board also relied on the presumption of the Union's majority status flowing from the Union's incumbency.<sup>16</sup>

Accordingly, I reject Respondent's argument in this case that employer conduct which does not preclude a fair rerun election will not warrant a bargaining order. That argument has relevance only to bargaining orders entered as a remedy for unfair labor practices which interfere with an election and not to bargaining orders necessitated by a respondent's antecedent refusal to bargain which is unlawful in and of itself.<sup>17</sup>

Based on the record herein I have found that Respondent became the successor to Swift with whom the Union had a collective-bargaining agreement. I have further found that the Union on or about January 15 requested recognition of Respondent and Respondent declined recognition. While Respondent did not become a successor to Swift until January 20 when Respondent employed as a majority of its employees former employees of Swift, the Union's original request for recognition was entitled to be treated as a continuing request so that it remained effective on January 20. This is particularly

in like situations, *Gissel* reaffirmed the basic premise underlying *Bernel Foam*. That is "that there is nothing inconsistent in a union's filing of an election petition and thereby agreeing that a question of representation exists, and then filing a refusal-to-bargain charge after the election is lost because of the employer's unfair labor practices." *Gissel, supra*, at 616, fn. 34. That principle of law remains whether or not *Gissel* standards are applicable.

<sup>16</sup> The Board's Order in *Automated Business Systems* was remanded by the court of appeals, 497 F.2d 262 (6th Cir. 1974), on the issue of the union's continuing majority status, but it approved the Board's application of *Gissel* to the case.

<sup>17</sup> Respondent cites *Mitchell Standard Corp.*, 140 NLRB 496 (1963), and *Tennsco Corp.*, 141 NLRB 296 (1963), *enf. denied* 339 F.2d 396 (6th Cir. 1964), as having relevance and application to the instant case and as showing the legality of Respondent's refusal to bargain. Without going into all the details of the cases I find them clearly distinguishable from the case sub judice. In *Mitchell* a successorship was found, but the Board found the employer's refusal to bargain with the union was justified on its good-faith doubt of the union's majority status premised in part on strong evidence of employee discontent with the union. There is no such evidence in the instant case. *Tennsco* is distinguishable for there, unlike here, the employer was found not to be a successor. Moreover, evidence in that case showed a substantial decline in dues-paying members while employed by the preceding employer, a factor not found in the instant case.

appropriate here where Respondent's January 15 refusal to recognize the Union was unqualified and unlimited as to time therefore making any renewed request for recognition futile. By virtue of Respondent's becoming successor to Swift the Union is entitled to the "presumption" that it was majority representative of Respondent's employees on and after January 20. There was no valid evidence presented to rebut such presumption herein or to otherwise provide a basis for a good-faith belief that the Union no longer enjoyed majority status. Respondent never accorded the Union recognition on or after January 20 even though the testimony of Lee, credited in this regard, reveals that Perdue told him on January 15 that he felt Respondent would recognize the Union hiring of 50 percent of Swift's former employees. These facts, I conclude, establish a classic violation of Section 8(a)(5) and (1) of the Act by Respondent. Respondent having engaged in practices found herein to warrant setting aside the May 27 election, and a timely charge having been filed on Respondent's antecedent refusal to extend recognition to the Union, there is nothing to preclude the entry of a customary bargaining order for Respondent's violation of the Act. I conclude, therefore, that Respondent violated Section 8(a)(5) and (1) of the Act as alleged and that a bargaining order is the appropriate remedy for such violation.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent, by implicitly promising its employees unspecified benefits in order to discourage them in their union support, engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. Respondent, by threatening employees with the futility of selecting the Union and with the inevitability of strikes if the Union were selected in order to discourage their union support, engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.
5. The Union's Objections 2 and 4 to the election in Case 10-RC-12589 have merit and must be sustained and the election held on May 27, 1982, set aside.
6. All production and maintenance employees, including plant clerical employees and truck drivers at the Employer's Douglas, Georgia feed mill and poultry process-

ing facilities, excluding office clerical employees, quality assurance employees, guards and supervisors as defined in the Act, constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

7. Respondent became the legal successor to Swift and Company on January 20, 1982.

8. The Union was at all times material the representative for the purposes of collective bargaining of a majority of employees of Swift & Company in the unit described in paragraph 6 above and pursuant to Section 9 (c) of the Act was the exclusive representative of such employees, and by virtue of Respondent's legal successorship to Swift the Union became on January 20, 1982, and is, now, the representative for the purposes of collective bargaining of the majority of the employees in the above unit.

9. Respondent, by refusing to recognize and bargain with the Union as exclusive representative of employees in the above unit on and after January 20, 1982, engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

10. The unfair labor practices set forth above in paragraphs 3, 4, and 9 affect commerce within the meaning of Section 2(6) and (7) of the Act.

11. Respondent did not engage in any other unfair labor practices alleged in the complaint.

#### THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend to the Board that Respondent be ordered to cease and desist therefrom, and to take certain affirmative actions to include the posting of an appropriate notice to employees. Further, having found merit to the Union's election objections I also recommend to the Board that the election in Case 10-RC-23589 be set aside, and, in view of my conclusion that Respondent unlawfully refused to bargain prior to the election, the petition be dismissed.

Having found that Respondent, in violation of Section 8(a)(5) and (1), refused to recognize and bargain with the Union in the appropriate unit on and after January 20, 1982, I shall recommend that it be ordered to cease and desist therefrom, and that, upon request of the Union, it bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the unit found appropriate herein.

[Recommended Order omitted from publication.]