

Toys-R-Us, Inc. and Production, Merchandising and Distribution Employees Union, Local 210, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. Cases 22-CA-15914 and 22-RC-9990

September 28, 1990

DECISION, ORDER, AND DIRECTION OF
SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On September 7, 1989, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

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

1. The judge found that the Respondent violated Section 8(a)(1) of the Act when its former shipping manager, Hesketh Browne, told employee Martrovitz Molette that he would have to wait until after the election to receive a merit wage increase. In reaching this conclusion the judge, citing *Brunswick Food & Drug*, 284 NLRB 663, 675 (1987), and *Centre Engineering*, 253 NLRB 419 (1980), found that the Respondent offered Molette no evidence that he would receive the increase regardless of the outcome of the election or that the raise would be retroactive. For the following reasons, we find merit in the Respondent's contention that Browne's statement to Molette was not coercive.

In *Centre Engineering*, above, the Board noted that it is unlawful for an employer to withhold wage increases or accrued benefits because of union activities and so advise employees, but that it is not unlawful for an employer to inform employees that expected benefits are to be deferred pending the outcome of the election in order to avoid the appearance of election interference. Applying those principles to the facts before

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

Regarding the judge's factual findings, we do not rely on any suggestion at sec. II.A of his decision that the Respondent's director of labor relations, Richard Cudrin, encouraged employees at the July 1988 meeting to use the "let's talk line" to express grievances, concerns, or complaints. In this regard, the record indicates that employees were encouraged to use the hotline to express grievances when it was first established in the early 1980s, and that Cudrin at the July 1988 meeting merely told employees that the hotline had been underutilized.

it, the Board found that the respondent's statement that it could not implement a planned raise "because their [sic] hands were tied" impressed on the employees that a raise would have been received but for the union campaign.² In the absence of assurances that the raise would be given after the campaign ended or that it would be made retroactive, the Board concluded that the respondent violated Section 8(a)(1) of the Act by unlawfully attributing to the union its failure to grant a wage increase. 253 NLRB at 421. In *Brunswick Food & Drug*, above, the Board found that the respondent violated Section 8(a)(3) and (1) by withholding a promised wage increase after telling the employee that his increase was frozen "because of the union." 284 NLRB at 681.

Turning to the facts of the instant case, the judge found that the Respondent's policy was to grant merit wage increases to deserving employees each February and on an individual basis throughout the year. The judge credited Molette's account of his conversation with Browne. In this regard, Molette testified that after the campaign began and prior to the September 22, 1988³ election, he informed Browne that he had improved his attendance and felt that he deserved a merit increase. According to Molette, Browne, after discussions with the warehouse manager, responded "that no increases of merit would be given or considered until after the union activity had subsided." On cross-examination by the Respondent's counsel, Molette answered in the affirmative when asked whether Browne said he would have to wait for a merit increase "until after the election was over." It was this latter testimony that the judge set out as Molette's description of what Browne told him. Further, Molette admitted on cross-examination that Browne stated that regardless of the outcome of the election, they would talk when the election was over about Molette's merit increase.

We find that Molette's credited testimony does not establish that the Respondent engaged in unlawful conduct. Specifically, we find that the judge erred in finding that the Respondent offered Molette no evidence that he would receive the increase regardless of the outcome of the election. Unlike the situations in *Centre Engineering* and *Brunswick Food & Drug*, above, Molette's credited testimony establishes that Browne stated that he would have to wait "until after the election was over" for a merit increase. Molette also stated that Browne said that regardless of the outcome of the election, they would talk when the election was over about Molette's increase.⁴ Thus, it would appear

² The Board found that under the circumstances of the case, including a prior statement by the respondent, it was clear that the respondent impliedly referred to the union by its "hands tied" statement.

³ All dates are in 1988 unless otherwise indicated.

⁴ Moreover, although the judge did not credit Browne's account of his conversation with Molette, we note that Browne's testimony on this particular point is not inconsistent with Molette's. Thus, Browne testified that he assured

to employees that an expected benefit was merely being deferred until after the election. Accordingly, we reverse the judge and find that under the circumstances here, the Respondent did not unlawfully attribute to the Union its failure to grant merit increases.⁵

2. The judge found that the Respondent violated Section 8(a)(1) of the Act by impliedly promising employees better wages, benefits, and working conditions if they withdrew their support for the Union. In so finding, the judge relied on *Color Tech Corp.*, 286 NLRB 476 (1987), in which the Board found that the respondent violated Section 8(a)(1) by urging employees to forgo their organizational activities while the respondent investigated area wage rates, thereby impliedly promising to adjust wages. We agree with the judge that the Respondent made unlawful implied promises of better wages.⁶ In so finding, we rely on facts found by the judge and also established by the uncontroverted testimony at the hearing.

After the filing of the petition, Richard Cudrin, the Respondent's director of labor relations at the time of the election, held a series of meetings with employees to discuss issues related to the election. Each meeting was divided into sessions to accommodate various groups of employees. At one of the sessions during the fourth meeting, an employee asked whether there was any way that the employees could vote again in less than a year if they voted against representation. Cudrin responded that if the employees could persuade the Union to withdraw its petition for 6 months, they would have the opportunity to see whether improvements would be made at the facility and could vote in 6 months if they were not satisfied. Cudrin further explained that a 6-month delay would enable the employees to evaluate their February raises. According to Cudrin, he discussed these issues at the two remaining sessions held that day and instructed the Respondent's managers to provide the information to employees who had attended the first sessions where it was not discussed. In this regard, Roger Stellatel, the Respondent's return-goods manager, testified that pursuant to these instructions he told employees that in 6 months "they will better know what is going on and they could see if they really wanted a union." Stellatel further stated that the employees were aware that the February raises fell within the 6-month period.

Regarding the February wage increases, the Respondent's employees are eligible each February for wage increases that are based partly on merit and partly on area wage surveys. The Respondent conducts the

wage surveys during the fall and adjustments are made in February for those locations that are not competitive in their area. The subject of wages was discussed at the fifth employee meeting, at which Cudrin distributed to the employees copies of the following statement:

AT TOYS "R" US WE GUARANTEE THE
FOLLOWING:

On behalf of Toys "R" Us, WE CAN GUARANTEE you straight talk. We will give a wage increase in February to all employees at our warehouse, consistent with our past practice. There are no strings attached.

Of course, if the Union won an election we would negotiate with them in good faith over wages as well as other terms of employment, but no one can predict the outcome of negotiations.

Labor Board procedure offers another possibility. If the union agrees, the board will permit the union to withdraw its representation petition before the election, and refile as early as six months later. This procedure allows employees to defer deciding on whether they want a union. It gives people time to think. The decision is up to you. We think the answer, now or later, is to vote NO.

The statement was notarized and was signed by Cudrin and by the Respondent's regional general manager and its distribution center manager. When questioned regarding the creation of the document, Cudrin testified that he had used a "guarantee type of thing" before, but that the idea of the Union withdrawing the petition for 6 months came from an employee's question at the meeting 10 days earlier. According to Molette, Cudrin introduced the document by stating that the Union could guarantee employees only a fair hearing and fair negotiations, but that the document reflected what the Respondent could guarantee. Molette further stated that Cudrin indicated that the employees could opt to have a "feeling out period to see what the company . . . could possibly do for us."

In the meantime, Cudrin instructed the Respondent's managers that the employees might circulate a petition asking the Union to withdraw its representation petition, and told Stellatel not to permit the employees to solicit signatures during working hours. According to the credited testimony of employee Judy Ann Bell, Stellatel told her that a petition would be coming around "asking the employees to give the company six months before they decide whether or not to bring in a union." Bell asked "why," and Stellatel responded that the Company thought the employees would like their February raises. When Bell asked how the upcoming raises would be different from other February increases, Stellatel responded that "maybe" the Respondent felt it had not been treating employees right

⁵Molette that all of the employees who deserved merit increases would get them after the election, regardless of the outcome of the vote.

⁵We shall amend the Conclusions of Law and the judge's recommended Order in accordance with this finding.

⁶The record does not support the judge's finding that the Respondent also impliedly promised better benefits and working conditions. We shall modify the recommended Order accordingly. We shall also add appropriate narrow injunctive language to the notice.

“and they feel that they should do something to amend for it.”⁷

In view of the above, we find that the Respondent engaged in a course of conduct that suggested to employees that if they delayed the election they would receive better wages in February and could thereafter reevaluate their need for organization. An employee question at the fourth meeting established in Cudrin’s mind the connection between delaying the election for 6 months and the occurrence during the 6-month period of the February wage increases. Immediately thereafter, this information was disseminated to other employees by Cudrin and by the Respondent’s management. The foreseeable linkage in the employees’ minds between the wage increase and a 6-month delay is reflected in Stellatel’s testimony that all the employees were aware that the February wage increases would fall within the 6-month period.

The Respondent’s “wage guarantee” that was distributed 10 days later further solidified that link between the February wage increases and a delay in the election. Thus, this document, which was signed by the Respondent’s top management personnel, discussed the February increases and then urged employees that a 6-month delay would allow them “to defer deciding on whether they want a union” and give them “time to think.”

In support of its view that management was merely discussing a preexisting benefit, the Respondent contends that the February increases were controlled by market forces and not by the Respondent’s desire to influence or reward employees. To the extent, however, that the increases were also based on employee evaluations, which involved more subjective criteria, the Respondent’s contention is not persuasive. Moreover, although the document refers to “past practice” with respect to the granting of wage increases, the fact that it was presented as a “guarantee” suggests that employees would receive increases regardless of their individual qualifications or the result of the relevant wage survey.⁸ Such an interpretation concerning the

suggestion of an improved benefit is consistent with Stellatel’s comment to Bell insinuating that the February increases would be different from those given in previous years. Finally, consistent with this course of conduct promoting an election delay, Cudrin told the Respondent’s managers to expect an employee petition to circulate requesting that the Union withdraw its representation petition.

Viewed as a whole, the Respondent’s conduct went beyond the bounds of acceptable campaign propaganda. Despite its disclaimers that it could not make promises, the Respondent’s message was clear and its implied promise specific: the Respondent asked employees to give it another chance to improve wage rates after which the employees could reevaluate their need for union representation.⁹ Accordingly, we find that under *Color Tech Corp.*, above, the Respondent violated Section 8(a)(1) by its unlawful implied promise of better wages.

3. The Respondent’s violation of Section 8(a)(1) was sufficiently serious and widespread in its impact to have interfered with the election process. The Board has long held that unfair labor practices that have been litigated in a consolidated unfair labor practice/representation proceeding can form the basis for setting aside the election even though those matters were not raised by the objections. *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988). Accordingly, we shall order that the election be set aside on the basis of the Respondent’s unlawful implied promise of better wages.¹⁰

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3.

“3. The Respondent violated Section 8(a)(1) of the Act by impliedly promising employees better wages if they would withdraw their support for the Union.”

Substitute the following for Conclusion of Law 6.

“6. The results of the election shall be set aside on the basis of the Respondent’s violation of Section 8(a)(1), and a second election shall be held.”

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Toys-R-Us, Inc., Port Newark, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and reletter the following paragraphs.

2. Substitute the following for new paragraph 1(a).

⁹ Compare *National Micronetics*, 277 NLRB 993 (1985) (respondent’s statements asking employees to give it more time or a second chance too vague to rise to the level of illegal promises).

¹⁰ In view of our finding, we find it unnecessary to pass on the Union’s objection to the election.

⁷ Although Bell testified that she saw the employee petition, there is no further information regarding the petition in the record.

⁸ Our dissenting colleague argues (1) that the document simply guaranteed employees that their February increases would be consistent with the Respondent’s past practice, and (2) that it is “not disputed” that the Respondent had a past practice of granting wage increases each February. Regarding a merit increase, Cudrin did testify that each February employees received a wage increase “based upon their performance.” It is not clear from the record, however, whether the Respondent’s consistent past practice was to give all employees a favorable evaluation that would result in a February merit wage increase.

Moreover, we note that at the time the Respondent distributed the “guarantee,” it appears that the employees had not yet been evaluated for the February increases and the area wage surveys had not been completed. Regarding the latter, Cudrin testified that the Respondent’s practice is to commence gathering information for the wage surveys in late summer or early fall, analyze the data, and determine by the end of December whether adjustments in the starting rates are necessary. Therefore, we find that the Respondent in the summer of 1988 had no basis on which to determine that increases based on area wage surveys would be given to all employees the following February.

“(a) Promising employees better wages in order to discourage them from supporting the Union.”

3. Substitute the attached notice for that of the administrative law judge.

[Direction of Second Election omitted from publication.]

MEMBER CRACRAFT, dissenting in part.

My colleagues direct a second election on the basis of finding that the Respondent engaged in a course of conduct that impliedly promised better wages. I cannot agree.

After the Union filed an RC petition in July 1988, the Respondent’s director of labor relations, Cudrin, held a series of employee meetings to discuss issues relevant to the election. In one meeting an employee asked why (if employees rejected the Union in an election) employees would have to wait a year before another election. Cudrin replied that if the Union withdrew the petition, employees would be able to evaluate their February increases and could have an opportunity to vote in 6 months.

Cudrin instructed management to discuss this information with employees who had not been present when the question arose. Stellatel, a manager, informed employee Bell that there was going to be a petition asking for a 6-month delay “before they decide whether or not to bring in a union or not” and that the Respondent thought that the employees would like the February increases. There is no evidence that other employees learned of Stellatel’s remarks.

Cudrin also distributed a document guaranteeing employees their February increases would be “consistent with our past practice” and stating that a 6-month delay in an election would give employees “time to think.” That Respondent has a past practice of granting wage increases each February is not disputed. The increases are based partly on merit and partly on the results of an area wage survey Respondent conducts during the preceding fall.

For the following reasons, I do not believe the facts support the conclusion that the Respondent engaged in an improper course of conduct.

First, the Board’s practice is that unless good cause is shown, a union, which withdraws its petition after hearing, is not permitted to file a petition to represent the same employees for a period of 6 months after its withdrawal. *Sears, Roebuck & Co.*, 107 NLRB 716 (1954), cited in NLRB Casehandling Manual (Part Two) Representation Proceedings, Section 11114.1a. Thus, Cudrin’s statement that employees could obtain an election in 6 months if the Union withdrew the pending petition was a correct statement of law.

Second, as for linking a delay in the election and the annual February wage increases, I see nothing unlawful about stating the obvious, i.e., that February would be within the 6-month period in which the Union could

not file another petition. Even the majority acknowledges that the employees were well aware February would come within the 6 months.

Third, contrary to my colleagues’ finding, neither Cudrin’s response nor the distributed document implied that the Respondent would act different than in the past. In fact, both Cudrin and the document stated just the opposite, that the Respondent would follow its past practice. Indeed, Board law would require that the Respondent continue its past practice, so I see nothing improper about so stating.¹

My colleagues’ reliance on *Color Tech Corp.*, 286 NLRB 476 (1987), is unconvincing. In *Color Tech*, when the respondent asked employees to delay organizing to allow the respondent to investigate area wages, the employees could reasonably expect a departure from past conduct because the respondent had no past practice of surveying area wages before granting increases. In contrast, given the existence of the Respondent’s policy concerning wage increases, I believe a reasonable person would interpret Cudrin’s statement and the guarantee in the distributed document as a promise not to depart from past practice.

In sum, I would not find the Respondent’s actions constitute an unlawful course of conduct, and I would not set aside the election.²

¹ The majority, observing that the Respondent’s February wage increase program included a discretionary aspect, finds that the Respondent could use employee evaluations to grant increases as a means of influencing employees. The majority relies on the Stellatel comment as evidence that the Respondent’s course of conduct implied the upcoming February increases would be better than might otherwise be expected. Although I would find Stellatel’s comment unlawful, as it could be interpreted by Bell as a promise that February increases would be different from increases in the past, I would not (nor do my colleagues) find that Stellatel’s comment was disseminated to other employees. Absent evidence of dissemination of the Stellatel comment, I cannot treat the Stellatel incident as part of the Respondent’s course of conduct. Consequently, I am unable to agree with my colleagues that Cudrin’s remarks and the distributed document promising to continue past practice (as required by Board law) support a finding that a reasonable person would believe the Respondent was promising to grant increases in a manner different from increases in the past. In addition, absent evidence of dissemination, I would not find that the Stellatel comment interfered with the election.

² My colleagues find it unnecessary to pass on the judge’s brief discussion of the Union’s objection. The objection was based on the Respondent’s references to past practice at other facilities. The record shows that the references factually stated the results of the wage surveys. I see no basis for finding this conduct objectionable.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post and abide by this notice.

WE WILL NOT promise our employees that they will be given better wages in order to discourage their sup-

port for Production, Merchandising and Distribution Employees Union, Local 210, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, or any other labor organization.

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

TOYS-R-US, INC.

William O'Connor, Esq., for the General Counsel.
Robert G. Brody, Esq. (Jackson, Lewis, Schnitzler & Krupman), of New York, New York, for the Respondent.
Ronald Goldman, Esq. (Manning, Raab, Dealy & Storm), of New York, New York, for the Union.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The pleadings in Case 22-CA-15914, as amended at the hearing, put in issue whether Toys-R-U's (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act). In particular, Respondent is alleged to have (1) unlawfully sought from its employees their reasons for supporting Production, Merchandising and Distribution Employees Union, Local 210, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO (the Union), (2) implied to its employees that they would receive better wages and benefits if they did not support the Union, and (3) informed them that they would not be given merit increases if they supported the Union.

Objections were filed by the Union to an election held in Case 22-RC-9990. Those of its objections which paralleled the above allegations of unfair labor practices were consolidated for hearing.

The hearing was held in these cases in Newark, New Jersey, on March 15 and 16, 1989. 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 and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent is engaged in the retail sale of toys and related items. Its annual gross revenue and its receipt of goods across state lines are sufficient to meet the Board's jurisdictional standard for retail concerns.

The pleadings establish that the Union is a labor organization as defined in the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Evidence*

Respondent operates about 350 retail stores and numerous distribution centers throughout the United States. It has a warehouse at Port Newark in New Jersey. Its approximately 150 employees there have not been represented for purposes of collective bargaining since that facility opened in 1984.

On July 27, 1988 (all dates hereafter are for 1988 unless stated otherwise), the Union filed a petition in Case 22-RC-9990 to represent the employees at Port Newark. Richard Cudrin was then Respondent's director of labor relations and has since been promoted to vice president. He testified that, on the Union's filing the petition, he visited Port Newark to meet with employees there. Over the next few months, up until the election on September 22, he held six meetings altogether, each with a particular theme. The first, according to Cudrin, consisted of a "general introduction"; the second was on the topic of the costs to employees of joining a union; the third concerned the date of the election; the fourth on negotiations; the fifth on strikes and contract comparison; and the sixth, "just a wrap-up."

The first meeting Cudrin held was in late July. Rather than shutdown operations in order to talk with all the employees at once, Cudrin spoke separately with groups of about 25 employees each, in the conference room at Port Newark. There were six such group sessions which comprised the first meeting. Each session that day lasted about an hour and all the sessions followed essentially the same format.

Cudrin had not held any such meetings with Port Newark employees since 1986 when, as he testified, there "was a [previous] union situation there."

Cudrin began the first meeting by mentioning the "let's talk line." He was referring to an "800" telephone line that Respondent set up in the early 1980s for the use of its employees nationwide in calling its corporate office in Paramus, New Jersey. They were encouraged to use that line to express any grievance, concern, or complaint they had.

At the first meeting at Port Newark, Cudrin told the employees that no one has used the "let's talk line" in 2 years to contact him but instead have "chosen to go externally," referring to the Union's petition. Cudrin then went on to explain in general representation case election procedures. He also told the employees that Respondent was not permitted to, nor would it make, any promises to them in connection with "the pros and cons of joining a union." (Cudrin told the employees at each of the six meetings during the preelection campaign period that Respondent could make no such promises). Cudrin then asked the employees to state what kind of dissatisfaction would cause employees to go to a union. He told them that he was not asking them why they "as individuals in this room are interested in a union" but was asking "a general question." A number of employees answered and, as they did, he wrote the answers on a blackboard. The answers included references to better wages and better hours. Notwithstanding Cudrin's earlier statement that he was not interested in asking why anyone of them wanted a union, a number of employees expressed "actual grievances." The discussion at one of the group sessions on the first meeting day became somewhat heated. In the course of an exchange at that session, according to an employee, Henry Gibson, Cudrin asked him what the Union wanted. Gibson testified further that he responded to that question by telling Cudrin that he was stating only what he wanted. Cudrin denied that he asked Gibson what the Union wanted. I credit Cudrin's denial as it is unlikely that one as experienced in labor relations as Cudrin would so abruptly depart from the format he had planned.

At the first meeting, Cudrin did not list any of the employees' specific grievances on the blackboard he was using. He listed "focal discussion points."¹

Cudrin also walked about the Port Newark warehouse during the day on which he first met with the employees in late July. While in the warehouse that day, Cudrin asked employee Gibson, according to Gibson's uncontroverted account, what "were the things about the Company that [he] was dissatisfied with."

Cudrin testified that, at one of the group sessions during the course of the fourth meeting he held among the Port Newark employees, he was asked by an employee why the employees would have to wait a year if they made an incorrect decision—a reference to the fact that, if they voted against representation, no election could be held for a year. Cudrin responded that if the employees could get the Union to withdraw its petition for 6 months, they would have the opportunity in that interval to see whether or not things were better. Cudrin pointed out that annual wage increases are given each February.

At the fifth meeting, held 10 days after the fourth, Cudrin distributed copies of a document, sworn to and signed by him and by other officials of Respondent before a notary on August 30. It read:

AT TOYS "R" US WE GUARANTEE THE
FOLLOWING:

On behalf of Toys "R" US, WE CAN GUARANTEE you straight talk. We will give a wage increase in February to all employees at our warehouse, consistent with our past practice. There are no strings attached.

Of course, if the Union won an election we would negotiate with them in good faith over wages as well as other terms of employment, but no one can predict the outcome of negotiations.

Labor Board procedure offers another possibility. If the union agrees, the board will permit the union to withdraw its representation petition before the election, and refile as early as six months later. This procedure allows employees to defer deciding on whether they want a union. It gives people time to think. The decision is up to you. We think the answer, now or later, is to vote NO.

Respecting the subject of a wage increase referred to in the above-quoted document, Respondent's policy has been to grant employees a merit increase each February and also a further increment based on wage surveys it conducts in various geographic areas for all its employees, nationwide. Respondent's policy is also to grant merit increases to individuals at other times, as it chooses.

At the fifth meeting, Cudrin told the Port Newark employees that, at its facility in Philadelphia, the employees had received a 75-cent increase after they had voted against representation by a union. He also told the employees that this same situation occurs even where there is no union organizing going on, and used its Houston distribution center as

¹One of General Counsel's witnesses, during cross-examination, related that Cudrin asked employees to raise their hands if they signed authorization cards for the Union. Cudrin denied this. I credit Cudrin's denial.

an example. There, he told the employees at Port Newark, the starting rates had been raised by \$1.

Cudrin had told the managers at Port Newark that a petition might be circulated among employees for their signatures, asking the Union to withdraw its petition for an election. Cudrin instructed the managers that they were not to permit the employees to solicit signatures during working time. The General Counsel developed testimony from one witness, Judy Ann Bell, that the manager of her department, Roger Stellatel, told her that there "was going to be a petition coming around asking" that Respondent be given "six months before they decide whether or not to bring in a union or not." Bell further testified that Stellatel then said that Respondent feels that [the employees] will like the raises [they] get in February" and that "maybe" Respondent had not been treating the employees right and "should do something to [make amends] for it."

Stellatel testified that Bell initiated the conversation by asking him if he had heard about the petition, which he referred to as a "hot item" then. He testified that he explained to her the substance of the petition and that she then said that she understood that Stellatel was in effect saying that the employees could expect "good raises" in February. Stellatel testified also that he did not say that and that "[Respondent] can't promise you that."

I credit Bell's account. She impressed me as candid; also, it seems unlikely that she would have to ask about the contents of such a "hot item" as the petition.

There is one other factual matter to discuss. The complaint alleges that Respondent, by Shipping Department Manager Hesketh Browne advised employees that Respondent would not grant employees merit raises because they joined the Union. Respondent's policy according to its manual is to grant merit increases each February as noted above, and also on an individual basis throughout the year. General Counsel's witness as to that allegation was Martrovitz Molette. He related that he told Browne that, as he had improved his attendance, he felt that he was entitled to a merit increase. He testified that Browne agreed with him, that Browne checked the matter out with Warehouse Manager Kenny Koholik and that Browne, a few days later, told him that he would have to wait until the election was over. The election, as noted below, was held on September 22. Browne, who is no longer employed by Respondent, testified that Molette approached him for a merit increase and that he told Molette then that there was a freeze on merit raises until after the election because the Union would say that Respondent is trying to buy votes by giving merit increases. I credit Molette's detailed account as it impressed me as one that was recounted by Molette from a clear recollection of the event.

Respecting the first issue—that Respondent unlawfully solicited from its employees their reasons for supporting the Union, most of the relevant evidence thereon bears more directly on the third issue, discussed below. Insofar as Gibson's testimony, that Cudrin asked him on one occasion what the Union wanted, pertains to the allegation of unlawful soliciting of employees' reasons, that testimony was not credited. I note also that General Counsel's brief does not present, as a separate issue, the alleged unlawful soliciting of employee reasons for their supporting the Union. Rather, that brief treats the evidence thereon as pertinent, instead to General Counsel's third contention, discussed in detail below. That evidence relates directly to that third issue and is best treated as part of the discussion thereon.

The second issue for consideration pertains to the allegation that Respondent unlawfully interfered with employees' Section 7 rights by having advised that merit increases would not be granted because of the Union. The credited evidence thereon is that employee Molette was told that he would have to wait until after the election. Respondent offered no evidence that Molette would receive the increase regardless of the outcome of the election or that the raise would be retroactive. In these circumstances, I find merit to the complaint allegation. Cf. *Brunswick Food & Drug*, 284 NLRB 661 (1978). See also *Centre Engineering*, 253 NLRB 419, 421 (1980).

The third and remaining issue arises from General Counsel's contention that Respondent impliedly promised employees improved wages, benefits, and working conditions to discourage support for the Union and from Respondent's denial thereof and its reliance on its repeated statements to the employees that it could not and would not make any promises to influence them as to their support for the Union.

In evaluating the evidence as to this issue, Respondent's "entire course of conduct" must be analyzed. *Mast Advertising & Publishing*, 286 NLRB 955 (1987). An employer's statements to employees that it could not make promises to influence the outcome of an election is not dispositive of the issue. See *Angelica Corp.*, 276 NLRB 617 (1985), and cases cited therein at 623.

Respondent set up a "Let's talk line," an "800" number, in the early 1980s in order that its employees may bring to the attention of its corporate office, for prompt resolution, any grievances or problems they had. When Respondent learned of the Union's petition in July, its director of labor relations then went to Port Newark and told the employees there that they had not used the "Let's talk line" to get his attention but, instead, had signaled him by having gone to the Union. That statement makes clear that Respondent's director of labor relations was there to learn of, and resolve, employee grievances and complaints, just as if they had used the "800" number. His asking them to relate in general why employees would go to a union was obviously not in furtherance of a seminar discussion but in direct relation to his expressed concern over their failure to use the "Let's talk line." That the employees understood this is evident from some of their responses. They also identified other areas of dissatisfaction, e.g., wages. Respondent, while professing that it could make no promises, had no hesitancy in later issuing a sworn guarantee to them, while urging them to "vote NO," that it will give them a wage increase in February 1989 while suggesting the "possibility" of their inducing the Union to withdraw from the election schedule for September 22. As noted earlier, that February increase is based on a combination of merit factors and studies of area wages.

It strikes me as quite clear that, where Respondent had, in response to the Union's petition for an election, asked its employees what their concerns are with a view to allaying those concerns and then guaranteed these employees that a major concern they had would be resolved if they considered having the Union go away, Respondent unequivocally made implied promises to them that they would receive wage increases and other benefits provided they withdrew their support from the Union. See *Color Tech Corp.*, 286 NLRB 476 (1987). In *Gary Mfg. Co.*, 242 NLRB 539 (1979), the Board held that the creation of a "Hot Line," set up identically as

was Respondent's "Let's talk line," was the most significant single violation of the Act for purposes of imposing the bargaining order remedy issued in that case. Cudrin's appearance before the employees at the first meeting, as he came there because they had signaled him by having gone to the Union instead of through the "Let's talk line" must similarly be held to be a most significant violation.

The question remains is whether Respondent had negated the import of that conduct by its having repeated, at each of the six meetings, that it would not make any promises. In *Raley's Inc.*, 236 NLRB 971 (1978), the Board addressed such an issue and stated at 972:

Were we to conclude that Respondent, by merely reciting a "no promises" formula, had clearly discharged its duty to avoid giving the employees the impression that their complaints would be remedied, we would be forced to conclude that the parties at these meetings were engaged in a largely meaningless exchange concerning the employees' grievances and complaints. However, it is apparent that the reason for voicing such complaints was the hope that they might be remedied. Clearly, as reflected in the Administrative Law Judge's Decision, the adamancy with which the employees continued to express their grievances and Respondent continued to entertain them, despite such formalized disavowals by Respondent that any changes would ensue, sufficiently indicates that such disavowals were not tendered or taken at face value. Thus, we conclude that Respondent's oft-repeated stock phrase of "no promises" was a mere formality, serving only as an all-too-transparent glow on what is otherwise a clearly implied promise of benefit.

In the instant case, the circumstances under which Respondent impliedly promised wage increases and other benefits were so structured that it is unlikely that its employees could be expected to place much weight on Respondent's statements that it was making no promises. I thus find that Respondent unlawfully interfered with their right to freely choose as to whether or not they desired representation by the Union.

III. THE OBJECTIONS TO CONDUCT EFFECTING THE RESULTS OF THE ELECTION

The Union did not receive a majority of the votes cast at the election held in Case 22-RC-9990 on September 22. Eighty-seven employees voted against representation, 58 for, and 8 were challenged. The Union filed timely objections to conduct affecting that result. It withdrew all of those objections but one, which read:

On various dates during the months of August and September, 1988, the exact dates being presently unknown, [Respondent] by its agents, officers and representatives promised [its] employees a seventy-five (75) cent per hour increase in the event that [the Union] was defeated in the upcoming election.

That objection was consolidated for hearing with the hearing in Case 22-CA-15914 as it overlapped with the allegation that Respondent had unlawfully made implied promises of wage increases.

The 75-cent figure referred to in the objection was a figure mentioned by Respondent's director of labor relations when he discussed the sizes of raises which had been given at different facilities of Respondent. In particular, he had mentioned that, at a Philadelphia facility, the employees there had received a 75-cent-an-hour raise after a union election.

In any event, in view of my findings above as to the allegations in Case 22-CA-15914, I shall sustain this objection.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization as defined in Section 2(5) of the Act.

3. Respondent has committed unfair labor practices within the meaning of Section 8(a)(1) of the Act by having told its employees that merit raises could not be given until after the election in Case 22-RC-9990 was held and by having impliedly promised them better wages, benefits, and working conditions if they withdrew their support of the Union.

4. The aforesaid unfair labor practices affect interstate commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent did not commit any other unfair labor practices.

6. The Union's timely objection to conduct affecting the results of the election held in Case 22-RC-9990 having been sustained, it is appropriate to set aside the results of the election and to re-run the election.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

²If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Toys-R-Us, Port Newark, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that merit wage increases cannot be given until after a Board election is held.

(b) Promising employees better wages, benefits, and working conditions in order to discourage them from supporting Local 210, International Brotherhood of Teamsters, Chauffeurs Warehousemen and Helpers of America, AFL-CIO.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Post at its Port Newark, New Jersey facility copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

IT IS FURTHER RECOMMENDED that the results of the election held in Case 22-RC-9990 are set aside and a new election is to be held at a date, time and place to be set by the Regional Director.

IT IS ALSO FURTHER RECOMMENDED that the allegations of unfair labor practices not found to have merit are dismissed.

³If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."