

So-Lo Foods, Inc., t/a BI-LO; So-Lo Foods, Inc., t/a Valu Food and United Food and Commercial Workers Union, Local 27, AFL-CIO-CLC.
Cases 5-CA-19473, 5-CA-19673, 5-CA-19481, and 5-RC-13005

July 19, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The issues discussed below in detail are whether the Respondent's president, Louis Denrich, violated Section 8(a)(1) of the Act in describing to employees the collective-bargaining process and whether one of the Respondent's mass mailings in the election campaign included plant closure threats in violation of Section 8(a)(1).¹ The judge found violations on both counts, concluding that Denrich's explanation of the bargaining process constituted an unlawful threat to reduce existing benefits if employees chose to be represented by the Union and that the mass mailings included unlawful threats as alleged. The Respondent excepted to both findings.²

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,³ and conclusions, as modified here,⁴ and to adopt the recommended Order,⁵ as modified.

¹ On July 20, 1990, Administrative Law Judge Bernard Ries issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed limited cross-exceptions, a supporting brief, and an answering brief. The Charging Party filed limited cross-exceptions, a supporting brief, and an answering brief. The Respondent filed a brief in response to the cross-exceptions.

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

² Other issues, warranting a less-detailed discussion, are set forth in fns. 4 and 5 below.

³ 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.

⁴ In affirming the judge's finding that the Respondent's president, Denrich, violated Sec. 8(a)(1) by promising a wage schedule revision, with consequent wage increases, we rely only on his separate conversations with employees John Day and Carol Corron. In each of these conversations, Denrich was not responding to a question from the employee involved. Instead, he first raised the subject of a previously unannounced, unexpected, and still undefined revised pay scale.

⁵ We agree with the judge that the Respondent's unlawful conduct at its Havre de Grace store warrants issuance of a remedial bargaining order in accord with the principles set forth in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). We need not pass, however, on the judge's finding that the Respondent's "hallmark" 8(a)(1) threats of plant closure, standing alone, justify a bargaining order in this case. These threats occurred in conjunction with numerous other 8(a)(1) violations committed by the Respondent's senior officials in a relatively brief 3-month period between the filing of a representation petition and the holding of a Board election. These unfair labor practices affected the entire bargaining unit of approximately 51 employees, and many of them targeted Bonnie Arnold, whom the Respondent knew to be the principal employee proponent of the Union. Based on the totality of the Respondent's unlawful conduct, we conclude that the lingering effects of the Respondent's un-

1. A Board representation election was held on February 18, 1988, among unit employees at the Respondent's Havre de Grace retail food store. In furtherance of the Respondent's preelection campaign against the Union, President Denrich visited the store almost daily to talk with individual employees. His discussions covered a range of subjects related to union representation and collective bargaining, including the bargaining process itself.

According to Denrich's testimony, which was corroborated by employee witnesses, he generally described this process as being "like horse trading back and forth. You could win, you could lose, you know, you could be the same." Denrich further testified that he also said to employee Bonnie Arnold, "It's a bargaining process, and we're going to start, you know, from a clean slate. Meaning, we don't have a contract right now, so what are we starting with? You know, yes, you have these benefits, but there is no contract that we have right now to bargain from." Denrich similarly explained to employee John Day that, unlike in an established unionized setting, the parties did not "have the old contract and then you're bargaining for the new contract." Instead, "you're going to be bargaining basically from nothing. You're going to be bargaining from scratch." Day also testified that Denrich explained that the Union could not guarantee to improve on existing conditions, that no one could tell what the outcome of negotiations would be, and that wages could go up or down, or stay the same, as the result of negotiations.

The judge acknowledged Board precedent holding that an employer may in certain circumstances lawfully describe the bargaining process as "bargaining from scratch" and refer to the possible negotiated loss of existing benefits.⁶ He found, however, that Denrich "crossed over to the forbidden side" and unlawfully threatened to reduce employees' benefits prior to negotiations when he referred to "bargaining basically from nothing." We disagree.

The judge's analysis artificially isolates the single comment to employee Day from the overall context of remarks repeatedly made by Denrich to him and to other employees. In this context, Denrich expressed his opinion that (1) the contract negotiation process was like horse trading; (2) employees could gain new benefits or lose existing benefits; and (3) in bargaining for a first contract, there is a greater degree of uncertainty because the parties have no track record of past negotiations and contracts on which to rely in forecasting

fair labor practices make the likelihood of conducting a fair second election in the foreseeable future so slight that, on balance, it is preferable to rely on the majority employee preference expressed through valid authorization cards. *Gissel*, supra at 614.

⁶ See, e.g., *Clark Equipment Co.*, 278 NLRB 498, 499-500 (1986). We disavow reliance on the judge's personal observation that an employer should not be permitted to discuss with employees the possibility of losing benefits in an initial bargaining context.

what particular benefits may be gained or lost in the negotiations at hand.

In evaluating comments concerning “bargaining from scratch,” the Board cases draw a distinction between (1) a lawful statement that benefits could be lost through the bargaining process and (2) an unlawful threat that benefits will be taken away and the union will have to bargain to get them back.⁷ Contrary to the judge, we find it more reasonable to infer that the contrast drawn by Denrich between an established unionized setting and “bargaining basically from nothing” in first contract talks at Havre de Grace related to Denrich’s third point. In context, it did not reasonably tend to indicate that the Respondent intended to strip away benefits prior to bargaining and force the Union to negotiate restoration of those benefits. Accordingly, notwithstanding the commission of numerous unfair labor practices by the Respondent, we find that Denrich did not violate Section 8(a)(1) of the Act in his remarks to employees about the bargaining process.

2. We affirm the judge’s finding that the Respondent’s February 1, 1988 mass mailing to employees and its subsequent use in election campaign discussions with employees violated Section 8(a)(1) by implicitly threatening to close the Havre de Grace store if employees voted for union representation. The document in question consisted of a cover letter and reprints of 18 newspaper articles about store closings and/or employee job losses. Collectively, this literature was not restricted to conveying the legitimate message that a union could not guarantee job security against general economic adversity. Instead, it strongly suggested that Havre de Grace employees now had job security and that they would jeopardize this security if they chose to be represented by the Union. Indeed, the cover letter stated, “Our constant effort to see that you have a steady job is one of the many reasons you should vote NO UNION on election day.” It thereby implied that the Respondent’s “constant effort” to provide job security might be abandoned if the employees voted for union representation.

Concededly, some of the attached newspaper articles indicate that the Union’s economic actions had been a factor leading to the closing of other employers’ stores. The majority of the articles, however, fail to identify union activity as a cause of store closings. In sum, these articles fail to provide the necessary objective basis for the Respondent’s implicit claim that unionization would imperil employee job security for reasons beyond its control. Absent such a basis, the February 1 mass mailing and the followup usage of it reasonably tended to threaten employees with the Respondent’s willingness to close the Havre de Grace store if employees voted for the Union.

⁷E.g., *Histacount Corp.*, 278 NLRB 681, 689 (1986); *Plastronics, Inc.*, 233 NLRB 155, 156 (1977).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent So-Lo Foods, Inc., t/a BI-LO and So-Lo Foods, Inc., t/a Valu Food, Havre de Grace, Stemmers Run, and Elkton, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.⁸

1. Substitute the following for paragraph 1(b)

“(b) Impliedly threatening to close its stores; asking employees to maintain surveillance of the other employees and to report on their union activities; impliedly threatening to discharge the spouse of a prounion employee; coercively interrogating employees about union activities; impliedly promising to improve working conditions and to give a wage increase; unlawfully giving wage increases to employees; requesting an employee to take a position on asking other employees to abandon union support; threatening an employee with loss of friendship; unlawfully requiring an employee to remain in her department; unlawfully forbidding an employee to talk about a union; and engaging in and giving the impression of surveillance of the union activities of its employees.”

2. Substitute the attached notices for those of the administrative law judge.

⁸The judge failed to include general cease-and-desist language in each of his three recommended notices. We shall include such language in substitute notices.

APPENDIX A

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 at our Havre de Grace store.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with store closure, promise or grant benefits to employees, engage in surveillance or the impression of surveillance of union activities or request employees to maintain such surveil-

lance and to report on such activities, impliedly threaten to discharge the spouse of a prounion employee, coercively interrogate employees, request an employee to take a position on asking other employees to abandon union support, threaten an employee with loss of friendship, or unlawfully forbid an employee to talk about a union, in order to affect employees' support for United Food and Commercial Workers International Union, Local 27, AFL-CIO-CLC, or any other labor organization.

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

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time employees at our Havre de Grace store, but excluding guards and supervisors as defined in the Act.

SO-LO FOODS, INC., T/A BI-LO
SO-LO FOODS, INC., T/A VALU FOOD

APPENDIX B

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 at our Stemmers Run Road, Baltimore store.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT impliedly threaten employees with store closure, promise or grant benefits to employees, keep employees under surveillance, or interrogate employees, in order to affect their support for United Food and Commercial Workers International Union, Local 27, AFL-CIO-CLC, or any other labor organization.

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

SO-LO FOODS, INC., T/A BI-LO
SO-LO FOODS, INC., T/A VALU FOOD

APPENDIX C

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 at our Elkton store.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT impliedly promise benefits to or coercively interrogate employees, in order to affect their support for United Food and Commercial Workers International Union, Local 27, AFL-CIO-CLC, or any other labor organization.

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

SO-LO FOODS, INC., T/A BI-LO
SO-LO FOODS, INC., T/A VALU FOOD

James P. Lewis, Esq. and Eileen Conway, Esq., for the General Counsel.

Larry M. Wolf, Esq., Joseph K. Pokempner, Esq., and Peter D. Guattery, Esq. (Whiteford, Taylor & Preston), of Baltimore, Maryland, for the Respondent.

Joel A. Smith, Esq. (Abato, Rubenstein and Abato, P.A.), of Lutherville, Maryland, for the Charging Party.

DECISION

BERNARD RIES, Administrative Law Judge. These consolidated matters were tried in Baltimore, Maryland, on 13 days in June, July, and August 1989.¹ At the unopposed requests

¹The charge in Case 5-CA-19473 was filed on March 1, 1988, and the complaint was issued in that case on April 13, 1988. The charge in Case 5-CA-19673 was filed on May 9, 1988, and amended on May 18, 1988, and
Continued

of the Respondent, the time for filing first briefs was extended to January 12, 1990, and reply briefs to March 1. All parties have timely filed both initial and reply briefs.

Having reviewed the transcript, the exhibits, and the briefs, and taking into account my recollection of the manner in which witnesses deported themselves while testifying, I make the following

FINDINGS OF FACT²

I. BACKGROUND AND OVERVIEW

In 1987, the Denrich family owned 13 supermarkets in Maryland and one in Pennsylvania. [So-Lo Foods, Inc., t/a BI-LO;³ So-Lo Foods, Inc., t/a Valu Food.⁴] Louis Denrich is the young, aggressive scion who spearheaded the growth of the organization, from the corner grocery opened by Steve, his father, to the chain in which Louis Denrich now, as president, employs about 1000 "associates" (as Respondent's employees are designated).⁵

For several years, the Union has been trying, without success, to organize Respondent's stores on a single-store basis. In this proceeding, we are interested, inter alia, in the circumstances surrounding a union election loss at its Havre de Grace store (Case 5-CA-19481) (Havre), on February 18, 1988, by a 28-21 margin (with two challenged ballots). It is the General Counsel's contention that the election was so pervasively infected by the Respondent's unfair labor practices that no mere rerun of the election could undo the damage, and that entry of a bargaining order, based on authorization cards as permitted by *NLRB v. Gissel Packing Co.*, 395 U.S. 575, is warranted here.

Case 5-CA-19673 (the "Elkton" complaint) is composed of two distinct parts. One is a purely legal issue concerning the lawfulness of a questionnaire passed out by Respondent to employees at its Elkton, Maryland, location (and allegedly elsewhere) in April 1988; the second is a claim that Respondent, from January to March 1988, delayed the implementation of a pay increase for employees at all 14 stores for reasons proscribed by the Act. While the latter allegation is contained in the "Elkton" complaint, and extends to all employees, it in fact is most closely related, in time, spirit, and argument, to the Havre store and its February election.

The third complaint consolidated here (Case 5-CA-19473) arises out of conduct alleged to have occurred at Respondent's Store No. 9, located at Stemmers Run Road in Baltimore. The complaint here, like the one in the Havre case,

the complaint therein was issued on June 22, 1988. The charge in Case 5-CA-19481 was filed on March 3, 1988, and amended on April 14, 1988, and the complaint was issued on October 27, 1988. In Case 5-RC-13005, relating to a representation election held on February 18, 1988, the Regional Director originally found that in support of its objections, the Petitioner "relies on the same evidence submitted and adduced" during the investigation of Case 5-CA-19481. In view of such identity, the Regional Director, by orders dated November 21, 1988, and April 19, 1989, consolidated the four cases for hearing.

²Errors in transcript have been noted and corrected.

³As clarified at the hearing.

⁴As clarified at the hearing.

⁵Although there appear to be different corporate entities involved, at the hearing counsel for Respondent were more than willing to concede that all the stores constitute a single employer, as discussed hereafter. Accordingly, I shall generally make reference to "Respondent" to signify the corporate mass (which itself, as a practical matter, boils down to the energetic, ubiquitous Louis Denrich).

contains a miscellany of 8(a)(1) allegations, occurring in the early part of 1988. Although all three complaints allege that Respondent, by various conduct, violated Section 8(a)(3) in addition to Section 8(a)(1), the only true 8(a)(3) violation is asserted in the Elkton case—the claim that Respondent withheld wage increases at all stores for 2-1/2 months because of the union activity of its employees at Havre de Grace. In the other cases, General Counsel has labeled certain behavior—the grant of favors and benefits—as being violative of "Section 8(a)(3)," and although there may be some authority for this treatment which is unknown to me, I believe that the great weight of precedent has considered such conduct as being violative only of Section 8(a)(1),⁶ and I personally find it difficult to conceive of a grant of benefit as being encompassed by Section 8(a)(3)'s key word "discrimination."

These cases have gotten somewhat long in the tooth. By the time I began hearing them in June 1989, most of the pertinent events were almost 1-1/2 years old. By the time reply briefs were received on March 1, 1990, more than 2 years had passed, and memories had dimmed proportionately. General Counsel has persisted in seeking a *Gissel* bargaining order for the one 50-employee store in which an election has been held and lost; this has entailed, among other things, the prolonged and torturous examination of the signatories and collectors of authorization cards and the extended presentation (or attempt to present) various novel defenses by Respondent. The transcript consists of more than 2200 pages and there are numerous exhibits; three lawyers represented Respondent throughout the hearing, General Counsel had two trial counsel, and the Charging Party was represented by one attorney. Briefs containing some 315 pages have been filed. One wonders if some simpler, more expeditious system—which the administrative law process was projected to be—could not be devised. Most of the violative actions charged are not on their face insubstantial, but the effort, expense, time, and resources necessary to litigate them should also be taken into consideration in deciding whether to launch such an undertaking.

By the time the taking of evidence had been completed, it was clear that (1) General Counsel had failed or been unable to present evidence in support of many of the (often unspecific and amorphous) 8(a)(1) allegations in the complaints, and (2) there was real uncertainty about what evidence was intended to prove which 8(a)(1) allegations. The former failure may be derived from careless precomplaint investigation, ineptitude in analyzing the evidence and the law, the passage of time, and/or a reluctance on the part of employees to further lend a hand to the proceedings. The latter failure probably should be laid at my doorstep. At one early point, when I asked counsel for General Counsel to identify the allegation to which certain testimony was addressed, I was told, after an extended period of thumbing through the complaint, that "I think I would have to bring this within probably 10(c) or (d), your honor, of the complaint." After this experience, not wanting to replicate the undue consumption of time with each witness, recognizing that the connection between certain testimony and certain allegations was evident, and hearing few complaints from the counsel for Respondent about a lack of specificity, I stopped asking such questions. Nonetheless, with such broad-spectrum, general,

⁶E.g., *Stride Rite Corp.*, 228 NLRB 224, 225 (1977); *Color Tech Corp.*, 286 NLRB 476 (1987).

and indefinite allegations as the one set out below, it is not always easy to know what testimony was thought to fall into the category shown:

Respondent, acting through Louis Denrich at its Havre de Grace, Maryland facility, on or about January 27, 1988, February 9, 1988, February 14, 1988, February 15, 1988, February 17, 1988, February 18, 1988 and on numerous other dates from on or about November 25, 1987, through on or about February 18, 1988, threatened to close its store if employees engaged in activities on behalf of the Union, or if the Union got in.

In other areas, the problem presented was that the allegation, meant to encompass several transactions, was reasonably specific about dates, but the dates, if any, mentioned by the witnesses did not approximate those referred to in the allegation.

It was for these reasons that I authorized the filing of reply briefs, principally in the hope that Respondent would be able to answer or argue against in its second brief any allegations it had failed to address in its initial brief, and General Counsel could respond to any claim made in Respondent's first brief that particular matters were not properly before me. Curiously, General Counsel's 61-page opening brief was, with respect to the 8(a)(1) allegations, more of a summary of highlights (complete with such useful tips as "Handley's flat denial at transcript 1789-1790 is one of a number of places in the record calling for a credibility determination.") than an analysis of the evidence, while Respondent's 157-page initial brief at least touched on virtually every item of dialogue which could be conceivably argued to furnish some support for a finding of violation. I shall attempt to distill from these two approaches a discussion of what General Counsel apparently thinks is in contention, in the light of the rather liberal (or prudent) approach adopted by the Respondent in its two briefs.

I should note that credibility resolutions have been quite difficult in this case. While most of the witnesses *seemed* credible, internal contradictions and inconsistencies plagued both sides of the proceeding, and that may well be due to the length of time which elapsed between the events and the trial. I have my doubts as to whether the average individual is capable of recalling (even weeks, rather than years, later) whether a company official said to him on the day of the election "Do I have your vote?" as opposed to "I'm counting on you." A further dynamic at play here is that a number of General Counsel witnesses at first attempted to avoid compliance with their subpoenas, for reasons not clarified by the record; what was clear was General Counsel's extra burden in extracting testimony about events of relatively ancient vintage from reluctant and unprepared witnesses.⁷

I should note that although I will be unable to refer to all the evidence taken, I have tried, to the best of my ability,

⁷The proceeding had a fatal air about it early on. For the benefit of the reader of the transcript, who could easily become confused, the court reporter somehow failed to record perhaps 20-25 minutes of the testimony of witness Bonnie Arnold during her appearance on June 29, 1989. Arnold was recalled to repeat the lost testimony on July 17. The tapes containing Arnold's reconstructed testimony, together with the evidence given by the other witnesses who testified on that day, were then lost in an airplane crash. Arnold, for the third time, and the other July 17 witnesses for the second, were required thereafter to repeat their demolished testimony.

to take it into account in making my determinations of fact and law.

This seems an appropriate time to acquaint the reader with Respondent's leading supervisors and managers. Aside from President Louis Denrich and his father Steve (who still plays some sort of figurehead role in managing the operation), there are a number of supervisory personnel who have various chainwide responsibilities. Charles Yingling was vice president of operations until February 1988, when he was (as later discussed) transferred to the newly created post of vice president of human resources, whose functions seem to overlap his prior job. Robert Morrison became vice president of operations at that time. Also in February, Patricia Miller, theretofore the personnel director, became the personnel administrator. George Handley was produce buyer and supervisor for all the stores, Jenelee Rolfe was in charge of all the bakery and deli departments, and Jackie White and Debbie Reis, were, respectively, supervisor and assistant supervisor of the "front end," where the cashiers worked at the stores. William Tolson was the director of security at the stores, supervising an uncertain number of guards whose principal routine occupation was to prevent or detect shoplifting. All these chainwide managers (and others) spent varying percentages of their time at the stores themselves and Louis Denrich was particularly active in getting around to the stores, both to oversee his domain and apparently to humanize management to the "associates."

Prior to the Havre campaign, to which we are about to turn, Local 27 had made at least two official efforts to seek to represent employees at the Elkton store, once in 1981 and again in 1987, but had withdrawn prior to election. It appears, however, that over the years, Local 27 had made other failed sorties at the stores, accomplishing nothing of any great consequence. Local 27, one gathers, is the leading union representative of employees of grocery store chains in Baltimore and vicinity.

II. THE HAVRE DE GRACE CAMPAIGN

A. Allegations of Section 8(a)(1)

On November 25, 1987,⁸ the Union filed a petition seeking to represent the employees at the Havre store. The complaint alleges that from that date and up to the election held on February 18, the Respondent, in the person of six of its officials, violated the act in various ways.

B. The February 1 Mailings and Their Subsequent Use

At Havre, Louis Denrich and his attorneys mapped out a campaign, apparently not dissimilar from that employed in election efforts at the Elton store which Respondent had previously survived. The campaign was kicked off with a mailing on February 1 to all Havre employees, containing a cover letter signed by Denrich and Store Manager Warren Hein and copies of 18 newspaper articles and advertisements going back to 1981. Denrich testified (but not always: compare Tr. 2536-2537 with Tr. 2655-2667) that these articles, (which, as discussed below, he later referred to extensively in individual interviews and group lunches with most of the Havre

⁸Subsequent dates refer to the year 1987 if the month is November or December, and to 1988 if January or February, except as otherwise indicated.

employees) were selected by him from a collection which he maintained and from another collection kept by his attorneys.

With only a few exceptions, the articles refer to the closing of stores in the proximate area, many (but not all) of the stores said to be unionized. So that the employees would catch the drift of the newspaper stories, the cover letter listed the headlines of the enclosed articles (e.g., "Safeway Stores Close After Vote"; "Fisher Foods, Inc. To Close Its Stores"; "Workers Due Severance" (to which Denrich appended the following quote from the story: "About 180 workers will lose their jobs when Brager-Gutman closes its stores"); "Pantry Pride will Lay Off 4,300").

The cover letter focuses, as Denrich testified his frequent individual campaign conversations did, on the subject of "job security," making the point repeatedly that such security "means steady work and steady pay," whereas organized firms occupied much more uncertain footing. While Denrich testified that he was merely responding to union propaganda, at the hearing Respondent proffered no campaign literature originating prior to February 1 (or thereafter) in which the Union emphasized "job security"; and, in fact, in his February 1 letter, Denrich stated that while "this union" talked about wages and benefits, "*They do very little talking about jobs and steady work.*" (Emphasis added.)⁹

It is pertinent to note that a number of the articles have nothing to do with the kinds of closings which might legitimately result from labor disputes. A story regarding the sale of a Mash's Inc., meat plant attributed to former employees the belief that the "abrupt sale was the ultimate revenge by the owner on the labor union with which he had struggled for more than two decades." A 1983 article about the closing of a Hochschild Kohn department store, on which someone has underscored the fact that the present Charging Party represented the employees, neglects to also underline the statement by a company spokesman that the store had not been profitable for years and that "the multi-level store was not efficient for retail sales." Similarly, the article on the closing of Cook's 4 area department stores quotes a spokesman as saying that the chain planned to close, as well, 12 other stores in 5 other States, and also that the decision was "a financial one," the company having "not performed well" (to the tune of a \$6.4 million loss in the last fiscal year); there is no reference in the story to the closed stores being unionized, but, regardless, someone has underlined the words, "About 220 Cook's employees will lose their jobs when the stores close." An article about the 1983 closing of A&P's remaining 25 "Plus discount food stores" is explained by an industry observer as related to the lack of a clear consumer image and similar marketing problems, and there is no reference to a union, but a line is drawn only under the sentence stating that A&P "will close" the stores. The story about the closing of the Pantry Pride stores, which had been in bankruptcy for over 2 years, fails to underline the statement attributed to the company president that "intense supermarket competition and several million dollars in lost revenues during the past years prompted the closings"; what is underlined is the name and title of the president of the UFCW local.

⁹At one point, Denrich conceded that the February 1 mailing and its subsequent use was in anticipation of an assumption about the Union's "normal mode of operation"—"painting a very rosy picture"—but he "hadn't seen any of that" as of February 2.

The cover letter closes:

Ask yourself what good are union promises if you worked at Pantry Pride, Acme's Baltimore, Anne Arundel, Howard, Edgewood and Bel Air locations; Cook's; Memco; and Safeway's Eastern Shore and Delaware locations and the other companies listed in the attached clippings.

Our constant effort to see that you have a steady job is one of the many reasons you should vote NO UNION on election day.

This letter was the only mass mailing made by Respondent to its Havre employees. Its theme is the closing of stores in the area, some of which are not even characterized as unionized stores, and some of which are explained as either "revenge" or as related to nonunion considerations. I read this letter (and I think any reasonable reader might) as the attempted communication of the idea that if the Havre store should elect to be represented, the store stood a good chance of being arbitrarily closed.

It must be remembered that we are here dealing not with a sole location, which an employer might normally be reluctant to shut down, but rather with only 1 of 14 locations, the closing of which might well seem to the Havre employees to be worthwhile to the employer in terms of its effect on the employees at other locations. It is my opinion that Denrich's February 1 letter and scattershot enclosures were designed to inspire in the Havre employees a fear of closure of their store in the event of unionization, and that this communication reasonably tended to achieve that result.

Denrich was not content to mail this material and let it go at that. He told us that he carried a copy of it (as one of his "props") to individual breakroom meetings with ex-employees and frequently made reference to it. As indicated earlier, he testified in general that he was merely responding to union guarantees of "job security," but, for the reasons given, I do not believe that to have been the case (although it may be that an employee occasionally brought up the subject). As noted, there is no evidence that at the time the February 1 mailing was prepared (or thereafter), the Union had made an open issue of job security. It is clear, rather, that Denrich wanted to talk about closings in order to suggest to employees that he was well-positioned to take such an action if he chose to. I do not find that Denrich intended to convey the message that he would inexorably close the store if the employees voted for the Union; his frequent references to "bargaining from scratch," as discussed hereafter, would indicate to employees a potential willingness to engage in negotiation. I do believe, however, that the store-closing messages, by the mailings and the subsequent references thereto, were motivated by an intent to notify the employees that closure was an option which Denrich deemed available to him at Havre. When dealing with such a significant and sensitive subject, there is no need, in my view, that the message be one of inevitability.

I conclude that, by such conduct, Denrich engaged in the kind of threatening behavior prohibited by Section 8(a)(1). *Mohawk Bedding Co.*, 216 NLRB 126 (1975).¹⁰

¹⁰*EDP Medical Computer Systems*, 284 NLRB 1232, 1255, 1264 (1987), cited by Respondent, is not only mild by comparison, but is sharply distinguishable on its facts.

C. The Other Allegations Arising from the Campaign

1. The Bonnie Arnold incidents

Bonnie Arnold, the Havre bakery manager, testified that soon after the union campaign commenced, Store Manager Hein came up to her, her husband, Produce Manager Tim Ford, and Seafood Manager Carol Shaffer at breaktime in the bakery and stated that he had received a call from Denrich, who wanted “a couple of department heads to be like his eyes and ears for the store, to find out what was going on and why.” The employees (all nonsupervisory except, as later ascertained, Chuck Arnold) talked it over and told Hein that they declined.

Denrich testified that he did call Hein on November 26, after receiving the petition, and told him to have a department managers’ meeting soon at which they should be informed that if they or other Associates” had any questions they should direct them to Hein (and from Hein to him). He denied giving Hein any charge to seek out “eyes and ears.”

Hein did not testify, and his absence was not explained. Whether or not with Denrich’s authority, Hein did, as a statutory supervisor, make a request to three statutory employees to engage in secret surveillance and reporting of the union activities of other employees. Such a supervisory request reasonably tends to restrain employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1).

As indicated, the February 1 mailing was followed by the second aspect of Respondent’s campaign—individualized meetings in the Havre breakroom between one employee and (usually) Denrich, Vice President Yingling, Vice President Morrison, and Store Manager Hein; and the third part of the campaign was a series of breakfast and luncheon meetings at the local Sheraton hotel for small groups of Havre employees.

Given the number of individual breakroom meetings¹¹ attended by Denrich (he met with many employees on more than one occasion, and he also spoke with them at their work stations, see, e.g., Tr. 2259), the different courses the conversations probably took, as Denrich testified, and the passage of time between February 1988 and the hearing, it is most unlikely that Denrich actually recalled what he said to every employee on every occasion. Despite this admitted fact, he sometimes testified as if he remembered and sometimes simply referred to the probabilities (“I would have said”). He was so obviously anxious to prevail in this proceeding, and so willing to change “would have” to “did” when prompted, that I think he would have answered almost any question in the light which seemed most favorable to his cause. Bonnie Arnold, is, as earlier indicated, employed as the nonsupervisory manager of the bakery department at Havre. She was also the instigator of the union activity at the store and its most active proponent, a fact which Denrich quickly came to know. She is, in addition, married to Havre Meat Manager Chuck Arnold, who was, on January 15, adjudged in the representation case to be a statutory supervisor.

¹¹ General Counsel’s first brief appears to argue that the breakroom meetings were *Per se* violative. The complaint, however, does not so allege, and when, at one point in the proceeding, I stated that there was “no allegation that Mr. Denrich violated the Act by talking to these employees in the breakroom, as a general matter” (Tr. 2436), counsel for General Counsel did not demur.

Bonnie Arnold being a dedicated union supporter, it would not surprise me if she recalled events in a fashion which tended to serve her objectives. I doubt, however, that she is the sort of person who would fabricate or, with malice, grossly distort conversations or events.

The first meeting described by Arnold as having occurred between her and various management officials was held in mid-January, probably a few days after Chuck Arnold had been found to be a supervisor, when Yingling asked her to come to the breakroom. There she found (she believes) Denrich, Morrison, and Hein. Denrich asked her if she knew that her husband had been held by the Region to be a supervisor. Arnold said she did and asked “if Chuck was going to be fired.” Denrich purportedly said “that he was angry and that he was pissed, but he wasn’t going to do anything right then. He said that he had fired a meat manager in Elkton” for union activity. In further discussion, Denrich asked why she wanted the Union,¹² and Arnold referred to “a pension” and “job security.” Denrich said “it would be in my best interest and in Chuck’s best interest if the union didn’t get in.” He explained this remark by stating that he had provided “good job security without the union.” More discussion ensued, with Arnold saying that the recent replacement of the well-liked Yingling by Morrison in handling personnel problems was unsatisfactory, “and we needed the union.”

Denrich knew, at the time he spoke to Arnold, that she was a major union supporter. His reason for wanting to speak to her after the Region had declared her husband to be a supervisor was:

And I felt obligated that I had to talk to her because of the whole issue and that, you know, that I felt that—I guess they, you know, she I knew, I assumed, that she was very concerned about his job.

The source of this “assumed” “concern” is undisclosed, but the testimony does indeed indicate that Denrich believed, when the meeting started, that Bonnie Arnold was worried about her husband’s job. Denrich had already met with Chuck Arnold, as soon as the Region’s decision had issued, to assure him that “we were not going to fire him.”¹³ According to Denrich, at the meeting with Bonnie, he told her of having given such reassurance, but she “right away blurted out, you know, like you’re going to fire Chuck.” He says that he denied that and made it “clear to her that I wasn’t going to fire Chuck.” Nonetheless, he admittedly told her that he was “upset” with Chuck, saying that “supervisors [are expected] not to be involved with unions” (at the same time telling Bonnie that “it wasn’t clear that he was involved”). Denrich also attributed to Bonnie, rather than to himself, the statement, “I know that you fired a meat manager before for union activity,” which he says, he conceded to her as factual.

I find Arnold’s version of the conversation more probable. If, as Denrich says, he had assured Arnold from the outset that her husband would not be fired, it is unlikely that she

¹² On brief, General Counsel refers to Arnold being asked by Denrich “why she wanted a union” as a separate violation. The testimony, although unspecific, makes it clear that Denrich and Arnold had many conversations about the campaign, and Arnold was no shrinking violet in displaying her partisanship. This sort of question to Arnold, I believe, did not violate the Act.

¹³ Chuck Arnold did not give testimony at this hearing.

still would have “blurted out” that Denrich was going to fire him. I believe that this special meeting with Arnold in mid-January, 2 weeks before the blitz of individual interviews had begun, was hardly an effort by the staunchly antiunion Denrich¹⁴ to reassure Arnold, but was rather an effort to intimidate her and to decelerate her union activity by suggesting that her vulnerable husband’s activity had “upset” Denrich. Yingling’s version of Denrich’s assurances to Bonnie Arnold hardly reflects an effort to make it “clear” that Chuck’s job was safe: “I haven’t fired Chuck. He still has a job.” I also believe that Denrich, having mentioned that he was “upset” at Chuck, might well have told Bonnie that he had discharged a supervisor at another store for union activity. And in this setting, the comment that it would be in Bonnie’s and Chuck’s “best interest if the Union didn’t get in” (which statement Denrich admitted), though explained at the hearing as having to do with the “job security” previously furnished by Denrich, carried an especially significant overtone. The statement is simply a flat assertion that the two are *better off* without a union than with one. The personalization of this remark—limited to Bonnie and Chuck—renders distinguishable the cases cited by Respondent in which the Board has tolerated a “best interests” comment made to all the employees. E.g., *Thomas Industries*, 255 NLRB 646 (1981). When directed only toward Bonnie and Chuck, in the given context, the statement is quite menacing.

Thus, although I find no direct and unequivocal expression of intent by Denrich to discharge Chuck Arnold, I believe that Denrich made this precampaign special effort to meet with the known leading activist in order to suggest to her that such a possibility was a real one, and thus to damp down her activism. Although Denrich was not necessarily prohibited by law from discharging Chuck Arnold, he could not lawfully use the threat of such a discharge to restrain the exercise of Section 7 rights by Bonnie Arnold. See *Advertiser’s Mfg. Co.*, 280 NLRB 1185 (1986).

Arnold testified that at a Respondent—sponsored luncheon for a group of the Havre employees at the Sheraton on February 12, Denrich exhibited a group of clippings (evidently the ones mailed to the employees on February 1) and, showing an article relating to the Safeway chain, said, “I would hate to see this one day read Valu Food Closes 14 Stores.”¹⁵ When Denrich eventually asked if there were any questions, Arnold commented that she had felt “really intimidated” at an earlier meeting at which she thought that he had threatened her job as well as her husband’s. Denrich replied that it was an inappropriate subject for discussion.

Denrich, in recalling this luncheon, agreed that he had referred to and read from the clipping relating to the Safeway and Acme closings. He also agreed that when he asked for questions, Arnold said that she had “felt intimidated” by an earlier meeting with him (evidently referring to the mid-January meeting), and he replied that “This is not the place to

talk about it.”¹⁶ Denrich denied having made any statement about substituting “Valu Food” for “Safeway” in the clipping about closure.

Again, while I thought I detected in Bonnie Arnold a tendency to exaggerate, I do not think she was likely to fabricate such a statement. Denrich, on the other hand, seemed very capable of emotion in addressing this subject. I concluded, having taken into account the absence of corroboration of Arnold, that Denrich did refer specifically to the possible closing of Valu Food stores at this luncheon, and I would think that such a reference is the kind of toying with the fate of the voters which the Board would find to constitute an unlawful threat, in violation of Section 8(a)(1).

2. Various other alleged violations

On January 27, Yingling went to the Havre store and, with Store Manager Hein, spoke to a few employees. Thereafter, beginning on February 2, and up to the election on February 18, Denrich came to the store almost every day, sometimes spending more than 12 hours there in order to speak separately to the 50-odd employees, together with other managerial representatives, in the breakroom, as well as to show some documents and antiunion movies. Denrich had a collection of props, such as his February 1 mailing and some union contracts, and a prepared list of topics: strikes, closings, dues, fees, assessments, union officer salaries, etc., although he found that he did not have to speak about all the topics to all the employees (an employee, e.g., might become so aroused by the idea of assessments that Denrich would home in on that subject alone).

a. Bargaining from scratch

One of the subjects about which Denrich usually spoke to employees in these breakroom meetings was the collective-bargaining process. He understandably was unable to repeat for us precisely what he told each of 50 employees, but he said that his remarks followed a standard pattern. He would say that the process is “like horse trading back and forth. You could win, you could lose, you know, you could be the same.” Several General Counsel witnesses, on cross-examination, testified that Denrich had made such complete statements, even though on direct they only quoted him as having referred to the possibility of “losing.” Their initial recollection of just the reference to “losing” makes one believe that any such reference is the one that really strikes a chord with employees.

I fail to understand why an employer should be allowed to tell employees that they could, in an initial bargaining context, “lose” benefits. There is no clear legitimate reason why employees who receive a certain quantum of benefits when they are not represented by a union should be confronted with the possibility of “losing” benefits merely because they have chosen to be represented.¹⁷

The Board has held, however, that an employer may describe collective bargaining as “bargaining from scratch” or involving the possible “reduction of wages” except in cir-

¹⁴The employee manual states, “Our Company is a non-union company, and we intend to stay that way We are firmly convinced that a union cannot help solve any problems that we cannot solve ourselves by working together.”

¹⁵One of the articles in the February 1 mailing is headlined, “Safeway Closes 8 Shore Stores.”

¹⁶If, as Denrich claims, all he did at that meeting was to reassure Arnold about the safety of her husband’s position, one would not expect him to be so defensive.

¹⁷I recognize that the cost to an employer of having to deal with a union might be a legitimate consideration, but Denrich did not so limit the possibility of loss.

cumstances which “effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure on what the Union can induce the employer to restore.” *Plastronics, Inc.*, 233 NLRB 155, 156 (1977). See also *Histacount Corp.*, 278 NLRB 681, 689 (1986); but see *Scranton Lace Co.*, 294 NLRB 249 (1989), while it is not perfectly clear what factors or contextual distinctions will transform a “bargain-from-scratch” statement from a lawful description to an unlawful threat, see the useful collection of cases in *Shaw’s Supermarkets v. NLRB*, 884 F.2d 34 (1st Cir. 1989), it seems to me that, on at least some occasions, Denrich crossed over to the forbidden side.

Denrich’s description of a “standard” explanation of collective bargaining varied. At one point in the hearing, as shown above, he said that he made “horse trading” analogies. However (at Tr. 2264), after repeating such a hypothetical explanation, he added, with regard to Bonnie Arnold and others (although it is hard to believe that he would really recall such specific additions):

And what I would say, you know, at times, and I said it to her at this time, I said “You know what you have now.” I said Do you know what you’re going to have?” You know, I said Things can be lost, things can be gained, things could stay the same. You don’t know what’s going to happen.”

I said “It’s a bargaining process, and we’re going to start, you know, from a clean slate.” Meaning we don’t have a contract right now, so what are we starting with? You know, yes, you have these benefits, but there is no contract that we have right now to bargain from.

Denrich (at Tr. 2296) was even more explicit on this point. He testified that he told employee John Day that, unlike an existing union setting such as ALP (by which Day had once been employed), he would not “have the old contract and then you’re bargaining for the new contract”; instead, at Havre, it was “different”: “You’re going to be bargaining basically *from nothing*. You’re going to be bargaining from scratch.”

To emphasize that, unlike bargaining from an existing agreement, nonunionized employees would be bargaining from “nothing” is, in my view, to indicate that the employer intended to strip the employees clean of benefits before bargaining begins, as in *Mississippi Chemical Corp.*, 280 NLRB 413 (1986), and *Plastronics, Inc.*, supra at 156. How this differs from “bargaining from scratch” or “from zero” is not entirely clear to me, but the Board has drawn such a distinction and it is my duty to apply it as best I can. Accordingly, I conclude, based on Denrich’s own testimony, that on some occasions during the early part of February he threatened to reduce benefits if employees chose to be represented by a union.¹⁸

¹⁸There also may be applicable here those cases in which bargaining-from-scratch language has been found unacceptable because of the commission of contemporaneous unfair labor practices, a doctrine of somewhat uncertain contours sometimes applied by the Board. *Beverly Enterprises-Indiana*, 281 NLRB 26 (1986); *Belcher Towing Co.*, 265 NLRB 1258 (1982).

b. *Withholding of wage increases and related allegations*

The complaint in the Elkton store case (5-CA-19673) contains only two counts of substantive violations. As they impinge on Havre and the election there, the one of immediate interest to us at this time is the claim that at all 14 of its stores, from about January 1, 1988, to about March 6, 1988, “Respondent delayed the implementation of a wage increase to employees” in circumstances proscribed by the Act. Since this pervasive allegation also ties into allegedly unlawful statements made to Havre employees, it seems appropriate to discuss this area at the present juncture.

The record shows that until (and after) January 3, 1986, Respondent maintained no official fixed salary schedule or regular increase system other than a 25-cent raise per employee every 6 months from his or her anniversary date (with certain exceptions). On the date given, Denrich sent to all “employees” (as they were then known) a schedule establishing a formal wage system for classifications falling into three basic groups which continued the 25-cent raise for all three groups every 6 months with a maximum for each group.

The 1986 rates remained in existence in 1987, but, Denrich testified, he was interested toward the end of 1987 in “updating” the schedule. In a letter to an attorney dated September 9, Denrich stated that he was “in the process now of researching and investigating our present wage status and future wage strategy” and hoped to “implement a new wage structure no later than January 1, 1988.” At a November 3 meeting with his attorneys, Messrs. Pokempner and Wolf, also attended by personnel director Miller, there was, inter alia, discussion about raising some pay levels, the possibility of an attendance bonus, and the need for a seafood manager pay schedule. The participants planned to meet again in December to “finalize” a schedule after Denrich had done the appropriate research.

Denrich said that he began having discussions with various managers, but stopped when he heard on November 26 about the Havre petition being filed. Denrich informed Pokempner of this development, and after Pokempner was told that Denrich was still in the research stage, he warned Denrich that bringing out a wage increase prior to an election could be a “real problem,” because it would look as if Respondent was bribing the employees. Pokempner said that since there was no history of giving periodic wage increases and none has been announced, Respondent could face unfair labor practice charges and election objections if it proceeded with preparing and announcing the raises. Recognizing the possibility that they could also be charged with unlawfully withholding an increase—described by Pokempner as a “damned if you do, damned if you don’t” situation—it was decided by Pokempner that since the new system had not been formulated, Respondent’s safest approach was to hold off the program.

They further discussed what to do if an employee inquired about an increase. Denrich was told that they could not “really talk about it,” that it would seem like a bribe to increase wages during the campaign, and he was warned not to blame the Union for the freeze. It was decided that if the subject arose, Denrich was to respond that “we can’t even talk about it.”

But Denrich apparently found it impossible to confine himself to such a simple formula. He testified that, as a general matter, when an employee inquired about the circulating rumors of a new schedule, he said to them that he "couldn't do anything now because there was an election petition and because putting in a new wage schedule, at this time, would be considered bribing the employees." Denrich admittedly went somewhat further with employee Geraldine Holley: "I said that yes, *we were discussing it*. . . . That we had some talks about it," but it would seem like bribery, etc. When asked whether he had to tell this to Holley, Denrich disingenuously said that he could not "lie" to her; but no reason appears why he could not have answered the question as Denrich and counsel had planned.

On March 11, 1988, 21 days after the election, Denrich mailed out to all "associates" a new and more complex wage schedule which took effect on March 6. The principal schedule provided no new raises for most employees until they had worked for 2-1/2 years, at which time they received \$6 or 50 cents more than the wage such employees had been receiving. This 50-cent increase continued at 6-month intervals until 6-1/2 years of service, when the 6-month raises began decreasing, so that after 8 years, an employee previously earning the top scale of \$8.50 was raised to a top scale of \$8.60. Separate schedules applied to "Parcel Pick-Up/Baggers/Utility Clerks/Day Porters," to "Night Crew Grocery Stockers/Produce Stockers/Dairy Managers and Receivers," to "Meat Cutters," to "Hourly Department Managers," to "Store Detectives," and to "Truck Drivers." The letter was fixed in content, thought Denrich, around the first week in March. He estimated that "about half" of the work force received a raise.

General Counsel relies on *Atlantic Forest Products*, 282 NLRB 855, 858 (1987), as "succinctly summariz[ing] the law applicable to both Section 8(a)(1) and (3) allegations." That case, however, specifically addresses the question of how an employer is expected to proceed with an "expected" wage or benefit adjustment, the answer (sometimes easier said than done) being, as stated in *McCormick Longmeadow Stone Co.*, 158 NLRB 1237, 1232 (1966), and hundreds of other cases, "as if the union were not on the scene." Yet the Board has long recognized that a "tension" exists between this principle and the "settled Board policy" that a grant of benefits prior to an election raises a presumption of illegality, requiring the employer who grants the raise to risk having to rebut the presumption, a risk which increases geometrically when "the benefits are not pursuant to any fixed practice, pattern, or preorganizational announcement, but the timing and eligibility for the benefit are purely within the discretion of the employer." *Singer Co.*, 199 NLRB 1195, 1196 (1972). In *Singer*, the Board saw no distinction between postponements of *expected* benefits, which may be done if the employees are given to understand that the purpose is to avoid an appearance of impropriety (e.g., *Uarco Inc.*, 169 NLRB 1153 (1968)) and "a situation where, as here, the benefits are not necessarily expected, and the withholding is for the limited purpose of protecting the employer from charges of unlawful conduct." *Ibid*.

It would appear that something has gone off the track in this area. The Board adheres to the axiom that an employer is to proceed as if the union were not on the scene, and yet simultaneously permits an employer not to do so even

though benefit increases are "expected" by the employees, for the purpose of avoiding an appearance of election interference. But if the increase is "expected," no probability of election interference exists, or so, at least, would seem the underlying rationale for the doctrine of having an employer proceed as if his situation was normal.

In addition, *Singer Co.* appears to treat 8(a)(1) and (3) violations as coextensive. In that case, where the employer withheld promotions until after the election, the Board noted that the withholding had not been done within the context of antiunion propaganda, there appeared to have been no formal announcement of the withholding, and inquiring employees were told that promotions would be withheld until after the election; in these circumstances, said the Board, "we do not believe that the employees could reasonably conclude that the Employer's postponement of promotions and reclassifications was intended to influence organizational activities," and it thereon dismissed the "8(a)(1)" allegation. But the Trial Examiner had found violations of Section 8(a)(1) and (3), and the Board obviously intended to dismiss the latter as well. The difficulty is that the Board's rationale for dismissal had everything to do with "coercion" and little or nothing to do with "discrimination."

An assertion that an employer withheld benefits in order to discourage union membership is an 8(a)(3) allegation, which presumably should be analyzed, like all specific 8(a)(3) allegations, under *Wright Line*, 251 NLRB 1083, 1089 (1980), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

In the present case, the half-way-across-the-board wage increase had not been expected, although rumors were abroad about such an increase, and during some of the breakroom interviews, employees put questions to Denrich about it. There is some reason not to believe that, as Denrich testified, the wage increases had not been virtually fixed by the time the Havre petition was filed in late November,¹⁹ but not quite enough.

The halt in processing the projected increases does not present a prima facie case of discrimination, in view of my conclusions about the motivation for the action. I found credible Denrich's specific testimony about his conversation with Pokempner to the effect that the wage survey had not been completed as of late November, that if allowed to run its natural course, the timing of wage increases might well coincide uncomfortably with the holding of the election, and that increases so timed would very likely call forth charges and election objections which, in such a discretionary setting, might be difficult to defend against. My judgment, as we shall see from later instances of individual raises, is that Denrich's personal preference would have been to finish the wage schedule as quickly as possible and get it into effect prior to the election, but he instead accepted the advice of counsel that proceeding in that direction was the least prudent choice. On the limited facts as here presented, I would dismiss the claim that Respondent's decision to delay the processing of a new wage schedule was violative of Section 8(a)(3).

¹⁹For example, an increase was given to all eight seafood managers, in November in one case, and early February in the others, as discussed *infra*. This could suggest that the increases were set by November, especially since our earliest documentation of the matter shows that Denrich had been "in the process" of researching the wage structure since prior to September 9.

That holding does not dispose of the possibility that the Respondent may have violated Section 8(a)(1) by certain references to the frozen wage increases, even though it may not have unlawfully failed to process such increases to completion. *Hostar Marine Transport Systems*, 298 NLRB 188 (1990). Charging Party cites six instances in which employees testified that Denrich discussed the possibility of a new pay scale with them, and Denrich's testimony indicates that there were other such conversations.

Denrich testified that he never raised the issue of a wage increase with any of the employees, but did discuss the matter with them if they broached the subject, based on rumors they had heard. I am, with two exceptions (John Day and Carol Corron) inclined to believe Denrich on this score; there is insufficient employee testimony to establish a pattern to the contrary. The state of the law regarding references to postponement of benefits because of an election is not entirely clear.

The standards draw some rather fine lines. In *Atlantic Forest Products*, supra at 858, the Board (which seemed to be talking Sec. 8(a)(1) while discussing Sec. 8(a)(3)) stated that an employer may postpone an expected wage or benefit adjustment so long as it "[makes] clear" to employees that the adjustment would occur whether or not they select a union, and that the 'sole purpose' of the adjustment's postponement is to avoid the appearance of influencing the election's outcome. . . . In making such announcements, however, an employer must avoid attributing to the union the 'onus for the postponement of adjustments in wages and benefits'. . . or 'disparaging and undermin[ing] the [union] by creating the impression that it stood in the way of their getting planned wage increases and benefits.'" [Quoting from *Uarco, Inc.*, 169 NLRB at 1154.]

What is the employer's responsibility when he is *not* postponing an "expected," planned, and announced benefit? Since the employees have not been told to expect the increase, it would make no sense for the employer to be required to explain the "sole purpose" of the postponement of an adjustment which has not been settled and of which they are unaware. However, if the employer begins to speak about the likelihood of new benefits, even in response to employee questions, he then approaches the forbidden zone of promises of unlawful benefit. As noted earlier, Denrich, despite having been warned by counsel simply not to talk about wage increases if the subject should arise, himself testified that he went further by sometimes engaging in active discussion of the contemplated increases.

Geraldine Holley, for example, testified that she had heard rumors about a change in the wage schedule, and sometime in December asked Denrich about it. He said "they had been planning it for a while, but they hadn't put it into effect yet. They were going to have to hold off until after the Union organization was over with" However, Holley conceded on cross that Denrich had also told her that Respondent "hadn't finished . . . planning it yet," and that they "couldn't" implement a change until the Labor Board proceedings were over with," because "it would be like they were . . . trying to bribe the employees."

These remarks are reasonably consistent with the Board's standard for the requisite explanation which should accompany a postponement of an *expected* benefit, but there appears to be no reason for an employer to say *anything* about

the likelihood of employees receiving a previously unannounced one. As the Charging Party points out, an employer seems to be unfairly receiving the best of all possible worlds when he can, because of uncertainty, withhold a benefit and at the same time dangle it in front of employees as a plum they can expect in the future. While only a handful of employees testified that they had discussions with Denrich about rumored wage increases, in each instance he gave the distinct impression that he was preparing to make such increase and was being held up because of the election (as noted, it turned out that perhaps only half of the employees benefited by the March increases). No doubt, Denrich's words about the increases spread as pervasively among the employees as the original rumors about them. If telling employees that the employer is "looking into improving the health plan and checking into a pension plan" is violative, even when accompanied by such disclaimers such as "I can't say no more because I wasn't supposed to say that" and "the company would not make any promises," *Pennsy Supply*, 295 NLRB 324 (1989), then it seems to follow that Denrich's statements about a projected wage increase were equally "an implied promise to better working conditions."

c. Allegations pertaining to Jacqueline Yrizarry

Jacqueline Yrizarry, the deli manager at Havre, testified that at some unknown time, during a meeting in the breakroom, she was asked, by an unremembered "member of management," if she had signed a union card or if she knew of anybody else who had signed cards.²⁰ She responded that she had signed a card.

On a Saturday before the election, according to Yrizarry, she was called to the nearby bakery area to speak to supervisor Jenelee Rolfe about "different things." In so doing, the Union was discussed. Rolfe asked about Yrizarry's "feelings about unions" and Yrizarry said she was not sure. Rolfe offered, based on past experience, that unionized people "could" lose their jobs, go on strike, etc. Rolfe gave some hypothetical examples of how she could easily discharge Yrizarry, and she also mentioned a few times when Yrizarry had not made sandwiches for customers, saying, "Well, you know, if I wanted to push it." Rolfe also said to Yrizarry that Denrich "would believe anything she had to say." As they finished talking, Rolfe asked if Yrizarry could now support Denrich with a "thumbs up." Rolfe then walked up to Vice President Morrison, standing nearby, and said Yrizarry "had seen it their way."

A day or two later, Yrizarry went to Denrich to tell him what Rolfe had said and to assert that Rolfe owed her an apology. Denrich did not respond, but Rolfe did later apologize for any misunderstanding, probably prior to the election. Denrich also subsequently apologized for what Rolfe had said. Yrizarry testified that it was "plain as the nose on my face" what "was going on" when Rolfe was speaking to her. She also testified, however, that after Denrich apologized, she did not feel that her job "was in any way, shape or form jeopardized because the man was very up front with me."

Rolfe denied having asked Yrizarry about her union sentiments, but did recall a union-related conversation with

²⁰ It would have been Denrich, Yingling, Morrison, or White, all recognized supervisors. Tr. 1120.

Yrizarry shortly before the election. Rolfe spoke at some length about job security only being assured by an employee doing her job, regardless of the status of the union. She said that, despite a union, an employee could be fired for not performing. Yrizarry professed confusion, and Rolfe, recognizing that “she wasn’t understanding anything that I was saying,” referred her to Morrison, who was walking down the aisle, for clarification, but Yrizarry did not want to speak to Morrison. The conversation ended with Rolfe again urging support for the Respondent, “possibly” saying that perhaps Yrizarry could give Denrich her “thumbs up.”

A few days later, Denrich called Rolfe and asked what she had said to Yrizarry, who was “upset.” After hearing Rolfe’s version, Denrich suggested that she talk to Yrizarry, which she did, saying she was sorry if Yrizarry had not understood what she was saying and that she did not have to worry about her job. Yrizarry reported to Rolfe that Denrich had also said she was a “good” worker and her job was “secure.”

Yingling testified that neither he nor Denrich nor Jackie White asked, at a meeting “with Yingling and Denrich in the breakroom,” if Yrizarry had signed a union card or knew of other employees who had. According to Yingling, it was Yrizarry who volunteered that she had signed a card “to get rid of” the solicitor. Yingling was present during only one interview with Yrizarry. Denrich, who said that he had had “multiple” meetings with Yrizarry, most of them initiated by her “questions and problems and crying and things,” recalled the occasion when Yrizarry had come to him “really upset” and with “bags under her eyes and . . . tears.” She told him that Rolfe had “threatened her job”; in doing so, she had mentioned her power to influence Denrich. Denrich himself became upset and contacted Rolfe, who conceded that she had been speaking to Yrizarry about people being fired when they did not do their work, whether union or non-union. Denrich told her to apologize, and he himself later went to Yrizarry and apologized, saying that what Rolfe had tried to explain was “a reality of life,” not a threat, and that he did not simply listen to Rolfe, but always “investigate[d]” the facts. He reassured her about the “great” job she was doing.

Denrich also denied hearing any member of management ask if Yrizarry had signed a union card or knew of other employees who had done so.

Yrizarry impressed me as a most honest witness who literally agonized over her testimony. I believed her when she said that she was asked by a member of management during a breakroom meeting whether she had signed a card and if she knew of others who had. Although she could not recall the identity of the questioner, she said it had to be one of a group of people shown by the record to occupy supervisory status; and although she answered the first question in the affirmative, it is my impression that the “totality of the circumstances”—being asked such questions in the isolated presence of at least two supervisors, with no explanation for the inquiry—made the questioning coercive, within the contemplation of the test, as quoted, embraced in *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

I have almost as much confidence about the complaint allegation that Rolfe “impliedly threatened to evaluate employees more strictly and discipline and/or discharge them for engaging in union activities” by virtue of her conversa-

tion with Yrizarry. Rolfe admittedly spoke of an employee’s vulnerability to discharge regardless of union representation, and I believe that she also referred to past overlooked deficiencies on Yrizarry’s part, as well as Rolfe’s accessibility to Denrich’s ear. Put together, this does reasonably sound like a threat to Yrizarry’s job, and however Rolfe may have meant it, she should have realized what the natural impact of her statements would have been on Yrizarry.

I am, nonetheless, inclined to recommend dismissal of this allegation, based on the prompt apologies by Rolfe (who said that Yrizarry had misunderstood her and that she did not have to worry about her job) and by Denrich (who told her that she was a good worker and that her job was “secure”), and on Yrizarry’s acknowledgement that, as a result of the apologies, she did not feel that her position was “in any way, shape, or form jeopardized.”²¹ *Raysel-IDE, Inc.*, 284 NLRB 879, 881 (1987).

Finally, while General Counsel argues that Rolfe’s gratuitous statement to Vice President Morrison that Yrizarry had “seen it their way” is coercive, I fail to detect the coercion. Yrizarry was not required to respond to the remark, and I cannot perceive any constraint that it imposed on her.

d. *The allegedly unlawful pay raises*

The complaint alleges that Respondent violated the Act when, shortly before the election, it granted pay raises and, in one instance, retroactive pay, to certain employees in order to influence them to vote against the Union.

In reaching the following conclusions, I have taken into consideration an exhibit introduced by Respondent showing retroactive increases given to six other employees on various days in March, April, May, and July 1987. Although Denrich testified that he remembered two of the five situations, I have my doubts (in each case with which he was purportedly familiar he stated that “it looks like” the situation was etc.). In any event, there is no clear evidence that Denrich personally played any part in effecting these adjustments.

There is also in evidence notes taken by Denrich as he made his normal tour of the stores in July and August 1987. Some of them show pay problems and other requests brought to his attention by employees, but there is no evidence that Denrich was instrumental in personally resolving them in the employees’ favor, and counsel for Respondent stated that the notes were not offered to furnish such proof.

I have also noted the testimony of Carol Corron that on election day, Denrich said to her that Respondent needed her help, and that “we would all be given raises after this was over.” She took advantage of the occasion to inquire about the 25-cent raise she had expected when she transferred into the meat department from the bakery in 1987. Denrich said that he would check into the matter, and then, “a couple hours later,” returned and said “they didn’t do that anymore.”

Denrich agreed that Corron had asked about her 25-cent transfer raise; he made an inquiry to the payroll department and was told that the practice had been abandoned. Denrich was himself dubious, however, that he actually checked with the payroll office and responded to Corron on the same

²¹ Although subjective reaction is seldom relied on in applying Sec. 8(a)(1), her enthusiastic reaction gives some assistance in determining whether the violation may reasonably be said to have been cured.

day—election day: it “wouldn’t seem I’d do that.” I tend to agree that, as busy as Denrich obviously was on February 18, he would not have had the inclination nor the time to look into Corron’s request on that day. Thus, I would not draw from Corron’s probably mistaken testimony the favorable inference urged by Respondent, based on its view of the facts, that Denrich obviously had no interest in influencing votes because he could have delayed until after the election his negative, and perhaps damaging, reply to Corron. My guess—like Denrich’s—is that he did not respond to her until the election was over.

Carolyn Shaffer, a rank-and-file employee serving as the seafood manager at Havre, testified that probably around October 1, “before any of the Union stuff was going on in the store,” she asked Denrich for a raise, citing various urgent personal needs. He told Shaffer that “there was a pay scale going into effect,” but he “would have to wait until after the Union election before he could put it into effect,” referring to the fact that it could be construed to “buy people’s votes and he could not do that.” Nonetheless, considering her pressing situation, he agreed to look into it.

Time passed, no raise was forthcoming, and Shaffer broached the matter with Denrich again, maybe “a couple of weeks before Thanksgiving.” Once more he said he would investigate, and this time, according to her pay record and a stipulation entered into by the parties, a \$1.50 per hour raise, taking her to a wage of \$7 became effective November 28, 1987, and showed up in her check perhaps “the second or third week in December.”

Denrich testified that he did tell Shaffer in late November that he was “putting in” a new pay scale in January, but he says that he only referred to a scale for seafood managers. He had specifically discussed promulgation of such a scale for seafood managers in the November 3 discussion with his attorneys about changing the existing wage schedule because “we didn’t have at that time” a seafood manager pay scale. But, as the January 3, 1986, wage schedule indicates, there also was no existing wage schedule for any of the various other managers at that time.

Shaffer’s testimony is somewhat confusing, but it is my judgment that she did in fact first speak to Denrich about a raise “before any any of the Union stuff was going on in the store.” Denrich made a note of her request and said he would check into it, but nothing happened. While she testified that “[i]t seems like to me there was a couple of weeks had went by and I didn’t see anything,” at which time she again asked Denrich about the raise, I believe that this second conversation occurred sometime late in November, since it must have been at that time that Denrich spoke of the representation petition, which was not filed until November 25 and therefore could not have been referred to in the first conversation, which probably was held around the “end of September.” This time, however, Shaffer got action. As the record shows and the parties stipulated, Shaffer was raised from \$5.50 to \$7 effective November 28.²²

The evidence shows, in other words, that Denrich apparently paid no particular attention to Shaffer’s urgent request for a much needed raise until after the petition was filed, at which time he acted with dispatch and in seeming defiance of his counsel’s advice, and his own comment to Shaffer,

that wage increases could appear to constitute bribery. I cannot accept that this action was motivated either by altruism or business considerations. Denrich’s delay after the first request militates against the first explanation, and that appears to be the only explanation offered by Denrich.²³

In these circumstances, I cannot accept the purported justification that Denrich was simply acting out of the goodness of his heart, and I conclude that the evidence as a whole, including Denrich’s explanation, preponderates in favor of a finding of violation.²⁴

Denrich explained that the “bagger” classification was once used frequently for hiring at a low rate, but “we really don’t use it very much any more”; in fact, he thought they were “ancient history” and that “we didn’t have any.” Generally, new stores had used baggers “a lot,” but they were later reclassified as “grocery clerks.” Some got lost in the system, and Smith appeared to be one of them. Smith had never before complained to him about his classification. Denrich looked into the complaint and found merit in it. Pursuant to the practice of paying “retros” in such situations, which had been done “plenty of times,” Smith received some backpay.

The record shows that Respondent makes some 40–60 retroactive changes in employee status during an average year at all its stores. Of the six examples from early 1987 placed in the record by Respondent, they represented inadvertent failures to pay employees in accordance with recent changes. There is no evidence of any previous alleged failure to reclassify on a par with Smith’s case.

Nonetheless, although the case is suspicious, I conclude that no violation has been established. According to his testimony, Smith had been complaining to various store managers for years about being misclassified, but he had never previously approached Denrich about the matter. Although Denrich’s testimony is questionable in this area as in others,²⁵ there is no reason to believe that, having been informed for the first time that Smith was performing grocery clerk duties, he would not have acted with reasonable promptness, with or without a union campaign, to set matters aright. Unlike the broader increases which he was advised to withhold, Smith’s increase amounted to a clearer and less

²³The other seafood managers apparently received a \$1 raise in February; at least that was the case according to the testimony of Stemmers Run Seafood Manager Richard Heinly. These raises are not referred to by the complaint.

²⁴On brief, Respondent states that the record shows that Shaffer received her increase effective November 22, “prior to the filing of the petition”; but in fact her pay record and the stipulation of the parties show that her increase was “effective” November 28; when it was actually recorded is undisclosed. Respondent’s argument as to “payroll ending dates” based on Susan Yale’s card seems to be defeated by the 2-9-88 entry. *Charles Smith* is employed part-time at Havre, for about 15 hours per week. He testified that he was not sure of his classification when he began work in, as his pay record shows, 1984. At some point, he was asked his classification by the main office, which said that the records showed him to be a “bagger.” Believing that he should be classified as a grocery clerk, a higher-paying rate, Smith spoke to three successive Havre managers, including Hein, but got no results. Perhaps within a month of the election, he spoke, for the first time, to Denrich about the matter, and within the week, Denrich had arranged, effective January 24, a change of classification to grocery clerk for Smith, with a concomitant raise of 25 cents per hour, as well as backpay of \$99.45 (or approximately 25 weeks of compensation, at 25 cents times 15 hours per week), paid by check on February 12.

²⁵While, as noted, he testified at one point that he had thought that baggers were “ancient history,” the wage schedules issued on March 11, 1988, contained a separate schedule for “Parcel Pick-up/Baggers/Utility Clerk/Day Porter.”

²²When the actual decision was made is undisclosed by the record.

discretionary entitlement. And as for the 6 months of retroactive pay (a figure which, Smith made clear at the hearing, he thought was far from adequate), that arbitrary figure evidently was warranted and could justifiably have been made larger. I would, in the circumstances, dismiss the allegation as to Smith. *American Sunroof Corp.*, 248 NLRB 748, 749 (1980).

Sterling Rapposelli, a part-time employee and a fairly incoherent witness, met in the breakroom with Denrich and Yingling. After talking about strikes, etc., Denrich allegedly said that he had discussed Rapposelli with Manager Hein, who told him that Rapposelli was "doing a good job"; asked him if he was satisfied with the hours he was getting; and discussed a possible pay increase for Rapposelli because he was a "utility clerk" and "kind of wrote it down in his little black book" Rapposelli was "almost positive" that he did not initiate the subject of a raise.

Perhaps 2 or 3 days before the election, having missed his scheduled luncheon, he met again privately with the two managers. After Denrich gave him "the same speech over again," he told Rapposelli that he had looked into it, found that Rapposelli was being underpaid, and that the 50-cent increase would be reflected in his next pay check (it was, in the check for the period ending February 13, 1988. His classification was also changed to that of grocery clerk.)

On election day, Denrich told Rapposelli and his brother Tom, also an employee, that he had been talking to their father, and he "was counting on us."

Rapposelli was hired as a "bagger" (he "believe[d]") in 1985, and his duties remained the same thereafter. These consisted of "bagging when the store got busy"; stocking shelves; taking care of the eggs and milk and bread; and filling in wherever needed.

Denrich said that in his discussion with Rapposelli in the breakroom, he had the same reaction that he had had to Charles Smith's revelation of being classified as a bagger—"surprise" when he heard that Rapposelli was a bagger, because "really we weren't using that many baggers anymore" except when opening up the store. After a while, "normally they were transferred into other departments to become grocery clerks, or deli, or produce, or whatever." It was not clear how Denrich came to know Rapposelli's classification: at first he testified that Rapposelli "brought it to my attention," and then on the next page stated that he found out from "talking to Warren," the store manager. The explanation as to why Smith, but not Rapposelli, received retroactive pay, was that "we don't like to give retros if we don't have to" and "[w]e felt that the decision we made was satisfactory . . . to bring him up to the grocery clerk schedule."

Unlike the case of Smith, I am inclined to regard the upgrade of Rapposelli as the product of Denrich's irresistible urge to display "a fist inside the velvet glove," *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). Rapposelli did not complain about his pay or his classification, as had Smith, and I do not think that his work had changed, as Smith's apparently had. With no complaint from Rapposelli, I doubt that, in normal conditions, Denrich would have made the extra effort required to pay him a higher wage, just as, admittedly, "we don't like to give retros unless we have to." Denrich testified that he made no effort to check his other stores in a search for other matured baggers to promote. I conclude that the raise given to Rapposelli so soon before the

election constituted an effort to infringe on his freedom of choice, in violation of Section 8(a)(1).

Bakery employee *Susan Yale* testified that on about February 10, she spoke to Denrich, Yingling, and Jackie White in the breakroom for about 20 minutes. She recalled that Denrich asked if she was having any problems.²⁶ She spoke of a promotion for her sister Dawn Saponaro and a 25-cent wage increase for herself. In a second conversation prior to the election, Denrich told her that she would be receiving her raise, which was reflected in her next paycheck. Her sister was also promoted subsequent to the election.²⁷

On cross-examination, Yale agreed that, in answer to Denrich's question about problems, she brought up a complaint she had about the loss, as a result of the new pay scale in 1986, of a 25-cent differential which she had previously been receiving as a cake decorator. Yale had never spoken to Denrich or any other manager about the problem before; she and Bakery Manager Bonnie Arnold had discussed it, but there is no evidence that Arnold had made any effort to have Denrich himself straighten out the situation. The next time Yale saw Denrich, a day or two later, he said that he had looked into the matter, "that [she] was right, it was incorrect," and the situation would be taken care of. She received the extra 25 cents in her payroll check on February 19, which she agreed would have been made up prior to the election.

With respect to the raise given to Yale, Denrich testified that in looking into her complaint about erosion of her 25-cent differential, he found that she was being shorted, and her salary was therefore increased. Prior to this meeting, Denrich had not heard about the problem.

As in Smith's case, I see no viable basis on which to conclude that the grant of a increase to Yale was unlawful, although the circumstances are suspicious. In answer to a question about any problems that she had, Yale complained about her loss of a 25-cent differential. Denrich investigated and found that she had been improperly treated. He ordered that the differential be restored. There is no dispute that he was correcting a wrong which had never been made known to him before, and unlike the cases of Shaffer and Rapposelli, Yale's increase is not easily considered simply an exercise of discretion. I note that, evidently unlike the case of Smith, Yale did not seek retroactive pay and Denrich did not go out of his way to offer it to her. *American Sunroof Corp.*, supra at 749.

e. Solicitation of grievances and implied promises

The Havre complaint, with regard to Denrich, contains a single allegation respecting solicitation of grievances—that "on or about January 27," Denrich "attempted to influence employees' union support by soliciting grievances." On brief, General Counsel names two instances in which employees testified that they were asked, when called into breakroom meetings, whether they had "any problems." Denrich affirmed that it was his usual custom to greet employees at the stores with variations of "How're you doing?" or "Do you have any problems?", and the general

²⁶ On direct examination, Yale testified that Denrich "asked what our grievances were . . . [w]hy we wanted to get in a union." On cross, however, she readily agreed that Denrich asked neither question, but simply inquired whether she had "any problems."

²⁷ The complaint does not allege that the sister's promotion was a violation.

tenor of employee testimony is that he usually made some such greeting to them.²⁸ Denrich's general casual cordiality with employees may, however, arguably be distinguished from isolated breakroom meetings at which he sat them down and asked, more emphatically, if they had "any problems." *Carbonneau Industries*, 228 NLRB 597, 598 (1976). The Board has held that soliciting grievances gives rise to a rebuttable inference that the employer is making a promise to correct any such grievances, *Uarco, Inc.*, 216 NLRB 169 (1975). The Board had also held that expressing a strong willingness to employees at a meeting to oblige them if they felt a "need" to discuss wages or talk about any matter contains "no indication or suggestion that Respondent would act on any grievances or problems raised by any employees." *Wm T. Burnett & Co.*, 273 NLRB 1084, 1086 (1984). See also *Sunnyvale Medical Clinic*, 277 NLRB at 1223. These cases are not easily reconcilable. My own feeling is that, even in the unprecedented circumstances of the breakroom campaigning, Denrich's question about "problems," without more, did not logically or in common intercourse connote a serious commitment to resolve any such problems, especially since they appeared to be nothing more than a solicitous opening gambit for launching into the semistandard antiunion attack. This conclusion is to some extent bolstered by the employees' familiarity with Denrich's availability.

Two other instances purportedly falling into this general category are listed by General Counsel. One is the instance involving Sterling Rapposelli, which I have already discussed in the context of the raise actually given to him. The remaining incident, according to General Counsel, may be found in a conversation between Denrich and Bonnie Arnold.²⁹

The day before the election, Denrich asked to speak to Arnold. He told her that after talking to many employees, he saw the need for changes in the store and "he needed a year to get some of these changes to go through." He assertedly wondered if they could "work something out" so that she would tell the voters to give him the needed year. Arnold replied that the employees could make up their own minds. When Denrich said that he did not need Arnold to win, she accused him of taking her participation personally. Denrich replied that "it was personal to him, that if [she] wasn't with him on this, then we could not be friends." When he further stated that no outsider was going to come in and tell him how to run his store, she became "upset" and left.

Denrich testified that he asked for the meeting because supervisor Jenelee Rolfe, who had spent much time in the store prior to the election, told him that she felt that "Bonnie may have changed her allegiance." In the breakroom, he told her what Rolfe had said and asked "Is there anything I can do?"

²⁸ He also had a "President's Hotline," by which an employee could directly communicate with him (although the employee manual indicates that the communication was to be in writing, see C.P. Exh. 3, p. 33, the testimony referred to telephone calls), and he regularly scheduled "Meet the President" days at all the stores, permitting employees to bring grievances to his attention.

²⁹ Respondent refers on brief—but General Counsel does not—to a breakroom meeting in which Arnold asked about the raise received by Carol Shaffer and Denrich replied, "Bonnie, that's one of the reasons why you don't need a union. If you have problems, you can always come to me and I would do what I can." From General Counsel's failure to mention this exchange, I infer that the Government either believes that no such violation is alleged or that "I would do what I can" is, in Respondent's words, "too nebulous to support an adverse finding," and, in any event, consistent with Denrich's historical practice.

. . . . What can I say to you?" In response, Arnold "went into a long discussion about why the company needed a union." He then testified at length about the issue-oriented discussion which followed, but did not specifically address all of Arnold's other allegations. He did state, however, that she accused him of "taking it personal" and he said, "Yeah, it is personal to me." Denrich denied that Arnold had ever abruptly departed from a conversation with him.

For one thing, I find it most unlikely that Rolfe would have had any reason in the world to believe that Arnold was wavering in her Union allegiance, and I do not believe Denrich's version of the genesis of this conversation. Nor do I accept his testimony that he merely spoke to her about changing her own mind (although his account—"Is there anything I can do?"—may itself constitute an unlawful solicitation and implied promise). I believe Arnold's testimony that Denrich spoke to her as a leader of the union movement and asked her to try to convince the voters to give him a year to make needed changes in the store.

Respondent, citing recent cases holding lawful employer requests for "a second chance to see if they could make things better," *National Micronetics*, 277 NLRB 993 (1985), and for another year "to work together," *Clark Equipment Co.*, 278 NLRB 498, 500 (1986), argues that they stand for the doctrinal proposition that "Generalized expressions of this type . . . have been held to be within the limits of permissible campaign propaganda," *National Micronetics*, supra at 993, citing *Allied/Egry Business Systems*, 169 NLRB 514, 517 (1968). While the conclusion might be subject to dispute, the authority of the precedent cannot be, and, on this point, I am unable to meaningfully distinguish the cited cases.

However, I do believe that Denrich violated the Act, in a manner fully and fairly litigated, by calling in Arnold and putting her in the awkward and discomfiting position of having to respond to his request that she attempt to dissuade union supporters from following their bent. Putting her on that particular spot plainly constituted coercion and interference under Section 8(a)(1). It is true that the Board's 2-1 panel decision in *Gary Aircraft Corp.*, 190 NLRB 306, 312 (1971), argues against such a finding, but its subsequent decision in *Cordin Transport*, 296 NLRB 237 fn. 3 (1989), slips the absolutist shackles of *Gary Aircraft* and examines the "context" in which the request was made. I need refer to no more of the context than Denrich's earlier pressure on Bonnie Arnold regarding the tenuousness of her husband's and her own job.

I also believe that Denrich's statement—and here I credit Arnold—that "if she wasn't with him on this, then we could not be friends" was violative. I perceive no reasonable inference but that the friendship which would be lost over unionization could naturally result in adverse consequences for Arnold. That is clearly an 8(a)(1) threat.

f. *The Donahey discussions*

William Donahey, who has since voluntarily left Respondent's employ, testified that during a breakroom interview with Hein and Yingling, he was asked by Yingling if he "knew anything about this union campaign," to which he replied that he was "really not paying much attention to it, which I wasn't." Donahey testified that he was further asked by Yingling "what are the—any other employees trying to

get other employees to sign union cards or join the union," to which he responded that he had no idea. With Yingling saying they were "sorry you couldn't shed more light on this," the meeting concluded.

This meeting probably occurred, as Donahey seemed to agree, on January 27, when, according to Yingling, he first came to the Havre store to oversee the preelection activities (Denrich did not start participating in the breakroom meetings until February 2), and he conceded that he and Hein had a few quick breakroom conversations with employees on and after that date. Yingling denied having asked Donahey "who was involved with the union" or any like questions, but he did recall that he spoke to Donahey on January 27 in a "very short" conversation in the breakroom.

Although, as discussed hereafter, I am not enthused about Donahey's reliability, this particular segment of his testimony sounds real to me. It seems likely that Yingling might have asked these questions and that the courteous Yingling would have expressed sorrow that Donahey "couldn't shed more light on this." Yingling actually recalled speaking to Donahey in such a "short conversation," but did not tell us what he did discuss or might have discussed. I have considered and rejected the argument that the end of January would have been late in the game to be searching out the identity of union partisans. Those individuals would logically have been the ones on which management wished to concentrate during the campaign. I would credit Donahey on this subject, and would further hold that the unexplained and unapologetic probing of union activity by a top management official was, in the total circumstances, likely to have had a coercive effect, in violation of Section 8(a)(1).

According to Donahey, not long before the election, he was called into the breakroom by Denrich (and perhaps Hein). Denrich showed him some clippings from the February 1 mailing and stated that the Havre store "could be closed" and that the employees could lose benefits "that we already had established." Donahey further testified, at least initially, that Denrich said that "there . . . was going to be an across-the-board raise that had been initiated before the union even started its drive at our store." However, when counsel for General Counsel tried to pin this down more specifically, Donahey somehow converted the statement about the "pay raise" into Denrich saying, "I know that things can be improved here at these stores and that you meat cutters may be looking for a retirement program, and that when this is over we'll talk about that." In further questioning by me about the "pay raise," Donahey returned to asserting that Denrich had said "there was to be an across-the-board pay raise."

At another meeting with Denrich, Donahey was shown the Union pay scale for meatcutters at another chain, without Denrich pointing out that he was referring to the beginning wage. Presumably knowing that Donahey's financial condition caused him to work every possible Sunday in order to earn time-and-one-half premium pay, Denrich allegedly said that "quite possibly Sundays could either go to straight time or we can make 50 cents per hour over normal pay for working all day Sunday." At this meeting, Denrich asked Donahey, "Do we have your vote" (which he evaded answering) and also made a statement purportedly "to the effect that he had 14 [sic] other stores and maybe losing one wasn't too rough."

Denrich and Yingling denied Donahey's more sinister allegations, while admitting showing him clippings about store closings. I was not impressed with the trustworthiness of any of the three witnesses, but Section 10(c) requires the General Counsel to shoulder the burden of proving his case by a "preponderance of the testimony taken." Donahey exhibited an extreme bias in favor of the Union. He also was most elusive and suspiciously uncertain about whether Chuck Arnold had ever expressed his preference to Donahey, while at the same time he was "absolutely" certain that Arnold had nothing to do with Donahey's signing a card. While answering "No" to a question as to whether Denrich had ever talked to him "about collective bargaining with the union," he then went on to answer affirmatively four questions which necessarily constituted a discussion about collective bargaining. These examples of Donahey's testimony lead me to believe that I am unable to trust the veracity of his testimony as a whole.

On these issues, I am constrained to find that we heard half-truths and embellishments from Donahey. I would not depend on his testimony (while recognizing that it could be true) that Denrich simply stated that the Havre store "could be closed" or that closing one "wasn't too rough." I have no idea whether a pay raise was mentioned, and although Denrich conceded that he spoke of the possibility of a lower Sunday premium, he said that it was in the context of a "bargaining—from-scratch" explanation which, as earlier discussed, the Board seems to find legally tolerable. I doubt that Denrich asked if Respondent had Donahey's vote; other testimony along this line shows that Denrich usually stated affirmatively, and without questioning, that he hoped he could count on the employee for support. In sum, except as indicated with respect to Yingling, I recommend dismissal of all allegations related to Donahey.³⁰

g. Surveillance and other allegations

Other kinds of occurrences allegedly violative of the Act were litigated. It seems useful to preface their discussion with some background information regarding the situation at Havre prior to the election.

Despite my resistance, and General Counsel's repeated acknowledgements that the matter was not, in general terms, encompassed by the complaint (Tr. 924, 1336-1339, 1631, 1649, 1788), a plethora of testimony seeped into the record about the presence of outside supervisors and union organizers in the Havre store during the 10 days or so preceding the election. Whether the supervisors were brought in to constitute a show of force, to engage in surveillance of union activity, or simply to guard against an invasion by a group of organizers (and union members from other bargaining units) who, the record shows, made frequent trips through the store as the election approached, greeting and speaking with the employees, I do not know. It is evident that the store was chockablock with representatives of both sides. Denrich was present almost constantly; Jenelee Rolfe was exclusively stationed at Havre for several days; Director of Security William Tolson and security guards were prowling around almost ceaselessly; the produce supervisor for all the stores,

³⁰Donahey admitted that when he left Respondent's employ, he spoke to the Union about filing a claim on his behalf for Respondent's failure to continue his insurance coverage.

George Handley, spent most of his time at Havre in the period prior to the election; Vice Presidents Yingling and Morrison were often on the premises; and other storewide managerial types were assigned there. Similarly, it appears that as the countdown to the election proceeded, more and more union organizers or partisans made more and more appearances, buying bagels and fruit and in subtle ways waving the union banner. The atmosphere was both unprecedented and presumably tense.

While, as indicated, I attempted to discourage the almost unstoppable flow of unfocused testimony about the strangers in the store prior to the election, certain incidents were litigated more or less in harmony with allegations specified in the complaint.

Arnold told us that on the Saturday preceding the election, Jenelee Rolfe came into the bakery, said she would be there “for the duration,” and “wanted to know [Arnold’s] schedule.”³¹ Rolfe stayed in the bakery until the election on the following Thursday. During this period, Rolfe did little but occasionally wait on a customer and a few other functions.

Rolfe testified that in February, she was asked by Yingling to go to Havre “to maintain business” in the bakery department because there was “a lot of union activity going on, a lot of confusion in the bakery department.” She arrived at 8 a.m. on Saturday and stayed until after the election, except for Sunday. She said that when she first came, Arnold asked if she was there “to baby-sit her,” to which Rolfe replied that she was there to “make sure we stay in business and maintain our bakery.” Rolfe also told Arnold that she would “appreciate it if [she] would not do union business on your working hours.” Arnold was, Rolfe said, quite open about her sympathies.

Arnold testified that it had been the practice of employees in the morning to buy a roll at the bakery, “talk for a few minutes, get warm.” About the Saturday prior to the election, Rolfe told Arnold that they “weren’t allowed to come up to the bakery,” had to “stay on the other side of the counter” and had to get their pastries and leave: “They couldn’t stand around and talk.”

Rolfe testified that it was against Company policy for employees in one department to enter another, help themselves, and hang around. She says that she told Arnold that she “would prefer that they not take their breaks in the bakery department.” Rolfe was not sure, but thought that the policy was set out in the employee handbook.

Rolfe’s concession that she was told by Yingling to go to Havre because there was “a lot of union activity,” a “lot of confusion,” in the bakery department, plus the fact that, like Arnold, she was not present on Sunday, strongly suggest that her special purpose for being there was to ride herd on Arnold, and to do so in a rather ostentatious manner, given the number of supervisors who were already in place to monitor this relatively small store. There is no evidence that an unusual amount of union activity had been taking place at the bakery counter, although doubtless the subject had come up before the employees were interdicted by Rolfe from continuing their prior practice of talking “for a few minutes” after purchasing a bakery product.

³¹ She asked if Arnold had Sunday off, and said “Good” to Arnold’s affirmative reply.

I conclude that storewide Supervisor Rolfe’s specific assignment to the bakery department for 5 full days, according to a schedule which coincided with Arnold’s, was not only an effort to oversee Arnold’s union activities, but was also designed deliberately to give impression that those activities were being monitored. I further conclude that the record does not support a finding that any such union activity in which Arnold may have engaged while on duty interfered with her work or differed—except in terms of content—from the kind of worktime communication which had been permitted in the past.

General Counsel also notes testimony by Arnold about a conversation with George Handley, the produce supervisor for all the stores, who spent an unprecedented amount of time at Havre during the week or two before the February 18 election. Arnold, who was obviously friendly with Handley, testified:

[During the week before the election] we would talk back and forth to each other and this, that, and the other, and George came up and he said, “Bonnie, I’ve known Louis for a long time. I’ve known him for like 22 years,” and he was teasing, he said “we had a fight one time when I was little,” you know, and whoever, he said he whipped Louis, you know, just teasing, carrying on. And he said, “Look, Bonnie, I’ve known him so long, I know if the Union get in, he will close this store.” And I said, “Oh, George.”

Handley testified that in his amiable conversations with Arnold during the week preceding the election, he made no statement about Denrich closing the store. While Handley struck me as a relaxed and pleasant witness, his testimony seemed unreliable. On cross-examination by Charging Party, when asked how he “came to know Mr. Denrich 22 years ago,” Handley replied that it was not 22 years ago. To the next question—“I thought that’s what you said”—Handley answered, “I *said* 15 years. I didn’t *say* 22 years.” This appears to be an admission that Handley did have a conversation with Arnold in which the length of his relationship with Denrich was mentioned, and tends to corroborate the remainder of her testimony.

In any event, I do not believe that Arnold manufactured this conversation. The facts that she referred to Handley “teasing,” that she replied, “Oh, George,” arguably as if she did not believe him, and that she testified that, in fact, she did not think Denrich *would* close the store in the event of unionization, do not militate against finding a violation based on Handley’s statement. The Board has settled the principle that the test of coercion or restraint is whether a statement would reasonably tend to have such a result, *Hanes Hosiery*, 219 NLRB 338 (1975), and Handley’s prediction would surely have such a tendency. That the statement was made as the culmination of a good-humored conversation does not seem to detract from that tendency.

Not long before the election, Security Director Tolson approached Arnold and introduced himself. According to Arnold, Tolson said he was there “to make sure that I stayed in my department and that there was no union activity, that I wasn’t allowed any phone calls.” Tolson was “very nice” and apologized for having to impose such constraints.

Tolson, who testified that he arrived at the store on February 8 at Denrich's instruction (because the employees were being interfered with and the store was "in somewhat chaos") and stayed there full-time (except for Saturday and Sunday) through election day on February 18, recalled that store management had noticed an "unusual" amount of telephone calls coming into all the departments, and he told the department heads separately to keep "all personal telephone calls down to as minimal as possible." Tolson also denied mentioning the union in the conversation with Bonnie. He was not specifically asked to deny that he said he was there to make sure that she stayed in her department, but his testimony as a whole contradicts that claim.

Arnold also testified to a similar remark by Tolson as that made by Handley, earlier discussed. At some time prior to the Handley conversation, Tolson allegedly told Arnold that "he knew that Louis and his father had already had meetings and if in fact the Union did get in, the store would close." She "probably" responded to Tolson that she "didn't think he would do it."

Tolson gave quite a different version. He said that when he began his full-time tour of duty at the store, he had a conversation with Arnold at the bakery counter in which Arnold said to him that she had heard that Denrich was "talking with his father about closing the store down if the Union got in, and she asked me if I have heard the same thing." He denied having heard any such rumor, and was rebuffed when he asked her to name her source.

Tolson made a good personal impression, and I am aware that he was discharged by Respondent because of an incident on the evening of the election.³² I am inclined, however, to accept most of Arnold's account.

Some of Tolson's testimony gave me considerable pause. For example, with reference to a matter to be discussed hereafter, he said that he was aware of the Respondent's off-duty no-access rule "because when I came with the company, I had a set of rules and regulations, a general basic guidelines to go by in what the company allows and doesn't allow." When asked if these rules were written, Tolson answered, "To actually say they're written, no, sir, I don't believe they were." Then he was remitted to "guessing" who it was that told him what the rules were. Again, he testified that store management ("I believe it was Mr. Hein") had asked him to tell the department heads to keep personal calls to a minimum, but he had "no idea" why Hein did not undertake to perform this simple task himself.

My inclination is to accept Arnold's testimony that Tolson apologetically said that he was there to make sure that Arnold (and presumably other employees) "stayed in my department and that there was no union activity." The former restraint was, in practice, a new one, the latter was unqualified and overbroad, and I find that Respondent thereby violated Section 8(a)(1). My intuition as to the telephone call matter is that Tolson did not say that Arnold was not allowed "any" phone calls, but rather that, as he testified, he asked her to keep the calls to a minimum.

I find it highly unlikely that Arnold, who indicated that she did not believe Denrich would close the store, would put such a question to Tolson. Accordingly, I accept her testi-

³²The record also shows that Tolson nonetheless received a "favorable" reference from Respondent.

mony and find that Tolson violated Section 8(a)(1) by saying that Denrich and his father had already decided that if the Union was elected, "the store would close."

Arnold testified that on February 17, she left the store to take her break in her car. Tolson and Rolfe allegedly followed her out of the door and stood watching. Employee John Day, coming to the store to shop on his day off, spotted Arnold and came to her car to converse. Two security guards drove around and pulled over next to her vehicle, facing in the opposite direction and occupying a space which was not a parking spot, and then "just sat there and watched us" until Arnold returned to the store (she thought that Day left at some earlier time). Day gave substantially corroborative testimony, although he testified that the guards left after "a couple of minutes, maybe five," and he believed that he and Arnold returned to the store together.

Rolfe denied ever following Arnold out to the parking lot. Tolson recalled leaving the store to make a "periodic outside patrol" to check that no vehicle was parked in a fire lane, and he noticed Arnold and a man sitting in a vehicle in an unusual location. He saw that Arnold was looking at him, and he walked on to where two security guards were parked in their personal cars. He told them not to bother Arnold's vehicle as long as it was not blocking the receiving area. On cross, Tolson conceded that he need not have left the store to see the fire lane, which is directly in front of the store.

Since Tolson admittedly did not have to leave the store in order to observe the fire lane, his departure from the store shortly after Bonnie Arnold walked out certainly suggests that he was intending to monitor her activities or at least give the impression of doing so. Tolson's admission that he did speak to the security agents to tell them not to bother Arnold's car, which was not illegally parked, is decidedly odd. Given the corroborative testimony of John Day, who struck me as a most creditable witness, coupled with Tolson's peculiar explanation of his contact with the security guards, I am willing to find that the guards drove over and parked next to Arnold's car, and that their impetus for doing so was an instruction by Tolson to, in the words of the complaint, "inhibit [her] activities on behalf of the Union."³³ I find that Respondent, through Tolson, also violated Section 8(a)(1) by surveilling the activities of Arnold.³⁴

Charles Smith testified that about 4 days prior to the election, he stopped at the store to buy some lunch to take to his regular job, as he did each day, and Tolson cautioned him that Denrich had instructed that employees could not enter the store if they were not on the clock. Smith left. However, he then asked Yingling if he could come in, and Yingling said "Sure." Moreover, on other days thereafter and prior to the election, he entered the store off-the-clock without hindrance; he could not recall whether Tolson saw him, but there was present a plenitude of supervisors who did not bar him.

Tolson said that he had noticed Smith often enter the store during off-duty hours and converse with others, particularly in Bonnie Arnold's area. Having been informed that Denrich had made a rule "during the last couple of days of the day

³³Security guard Mark Donnellon testified that the guards had been instructed by Tolson to "watch what the [Union was] doing . . . outside the store."

³⁴Whether Rolfe was with Tolson on this occasion, I cannot say; Day did not remember seeing her.

of the vote” that off-duty employees should not be allowed to disturb other employees. Tolson informed Smith of the policy when he entered the store. After leaving, Smith soon returned; having received a hand signal from Yingling, Tolson did not interfere with Smith again. Denrich, however, denied that he gave any “specific instruction” dealing with “employees no longer on the clock coming back into the store, from the period of February 14–18.

The Board’s rule governing the validity of a no-access rule as applied to off-duty employees is a three-part test. The no-access limitation must only limit access to the interior of the facility and access to working areas; must be clearly disseminated to all employees; and must be applied nondiscriminatorily. *Tri-County Medical Center*, 222 NLRB 1089 (1976).

The employee manual issued in January 1986 provides, “Once you complete your work schedule, you are to leave the premises unless you are purchasing items as a customer” (C.P. Exh. 3, p. 23). While the manual does not speak to the matter of returning to the store after leaving it, it seems implicit that such reappearances are also forbidden (except for the purpose of purchasing groceries). The dissemination of this rule via the manuals seems adequate; and the rule is limited to the “premises,” which employees would likely construe to mean the store itself. There does not appear to be discriminatory application of the rule—while most of the testimony on this point has to do with employees reentering the store to purchase groceries, Kelly Smith testified that she had previously stopped at the store while off-duty “just to stop by to say hi to somebody.” There is no indication that she did this more than once or that she was seen by a supervisor.

Furthermore, this seems to me to have been a very trivial incident, particularly in the light of the speed with which Smith was allowed to reenter the store by Yingling. I do not believe that this was shown to be an unfair labor practice. Even if it was—and there is no evidence that Smith had any notion that union activity played a role in his momentary expulsion—it was so quickly set aright that I would be reluctant to find it violative of Federal law.

Kelly Smith, daughter of Charles, testified that although she was scheduled to start work at the Havre store on election day at 4 p.m., she entered the store to vote at about 1 p.m. As she approached the voting area, Tolson stopped her and asked if she was on the clock. When she said no, Tolson said that Denrich “did not want me in the store if I wasn’t on the clock.” She departed, but returned a few minutes later after being told by organizer Gary Gatewood that she was entitled to vote. This time, Tolson did not try to stop her. As earlier noted, Smith told of having previously stopped at the store while off duty to say hello to someone.

Tolson testified that when Smith entered, she headed toward the meat room, and Tolson approached to ask where she was going. She said that she needed to talk to somebody, and Tolson told her that that was against company policy for off-duty employees. He asked her to leave, and she did. When, several minutes later, she reentered and headed toward the voting booth, he did not intercede.

Although Smith first testified on cross that she proceeded “immediately to the voting area” in the breakroom when she entered the store, she also agreed that she stopped and “talked to a few people” as she went, for “[a]bout five minutes, if that long.” She also conceded that Tolson stopped her “by the meat case”; when asked if the meat case was

located in the area of the polling place, Smith replied, “Going towards that way, yes.” She further testified that when she saw Gatewood as she left the store, he told her to reenter the store and “this time walk directly to the voting area.” When she followed his advice, she was not disturbed.

Here, we seem to have a case of an off-duty employee who came into the store, probably to vote, but who first stopped to chat with other on-duty colleagues on what appears to be a circuitous route to the polling area. In so doing, she appears to have been in breach of a valid no-access rule. Despite this, when she returned to the store and proceeded directly to vote, she was not deterred from doing so. I cannot find in all this an actionable unfair labor practice.

John Day testified that on election day, he was speaking to employee Donahey in the parking lot when organizer Gatewood pulled up in his car and joined the conversation. Two security guards drove up and parked next to Gatewood’s automobile, and remained there until the two employees left to go to work.

Gatewood testified to what appeared to be a different incident and Donahey gave no testimony on the subject. Respondent failed to call as witnesses any security guards who were working in the lot that day. The excellent impression made on me by employee Day leads me to credit his testimony. Since Tolson testified that the security guards were instructed by him to monitor the union organizers, I would hold him, and thus the Respondent, liable for the coercively “close observation of employees in order to inhibit their activities on behalf of the Union” on February 18, as alleged in the complaint.

D. The Requested Bargaining Order

The complaint seeks a remedial bargaining order at the Havre store pursuant to the authority granted by *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), which held that such an order based on signed union authorization cards may be issued where an employer has engaged in unfair labor practices which have a tendency to impede the election processes and make the possibility of expunging the effects of such practices by the use of customary remedies, “though present,” nonetheless “slight.” *Id.* at 614. In order to determine whether a bargaining order should be entered in this case at the Havre store requires, first, a unfortunately laborious investigation of whether, under the law, an order can legally be entered. We turn first to the somewhat unusual (for this sort of case) issue of the scope of the appropriate bargaining unit, and then to the card majority question.

1. The bargaining unit

As indicated, General Counsel seeks a bargaining order at a single grocery store. Respondent argues that the *only* appropriate unit would include all of Respondent’s stores, and, consequently, that General Counsel would have to produce perhaps 500 signed union cards and prove sufficient unmitigated unfair practices throughout most of the stores in order to make a *Gissel* order possible. At the hearing, I ruled that Respondent would not be allowed to attempt to prove that the only appropriate unit consisted of all stores, whether back in 1987 or later. I so ruled on the basis of the following facts.

Although the Union has been attempting to organize Respondent on a store-by-store basis since 1981, it was not until a representation hearing on April 14, 1988, regarding the Rosedale Shopping Center store that the Respondent first took the position that the only appropriate unit consisted of every store owned by it. At the earlier hearing on the Havre petition held on December 9, 1987, counsel for Respondent stipulated that "an appropriate unit would consist of all full-time and regular part-time employees at its Havre de Grace location," and that was the unit in which the February 1988 election was held. Respondent took the same position at a February 24, 1988, hearing on the Stemmers Run store petition filed on February 14, and at the Elkton hearing held on March 2, 1988.

At the April 14 hearing on the Rosedale petition, however, the same attorney stated as the Employer's position that "the only appropriate unit is a unit of all of the Employer's 14 locations." Despite this assertion, counsel stated, in effect, that "Respondent was willing to fragment the newly discovered monolith by going ahead with the election at the Elkton store, where a Decision and Direction of Election had already issued, and would also proceed with the proceedings at the other [two] locations that are already in place in compliance with the normal Board processes." Counsel also stated that there had been "no significant change in the Employer's operation" since the three most recent cases had been initiated.

The hearing officer denied the Employer's request to litigate the unit issue, but on review, the Board reversed the ruling, stating that the position taken by the Respondent in earlier cases did not bind it in the latest proceeding, and noting that "the issue as to the proper unit scope has never been litigated, in this or any other proceeding involving the Employer." On remand, the Union withdrew the petition.

At the hearing in this case, Respondent notified me that it desired to litigate the all-stores unit claim, proffering 66 topics on which it would introduce evidence (and presumably provoke contradictory proofs). Counsel for Respondent assumed a dual position: the first was that Respondent had been "in error" in the past in agreeing to single-store units.³⁵ The second, in response to an assumption stated by me, was that even if the Respondent's operations had been deliberately restructured to affect the size of the bargaining unit, "the reason" would be "immaterial," and only the result would count. In due time, I ruled that I would not hear further evidence in support of the effort to establish that the only appropriate unit is an all-stores unit.³⁶

³⁵ While it is usually laudable to see counsel throw themselves on the sword for the sake of their clients, I find it rather improbable that the veteran labor lawyers representing Respondent here would not have spotted, with the instinct of a cat sensing a bird, an all-store-unit argument, had there been any scintilla of a suggestion in reality that such a contention might have borne fruit.

³⁶ Despite this, and without objection by the General Counsel or the Charging Party, Respondent introduced in evidence two documents distributed by Denrich to store managers and supervisors on February 26, 1988, and June 27, 1988. The first document is designed to concentrate all personnel problems in the hands of Charles Yingling, whose promotion to "Vice President of Human Resources" (from "Director of Operations") is also announced. This document is peculiar because it seems to say that Yingling already possessed the authority invested ("Traditionally, if a store manager or supervisor had a 'people' problem Mr. Yingling was called to straighten it out" (emphasis added)). Furthermore, the letter also announces the promotion of Pat Miller to Personnel Director (from Personnel Administrator) and seems to accord her the same authority as that given to Yingling ("As with Charles, if you have a 'people problem' call Pat.").

"It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations." *St. Francis Hospital*, 271 NLRB 948, 949. Sec. 102.67(f), referred to above, provides:

(f) The parties may, at any time, waive their right to request review [of a Regional Director's Decision and Direction of Election]. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmation of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

It is true that if, after an election, an employer revamps its organizational structure, such action may well result in the creation of evidence which was, beyond doubt, "previously unavailable" at the time of the original litigation. There are two reasons why, despite any such alleged changes, the rule against relitigation should nonetheless normally apply in *Gissel* bargaining unit situations.

The first is that changes made at a time when the employer perceives himself to be in actual jeopardy of having to bargain with a union are necessarily instinct with the intimation that the changes are related to the union effort, and the Board should permit cognition of the claimed alterations only when the employer has cogently proffered that the changes were not simply voluntary, but were compelled by circumstances of a most exigent nature and are of such a character as to make bargaining in the smaller unit totally unworkable. To permit any lesser showing could threaten havoc to the system. In the present case, the Respondent did not suggest that it was abruptly shifting its organizational and functional structure after many years of doing business the same old way because of any perceived economic need. Cf. *St. Anthony Hospital Systems*, 884 F.2d 518 (10th Cir. 1989), enfg. 282 NLRB 790 (1987) ("To hold otherwise would allow employees to nullify unfavorable elections simply by modifying the job responsibilities of a particular position.")³⁷

The second reason for locking in the scope of the bargaining unit in a *Gissel* case flows from the Board's well-settled rule that "the validity of a bargaining order depends on an evaluation of the situation as of the time the unfair labor practices were committed." *Highland Plastics*, 256 NLRB 146, 147 (1981); *M.P.C. Plating*, 295 NLRB 583 (1989). In applying this rule, the Board refuses to take into consider-

The June 27 letter, characterized as "a follow-up" to the February letter, was much more formal and provided that hiring, discharge, disciplinary actions, transfers, promotions, wage and benefit matters and problems, and training programs for all 1000 employees had to be submitted to Yingling "for review and final decision."

³⁷ On two occasions during the hearing, I referred to the right of Respondent to appeal my ruling during a hiatus in the case. To my knowledge, Respondent never took advantage of this opportunity.

ation subsequent changes in the constituency of the unit or other factors.³⁸

If we are, for purposes of *Gissel*, to freeze the playing field and the players as of the time of commission of the unfair labor practices, then it should follow that the size of the field should be untouched. Even counsel for Respondent stated in the Rosedale proceeding, as earlier quoted, a willingness to continue processing the already-commenced cases, including Havre, “in compliance with normal Board processes.” He further agreed that there had been “no significant change” in the operation as of April 1988. An unfair labor practice case arising after a representation case in the same unit is, as the Ninth Circuit stated in *Sahara Datsun, Inc. v. NLRB*, 811 F.2d 1317, 1321 (1987), a “continuation of the representation case heard by the regional director.”

Accordingly, I reaffirm my ruling made at the hearing that the Board precedent restricting the evaluation of the entry of a bargaining order to the facts as they existed at the time of the commission of the unfair practices operates so as to preclude relitigation of the scope of the bargaining unit which, at the time, was recognized by Respondent as an appropriate one and so as to prevent enlargement of that unit (in the ordinary case) by a voluntary modification of the structure of the company.³⁹ I see no conflict here with the Board rule that stipulations which contravene Board policy or statutory requirements will not be honored, as Respondent argues. That rule obviously applies only to stipulations which *on their face* have such an effect; otherwise, a party to a stipulation could always force a hearing simply by alleging that its stipulation was, because of the actual facts, inconsistent with law. See *C.K.E. Enterprises*, 285 NLRB 975 fn. 1 (1987) (stipulation excluded “leadpersons”; employer argues that now that administrative law judge has found them to be not supervisors, but rank-and-file, the appropriateness of bargaining unit should be redetermined; Board finds no evidence that demonstrates that exclusion of leadpersons “even if . . . statutory employees,” is “inconsistent with Act or Board policy”).

2. The card majority

In order to qualify for a bargaining order under *Gissel*, the General Counsel must establish that “at one point” (395

³⁸The Board’s refusal to examine employee turnover long after the events seems a sound method of guarding against the diehard wrongdoing employer. It is arguable that the literal language of the Supreme Court in *Gissel* implies that the Board should base its judgment on the situation as it stands at some later time (“In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer’s unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (*or a fair rerun*) . . . is slight . . . then such an order should issue.” (Emphasis supplied.) It would appear that the court did not fully train its sights on the Pandora’s box which would be opened by a “second look” doctrine, but several (although not all) courts of appeals, in addition to the Board, have recognized the consequences. E.g., *NLRB v. L. B. Foster Co.*, 418 F.2d 1, 5 (9th Cir. 1969); *G.P.D., Inc. v. NLRB*, 430 F.2d 963, 964 (6th Cir. 1970).

³⁹This conclusion also seems consistent with the Board’s recent holding in *Butera Finer Foods*, 296 NLRB 950 (1989), where a successor employer at one store attempted to show that two other stores opened by him within 2 months of opening the first should all be considered a single employerwide unit. The Board stated, at fn. 1, that since, “when the Union demanded recognition, only the Ogden store was in existence, . . . evidence of multistore bargaining units is not relevant.”

U.S. at 614) the Union had acquired a majority of valid signed authorization cards in the unit found appropriate.

The cards used in this campaign were themselves invulnerable to direct attack. They were headed, in capitalized letters, “AUTHORIZATION FOR REPRESENTATION.” The printed portion that followed was worded, “I hereby authorize the United Food and Commercial Workers Local 27, AFL–CIO–CLC, to represent me for the purpose of collective bargaining.” In *Gissel*, the Court discussed the weight which should be given to such unambiguous language when card solicitors make statements about the purpose of the cards which may arguably tend to dilute the plain wording; the Court came down on the side of the printed word (id. at 606–607):

[W]e think it sufficient to point out that employees should be bound by the clear language of what they sign unless that language is deliberately and clearly canceled by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. There is nothing inconsistent in handing an employee a card that says the signer authorizes the union to represent him and then telling him that the card will probably be used first to get an election.

In so holding, the Court approved the rulings of the trial examiner in *General Steel Products*, one of the three cases consolidated for consideration in the case known familiarly as *Gissel*. Those rulings are quoted in *Gissel* at 584 fn. 5:

Accordingly, I reject Respondent’s contention “that if a man is told that his card will be secret, or will be shown only to the Labor Board for the purpose of obtaining election, that this is the absolute equivalent of telling him that it will be used ‘only’ for purposes of obtaining an election.”

With respect to the 97 employees named in the attached Appendix B Respondent in its brief contends, in substance, that their cards should be rejected because each of these employees was told *one or more* of the following: (1) that the card would be used to get an election (2) that he had the right to vote either way, even though he signed the card (3) that the card would be kept secret and not shown to anybody except to the Board in order to get an election. For reasons heretofore explicated, I conclude that these statements, singly or jointly, do not foreclose use of the cards for the purpose designated on their face. [Emphasis in original.]

The Court later noted its belief that “the Trial Examiner’s findings in *General Steel* (see fn. 5, supra) represent the limits” of the rule tolerating some potentially misleading statements, and also cautioned against “a too easy mechanical application” of the principle enunciated in *Cumberland Shoe Corp.*, 144 NLRB 1268 (1963), that an unambiguous card will be counted unless it is proved that the employee was told that the card was to be used “solely” to obtain an election. 395 U.S. at 608.

As the law of *Gissel* stands, however, and as it has been construed by the Board over the years, the fact that an employee is told that a card “would” be used to get an election

or even that the employee retains the “right to vote either way,” despite having signed the card, or both, does not have the effect of vitiating the card as a valid authorization for representation. *Ona Corp.*, 261 NLRB 1378, 1410 (1982) (telling an employee that signing a card puts him under “no obligation” does not invalidate the card). Accord: *De Queen General Hospital*, 264 NLRB 480, 495 (1982).

Through employee-signers, employee solicitors, and professional union solicitors, General Counsel introduced signed cards collected during the payroll periods ending December 5, 1987, through February 20, 1988.⁴⁰ According to an appendix attached to General Counsel’s opening brief, throughout the designated periods the Union had collected a continually increasing majority of cards from the employee complement, ranging from 29 cards/52 employees in the first pay period shown to 43/53 in the final period.⁴¹ I have not personally attempted to validate the accuracy of General Counsel’s appendix, principally because Respondent’s reply brief has not questioned it. While I do not regard them as holy writ, Respondent’s two briefs are quite well organized and encompassing, and I have no doubt that if the figures in the appendix were inaccurate, Respondent would have made me aware of any such deficiencies.

I conclude, therefore, that the Union had collected cards from an increasing majority of the unit employees during the period shown in the appendix. By cross-examination, and by calling a number of employee-signers, Respondent has sought to establish, and now argues, that many of the cards were “cancelled” by representations made to signing employees, within the meaning of *Gissel*.

I see no need, however, to prolong this already prolix analysis by considering, card by card, all the conflicting evidence pertaining to what employees were told and by whom. For, applying the *Gissel*-approved standards formulated by the trial examiner in *General Steel*, it does not seem to matter whether General Counsel’s factual arguments are accepted; in my view, even assuming arguendo the evidentiary claims made on behalf of Respondent, they would be insufficient to nullify the cards. Some specific comments, however, are in order.

1. There was, unquestionably, considerable comment by the Union organizers about the holding of an election, given the unlikelihood that Respondent would respond affirmatively to a demand for an election. It is regrettable that such references are made, because they may not be clear to some employees when uttered, and, with the passage of time, an election may become the only avenue of recognition recalled. However, under the case law, references to elections—even, startlingly, if employees are told that they can vote *against* the union in an election—are simply insufficient to nullify a card.

2. Frieda Scott (G.C. Exh. 15) testified at one point that organizer Gary Gatewood told her that the card was for “just” a meeting at which employees “could listen to the Union and what they were going to do for us.” While Scott

seemed an honest witness, I think that she was confused. Bonnie Arnold testified that *she* solicited the card, which is dated November 24, 1987, from Scott, and Gatewood credibly testified that he did not become involved in the campaign until he joined the staff on January 11, 1988. He recalled paying a “support” house call on Scott shortly before the election, but I do not believe that he would have made at that time any of the remarks attributed by her to him.

3. Sheryl Mitchell (G.C. Exh. 18) testified for Respondent that although she could not recall when or from whom she received her card, she remembers being told at a meeting that its “only” purpose was to get a union vote, that signing did not mean that “there would be a union coming into our store, it was just for a vote.”⁴² It seemed clear that Mitchell was uncertain about what she had been told; asked on cross if the word “only” was used, Mitchell replied, “No, I don’t think so.” Mitchell checked “Yes” to a question on the card which asked “Would you participate in an organizing committee?” Considering her uncertainty about what was told her and the likelihood that she did want representation, I would find that Bonnie Arnold gave Mitchell the card, as Arnold testified, probably prior to any meeting attended by Mitchell, and I would qualify Mitchell’s card.

4. Dianne St. Laurent (G.C. Exh. 24) was married to a serviceman who was about to be shipped out, and when she signed a card for Arnold, St. Laurent said that she “didn’t care one way or the other.” It has often been held immaterial that an employee is contemplating severance of employment. *Stride Rite Corp.*, 228 NLRB 224, 236 (1977). St. Laurent was still employed at the time of the election, and she was authorized to vote. Her card should count.

5. There is some complicated testimony about employees John Schatz (G.C. Exh. 25) and Keith Jennings (G.C. Exh. 36). Both testified that Gatewood said at a meeting at a diner that there was “no obligation” to vote for the Union if they signed a card. As we have seen, this statement does not invalidate a card.⁴³ Moreover, I do not believe that Gatewood made any such remark, and I further believe that Schatz signed his card 3 days before the meeting at which the statement was allegedly made. In addition, Schatz was the person whose enthusiasm led him to organize the breakfast meeting for the night crew, and both Schatz and Keating marked on their cards that they would participate in an organizing committee. I would count their cards as valid.

6. Howard Oals (G.C. Exh. 24) testified that whomever he received his card from said it was “just” to show interest, but he was not sure of the exact words, not “even vaguely.” I find that Respondent has failed to carry its burden necessary to cancel this card.

7. Carolyn Shaffer (G.C. Exh. 54) “thinks” she got her card from organizer Michael Tumolo in the parking lot of a motel at which a meeting was being held on November 23. At first, Shaffer testified that she asked Tumolo “what it meant” and “if we were voting in for a union,” and his

⁴⁰General Counsel also entered in evidence copies of the employees’ W-4 tax forms so that I might compare the employees’ authentic signatures with those shown on the cards. This procedure has been approved by the Board and the courts of appeals, e.g., *NLRB v. Philamon Laboratories*, 298 F.2d 176, 179–180 (2d Cir. 1962), and, as well, by the Fed.R.Evid. 901(b)(3).

⁴¹Although General Counsel introduced a total of 44 cards, he concedes on brief that the card of Gene West, who was not an employee at any material time, should not be counted.

⁴²I disagree with Respondent’s argument on brief that Kimberly Eldreth’s testimony “supported” Mitchell’s. Eldreth’s version had no negatives; she said the avowed purpose of the card was “to give them the opportunity to give us an election.”

⁴³Schatz also testified that Gatewood said “This is just so they can get a vote in the store, if they had a majority of people to sign.” Since the petition was filed on November 25, I cannot imagine that Gatewood would have made such a statement on January 27.

reply was “No, it was like a registration for signing up for a meeting.” Shaffer’s testimony was suspect. In the next two attempts to have her reconstruct the conversation with Tumolo, she neglected to include any question to Tumolo as to whether “we were voting in for the union,” and finally testified that “that didn’t happen.” Because of her daughter’s pregnancy, she was so distracted that she could not recall anything being said at the meeting about the cards. She did remember that, at the meeting, a paper was passed around for people to sign, and the people and the cards were counted “to make sure that everybody had signed their card”—the suggestion here is that she must have understood the cards to represent something more than a second kind of attendance list. Jacqueline Yrizzary accompanied Shaffer to the meeting, and she testified that she and Shaffer “did ask a question” when they signed their cards, but the response that she recalled had nothing to do with a registration list: “[I]t was told to us that it would give the Union a chance to have meetings and whatnot to get, you know, people together that might be interested.”

Shaffer went to the first meeting on a “very cold and raining” evening, even though she was concerned by her daughter’s imminent delivery. She read the card “vaguely.” She seemed to be saying that she was told that the card constituted only a registration list, even though another such list was signed at the meeting and was compared with the cards.⁴⁴ She checked the “would participate” box on the authorization card. It is my conclusion that she was not misled into believing that the card meant something other than it stated and I conclude that the card should be counted as valid.

8. Some employees, such as Rhonda Ray (G.C. Exh. 62) and Linda Schatz (G.C. Exh. 66), gave testimony to the effect that that were told that the purpose of signing the card was to see if there was enough interest to have an election. Generally speaking, such testimony does not necessarily seem to detract from the authorization of representation printed on the card, as the Supreme Court held in *Gissel*. In most such cases, in any event, the testimony was quite uncertain. Ray was an honest witness, no longer employed by Respondent, but her faulty recollection was apparent. Schatz thought that she received the card from Gatewood, who did not join the staff until 7 weeks after she signed her card.

9. Only one card would I reject on this record. G.C. Exh. 63 purports to be a card signed by “Kelley A. Smith” on November 24, 1987. No issue was made at the hearing or on brief about the following point: the name as printed and signed on the Form W-4 marked G.C. Exh. 100 is “Kelly” Ann Smith, with no “e.” Since I am to assume that the W-4 is authentic, I have to think that Kelly Smith would not have misspelled her own first name on the authorization card. Smith testified, but was not asked to authenticate her card or about this discrepancy. I would therefore not count the card, but the fact of a continuing majority remains the same.

⁴⁴ Organizer Tumolo denied that he attended the meeting described by Shaffer, and stated that he “said nothing about the reason for signing cards in the parking lot to any employee.” Tumolo seemed believable.

3. The appropriateness of a bargaining order

Under *Gissel*, the Board may conclude that a bargaining order based on authorization cards is an appropriate remedy when it seems likely that the employer’s unfair labor practices would impede the election process, an impediment that probably cannot be removed by imposition of the Board’s traditional sanctions as a prelude to an election. 395 U.S. at 610–614.

The appendix to General Counsel’s brief shows that for the payroll period ending January 30, the Union had obtained 41 signed authorization cards from 51 unit employees. On February 1, Respondent mailed to its employees the letter pertaining to store closures and enclosed copies of newspaper articles regarding such closures (some of which, as discussed, were not even identified as unionized stores). Thereafter, in the individual interviews with employees in the Havre breakroom, Denrich repeatedly alluded to these articles. On February 18, when the election was held, the Union’s overwhelming card majority was stunningly whittled into a 28–21 loss.

I have concluded above that the promulgation of and intensive emphasis on the subject of store closings were intended to convey to employees the possibility that their store might be closed if they selected the Union to represent them. To many of the employees, this possibility might not seem at all remote, considering that Respondent operated 14 stores; the chilling effect of one closure could be seen by them to promise handsome dividends at the other locations.⁴⁵

Threats to close the facility are considered by the Board to be “hallmark violations,” e.g., *Long-Airdox Co.*, 277 NLRB 1157, 1160 (1985). Such a threat is “one of the most coercive actions which a company can take in seeking to influence an election.” *Donn Products v. NLRB*, 613 F.2d 162, 166 (6th Cir. 1980). I have found other violations here which may be said to vary in their placement on the spectrum of seriousness, ranging from impliedly threatening to fire the union leader’s husband to unlawful economic pressure to coercive interrogations.

But, in my view, pounding home the message of potential plant closure by the top management official via a mass mailing and individual follow-ups to employees warrants, without more, a conclusion that a bargaining order is remedially appropriate. As the Third Circuit held in *Midland-Ross Corp. v. NLRB*, 617 F.2d 977, 987 (1980), “[A] closing is the penultimate threat for an employee, and its psychological effect is at least as likely not to dissipate as other unfair labor practices we have held to justify a *Gissel II* order. [Case citations omitted].” Employees who received a not-so-veiled threat that Denrich considered closing the store as a viable option would not, I think, derive much comfort from a posted notice that Respondent would not in the future threaten to close their store.⁴⁶

⁴⁵ I find immaterial the fact that Denrich was overheard by Kelly Smith giving a negative answer to Michael Jeppi’s question to him as to whether the store would be closed in the event of an election loss to the Union. Whether the two employees found this answer convincing is unknown. Perhaps of more significance is the fact that Jeppi asked the question in the first place, having heard it, according to Denrich, by rumor.

⁴⁶ I therefore reject Respondent’s claim on brief that the mailing, “standing alone, or in conjunction with the entire campaign, is protected opinion under Section 8(c) of the Act.”

Accordingly, I conclude that this case falls within the so-called "*Gissel II*" category of unfair labor practices which tend to undermine a union's majority status and make a fair election unlikely. A bargaining order is called for, in normal circumstances.

4. The affirmative defenses

Respondent contends, however, that these circumstances are not normal ones. Two central themes highlight this claim.

a. *The leafletting*

Almost 7 months after the Havre election, in September 1988, the Union began picketing and leafletting, at various times, at five of Respondent's store (none of which was Havre). For the first 100 days, as Respondent states on brief, "the message conveyed by the picketers was exclusively related to the labor dispute between the Union and Respondent." The leaflets then distributed accused Respondent of breaking the labor laws, and they urged shoppers to refrain from making purchases at the Valu Food stores.

In the latter part of January 1989, the Union adopted a new tactic by mailing out to all residences in 12 zip codes near Respondent's stores (including Havre) a document bearing the return address of "Concerned Consumers of Maryland" (but also noting in small print that the message was "brought to you by . . . The United Food and Commercial workers Union, Local 27") which carried a reprint of a December 15, 1988 newspaper article describing a fine and probation imposed on Respondent by a county judge for offering for sale 44 underweight packages of meat and fish at one of Respondent's stores. The article contained Respondent's explanation of the shorting. The leaflet tied in these violations with alleged unfair labor practices and urged a consumer boycott. Subsequently, at the picketed locations, the Union distributed for about a month another leaflet referring to the newspaper story and warning customers to "PROTECT YOUR FAMILY" by checking the date of perishable goods and by checking receipts furnished by cashiers who are forced to work under conditions in which "mistakes can happen."

Thereafter, in mid-March 1989, the Union handed out and mailed a leaflet reporting that, since 1983, state inspectors had cited Respondent for more than 1000 health violations, including rodent droppings, spoiled foods, etc., and again entreating shoppers to stay away. No reference was made to a labor dispute other than the appearance of the Union's name on the leaflet. Later leaflets combined warnings about health violations, overcharging, and violation of employee rights, and continued to argue against buying at Valu Food. At the same time, since April 1, 1989, the Union also handed out leaflets which adverted solely to the labor dispute in asking consumers "to boycott Valu Food."

The Respondent did not remain somnolent through this period. In flier after flier, Respondent replied, attacked the picketing and, while not denying the reported 1000 violations, insisted that it had always corrected these relatively minor violations, hired experienced "sanitarians" to oversee any problems, etc. The fliers also assaulted the Union on other fronts, including its refusal to participate in an all-stores election, and even attempted to turn the Union action to its benefit by conducting "picket sales."

b. *The threats to destroy*

Respondent also introduced the testimony of two witnesses to establish that by February 1989, the Union was no longer interested in organizing its stores, but only in eliminating it as a competitor of other chains whose employees were represented by Local 27.

Cynthia Colburn, a front end manager for 5 or 6 years, now at the Odenton store, testified that chief organizer Donnelly called her a number of times for a date, but Colburn turned him down, citing a "conflict of interest."

In February 1989, shortly after a judicial decision barring picketing at the store, Donnelly called and, in the course of conversation, said that the next campaign would be "a thousand health violations." When Colburn asked how that would result in organizing the store, Donnelly said that "they had no longer any interest in organizing Valu Food, that they just wanted to put Louis out of business." She called Denrich and reported the conversation.

Colburn also testified on cross that perhaps in March 1989, Donnelly was in attendance at a picket line in front of the Odenton store as she and two other employees drove up. One of the other employees had a conversation with Donnelly in which he "told us that if Louis would agree to organize the Havre de Grace store, that he would remove the pickets from all the other stores."

Donnelly testified that he struck up an acquaintanceship with Colburn at a representation hearing and saw or spoke to her intermittently thereafter. At the instant hearing, he stated that he did not "recall" speaking to her about the projected "1000 health violations" leaflet, or about "any aspect" of the "organizing campaign." He was not specifically called on to deny that he had said that the Union had lost interest in organizing Valu Food, "that they just wanted to put Louis out of business." Presumably, I am to infer that no such conversation would have occurred because, according to Donnelly, he and Colburn had early on recognized that they were on opposite sides of the fence (she was an ardent antiunionist), and they had agreed not to discuss the Union. Such a desired inference is no substitute for an explicit question and answer, and I am persuaded that the failure at hearing to confront Donnelly directly with Colburn's assertion, plus his half-hearted (and logically inconsistent) inability to "recall" referring to the "1000 health violations" campaign, plus the solid impression Colburn made in giving testimony, should lead me to accept Colburn's testimony.

Jenelee Rolfe testified that on February 15, 1989, as she was making her rounds of the stores, she found organizer Tumolo at the Beltway Plaza store handing out one of the pamphlets which accused Respondent of cheating customers. After some chitchat, Rolfe asked why he did not "give up the bull crap" because the employees thought too highly of Denrich to organize. Tumolo assertedly replied that Local 27 president Russow "was not interested in organizing Valu Food any more. That he had a hard-on against Louis, that he wanted blood, and he was going to put Valu Food out of business." As she walked away "upset," Tumolo called, "wait until you see what we have coming out next. It's a real biggie. You're going to be shocked." She later reported the diatribe to Denrich. Rolfe testified that Tumolo was not speaking in an angry tone.

Tumolo described a heated argument in which he lashed out at Rolfe's claim that Respondent ran a "nice" operation.

He mentioned some facts he had uncovered in research at the health department and also said, in anger, “[Local 27 president] Tom Russow’s really pissed about what happened over at Havre de Grace. He was there. He’s really pissed about it and that’s why these picket lines are up. We’re going to close your stores.” He explained at the hearing that he was “cold” and “tired” and “mad” and “just wanted to hurt her.”

C. The Defenses

From the foregoing, Respondent advances two basic contentions.

First, Respondent argues that an employer is justified in refusing to meet with a union representative “who had expressed both bitter hostility to the employer and a desire to destroy the employer financially,” an attitude which would make “any attempt at good-faith bargaining a futility,” see *Deeco, Inc.*, 127 NLRB 666, 667 (1960). This line of cases, however, has to do only with an employer’s right to refuse to bargain with a personally hostile union representative. *NLRB v. Kentucky Utilities Co.*, 182 F.2d 810, 813 (6th Cir. 1950).

In *Holmes Detective Bureau*, 256 NLRB 824 (1981), the Board appears to have taken a different tack with regard to the right of an employer to refuse altogether to bargain with a union whose president had stated several times that he would put the employer “out of business.” The statements themselves were, while “intemperate,” provoked by Respondent’s “misconduct” (which consisted of failure to comply with various contract requirements) and therefore no justification for a refusal to bargain.

The Board also examined into whether the record supported a conclusion that the union “had any motive to destroy Respondent or . . . [was] engaged in any such effort,” *id.* at 825, and found no support. There is evidence here which is probative of such a motive. Both Donnelly and Tumolo, in the same month, made statements attributing to Local 27 a motive to destroy Respondent. Russow, president of the Local, was not called to testify to the contrary. It is not irrational to infer that if a union is unable to organize a competitor of bargaining units which it represents, it might well wish to put that competitor out of business.

That objective, however, is not an uncommon one. Picketing for recognition may have the same effect. The problem here is that the two union representatives spoke of ruining Respondent’s business in preference to organizing it.

Whatever provoked Donnelly and Tumolo to make such statements in February, it does not appear that the Union felt the same in March and thereafter. As noted, Donnelly was quoted as having said in March that if Respondent would recognize the Union at Havre, there would be no picketing at the other stores—this clearly indicates a representational intent. The Union invested heavily in both time and resources in the litigation of this proceeding, similarly suggesting a desire to represent the Havre employees. Once having achieved that goal, as the Sixth Circuit recently stated in *Roadway Package System, v. NLRB* (unpublished; Apr. 24, 1990; *sl. op.* 10), “it is improbable that a union would organize a company and then force its demise, putting its members out of work” Not only is this “improbable” and apt to implicate breach-of fair-representation problems, but it would probably require the substantial participation of the

employee complement to “force the demise” of the employer in such a situation; the Union could not do it alone.

I am not convinced, in the end, that the passing indications given by Union agents of a desire to destroy or harm the employer are sufficient here for the Board to deprive employees of their undoubted right to select, for better or worse, representatives of their own choosing. E.g., *NLRB v. Sunbeam Electric Mfg. Co.*, 133 F.2d 856, 860 (7th Cir. 1943). For the Board to cabin that right of choice—which can be almost as easily withdrawn from the Union by the employees as bestowed on it—would take more unqualified proof than has been presented.⁴⁷

Respondent’s second contention is constructed on an amalgam of *Laura Modes Co.*, 144 NLRB 1592 (1963), and *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953). *Laura Modes* is not a clearly defined concept, and it is only rarely applied to deprive a union of representative rights. The case involved attempted “union enforcement of an employer’s mandatory bargaining duty by unprovoked and irresponsible physical assaults” by virtue of an attack on managers by union officials. Since the notion was introduced, it has been discussed in broader terms (although seldom invoked, not even in response to seemingly widespread strike misconduct in a *Gissel*-type case, *Fairview Hall Convalescent Home*, 206 NLRB 688 (1973)). It is clear in *Laura Modes* that the Board found repugnant and barbaric the attack mounted by union agents on managerial officials, and, as well, the evidence of the union’s “total disinterest in enforcing its representation rights through the peaceful legal process promised by the Act . . .” 144 NLRB at 1596. To discourage future departures from reasonably civilized legal and behavioral norms, the Board chose to deny the offending union its representative status, but only until the union “demonstrates a majority among [the] employees through the Board’s election procedures.” 144 NLRB at 1596. Thus, the behavior was not considered so repulsive that the union would be forever barred from representing the employees—the question was whether the employees still wanted the union, warts and all. But in this case we deal with behavior not remotely approaching that condemned by the Board in *Laura Modes*.

The other strand of precedent with which Respondent would braid *Laura Modes* is *Jefferson Standard*, a holding that a handbill issued in the midst of a strike which made no references to the labor dispute and confined itself to a disparagement of the employer’s product constituted “disloyalty” and a lawful “cause” for the discharge of the employee-distributors. There was similar conduct by the Union here, is publicizing the short-weighting and health violations. Although also apparently true in *Jefferson Standard*, it seems difficult, given the entire scenario and the generally static audience before whom it was played out, that anyone could view these specific attacks as separable from the ongoing labor dispute rather than as an overall part of the dispute (which, if not apparent to the more interested observers, was

⁴⁷ I am assuming, for purposes of these affirmative defenses, that the Board’s rule in *Gissel* cases limiting consideration to the circumstances which existed at the time of the employer’s unfair practices does not apply here. The argument to the contrary, which I find persuasive, is based on the good chance that if Respondent had not handled the Havre election as it did, a union victory there might have entirely changed the course of events and the Union’s subsequent approach to campaigning.

surely put into context by the publications issued by Respondent in replying to the Union thrusts).

Jefferson Standard is a narrow holding as to certain circumstances in which an employee may go too far in prosecution of a labor dispute, and it relies in large measure on the "underlying contractual bonds and loyalties of employer and employees" (id. at 473), a relationship found by the dissenters to be ill-fitting in the labor-management arena ("Many of the legally recognized tactics and weapons of labor would readily be condemned for 'disloyalty' were they employed between man and man in friendly personal relations," id. at 479-480). As the Charging Party has pointed out, however, conduct which is not protected by the Act for individuals has been held to be consistent with good-faith bargaining ("But surely that a union activity is not protected against disciplinary action does not mean that it constitutes a refusal to bargain in good faith," *NLRB v. Insurance Agents*, 361 U.S. 477, 494 (1960)). The equation which Respondent seeks to draw between the consequences of unprotected individual activity and the tolerable outer limits of pressure applied by a union qua union is, in other words, an unacceptable one. Again, I believe that the balance must be struck in favor of what appears to be the best evidence of employee sentiment before Respondent's unfair labor practices took hold. As the Supreme Court noted in *Gissel*, 395 U.S. at 613, putting into perspective this entire exercise in what must candidly be regarded as speculation, "There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition."

I conclude, accordingly, that, as far as one can tell, the ends of the law will be served by entering the remedial bargaining order at the Havre facility requested by the General Counsel and the Charging Party.

E. *The Objections to the Election in Case 5-RC-13005*

Having found support in the record for certain Objections to Election filed by the Petitioner in Case 5-RC-13005, namely Objections 1(a), 1(c), 4, 5, and 8, and having also concluded that such conduct is violative of Section 8(a)(1), I must hold that Respondent has interfered with the exercise of employee free choice in the election conducted on February 18, 1988. *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786-1787 (1962). I recommend, accordingly, that the election be set aside.

III. THE STEMMERS RUN ROAD CASE

We now turn to the remaining allegations involving two other stores in Respondent's chain. The first complaint involves the Stemmers Run Road store ("Stemmers").

The union campaign at Stemmers began in early January 1988, when nonsupervisory Seafood Manager Richard Heinly (who later quit Respondent's employment after being demoted) met with a union organizer, signed a card, and was given 25 cards to distribute. The Union filed a petition for election on February 4, 1988. General Counsel's brief skeletonally outlines the violations that the Government believes it has proved at Stemmers, and they are based on the testimony of Heinly and two other Stemmers employees.

A. *Events Relating to Hayes*

One of these employees is Debra Hayes, who worked as a cashier at Stemmers at times material. Hayes was active on behalf of the Union, passing out cards during her time off, and she thought that this activity was known to management.

Hayes testified that sometime around January 10, Denrich came into the store and Hayes was told by the manager, as she waited on a customer, that she should close her register because Denrich wanted to talk to her. She did so, and Denrich then asked her "[H]ow things were going. You know, if I had any problems." With Store Manager Kenneth Knight in attendance, Hayes listed a catalogue of problems, including one about being sent home 1 day when there was no need for the number of cashiers on hand. Thereafter, Hayes saw Denrich call four or five other cashiers into the office to speak to them.

When Hayes complained, in answer to his inquiry about "problems," about being sent home, Denrich reprimanded Knight for doing so and told Hayes to get her timecard so that he could take care of it. He told Knight that they were "having too much of a problem with this. You're sending these girls home and you're not asking them, you're just sending them. I've had too many complaints." Hayes gave Denrich her card and he saw to it that some 2-1/2 hours of wages were added.

Denrich testified that prior to this complaint, he had received "some complaints from the Stemmers cashiers over a period of time" about, inter alia, their being sent home without pay, and he says that he told Manager Knight in October that "they shouldn't be sending people home forcibly" even though the workload did not require their presence. Although he had received this complaint "from the cashiers over a period of time . . . even in the summer of that year," it was not until Hayes had become an activist for the Union that Denrich made this gesture of recompense.⁴⁸

I find that by paying Hayes for being sent home "forcibly," Denrich was motivated by the union campaign. When, as Denrich testified, cashiers had made previous complaints about this practice, it is clear that no reparations were made. On this occasion, only days after the Union's campaign for cards at Stemmers was begun, Denrich made a display of criticizing Knight (Knight testified, but was not asked about this matter) and also compensated Hayes for the loss recently suffered by her, a major union partisan. I cannot help but believe that the relief given was an unlawful grant of benefit. I recognize that, as Hayes testified, changes had resulted from an October grievance meeting between the cashiers and Denrich (e.g., the cashiers no longer were required to clean the bathroom), but he had made no previous effort to financially compensate cashiers for a complaint which he admittedly had received from a number of them in the past. Giving money to Hayes was no way, as Denrich put it, to "reprimand" Knight.

⁴⁸ The fact that Denrich came to the store and met individually in the office with several cashiers, beginning with Hayes, leaves little doubt in my mind that he had become aware of and was responding to the new union effort at Stemmers. His normal practice when entering a store, he said, was simply to greet employees with a "Hi, how you doing?" I also note that Stemmers management trainee John Cuddy conceded at the hearing that prior to the receipt of the February 4 petition, he "knew that some of the employees were for the union," which included Hayes, although he denied knowing that "there was a union organizing campaign" going on.

I conclude, therefore, that the payment made to Hayes was a grant of benefit inspired by the emergent union effort at Stemmers, and violative of the Act under the principle in *NLRB v. Exchange Parts Co.*, 375 U.S. 405, *supra*.

On February 10, management trainee John Cuddy, who was believed by Hayes to be the assistant manager and who is conceded by Respondent to have held supervisory status, asked to speak to Hayes for a few minutes. After asking about “problems” she might be having, and getting a response from Hayes, Cuddy said that Denrich had “sent me in here to make sure all the problems were corrected,” and that if she had any problems, to see him rather than Manager Kenneth Knight because Cuddy “[d]eal[s] directly with Louis.” After Cuddy brought up the case of a cashier who had filed charges with the Board over a dispute, he asked if Hayes knew that the Union was responsible for closing several named supermarkets. When she defended the Union, Cuddy said “[T]his union’s bad It closes everything it gets its hands on.” Cuddy went on to say that “you were going to get a wage of a dollar more an hour. But since the Union came in everything’s frozen because it’s against the law to do that.”

Cuddy testified that Yingling transferred him from another store to Stemmers to replace the Stemmers assistant manager. Yingling (or some manager) told him that morale was “a little off” among the cashiers, and by the second week of his arrival, several cashiers had complained about scheduling, menial duties, and assignment to the express lane.

Cuddy testified that Hayes complained to him 5 or 6 times and had also made it quite clear that she was in favor of the Union in the first few weeks he was there. He would respond by saying that Respondent had always been fair to him, and “if you have . . . any complaints . . . we’ll try to take care of them for you” He did not “recall” telling Hayes that this union “closed Acme and Pantry Pride,” although he remembered “talking to a different employee about something of that nature” Subsequently, however, Cuddy testified that he “may have said something to that effect to Debbie Hayes in one of our conversations.” He denied saying to Hayes that the Union “closes everything it gets its hands on,” or mentioning a raise, or making any reference to Denrich sending him in to handle problems directly.

The “different” situation to which Cuddy referred, relating to the closing of Acme and Pantry Pride, occurred as he passed the bakery and heard the bakery manager and two other employees, Pauline Morris and Dorothy Machin, conversing about the Union. Morris had worked for Pantry Pride and expressed the belief that the Union had been useful there. What follows is Cuddy’s recollection of how he “buted in”: “Acme and Pantry Pride, you know, what’d they—you know—what’d they do for you at the time? What have they done for you now, you know, at this time?” Why he would have mentioned Acme was not discussed at the hearing.⁴⁹ Morris reacted sharply, and Cuddy withdrew. Pantry Pride and Acme have closed nearly all of their stores.

Denrich denied having had anything to do with Cuddy’s presence at Stemmers, much less having instructed him to solicit grievances or resolve problems. Cuddy made a good impression as a witness, but Hayes struck me as outstanding.

⁴⁹ In subsequent versions, Cuddy omitted the reference to Acme (Tr. 1716), and then put it back (Tr. 1717).

I credit her testimony in its essentials, and I conclude that Respondent violated the Act in the following ways: by Cuddy asking Hayes about her problems and at the same time telling her that Denrich had “sent me in here to make sure all the problems were corrected” (this would not normally be the function of a manager trainee, and the conversation as a whole indicates that it dealt with the union effort);⁵⁰ and by impliedly threatening closure if the Union should win recognition (“It closes everything it gets its hands on.”). I would agree with the complaint allegation that Cuddy unlawfully stated that the employees’ wage increase “was frozen because of the Union”; even though Hayes’s testimony was that Cuddy said “everything’s frozen because it’s against the law to do that,” what Cuddy was in fact doing was promising a benefit to Hayes once the Union had gotten out of the way.

General Counsel’s brief succinctly touches on an encounter by Hayes with admitted statutory supervisor Mary Debbie Neis, who held the position of assistant front end supervisor for all the stores. Weis testified that she had been sent to Stemmers by her superior to look over the cashier’s schedule made up by a newly appointed Stemmers head cashier “to make sure that the hours were distributed fairly.” While in the breakroom, Weis was joined by Hayes and two other cashiers. The cashiers made some complaints about the scheduling in the past, and Weis said that she was there to make sure that assignments were made fairly. Hayes recalled no mention of the Union, nor did Weis. Weis told the new head cashier to be sure that seniority should govern assignment—a request made by Hayes—and that the express register assignment should be distributed equitably, a matter about which all the cashiers had complained. Hayes testified that a practice of trying to keep employees on the express register no more than 3 times a week was begun. I have no reason to believe, however, that if a complaint had been made previously to Weis, it would not have been acted on. I recommend dismissal of this allegation.

The complaint alleges that Denrich and four Stemmers individuals are statutory supervisors and agents of Respondent and that two are only “agents.” One of the latter is Personnel Assistant Bonnie Birtcher, an hourly paid former cashier whose primary function is to train new cashiers, which she does at different stores nearly every week for 3 days. In the course of training, she tells the trainees of “all company policies” so that they are “aware of what the company expects . . . of the employees,” such as company policy regarding breaks and lunches when working the cash register. When she returns on Thursdays and Fridays to the office which she shares with Personnel Director Pat Miller, to whom Birtcher began reporting in October 1987, she performs various ministerial duties, such as verification of previous employment of applicants. She also occasionally assists at a “very few” stores, one of which was Stemmers, in asking applicants to respond to a standard questionnaire, and when she submits the applications to Miller (who also interviews applicants), she is asked by Miller her opinion of those she had interviewed. Her “guess” is that, of the perhaps 50 people she interviewed in a 2-year period, she may have recommended 25 of them for hire, and possibly half of those

⁵⁰ As indicated, at the hearing Cuddy virtually confirmed this testimony by saying that he told Hayes, while discussing the Union, “if you have . . . any complaints . . . we’ll try to take care of them for you.”

were hired. Employee Hayes testified that she did not regard Birtcher as a “manager or a supervisor,”⁵¹ and it is difficult to conclude that she would have reasonably been regarded by other employees as an agent of Respondent for purposes of communicating labor policy.⁵² While I therefore recommend dismissal of this allegation attributed to Birtcher, I would otherwise credit Hayes’ testimony that, around the end of January 1988, while Birtcher was shopping in the store, the two began to discuss the Union; Birtcher said that it was “bad” and she could not see why the employees would want it; Hayes mentioned something about attempting to have an election at Stemmers; Birtcher said that her “understanding is that Louis would close the store before he would allow this union in because, you know, its no good”; and when Hayes asked how she knew that, Birtcher replied, “Well, I don’t—I can’t say that.”⁵³ Not only was I much impressed with Hayes, but I was less than overwhelmed by the form of Birtcher’s denial: “No, sir . . . Not that I can recall.”

B. Events Relating to Heinly

Seafood Manager Heinly, a nonsupervisor, testified that around February 4, 1988, Store Manager Knight came to Heinly’s department and asked him “if union representatives had been to his house or [sic] to call me.” Heinly replied that they had done so on several occasions. Knight went on to say that Heinly and the seven other seafood managers would be receiving a pay raise of \$1 an hour and then talked about how, when he had worked at Acme, “things didn’t work out with disciplining the employees as well as they could working with a nonunion company.” Ninety minutes later, Knight returned to say that “the raise was retroactive the next day” and that there would be an additional increase in the future. Heinly received the \$1 raise in his next check, and, sometime later, a 50-cent raise.

In answering a question as to Knight’s knowledge of his union activity, Heinly said that such knowledge was obvious to him from the way Knight and Cuddy would follow him if he conversed with another employee and would “break up the conversation.” Heinly also alleged that he was followed in this manner by various security guards.⁵⁴

Knight denied knowing of Heinly’s relationship with the Union and having any conversation with, or making any inquiries of, Heinly about the Union. He was not specifically asked about, but presumably would have denied if asked, the claim by Heinly that he and Cuddy kept known union supporters under surveillance.

The General Counsel’s brief refers to only two violations respecting Knight vis-a-vis Heinly: one, that Knight followed

Heinly around the store, and two, that Knight questioned Heinly.⁵⁵ First of all, I would credit Heinly over Knight. Heinly seemed most honest, and I have taken into account his reason for bitterness against Respondent. Knight was not an unimpressive witness, but I believe that I sensed an intense (and understandable) desire to protect his job.

Secondly, I conclude that the interrogation of Heinly, sprung on him abruptly and without explanation, and in the context of the conversation about wage increases, violated Section 8(a)(1), despite the fact that Heinly admitted to having had contacts with the Union. I further find reliable Heinly’s impression that the managers were keeping him under surveillance and following him around the store, breaking up conversations, and that such conduct can only be attributed to Heinly’s known support for the Union.

The remaining item relating to Heinly alluded to in General Counsel’s brief is a peculiar incident in which, on February 19, a security guard, Mark Donnellon, was said by Heinly to have pointed his finger in Heinly’s face and, in an “uproar,” told Heinly that if he did not vote no in the election at Stemmers, “what happened to people in Havre de Grace will happen to me.” While Donnellon gave an entirely innocuous account of their conversation (almost too innocuous for Donnellon to have recalled the matter at all), I thought Heinly’s seemed more likely. However, Donnellon, whose principal duty consisted of spending time at the stores watching for shoplifters, was clearly not an agent of Respondent, either actual or apparent, for the purpose of labor relations communications. It may be noted, moreover, that Heinly had no idea of what Donnellon was talking about, nor could Donnellon have reasonably expected him to. I would dismiss this allegation.

C. Events Relating to Machin

The remaining Stemmers allegations relate to Dorothy Machin, a 5-year employee. She was a bakery clerk at Stemmers in 1988.

Machin testified that one morning around the end of February 1988, storewide bakery supervisor Rolfe entered Stemmers, spoke to the deli manager, and then came to the bakery and asked Machin if she had signed a union card. Machin said she had. Rolfe then said that Denrich “didn’t have to bargain at all,” that he was still the head of the company, and that he would say how the company was run. Machin replied that they were not trying to take the company away from Denrich. In the course of discussion, Rolfe assertedly said that “the union would bust people back to part-time, that they [don’t] need that many full-time people back there,” and “there wouldn’t be any more Saturdays Off.” Machin replied that she could not understand why “the union would bust people back to part-time” because she assumed that full-time employees would pay more union dues.

Rolfe denied having held any such conversation. She recalled only one union-related discussion with Machin, sometime after the Havre election, when, as Rolfe talked to the deli manager at Stemmers, Machin joined the conversation and asked abruptly when Denrich was coming to “talk about the Union and take us for a free lunch?” Rolfe purportedly

⁵¹ At the hearing, General Counsel seemed to agree that Birtcher is deliberately not alleged to be a supervisor, but rather only an agent.

⁵² Indeed, it is uncontroverted that Hayes frequently called Birtcher at home with various complaints, both while and after Birtcher worked as a cashier, and that Birtcher responded that “there’s nothing I could do about that.”

⁵³ The fact that Hayes would have asked how Birtcher came to have knowledge of such an intention indicates that Hayes did not regard Birtcher as an agent of, or closely allied with, management. There is no showing that Hayes was aware of Birtcher’s office duties.

⁵⁴ His testimony that security guards were “hanging around” his department more often after February 4 is mitigated for present purposes by his volunteered information that “that was also due to a lot of things being stolen from [there]—by customers.” General Counsel stated that because there was no allegation as to guards, he offered this only for the purpose of establishing animus.

⁵⁵ The brief makes no reference to the raise received by Heinly or to the promise of a future raise, although both matters are alleged in the complaint. Knight said that he first heard of the raise for seafood managers from Yingling, perhaps around January 24.

replied that she had “been through Havre de Grace and I really can’t get into that.” Rolfe then suggested, since the woman with whom she was speaking, Deli Manager Lee Horstman, had been a union member, “why don’t you ask Lee what’s going on with it?”

Horstman then described to Machin her experience with a union, indicating that she was “not prounion.” According to Rolfe, Horstman told Machin that the Union “couldn’t guarantee her every single Saturday off,” a privilege then being accorded to Machin, a league bowler; denied the Union’s claim, mentioned by Machin, that it could get her \$7 to \$9 an hour; and Rolfe denied hearing Horstman say that Denrich would never recognize the Union and would not bargain with it.

Horstman’s testimony substantially corroborated Rolfe’s.

This is the kind of testimonial conflict that turns gray what may be left of a factfinder’s hair. Machin was, I thought, a most impressive witness; Rolfe’s demeanor gave no appearance of simulation; and I was moved to silent superlatives in my appraisal of Horstman. It is very difficult for me to believe that Machin, a current employee, manufactured her testimony; and it is equally difficult for me to think that the refreshingly open Horstman was not telling the truth. It may be simply that Machin is confused about the events. On her redirect testimony, when Machin was asked if Horstman “was in on the conversation,” Machin answered, “Not at that time, I don’t think she was.” In these circumstances, I am constrained to conclude that the evidence is in equilibrium, and that General Counsel has therefore failed to prove by a preponderance of the evidence the allegations attributed to Rolfe.

Machin further testified that perhaps in early February 1988, while talking with John Cuddy and mentioning that she had signed a union card, Cuddy stated that he had been sent to the store by Denrich and “was going to take back all of our problems to him to see what he could handle. You know, what he could fix and stuff.” She thinks that she told him “a few” problems. On another occasion, also in early February, Cuddy said, in the context of a discussion about the Union, that Stemmers “was such a low volume store that Louis wouldn’t have any problems closing it.”

Cuddy recalled an occasion, perhaps in mid-February, when, in casual conversation, Machin complained about not getting enough hours. He referred, probably, to their “low volume” store as explaining why shifts had to be split. In discussing this subject, Machin told why she thought a union might help, and volunteered the information that she had signed a card. Cuddy responded that he did not think a union was needed, because they could “get our problems straightened out and . . . take care of that in the store or at company level.”

As for these conversations, there is no likelihood that Machin was confused. With regard to the allegation that his presence was explained as an implied promise to correct problems, Cuddy came close to conceding it with his last-quoted offer to Hayes. While the possibility always exists that I may be wrong, I am comfortable with a finding that, as Machin testified, Cuddy coerced her by suggesting that Stemmers was such a low-volume store “that Louis wouldn’t have any problems closing it.”

IV. THE ELKTON QUESTIONNAIRE

On April 22, 1988, a “mandatory” (according to a notice) meeting for the “associates” was held at the Elkton store after it closed for the day. Employee Melanie Vance testified that chainwide meat department supervisor Beamon handed out questionnaires to the employees, telling them to fill the forms out and hand them back unsigned. He also said that if anyone “had something else to do, we could leave.” A union campaign was being waged at the Elkton store at the time, the petition having been filed on February 12. Beamon said that the purpose of the questionnaire was to find out “how the employees felt about the Company . . . and then we would get the results back later.” About a month before the hearing, Denrich came to the store and discussed the results with the employees, but did not mention the Union.⁵⁶

The complaint alleges that the questionnaire violates the Act by asking a question concerning “the extent of union support among employees.” Of the 103 questions put by the forms, most of which were to be answered by checking varying degrees of agreement or disagreement, question 43 was phrased, “The employees of this store do not feel that they need a union to speak and act for them.” The other statements were more personally work- and attitude-related, such as “My manager helps me learn from my mistakes” and “This company expects too much work from me.” Although the form states boldly at the top of the first page and the bottom of the last, “Please do not sign your name!” and each page is marked “*CONFIDENTIAL*,” most of the final 17 questions seem to make theoretically possible the identification of the employee by (1) asking the name of his or her department and store manager and (2) propounding essay questions (e.g., “If I could change something or begin something, I would:”) which could reveal not only facts about the writer, but also provide good specimens of the examinee’s handwriting.

The Government’s brief argues that item 43 “is in fact a means of measuring employee sympathy as the scheduled election date approached.” I do not agree with this assertion of fact, since an employee’s opinion as to whether his colleagues “do not feel that they need a union to speak and act for them” has not been shown on this record by any empirical evidence to constitute a useful and scientific means of measuring such sympathy. Moreover, even if that had been proven, I do not see how the gathering of such general information by such a method could have a coercive, restraining, or intimidating effort on the employees.⁵⁷

Perhaps in recognition of these problems, General Counsel pushes beyond the borders of the complaint’s stated theory to suggest that this display of interest in the feelings and sentiments of the employees is “of a piece with the solicitation of grievances and promises—actual or implied—which figured so prominently in the Havre de Grace and Stemmers Run cases.”

⁵⁶The election had been blocked by a charge. Although the complaint in the Elkton case (5-CA-19673) alleges that the questionnaires were distributed at all of Respondent’s stores (and that does seem quite likely), the proof adduced at the hearing was limited to the Elkton location.

⁵⁷Assuming that General Counsel has proved what it had alleged as violative—the filling out of the forms at all the stores—the argument is even less persuasive as to the non-Elkton stores at which no other elections were scheduled.

This is, perhaps, further than General Counsel had to go. One of the cases relied on by General Counsel is *Gordonsville Industries*, 252 NLRB 563 (1980), in which I concluded, depending on *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), that, in the circumstances, a questionnaire which sought to identify employee grievances in an unprecedented fashion soon after the initiation of a union effort constituted an implied promise to rectify grievances, in violation of Section 8(a)(1). I declined to find, however, that the survey also amounted to coercive "interrogation," as charged, because the form did not "explore employee evaluation of working conditions." 252 NLRB at 569.

In reversing the latter holding, *id.* at 563, the Board concluded that the data supplied by the employees on the forms "clearly gave information which could serve to identify employees" (which is also true, if possibly more complicated, in this case). The Board went on to hold that even though the poll posed no express question about "union sentiments," it was "obvious" that some questions (such as "[w]hat would you like to see done to make your company a better place to work?") "had that effect." This latter inference was based on the fact that a number of employees responded with answers "which revealed their union sentiments." The Board concluded that the "necessary confidentiality and assurances against reprisals were lacking during the administration of the survey," and "the responses generated by some of the subjective open-ended questions had the effect of infringing on the employees' Section 7 rights" and constituted unlawful interrogation. *Id.* at 564.

It is unclear to me how the standard of judging a survey by some of the "responses," rather than by the customary test of the reasonable tendency of the questions to coerce, was developed. I presume that the Board would equally have held that, regardless of the responses, the "subjective open-ended questions" themselves, absent assurances, would also have been violative. Applying *Gordonsville* to the present case, there were here an absence of "assurances against reprisals" and "subjective open-ended questions" which could have encouraged disclosure of union sentiments. That seems to be a sufficient basis, under the Board's *Gordonsville* ruling, to sustain a finding of unlawful interrogation.⁵⁸

Moreover, as in *Reliance Electric* and *Gordonsville* (further followed in *Keystone Lamp Mfg. Corp.*, 284 NLRB 626, 639 (1987)), the in-depth formal inquiry into employee sentiments about their work environments must similarly have given rise to the "compelling inference" that the employer is "implicitly promising to correct those inequities he discovers as a result of his inquiries . . ." *Reliance Electric*, supra, 191 NLRB at 46. For this reason as well, I find that the circulation of the questionnaires at Elkton violated Section 8(a)(1).⁵⁹

⁵⁸In *Gordonsville*, the Board also employed the phrase "[e]specially since it occurred within the context of other violations of Section 8(a)(1)." The use of the word "especially" indicates that other unlawful conduct is not critical to the finding. *Id.* at 563.

⁵⁹As Respondent points out on brief, an earlier case, *ITT Telecommunications*, 183 NLRB 1129 (1970), evidently would dismiss a claim that the questionnaire constituted an unlawful promise of benefits. It may also be that that case would not have found unlawful interrogation here, since there the Board gave no weight to the survey question, "Many company employees I know would like to see the union get in." Unlike that case, however, the instant and the cited later cases made identification of the examinees possible.

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. United Food and Commercial Workers International Union, Local 27, AFL-CIO-CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. By, at its Havre de Grace store, from November 1987 to February 1988, impliedly threatening to close the store by virtue of a mailing and discussion thereof, and by other conduct; asking employees to maintain surveillance of other employees and report on their union activities; impliedly threatening to discharge the spouse of a prounion employee; threatening to reduce benefits prior to bargaining; coercively interrogating employees about union activities; impliedly promising to improve working conditions and to give a wage increase; unlawfully giving wage increases to employees; requesting an employee to take a position on asking other employees to abandon union support; threatening an employee with loss of friendship; unlawfully requiring an employee to remain in her department; unlawfully forbidding an employee to talk about a union; and engaging in and giving the impression of surveillance of the union activities of its employees, Respondent violated Section 8(a)(1) of the Act.

4. By, at its Stemmers Run Road store, in January and February 1988, unlawfully making and promising and impliedly promising grants of benefits, impliedly threatening to close the store, keeping an employee under surveillance, and interrogating an employee about union activities, Respondent violated Section 8(a)(1) of the Act.

5. By, at its Elkton store, on April 22, 1988, by means of a questionnaire, coercively interrogating employees and impliedly promising to rectify their grievances, Respondent violated Section 8(a)(1) of the Act.

6. The appropriate unit for collective bargaining at the Havre de Grace store is:

All full-time and regular part-time employees excluding guards and supervisors as defined in the Act.

7. By refusing, on or about April 5, 1988, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit described above, Respondent violated Section 8(a)(5) and (1) of the Act.

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

9. Except as found above, Respondent has not violated the Act in any other respect alleged in the consolidated complaints.

THE REMEDY

I shall recommend, as a remedy for the unfair labor practices committed at the Havre de Grace store and pursuant to *Gissel Packing Co.*, supra, that Respondent be required to bargain with the Union as the representative of the unit employees at that store. I shall also recommend that Respondent be required to post at its Havre de Grace store, its Stemmers Run Road store, and its Elkton store, the attached notices marked, respectively, Exhibits A, B, and C.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶⁰

ORDER

The Respondent, So-Lo Foods, Inc., t/a BI-LO and So-Lo Foods, Inc., t/a Valu Food, Havre de Grace, Stemmers Run, and Elkton, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively in good faith, on request, with United Food and Commercial Workers International Union, Local 27, AFL-CIO-CLC (the Union), at its Havre de Grace store as the exclusive collective-bargaining representative of all employees in the appropriate unit set forth in paragraph 6 of the Conclusions of Law entered above.

(b) Impliedly threatening to close its stores, asking employees to maintain surveillance of other employees and to report on their union activities, impliedly threatening to discharge the spouse of a prounion employee, threatening to reduce benefits prior to bargaining, coercively interrogating employees about union activities; impliedly promising to improve working conditions and to give a wage increase; unlawfully giving wage increases to employees; requesting an employee to take a position on asking other employees to abandon union support; threatening an employee with loss of friendship; unlawfully requiring an employee to remain in her department; unlawfully forbidding an employee to talk about a union; and engaging in and giving the impression of surveillance of the union activities of its employees.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-

organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purposes of collective bargaining or other mutual aid, or to refrain from any and all such activities.

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

(a) Recognize and, on request, bargain collectively with the Union, as the exclusive representative of the employees in the appropriate unit set forth above, with respect to rates of pay, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its places of business at Havre de Grace, Stemmers Run Road, and Elkton, Maryland, copies of the attached notices marked "Appendix A," "Appendix B," and "Appendix C."⁶¹ Copies of the notice, on forms provided by the Regional Director for Region 5, 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.

(c) 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 ALSO ORDERED that those portions of the complaints found to be without merit are hereby dismissed.

⁶⁰If 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.

⁶¹If 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."