

Baddour, Inc. and Highway and Local Motor Freight Employees, Local 667, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO.¹ Cases 26-CA-13225 and 26-RC-6527

May 31, 1991

DECISION, ORDER, AND DIRECTION OF
THIRD ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT, DEVANEY, OVIATT, AND
RAUDABAUGH

On April 6, 1990, Administrative Law Judge Donald R. Holley issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

The judge found and we agree that the Respondent unlawfully threatened employees with job loss in the event of a strike. During its campaign speeches before the second election, the Respondent, inter alia, told employees without other explanation that "union strikers can lose their jobs" and that "you could end up losing your job by being replaced with a new permanent worker." The Board in *Larson Tool & Stamping Co.*, 296 NLRB 895 (1989), made it clear that employers cannot tell employees without explanation that they would lose their jobs as a consequence of a strike or permanent replacement.³ The phrase "lose your job" conveys to the ordinary employee the clear message that employment will be terminated. Further, if the employee is also told that his/her job will be lost because of replacement by a "permanent" worker, the message is reinforced. In these circumstances, where the single reference to permanent replacement is coupled with a threat of job loss, it is not reasonable to suppose that the ordinary employee will interpret the words to mean that he/she has a *Laidlaw* right to return to the job.⁴

¹On November 1, 1987, the Teamsters International Union was readmitted to the AFL-CIO. Accordingly, the caption has been amended to reflect that change.

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

³For example, the Respondent could have explained that the names of replaced employees would be placed on a preferential hiring list and that they would be recalled if a permanent replacement left the employ of the Respondent.

⁴Chairman Stephens agrees that the Respondent's campaign speeches of May 15 and 22, when read together and in conjunction with the Respondent's subsequent threat (1 week later) of plant closure, had a coercive tendency in violation of Sec. 8(a)(1). An employer is no doubt privileged to explain that

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Baddour, Inc., Memphis, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the election held on June 2, 1989, in Case 26-RC-6527 is set aside and that this case is severed and remanded to the Regional Director for Region 26 for the purpose of conducting a new election.

[Direction of Third Election omitted from publication.]

MEMBER DEVANEY, dissenting.

I agree with my colleagues that the Respondent violated Section 8(a)(1) of the Act and interfered with the election conducted in Case 26-RC-6527 by granting employees a benefit for the purpose of influencing their votes and by threatening them with plant closure. Contrary to the majority, however, I do not find that the Respondent's statements regarding the consequences of an economic strike constituted a threat of job loss further violating Section 8(a)(1).

The Board in *Eagle Comtronics*, 263 NLRB 515 at 516 fn. 8 (1982), made a distinction between truthful, although incomplete, statements consistent with *Laidlaw*¹ regarding an employer's right to replace economic strikers and statements that go "beyond informing the employees of the risk of being permanently replaced by telling them they would permanently lose their jobs." (Emphasis in original.) In this case, the Respondent made speeches to employees informing them, as relevant here, that "you could end up losing your job by being replaced with a new permanent worker." The Respondent also said that "[t]housands of good employees like you have ended up losing their jobs when they were replaced with permanent replacements in a union economic strike" Because the statements in the Respondent's speeches to employees specifically link job loss to permanent replacements, I find that they do not constitute an absolute job loss or threat to punish employees for striking.

it had a right to hire permanent replacements under *Mackay Radio & Telegraph Co. v. NLRB*, 304 U.S. 333 (1938). Moreover, Chairman Stephens would not necessarily fault an employer for using the phrase "job loss" to describe what happens to the employees' jobs during an economic strike in the event that permanent replacements are hired. See *Larson Tool & Stamping Co.*, supra (dissenting opinion), citing *John W. Galbreath & Co.*, 288 NLRB 876 (1988). However, in his view, the Respondent crossed into the zone of coercive speech by telling its employees that "[t]housands of good employees like [them] ended up losing their jobs when they were replaced," and that "you could end up losing your job by being replaced" (Emphasis added.) Such comments, made in the context of remarks which treated strikers as an inevitable, but ultimately futile, consequence of unionization, suggested that the Respondent would not regard the employees as having any employment status following the conclusion of any strike.

¹*Laidlaw Corp.*, 171 NLRB 1366 (1968), enf.d. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1969).

In so concluding, I stress that subsequent to *Eagle Comtronics* the Board made it clear in *John W. Galbreath & Co.*, 288 NLRB 876, 877 (1988), that not all statements about job loss in the event of an economic strike would be found impermissible. There, the Board found that the employer did not interfere with the election by giving its employees an incomplete statement of their *Laidlaw* rights in telling them that they could lose their jobs as a result of an economic strike. The Respondent's statements, quoted above, are also consistent with *Laidlaw* because, as the Respondent explicitly told the employees, replaced economic strikers do not have employment rights superior to those of permanent replacements. Further, I note that the Respondent did not indicate to employees that an economic strike and their replacement were inevitable consequences of bargaining with the Union. For these reasons, I find that the campaign statements at issue were not coercive, but rather served as a legitimate explanation to employees about the consequences of their engaging in an economic strike.² Accordingly, I would dismiss this allegation of the complaint.

²See Chairman Stephens' dissenting opinion in *Larson Tool & Stamping Co.*, 296 NLRB 895 (1989). I see no material difference between the statements here and those in *Larson Tool*.

John Goree, Esq., for General Counsel.
William E. Hester III, Esq. (Kullman, Inman, Bee & Downing), of New Orleans, Louisiana, for the Respondent.
Duria Jones, Organizer Agent, of Memphis, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge. On September 2, 1982, the above Union filed a petition in Case 26-RC-6527 seeking an election among certain employees of Baddour, Inc. (Respondent). An election was conducted on October 19, 1982, and the Union failed to receive a majority of the valid votes cast. It filed timely objections to the conduct of the election, and such objections were consolidated with a pending unfair labor practice case. On September 26, 1986, the Board issued a Decision, Order, and Direction of a Second Election in *Baddour, Inc.*, 281 NLRB 546 (1986). The United States Sixth Circuit Court of Appeals enforced the Board's Order on May 19, 1988, and the United States Supreme Court denied certiorari on November 7, 1988. Thereafter, on November 25, 1988, the Sixth Circuit mandated enforcement of the Board's Order for a second election. A second election was conducted in the representation cause on June 2, 1989.¹ The tally of ballots revealed that of approximately 246 eligible voters, 93 votes were cast for the Petitioner and 124 votes were cast against the Petitioner. There were 12 challenged ballots which are not determinative. On June 9, the Petitioner filed timely objections to conduct affecting the results of the election. In the meantime, the

¹All dates herein are 1989 unless otherwise indicated.

Union filed the original charge in Case 26-CA-13225 on May 31, 1989. Thereafter, the Regional Director for Region 26 of the National Labor Relations Board issued a complaint on July 7 which alleged, in substance, that during the months of May and June Respondent violated Section 8(a)(1) of the National Labor Relations Act by: granting its employees a benefit by reopening the cafeteria at its facility; threatening employees with the loss of their jobs if selection of the Union as their collective-bargaining representative led to a strike; and threatening employees with plant closure if they selected the Union as their bargaining agent. After Respondent filed a timely answer denying it had engaged in the unfair labor practices alleged in the complaint, the Regional Director issued an order consolidating Case 26-RC-6527 with Case 26-CA-13225 for hearing thus placing the Union's objections in the representation case before me for determination. The objections which mirror the complaint allegations are:

1. At a group meeting held by the Employer on Thursday prior to the election, the employees were told, "I urge everyone of you to vote no. If you don't vote no, you will not be around for 1990."

2. The employees were told that the Company would put back into effect the cafeteria that they had discontinued after the 1982 election. They asked prospective voters to suggest what they wanted on the menu.

3. The Employer engaged in intimidation during the course of the campaign and immediately preceding the election.

The case was heard in Memphis, Tennessee, on October 18. All parties appeared and were afforded full opportunity to participate. On the entire record, including careful consideration of posthearing briefs filed by the parties, and from my observation of the demeanor of the witnesses who appeared to give testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Baddour, Inc., a Tennessee corporation, with a place of business in Memphis, Tennessee, is engaged in the wholesale distribution of consumer goods. During the 12-month period preceding issuance of the complaint in the instant case, it sold and shipped from its Memphis facility to points located outside the State of Tennessee products, goods, and materials valued in excess of \$50,000, and during the same period, it purchased and received at its Memphis facility from points located outside the State of Tennessee goods, products, and materials valued in excess of \$50,000. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. STATUS OF LABOR ORGANIZATION

It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The following issues are posed by the complaint, Respondent's answer, and the objections:

1. Whether Respondent violated Section 8(a)(1) of the Act by reopening its cafeteria on May 8, 1989.

2. Whether on May 15 and 22, 1989, Respondent violated Section 8(a)(1) of the Act during speeches to employees by threatening its employees with loss of their jobs if there was a strike at the facility.

3. Whether Respondent violated Section 8(a)(1) on June 1, 1989, by threatening its employees with plant closure if they selected the Union as their bargaining agent.

4. Whether Respondent engaged in conduct which requires that the June 2 election be set aside and a second rerun election be ordered.

The issues are discussed individually below.

B. Reopening of the Cafeteria

For some unstated period prior to May 1983, Respondent operated a cafeteria at its facility and furnished meals to its employees free of charge. By memo dated April 28, 1983, it informed its employees the cafeteria operation cost it approximately \$400,000 per year and "since only half of the employees on the roll eat it had been decided to 'eliminate this very large expense that is not benefiting everyone'" (G.C. Exh. 6).² Subsequently, by memo to employees dated May 25, 1983, Respondent notified employees the cafeteria would be closed on Friday, May 27, 1983 (G.C. Exh. 7). Simultaneously, Respondent informed its hourly employees except over-the-road drivers that effective June 26, 1983, they would receive a pay increase of 15 cents per hour; that "In effect, Baddour, Inc. is helping you defray the cost of the meal you will now be providing. This increase represents \$1.20 per eight-hour day" (G.C. Exh. 7, p. 2).

From the time the cafeteria was closed in 1983 until the end of December 1988, Charles Baddour, chairman of Respondent's board of directors and owner, used the kitchen and equipment in the cafeteria to bake cakes for himself and his friends. In early 1987, Charles Baddour retired, but he continued to visit the facility five or six times a week to bake cakes until the first week of 1989.

Eddie Branan, Respondent's director of corporate support, whose duties included managing housekeeping, food service, purchasing, and special events, testified he explored the possibility of opening a cafeteria in a dining room located in the warehouse at Respondent's facility while Baddour was still using the kitchen in the main building. He claimed he interviewed several firms, including ARA, Savon Foods, and Serv-O-Matic during October 1987 to ascertain whether they would be interested in providing food service. While Serv-O-Matic presented a proposal by letter dated October 20, 1987, Branan testified no agreement was reached because an investment of \$50,000 would have been required to prepare the warehouse location and Serv-O-Matic was unwilling to make the investment unless it had a long-term contract which Respondent was not willing to enter.

During the period 1982 to 1989, Respondent lost significant sums of money. In March 1989, it retained The Finley Group, a consulting firm, to assist in "turning around" the financial condition of the Company. Two individuals from the firm, Timothy Finley and Robert Pate, presented them-

selves at the Company to commence their efforts on March 29. Finley was designated the president and chief executive officer of Respondent, with Pate as his assistant. The record reveals that from late March through the date of the hearing in the instant case, Finley and Pate have made virtually all decisions at the facility which exert a major impact on the Company's financial performance.

By memo to employees dated March 4, Respondent acknowledged that it was aware the Union had been soliciting employees to sign membership applications and dues-check-off authorization cards for several weeks. The memo urged employees to refrain from signing such cards.³

Pate testified he toured Respondent's facility in late March or early April and noticed a cafeteria on the bottom floor of the building was not being used. He claimed he had learned by talking to 40-50 of Respondent's employees who were involved in buying, merchandising, advertising and computer endeavors that their morale was very low, and he, after gaining Finley's approval, decided to reopen the cafeteria on an "employee pays" basis to improve morale and seek to create a family atmosphere by causing employee, who did not normally meet to gather at one place to eat.⁴

Pate testified he was unaware, except in a general way, of the union situation at Respondent when he made his decision to reopen the cafeteria. He acknowledged he knew at the time that an election had been held at some time in the past, and that the matter had been tied up in the courts for years. He claimed the major reason for taking action at the time was the necessity for the institution of change immediately to accomplish a turnaround of Respondent's financial performance; that improving the morale of employee was one way to cause them to pull together in an attempt to save the Company.

It is uncontradicted that on April 17 Pate instructed Branan to take action to reopen the cafeteria. Branan thereafter scheduled an April 10 meeting with Serv-O-Matic representatives. The parties thereafter agreed that Serv-O-Matic would reopen the cafeteria serving breakfast, if needed, and a lunch. The price of the one meat and two vegetables lunch was to be \$2 for the first month and \$2.25 thereafter. The agreement was that Serv-O-Matic would furnish the food and its own employees; that Respondent would provide the kitchen equipment and would pay for the utilities. Additionally, while the employees were to bus the tables, Respondent was to provide labor to clean the table and seating area.

The record reveals Region 26 personnel first contacted Respondent to discuss arrangements for a rerun election on April 19. Several days later, on April 21, Respondent's employees were informed by memo dated April 21 that Serv-O-Matic would reopen the cafeteria and serve hot meals Monday through Friday on an employee-paid basis. A list of food items which would possibly be sold was attached to the memo and employees were requested to check food items they would not like to see on the menu and to write in any items they would like that were not on the list and return the attachment to their supervisor. Thereafter, by memo dated May 5, the employees were informed the cafeteria would be opened on May 8.

²The record reveals Respondent had ceased providing free lunches to its warehouse employees at some point in 1982, and it indicated in a memo to employees dated May 9, 1989, that elimination of the benefit caused employees to contact the Teamsters for help. See G.C. Exh. 1(b).

³See G.C. Exh. 1(f).

⁴The office group, which consists of approximately 200 employees, is not in the bargaining unit sought by the Union.

During the week of May 29, Respondent caused its supervisors to read campaign material placed in the record as General Counsel's Exhibit 8 to employees in small groups. One section of the material treated improvements in employee pay benefits and other conditions of employment which had been instituted since the 1982 election. With respect to the cafeteria, the supervisors informed employees (at p. 15):

Just recently, we reopened the cafeteria on a cash basis through Serv-O-Matic. The Company, quite frankly, is not making one cent out of this operation. In fact, we have provided the space and equipment for Serv-O-Matic so that they can provide meals for you at the lowest possible cost. I hope each of you takes advantage of this fine benefit on a regular basis as I do.

Analysis and Conclusions

The General Counsel correctly observe that the "critical period" for a second election commences as of the date of the first election. *Times Wire & Cable Co.*, 280 NLRB 19, 20 (1986); *Singer Co.*, 161 NLRB 956 (1966).

In *Honolulu Sporting Goods Co.*, 239 NLRB 1277, 1280 (1979), the Board discussed the validity of wage or benefit increases during the pendency of representation petitions stating:

The validity of wage increases or other benefits during the pendency of representation petitions turns upon whether they are granted "for the purpose of inducing employees to vote against the union." And a lawful purpose is not established by the fact that the employer who took such action did not expressly relate the granted wage increases to the organizational campaign. For, as the Supreme Court observed in *N.L.R.B. v. Exchange Parts Company*, *supra* at 410, "the absence of conditions of threats pertaining to the particular benefits conferred" is not "of controlling significance." Under settled Board policy, a grant or promise of benefits during the critical preelection period will be considered unlawful unless the employer comes forward with an explanation, other than the pending election, for the timing of such action [citations omitted].

Capitulated [sic], the instant record reveals the following: (1) Respondent perceived as late as May 1989, that its elimination of free lunches for its warehouse employees during 1982 was one reason such employees sought Teamsters' help in 1982; (2) when appellate procedures were exhausted in *Baddour, Inc.*, *supra*, in November 1988, Respondent was placed on notice of the fact that a rerun election would be conducted among its warehouse employees and truckdrivers in the future; (3) in early March, the Union commenced to solicit employee signatures on membership application and dues-checkoff authorization cards and Respondent acknowledged its awareness of such activity by advising employees not to sign such cards; (4) in early April, Respondent decided to reopen the cafeteria in its headquarters building on an "employee pays" basis; (5) on April 19, the Regional Office contacted Respondent to schedule the June 2 rerun election; (6) on April 21, Respondent announced it would soon be reopening its cafeteria; (7) on May 5, Respondent notified employees the cafeteria would be reopened on May 8; and

(9) during the week of May 29, Respondent informed employees, during election campaign speeches, that it had reopened its cafeteria under conditions favorable to employees and it urged employees to take advantage of the "fine benefit" which was then available.

In my view, by establishing the facts set forth above, the General Counsel has proved prima facie, that Respondent reopened its cafeteria on May 8, 1989, with an object of discouraging its employees from selecting the Union as their bargaining agent.

While the record warrants an inference that Respondent reopened its cafeteria under conditions favorable to employees to influence their vote in the June 2 rerun election, it sought to avoid a finding that it violated Section 8(a)(1) of the Act by causing Pate to testify he was unaware of the union situation when he decided to reopen the facility, and that his sole reason for taking the action was his desire to improve employee morale and thus cause employees to become a positive factor in the attempt to turn around the financial performance of the Company. Noting that the Respondent officials with whom he was dealing were necessarily fully aware of the status of the union situation when Pate was interviewed, I cannot accept his claim that pertinent information was withheld from him and he was merely told in March that an earlier election had been held, but the matter was tied up in the courts. Similarly, as Respondent management perceived as late as May 1989, that elimination of free lunches for warehouse employees in 1982 was one of the reasons employees sought representation through the Teamsters, I do not credit Pate's assertion that the sole reason for reopening the cafeteria was to improve employee morale as part of the turnaround effort. Assuming, arguendo, Pate was not aware a second election would be held in the immediate future when he decided to reopen the cafeteria, the facts strongly suggest he became aware of that fact before his decision was implemented. Moreover, the record clearly reveals employees were encouraged to consider the "fine benefit" recently conferred on them when voting in the rerun election.

In sum, when all the record facts are considered, I am not inclined to credit Respondent's explanation for the timing of the reopening of its cafeteria. I find, as alleged, that by reopening its cafeteria during the critical period immediately preceding the June 2, 1989, rerun election, Respondent violated Section 8(a)(1) of the Act.

C. The Strike and Loss of Employment Statements

The record reveals that Respondent sought during the last 2 weeks of May to convince its employees they should vote against the Teamsters in the scheduled June 2 election by informing them the Union had gained representation rights at various employers in the area, but had been unable to negotiate favorable contracts, or had agreed to contracts which failed to provide pay increases for the employees covered by them. The general theme expressed in the prepared speeches which were read to employees was to the effect that the employees voted for the Union; the employers negotiated with the Union; and that no contract was reached, or a contract which did little for the employees wages was agreed upon.

The General Counsel points to excerpts from speeches read to employees on May 15 and 22, and contends that, by making specified remarks during such speeches, Respondent threatened its employees with the loss of their jobs if they

selected the Union as their bargaining agent and the Union called an economic strike in an attempt to cause Respondent to agree to contract terms. The excerpts relied on were as follows:

The May 15 Remarks

By Speaker No. 1:

It seems like some union is calling a strike every day, and the Teamsters have one of the worst strike records in the country. Just look at what is happening at Eastern Airlines right now, and you will see a good example of what can happen with a union.

Before you decide to give the Teamsters the power to call you out on strike, you should review and remember the basic legal facts about union economic strikes.

First, strikers do not get paid, and their benefits, such as hospitalization insurance can be suspended. Here at Baddour, we pay employees to work, and if the Teamsters come in to call you out on strike you will not be paid.

Second, strikers are not eligible for unemployment compensation. Both Tennessee, and Mississippi have laws which prohibit the payment of unemployment money to union strikers.

Third, union strikers are not eligible for food stamps unless they were eligible prior to the strike.

Fourth, and worst of all, union strikers can lose their jobs. Under the law, companies are permitted to hire new permanent replacements when a union calls employees out on strike to try to force the company to give in to one of its demands or proposals. Here at Baddour, we have made commitments to the Fred's stores that we will supply them with needed goods and products, and we plan to do that even if the union threatens or calls a strike. We would like to do our work with you, but if the Teamsters call you out on strike, we will exercise all of our legal rights and replace each and everyone of you with a new employee if that's what it takes to keep supplying our customers.

By Speaker No. 2:

I don't believe anyone here would like to see a strike at Baddour, but with the Teamsters, there is always a real chance that some day each of us may get involved in or caught up in a union strike. Thousands of good employees like you have ended up losing their jobs when they were replaced with permanent replacements in a union economic strike, and we do not want to see any of you added to that list. We want to see all of you grow and prosper with Baddour.

The May 22 Remarks

The other point we made last week is what can happen if in bargaining we said "NO" to one of the union's demands or proposals and the Teamsters kept pushing that demand or proposal. As we discussed, the only thing the union could do to try to force us to give in to the demand or proposal would be to call you—the employees—out on strike. Even though they claim otherwise, the Teamsters are one of the most strike-

happy unions in the Country, and they have a record of calling strikes against warehouses such as ours. Before you give the Teamsters the power to call you out on strike you need to remember these very important points about union economic strikes.

One—you will not get paid and your benefits can be suspended. Two—you will not any unemployment money [sic] because Tennessee, Mississippi, and Arkansas prohibit the payment of unemployment compensation to strikers. Third—you will not receive any food stamps unless you were eligible to receive them before the strike. And fourth—you could end up losing your job by being replaced with a new permanent worker. As part of their strike record, the Teamsters have been responsible for thousands of employees losing their jobs when they were replaced in Teamster [sic] economic strikes. We would hate for anything like that to happen here at Baddour, and that is one of the main reasons we have taken a strong stand against the Teamsters. Where there a no unions [sic]—there is no possibility of a union strike.

Analysis and Conclusions

In *Eagle Comtronics*, 263 NLRB 515, 516 (1983), the Board held an employer does not violate the Act by truthfully informing employees that they are subject to permanent replacement in the event of an economic strike "[u]nless the statement may be fairly understood as a threat of reprisal against employees or is explicitly coupled with such threats." Continuing, it stated, "[a]s long as an employer's statements on job status after a strike are consistent with the law, they cannot be characterized as restraining or coercing employees in the exercise of their right under the Act."

The statement alleged to be offensive in *Eagle Comtronics* was "that in the case of an economic strike . . . present employees could be replaced with applications on file." The Board held that by making such a statement the employer simply described the employer's legal prerogative without contravening any *Laidlaw*⁵ rights.

Under *Laidlaw* replaced economic strikers, who have made unconditional offers to return to work, are guaranteed the right to full reinstatement when positions become available, and are guaranteed the right to be placed on preferential hiring list if positions are not available. The employer's right to permanently replace such strikers does not "entail an absolute loss of employment for those striking employee who are replaced." *Gino Morena Enterprises*, 287 NLRB 1327 (1988).

In a number of cases decided since *Eagle Comtronics*, supra, the Board has found to be violative employer statements that economic strikers may or would lose their jobs as a consequence of a strike or a permanent replacement. See, for instance, the following cases in which statements have been held to be violative: *Fern Terrace Lodge*, 297 NLRB 8 (1989) (the replaced striker is not automatically entitled to his job back just because the strike ends); *Larson Tool & Stamping Co.*, 296 NLRB 895 (1989) (during a strike, you could lose your job to a permanent replacement); *Great Dane Trailers*, 293 NLRB 384 (1989) (that economic strikers do not have a right to their jobs after a strike . . . they would

⁵ *Laidlaw Corp.*, 171 NLRB 1366 (1968), enf'd. 414 F.2d 99 (7th Cir. 1979).

be permanently replaced and could not get their jobs back); *Hajoca Corp.*, 291 NLRB 104 (1988) (that if the employees went on strike they would be permanently replaced, an if that occurred, they would no longer have jobs); and *Gino Morena Enterprises*, supra (if the union went on strike . . . it wouldn't do us any good because he would bring in other employees . . . and not only would we not have a job, or not have any work, but he probably wouldn't have a job either.'')

In sum, the Board has indicated in the above-cited cases that an employer can lawfully tell employees that it can and will hire permanent replacements if they participate in an economic strike. Significantly, however, it has also indicated that if the employer goes further to describe the consequence of permanent replacement, it cannot describe a consequence which is inconsistent with the *Laidlaw* rights accorded economic strikers. Further, it has repeatedly held that by telling employees the consequence of striking or permanent replacement is that they may or would lose their jobs, without further reference to their *Laidlaw* rights, an employer violates Section 8(a)(1) of the Act.

Here, Respondent, after telling employees it would permanently replace them if they engage in an economic strike, told them "union strikers can lose their jobs"; "thousands of good employees like you have ended up losing their jobs when they were replaced with permanent replacements in a union economic strike, and we do not want to see you added to that list"; and "you could end up losing your job by being replaced with a new permanent workers." By making such statements regarding the consequence of engaging in a strike and/or the consequence of permanent replacement, I find that Respondent described a consequence which was inconsistent with its employees' *Laidlaw* right, and it thereby violated Section 8(a)(1) of the Act.

D. *The Alleged Threat of Plant Closure*

The record reveals Respondent's president, Timothy Finley, and its vice president of personnel, Larry Hunsucker, conducted a meeting with Respondent's warehouse employees on June 1. Hunsucker spoke briefly at the outset of the meeting, and then Finley spoke. The complaint alleges that during his speech Finley threatened the employees with plant closure if they selected the Union as their bargaining agent.

The General Counsel sought to prove the plant closure threat by causing three current Respondent employees and one former employee to describe what said by Finley during the meeting. The current employees were Lorene Woods, Tony Graham, and Ernest Langford. The former employee was Gregory Chatam.

Employee Woods, Graham, and Langford, and employee Chatam indicated during their testimony that Finley concluded his remarks on June 1 by threatening that the business would be closed in 1990 if they voted for the Union. Woods testified the words uttered were: "If I were y'all, I would, I would advise you to vote against that union because if you don't, we will close these doors in 1990." Graham's recollection was that after telling employees about a unionized business his father owned before his death, Finley told them: "that's why I would urge each and every one of you to vote 'No,' or we will not be here in 1990." Langford's recollection was that Finley threatened employees with plant closure by telling them "that if the union was voted in, that the

company would go out of business in 1990." Finally, Chatam, after indicating several times that Finley's final statement was that "by 1990, the company may no longer be in business," eventually testified Finley's last statement was "if we voted the union in, the company will be closed in 1990."

Respondent sought to refute the testimony of the above-named employee witnesses through the testimony of Finley and Donald Eure. Both individuals agreed Finley told employees the Company could go out of business in 1990 if it continued to experience losses, but both categorically denied that Finley told employees during his speech that the Company would go out of business if they voted for the Union.

Analysis and Conclusions

Obviously, the conflicting testimony given by the General Counsel's and Respondent's witnesses requires that I resolve the credibility issue presented. I resolve the issue in the General Counsel's favor for several reasons. First, Woods and Graham, in particular, were impressive witnesses and they appeared to be seeking to relate Finley's remarks during the meeting to the best of their ability. Moreover, the record reveals both employees were questioned by Regional personnel about the meeting shortly after it was held, and their testimony during the hearing was not shown to be in conflict with their pretrial statements.⁶ Finally, Woods and Graham, as well as Langford, remain in Respondent's employ and I deem it unlikely that they would intentionally attribute comments to Finley which he did not actually make.

Respondent argues that Finley is an intelligent man who had discussed an outline of his speech with counsel before speaking, and such factors would appear to negate any propensity by him to make unlawful statements during his speech. While the observations are true, I note Finley claimed he disposed of his outline after making his June 1 comments, and his denial that he made a plant closure threat during his speech was not corroborated by any witness(es) that has no stake in the outcome of the instant case.

In sum, in the circumstances described, I credit the employees and find, as alleged, that during June 1, 1989 comments to employees, Respondent, through Finley, threatened employees with plant closure if they selected the Union as their bargaining agent.

E. *The Objections*

Having found that Respondent violated Section 8(a)(1) of the Act by granting employees a benefit during the critical period before the June 1, 1989 election, threatening them with loss of their jobs if there was a strike at the facility, and by threatening them with plant closure on June 1 if they selected the Union as their bargaining agent, I find the above-described objections for the conduct of the election to be meritorious.

I further conclude that by engaging in such objectionable conduct, Respondent interfered with the laboratory conditions necessary to ensure that the employees could exercise a free and untrammelled choice in the election held on June 2, 1989. Accordingly, I recommend that the June 2, 1989 election be set aside and that the Board order that a third election be held in Case 26-RC-6527.

⁶Graham gave a statement some 8 days after the meeting.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of the Act.

3. By engaging in the unlawful conduct described in section III above, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

THE REMEDY

Having found that the Respondent engaged in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The Respondent, Baddour, Inc., Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Granting employees a benefit during the critical period preceding a Board conducted election for the purpose of influencing their selection of the Union as their bargaining representative; provided, however, that nothing herein shall be construed as requiring Respondent to abandon any benefits heretofore established.

(b) Threatening employees with loss of their jobs if they participate in an economic strike at its facility.

(c) Threatening employees with plant closure if they select the Union as their collective-bargaining agent.

(d) In any like or related manner interfering with, coercing, or restraining employees in the exercise of rights guaranteed them in Section 7 of the Act.

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

⁷If 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.

(a) Post at its Memphis, Tennessee facility copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

⁸If 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."

APPENDIX

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

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

WE WILL NOT grant employees a benefit during the critical period preceding a Board-conducted election for the purpose of influencing their selection of the Union as their bargaining representative.

WE WILL NOT threaten employees with loss of their jobs if they participate in an economic strike at our facility.

WE WILL NOT threaten employees with plant closure if they select the Union as their collective-bargaining agent.

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

BADDOUR, INC.