

Gardner Engineering, Inc. & Gardner Mechanical Services, Inc. and Local 350, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States & Canada, AFL-CIO, CLC and Robert Adair. Cases 32-CA-11472 and 32-CA-11561

February 28, 1994

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND TRUESDALE

On March 23, 1993, Administrative Law Judge George Christensen issued the attached decision. The General Counsel and Charging Party Local 350 filed exceptions, supporting briefs, and answering briefs. The Respondent filed cross-exceptions, a supporting brief, and a reply brief.

The National Labor Relations 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,¹ and conclusions and to adopt the recommended Order as modified and set forth in full below.

1. The judge dismissed the complaint allegation that the Respondent violated Section 8(a)(1) when its owner, James Gardner, interrogated employee Robert Adair before the election and specifically requested

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

We further correct the following factual errors by the judge, which do not affect his decision. Four union members rather than five started work at Gardner Mechanical Services on May 22, 1989; the fifth employee began about a week later. The judge made reference to the first day of hearing on the earlier unfair labor practice case, Case 32-CA-10406, as involving testimony concerning the coverage of the collective-bargaining agreement between the Union and Gardner Engineering, Inc. There was no testimony to that effect at the first day of hearing in that case which was held in October 1989, and the judge is apparently referring to testimony developed in the supplemental proceedings in that prior case which took place in May 1991. The judge mischaracterized the settlement agreement in the earlier case as precluding the Union from filing any action involving contributions for the period May 19, 1989, through May 1, 1990; the correct dates are May 19, 1989, through October 31 of the same year. He further found that Respondent Gardner Engineering, Inc. agreed to reimburse the union funds for claims by five named union members; however, it appears that one named employee specifically waived his right to such benefit payments.

We find it unnecessary to pass on the judge's finding that Respondent Gardner Mechanical Services is a disguised continuation of Respondent Gardner Engineering, Inc. We agree that the Respondents constitute a single employer. See, e.g., *Canterbury Educational Services*, 308 NLRB 506, 509-510 (1992), and *Hydrolines, Inc.*, 305 NLRB 416, 417-419 (1991).

Adair to make annotations to a list of eligible employees to indicate how Adair thought each employee would vote. The judge concluded that the interrogation was not unlawful because Gardner's request was "unaccompanied by any intimidation, threat or promise" and was an isolated incident. We disagree.

The judge found that approximately a week and a half before the election, during the course of a conversation between Gardner and Adair, Gardner noted to Adair that he had been allowing Adair to take a truck home at night and that Gardner had made certain state payments on the truck on Adair's behalf. Gardner stated that he hoped Adair would keep this in mind when he voted in the upcoming election. He then handed Adair a list of employees with headings of "yes," "no," and "comments" after each name and asked Adair to make entries indicating how Adair thought each listed employee would vote and to return the document to Gardner. Adair accepted the document but later decided it was improper to fill it out and discarded it.

The judge analyzed this case under *Rossmore House*, 269 NLRB 1176 (1984), enf. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In that case the Board employed a "totality of circumstances" test to determine if an interrogation would reasonably tend to restrain, coerce, or interfere with employees in the exercise of their statutory rights. Applying that test, we conclude that Gardner's request was unlawful.

We initially note that Gardner was the Respondent's owner. Further, Gardner made his request immediately after he reminded Adair that Adair was enjoying a benefit provided by the Respondent, with the clear implication that the benefit might be withdrawn depending on how Adair voted in the election. Thus, contrary to the judge's characterization, Gardner's request was accompanied by intimidation and an implicit threat of loss of benefit. Additionally, unlike *Rossmore House*, there is no evidence in the record that Adair was an open and active union supporter at the time of the interrogation, although he was a union member. Finally, the information Gardner sought from Adair was not limited to Adair himself, but additionally sought to find out how Adair believed the other unit employees would vote as well. It is well established that such questioning of an employee regarding the union sentiments of others is unlawful. Accordingly, we conclude that, under all the circumstances, the questioning of Adair constituted an unlawful interrogation in violation of Section 8(a)(1). See, e.g., *Cumberland Farms*, 307 NLRB 1479 (1992), and *Liquitane Corp.*, 298 NLRB 292, 293 (1990).

2. The judge concluded that the Respondent did not violate Section 8(a)(5) by withdrawing recognition from the Union and subsequently unilaterally changing

certain terms and conditions of employment. In so doing, the judge found that there was no continued presumption of majority support for the Union at the time of the withdrawal of recognition. We disagree.

Initially, we agree with the judge's rejection of the Respondent's argument that the parties' agreement settling the prior unfair labor practice charge and the subsequent non-Board election conducted pursuant to that settlement agreement privileged its conduct. We thus agree with the judge's determination that the Respondent's postsettlement, preelection conduct precludes any reliance on the election results as proof that a majority of unit employees did not desire union representation at the time of the election.² In this regard, we rely on the judge's finding that the Respondent violated Section 8(a)(1) through the statements made by Gardner at his employee meeting the day before the election as well as our additional finding that the Respondent violated Section 8(a)(1) by Gardner's interrogation of employee Adair, discussed above. However, we disagree with the judge's further determination that there was no continued presumption of majority support for the Union among unit employees at the time of the withdrawal of recognition.

The judge noted that a union enjoys an irrebuttable presumption of majority support within an appropriate unit for the duration of a collective-bargaining agreement when an employer has recognized the union as the exclusive representative of unit employees.³ The judge also stated that a union enjoys a continuing presumption of majority support following the expiration of an agreement unless it is affirmatively demonstrated in a context free of serious unfair labor practices that a majority of employees do not desire representation. In finding that the Union here could not be presumed to have continued majority support, the judge relied on what he considered to be the "tacit recognition" by all the parties and the judge in the earlier unfair labor practice proceeding that the 1988-1990 collective-bargaining agreement between the Union and Respondent Gardner Engineering, Inc. was applied to union members only.⁴ He further relied on his finding that the

limitations on the agreement essentially were perpetuated in the settlement agreement covering the earlier unfair labor practice charge. Finally, the judge noted the absence of any evidence of support for the Union among any unit employees beyond the Union's members and, accordingly, concluded that the presumption of continuing majority support was untenable.

Contrary to the judge, we conclude that there is insufficient evidence to establish that the prior collective-bargaining agreement was a "members only" agreement that would not carry with it a presumption of majority support. We note that the language of the collective-bargaining agreement was not thus limited: on its face it applied to all employees performing bargaining unit work. Indeed, no party in this or the prior proceeding argued that the collective-bargaining agreement applied only to union members. In this regard, the judge in this case cited to the supplemental decision of a different judge in the prior unfair labor practice case to support his conclusion that the collective-bargaining agreement was limited to union members. We point out, however, that the Board in an unpublished decision of November 6, 1991, adopting the supplemental decision in the prior case, specifically declined to adopt the judge's "apparent conclusion" that nonunion employees performing unit work were not covered by the parties' collective-bargaining agreement because it was neither alleged nor litigated. Thus, in light of the Board's decision in the prior matter, we find that the supplemental decision in that case provides no support for the judge's conclusion in the instant case. Additionally, although, as the judge here notes, there is some acknowledgment in the instant proceeding that the parties' prior agreement was not applied uniformly to all unit employees, this falls far short of a sufficient basis to conclude that the agreement was in fact limited to union members only. We thus decline to make such a determination, especially in light of the judge's finding that there is no evidence that the Union knew of or acquiesced in the manner in which the Respondent applied the collective-bargaining agreement before the events at issue.⁵

With respect to the settlement agreement, it is clear from the supplemental decision in the prior unfair labor practice proceeding that the Union was aware that there were employees doing unit work other than the members named in certain provisions of the settlement agreement at the time it entered into that agree-

²We note, however, that, contrary to the judge's statement, it is well established that the Board will not set aside a Board election due to preelection unfair labor practices in the absence of the filing of a timely and meritorious election objection. *Irving Air Chute Co.*, 149 NLRB 627 (1964). Moreover, the cases cited by the judge did not support his statement. This misstatement regarding Board precedent does not affect our analysis of the judge's decision.

³In agreeing with the judge's analysis, we disavow reliance on his statement that the irrebuttable presumption of majority support for the duration of a contract term undoubtedly prompted Respondent Gardner Engineering, Inc. to settle the prior unfair labor practice case.

⁴At one point in his decision, the judge stated that the prior agreement was limited in its application to employees dispatched from the Union's hiring hall. Contrary to the judge's statement, there is no evidence to that effect. As the judge also noted, however, there is

some evidence, discussed above, that Respondent Gardner Engineering, Inc. restricted the application of the terms of its contracts to union members.

⁵Cf. *Arthur Sarnow Candy Co.*, 306 NLRB 213, 215-216 (1992). In that case, the Board adopted the finding that an agreement was applied to members only and therefore the presumption of continuing majority status could not be applied. There, however, unlike here, the facts established that although the Union did not agree with the employer's practice the Union should have known about it.

ment. However, we disagree with the judge's finding that the coverage of the settlement agreement itself was limited to members only. In this regard, as was true with the prior collective-bargaining agreement, the terms of the settlement agreement extended recognition to the Union in a unit of all those performing bargaining unit work. Especially in light of the fact that the Union knew at the time it was entering into the settlement agreement that there were nonunion members performing such work, we do not conclude that the Union acquiesced to more limited recognition when it agreed to the broadly worded settlement. To the contrary, the fact that the Respondent entered into the broadly worded settlement after it had informed the Union that it had nonunion employees performing unit work suggests the Respondent was acquiescing to a broader recognition of the Union than it may have previously adhered to in practice. Further, we note that although some backpay terms of the settlement are restricted to the named union members, the grievance procedure set forth in appendix A is not so limited. We conclude, therefore, contrary to the judge, that through the settlement agreement the parties intended that the Respondent voluntarily recognize the Union as the exclusive bargaining representative of all unit employees.

In sum, it has not been established that either the parties' prior collective-bargaining agreement or the settlement agreement was applicable to members only and that therefore the normal presumptions of majority support would not apply. Thus, in light of the fact that the Respondent presented no evidence to rebut the Union's continuing presumption of majority status apart from the results of the non-Board election, which we decline to rely on for the reasons stated above and in the judge's decision, we find that the Union was the majority representative of the employees in the unit when the Respondent withdrew recognition and instituted new or changed rates of pay, wages, hours, and working conditions.⁶ We accordingly conclude, contrary to the judge, that the Respondent violated Section 8(a)(5) of the Act by these actions.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Gardner Engineering, Inc. & Gardner Mechanical Services, Inc., Reno, Nevada, constituting a

⁶Undisputed testimony in the record indicates that after the Respondent withdrew recognition it instituted a new 401(k) plan and wage increases, granted eligibility for its profit-sharing plan to employees formerly covered under a union plan, stopped payments to union trust funds, and made changes to employees' vacation pay and insurance coverage.

single-integrated business enterprise and employer, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promising employees new and/or increased rates of pay, wages, and working conditions to induce their refraining from or ceasing to support representation by Local 350, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States & Canada, AFL-CIO, CLC or any other labor organization.

(b) Threatening employees with loss of benefits if they secure representation by Local 350 or any other labor organization.

(c) Promulgating a rule restricting employee discussions during working hours solely with respect to discussions of the pros and cons of representation by Local 350.

(d) Threatening employees with discharge for discussing union representation.

(e) Coercively interrogating employees about other employees' union support.

(f) Discharging employees for engaging in union and/or other concerted activities protected by the Act.

(g) Withdrawing recognition from and refusing to bargain collectively in good faith with Local 350 as the exclusive collective-bargaining representative of a unit of employees classified as service technicians, excluding all other employees, guards, and supervisors as defined in the Act, and instituting new or changed rates of pay, wages, hours, and working conditions without bargaining.

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

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

(a) Offer Robert Adair immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and make him whole for any losses in wages and benefits occasioned by the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(b) Remove from the files any reference to the unlawful discharge and notify Adair, in writing, this has been accomplished and the discharge will not be used against him in any way.

(c) Recognize and bargain, on request, in good faith with Local 350 as the exclusive collective-bargaining representative of employees in the above-described unit.

(d) On request, rescind any unilateral changes in rates of pay, wages, hours, or working conditions.

(e) Make whole the unit employees for losses, if any, of earnings and other benefits suffered as a result

of unlawful implementation of unilateral changes, and reimburse them for any medical expenses as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), with interest in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and make contributions on their behalf to union trust funds, with any additional amounts thereon to be computed in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its facilities in Reno, Nevada, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 32, upon receipt shall immediately be signed and posted by Respondent's authorized representative and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure the notices are not altered, defaced, or covered by any other material.

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

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.

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 promise you new and/or improved rates of pay, wages, hours, and conditions of employment to induce you to refrain from or cease seeking

⁷If 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."

and securing representation by Local 350, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States & Canada, AFL-CIO, CLC or any other labor organization.

WE WILL NOT threaten you with loss of benefits if you seek and secure representation by Local 350, or any other labor organization.

WE WILL NOT single out and restrict your discussing, during working hours, only the pros and cons of representation by Local 350, or any other labor organization.

WE WILL NOT threaten to discipline you, including discharging you, for discussing representation by Local 350, or any other labor organization.

WE WILL NOT coercively interrogate employees about other employees' union support.

WE WILL NOT discharge or otherwise discipline you for engaging in union or other concerted activities protected by the Act.

WE WILL NOT withdraw recognition from and refuse to bargain collectively in good faith with Local 350 as the exclusive collective-bargaining representative of a unit of employees classified as service technicians, excluding all other employees, guards, and supervisors as defined in the Act, or institute new or changed rates of pay, wages, hours, and working conditions without bargaining.

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

WE WILL offer Robert Adair immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, with all seniority and other rights and privileges, and WE WILL make Adair whole for any losses in wages and benefits he suffered by virtue of our unlawful discrimination against him, with interest on the sum or sums due, and WE WILL remove from our files any reference to his unlawful discharge and advise him in writing this has been done.

WE WILL recognize and bargain, on request, in good faith with Local 350 as the exclusive bargaining representative in the above-described unit.

WE WILL, on request, rescind any unilateral changes in rates of pay, wages, hours, or working conditions.

WE WILL make whole our unit employees for losses, if any, of earnings and other benefits suffered as a result of our unlawful implementation of unilateral changes, and reimburse them for any medical expenses, plus interest, and make contributions on their behalf to the union trust funds.

GARDNER ENGINEERING, INC. & GARDNER MECHANICAL SERVICES, INC.

Gary M. Connaughton, Esq., for the General Counsel.
David G. Miller, Esq. (Breon, O'Donnell, Miller, Brown & Dannis), of Palos Verdes, California, for the Respondent.
John J. Davis, Esq. (McCarthy, Johnson & Miller), of San Francisco, California, for the Union.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge. On March 3 and 4, 1992, I conducted a hearing at Sparks, Nevada, to try issues raised by a consolidated complaint issued on January 18 and amended on February 14, 1991, based on a charge filed by Local 350 in Case 32-CA-11472 on October 24 and amended on November 1, 1990, in Case 32-CA-11472 and a charge filed by Adair on December 12, 1990, in Case 32-CA-11561.

The complaint alleged and the answer denied that Gardner Engineering, Inc. (GEI) & Gardner Mechanical Services, Inc. (GMS), at all pertinent times, constituted a single-integrated business enterprise and employer within the meaning of the Act.

The complaint further alleged and the answer denied that prior to May 1, 1990, GEI was a member of the Nevada Association of Mechanical Contractors, Inc. (Association) and authorized the Association to bargain with Local 350 on its behalf concerning the wages, hours, and working conditions of GEI's service employees; that the bargaining unit described in a 1988-1990 collective-bargaining agreement between the Association and Local 350 was appropriate for collective-bargaining purposes; that the agreement covered the wages, hours, and working conditions of GEI's service employees, an appropriate unit, and that by virtue of that and previous agreements Local 350 was the exclusive representative of GEI's service employees within that unit through the May 1, 1990 expiration of the 1988-1990 agreement.

The complaint next alleged and the answer denied in May 1989 GEI moved its service operations and employees from its GEI facility in Reno to a newly established facility in Reno, continued the same service operations formerly performed at the GEI facility with the same service employees, equipment, tools, etc., those employees utilized at the GEI Reno facility, and thereafter treated the service employees at the new facility as new, unrepresented employees of GMS.

The complaint also alleged and the answer denied in October 1989 GEI and Local 350, with the approval of the General Counsel, negotiated a non-Board settlement of issues raised by a complaint issued in Case 32-CA-10406 based on Local 350 charges the above-described change violated the Act which included, inter alia, GEI's agreement to resume recognition of Local 350 as the exclusive collective-bargaining representative of the service employees at the GMS Reno facility until a representation election to be held on or about May 1, 1990, and that since the May 1, 1990 election Local 350 has continued to be the exclusive collective-bargaining representative of the service employees employed at the GMS Reno facility.

The complaint then alleged and the answer thereto denied the alleged single enterprise and employer violated Section 8(a)(1), (3), and (5) of the Act (the Act) by:

1. Prior to the election, asking a service employee to poll other service employees about how they were going to vote

in the election scheduled to take place on or about May 1, 1990, pursuant to the October 1989 settlement in Case 32-CA-10604.

2. Prior to the election, promising the service employees a 50-cent-an-hour increase to discourage their voting for Local 350 representation.

3. Subsequent to the election, withdrawing recognition of Local 350 as the collective-bargaining representative of any of the service employees after a majority of the service employees voted against Local 350 representation.

4. Subsequent to the election, changing the service employees' rates of pay, wages, hours, and conditions of employment following the election and/or instituting new rates of pay, wages, hours, and conditions of employment, without prior notice to or bargaining with Local 350 over the changes.

5. Subsequent to the election, promulgating a rule solely barring employee discussion of the pros and cons of Local 350 representation when the service employees evidenced a renewed interest in such representation.

6. Subsequent to the election, threatening service employees with reductions in benefits if they secured Local 350 representation.

7. Subsequent to the election, discharging service employee Adair because of his union and/or protected concerted activities.

In his posthearing brief, the General Counsel moved to amend the complaint by adding an additional alleged violation of Section 8(a)(1) of the Act, to wit, by an admitted supervisor's telling an employee the owner of GEI and GMS, James Gardner, wanted to discharge a service employee for discussing Local 350 representation with other service employees subsequent to the election. Counsel for the alleged single enterprise and employer opposed the amendment on the grounds the proposed amendment was untimely and any issues created by the amendment were not fully litigated.

Counsel for the alleged single enterprise and employer moved to strike a portion of the General Counsel's posthearing brief on the ground the brief misrepresented the settlement which led to the election.

The issues created by the foregoing are whether, at pertinent times, GEI and GMS constituted a single business enterprise and employer; GEI authorized the Association to bargain with Local 350 over the wages, hours, and working conditions of its service employees and to execute a collective-bargaining agreement covering those terms on its behalf; the unit described in the 1988-1990 (and prior agreements) constituted a unit appropriate for collective-bargaining purposes within the meaning of the Act; Local 350 was a duly designated exclusive collective-bargaining representative of the unit described in the 1988-1990 agreement through its expiration; the alleged single enterprise and employer shifted its service operations and employees in Reno from the GEI facility to the GMS facility and continued the same service operations at the GMS facility which were performed at the GEI facility; following the May 1, 1990 expiration of the 1988-1990 agreement, a unit consisting of all service mechanics and service technicians, excluding all other employees, guards and supervisors as defined in the Act, was appropriate for collective-bargaining purposes within the meaning of the Act; after May 1, 1990, Local 350 was the duly designated exclusive collective-bargaining representative of em-

ployees within the unit just described; the alleged single enterprise and employer committed the acts alleged as unfair labor practices and thereby violated the Act; the General Counsel's motion to amend the complaint should be granted and, if so, whether the alleged single enterprise and employer violated the Act by the conduct alleged in the complaint amendment; and whether portions of the General Counsel's posthearing brief should be stricken.

The General Counsel, Local 350, and the alleged single enterprise and employer appeared by counsel and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. All three filed briefs.

Based on my review of the entire record, observation of the witnesses, perusal of the briefs, and research, I enter the following

FINDINGS OF FACT¹

I. JURISDICTION

The complaint alleged and the answer admitted at all pertinent times GEI was an employer engaged in commerce in a business affecting commerce within the meaning of Section 2 of the Act. The complaint also alleged at all pertinent times GMS was an employer engaged in commerce in a business affecting commerce and the answer to the complaint neither admitted nor denied that allegation. Such failure constitutes an admission.²

I therefore find at all pertinent times GEI and GMS were employers engaged in commerce in a business affecting commerce within the meaning of Section 2 of the Act.

II. LABOR ORGANIZATION

The complaint alleged Local 350 was a labor organization within the meaning of Section 2 of the Act. The answer neither admitted nor denied the complaint allegation and constitutes an admission.³

I therefore find at all pertinent times Local 350 was a labor organization within the meaning of Section 2 of the Act.

III. THE MOTIONS TO STRIKE AND AMEND

A. *The Motion to Strike*

Counsel for the alleged single enterprise and employer moved to strike portions of the General Counsel's brief setting forth terms of an October 1989 agreement between Local 350 and GEI, approved by Administrative Law Judge Clifford Anderson, and the Board settling issues raised by a complaint issued against GEI in Case 32-CA-10406.

Counsel for the alleged single enterprise and employer argues the description of the terms of the settlement agreement

¹ While every apparent or nonapparent conflict in the evidence has not been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying, and my evaluation of the reliability of their testimony; therefore, any testimony in the record which is inconsistent with my findings is discredited.

² Sec. 102.20, Rules and Regulations of the National Labor Relations Board.

³ Sec. 102.20, Rules and Regulations of the National Labor Relations Board.

contained in the General Counsel's brief misstates and misrepresents terms of the settlement agreement by indenting the description of terms of the agreement and including in the indented description terms which were not contained in the formal settlement agreement executed by the parties.

The settlement agreement was not confined to terms set out in the formal document executed by the parties; the document was orally amended on the record at a hearing conducted by Judge Clifford Anderson in Case 32-CA-10406 when the formal document was presented by the parties for his approval on the second day of the hearing. Judge Anderson approved the terms of the settlement agreement as amended by the parties, on the record, at the hearing, and the General Counsel's brief accurately sets forth terms of the amended agreement.

The fact the General Counsel indented terms of the settlement agreement when he described them in his brief is immaterial; such indentation was neither a "misstatement" nor a "misrepresentation." I thus deny the motion.

B. *The Motion to Amend*

In his posthearing brief, the General Counsel moved to amend the complaint by adding an allegation that the alleged single enterprise and employer violated Section 8(a)(1) of the Act by an alleged October 1990 statement uttered by admitted Supervisor Bruce Wright to an employee to the effect Owner James Gardner wanted to discharge service employee Don Scilacci for discussing Local 350 representation with other employees. The General Counsel alleges the statement was an implied threat to discharge employees for discussing union representation and a violation of Section 8(a)(1) of the Act.

Counsel for the alleged single enterprise and employer contends that because the proposed amendment was not contained in the complaint he was deprived of an adequate opportunity to prepare and present defenses and unable to fully and fairly litigate the issue or issues raised. Counsel further argues the amendment is barred under the 6-month limitation period of Section 10(b) of the Act.

The complaint alleged the alleged single enterprise and employer violated Section 8(a)(1) of the Act by, admitted, Supervisor Wright's telling service employee Adair, in the course of a conversation between Wright and Adair on or about October 2, 1990, GMS would not be able to guarantee anyone work in the winter when work was slow and would not reimburse employees for the cost of job-related schooling if Local 350 were to again represent any of the service employees.

These two alleged independent violations of Section 8(a)(1) of the Act stemmed from the Region's investigation of Adair's December 12, 1990 charge in Case 32-CA-11561 that the alleged single enterprise and employer violated Section 8(a)(1) and (3) of the Act by discharging him on October 5, 1990, for engaging in activities on behalf of Local 350 and other concerted activities protected by the Act and Local 350's October 24, 1990 charge in Case 32-CA-11472.

Adair testified in October 1990, prior to his October 5, 1990 discharge, in the course of a conversation with Wright, Wright stated: (1) GMS would not be able to guarantee anyone work in the winter when work was slow if they were represented by Local 350; (2) GMS would not reimburse employees for school tuition if they were represented by Local

350; and (3) James Gardner wanted to discharge Don Scilacci for discussing Local 350 representation with other employees and he had to talk him out of doing so. Counsel for the alleged single enterprise and employer called Wright to the stand in rebuttal and Wright testified he did not recall discussing statements (1) and (2) and that he did not utter statement (3).

Neither the Adair nor the Local 350 charges listed the statements (1) and (2) set out in above and set forth in the complaint as alleged violations of the Act. Those complaint allegations were based on statements made to the Region in the course of the Region's investigation of the merits of the charges.

The General Counsel has broad latitude in including within a complaint allegation of unfair labor practices disclosed during such an investigation.⁴

The charges which prompted the investigation were timely filed (i.e., within 6 months after the date Wright allegedly uttered the two statements set out in the complaint) and the third statement allegedly uttered by Wright was allegedly uttered during the same conversation in which he uttered the two statements set out in the complaint and forms the basis for the proposed complaint amendment.

The alleged single enterprise and employer was fully aware prior to the hearing of the Wright comments allegedly uttered during the early October 1990 conversation between Wright and Adair, which formed the basis for the General Counsel's complaint allegation that the alleged single enterprise and employer violated Section 8(a)(1) of the Act, and that those alleged comments formed part of the basis for the General Counsel's complaint allegation that the alleged single enterprise and employer was discriminatorily motivated in effecting Adair's October 5, 1990 discharge.

The alleged content of the Wright/Adair October 1990 conversation was fully developed by the General Counsel and counsel for the alleged single enterprise and employer during the hearing.

Counsel for the alleged enterprise made no objection to the inclusion of the Wright statements described in statements (1) and (2) above as alleged unfair labor practices in the complaint.

The third alleged Wright statement is closely related to the complaint allegations described in statements (1) and (2) above.

The issues raised by the proposed amendment were fully and fairly litigated and the alleged single enterprise and employer suffers no prejudice by my grant of the proposed amendment and ruling on its merits.⁵

I therefore grant the General Counsel's motion to include the third alleged Wright statement in his early October 1990 conversation with Adair as an additional complaint allegation.⁶

⁴ *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307 (1959).

⁵ The fact the General Counsel's motion to amend was contained in his posthearing brief is immaterial. *Heartland of Lansing Nursing Home*, 307 NLRB 152 (1992).

⁶ *Facet Enterprises v. NLRB*, 907 F.2d (10th Cir. 1990); *Northern Wire Corp. v. NLRB*, 887 F.2d 1313 (7th Cir. 1989), enfg. 291 NLRB 727 (1988); *NLRB v. Coca Cola Bottling Co. of Buffalo*, 811 F.2d 82 (2d Cir. 1987), enfg. 274 NLRB 1341 (1985); *Rockwell International Corp. v. NLRB*, 814 F.2d 1530 (6th Cir. 1987), enfg. 278 NLRB 55 (1986); *NLRB v. Allen's IGA Foodliner*, 651 F.2d 438

IV. THE SINGLE ENTERPRISE/EMPLOYER; ASSOCIATION MEMBERSHIP AND AUTHORITY; APPROPRIATE UNIT UNDER THE TERMS OF THE SERVICE AGREEMENTS; ALLEGED DISGUISED CONTINUATION AS NONUNION; AND APPROPRIATE UNIT AFTER MAY 1, 1990 ISSUES

At relevant times James Gardner owned all the shares of Gardner Holding, Inc. (GHI) and GHI owned all the shares of GEI and GMS. Thus Gardner owned and controlled GHI, GEI, and GMS. His ownership and control was not passive; he actively engaged in managing the three corporations, including the labor relations of GEI and GMS.⁷

Prior to May 1989, GEI employed construction employees and service employees who worked out of a single Reno facility in conducting its business of installing and servicing heating, air conditioning, and piping systems in the Reno, Nevada area. GEI, at that time was a member of the Nevada Association of Mechanical Contractors, Inc. (Association), authorized the Association to negotiate and enter into collective-bargaining agreements with Local 350 on its behalf and was bound by two collective-bargaining agreements negotiated on its behalf by the Association with Local 350, one agreement covered the wages, hours, and working conditions of its employees engaged in construction, and a second agreement, called the Service, Maintenance and Refrigeration Agreement (the Service Agreement), covered its service employees.

The last Service Agreement between the Association and Local 350 was executed in 1988 for a term extending from May 2, 1988, through May 1, 1990. In section 3 of article I of that agreement (and preceding Service Agreements), Local 350 was formally recognized as the exclusive collective-bargaining representative of all employees engaged in the fabrication, assembly, installation, dismantling, repairing, adjusting, altering, servicing, handling, distribution, and tying in of all piping materials, appurtenances, and equipment of all heating and refrigeration systems and their components; including hangars, supports, and controls, who were employed by the employer-members of the Association.

The Service Agreement specified workweeks, what constituted overtime and the pay, holidays and pay for working on those holidays or during time outside the specified workweek, shift premiums, rates of pay for servicemen and apprentices, and contributions per working hour of each covered employees to vacation, health and welfare, apprenticeship and training, local retirement, national pension, and contract administration funds or trusts. The agreement also required the registration of all apprentices with Local 350, established ratios of apprentices to servicemen, established a grievance/arbitration procedure, and required each employer covered by the agreement to utilize Local 350's hiring hall for hiring purposes.

Despite the terms of the 1988-1990 and previous Service Agreements, the alleged single enterprise and employer limited its application of the terms of the Service Agreements

(6th Cir. 1981), enfg. 244 NLRB 202 (1979); *Pentre Electric*, 305 NLRB 882 fn. 1, 883 (1992); and *Westinghouse Electric Corp.*, 296 NLRB 1166 (1989). Also see *Embassy Suites Resort*, 309 NLRB 1313 (1992).

⁷ I find and conclude at all pertinent times Gardner was an officer, supervisor, and agent of GEI and GMS acting on their behalf within the meaning of Sec. 2 of the Act.

to journeyman servicemen who were dispatched from Local 350's hiring hall at its request. The rates of pay, wages, hours, and working conditions of apprentices hired "off the street" and servicemen either hired "off the street" or promoted to that position from apprentice positions were unilaterally established by the alleged single enterprise and employer. As a result, in May 1989 a majority of the servicemen and apprentices GEI employed at its Reno facility were not members of Local 350, GEI was not recognizing Local 350 as their collective-bargaining representative, and their rates of pay, wages, hours, and working conditions were not governed by the terms of the 1988-1990 Service Agreement. The record does not disclose whether Local 350 was aware of and acquiesced to that noncoverage prior to the negotiation and execution of the October 1989 settlement agreement in Case 32-CA-10406, but Judge Anderson specifically ruled in a supplemental decision he issued in that case that Local 350 was aware of noncoverage at the time it entered into the settlement.

On Friday, May 19, 1989, Bruce Wright, then the general manager of the service department at GEI,⁸ advised the service employees GEI was going to cease its service operations at the Reno facility from which it conducted its construction and service operations and was (beginning the next workday, May 22, 1989) going to conduct its service operations separately at another Reno facility under the GMS name.⁹

Wright offered employment at the GMS Reno facility to all the currently employed GEI service employees, but announced the service operations at the GMS facility were going to be nonunion and conditioned employment at the GMS Reno facility on execution by each service employee of an application for employment by GMS and acceptance of employment as a new, unrepresented employee.

Wright advised the journeyman servicemen who were members of Local 350 and whose wages, etc., were governed by the 1988-1990 and prior Service Agreements they had two options; either to execute applications for employment at the GMS Reno facility as new employees on an unrepresented basis, at the rates of pay, wages, hours, and working conditions of the other, currently unrepresented, GEI service employees or the option of reporting to the Local 350 hiring hall for registration and dispatch to employers whose employees were covered by the 1988-1990 Service Agreement.

Several servicemen, who were Local 350 members, wanted continued coverage under a Local 350 agreement (particularly continued participation in the trusts established under the Association-Local 350 agreements) elected the latter option. Five Local 350 members selected the former option. Those five, and the servicemen and apprentices who were not members of Local 350, filled out applications for employment as new employees of GMS and commenced work at GMS' Reno facility the following workday, May 22, 1989, performing the same work with the same tools, equipment, supplies, and vehicles they utilized at the GEI facility, under the same supervision they had while working out of the GEI facility, and performing work for the same customers or class of customers.

⁸I find that at all pertinent times Wright was a supervisor and agent of GEI and GMS acting on their behalf within the meaning of Sec. 2 of the Act.

⁹Prior to that time, GMS operated a service facility in Las Vegas, Nevada.

Immediately following the shift, Gardner appointed Wright president and general manager of GMS and GEI ceased applying the terms of the Service Agreement with respect to the five GEI servicemen who accepted employment at the GMS-owned facility. Thereafter uniform rates of pay, wages, hours, and conditions of employment were instituted for all service employees, which differed substantially from those set out in the 1988-1990 Service Agreement.

Local 350 promptly filed charges with the Region in Case 32-CA-10406, a complaint issued alleging the GMS Reno operation was a disguised continuance of the GEI service department, and a hearing on the issues raised by the complaint commenced before Judge Clifford Anderson on October 18, 1989. In negotiations on the second day of the hearing before Judge Anderson, after hearing evidence the first day of the hearing concerning the members-only coverage of the 1988-1990 Service Agreement, Local 350 and GEI agreed, with the concurrence of the General Counsel, on terms of settlement limited in its remedial reach to the five Local 350 members who accepted employment on May 19, 1989, at the GMS Reno facility. Judge Anderson recommended approval of the agreement and the Board adopted his recommendation.

The settlement agreement provided:

1. GEI agreed to recognize Local 350 as the exclusive collective bargaining representative of "all employees in the service unit alleged in the complaint." for the duration of the 1988-1990 Service Agreement (i.e., to May 1, 1990).¹⁰

2. GEI agreed to pay \$12,000 to the trust funds established under the Service Agreement, as full and complete settlement of claims alleged in the complaint issued in Case 32-CA-10406 with respect to alleged delinquencies in GEI payments into the trusts on behalf of the five Local 350 members who accepted employment at the GMS Reno facility on May 19, 1989. The payment was designated as intended to cover payments to the funds on behalf of the five which should have been tendered to the funds by GEI between May 19, 1989 and November 1, 1989.

3. GEI agreed to pay the amounts set out in the Service Agreement to the various funds on behalf of the five Local 350 members who accepted employment at the GMS Reno facility commencing November 1, 1989 and continuing through the expiration date of the Service Agreement (May 1, 1990).

4. GEI agreed to make contributions on behalf of any employees hired as "Service Mechanics" or "Service Technicians" on and after November 1, 1989 to the funds established under the Service Agreement for the balance of the term of that Agreement.

5. Local 350 and GEI agreed that on or about May 1, 1990 Local 350 and GEI would select a neutral party to conduct a secret ballot election among employees at the GMS Reno facility classified as Service Mechanics

¹⁰The complaint in Case 32-CA-10406 described the unit as:

All full-time and regular part-time employees performing work described in "Section 3" of the May 2, 1988 through May 1, 1990 master collective bargaining agreement between the Union and the Association (the work described in Section 3 of Article I of the agreement is set forth above), excluding all other employees, guards and supervisors as described in the Act.

and/or Service Technicians to determine whether a majority of the employees in those classifications desired representation by Local 350, agreeing in the event a majority voted for Local 350 representation, GEI would commence negotiations with Local 350 concerning terms of a successor to the Service Agreement expiring May 1, 1990 and, in the event a majority voted against Local 350 representation, Local 350 would not demand negotiations for a successor agreement.

6. Local 350 agreed to withdraw its charges in Case 32-CA-10406 and further agreed Local 350 would not file any court actions seeking contributions to the trusts established under the 1988-1990 Service Agreement for the period between May 19, 1989, and the expiration date of the 1988-1990 Service Agreement.

7. GEI agreed to reimburse any trust fund which determined the \$12,000 payment did not fully resolve any delinquency in the payments due to such fund to cover the May 19-November 1, 1989 period with respect to any of the five Local 350 members who accepted employment at the GMS facility on May 19, 1989, to a limit of \$800 for any one claimant and a maximum total outlay of \$3,200.

Prior to the expiration of the 1988-1990 Service Agreement, GEI terminated the authority of the Association to represent GEI for collective-bargaining purposes vis-a-vis service employees and terminated the 1988-1990 Service Agreement as of May 1, 1990, pursuant to the terms of the 1988-1990 Agreement's duration clause. Both terminations were timely and valid.

On or about May 1, 1990, Local 350 and GEI authorized Justice of the Peace William Beemer to conduct a secret-ballot election at the GMS Reno facility on May 4, 1990.

By that time, only three of the five Local 350 members who elected to accept employment at the GMS facility on May 19, 1989, were still employed at the GMS Reno facility.

Gardner furnished Beemer with a list of the names of the employees eligible to vote in the election. He listed the names of 11 employees 5 classified as "HVAC Service Technician Journeyman"; 1 classified as "HVAC Service Technician Journeyman B"; 1 classified as "HVAC Controls Specialist"; 1 classified as "HVAC Service Technician Installer"; and 3 classified as "HVAC Service Technician Apprentice."

All 11 cast ballots; 2 voted for Local 350 representation and 9 voted against Local 350 representation.

On these facts, I find and conclude:

1. At times pertinent, GEI and GMS constituted a single business enterprise and employer within the meaning of the Act.¹¹

2. A unit consisting of the GEI/GMS employees performing the work described in section 3 of article I of the 1988-1990 Association-Local 350 agreement was and is an appropriate unit for collective-bargaining purposes within the meaning of the Act.

3. Prior to May 2, 1988, the Association was authorized by GEI to negotiate and execute on its behalf collective-bar-

gaining agreements with Local 350 covering the rates of pay, wages, hours, and working conditions of GEI's employees within the unit.

4. Pursuant to that authority, the Association negotiated and executed collective-bargaining agreements with Local 350 covering the rates of pay, wages, hours, and working conditions of GEI's employees within the unit, including an agreement for a term extending from May 2, 1988, through May 1, 1990.

5. Under terms of that and prior agreements, Local 350 was recognized by GEI as the exclusive collective-bargaining representative of GEI employees within the unit.

6. Despite the terms of the 1988-1990 and prior Service Agreements, GEI applied the terms of those agreements only to journeyman servicemen/Local 350 members referred to GEI from Local 350's hiring hall at GEI's request.

7. On July 19, 1989, GEI engaged in a disguised continuation of its service operations in Reno by shifting those operations to another facility in Reno ostensibly operated by GMS, continued those operations on a nonunion basis, and ceased to honor the terms of the 1988-1990 Service Agreement with respect to the journeyman servicemen/Local 350 members who accepted employment at the GMS Reno facility.

8. On October 19, 1989, GEI and Local 350 settled the issues raised by a complaint issued on the basis of charges filed by Local 350 over that disguised continuation by negotiating a settlement agreement in which GEI agreed to restore the status quo ante, i.e., compliance with the 1988-1990 Service Agreement for the balance of its term only with respect to the five journeyman servicemen/Local 350 members who accepted employment at the GMS Reno facility on May 19, 1990.

9. The unit set forth in the settlement agreement and in the complaint as an appropriate unit of service employees at the GMS Reno facility after May 1, 1990, i.e., a unit consisting of employees classified as service technicians, excluding all other employees, guards, and supervisors as defined in the Act was and is appropriate for collective-bargaining purposes within the meaning of the Act (I consider the "Controls Specialist" as a "Service Technician," since the job title indicates he specializes in servicing heating and cooling controls, a component of the service functions of a service technician).

V. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Alleged Mid-April 1990 Poll*

The complaint alleged and the answer thereto denied in mid-April 1990, James Gardner violated Section 8(a)(1) of the Act by instructing an employee eligible to vote in the election to poll the other employees eligible to vote in the election regarding their expected vote in the election.

In addition to denying Gardner committed the alleged violation, GEI/GMS contends the complaint allegation is time-barred under Section 10(b) of the Act.

In April 1990, in the course of a conversation between Gardner and Adair, a local 350 member employed at the GMS Reno facility as a journeyman serviceman, Gardner stated he had been allowing Adair to take one of the trucks the servicemen used in their work home at night and was paying for California registration of the truck (Adair lived in Truckee, California, and commuted between his California

¹¹ *Blackberry Creek Trucking*, 291 NLRB 474 (1988), cases cited therein; also see *Colonial Metal Spinning & Stamping Co.*, 310 NLRB 21 (1992).

home and Nevada work assignments in the truck in question). Gardner next said he hoped Adair would keep that in mind when he voted in the forthcoming election. He then handed Adair a document listing the names of employees eligible to vote in the election with columns headed "yes," "no" and "comments" after the names, and asked Adair to make entries in the columns indicating how Adair thought each listed employee would vote in the election and return the document to him. Adair accepted the document but later decided it was improper for him to fill in the columns and return the document to Gardner, discarded the document and heard nothing further from Gardner with respect to the request.

Adair stated the conversation occurred approximately a week and a half prior to the May 4, 1990 election, i.e., on or about April 24, 1990. The Local 350 charge precipitating the Regional investigation which resulted in this complaint allegation was filed on October 24, 1990, exactly 6 months subsequent to the former date.

I credit Adair's testimony with respect to the date of the conversation and, based thereon, find and conclude the complaint allegation was not untimely and warrants consideration and determination on its merits.

The General Counsel contends Adair correctly construed the Gardner request as a request he poll the other employees, list their voting intentions on the document, and return it (as well as listing his own intention). Alternatively, the General Counsel argues the Gardner request constituted an unlawful interrogation of Adair concerning his and other employees' voting intentions.

In *Rossmore House*,¹² the Board ruled questioning an employee concerning his and other employees' views about union representation is not violative of the Act, absent intimidation, threats, or promises.

Gardner's request was unaccompanied by any intimidation, threat, or promise. It was a single, isolated incident, and Adair never responded with the requested information.

Under these circumstances, I find and conclude GEI/GMS did not violate the Act by Gardner's mid-April request.

B. The Alleged May 3, 1990 Violation

The complaint alleged and GEI/GMS conceded on May 3, 1990, the day before the scheduled election, Gardner promised the servicemen and apprentices employed at the GMS Reno facility increased wages after the election, regardless of the outcome of the election.

The complaint alleged and GEI/GMS denied the Gardner promise violated Section 8(a)(1) of the Act.

Shortly before the election, Gardner learned Local 350 and the Association agreed, in negotiating a successor to the Service Agreement expiring May 1, 1990, to a two-step wage increase for employees covered by the agreement, i.e., a 40-cent-an-hour wage increase effective May 1, 1990, and a 20-cent-an-hour increase 6 months later.¹³

¹² *Rossmore House*, 269 NLRB 1176 (1984), *affd.* 760 F.2d 1006 (9th Cir. 1985).

¹³ Gardner was informed of the terms of the Local 350-Association Agreement by a Local 350 representative, who cautioned him, in view of the scheduled election, not to attempt to influence the election outcome by initiating changes in the wages of the service employees at the GMS Reno facility.

Gardner summoned the servicemen and apprentices employed at the GMS Reno facility, as well as GMS President Wright and Service Manager Teresa Doane, to a meeting on May 3, 1990, the day prior to the election.

At that meeting, Gardner described a profit-sharing plan the employees would participate in if a majority voted against continued Local 350 representation;¹⁴ stated he was looking into the creation and implementation of a 401K plan covering the employees;¹⁵ advised the employees that Local 350 negotiated a 40-cent-an-hour increase for employees covered by the Service Agreement effective May 1, 1990, and stated he was going to grant the employees a 50-cent-an-hour increase after the election, regardless of its outcome. He also stated he was going to continue a training program and continue to reimburse employees for the cost of their job-related schooling.¹⁶

Gardner did not tell the employees Local 350 negotiated a 20-cent-an-hour increase for employees covered by the Service Agreement, effective November 1, 1990, in addition to the May 1, 1990 increase of 40 cents per hour.¹⁷

GEI/GMS contends Gardner's announcement of his intended new and/or increased wages and benefits confirmed changes previously planned and conformed with past policy and practice and thus did not violate the Act.

I reject that contention.

First, after announcing Local 350 had secured a 40-cent-an-hour increase for employees represented by Local 350 and covered by the Service Agreement supplanting the agreement which expired May 1, 1990, Gardner promised the employees a wage increase 10 cents per hour higher than that, without mentioning the second-step increase; second, there is no evidence he called employees to previous meetings to make announcements and promises of new and/or increased wages and benefits of the magnitude of those announced and promised at the May 3, 1990 meeting; third, the rates of pay, wages, and fringe benefits of the service employees at the GMS facility who were not members of Local 350 after May 19, 1989, differed from and were unrelated to the rates of pay, wages, and fringe benefits set out in the Service Agreement expiring May 1, 1990, and the record fails to disclose any correlation between the rates of pay they would receive as a result of the 50-cent-an-hour increase and the rates of pay of the servicemen and apprentices covered by the agreement Local 350 negotiated as the successor to the Service Agreement which expired May 1, 1990; and fourth, the timing of Gardner's statements and promises support a conclusion, which I make, the statements and promises were designed and intended to discourage employee support of Local 350 in the election the next day.

The Board has consistently held employer promises of new or changed wage rates, benefits, and conditions of employment which increase and/or improve prior wage rates,

¹⁴ The plan by its terms was limited to employees who were not represented by a labor organization and covered by a collective-bargaining agreement.

¹⁵ The plan was placed in effect on July 1, 1990.

¹⁶ Gardner had been informed by an employee or employees that Local 350 had been telling service employees he would reduce their benefits if they voted against Local 350 representation.

¹⁷ Gardner stated he promised the employees a 50-cent-an-hour increase rather than a 40-cent-an-hour increase to equal in value the staggered increase negotiated by Local 350.

benefits, and conditions immediately prior to an election intended to determine whether employees desire union representation are violative of the Act,¹⁸ particularly where, as here, an employer advises the employees one of the new benefits will be available only to nonrepresented employees.¹⁹

The Board reasoned the timing and nature of such inducements constitutes unlawful discouragement of employee support for union representation, in violation of Section 8(a)(1) of the Act.

On the basis of the foregoing, I find and conclude by Gardner's promises and statements 1 day prior to the May 4, 1990 election, GEI/GMS violated Section 8(a)(1) of the Act.

C. The May 4 and 5, 1990 Recognition Withdrawal and Unilateral Changes

The complaint alleged GEI/GMS ceased to recognize Local 350 as the exclusive representative of service employees at the GMS Reno facility after receiving the results of the May 4, 1990 election, at all times thereafter GEI/GMS failed and refused to recognize Local 350 as their representative, and on and after May 5, 1990, made changes in the rates of pay, wages, hours, and working conditions of those employees without prior notice to or bargaining with Local 350, thereby violating Section 8(a)(1) and (5) of the Act.

GEI/GMS concedes it took those actions but contends it did not thereby violate the Act on the ground that the October 19, 1989 settlement contemplated GEI/GMS' withdrawing recognition of Local 350 as the collective-bargaining representative of the employees in question and bargaining with Local 350 with respect to their rates of pay, etc., following the May 4, 1990 vote against Local 350 representation.

Noting Local 350 did not file its charge that GEI/GMS violated the Act by withdrawing recognition and effecting unilateral changes until October 24, 1990, over 5 months after its commission of the alleged unfair labor practices, and further noting under the Board's Rules and Regulations governing Board-conducted representation elections, objections to conduct allegedly affecting an election must be filed within 5 days after the election, GEI/GMS also argues it would be inequitable to set aside and treat of no force and effect the May 4, 1990 election results on the basis of alleged unlawful employer interference in the eligible voters' exercise of a free and uncoerced choice, in the absence of election objections filed within 5 days after the election.

The latter contention is rejected.

The election was a *non-Board* election; Local 350 could not file and the Region could not entertain objections de-

signed to set it aside. It was also established Local 350 was unaware of Gardner's May 3, 1990 statements until October 1990 and timely filed its charge Gardner's preelection promises and statements violated Section 8(a)(1) of the Act when it learned of the statements in question.

The Board has set aside and treated of no force and effect Board-conducted elections a union has lost, despite the union's failure to file objections thereto, when the Board found merit in a subsequent union charge the employer's preelection conduct violated the Act and prevented a fair and free election (*Nichols*, supra). In numerous cases, the Board set aside Board-conducted elections when, in unfair labor practice proceedings based on postelection charges filed by the union, the Board found merit in a charge the employer prevented a free and fair election by its preelection conduct (*Bi-Lo Foods*, *Ring Can*, *Chosun*, and *La Favorita*, supra, plus numerous earlier cases).

Turning next to the contention the parties contemplated GEI/GMS' withdrawing recognition from Local 350 if Local 350 lost the May 1990 election by virtue of the 1989 settlement and thus GEI/GMS was lawfully entitled to withdraw such recognition and effect unilateral changes in wages, etc. after Local 350 lost the May 4, 1990 election, GEI/GMS cites *Hollywood Roosevelt Hotel*, 235 NLRB 1398 (1978), as authority therefor.

That case turned on a Board-finding that the charging union and the Board's Regional personnel were aware of and considered the employer's preelection conduct which formed the basis for the union's postelection charge as disposed of under the terms of the settlement agreement.

That is not the case here; the settlement in this case was reached in 1989, while the GEI/GMS preelection conduct which formed the basis for Local 350's 1990 charge occurred in 1990. The *Hollywood Roosevelt Hotel* decision is inapplicable.

I thus find and conclude the October 1989 settlement does not bar the determination on its merits of the complaint allegation GEI/GMS violated the Act by withdrawing recognition of Local 350 and failing to notify and bargain with Local 350 prior to instituting new or changed rates of pay, wages, hours, and working conditions.

The basic issues are: (1) whether the results of the May 4, 1990 election should be disregarded and treated as having no force and effect because of GEI/GMS' violation of Section 8(a)(1) of the Act—making promises and statement 1 day prior to the May 4, 1990 election to influence the voters in that election and (2) if so, whether GEI/GMS violated Section 8(a)(1) and (5) of the Act by its failure and refusal to recognize and bargain with Local 350 after the expiration of the 1988–1990 Service Agreement.

An employer has a duty and obligation under the Act to recognize a union as the exclusive collective-bargaining representative of an appropriate unit of employees and to bargain with the union over the rates of pay, wages, hours, and working conditions of the unit employees when the union represents a majority of the employees within the unit.

The Board, with court approval, irrebuttably presumes a union represents a majority of the employees within an appropriate unit for the duration of an agreement wherein an employer recognized the union as the exclusive collective-bargaining representative of the unit employees (or for 1 year after the union has been certified by the Board as the major-

¹⁸ *NLRB v. S. E. Nichols, Inc.*, 862 F.2d 952 (2d Cir. 1988), affg. 284 NLRB 556 (1987); *Pincus Elevator*, 308 NLRB 684 (1992); *Borden, Inc.*, 308 NLRB 113 (1992); *J & C Towing Co.*, 307 NLRB 198 (1992); *Stanford Realty Associates*, 306 NLRB 214 (1992); *Browning-Ferris Industries*, 306 NLRB 682 (1992); *Coronet Foods*, 305 NLRB 119 (1991); *Sears, Roebuck & Co.*, 305 NLRB 193 (1991); *Bi-Lo*, 303 NLRB 749 (1992); *CPF Corp.*, 303 NLRB 316 (1991); *Ring Can*, 303 NLRB 353 (1991); *Chosun Daily News*, 303 NLRB 901 (1991); *La Favorita*, 302 NLRB 849 (1991); *Fun Connection*, 302 NLRB 740 (1991); and *Fontaine Body*, 302 NLRB 863 (1991).

¹⁹ *E & L Plastics Corp.*, 305 NLRB 1119 (1992); *Alaska Pulp*, 300 NLRB 232 (1990).

ity representative) and required the employer to recognize the union as the exclusive collective-bargaining representative of the unit employees and bargain with the union over their wages, etc., for the term of the agreement or the certification year.

Following the expiration of the agreement or the certification year, the Board presumes the union continues to represent a majority of the unit employees unless, following agreement expiration, it is demonstrated a majority of the unit employees do not desire representation by the union, *provided* the employer has not committed unfair labor practices “sufficiently serious to significantly undercut employee support for the union and thus cast doubt on the validity of the election results” (where a representation election was held among the unit employees following the expiration of the agreement).²⁰

Where employer unfair labor practices satisfy the above criteria, the Board invalidates a majority vote against union representation (as well as production of a petition signed by a majority stating the employees do not desire union representation) and, applying the latter presumption set out above, finds the employer violated the Act by withdrawing or withholding recognition from the union and instituting new or changed rates of pay, wages, hours and working conditions on the basis of the election results or his receipt of such a petition.²¹

In this case there is no evidence concerning the actual extent of Local 350 support among the unit employees before May 19, 1989, and there is evidence it was unlikely on that date Local 350 support extended beyond a minority of the unit employees—the journeyman servicemen/Local 350 members—when Gardner, on that date, shifted his service operations from the GEI Reno facility to the GMS Reno facility.

The irrebuttable presumption noted above undoubtedly prompted GEI’s October 1989 agreement to settle Local 350’s charges in Case 32–CA–10406 by resuming technical recognition of Local 350 as the exclusive representative of the employee classifications described in the 1988–1990 Service Agreement’s recognition clause, but in actuality, under the terms of the October 1989 settlement agreement, as in the application of the terms of the 1988–1990 Service Agreement from its inception, the Service Agreement was only applied to the *five journeyman servicemen/Local 350 members* who accepted employment at the GMS Reno facility on May 19, 1989, i.e., it continued to be administered as a members-only contract.

In view of Local 350’s, the General Counsel’s, Judge Anderson’s, and the Board’s tacit recognition of the foregoing, I find and conclude a presumption of continuing Local 350 support among the unit employees after May 1, 1990, is untenable; the only presumption which may be entertained after

May 4, 1990, is a presumption the three Local 350 members were Local 350 supporters.

I therefore find and conclude, while GEI/GMS’ May 3, 1990 conduct prevents any reliance on the May 4, 1990 election results as proof a majority of the unit employees did not desire Local 350 representation at that time, in view of that tacit recognition and the absence of evidence Local 350 had any support among the unit employees beyond its members employed at the GMS Reno facility after May 1, 1990, there is insufficient basis in the record to support a finding and conclusion GEI/GMS violated the Act by ceasing after May 1, 1990, to recognize Local 350 as the exclusive representative of a *majority* of the service employees at the GMS Reno facility and instituting new or changed rates of pay, wages, hours, or working conditions.

I thus find and conclude GEI/GMS did not violate the Act by ceasing to recognize Local 350 as the representative of the unit employees and by instituting new or changed rates of pay, wages, hours, and working conditions.

D. *The Alleged Postelection Threats and Alleged Discriminatory No-Solicitation Rule*

Following the May 4, 1990 election Gardner, as he promised on May 3, distributed to all the unit employees documents describing the profit-sharing plan and 401(k) plans he planned to institute.

The employees learned from those documents they would not be eligible for any distributions from the profit-sharing plan until they had worked at the GMS Reno facility for 1 year and would not be able to make withdrawals from their 401(k) plans until they had worked at the facility for 6 years.

The Local 350 members who accepted employment at the GMS Reno facility also learned they would not be placed under the Employer’s health plan until they exhausted coverage under the trust established for that purpose pursuant to the 1988–1990 Service Agreement.²²

The employees discussed these limitations and their dissatisfaction over the Employer’s failure to credit the time they worked at the GEI Reno facility towards the date they would be eligible for profit sharing and the date they could begin to make withdrawals from their 401(k) plans. The Local 350 members also discussed their dissatisfaction over the employer’s failure to cover them under the employer health plan immediately after the expiration of the 1988–1990 Service Agreement. Adair participated in the discussions and stated he would discuss the employees’ concerns and complaints with Gardner.²³

Adair contacted Gardner, informed Gardner the employees thought the failure to credit GEI service towards entitlements under the profit sharing and withdrawals from the 401(k) plans, as well as the failure to cover the Local 350 members with the employer health plan after May 1, 1990, was unfair. Gardner responded he wanted to encourage long service among the employees by the 401(k) plan provision, he did not want to pay for double coverage for health insurance,

²⁰ *St. Agnes Medical Center*, 304 NLRB 27 (1991).

²¹ *Kuna Meat Co. v. NLRB*, 966 F.2d 428 (8th Cir. 1992); *Xidex Corp. v. NLRB*, 924 F.2d 245 (D.C. Cir. 1991); *NLRB v. Powell Electric*, 906 F.2d 1007 (5th Cir. 1990); *NLRB v. Tahoe Nuggett*, 584 F.2d 293 (9th Cir. 1978); *NLRB v. Vegas Vic*, 546 F.2d 77 (9th Cir., 1976); *Terrell Machine Co. v. NLRB*, 427 F.2d 1088 (4th Cir. 1970); *Lee Lumber & Building Material*, 306 NLRB 408 (1992); *Ron Tirapelli Ford*, 304 NLRB 576 (1992); *St. Agnes Medical Center*, supra; *Davies Medical Center*, 303 NLRB 195 (1992); and *Cypress Lawn Cemetery Assn.*, 300 NLRB 609 (1991).

²² Participants in the trust plan earned credits which extended coverage thereunder for some time after employer contributions on their behalf ceased.

²³ Adair was a leadman, had been in the service of GEI/GMS longer than the other employees, and was often looked to for guidance.

since he had paid into the trust fund on behalf of the Local 350 members while he was complying with the Service Agreement, and that it was his company and he would do as he pleased with respect to profit sharing.

Adair relayed Gardner's responses to other employees and they began to discuss the possibility of another election on the question of whether they desired Local 350 representation.

The foregoing discussions continued through the summer and early fall of 1990.

Wright became aware of the discussions and, in a conversation with Adair the morning of October 2, 1990, informed Adair he had to fight to keep Scilacci's job, Gardner wanted to fire Scilacci (like Adair, a Local 350 member) for discussing Local 350 representation with other employees and he had to talk Gardner out of doing so.

Later the same day, Wright conducted a meeting of the service employees at the GMS Reno facility. Wright stated he was tired of hearing through the grapevine the employees were discussing a new election²⁴ and complaining about the 401(k) and profit-sharing plans; the employees should bring such matters to him; Adair could not resolve his problems through another employee and other employees could not resolve their problems through Adair. Wright stated if Local 350 came in the Company would have to go by union rules, it could not reimburse employees for job-related school expenses (as it was doing), or guarantee the employees a 40-hour workweek during the slow winter season. He stated he did not care if they voted for or against union representation, but he wanted them to discuss union versus nonunion issues on their own time, their working time belonged to the customers.

There was no evidence the employees were restricted in their discussion of any subjects other the pros and cons of union representation while working.

Threat of benefit losses in the event employees secure union representation violate Section 8(a)(1) of the Act, since they discourage employee exercise of free choice,²⁵ as are restrictions on employee discussions during working hours limited to restrictions on discussions concerning the pros and cons of union representation during working hours, but otherwise unlimited.²⁶

I therefore find and conclude GEI/GMS violated Section 8(a)(1) of the Act by the threats of benefit losses and restriction of employee discussion, detailed above.

The Board also holds threats to discharge employees for discussing union representation violate Section 8(a)(1) of the Act.²⁷

²⁴ Adair informed Wright before the meeting he had been to Local 350's office and Local 350 was contemplating seeking a new election.

²⁵ *Dougherty Lumber*, 299 NLRB 295 (1990); *Monfort of Colorado*, 298 NLRB 73 (1990); *Avecor*, 296 NLRB 727 (1989); and *Springfield Jewish Nursing Home*, 292 NLRB 1266 (1989).

²⁶ *Willamette Industries*, 306 NLRB 1010 (1992); *Emergency One, Inc.*, 306 NLRB 800 (1992); *Columbus Mills*, 303 NLRB 223 (1991); *Fontaine Body*, 302 NLRB 863 (1991); and *Premier Maintenance*, 282 NLRB 10 (1986).

²⁷ *NLRB v. Turner Tool*, 670 F.2d 637 (5th Cir. 1982), *enfd.* 256 NLRB 595 (1981); *Princeton Health Care Center*, 285 NLRB 1016 (1987); and *Cave Springs Theater*, 287 NLRB 4 (1987).

I therefore find and conclude Wright's statement to Adair that Gardner wanted to discharge Scilacci for such discussion also violated Section 8(a)(1) of the Act.

E. *The Adair Discharge*

The complaint alleged and the answer thereto denied GEI/GMS violated Section 8(a)(1) and (3) of the Act by discharging Adair on October 5, 1990, and thereafter failing and refusing to reinstate him to his former position for engaging in union or other protected concerted activities.

Adair, a Local 350 member, was hired by GEI as a journeyman serviceman in 1980 and, with two breaks in employment (in 1984 and 1987), remained in the employ of GEI at the GEI Reno facility and the GMS Reno facility from 1987 until his October 5, 1990 discharge.

I have recounted above Adair's participation in employee discussions of the dating of their employment at the GMS Reno facility as the beginning date for the unit employees' eligibility for profit sharing and the beginning date when they could make withdrawals from the 401(k) plan and the policy of not covering Local 350 members employed at the GMS Reno facility under the company health plan until they exhausted their accumulated credits in the Local 350-Association health plan. I have also described the dissatisfaction Adair and other unit employees voiced during those discussions over those requirements and policies and Adair's, in a customary practice, in accordance with his status as a senior employee and leadman, bringing those matters to Gardner's attention with the obvious hope Gardner would change the policies governing the profit-sharing and 401(k) plans to credit total unit employee service at the GEI Reno facility towards meeting the time requirements for receipt of profit sharing and withdrawal from the 401(k) plans, as well as earlier coverage of the Local 350 members under the company health plan and consequent retention of reserve credits built up by those members in the Association-Local 350 health plan. I have also detailed Gardner's responses to Adair's efforts to secure modifications in the various plans and Adair's communication of Gardner's views to other unit employees.

Adair noted the October 1989 settlement required GEI to pay not more than \$800 per individual and not more than \$3,200 total, in addition to a lump sum of \$12,000, to cover credits on behalf of the five Local 350 members who accepted employment at the GMS Reno facility on May 19, 1989, for a period extending from May 19 through November 1, 1989, in the event the \$12,000 was insufficient to cover their credits over the period in question. He mentioned this to Gardner and stated, in view of the fact Gardner was utilizing his credits earned by past services under the Association-Local 350 plan to defer his coverage under the company health plan, he should receive \$800 as compensation for those lost credits. Gardner rejected the suggestion, stating that agreement only required he reimburse the Association-Local 350 trust for contribution shortfalls during the May-October 1989 period. Adair nevertheless adhered to his position and, as Gardner described it, "bugged" him about the alleged money due to him under the settlement terms in question.

Adair continued to discuss the company policies and positions just described with other employees after communicating Gardner's failure or refusal to make any adjustments therein, culminating in Wright's admonitions to the service

employees on October 2, 1990, described above and Gardner's discharging Adair, 2 days later, based on recommendations therefor by both GMS President Wright and Service Manager Doane.

All three—Gardner, Wright, and Doane—conceded the latter two recommended and the former effected the discharge in substantial measure because Adair's influence among the unit employees and discussions with other employees concerning the alleged unfairness of the company policies and practices just described was perceived as a cause for employee dissatisfaction with the Company and its policies and practices; i.e., because he was "stirring up the troops."

GEI/GMS does not seriously contest Adair was discharged to remove from GEI/GMS' employ the strongest advocate and supporter of his and other employees' views the policies and practices described above were unfair and warranted revision, but argues Adair was only speaking on his own behalf and therefore not engaged in concerted activities protected by the Act.

In the lead case defining what constitutes concerted activities protected by the Act, the Board stated in *Meyers Industries*, 268 NLRB 493, 497 (1984):

[T]o find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action (e.g., discharge) was motivated by the employee's protected activity.

Applying that test, the Board held an employer violated the Act by discharging an employee for bringing employee complaints about the timing of a sales training session to the attention of management (*Henry Colder Co.*, 292 NLRB 941 (1989)); similarly, where an employer discharged an employee for complaining to the employer and coworkers over the employer's new lunch policy (*Salisbury Hotel*, 283 NLRB 685 (1987)); similarly, where an employer discharged an employee for discussing wage rates with other employees (*U.S. Furniture*, 293 NLRB 159 (1989)); and where the concern expressed by an employee to a management representative was also expressed by other employees (*Mike Yurosek & Sons*, 306 NLRB 1037 (1992)).

Adair's discussions with other employees and with management concerned his and other employees' complaints regarding elements of their wages and conditions of employment; management was fully aware of his activities; such discussions clearly fall within the definition of concerted activities; and GEI/GMS was motivated by his engagement in those activities in deciding to, and effecting, his discharge.

I therefore find and conclude GEI/GMS violated Section 8(a)(1) of the Act by discharging Adair.

I also find GEI/GMS violated Section 8(a)(3) of the Act by discharging Adair, as Gardner was motivated in part by Adair's persistent claim GEI was violating terms of the settlement agreement between GEI and Local 350 by failing and refusing to honor his claim to additional payments on his behalf under the reimbursement provisions recited above.

The Board has consistently ruled employee discipline for asserting a claim arising out of an agreement between a union representing the employee and his employer violates Section 8(a)(3) of the Act (*NLRB v. City Disposal Systems*, 465 U.S. 822 (1984)), even if the agreement interpretation the employee relies on in asserting his claim is mistaken (*Interboro Contractors*, 157 NLRB 1295 (1966), *enfd.* 388 F.2d 495 (2d Cir. 1967)).

I find the October 1989 settlement agreement, because it established conditions of employment of unit employees covered by the 1988–1990 Service Agreement for the balance of the term of that agreement and was entered into on behalf of Adair and similarly situated employees, thus, falls within the purview of the *City Disposal* doctrine.

CONCLUSIONS OF LAW

1. At all pertinent times GEI and GMS were employers engaged in commerce in business affecting commerce and Local 350 was a labor organization within the meaning of Section 2 of the Act.

2. At all pertinent times GEI and GMS constituted a single business enterprise and employer within the meaning of the Act.

3. Prior to May 2, 1988, GEI authorized the Association to negotiate and execute on its behalf a collective-bargaining agreement with Local 350 covering the rates of pay, wages, hours, and working conditions of its service employees.

4. Pursuant to that authority, the Association negotiated and executed a collective-bargaining agreement for a term extending from May 2, 1988, through May 1, 1990, with Local 350, covering the rates of pay, wages, hours, and working conditions of GEI's service employees (including, *inter alia*, a provision in which Local 350 was recognized as the exclusive representative of GEI's service employees for collective-bargaining purposes).

5. The employee unit covered by that agreement, i.e., all service employees at the GEI Reno facility was (and is) appropriate for collective-bargaining purposes within the meaning of Section 9 of the Act.

6. Despite the language of the 1988–1990 agreement, GEI treated the agreement as a members-only contract and applied its terms solely to Local 350 members employed by GEI.

7. On July 19, 1989, GEI engaged in a disguised continuance of the service business it conducted at the GEI Reno facilities by shifting that business to a new Reno location under the ostensible ownership and operation of GMS and continuing the same business with the same equipment, tools, class of customers, and employees.

8. At that time (July 19, 1989), GEI ceased to honor the terms of the 1988–1990 members-only contract.

9. On October 19, 1989, pursuant to an agreement negotiated and executed by GEI and Local 350 and approved by the General Counsel, Judge Anderson, and the Board, GEI resumed honoring its 1988–1990 collective-bargaining agreement as that agreement had been administered, i.e., as applying only to Local 350 members employed by GEI.

10. At and following the May 1, 1990 expiration of the collective-bargaining agreement, the unit covered by that agreement, including all service technicians and the controls specialist, excluding all other employees, guards and supervisors as defined in the Act, was and is an appropriate unit

for collective-bargaining purposes within the meaning of Section 9 of the Act.

11. GEI/GMS violated Section 8(a)(1) of the Act.

a. By Gardner's May 3, 1990 promising the unit employees new and increased rates of pay, wages, and/or working conditions as an inducement to vote against Local 350 representation scheduled for May 4, 1990.

b. By Wright's October 2, 1990 threat of benefit losses if the unit employees secured Local 350 representation.

c. By Wright's October 2 restriction of unit employees' discussions during working time by prohibiting any discussion of the pros and cons of Local 350 representation.

d. By Wright's October 2 telling an employee Gardner wanted to discharge an employee for discussing union representation.

12. GEI/GMS violated Section 8(a)(1) and (3) of the Act by discharging Adair on October 5, 1990, for engaging in union and other concerted activities protected by the Act.

13. GEI/GMS did not otherwise violate the Act.

14. The unfair labor practices described above affected and affects interstate commerce as defined in the Act.

THE REMEDY

Having found GEI/GMS engaged in unfair labor practices, I recommend GEI/GMS be directed to cease and desist therefrom and to take affirmative actions designed to effectuate the purposes of the Act.

Having found GEI/GMS unlawfully discharged Robert Adair, I recommend GEI/GMS be directed to reinstate Adair to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, and to make Adair whole for any loss in earnings and benefits he may have suffered as a result of the discrimination practiced against him, with the pay and interest thereon he is entitled to receive computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]