

Selkirk Metalbestos, North America, Eljer Manufacturing, Inc. and Sheet Metal Workers Local #213, AFL-CIO. Cases 27-CA-12556-2, 27-CA-12633, and 27-CA-12821

April 26, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On February 28, 1995, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent, the General Counsel, and the Charging Party filed exceptions and supporting briefs, and the Respondent and the Charging Party filed answering briefs and reply briefs to the answering briefs. The Respondent also filed a motion to reopen the record, and the General Counsel filed a response opposing the motion.

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

The Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order as modified.

The General Counsel has excepted to the judge's failure to find that the Respondent violated the Act by

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² In adopting the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(5) by unilaterally restricting the Union's access to the plant lunchroom, we emphasize that the record fails to show any factual basis to support a finding that the Union's access to employees was less restrictive or more confidential before the change. Thus, the General Counsel failed to show that the change was a substantial and material one about which the Respondent was required to bargain.

Given our adoption of the judge's finding that the Respondent violated Sec. 8(a)(1) by threatening dire consequences if the Union won the decertification election, we believe it would be cumulative to find that the Respondent also threatened plant closure. We therefore find it unnecessary to pass on the General Counsel's exception to the judge's dismissal of the plant closure allegation. Consequently, we shall deny as moot the Respondent's motion to reopen the record to introduce further evidence concerning such an allegation.

The Charging Party has excepted to the judge's failure to find that the Respondent violated Sec. 8(a)(5) by failing to meet and bargain with the Union. We find it unnecessary to pass on the issue the Charging Party's exception raises because the finding of such an additional 8(a)(5) violation would be cumulative and would not affect the Order.

³ Member Cohen agrees with his colleagues that the withdrawal of recognition on April 29, 1993, was unlawful. Respondent could not rely on the election results of April 15. Although the Union lost that election, the election was later set aside as invalid. However, Member Cohen finds it unnecessary to rely on *W. A. Krueger*, 299 NLRB 914 (1990). In that case, the union lost the election, and that result was upheld.

promising employees a plan for handling complaints if they did not select the Union as their bargaining representative. We find merit to this exception.

In April 1993, during the decertification election campaign, the Respondent's plant manager, Walter Crew, read and posted a list of questions and answers about the election. In response to a question about whether there would be a procedure for handling grievances, Crew stated, "If the Union is voted out, I will sit down with all employees to devise a plan for the handling of complaints."

The judge found that Crew's statement made no commitment with regard to a grievance procedure and therefore was not unlawful. We disagree.

There can be no doubt that the statement "I will sit down with all employees to devise a plan for the handling of complaints" is a promise that there will be a complaint procedure if the Union loses the election. A complaint procedure is a benefit. Thus, the statement is an explicit promise of a benefit. The statement explicitly links the benefit to the election results.

Concededly, Crew made no commitment as to the specifics of the promised complaint procedure. But, the fact that the details of a promised benefit are not specified does not mean no promise has been made. What is critical is whether the statement is a promise. We see no other way of interpreting the statement. See *Pincus Elevator & Electric Co.*, 308 NLRB 684, 692 (1992), *enfd.* 998 F.2d 1004 (3d Cir. 1993) (statement that respondent was considering a pension plan contained implied promise of benefit).

We conclude, in agreement with the General Counsel's exception, that the Respondent violated Section 8(a)(1) by promising employees a plan for handling complaints if they did not select the Union as their bargaining representative.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Selkirk Metalbestos, North America, Eljer Manufacturing, Inc., Nampa, Idaho, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(f) and reletter the subsequent paragraphs.

"(f) Promising employees a plan for handling complaints if they did not select the Union as their bargaining representative."

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

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 fail and refuse to provide to Sheet Metal Workers Local #213, AFL-CIO information pertaining to the costs, attendant to its bargaining unit employees' health insurance plan, to itself and to the employees, which information is necessary and relevant for the purpose of collective bargaining.

WE WILL NOT impliedly promise that our employees will receive a wage increase for voting against the Union in the decertification election by stating to them that the Union has prevented them from receiving a wage increase.

WE WILL NOT impliedly promise that each of our employees will be given a 401(k) savings plan if they vote against the Union in the decertification election by informing them that all of our unrepresented employees have such a benefit.

WE WILL NOT promise our employees retroactive pay raises in order to induce them to vote against the Union in the decertification election.

WE WILL NOT threaten our employees with sinister consequences if the Union prevails in the decertification election.

WE WILL NOT withdraw recognition from the Union as the exclusive representative for purposes of collective bargaining of our bargaining unit employees.

WE WILL NOT promise employees a plan for handling complaints if they do not select the Union in the decertification election.

WE WILL NOT unilaterally, and without bargaining with the Union, implement changes in the contractual grievance-and-arbitration procedure.

WE WILL NOT unilaterally, without the consent of the Union and in the absence of a bargaining impasse, implement a requirement that our bargaining unit employees contribute a monthly copayment to the cost of their health insurance coverage.

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 recognize and, on request, bargain with the Union as the exclusive representative for purposes of collective bargaining of our employees in the following appropriate unit and WE WILL, if the bargaining results in an agreed-on collective-bargaining agreement, embody such in writing:

All production and maintenance employees including shipping and receiving employees, employed at our Nampa Idaho plant; excluding all office clerical employees, professional guards, and supervisors as defined in the Act.

WE WILL, on request, provide updated information to the Union pertaining to our health insurance costs.

WE WILL rescind any changes in our employees' contractual grievance-and-arbitration procedure and the requirement that our employees contribute a monthly copayment toward the cost of their health insurance coverage and WE WILL reimburse our employees for any deductions we have made from their monthly wages for the copayment of the cost of their health insurance, with interest.

SELKIRK METALBESTORS, NORTH
 AMERICA, ELJER MANUFACTURING, INC.

Chet Blue Sky, Esq. and *Gene Chavez, Esq.*, for the General Counsel.

Frank Parker, Esq. (Meier & Parker, L. C.), of Bedford, Texas, for the Respondent.

Alan Herzfeld, Esq. (Nevin, Kofoed, & Herzfeld), of Boise, Idaho, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. The unfair labor practice charge in Case 27-CA-12556-2 was filed by Sheet Metal Workers Local #213, AFL-CIO (the Union), on April 21, 1993; the original and first amended unfair labor practice charges in Case 27-CA-12633 were filed by the Union on May 10 and 24, 1993, respectively; and the original and first amended unfair labor practice charges in Case 27-CA-12821 were filed by the Union on September 27 and October 12, 1993, respectively. On October 19, 1993, the Regional Director for Region 27 of the National Labor Relations Board (the Board) issued an order consolidating the aforementioned unfair labor practice charges and an amended consolidated complaint, alleging that Selkirk Metalbestos, North America, Eljer Manufacturing, Inc. (Respondent) had engaged in acts and conduct violative of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Subsequently, Respondent timely filed an answer, denying the commission of the alleged unfair labor practices. Pursuant to a notice of hearing, this proceeding came to trial before me on April 14 and 15, 1994, in Boise, Idaho. At the trial, all parties were afforded the opportunity to offer into the record all relevant evidence, to examine and cross-examine all witnesses, to argue their legal positions orally, and to file posthearing briefs. The latter documents were filed by counsel for each of the parties, and the briefs have been carefully considered by me. Accordingly, based on the entire record here, including the posthearing briefs and my observations of the testimonial demeanor of the several witnesses, I make the following

FINDINGS OF FACT¹

I. THE ISSUES

The amended consolidated complaint alleges that, prior to the holding of a decertification election, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act, by threatening its employees with bad consequences and unspecified harm if they selected the Union as their representative for purposes of collective bargaining; by threatening its employees with plant closure if they selected the Union as their bargaining representative; by promising its employees a retroactive wage increase, a pension plan, and a plan for handling complaints if they did not select the Union as their bargaining representative; and by stating to employees that the Union had prevented them from receiving a pay raise. Further, the amended consolidated complaint alleges that Respondent failed and refused to bargain in good faith with the Union in violation of Section 8(a)(1) and (5) of the Act,² by, prior to the holding of a decertification election, failing and refusing to provide to the Union information, which is necessary and relevant to the Union's performance of its duties as the collective-bargaining representative of certain of Respondent's employees, and by unilaterally restricting the Union's plant visitation rights, which were established by the parties' most recent collective-bargaining agreement; by withdrawing recognition from the Union as the collective-bargaining representative of certain of its employees; by unilaterally discontinuing the grievance procedure, set forth in the parties' most recent collective-bargaining agreement; and by unilaterally implementing a health insurance copay obligation for bargaining unit employees. Respondent denies the commission of any of the aforementioned unfair labor practice allegations. Specifically, Respondent contends that it withdrew recognition from the Union based on objective considerations that it no longer represented a majority of bargaining unit employees and that, therefore, it lawfully discontinued utilizing the contractual grievance procedure and lawfully implemented the aforementioned insurance copay obligation.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Significant facts are not in dispute here. Thus, the record establishes that Respondent is a multinational corporation with plants in the United States and Canada; that Respondent is engaged in the business of manufacturing heating, ventilation, and air-conditioning equipment for commercial, remodeling, repair, and industrial markets; that it maintains an office and plant facility located in Nampa, Idaho; that, at the facility, Respondent manufactures sheet metal venting sys-

¹ Respondent admits that it is now, and has been at all times material, an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act and that the Union is now, and has been at all times material, a labor organization within the meaning of Sec. 2(5) of the Act.

² While the amended consolidated complaint seemingly alleges that Respondent violated Sec. 8(a)(1) and (5) of the Act by refusing to bargain with Respondent, counsel for the General Counsel stated, at the hearing, that the General Counsel would offer no proof of such a violation of the Act and, in their posthearing brief, counsel limit their contentions as set forth infra.

tems for heating and cooling systems; that Jon Crilly, whose office is in Dallas, Texas, is Respondent's vice president of operations; and that Walter J. Crew is the plant manager of Respondent's Nampa facility. The record further establishes that, since approximately 1977, Respondent has recognized the Union as the collective-bargaining representative of its production and maintenance employees, including shipping and receiving employees; that there are approximately 150 employees in the bargaining unit; that Respondent's recognition of the Union has been memorialized in successive collective-bargaining agreements between the parties, the most recent of which was effective from July 8, 1988, through July 8, 1991; that, commencing on or about June 4, 1991, and prior to its expiration, the parties held approximately 12 bargaining sessions on a successor to their most recent agreement; that, subsequent to the contract's expiration, the parties engaged in bargaining on six occasions, with their final bargaining session held on February 24, 1993; and that, as of the date, the unresolved major issues were wages, the retroactivity of any wage increase, a personal holiday, the retirement income benefits plan for the bargaining unit employees, and Respondent's demand that each employee make a monthly contribution toward the cost of his or her health insurance coverage, the so-called health insurance copayment. On February 9, 1993, a decertification petition, in Case 27-RD-948, was filed with Region 27, seeking to decertify the Union as the collective-bargaining representative of Respondent's employees in the above-described unit, and on April 15, 1993, the decertification election was conducted, with 68 votes cast in favor of the Union and 73 votes cast against representation by the Union. Thereafter, on April 20, the Union filed objections to Respondent's conduct, allegedly affecting the results of the decertification election, and on May 26, 1993, the Regional Director for Region 27 issued a supplemental decision, finding merit to certain of the Union's objections and ordering that the decertification election, which was conducted on April 15, be set aside and that a rerun election be conducted. Respondent filed a request for review of the Regional Director's supplemental decision and orders, and on March 23, 1994, the Board denied Respondent's request for review.

B. Respondent's Alleged Failure and Refusal to Provide Information Pertaining to Health Insurance Costs

1. The facts

There is no dispute that, on January 5, 1993, Frank Raimondi, who is the Regional Director of Region 4 of the Sheet Metal Workers' International Association and who participated in the contract bargaining between Respondent and the Union, sent a letter to Jon Crilly, which among other points, stated that "the company demand for an employee copayment toward the company health care program remains a major roadblock. The union must have all pertinent information with respect to present and projected cost to both the company and the employees. This information must include data either supporting the inability of the company to continue coverage under the present system, or whatever other reasons may exist." There is no record evidence that Respondent ever sought clarification from Raimondi as to the information sought or that it ever provided the requested information to the Union. Walter Crew testified that Respond-

ent felt that Raimondi's request constituted harassment and that "we felt we had already given them the information. They were asking for the same thing." In this regard, on January 15, 1993, Crilly wrote to Raimondi that Respondent was "under no legal obligation to open confidential company records to you and we will not do so."

As to prior requests for health insurance cost information and whatever may have been provided to the Union in that regard, Raimondi testified that he made an oral request for health care cost information on June 18, 1991, and a written request 13 days later and that, other than "the booklet that they had made available to all the employees," which was provided to the Union at the start of bargaining, the Union received no information from Respondent regarding health care costs prior to January 5, 1993.³ Raimondi further testified that he made "numerous" other requests for health care cost information during the course of the bargaining, but, later, when asked specifically if he had made any other such requests, he averred, "[N]ot to my recollection." Contrary to Raimondi, Walter Crew testified that, on or about July 1, 1991, the Union submitted a 22-page information request, including a request for a summary description of Respondent's health insurance plan and "a cost breakdown of the plan" to Respondent, and in response, on July 12, Respondent provided information to the Union, including a copy of its insurance booklet. At the next bargaining session between the parties, referring to the insurance booklet, "[Raimondi] said that was not what he was asking for, he needed financial information on the health plan" in order to compare Respondent's health insurance plan to a union health insurance plan, and, on July 16, by facsimile transmission, Raimondi sent Crilly a copy of a letter from a health benefits coordinator of the Sheet Metal Workers' National Health Fund, together with an attached health insurance financial information request. In response, according to Crew, at the parties' August 1, 1991 bargaining session, Respondent provided the Union with a five-page document, setting forth financial information pertaining to Respondent's health insurance plan for the bargaining unit employees.⁴

While Raimondi and Floyd Reichert, the Union's business manager, each denied ever viewing or receiving this health insurance information, employee Thomas Smith, who served on the Union's negotiating committee during the bargaining for the successor to the agreement, which expired in 1991, testified, on behalf of Respondent, that he saw the disputed insurance financial information in Reichert's office in Boise, Idaho, sometime in 1991 when "we were trying to figure out a plan on insurance which would be feasible, and we were thinking about dumping the Company's insurance and going with [the Union's plan], and we compared the both of them."⁵ Further, Walter Crew was unable to recall any complaints by the Union, between August 1, 1991, and January 5, 1993, that it was unable to bargain over the health insur-

ance copayment issue due to a lack of financial information and denied that, at the February 24, 1993 bargaining session, the Union renewed its request for the health insurance information, which is the subject of the instant unfair labor practice allegation. Finally, asked if, between August 1991 and January 1993, the projected cost of Respondent's health insurance plan had changed, Crew testified, "I just know that health care costs have been going up every year for the last several years."

2. Analysis

It has long been established that, generally, an employer is under a statutory obligation to, on request, provide a labor organization, which is the collective-bargaining representative of the employer's employees, with information, which is necessary and relevant for the proper performance of the labor organization's duties in representing the bargaining unit employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); and *Aerospace Corp.*, 314 NLRB 100 (1994). This duty to provide information encompasses not only material necessary and relevant for the purpose of contract negotiations but also information necessary for administration of a collective-bargaining agreement, including information required by the labor organization to process a grievance. *NLRB v. Acme Industrial*, supra; *Bacardi Corp.*, 296 NLRB 1220, 1222-1223 (1989); *Howard University*, 290 NLRB 1006 (1988). The standard for relevancy is a "liberal discovery-type standard," with the sought-after information not having to be necessarily dispositive of the issue between the parties but only of some bearing on it and of probable use to the labor organization in carrying out its statutory responsibilities. *Aerospace Corp.*, supra; *Bacardi Corp.*, supra; *Pfizer, Inc.*, 268 NLRB 916 (1984). "[N]ecessity is not a separate and unique guideline, but is directly related to the relevance of the requested data." *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1965); *Bacardi Corp.*, supra. Moreover, information, which concerns the terms and conditions of employment of the bargaining unit employees, is deemed "so intrinsic to the core of the employer-employee relationship" so as to be presumptively relevant. *York International Corp.*, 290 NLRB 438 (1988), quoting *Southwestern Bell Telephone Co.*, 173 NLRB 172 (1968); *Buffalo Concrete*, 276 NLRB 839 (1985). Information pertaining to employees' health insurance has long been deemed to be of this type and, accordingly, must be furnished on request. *Deadline Express*, 313 NLRB 1244 (1994). In light of the foregoing, turning to the instant unfair labor practice allegation, the record establishes that Respondent's demand for an employee health insurance monthly copayment was a major issue during the contract bargaining between Respondent and the Union; that, in view of the demand, on January 5, 1993, the Union requested information, pertaining to the cost of Respondent's health insurance plan to the Company and to the employees; and that Respondent failed to comply with the Union's request. Also, contrary to the contention of Respondent, the Union had a legitimate need for the information sought. Thus, while I believe that Respondent did, in fact, provide health insurance cost infor-

³Raimondi hedged on this point during cross-examination. Thus, when asked by Respondent's counsel whether the Union had, in fact, received health care cost information beyond the booklet, Raimondi replied, "I received some information, but specifically, I do not recall anything other than the employee booklet."

⁴The information is contained in the final five pages of R. Exh. 3.

⁵He recalled looking at R. Exh. 3 because "the insurance was the main topic," and "that's the reason why I went."

mation to the Union in August 1991,⁶ by January 1993, the information was, at least, 18 months old, and Walter Crew conceded that the costs attendant to health insurance increase each year. Finally, I note that, if Respondent believed the Union's information request was overly broad or ambiguous, rather than refusing to comply, its obligation was to seek clarification and that no such clarification request was made. *National Electrical Contractors Assn., Birmingham Chapter*, 313 NLRB 770, 771 (1994). Based on the foregoing and the record as a whole, I believe that Respondent engaged in conduct, violative of Section 8(a)(1) and (5) of the Act, by failing to comply with the Union's January 5, 1993 information request. *Deadline Express*, supra.

C. Respondent's Alleged Unilateral Restriction of the Union's Contractual Plant Visitation Rights

1. The facts

The facts pertaining to this alleged violation of the Act are not in dispute. Thus, article 18 of the parties' most recent collective-bargaining agreement provides:

A representative of the Union shall be permitted to visit the office or plants of the Company for the purpose of investigating any matter arising out of this Agreement after notifying a representative of the Company of his intention to do so. The Union representative shall not unreasonably interfere with the normal work duties of employees or the operation of the plant.

Floyd Reichert, the business manager of the Union, testified that the parties' standard procedure for his plant visitations was that he would announce his presence to the receptionist; that Walter Crew would come out to the reception area and escort him to the employee lunchroom; and that he would then be allowed to conduct his business. Asked, during cross-examination, if he was required to be investigating a grievance or if he was permitted to speak to employees generally, Reichert replied, "That was open . . . I could go in and talk to two or three [employees] during the lunch period" as long as Crew was in the plant.

Reichert testified that Respondent abruptly changed this practice in late February or early March 1993 without notice to the Union and without any explanation. According to him, he visited the plant on that occasion in order to investigate a possible grievance and was taken by Crew to a conference room and was told to confer with the shop stewards in that room. Thereafter, in order to continue to investigate the grievance allegations, Reichert requested permission to meet with the employees, who were involved, in their lunchroom,⁷ but Crew refused to permit him to do so. Reichert objected to this change in practice and asked why; Crew responded, "You just can't go." Reichert also testified with regard to a subsequent incident, which occurred on March 22. On that occasion, he arrived at the plant during the bargaining unit employees' lunch period. He was accompanied by two new union organizers, one of whom spoke Spanish, and intended

⁶On this point, I specifically rely on the forthright testimony of employee Thomas Smith over that of Frank Raimondi and Floyd Reichert, neither of whom was a particularly impressive witness.

⁷Reichert explained that meetings in the lunchroom were required as "I need to keep it confidential when I talk to [employees]."

to introduce them to the employees in the lunchroom. He requested permission to address the employees there; however, Crew again denied him access to the lunchroom.

Crew, who testified that "I can't recall [Reichert] coming [to the plant] when it wasn't to deal with a grievance" and that "we would normally arrange it that the lunchroom would be free for that," conceded that "there was a period of time . . . where I had them meet in the conference room. Once or twice, Floyd had wanted to go to the lunchroom, but the tensions were just getting too high, and I thought it better if they meet in the conference room." Crew added that Reichert was provided with everyone with whom he desired to meet and that, while the union official asked why, he did not object. With regard to the March 22 incident, Crew testified that Reichert and the two other union officials arrived at the plant and that, after Reichert mentioned some grievances and a need to speak to the shop stewards, "I took them into the conference room and called for the stewards." A short while later, the Spanish-speaking official said that he wanted to address the employees in the lunchroom during their lunch hour. Crew added that such had never previously occurred; that he asked the three men to wait while he conferred with Respondent's attorney; and that he returned and informed the union officials "that they were not to be permitted to address the employees in the lunchroom."

2. Analysis

Counsel for the General Counsel and counsel for the Charging Party are correct that a contractual provision, which permits a union access to an employer's facility, survives the expiration of a collective-bargaining agreement. *Laverdiere's Enterprises*, 297 NLRB 826, 833 (1990), *enfd.* in relevant part 933 F.2d 1045 (1st Cir. 1991). Contrary to both counsel, however, I do not believe that, in the above-described circumstances, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act. Thus, while the expired collective-bargaining agreement here permitted union access in order to investigate matters arising under the terms of the agreement, while the parties' past practice seems to have been that Business Manager Reichert was permitted to discuss grievances with employees and shop stewards in the lunchroom, and while, on an occasion in late February or early March, he was denied permission to discuss a grievance with the involved employees in that area of Respondent's facility, the record establishes that, on the occasion at issue, Reichert was permitted to speak to whomever he desired in a conference room and that he did so. Moreover, there is no record evidence that Respondent's conduct disrupted Reichert's ability to investigate the grievance, which necessitated his visit to the plant. Therefore, in my view, the mere fact that Reichert was unable to speak to the employees where he desired to do so was not of sufficient moment so as to arise to the level of an unfair labor practice, and I so find. With regard to the March 22 incident, it appears that, rather than for the purpose of investigating a contractual grievance, Reichert requested permission to use the lunchroom in order to facilitate a Spanish-speaking organizer's efforts to address the bargaining unit employees. Inasmuch as the expired collective-bargaining agreement permitted access for the limited purpose of investigating contractual grievances and as there is no record evidence that union officials previously had been permitted access to the lunchroom in

order to make speeches to groups of employees, Respondent's refusal of access to the lunchroom on that occasion did not violate the terms of the expired contractual access provision. Accordingly, I conclude that Respondent's denial of access to its plant lunchroom on the above two occasions was not violative of Section 8(a)(1) and (5) of the Act and shall recommend dismissal of paragraph 11(c) of the amended consolidated complaint.

D. Respondent's Allegedly Unlawful Statements During the Period Immediately Preceding the April 15, 1993 Election

1. The facts

The record reveals that Respondent engaged in a campaign against the Union during the period preceding the April 15, 1993 decertification election and that the campaign consisted of notices, which were posted on the three plant bulletin boards, speeches to employees by Walter Crew and Jon Crilly, correspondence to employees and their families, and written responses to employee questions, pertaining to campaign issues. The latter were read to employees and posted on the plant bulletin boards.⁸ Crew testified that General Counsel's Exhibit 17 was a notice, which was posted on the plant bulletin boards on March 22. The first paragraph of the notice, which was addressed to all employees and signed by Crew, poses the question, "Is this Union good or bad for employees," and the second paragraph reads as follows:

Employees will answer the question on election day—it is likely an NLRB election will be held in mid-April. *The Company is now strongly opposed to employees being represented by the [Union].* This Union does not act in the best interest of employees. This Union does not deserve employee support. Should employees vote for the Union in the election, the consequences will be bad. It is not the Company's intent to discredit all Unions or to say that all Companies can be trusted. We do believe this Union is bad and Company intends to prove we can be trusted. We will be dedicated to working with all employees to improve wages, hours and conditions for all.

Crew next testified that General Counsel's Exhibit 18 is the text of a speech, which he gave to assembled groups of bargaining unit employees on March 25 and 26. The fourth paragraph of the speech reads as follows:

For over two years, this Union has denied you a pay raise while they tried to force the Company to give your pension money to the Union. At first we refused to do this because we were afraid of our liability for the under funded pensions of employees of other companies that were in the plan. This could have been many millions of dollars and would have broken Eljer. Since that time, we have found another reason to not accept their proposal—you might never have gotten a

pension from this Union. They waste the money and use it for their own personal benefits.⁹

In a written response to employee questions on March 25 and 26, which was posted on the plant bulletin boards on April 1, Crew replied to a question, regarding Respondent's contention that the Union had been stopping Respondent from giving employees a raise. He stated, "First of all, any attempt to implement the Company's contract offer prior to the NLRB election would be a violation of [the Act]. Secondly, since the [Union] is recognized as the [employees' bargaining representative], any attempt to pass on the wage increase could be construed as directly dealing with the employees in violation of the law." Then, in response to another question, Crew bluntly stated, "With this union out, the Company can put its proposal into effect which means more money for every employee."¹⁰

Crew identified General Counsel's Exhibit 19 as "my answers to questions that I got from employees from the plant meetings we had These particular questions were received at the April 1st and 2nd plant meetings." He added that the questions were both written and oral; that he orally responded to them at the conclusion of each meeting; and that he gave his written responses on April 7 in the above document, copies of which were posted on the three plant bulletin boards. The document consists of answers to 30 questions. The first question was, "What is the possibility of a 401(k) plan if the decertification is successful?" Crew replied as follows: "I cannot promise that there will be a 401(k) plan in this plant if the Union is voted out. It would be illegal for me to promise that, however, I can tell you that every Eljer employee, not represented by a union, has a 401(k) plan." The second stated question was, "Do you have an [sic] pension booklet for any non-union Eljer plant and can the employees see it?" Crew responded, "I don't have any booklet but I can again confirm that the employees in those plants have 401(k) plans." The third stated question was, "If the Union is decertified, are there any plans for an employee committee to review grievances? If not, how will grievances be handled?" Crew replied as follows:

It would be illegal for me to promise that there will be an employee committee to review grievances. I can tell you that I will review every one of them and any Supervisor who does not take a grievance seriously is going to find himself in my office. If the Union is voted out, I will sit down with all employees to devise a plan for the handling of complaints. Everyone needs to be involved in making policy in the plant. All of you have ideas that will make this a better place to work.

⁹With regard to the matter of a wage increase, the record establishes that, in the summer of 1991, as part of its successor contract proposal, Respondent had offered a 10-percent raise over the proposed effective period of the contract (35 cents per hour the first year, 30 cents the second year, and 30 cents the third year); that the offer remained in effect during bargaining in 1992; and that such was contained in Respondent's contract offer on February 24, 1993.

¹⁰Notwithstanding Crew's attempt to negate the alleged unlawful effect of his comment, Respondent continued to insist that the Union was the cause of its failure to give employees a wage increase, posting a notice "sometime in the first part of April," which again blamed the Union for having denied employees a wage increase for nearly 2 years.

⁸The record contains Respondent's written responses to, at least, 48 employee questions during the pre-election period.

Complaints are nothing more than upward communications and dealing with the complaints requires nothing more than good communications. People can speak for themselves if manager's [sic] will listen. We will listen because it is just good business.

Finally, with regard to this document, the 23d-stated question was, "As stated in your previous posting, what kind of 'consequences' await the Nampa employees if the Union prevails in the secret ballot election?" Crew replied:

I cannot tell you for sure what will happen if the Union wins the election except that we will all be in the same spot we have been for the past two years. It is illegal to threaten employees and I can't guess what the Union might do. It will be serious.

Crew next testified that General Counsel's Exhibit 20 is the text of a speech, which Jon Crilly gave to assembled bargaining unit employees on April 7, and that Crilly read verbatim from the document. According to the exhibit,¹¹ at one point, after stating that some supporters of the Union will say or do anything to win, including defacing government documents and violating company policy, Crilly stated:

You don't need this. There are limitations on what I can say legally, but I can promise this. I will guarantee to you in writing that your wages, benefits and working conditions will not be less than what they would be if the Union wins. Without the Union, there will be no strikes or lockouts. If you have raises coming, you will get them. If you have retroactive pay coming, you will get it.¹²

With regard to Jon Crilly's above-quoted comments, during the preelection period, Walter Crew had comments on the same subject matter. Thus, in his document, which was posted on the plant bulletin boards on April 1 and which contained his written answers to bargaining unit employee questions, posed on March 25 and 26, Crew stated, in response to three separate questions, that "the Company will guarantee you the same wages, benefits, seniority, etc. whether there is a Union here or not." Moreover, on April 7, in response to an employee question ("Why don't you put your promises in writing and give all employees a copy?"), Crew wrote, "The Company has not made any promises that were not already in writing. It is illegal for us to make prom-

¹¹ Echoing Walter Crew's written comment of the same day, Crilly said, during the speech, that "a non-union Nampa plant will have an open door policy. A non-union Nampa plant will have supervisors and managers who spend their time doing what a Union steward cannot do; solving the problems of individuals for the benefit of everyone."

¹² While, in its contract offers during 1991 and 1992, Respondent had offered to make its wage increase offers retroactive, by letter dated February 3, 1993, Jon Crilly wrote to Frank Raimondi that, if the Union did not accept Respondent's final offer by February 28, the offer of wage increase retroactivity would be withdrawn effective that date. The bargaining on February 24 produced no contract agreement, and there is no dispute that Respondent's offer of retroactivity was withdrawn from Respondent's offer. Crilly ended his speech to the bargaining unit employees with the comment, "During this year, we will do our dead level best to show that a union is unnecessary in this plant. Please give consideration to a No Vote next week."

ises of benefits." Further, notwithstanding what Crilly said, on the subject, during his speech on the same date, in response to a question regarding Respondent's withdrawal of its wage increase retroactivity offer on February 28, Crew stated, "I cannot promise any retroactivity if the Union is voted out. We wanted to implement pay increases in the summer of 1991 but were unable to do so."

Finally, as to allegedly unlawful preelection statements by Respondent's managerial employees, Paul Renon testified that he has been employed by Respondent for 11 years; that he is an assembler in the PS department; and that he is supervised by William Pillsbury, who, Respondent admits, is a supervisor within the meaning of the Act.¹³ According to Renon, he had a conversation with Pillsbury one day, shortly after the initial morning break at approximately 9 a.m., in late March or early April "at my work station where I was working at the time." Renon, who wore a union T-shirt at the time, continued, stating that Pillsbury "came up to me and just out of the blue he said, 'Boy, I'll be glad when this is over.' And . . . I asked him . . . 'Bill, what will happen if the Union is recertified?' And he told me, 'In my opinion . . . they'll shut the doors, because they can make the residential pipe in Logan . . . and they can do the bulk of the PS work in Logan.'" Renon asked what this would mean to the Union in Logan, and Pillsbury replied that such would "increase their bargaining power." Pillsbury concluded, saying that "he was scared and that he was too old to look for a new job and start over."¹⁴ Pillsbury did not testify at the hearing in order to admit or deny the conversation, and Respondent failed to explain his absence.¹⁵

2. Analysis

I initially discuss the amended consolidated complaint allegation that Walter Crew's comment, in his speeches to bargaining unit employees on March 25 and 26, that, for 2 years, the Union has denied them a wage increase, was violative of Section 8(a)(1) of the Act. I agree. In *Highland Yarn Mills*, 313 NLRB 193, 207 (1993), the Board concluded that a similar comment, made in the presence of a supervisor and not disavowed by him, constituted an unlawful implied promise that, if the Union were to be removed from the

¹³ There is no record evidence that Pillsbury is involved in managerial decisions or in the setting of corporate policy.

¹⁴ Counsel for Respondent asserts that, in his April 7 answers to employee questions (G.C. Exh. 19), Walter Crew vitiated the effect of any comments, attributed to lower level supervisors, unequivocally stating that "the company has no plans to close or relocate the Nampa plant." However, close scrutiny of Crew's 30 responses to questions failed to disclose the quoted language. Moreover, review of G.C. Exhs. 17, 18, and 20 and of R. Exh. 16 fails to reveal the quoted language.

¹⁵ Thomas Smith testified that he was present at a meeting at the Union's office subsequent to the filing of the decertification petition during which Floyd Reichert distributed a document, describing "what [management] could do and what shouldn't say or what they couldn't do," and the discussion concerned trapping Respondent's supervisors "into saying stuff they shouldn't be saying on what was going to happen and stuff like that." Smith recalled that Pillsbury's name was mentioned, and that Reichert said, "[T]o go after him and try to get him to say something he shouldn't say." While admitting that he distributed a document to employees, which detailed what supervisors could and couldn't do under the Act, Floyd Reichert specifically denied instructing employees to entrap their supervisors.

plant, employees would be given a raise. Here, for a 2-year period, Respondent had proposed wage increases as part of a comprehensive contract proposal, which the Union had rejected. While in his April 1 written response to a question about his comment, Crew seemingly negated the unlawful imputation of his comment, his accompanying remark (“With this union out, the Company can put its proposal into effect . . .”) and the posting of another campaign letter, which reiterated Crew’s remark during his speech, clearly establish that, on March 25 and 26, Crew was impliedly promising to implement Respondent’s proposed wage increases if the employees voted to decertify the Union. In these circumstances, I find that, by Crew’s statement, Respondent acted in violation of Section 8(a)(1) of the Act. *Highland Yarn Mills*, supra.

The amended consolidated complaint next alleges that, during his speech to bargaining unit employees on April 7, Jon Crilly acted in violation of Section 8(a)(1) of the Act by stating, “If you have retroactive pay coming, you will get it” and that, on the same day, in his written responses to employee questions of April 1 and 2, Walter Crew also acted in violation of Section 8(a)(1) of the Act by stating that “every Eljer employee, not represented by a union, has a 401(k) plan” and that “if the Union is voted out, I will sit down with all employees to devise a plan for the handling of complaints.” In support, counsel for the General Counsel argues that “implicit in these statements . . . is the obvious condition that the employees would receive the enumerated improvements and benefits if they abandoned their support of the Union.” With regard to the Crilly statement, I initially note that, notwithstanding having prefaced his statement with “If you have retroactive pay coming,” Crilly had to be aware that, at that point, the bargaining unit employees had no expectation of receiving a retroactive wage increase as, acting on behalf of Respondent, he himself had previously withdrawn the benefit from Respondent’s comprehensive contract proposal, a fact known by the bargaining unit employees. Moreover, that same day and on the same subject, Walter Crew had informed the bargaining unit employees that he could not promise any retroactive pay increase. In these circumstances, it is obvious that what Crilly promised constituted an unexpected and a significant monetary benefit to the bargaining unit employees and, given Crilly’s senior position to that of Crew in Respondent’s corporate hierarchy, the employees most certainly could infer that, in order to receive the retroactive wage increase, they had but to reject the Union. Crilly, of course, emphasized the point of his promised benefit when he concluded his speech by promising to show employees during the next year why a union was unnecessary and by asking for them to vote against the Union in the decertification election. In these circumstances, especially noting Crew’s April 1 response to a question (“With this Union out, the Company can put its proposal into effect which means more money for every employee”), I find that Jon Crilly’s statement, regarding retroactive pay, during his April 7 speech, constituted an unlawful promise of benefits in order to induce employees to vote against the Union and that Respondent thereby acted in violation of Section 8(a)(1) of the Act. *NLRB v. Del Ray Tortilleria*, 787 F.2d 1118, 1122–1123 (7th Cir. 1986); *Yale New Haven Hospital*, 309 NLRB 363, 369 (1992); and *Michigan Products*, 236 NLRB 1143, 1146 (1978).

Turning to the legality of Crew’s written question responses, “I cannot promise that there will be a 401(k) plan . . . if the Union is voted out. It would be illegal . . . however I can tell you that every Eljer employee, not represented by a Union, has a 401(k) plan” and “If the Union is voted out, I will sit down with all employees to devise a plan for the handling of complaints,” counsel for the General Counsel argues that the responses were unlawful as they contain the “obvious condition” that employees would receive the benefit if they reject the Union in the decertification election. In contrast, counsel for Respondent argues that Crew’s comments were mere statements of fact, privileged by Section 8(c) of the Act and that Crew specifically told the employees that it would be illegal for him to promise such benefits. I agree with counsel for the General Counsel that, notwithstanding his disingenuous disclaimer, the clear implication of Crew’s initial written response was that each bargaining unit employee would have a 401(k) savings plan, which represents an obvious financial benefit, established in his name if the Nampa plant employees rejected the Union and became unrepresented. That Crew intended that employees should construe his statements as a promise of an obvious employee benefit is clear from his explicit reiteration of the existence of the 401(k) retirement savings plans in his answer to the very next question. The Board has consistently found that employer promises or implied promises of new or changed wages, benefits, or conditions of employment immediately prior to an election, which is intended to determine employees’ union desires, are violative of the Act. Such is particularly egregious when, as here, the employer advises the bargaining unit employees that the new benefit is available only to its unrepresented employees. *Gardner Engineering*, 313 NLRB 755, 765 (1994). Accordingly, I find that Crew’s comment to the bargaining unit employees, shortly before the decertification election, that all of Respondent’s unrepresented employees have 401(k) plans constituted an implied promise of benefits and that, thereby, Respondent engaged in conduct violative of Section 8(a)(1) of the Act. *Pincus Elevator & Electric Co.*, 308 NLRB 684, 692 (1992). As to Crew’s response, regarding meeting with the bargaining unit employees in order to devise a complaint procedure if they rejected the Union, he set forth no specific grievance procedure and did not promise or imply that his discussions with employees would be successful. In short, unlike Crilly’s specific promise of retroactive pay and Crew’s implied promise of a 401(k) plan for each employee if the employees rejected the Union, beyond expressing a willingness to discuss the matter, Crew made no commitment with regard to a grievance procedure if the employees rejected the Union; accordingly, I find nothing unlawful regarding his statement. In these circumstances, I shall recommend dismissal of paragraph 5(f) of the amended consolidated complaint.

Regarding the alleged unlawful threats uttered by Walter Crew and by William Pillsbury, counsel for the General Counsel alleges that Crew’s comment in Respondent’s March 22 employee notice, “Should employees vote for the Union in the election, the consequences will be bad” and his written April 7 response to a question regarding his March 22 statement, “I cannot tell you for sure what will happen if the Union wins the election . . . I can’t guess what the Union might do.” It will be serious, were “reasonably calculated” to coerce or restrain the employees in the exercise of their

statutory right “to vote for the Union” and were, therefore, violative of Section 8(a)(1) of the Act. I agree. Thus, while the Board has found that similar statements, setting forth an employer’s view on the disadvantages of a union, constituted mere expressions of opinion, privileged by Section 8(c) of the Act (*Howard Johnson Co.*, 242 NLRB 386 (1979)), such were in a context free of simultaneous unfair labor practices. Here, I have concluded that, while Crew was setting forth his view of the consequences of voting in favor of the Union, Respondent was, simultaneously, unlawfully directly and impliedly promising economic benefits to employees in order to induce them to vote against the Union in the pending decertification election. As all of the instant acts and conduct occurred within the same brief period of time, it is reasonable to conclude, as I do, that a direct link exists between Respondent’s unlawful direct and implied promises and Crew’s “the consequences will be bad” and “it will be serious” comments and that, therefore, the two latter comments had “sinister” connotations. *Bay State Ambulance Rental*, 280 NLRB 1079 fn. 3 (1986); *Keister Coal Co.*, 247 NLRB 375, 385 (1980); and *Ohmite Mfg. Co.*, 217 NLRB 435 fn. 2 (1975). In this regard, I note that Crew’s March 22 comment came only three sentences after he stated Respondent’s strong opposition to the Union. Accordingly, I find that Crew’s above statements were coercive and that Respondent thereby engaged in conduct violative of Section 8(a)(1) of the Act.

Finally, turning to William Pillsbury’s allegedly unlawful threat of plant closure, I initially note that Paul Renon’s testimony was uncontroverted, and, given Pillsbury’s unexplained failure to testify, I rely on Renon’s account of their conversation. Nevertheless, contrary to counsel for the General Counsel and counsel for the Union, I do not believe that his comments constituted an unfair labor practice. In this regard, I note that, while the supervisor initiated the conversation, Renon’s question, “[W]hat will happen if the Union is recertified,” precipitated Pillsbury’s allegedly unlawful comment. Moreover, Pillsbury labeled his comment as his personal opinion, and there is no record evidence that Pillsbury is involved in the setting of corporate policy; that he was stating Respondent’s policy; or that Respondent, in fact, harbored any intent to close the facility. Accordingly, while, generally, an employer may not lawfully predict a plant shutdown as a consequence of unionization unless such is “carefully phrased on the basis of objective fact to convey [his] belief as to demonstrably probable consequences beyond his control” (*Gissel Packing Co.*, 395 U.S. 575, 618–619 (1969)), the record evidence suggests that Pillsbury is a low level supervisor, who is not privy to corporate policy, and that his remark to Renon was merely a “noncoercive [expression] of personal opinion.” *Wendt-Sonis Co.*, 138 NLRB 855, 856, and 867 (1962). In these circumstances, I conclude that Pillsbury’s comment to Renon did not violate Section 8(a)(1) of the Act and shall recommend that paragraph 5(c) of the amended consolidated complaint be dismissed. Cf. *American Wire Products*, 313 NLRB 989, 993 (1994).

E. Respondent’s Allegedly Unlawful Withdrawal of Recognition from the Union

1. The facts

There is no dispute, and Respondent concedes that, subsequent to the April 15 decertification election, in which a majority of the bargaining unit employees voted against representation by the Union and, on April 20, to which the Union filed objections over Respondent’s conduct, it withdrew recognition from the Union as the representative for purposes of collective bargaining of the production and maintenance and shipping and receiving employees at its Nampa, Idaho plant. What is at issue here are the timing and basis for Respondent’s conduct. In this regard, at the outset of his direct examination by counsel for the General Counsel, Walter Crew testified that the bases for Respondent’s withdrawal of recognition were a “combination of the election results and several other petitions that were filed by the employees.” Asked to identify the petitions, after stating that “we’ve had so many, its tough to remember them all,” Crew explained that the initial petition was “this decertification petition. After that, there was a . . . petition . . . for the company to implement a pay raise, there was another petition to . . . certify the election and get on with it.” He added that the latter was submitted to him after the election and that the wage increase petition was submitted later in the year.¹⁶ At this point, Crew was presented with General Counsel’s Exhibit 9, a letter, dated April 29, from himself to Wes Edmondson, a shipping department employee and the president of the Union. The document which, according to Crew was written in response to General Counsel’s Exhibit 8, a request for the resumption of bargaining, dated that same day,¹⁷ signed by Edmondson and several other employees, who were members of the employees’ negotiating committee and who were acting on the behest of Floyd Reichert,¹⁸ reads as follows:

I will be happy to meet with you individually as an employee of Selkirk. However, there is no recognized bargaining agent for the employees and I cannot meet with you as a negotiating committee. Just because I cannot meet with you in any capacity where you represent others does not mean I would not like to hear your ideas, suggestions and criticisms. Please feel free to talk to me

¹⁶At this point, Crew denied discussing the “particulars” of either petition with employees, who submitted the petitions, and denied any involvement in the gathering of signatures.

¹⁷The exhibit reads as follows:

We, as employees and members of the collective bargaining unit of Selkirk Metalbestos respectfully request resumption of negotiations between the Company and our negotiating committee hopefully prior to May 14, 1993 or at the Company’s earliest convenience. It is with great sincerity that we make this effort.

¹⁸Employee Paul Schmillen testified that G.C. Exh. 8 was given to Respondent as “Floyd Reichert asked us to try to get [the bargaining] going”

as a fellow employee at Selkirk on any matter at any time.¹⁹

Asked why he wrote that there was no recognized bargaining agent for Respondent's employees, Crew admitted that such was Respondent's view as of the date of his letter. Indeed, if Respondent's position was unclear, on that same day, April 29, with regard to the matter of bulletin board postings on behalf of the Union,²⁰ Crew sent the following memorandum to Edmondson:

As you are aware, the union contract expired almost two years ago and, recently, the employees voted to decertify the Union. The Company believes that a majority of the employees do not wish to be represented by this Union. Thus, the Company does not recognize the Union and cannot honor grievances filed on the Union's behalf. The Company policy with regard to bulletin board postings is stated in the Employee handbook on page 15. As soon as the NLRB election is certified, we expect to re-write the employee handbook to make it more detailed with regard to employee rights and that will include the subject of bulletin boards and solicitations. As things currently stand, if we allow those who support the Union use of the bulletin boards, we would have to give the same privilege to those who do not support the Union. I think that would create conflicts and controversy that are not necessary at this time. I would suggest you communicate the notice of any Union meeting in some other manner until the NLRB investigation is completed, which should be no more than a few weeks.

On May 27, 1993, the day after the Regional Director for Region 27 issued his decision finding merit to the Union's objections to the decertification election, the Union's attorney wrote to Crew, reiterating the Union's request for information pertaining to the projected cost of Respondent's health insurance plan to the Company and to the bargaining unit employees. Thereafter, on June 7, Respondent's attorney wrote the following letter to the Union's attorney:

In answer to your letter of May 27, 1993, [Respondent] has a good faith doubt that the [Union] represents a majority of our employees in an appropriate unit. This good faith doubt is based upon results of the National

¹⁹Employee Schmillen testified that, a week to 10 days after the decertification election, he and Wes Edmondson met with Crew in the latter's office, and "We asked . . . him . . . about the Union . . . where we stood at, and Walt said that we are no longer representatives within the company as far as the Union goes." Crew failed to deny this conversation.

²⁰Employee Schmillen testified, without contradiction, that, shortly after the decertification election, he and Wes Edmondson had a conversation with Colin Cortney, the production manager at the plant, as the three were walking down a stairway after a retirement lunch. The employees had noticed that all union literature had been removed from Respondent's bulletin boards and asked why. Cortney, whom Respondent admitted is a supervisor within the meaning of the Act, replied that Crew was the individual who should respond to them. Thereafter, the three went to Crew's office, and the latter said, "[T]hat the Union is no longer a representative at the Company. We could be a member of the [Union], but we weren't to represent the employees."

Labor Relations Board election and documents subsequently signed by a majority of employees indicating that they do not wish to be represented by this Union. Therefore, the Company has no choice but to deny your request for information

Asked if anything other than the decertification petition, the petition to certify the results of the election, and the petition for a wage increase constituted Respondent's objective considerations underlying its withdrawal of recognition from the Union, Crew replied, "That's all that I really recall."

Testifying on behalf of Respondent, Crew changed his testimony, increasing the factors on which Respondent relied for withdrawing recognition. Thus, he stated, "Besides the election, there were the tensions in the shop; the elation of those who were on one side, on the company side, in the election; the animosity from some of the prounion people; the objections that were filed to the election It was just turning into a boiling pit." He added that "several" employees voiced their desire not to be represented by the Union any longer; however, "I can't name you an actual individual." Then, after testifying that, during the 2-week period April 15 through 29 some employees spoke to him regarding having the decertification election result certified,²¹ Crew identified Respondent's Exhibit 18, a four-page exhibit, with each page bearing the identical heading and, beneath the heading, having signatures and dates next to each name. The page headings read as follows:

TO THE NLRB

We the undersigned feel the employees of [Respondent] have made a decision, cast a vote, and the vote has been tallied as to what the feelings of the employees at Selkirk are. It was stated that a simple majority was needed to decide the outcome of the vote. We see no need to change the rules now. We feel the vote should stand, if not how many more times will we vote. This indecision is causing stress and animosity among the employees. We the undersigned do not want [the Union] to represent us.

With regard to the document, which contains the asserted signatures of 85 bargaining unit employees,²² Crew testified that it was submitted to him by employee Jim Burrow, the individual who filed the decertification petition, on May 25 and that, on giving him the four-page petition, Burrow said, "[T]hat hopefully this would help speed things along, and get this whole process over with." Crew maintained that the petition was a complete document at the time he received it; however, when confronted with the fact that, of the five signatures on the last page, four are dated May 26 and one is dated June 1, he had no explanation, averring, "I can't answer that. I don't know. . . . I believe I received them all at the same time." Finally, conceding that, a month prior to receiving Respondent's Exhibit 18, on April 29, he had written two documents, with each announcing that Respondent had withdrawn recognition from the Union, Crew stated that

²¹Crew was able to identify just three.

²²While stating that he recognized some of the signatures, Crew conceded that he never attempted to verify that each signature was that of a bargaining unit employee.

his bases for doing so “must have been just the election and the people asking when it would be certified.”²³

2. Analysis

The amended consolidated complaint alleges that Respondent’s withdrawal of recognition from the Union as the collective-bargaining representative of its Nampa, Idaho bargaining unit employees was violative of Section 8(a)(1) and (5) of the Act. In this regard, the basic legal principles are well settled. Absent unusual circumstances, an incumbent labor organization is irrebuttably presumed to enjoy majority status within an appropriate unit during the effective period of a collective-bargaining agreement. On expiration of the agreement, while the presumption of majority status continues, such becomes rebuttable. In these circumstances, an employer, which wishes to withdraw recognition from an incumbent labor organization, may rebut the presumption of majority status by demonstrating, at an appropriate time, by a preponderance of the evidence, that the labor organization in fact no longer enjoys majority support or that the employer has a good-faith and reasonably grounded doubt of the labor organization’s majority status. *Brown & Root U.S.A.*, 308 NLRB 1206 (1992); *Laidlaw Waste Systems*, 307 NLRB 1211 (1992); and *Radison Plaza of Minneapolis*, 307 NLRB 94 (1992). However, it is equally well settled that an employer’s withdrawal of recognition from an incumbent labor organization must occur in a context free of unfair labor practices. *Gardner Engineering*, 313 NLRB 755, 756 (1994); *Radison Plaza Minneapolis*, supra at 96; and *Celanese Corp. of America*, 95 NLRB 664, 673 (1951). In the instant circumstances, I agree with counsel for the General Counsel and counsel for the Union that Respondent’s withdrawal of recognition from the Union was unlawful.

Initially, in this regard, notwithstanding counsel for Respondent’s June 7, 1993 letter to the Union’s counsel, asserting Respondent’s good-faith doubt, based on the result of the decertification election and the petition, submitted to Respondent on May 25, that the Union continued to represent a majority of the bargaining unit employees, I believe that Respondent withdrew recognition from the Union on or about April 29, 1993, and that such was based solely on the result of the decertification election. Thus, on no two occasions during the 2-week period following the April 15 decertification election, Walter Crew, Respondent’s Nampa, Idaho plant manager, informed employees Paul Schmillen and Wes Edmondson, the president of the Union, that the Union was no longer considered to be the employees’ bargaining representative, and on April 29 Crew wrote two letters to Wes Edmondson, stating, “[T]here is no recognized bargaining agent for the employees” and that “the company believes that a majority of the employees do not wish to be represented by this Union. Thus, the Company does not recognize the Union” Moreover, given Crew’s demon-

²³ The final asserted bargaining unit employee petition received by Respondent, R. Exh. 19, is a six-page document, with each page bearing the identical heading (“This survey/petition is to find the wishes of the employees of Selkirk Metalbestos. Do you want the company to implement its last wage and benefit proposal and the union to agree not to file NLRB charges against the company if they do so.”) and having signatures beneath the heading. According to Crew, it was submitted to him by employee Burrow on September 15.

strably, utterly inconsistent and contradictory testimony as to the factors underlying Respondent’s asserted “good faith doubt” of the Union’s continued majority status²⁴ and the fact that the employee petition, requesting certification of the decertification election result, was not submitted to Crew until a month after recognition was withdrawn, it is clear, and I find, that the only factor, on which Respondent relied for its withdrawal of recognition from the Union, was the tally of ballots from the decertification election, which showed that a majority had voted against representation by the Union.

While the issue there was whether the employer violated Section 8(a)(1) and (5) of the Act by making unilateral changes in employees’ terms and conditions of employment in the period between a decertification election, in which the majority voted against the Union, and the Board’s final order, overruling the Union’s objections and certifying the election results, in *W. A. Krueger Co.*, 299 NLRB 914 (1990), the Board concluded that, notwithstanding that the tally of ballots shows that a majority were cast against the labor organization, “in the decertification context the change in the basic relationship between the parties and in the parties’ obligations to bargain should not be effective until the date the certification issues” and, bearing directly on the issues here, that:

If objections to an election are timely filed, whether the tally of ballots reflects *uncoerced* employee sentiment requires an application of representation case law. If the Board sustains an objection to an election, that election is set aside and becomes a nullity. As long as an election objection is unresolved or one could be timely filed, the tally of ballots cannot be considered reliable evidence of employee sentiment.

Id. at 915–916. Here, the tally of ballots, in the April 15 decertification election, showed that a majority of the votes were cast against the Union, and the Union filed timely objections to the decertification election. In light of *W. A. Krueger Co.*, supra, inasmuch as the Union’s objections were pending at the time Respondent withdrew recognition from the Union, as I believe that the result of the election was the sole underlying rationale for Respondent’s asserted good-faith doubt of the Union’s continued majority status, and as such cannot be considered reliable evidence of employee sentiment, I believe that Respondent failed to demonstrate, by a preponderance of the evidence, objective factors sufficient to support a good-faith doubt of the Union’s majority such as to justify withdrawal of recognition from the Union. Moreover, this is especially true here as the Board ultimately sustained the Union’s objections, which were based on acts and conduct, in part, identical to that herein involved, and ordered a rerun election. *Decorel Corp.*, 163 NLRB 146 (1967). Accordingly, I find that Respondent’s withdrawal of recognition was violative of Section 8(a)(1) and (5) of the Act. *Laidlaw Waste Systems*, supra.

Equally as significant to a finding that Respondent’s above conduct was violative of the Act is the fact that its withdrawal of recognition from the Union was accomplished in

²⁴ Accordingly, other than obvious concessions, I place no reliance on the testimony of Crew with regard to the rationale underlying Respondent’s withdrawal of recognition from the Union.

a context rife with unfair labor practices sufficiently serious to significantly undercut employee support for the Union and, thus, cast doubt on the validity of the election results. Thus, I have found that, in the 2 or 3 weeks prior to the decertification election, Respondent engaged in acts and conduct blatantly violative of Section 8(a)(1) of the Act by informing employees that the Union was responsible for denying them wage increases for 2 years and, thereby, impliedly promising a wage increase if they voted to decertify the Union; by promising retroactive wage increases to employees if they voted to decertify the Union; by impliedly promising employees that each would be given a 401(k) retirement savings plan if employees voted to decertify the Union; and by coercing employees with sinister warnings that, if the Union won the decertification election, “the consequences will be bad” and “it will be serious.” In my view, Respondent’s unfair labor practices not only undermined the decertification election result, which forms the basis of its asserted good-faith doubt, but also were sufficiently flagrant and egregious in themselves so as to undermine the Union’s majority status and, thereby, taint a withdrawal of recognition. Accordingly, on this basis, Respondent’s April 29 withdrawal of recognition from the Union was likewise violative of Section 8(a)(1) and (5) of the Act. *St. Agnes Medical Center*, 304 NLRB 146, 147 (1991), affg. 287 NLRB 242 (1987); and *Guerdon Industries*, 218 NLRB 658, 661–662 (1975).

Finally, while it may be argued that the bargaining unit employees’ petition, which Respondent received on or about May 25 and in which 85 employees stated their support for certification of the decertification election result and opposition to representation by the Union, justified Respondent’s withdrawal of recognition from the Union at the time of its receipt, without regard to the validity of the petition itself, about which I harbor serious doubt,²⁵ such is not a legally viable position. Thus, as set forth above, any analysis of Respondent’s withdrawal of recognition from the Union during the spring of 1993 must be viewed in the context of the Employer’s own prior unfair labor practices, in particular, in light of Respondent’s unlawful conduct on or about April 29. Thus, I have concluded that Respondent unlawfully withdrew recognition from the Union on or about the latter date. As I believe that the conduct directly and obviously affected the bargaining relationship between Respondent and the Union, thereby tending to undermine and erode majority support, the effect of the conduct would clearly negate the legality of a subsequent asserted good-faith doubt of majority status based on withdrawal of recognition. *Guerdon Industries*, supra. Moreover, of course, between mid-April and late May 1993, Respondent engaged in no conduct designed to expurgate the effects of its above-described serious and pernicious unfair labor practices, which it committed during the preelection period, and I do not believe that, by mid-May, the coercive effect of the acts on the bargaining unit employees had dissipated so as to justify Respondent’s reliance on the signatures on the May 25 petition as evidencing the Union’s loss of majority support. In these circumstances, any contention

²⁵ I note that, despite Crew’s insistence that he received the entire document at the same time, the last page contains signatures, which are dated subsequent to May 25, a fact for which Crew had no explanation, and that Respondent made no effort to validate the employee signatures on the petition.

that Respondent may have been justified in withdrawing recognition from the Union on or after May 25 would, in my view, be specious.²⁶

F. Respondent’s Alleged Unlawful Unilateral Changes

1. The facts

The record reveals that article 17 of the most recent collective-bargaining agreement, between Respondent and the Union, established a grievance-and-arbitration procedure, which provided for a “joint Company-Union grievance board,” consisting of six individuals, with each party selecting three participants. The board was responsible for adjusting all grievances, which had not been resolved in the preceding three steps of the grievance procedure. General Counsel’s Exhibit 14 is an employee grievance form, on which is set forth a grievance dated October 16, 1993. While it is unclear in the record exactly when such was implemented, it is certain that the grievance-and-arbitration procedure, set forth in the exhibit, is not consistent with the above-described contractual grievance procedure. In this regard, under questioning by counsel for the General Counsel, Walter Crew admitted that, “since we had no Union at this time” Respondent implemented a different grievance-and-arbitration procedure whereby either the production manager or “a panel of . . . hourly people from the shop floor” issue final decisions on the merits of bargaining unit employee grievances. The latter group of employees, who, Crew stated, act as jurors, is known as the peer grievance review panel; it is unclear in the record as to what types of grievances are resolved by the production manager and what types are heard by this peer review panel. There is no dispute, and Crew admitted, that the Union was not notified of this change in the bargaining unit employees terms and conditions of employment.

The record further reveals that, during the effective period of the parties’ most recent collective-bargaining agreement, the entire cost of bargaining unit employees’ health insurance coverage was borne by Respondent and that, during the bargaining for a successor agreement, Respondent consistently proposed that the employees contribute to the cost of the insurance. On July 18, 1993, Respondent’s attorney wrote to the Union’s attorney that Respondent desired to implement a wage increase for bargaining unit employees and the health insurance changes, set forth in its final contract offer to the Union, including the employee copayment provision. In the letter, Respondent’s counsel specified that the letter should not be construed as recognition of the Union as the employees’ bargaining representative and that, if the Union attempted to bargain over changes in Respondent’s offers, nei-

²⁶ Likewise, I believe Respondent may not have justified a withdrawal of recognition on the bargaining unit employees’ petition, which it received on or about September 19. Thus, without regard to anything else, the petition indicates employee support for a wage increase and does not speak to loss of majority support for the Union as their bargaining representative. In these circumstances, it may not support a doubt as to the Union’s majority support. *Pic Way Shoe Mart*, 308 NLRB 84 (1992).

Moreover, while not clearly on point, the Board’s recent decision in *Underground Service Alert*, 315 NLRB 958 (1994), adds additional support for my view that Respondent may not rely on the May 25 employee petition to withdraw recognition from the Union.

ther would be implemented. Notwithstanding that the Union's attorney specifically objected to Respondent's unilateral implementation of the health insurance changes, including the employee copayment plan, according to Walter Crew, on or about October 1, 1993, Respondent implemented its stated changes in its employee health insurance plan, including a requirement that each bargaining unit employee make a monthly contribution toward the cost of his or her health insurance coverage.

2. Analysis

The amended consolidated complaint alleges that both the change in the bargaining unit employees' grievance and arbitration procedure and the implementation of the new health insurance copayment obligation were accomplished unilaterally by Respondent without bargaining with the Union and, therefore, were violative of Section 8(a)(1) and (5) of the Act. In this regard, there is no dispute that each act represented a change in the bargaining unit employees' terms and conditions of employment and that Respondent accomplished each change without bargaining with the Union. Presumably, Respondent defends against the amended consolidated complaint allegations on grounds that, having withdrawn recognition from the Union, it was no longer under any obligation to bargain with the Union prior to implementing the above changes in the bargaining unit employees' terms and conditions of employment. I have previously concluded, however, that Respondent's withdrawal of recognition from the Union, as the majority representative of its employees, was unlawful and itself violative of Section 8(a)(1) and (5) of the Act. Accordingly, at all times material, Respondent remained obligated to implement no changes in the bargaining unit employees' terms and conditions of employment without the consent of the Union or until the parties reached a bona fide impasse in bargaining. *Laverdiere's Enterprises*, supra. Here, there is no evidence that the Union consented to the above-described changes and no contention that the parties' were at an impasse in bargaining. In the circumstances, the conclusions are mandated that Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act, by unilaterally, without the consent of the Union, changing the bargaining unit employees' terms and conditions of employment by implementing changes in the contractual grievance and arbitration procedure and a new health insurance copayment obligation for employees. *Gardner Engineering*, supra; *R. T. Jones Lumber Co.*, 313 NLRB 726 (1994); *Alexander Linn Hospital Assn.*, 288 NLRB 103 (1988); *Conoco, Inc.*, 287 NLRB 548 (1987); and *Litton Business Systems*, 286 NLRB 817 (1987).

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is the majority representative for purposes of collective bargaining of the following appropriate unit of Respondent's employees:

All production and maintenance employees including shipping and receiving employees employed by Respondent at its Nampa, Idaho plant; excluding all office

clerical employees, professional employees, guards and supervisors as defined in the Act.

4. Since on or about January 15, 1993, by failing and refusing to provide the Union with updated information pertaining to the projected costs, attendant to health insurance for its bargaining unit employees, to itself and to the employees, which information was necessary and relevant for purposes of collective bargaining, Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

5. In or about March and April 1993, by stating to employees that the Union had prevented them from getting a wage increase, by impliedly promising employees that each would be given a 401(k) retirement savings plan if they voted to decertify the Union; by promising employees they would receive a retroactive pay increase if they decertified the Union; and by threatening employees with sinister consequences if the Union were victorious in a decertification election, Respondent engaged in acts and conduct violative of Section 8(a)(1) of the Act.

6. On or about April 29, 1993, by withdrawing recognition from the Union as the collective-bargaining representative of its bargaining unit employees, Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act.

7. In or about October 1993, by unilaterally, without bargaining with the Union as the collective-bargaining representative of its bargaining unit employees, adopting changes in the contractual grievance-and-arbitration procedure, and by unilaterally, without the consent of the Union and without an impasse in bargaining, implementing a monthly health insurance copayment obligation for bargaining unit employees, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.

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

9. Respondent engaged in no unfair labor practices other than specified above.

REMEDY

Having found that Respondent has engaged in serious unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist from its unlawful conduct and to take certain affirmative action designed to effectuate the policies of the Act. Thus, inasmuch as Respondent unlawfully withdrew recognition from the Union as the exclusive representative for purposes of collective bargaining of its bargaining unit employees, I shall recommend that Respondent be ordered to recognize and, on request, bargain with the Union and, if an agreement is reached on a successor agreement, embody such in a new collective-bargaining agreement. *Alexander Linn Hospital*, supra at 111-112.²⁷ In addition, I shall recommend that Respondent be ordered to, on request, provide the Union

²⁷I am not unmindful of the fact that, with the approval of the Board, the Regional Director for Region 27 has ordered that a rerun decertification election be conducted. Given the fact, however, that Respondent's own conduct tainted the results of the April 15, 1993 election, until a rerun election occurs and the results of the rerun election are certified by the Regional Director, Respondent is clearly obligated to continue to recognize and, on request, to bargain in good faith with the Union.

with all updated information pertaining to the costs, attendant to its bargaining unit employees' health insurance plan, to itself and to the employees. Further, I shall recommend that Respondent be ordered to rescind its above-described unlawful unilateral changes, specifically the new grievance-and-arbitration procedure and the new monthly health insurance copayment policy for bargaining unit employees, which terms and conditions of employment were implemented subsequent to Respondent's unlawful withdrawal of recognition from the Union. With regard to the unlawfully imposed health insurance monthly copayment, I shall recommend that Respondent be ordered to reimburse all bargaining unit employees for any amounts deducted from their monthly wages, as copayment amounts for the cost of their health insurance, from on or about October 1, 1993, to the present, with interest.²⁸ Finally, Respondent shall be ordered to post a notice, setting forth all its obligations herein.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁹

ORDER

The Respondent, Selkirk Metalbestos, North America, Eljer Manufacturing, Inc., Nampa, Idaho, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide the Union with updated information pertaining to the projected costs, attendant to health insurance coverage for its bargaining unit employees, to itself and to the employees, which information is necessary and relevant for purposes of collective bargaining.

(b) Stating to bargaining unit employees that the Union had prevented them from receiving a wage increase and, thereby, impliedly promising wage increases to employees in order to induce them to vote against the Union in the decertification election.

(c) Informing employees that each unrepresented employee is given a 401(k) retirement savings plan and, thereby, impliedly promising that such a benefit will be provided to each employee if employees vote against the Union in the decertification election.

(d) Promising employees that they will receive a retroactive pay increase if they decertify the Union.

(e) Threatening employees with sinister consequences if the Union is victorious in the decertification election.

(f) Withdrawing recognition from the Union as the exclusive representative for purposes of collective bargaining of its employees in the following appropriate unit:

All production and maintenance employees including shipping and receiving employees employed by Respondent at its Nampa, Idaho plant; excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(g) Unilaterally, without bargaining with the Union, adopting changes in the bargaining unit employees' contractual grievance and arbitration procedure.

(h) Unilaterally, without the consent of the Union or an impasse in bargaining, imposing a monthly health insurance copayment obligation on bargaining unit employees.

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

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

(a) Recognize and, on request, bargain with the Union, which is the exclusive representative for purposes of collective bargaining of its employees in an appropriate unit of all production and maintenance employees including shipping and receiving employees employed by Respondent at its Nampa, Idaho plant; excluding all office clerical employees, professional employees, guards, and supervisors as defined by the Act and, if agreement is reached on a successor contract, embody the agreement in a written agreement.

(b) On request, provide updated information to the Union pertaining to the costs, attendant to Respondent's bargaining unit employees' health insurance plan, to itself and to the employees.

(c) Rescind any changes in the bargaining unit employees' grievance and arbitration procedure, which were implemented subsequent to April 29, 1993, and implementation of the bargaining unit employees' monthly health insurance copayment obligation, which was imposed on or about October 1, 1993.

(d) Reimburse each bargaining unit employee for his or her monthly health insurance plan contributions, which amounts Respondent deducted from employees' paychecks since October 1, 1993, with interest as set forth in the remedy section.

(e) 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.

(f) Post at Respondent's facility in Nampa, Idaho, copies of the attached notice marked "Appendix."³⁰ Copies of the notice, on forms provided by the Regional Director for Region 27, 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.

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

IT IS FURTHER ORDERED that, insofar as the amended consolidated complaint alleges unfair labor practices not specifically found here, the amended consolidated complaint is dismissed.

²⁸ The interest rate shall be as computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

²⁹ If 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.

³⁰ If 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."