

Noah's New York Bagels, Inc. and Teamsters Local 853, International Brotherhood of Teamsters, AFL-CIO. Cases 32-CA-14257, 32-CA-14473, 32-CA-14551, and 32-RC-3914

August 15, 1997

DECISION, ORDER, AND DIRECTION OF
SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

On October 30, 1995, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent and the Charging Party filed exceptions and supporting briefs, and the General Counsel filed cross-exceptions and a supporting brief. The General Counsel filed a brief in answer to the Respondent's exceptions, and the Respondent filed an opposition to both the Charging Party's exceptions and the General Counsel's cross-exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions as modified.³

The facts are set forth more fully in the judge's decision. Briefly, the Respondent manufactures and sells bagels. During July 1994,⁴ the Union obtained authorization cards from a majority of the Respondent's drivers and filed a representation petition on July 27. The complaint alleged that the Respondent engaged in var-

ious illegal activities during the campaign. The judge found that some of the activity violated Section 8(a)(1) and dismissed other complaint allegations. We agree with the judge's findings, except as follows.

1. In mid-August, the Respondent's president, Bill Hughson, accompanied van driver George Killingsworth on his delivery route. According to Killingsworth, Hughson asked Killingsworth, *inter alia*, if he had made up his mind regarding the upcoming union vote, whether he had any concerns with the company, and about Killingsworth's interest in working in Los Angeles.

The judge found that the Respondent violated Section 8(a)(1) by asking Killingsworth about his concerns and implying that the Respondent would remedy them and by raising the possibility that Killingsworth could work for the Respondent in Los Angeles. We agree with those findings.⁵

Hughson and Killingsworth also discussed the negotiation process. The credited testimony shows that Hughson stated, *inter alia*, that wages "would" revert back to a minimum. Hughson then said that wages were a result of negotiations and could end up higher, lower, or the same after negotiations.⁶ The judge found that these statements by Hughson did not violate 8(a)(1) because he explained to Killingsworth that, as a result of negotiations, wages could go up, down, or remain the same. The Charging Party excepts, and we find merit in the exception.

The standard for determining whether statements of this type violate Section 8(a)(1) of the Act is set out in *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), *enfd.* 810 F.2d 638 (9th Cir. 1982), as follows:

It is well established that "bargaining from ground zero" or "bargaining from scratch" statements by employer representatives violate Section 8(a)(1) of the Act if, in context, they reasonably could be understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore. On the other hand, such statements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations.

¹The General Counsel has excepted to the judge's failure to make a specific credibility resolution and finding with regard to the complaint's allegation that Respondent's president, Bill Hughson, unlawfully interrogated employees Carlos Pacheco and Carlos Martinez by asking them if they had made "the right decision" about how to vote in the election. However, in his decision the judge noted that Hughson's account of what he said to Pacheco and Martinez was corroborated by John McCraw, Respondent's director of manufacturing. The judge also specifically discredited any testimony that was inconsistent with his findings. Since the judge did not find an unlawful interrogation, we infer that he discredited the testimony of employee Pacheco that would have supported the allegation.

The Charging Party has also excepted to the judge's failure to find that Hughson created the impression of surveillance of employees' protected activities by telling Pacheco that he knew how certain drivers were going to vote and that if Pacheco and Martinez voted against the Union, the Employer would win the election. Here again, we infer from the judge's failure to find the violation, and his discrediting of any testimony inconsistent with his findings, that he discredited Pacheco's testimony in support of this allegation.

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

³We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

⁴All subsequent dates are 1994.

⁵The judge did not find an unlawful interrogation. His failure to do so is apparently based on a finding that Hughson did not ask Killingsworth whether he had made up his mind regarding the election. In this regard, we note that Hughson denied asking the question, and the judge said that he discredited testimony inconsistent with his conclusions. We also note that it is neither illogical nor unreasonable to credit a part of a conversation and to discredit another part.

⁶We find, based on the judge's credibility determination, that Hughson initially said to Killingsworth that wages "would" revert to a minimum.

Applying this standard to the facts here, we find that Hughson's statement indicated that benefits "would be" reduced and thus could reasonably be understood as a threat of loss of existing benefits. Admittedly, Hughson followed up this statement to Killingsworth by telling him that wages were a result of negotiations, and that neither party could promise what the results of negotiations would be, and that wages could be higher, lower, or the same after negotiations. We find, however, that these statements did not cure Hughson's initial statement that wages "would" revert to a minimum. The statement overall can reasonably be understood to say that wages would revert to a minimum at least until negotiations were concluded and then could be raised, lowered, or remain the same. Accordingly, we find that Hughson's comments violated Section 8(a)(1).

2. On September 29, the day before the election, President Hughson gave a speech at a captive audience meeting for the drivers. The General Counsel alleged that the following portion of Hughson's speech violated Section 8(a)(1) because it promised to grant benefits if the employees rejected the Union:

Noah's [B]agels has a very exciting future, and I hope very much that we will be able to work hand-in-hand to make it a successful future for all of us. Through our rapid growth, we've clearly made some mistakes. It's disappointing that we had to hear about our mistakes in this way. However, I feel strongly that the best way to overcome our mistakes is for us to work together, without the intervention of a third party that costs all of us money yet is not concerned about our well-being. A third party that, despite its costs to both me and you, carries with it no guarantee of the things that are important to us all: job security, fair treatment, good wages and benefits, and a warm friendly work environment.

Please vote to give us a second chance to show what we can do. If we don't meet your expectations, the Teamsters will be there—they'll be just as happy to take your dues and initiation fees later as they are now.

The judge agreed with the General Counsel's arguments and found an 8(a)(1) violation. The Respondent excepts, and we find merit in the Respondent's exception.

In *National Micronetics*, 277 NLRB 993 (1985), the Board found no violation where the employer confessed that it had neglected matters in the past and asked for a second chance to make things better. That was the essence of Respondent's speech here. As in

National Micronetics, the Respondent did not make any specific promise that any particular matter would be improved. As the Board there explained: "Generalized expressions of this type, asking for 'another chance' or 'more time,' have been held to be within the limits of permissible campaign propaganda." Therefore, we will dismiss this allegation.

AMENDED ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Noah's New York Bagels, Inc., San Leandro, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

"(d) Telling employees that during negotiations wages would revert to a minimum."

2. Substitute the following for paragraphs 2(a) and (b).

"(a) Within 14 days after service by the Region, post at its facility in San Leandro, California, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 27, 1994.

"(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

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

DIRECTION OF SECOND ELECTION

IT IS FURTHER DIRECTED that Case 32-RC-3914 is severed and remanded to the Regional Director for Region 32 for the purpose of conducting a new election at such time as he deems appropriate.

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 solicit grievances from employees and impliedly promise to improve working conditions in order to cause employees to become disaffected with the Union.

WE WILL NOT promise employees loans, transfers, or other benefits in order to discourage union activities.

WE WILL NOT discriminatorily enforce a rule against the wearing of union buttons.

WE WILL NOT tell employees that their wages would revert to a minimum during contract negotiations.

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

NOAH'S NEW YORK BAGELS, INC.

Gary M. Connaughton, Esq., for the General Counsel.
Robert G. Hulteng and *Robert Leinwand, Esqs. (Littler Mendelsohn, Fastiff, Tichy & Mathiason)*, of San Francisco, California, for Respondent-Employer.
Andrew Baker, Esq. (Beeson, Tayer & Bodine), of San Francisco, California, for Union-Petitioner.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Oakland, California, on May 8 through 12, 1995. On October 6, 1994, Teamsters Local 853, International Brotherhood of Teamsters, AFL-CIO (the Union) filed the charge in Case 32-CA-14257 alleging that Noah's New York Bagels, Inc. (Respondent or the Employer), committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). The Union filed additional charges in Case 32-CA-14473 on January 18, 1995, and in Case 32-CA-14551 on February 22, 1995. On March 31, 1995, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a consolidated complaint and notice of hearing against Respondent al-

leging that Respondent violated Section 8(a)(5), (3), and (1) of the Act. Respondent filed a timely answer to the consolidated complaint, denying all wrongdoing.

On July 27, 1994, the Union filed a petition in Case 32-RC-3914 seeking to represent Respondent's wholesale and retail delivery drivers then employed at Respondent's Emeryville facility. During the pendency of the petition, Respondent moved its production and distribution facility to San Leandro, California. An election was held on September 30, 1994. The results of the election were seven votes cast for representation by the Union and nine votes against representation. There was also one challenged ballot. The Union filed timely objections to the election. On January 27, 1995, the Regional Director issued a Report and Recommendations on Objections and Notice of Hearing. The hearing on the Union's objections was consolidated with the unfair labor practices hearing.

All parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses¹ and, having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent is a California corporation with offices and a principal place of business located in San Leandro, California, where it is engaged in the manufacture and sale of bagels and associated food items in both the wholesale and retail markets in California. During the previous calendar year, Respondent derived gross revenues in excess of \$500,000. During the same time period, Respondent purchased and received goods and products valued in excess of \$5000 that originated from points outside the State of California. Accordingly, Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

During July 1994, the Union obtained union authorization cards from a majority of Respondent's wholesale and retail delivery employees. As stated earlier, on July 27, 1994, the Union filed its representational petition. The complaint alleges that during the union campaign, Respondent through its agents solicited employee grievances, promised employees increased benefits, instructed union adherents to remove their union T-shirts and buttons, and required employees to sign a document agreeing to Respondent's nonunion policy. Fur-

¹ The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

ther, the General Counsel seeks a bargaining order to remedy the alleged unfair labor practices. Finally, the General Counsel contends that Respondent violated Section 8(a)(5) of the Act by making certain unilateral changes after refusing to recognize and bargain with the Union. Respondent denies that it violated the Act. Further, Respondent argues that a bargaining order remedy is not appropriate under the facts of this case.

In the representation case, the issues are whether Respondent interfered with the election by engaging in the alleged unfair labor practices and whether Respondent interfered with the election by holding a party celebrating the opening of its new facility on the day of the representation election.

B. Facts and Preliminary Conclusions

1. The organizing campaign

Respondent's drivers began their organizing campaign in July 1994. On July 13, six of Respondent's wholesale drivers met at a hotel in Berkeley, California, with Rome Aloise, a representative of the Union. At this meeting, Aloise obtained signed union authorization cards from six employees. Aloise gave blank authorization cards to employees LaTonya (Latti) Foster and Justine Jimenez-Dehn to distribute to employees who did not attend the meeting. Between July 13 and 24, Foster and Jimenez-Dehn obtained five other signed authorization cards, which cards were delivered to Aloise. On July 25, Aloise sent a letter to Bill Hughson, Respondent's president, advising the Employer that the Union represented a majority of the drivers and requesting that the Employer recognize and bargain with the Union. As stated earlier, the petition was filed on July 27. Approximately 8 days later, Aloise was informed in a telephone conversation that Respondent would not voluntarily recognize the Union but would await a Board-conducted election. During the time between the filing of the petition and the refusal to recognize the Union, two additional drivers signed union authorization cards. The authorization cards state as follows:

Authorization for representation under, the National Labor Relations Act, I the undersigned employee of [Respondent] authorize Teamsters Local 853 to represent me in negotiations for better working conditions and wages. This authorization supersedes any similar authority previously given to any person or organization.

The appropriate bargaining unit was all full-time and regular part-time distribution and delivery drivers and pickers employed by the Employer at its San Leandro, California facility; excluding all other employees, guards, and supervisors as defined in the Act. There were approximately 18 employees in the bargaining unit.

2. The alleged solicitation of grievances

Respondent received a copy of the representation petition on July 27. Shortly thereafter, on August 3, Respondent's supervisors conducted a mandatory employee meeting. All

wholesale driver employees were required to attend.² The meeting was held in response to the Union's representation petition. Bill Hughson, Respondent's president did most of the speaking for Respondent. Hughson began by stating that Respondent had received a copy of the Union's petition from the Board. He stated that he was disappointed by the petition and that the petition meant that Respondent managers had messed up as managers and as human beings. Hughson asserted that he had been to training about what he could and could not do during the campaign. According to employees LaTonya (Latti) Foster and Justine Jimenez-Dehn, Hughson said that he wanted to know what problems the drivers were having with the Employer. A number of drivers spoke about various problems. One driver complained about disciplinary warnings and others complained that Respondent's policies were not clearly defined. Hughson said that if he had come to the employer as an outsider, he might feel that a union was needed and that he could see why the drivers were having problems. Hughson said he had been concentrating on the retail business but would now pay more attention to the wholesale side of the business. He stated that there would be changes and that he would do his best to make sure the problems were resolved. Hughson emphasized that the Employer had an open door policy and that employees could come and speak to him. The Employer had, in fact, an open door policy in effect since it began operations in 1989. The open door policy was included in the employee handbook in effect at the time the organizing drive began.

Hughson testified that he began the meeting by telling employees that he had received the representation petition from the NLRB. Hughson said he was disappointed that the drivers felt they needed union representation and that if the drivers felt that way, management must have "screwed up." He said in his opinion management was responsive to the employees' needs and that the employees and management could work together without the need for a third party. Hughson then responded to questions from employees. Both Hughson and Doug Troy, vice president of operations, deny that Hughson asked employees what their concerns were or promised to attempt to resolve them. Hughson and Troy both testified that Hughson reiterated Respondent's longstanding open door policy. Hughson and Troy had both been counseled not to make any threats or promises to employees during the campaign.

On or about August 10, Hughson held another meeting for the wholesale delivery drivers. At this meeting, some office and managerial staff were introduced to the employees. According to employee, Latti Foster, Hughson asked employees about their concerns and said he wanted to address them. Hughson again emphasized his longstanding open door policy. Hughson and Troy deny that Hughson asked employees about their concerns or promised to resolve problems.

The General Counsel contends that by telling the drivers that he wanted to know what their problems were and, thereafter, promising to do his best to see that the problems were resolved, Hughson solicited grievances and promised to resolve them in violation of Section 8(a)(1) of the Act. It is well established that when an employer institutes a new prac-

² Respondent's wholesale drivers drove vans and delivered to grocery stores, coffeeshops, and restaurants. The retail drivers delivered to Respondent's retail stores and drove large tractor trailers.

tice of soliciting employee grievances during a union organizational campaign, "there is a compelling inference that he is implicitly promising to correct those inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary." *Embassy Suites Resort*, 309 NLRB 1313, 1316 (1992); *Reliance Electric Co.*, 191 NLRB 44, 46 (1971). Here, Respondent had a prior open door policy and Hughson lawfully reminded employees of that policy. His statements that Respondent was responsive to employee needs and that Respondent and the employees could work together without a third party are lawful. *National Micronetics*, 277 NLRB 993 (1985); *Alterman Transport Lines*, 308 NLRB 1282 (1992). However, Hughson questioned employees about their problems and promised to do his best to resolve such problems. I find that by such conduct Hughson unlawfully made implied promises in violation of Section 8(a)(1) of the Act.

3. Hughson's ride with Killingsworth

During the middle of August, Hughson accompanied driver George Killingsworth on Killingsworth's route. Killingsworth testified that Hughson asked Killingsworth if he had made up his mind regarding the upcoming election. Hughson said that while the Employer could not make promises during the campaign, the Union was not under the same constraints. Hughson asked Killingsworth about his concerns.³ This prompted a long discussion by Killingsworth about problems such as job security, assignment of overtime, and scheduled days off. He discussed at length recent problems employees had about being required to work overtime. Killingsworth said that he would gladly work overtime but did not like being forced to work overtime. Killingsworth also spoke at length about the lack of clarity in Respondent's wage schedule. Killingsworth said that when he was hired he was told that after a year he would be making \$12 per hour but that he had been with the company over a year and was not yet earning \$12 per hour. Killingsworth stated that the wage schedule should be in writing and Hughson agreed.

According to Killingsworth, during their drive together, Hughson said that he had heard that Killingsworth had expressed an interest in driving in Los Angeles when Respondent opened its new retail stores in that area. Killingsworth said that he was interested if he was offered a comparable job and comparable hours. Hughson said that Respondent was planning to open three retail stores in the Los Angeles area but would not, at least initially, have a production facility in Southern California. Bagels would be shipped from the San Leandro facility to the Los Angeles stores. Killingsworth responded that he would be interested in such a route. Hughson said that after the stores were established there might be a possibility for employment for Killingsworth and that Hughson would keep him informed of the prospects.

According to Killingsworth, Hughson said that if the Union won the election, the pay and benefits that drivers were presently receiving "would" or "could" revert to square one, to a minimum, and there would be a long period of negotiations, as long as 2 years, before employees would know whether they would go back to what they had been

making before the Union got in. Hughson also told Killingsworth that if the Union won the election, Respondent would no longer be able to reward employees on the basis of performance, but only on the basis of seniority. According to Hughson he said that the Union would make such a demand in negotiations. Hughson told Killingsworth that Respondent could not distribute the new personnel manual during the preelection period.

Hughson denied asking Killingsworth about his problems with the Company. Hughson denied that he ever told Killingsworth that during negotiations wages would revert back to square one or a minimum. Based on Killingsworth's notes, written shortly after the conversation, I find that Hughson said that wages would revert back to a minimum. However, Hughson also told Killingsworth that wages were a result of negotiations and that neither the Employer nor the Union could promise results of negotiations. He said wages could end up higher, lower, or the same after negotiations. Hughson testified that Killingsworth raised the subject of transferring to Los Angeles and that he made no promises regarding work in Los Angeles.

A few days later, Hughson gave Killingsworth a typed copy of the wage schedule for Respondent's drivers. According to Killingsworth, Hughson said that he was sorry that the pay levels were so low but that Respondent could not raise the wage levels during the election campaign. Hughson denied that he apologized for low pay levels or indicated that Respondent intended to raise pay levels. According to Hughson, he simply handed the wage schedule to Killingsworth and stated, "You wondered where you stood on the wage schedule, here it is."

I find that Hughson asked Killingsworth about his concerns and implied that Respondent would remedy those concerns. I further find that by raising the possibility that Killingsworth could work for Respondent in Los Angeles in the context of a day spent discussing the Union, Hughson implied, and Killingsworth would reasonably infer, that the transfer was linked to favorable action in the upcoming election. I find that Respondent impliedly promised favorable action on such a job transfer in order to influence Killingsworth's vote in the upcoming election. I find no violation in Hughson statements that wages could revert to a minimum because Hughson explained that as a result of negotiations wages could go up, down or remain the same. See *Histacount Corp.*, 278 NLRB 681 (1986); *Computer Peripherals*, 215 NLRB 293 (1974).

4. Hughson's ride with Jimenez-Dehn

On or about August 10, Hughson accompanied employee Justine Jimenez-Dehn on her driving route. According to Jimenez-Dehn, Hughson asked what were her problems with the Company. She answered that there had been a high turnover in management, that Respondent's policies were not clearly defined and that she did not feel secure about her future with the Employer. Hughson mentioned that he had learned that someone in management had told employees never to go to the management offices and that Hughson wanted employees to know that they could come to the offices and speak to him. During this ride, Jimenez-Dehn and Hughson discussed the possibility of an incentive plan for the wholesale drivers. Jimenez-Dehn mentioned a conversation she had with a former manager. Hughson said that

³ Although Killingsworth had not previously indicated that he was a union supporter, during his conversations with Hughson he was quite open in his support for the Union.

“he couldn’t do anything about” such a plan during the union campaign. He said that “he couldn’t make any promises.” Hughson said he would be thinking about the problems that Jimenez-Dehn raised and would do his best to try to solve them. Hughson said he hoped that Jimenez-Dehn would give the Employer a second chance.

Hughson denied asking Jimenez-Dehn about her problems with the Company and promising to resolve such problems. Hughson testified that he told her that he couldn’t make any threats, interrogate employees, make any promises, or engage in surveillance.

I find that Respondent violated the Act by asking Jimenez-Dehn about her problems with Respondent and impliedly promising to remedy those problems or grievances.

5. The new employee handbook

On or about August 12, Respondent distributed a new employee handbook to its production employees. Due to the pending representation petition in the drivers’ bargaining unit, the handbook was not distributed to the drivers. Respondent instead distributed a letter to the drivers explaining that the new handbook was not being distributed to drivers because Respondent could not change existing benefits during the election campaign. A day later, Foster and Jimenez-Dehn asked Hughson why the drivers had not received the handbook. According to Foster and Jimenez-Dehn, Hughson said that he had been informed by his lawyers that because the handbook contained benefits that had not been previously announced to the drivers, he could not distribute the handbook to the drivers. He said there was a similar package, including raises and vacation benefits, for the drivers but that Respondent could not give it to the drivers because it might be deemed to be an election campaign bribe.

Hughson testified that the discussion involved the handbook and not a wage increase. According to Hughson, he told Foster and Jimenez-Dehn that because the handbook contained modifications to benefits that had not been previously discussed with employees, he had been advised that it was not legal or proper to introduce the handbook at that time. I find Hughson’s version of this conversation to be the most trustworthy. First, Respondent was considering raising the wages of the retail drivers but not an across-the-board wage increase. Respondent was not considering raising the wages of van drivers such as Foster and Jimenez-Dehn. Second, Hughson’s version of the conversation seems more consistent with the legal advice he had just received. Most important, his version of the conversation is consistent with the memorandum he had issued the previous day. That letter stated that because the new handbook included changes in benefits that had not been announced prior to the petition, the Respondent was withholding the handbook in an attempt to “follow the law.”

As mentioned above, on or about August 12, Respondent distributed its new employee handbook to its production and administrative employees at the Emeryville facility while at the same time withholding the handbook from the distribution employees. Respondent had been working on a new handbook in early 1994. When the representation petition was filed, the handbook was still in draft form. Holidays and vacation were among the policies that were not finalized when the petition was filed. Although employees were aware

that Respondent was working on a new handbook, the specifics of the handbook had not been announced.

When the new handbook was completed on August 12, Respondent decided not to distribute the handbook to the employees in the bargaining unit because the new benefits in the handbook had not been previously announced to the employees. Respondent withheld issuance of the handbook to the unit employees in an attempt to avoid unfair labor practices. The Employer distributed a letter explaining that the handbook was withheld to avoid the appearance of vote buying and to comply with the Federal labor law. The new handbook was distributed to the bargaining unit employees in January 1995, after objections to the election had been filed and had been set for hearing.

It is well settled that, in deciding whether to grant benefits while a representation election is pending, an employer should act as if no union were in the picture. *Centre Engineering*, 253 NLRB 419, 421 (1980). The Board’s general Rule is that an employer’s legal duty during a preelection campaign period is to proceed with the granting of benefits, just as it would have done had the union not been on the scene. See, e.g., *American Telecommunications Corp.*, 249 NLRB 1135 (1980). Thus, if an employer withholds wage increases or accrued benefits because of union activities, and so advises employees, it violates the Act. *Liberty House Nursing Home*, 236 NLRB 50 (1978). However, where employees are told expected benefits are to be deferred pending the outcome of an election in order to avoid the appearance of election interference, the Board will not find a violation. *Truss-Span Co.*, 236 NLRB 50 (1978).

Applying these principles to the facts of the instant case, I find that Respondent informed the employees, at the time it withheld the handbook, that the sole reason for its deferral of the benefits was to avoid the appearance that it was attempting to unlawfully affect the representation election. Respondent acted consistently with its expressed reasons. Thus, I find the evidence establishes that the sole reason for the deferral of the benefits was to avoid the appearance of impropriety. Accordingly, I find that Respondent did not violate the Act in deferring the granting of these benefits nor did Respondent unlawfully attribute the deferral to the Union. *Centre Engineering*, supra.

6. Withholding of wage increases

On or about August 14, Respondent granted wage increases for its production employees. As with the distribution of the handbook, Respondent did not grant a wage increase to its drivers.

During July 1994, Troy conducted a wage survey of several local businesses with similar employee classifications. This survey indicated that Respondent was not paying a competitive wage to its production employees and to its retail drivers and driver assistants. The survey indicated that the rate paid to the van drivers (the wholesale drivers) was competitive. Thus, Troy proposed a new wage schedule in July for comments by Hughson and John McCraw, director of manufacturing. McCraw recommended several changes in Troy’s proposed wage schedule. On or about August 14, the new wage schedule for production employees was implemented and a copy posted at the Emeryville facility. The production employees received a \$1-an-hour raise. However, due to the pending representation petition Respondent did not

implement a new wage schedule for the drivers. A wage schedule for drivers had not been finalized when the petition was filed. Respondent ceased work on this schedule after the petition was filed because it had no set past practice of granting wage increases and was concerned that the granting of such an increase would be presumed to be an unfair labor practice. In January 1995, Respondent conducted another wage survey for its driver employees and in February 1995, granted a wage increase based on that wage survey.

As stated earlier, in deciding whether to grant benefits while a representation election is pending, an employer should act as if no union were in the picture. *Centre Engineering*, supra. The Board does not automatically find the granting of benefits during an organizational campaign to be unlawful, but it presumes that such action will be objectionable "unless the Employer establishes that the timing of the action was governed by factors other than the pendency of the election." *American Sunroof Corp.*, 248 NLRB 748 (1980); *Honolulu Sporting Goods*, 239 NLRB 1277 (1979). However, the withholding of new benefits from employees who are awaiting a Board election also violates the Act if the employees otherwise would have been granted the increases in the normal course of the employer's business. *Progressive Supermarkets*, 259 NLRB 512 (1981). An employer is obligated to give any increase or benefit decided on, or any regular, normal increase that would come due during the critical period, but should not put into effect any increase not already decided upon before the union came on the scene. The more prudent course, the one least likely to result in a violation, is to refrain from giving the wage increases during that period, for at the very least the General Counsel would have the burden of showing the normalcy of the increase, or that it had been decided on prior to the advent of the union. *Liberty Telephone Communications*, 204 NLRB 317, 322 (1973).

In the instant case, Respondent had no practice of granting periodic wage increases. While Respondent was in the process of preparing a new wage schedule that process had not been completed or decided on when the petition was filed. Thus, believing that a wage increase at that time would be presumed to be an unfair labor practice, Respondent took the prudent course and suspended action on a new wage schedule. Accordingly, I find that Respondent did not violate the Act by postponing implementation of a new wage schedule for its drivers. *American Mirror*, 269 NLRB 1091 (1984); *Great Atlantic & Pacific Tea Co.*, 192 NLRB 645 (1971).

7. Acknowledgment of receipt for the handbook

As stated earlier on August 12, Respondent distributed its new handbook to its production employees. The General Counsel contends that by requiring employees to sign a receipt for the handbook, Respondent was forcing employees to agree to an antiunion policy under penalty of discipline.

Section 4 of the handbook entitled Unions reads as follows:

At Noah's Bagels we believe that unions *are not necessary*. We believe this for many reasons[.]

First, there is no reason why you should have to pay union initiation fees, union dues, and union assessments for what you already have. Noah's Bagels has never laid employees off in the past, and at this time there

is no reason we foresee that we should have to do so in the future. Noah's Bagels has never reduced wage rates in the past, and at this time there is no reason we foresee that we should have to do so in the future.

Second, there is no reason why you or your family should fear loss of income or job because of strikes or other union-dictated activity.

Third, we believe that the best way to achieve results is to work and communicate directly with each other without the interference of third parties or unions. We feel that Noah's Bagels employees are able to speak for themselves, and our management is committed to listening to you and being responsive to your needs.

The federal government gives employees the right to organize and join unions. It also gives employees the right to say "no" to union organizers and not join unions. Remember, a union authorization card is a power of attorney which gives a union the right to speak and act *for* you.

If you should be asked to sign a union authorization card, we are asking you to say "no."

The General Counsel does not contend that there is anything unlawful in Respondent's statement about unions. However, the General Counsel contends that the statement read with other sections of the handbook and particularly with the receipt leads employees to believe that they would be disciplined if they did not follow that policy.

The introduction to the handbook states, "We have put this Handbook together to help you understand your job at Noah's. Please read it carefully, as you will be responsible for its contents." In another section entitled, "About This Handbook" it states "[the handbook] is a summary of Noah's Bagels policies, benefits and work rules and how it will affect you. Please read it carefully and learn its contents." The section entitled, "Receipt of Crew Member Handbook" contains the statement, "This form is your confirmation that you have received this Handbook and that you have read, understood, and will follow its contents." In the section entitled "Crew Member Policies, the handbook sets forth a progressive discipline procedure for violations of Respondent's rules and policies. Finally the penultimate page of the handbook entitled, "Receipt of Crew Member Handbook" contains the following paragraph:

I acknowledge that I have received a copy of the Noah's Bagels Emeryville/San Leandro Crew Handbook. I understand that it contains important information on Company policies and on my privileges and duties as a crew member. I understand and agree that it is my responsibility to read and familiarize myself with the policies and procedures in this handbook. I further understand that the Company may change, rescind, add to or revise any policies, benefits or practices described in the handbook from time to time, in its sole and absolute discretion, with or without prior notice.

After the handbook was distributed to production employees, Respondent required employees to sign the "Receipt" and return it for the Employer's records. Respondent retained all the signed receipts.

I find that the statements in the "Receipt of Crew Member Handbook" refer to the policies expressed in the entire man-

ual and do not exclude the “Unions” section that states the Respondent’s antiunion position. In essence employees are required to read and familiarize themselves with the policies and procedures of the handbook.

I find the cases cited by the General Counsel to be distinguishable.⁴ In those cases the Board found that the employees were required to follow the policies in question and had reason to believe that discipline would follow if the employer’s antiunion policy were not followed. In this case, the Respondent after stating its antiunion views declared that federal law gave employees the right to organize and join unions. The policy merely *asks* employees not to sign union cards. The plain reading of the “Unions” section is that the choice of whether to join a union or not is the employee’s and not Respondent’s. Further, the receipt signed by employees requires acknowledgment of the privileges and duties in the handbook and responsibility for knowing Respondent’s rules. However, there is no language in the receipt that implies that employees would be disciplined for violating the antiunion policy. Thus, I find nothing that changes the “Unions” section from a lawful expression of the Employer’s views on unions to a prohibition of protected concerted activities or union activities. In my view, the Employer’s statement that the law gives employees the right to organize and join unions distinguishes this case from those cited by the General Counsel. Further, there is nothing in the receipt itself that negates the statement of employee rights.

8. The alleged unlawful offer of a loan

On or about September 27, Hughson accompanied Christie Gullixson, a wholesale driver, on her route. According to Gullixson, Hughson said that before the “union stuff” started Respondent had a package of wages and benefits for the drivers but because of the union campaign Respondent could not put that package into effect. During this conversation, Gullixson mentioned that she was having financial problems and Hughson offered to personally lend her some money. Gullixson responded that she would not be comfortable with such an arrangement. Hughson said that he had personally lent money to other employees.

Hughson admitted that after Gullixson talked about her personal problems and financial problem he offered to loan her money. In the past Hughson had made personal loans to certain employees and so informed Gullixson. The record reveals that in the past Hughson and Noah Alper, Respondent’s chairman of the board, had made seven separate personal loans to employees ranging from \$450 to \$1900. Both Hughson and Gullixson testified that the offer of a loan was not linked to the upcoming election. Hughson testified that he explained to Gullixson that he could not make threats or promises, engage in surveillance, or interrogate employees. According to Hughson, Gullixson raised the topic of wages and he answered that the Employer was restricted by law from discussing changes in wages or benefits.

I find the offer of a loan was impliedly linked to the union campaign. Both Hughson and Gullixson knew that the purpose of Hughson’s visit was to lawfully persuade the employee to vote against union representation. Although the

loan offer was not expressly linked to the representation election, had Gullixson accepted the loan, she would have reasonably felt obligated to Hughson at the time of the election. Hughson explained to Gullixson that he was talking about a personal loan and not a company loan. He further explained that he had in the past made personal loans to employees. The evidence shows that the topic was not raised in the context of the union campaign but Hughson did not give Gullixson any assurances that there were no strings attached to the loan. Accordingly, I find that under the circumstances, that Respondent offered a loan to Gullixson which reasonably tended to interfere with the election process.

9. Hughson’s preelection speech

On September 29, Respondent held a captive audience meeting for the drivers. Both Alper and Hughson read from prepared text and did not deviate from that material.

The General Counsel contends that the following portion of Hughson’s speech was violative of Section 8(a)(1):

Noah’s bagels has a very exciting future, and I hope very much that we will be able to work hand-in-hand to make it a successful future for all of us. Through our rapid growth, we’ve clearly made some mistakes. It’s disappointing that we had to hear about our mistakes in this way. However, I feel strongly that the best way to overcome our mistakes is for us to work together, without the intervention of a third party that costs all of us money yet is not concerned about our well-being. A third party that, despite its costs to both me and you, carries with it no guarantee of the things that are important to us all: job security, fair treatment, good wages and benefits, and a warm friendly work environment.

Please vote to give us a second chance to show what we can do. If we don’t meet your expectations, the Teamsters will still be there—they’ll be just as happy to take your dues and initiation fees later as they are now.

The General Counsel contends that by asking for a second chance to rectify mistakes, Respondent was promising to grant benefits if the employees rejected the Union. The General Counsel cites *St. Francis Hospital*, 263 NLRB 834, 841 fn. 5 (1982); *Hubbard Regional Hospital*, 232 NLRB 858, 879 (1977); *Royal Petroleum Corp.*, 243 NLRB 508 (1979). In the context of Respondent’s other statements that it would attempt to resolve employee problems and the implied promises made to Gullixson and Killingsworth, I find that Hughson impliedly promised to improve working conditions in violation of Section 8(a)(1) of the Act.

10. Hughson’s ride with Pacheco

On the day of the election, September 30, Hughson accompanied van driver Carlos Pacheco on his route. Pacheco testified that during their conversations that morning Hughson asked him if he was going to vote for the Union or for the Employer and that Hughson promised Pacheco job security if he supported the Employer in the election. Pacheco answered that he did not know how he was going to vote.

Hughson testified that he first reviewed with Pacheco the guidelines that prohibited threats, promises, interrogation, and surveillance. Hughson then told Pacheco that it was impor-

⁴*Heck’s Inc.*, 293 NLRB 1111, 1119–1120 (1989); *Matheson Fast Freight*, 297 NLRB 63 (1989); *La Quinta Motor Inns*, 293 NLRB 57 (1989); and *Leather Center*, 312 NLRB 521 (1993).

tant for the employee to vote. Hughson assured Pacheco that this was a secret ballot election and that nobody would know how Pacheco voted. Hughson denied asking how Pacheco was going to vote. Hughson testified that Pacheco said his job would be more secure with the Union. Hughson replied that in his experience the best job security was a healthy successful company. I find that Hughson's account of this conversation is more reliable and I credit his testimony over that of Pacheco.

Before returning to Respondent's facility, Hughson and Pacheco met John McCraw and driver Carlos Martinez for lunch. After the meal was over but before they left the restaurant, Hughson brought up the subject of the election scheduled for that afternoon. According to Pacheco, Hughson said that he hoped the two drivers would give the Employer a second chance and make the right decision. Hughson said that the retail drivers were going to vote against the Union and mentioned the names of certain drivers. Hughson stated that if Pacheco and Martinez voted against the Union, the Employer would win the election. As they were leaving the restaurant, Pacheco asked if he could drive back with Martinez so that the two employees could discuss their decision. Hughson agreed and he drove back to the facility with McCraw while Martinez rode with Pacheco. After Martinez and Pacheco arrived at the facility and began unloading the vans, Hughson asked if the employees had made the right decision and Martinez answered yes. Hughson thanked Martinez and shook his hand.

Hughson testified that he told Pacheco and Martinez that several employees had told him that they planned to vote no. He further reminded the employees that the bargaining unit was not just the eight wholesale drivers but also included the retail drivers. McCraw corroborated Hughson's version of this conversation by testifying that Hughson explained that the bargaining unit included the retail drivers.

I find that Respondent did not promise Pacheco job security as alleged in the complaint. I further find that Hughson did not violate the Act by telling Pacheco that certain employees had told Hughson that they planned to vote "no" in the election.

11. McCraw's ride with Martinez

Prior to meeting Hughson and Pacheco for lunch on September 30, McCraw rode with Martinez on the driver's route in San Francisco. According to Martinez, McCraw questioned him about his problems with the Company and what he did not like about the Company. Martinez responded that he did not feel secure about his job, because he had received an unfair warning. Later during the route, McCraw asked Martinez to give the Company another chance. According to Martinez, McCraw said that he hoped the drivers would give the Company a second chance. Martinez said he would give the Company a chance but that he did not think he was the only employee who thought the Company should have another chance.

McCraw testified that Martinez raised the subject of the Union and the election. According to McCraw, Martinez was open about his feelings on unions. McCraw said that he felt a union was not in the best interests of the employees or the Employer. McCraw said he hoped that the employees would vote against the Union and would give the Employer a second chance by voting against the Union. I credit McCraw's

testimony and find that he did not unlawfully interrogate Martinez or impliedly promise benefits in order to influence Martinez' vote in the election.

12. Lopez' statements to employees

In early September, Respondent hired Patrick Lopez, a self-employed labor consultant, to help with the election campaign. Prior to the election Lopez held numerous meetings with employees campaigning against union representation. The General Counsel contends that Lopez violated Section 8(a)(1) of the Act by telling employees that if the Union was voted in, negotiations would start from scratch, from zero, and go from there and employees could end up after negotiations with less than they had before the Union got in.

Lopez testified that he covered the subject of collective bargaining at four meetings on September 21. Each meeting began with the presentation of a video which was followed by a question-and-answer session. The video concerned negotiations and reviewed the concept of good-faith bargaining. According to Lopez, he told the employees that the parties have an obligation to sit down and negotiate in good faith. He said the parties submit proposals, exchange proposals, and engage in a give-and-take process. Lopez denied using the phrases "start from scratch" and "start from zero." The materials Lopez distributed which state, *inter alia*, "In fact ALL current wages and benefits are subject to negotiations; they can go up, go down or stay the same." There was a notice posted by Respondent, signed by Hughson, which used the words "from scratch." That notice stated in pertinent part, "This negotiation starts *from scratch*, with *nothing guaranteed*. You could end up with more than you have now, the same that you have now, or *less than you have now*. [Emphasis in original.]" Under the circumstances, I find that even if Lopez stated that negotiations started from scratch, he made it clear that wages could go up, go down, or remain the same. Accordingly, I find no violation has been established. See *Histacount Corp.*, 278 NLRB 681 (1986); *Computer Peripherals*, 215 NLRB 293 (1974).

13. Troy's statements to Foster and Jimenez-Dehn

During September, Doug Troy, vice president of operations, had a conversation with Foster and Jimenez-Dehn about the upcoming election. According to Jimenez-Dehn, Troy said that although employees thought Respondent had a lot of money, in fact Respondent had a lot of outstanding loans. He mentioned that if a certain bagel operation opened stores in the Bay Area it could adversely affect Respondent. He added that even if the Union won the election, it did not mean that wages would rise. He said bargaining would start from zero wages and go from there. Troy said there would be no guarantee of wage increases and employees could end up with less than they had before.

Troy testified that this conversation was started by Foster and Jimenez-Dehn. The two drivers asked Troy about the growth in the retail business. Troy responded by saying that Respondent wanted to expand rapidly and mentioned that a competitor was expanding in the Pacific Northwest and that Respondent wanted to be in position to withstand that competition. Troy said that Respondent's expansion was due to an increased line of credit. Troy said he wanted to correct something he had heard Jimenez-Dehn say on a radio show.

Jimenez-Dehn had said that certain drivers were disciplined for not working overtime. Troy said the discipline had been for insubordination and that her statement on the radio show was incorrect. Troy testified that he stated that in negotiations everything is on the table and at the conclusion of negotiations, the employees could have more, less or the same as they presently had. I find Troy's version of this conversation to be more accurate than that of Jimenez-Dehn. Accordingly, I find no violation in his statement to the employees. *Histacount*, supra; *Jordan Marsh Stores Corp.*, 317 NLRB 460 (1995); *Clark Equipment Co.*, 278 NLRB 498 (1986).

14. The prounion T-shirt and union buttons

On September 13, the first day that drivers began deliveries from the new San Leandro facility, Foster had a conversation with Mark Knight, a supervisor. Foster was wearing a prounion T-shirt and two union buttons. She was wearing a Noah's T-shirt as required by the Employer but her shirt had the added phrase "If its not Union, its not Kosher." Knight told Foster that she could not wear the T-shirt and to remove the buttons. Foster asked why and Knight responded "because [they are] against the company." Knight gave Foster another Noah's T-shirt to wear. Foster told Knight that both Troy and Hughson had seen her wearing the T-shirt and that neither objected to the shirt. Knight insisted that Foster change shirts. Foster changed shirts and also removed the union buttons.

The General Counsel does not contend that there was anything unlawful in Respondent's policy against shirts mocking Respondent's kosher products. The Employer strictly observes the kosher laws. The word kosher is contained in the Employer's logo and is shown on the Noah's T-shirt required to be worn by the drivers.

Knight testified that he had received instructions from Troy that employees were not to wear the defaced T-shirts. Thus, when Knight observed Foster wearing such a T-shirt, he instructed her that she could not wear the shirt on duty. When Foster asked why, Knight responded that it was not the proper uniform. Foster said that Hughson had allowed her to wear it. Knight said that Hughson was not present and that Foster could not wear the shirt. According to Knight, he did not observe any union buttons. Knight denied saying that Foster could not wear the shirt, because it was against the Employer. The evidence shows that employees including Foster were permitted to wear union buttons without interference. Further, employees were permitted to wear union shirts before and after going on their routes.

It is well settled that absent some special circumstance, such as maintenance of production and discipline, safety, or preventing alienation of customers, employees have the right to wear union insignia at work. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). Here, I find that Respondent's insistence that Foster not wear a shirt mocking its Kosher policy was lawful. Knight lawfully enforced Respondent's policy requiring the wearing of company T-shirts. With regard to the union buttons, I find that Knight unlawfully prohibited Foster from wearing union buttons. Knight apparently believed that the instruction not to wear the T-shirt also applied to union buttons. However, this mistake, even if made in good faith, unlawfully interfered with Foster's right to wear a union button at work. *Meijer, Inc.*, 318 NLRB 50 (1995).

15. Managers accompany drivers on their routes

The General Counsel contends that Respondent violated the Act by increasing the frequency that its managers accompanied drivers on their routes. Since 1989, when Respondent was first established, its managers have accompanied drivers on their delivery routes. This practice was developed to allow the managers to become more familiar with the routes and routines of the drivers. It is undisputed that during the preelection period Respondent increased the frequency with which its managers would accompany drivers. Respondent admits that this was done to allow the managers an opportunity to communicate the Employer's position on union representation to the drivers. Due to the different schedules worked by managers and drivers, accompanying drivers on their routes was a more convenient way for the managers to communicate individually with employees. The evidence indicates that on two occasions where employees expressed a preference to ride alone, the requests were honored without being questioned.

The General Counsel contends that the high level position of the managers, combined with the amount of time an employee was confined with the manager made this practice inherently coercive. The General Counsel cites *Advance Waste Systems*, 306 NLRB 1020 (1992). That case involved coercive interrogation and is not relevant to the question of whether one-on-one conversations, not otherwise coercive, are violative because the employer increased the frequency of such conversations to campaign against union representation.

Respondent cites *Livingston Shirt Corp.*, 107 NLRB 400 (1953), for the proposition that an employer may hold employee meetings on its property whenever and, however, it pleases as long as the statements made at the meeting are noncoercive:

It is conceded by everyone that Congress intended that both employers and unions should be free to attempt by speech or otherwise to influence and persuade employees in their ultimate choice, so long as the persuasion is not violative of express provisions of the Act; and we find nothing in the statute which even hints at any congressional intent to restrict an employer in the use of his own premises for the purpose of airing his views. On the contrary, an employer's premises are the natural forum for him just as the union hall is the inviolable forum for the union to assemble and address employees.

I find that, absent coercion, employers have the right to attempt to persuade employees in their election choice. Here, Respondent choose to speak to employees during their routes, because such a procedure did not interfere with the normal work hours of the managers and did not require the employees to remain after work for meetings. The fact that managers accompanied employees did not interfere with employee organizing activities because the employees were otherwise alone in their trucks and would not be in contact with other employees in any event. Further, I note that Respondent did not accompany an employee when an objection was made to such a ride. Thus, absent evidence of unlawful statements made during the rides, I find no violation in the fact that Respondent choose to campaign by accompanying

employees on their routes. Cf. *Emery Worldwide*, 309 NLRB 185, 186 (1992).

16. The representation proceeding

The Union filed an objection stating, “The Employer and its agents provided employees with gifts and parties in order to dissuade the employees from voting for union representation.” The objection is based on the fact that the Employer held a party to celebrate the opening of its new facility in San Leandro on the same date as the representation election.

The party began between 3 and 4 o’clock and ended about 7 p.m. The Employer has held such parties to celebrate the opening of each of its stores. At this party food was served and entertainment provided. In addition a raffle was held with a TV and a stereo as prizes. The price of these prizes were \$250 and \$110, respectively.

The evidence shows that the Employer has a past practice of having parties at its facilities when new stores open and when production milestones are met. In addition, seasonal parties are held by Respondent. The party was open to all employees at the San Leandro facility as well as Respondent’s employees at its retail stores.

First, I find that the holding of the party was not unusual but rather consistent with the Employer’s past practice. Second, the party was for production, administrative, and retail store employees in addition to the bargaining unit employees. Finally, the value of the prizes did not involve a magnitude that the Board would find coercive. In *Sony Corp. of America*, 313 NLRB 420 (1993), the Board overruled an objection to an election based on raffle prizes of a TV and stereo costing more than the items here. The Board held that in the absence of evidence that the value of the election prizes was so substantial as to coerce employees to interfere with the electoral choice, the complaint allegation of a violation of Section 8(a)(1) and the objections to the election should be dismissed.

Having concluded that Respondent, between the date of the petition and the date of the election, impliedly promised to remedy employee grievances and promised a loan to an employee and a transfer to another employee, and prohibited an employee from wearing her union buttons, I find that Respondent’s acts constitute objectionable conduct which interfered with the free choice of employees in the election. Such conduct constitutes grounds for setting aside the election. *American Safety Equipment*, 234 NLRB 501 (1978); *Dayton Tire & Rubber*, 234 NLRB 504 (1978). I, therefore, recommend that the election be set aside.

17. The bargaining order

In *NLRB v. Gissel Packing Co.*, 395 U. S. 575 (1969), the leading case on remedial bargaining orders, the United States Supreme Court held:

(1) Even in the absence of a demand for recognition, a bargaining order may issue if this is the only available effective remedy for unfair labor practices.

(2) Bargaining orders are clearly warranted in exceptional cases marked by outrageous and pervasive unfair labor practices.

(3) Bargaining orders may be entered to remedy less-unfair labor practices that nonetheless tend to undermine majority strength and impede the election process.

If a union has achieved majority status and the possibility of erasing the effects of the unlawful conduct and of ensuring a fair election through traditional remedies is “slight,” a bargaining order may issue.

(4) Minor or less-extensive unfair labor practices that have only a minimal effect on election machinery will not support a bargaining order.

As a precondition to a bargaining order, the Board currently requires a showing that the union achieved majority status in an appropriate bargaining unit at some relevant time. *Gourmet Foods*, 270 NLRB 578 (1984). Respondent questions the validity of the union authorization cards. However, I need not reach the issues raised by Respondent. Assuming arguendo that the Union had obtained valid authorization cards from a majority of the employees in the bargaining unit, I find that the General Counsel has not established a sufficient basis to support a bargaining order remedy.

Here I have dismissed most of the allegations of the General Counsel’s complaint. I have found only that Respondent impliedly promised to remedy employee grievances, promised a loan and a transfer impliedly to interfere with the election and mistakenly prohibited an employee from wearing her union buttons on one occasion. I find that such unfair labor practices fall into the category of minor or less extensive unfair labor practices within the meaning of *Gissel*. Accordingly, I find that a bargaining order as an extraordinary remedy is not appropriate in this case.

REMEDY

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

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. Respondent violated Section 8(a)(1) of the Act by soliciting grievances and promising improved working conditions, promising a loan, promising a transfer, and prohibiting an employee from wearing union buttons.

4. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. By the conduct set forth above, Respondent has illegally interfered with the representation election conducted by the Board in Case 32–RC–3914.

Based on the above findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

⁵ All motions inconsistent with this recommended order are hereby denied. 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.

ORDER

The Respondent, Noah's New York Bagels, Inc., San Leandro, California, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Soliciting grievances from employees and impliedly promising to rectify them in order to cause employees to become disaffected with the Union.

(b) Promising employees loans or transfers in order to discourage union activities.

(c) Discriminatorily enforcing a rule against the wearing of union buttons.

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

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

(a) Post at its facility in San Leandro, California, copies of the attached notice marked "Appendix."⁶ Copies of the

⁶If 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

notice, in both Spanish and English, on forms provided by the Regional Director for Region 32, after being signed by a responsible representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced, or covered by other material.

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

IT IS FURTHER ORDERED that the Regional Director for Region 32 shall set aside the representation election in Case 32-RC-3914 and supervise a rerun election.

_____ 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."