

**Production and Maintenance Union, Local 101, an affiliate of Chicago Truck Drivers Union (Independent) (Bake-Line Products, Inc.) and Efrain Jimenez**

**Bake Line Products, Inc. and Efrain Jimenez, Petitioner and Production and Maintenance Union, Local 101, an affiliate of Chicago Truck Drivers Union (Independent).** Cases 13–CB–15575 and 13–UD–433

September 28, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

On May 19, 1998, Administrative Law Judge William G. Kocol issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief. The Respondent filed an answering brief. The Charging Party filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions as modified below and to adopt the recommended Order.

The judge found that, during a deauthorization election campaign, the Respondent told employees that if it lost the election by a decisive margin it would consider disclaiming recognition and that this would leave the employees unrepresented and would void the collective-bargaining agreement. He also found that the Respondent told employees that in the absence of the contract the Employer might not give them the next scheduled wage increase and would be free to fire employees without good cause.<sup>2</sup>

The judge rejected the argument by the General Counsel and the Charging Party that *Hospital Employees 1115 Joint Board (Pinebrook Nursing Home)*, 305 NLRB 802 (1991), compelled finding a violation. He found that the

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

<sup>2</sup> In making this finding, the judge relied in part on a union leaflet containing an account of a union meeting attended by many employees. The leaflet stated, inter alia:

Ricardo Castaneda and Louis Burton explained that a union deauthorization petition is filed to break up unions. It weakens the union's bargaining position in future contract negotiations with the Company. It could cause you and your co-workers at Bake-Line to lose over a million and a half dollars in increased wages and benefits in 1998 should [Respondent] be forced to disclaim interest in representing you because of support of this self-serving petition. [Emphasis in original.]

majority opinion in *Pinebrook* did not represent the current state of Board law, but was, in reality, a dissenting view of what the law should be. The judge dismissed the complaint.

We agree with the judge's conclusions that the Respondent neither violated the Act nor engaged in conduct that warrants setting aside the election. We do not, however, rely on the judge's statements to the effect that *Pinebrook* was not Board law or that he was not bound by that law. Rather, we agree only that the decision in *Pinebrook* was at odds with earlier cases reflecting the sound views of the Board and reviewing courts concerning the circumstances under which union disclaimers of representation should be freely allowed and given effect. Accordingly, for the reasons stated below, we have decided to overrule *Pinebrook*.

In *Pinebrook* the Board found unlawful certain statements made during an election campaign. The majority in *Pinebrook*, supra at fn. 1, stated:

We adopt the judge's finding that the Respondent violated Sec. 8(b)(1)(A) by threatening employees that it would no longer represent them if they voted to deauthorize the union-security provisions of its collective-bargaining agreement with the Employer. In this regard, we assume that a union could cease representing employees, particularly if it became economically infeasible to represent them. (See the discussion in *Teamsters Local 42 (Grinnell Fire Protection)*, 235 NLRB 1168, 1169 (1978).) We further assume that a union could inform employees of this possible economic consequence. However, in the instant case, the Respondent failed to provide the bargaining unit employees with objective evidence that without the agreement's union-security provisions, it would not be economically feasible for it to represent the employees. Absent such objective evidence, the Respondent's preelection threat to walk away from its representational obligations if the election resulted in deauthorization constitutes restraint and coercion of the employees' Sec. 7 right to participate in the deauthorization election. See, e.g., *Steelworkers Local 1397 (U.S. Steel Corp.)*, 240 NLRB 848 (1979).

Then-Chairman Stephens, concurring, stated (*id.* at 802):

Nothing in the Act necessarily prevents a union from abandoning its role as collective-bargaining representative or informing employees that it will no longer act as their bargaining representative should the employee[s] decide to revoke the union-security provisions of the contract.

Chairman Stephens nevertheless found a violation because the union had threatened employees that it would

remain as their bargaining representative but would not properly represent them if they voted for deauthorization.

We agree with Chairman Stephens' view. In *American Sunroof*, 243 NLRB 1128 (1979), the Board gave full effect to a union's disclaimer of representation in the face of a deauthorization petition. In that case, employees filed a deauthorization petition, and the incumbent union disclaimed representation and its contract. Another union filed a representation petition, and the employer argued for a contract bar to that petition. The employer contended that giving effect to a union's disclaimer in the face of a deauthorization petition and finding that the collective-bargaining agreement did not bar a representation election sanctioned not only retaliation for filing the deauthorization petition but also employee and union circumvention of the contract-bar doctrine. The Board found no evidence that the disclaimer was collusive or that the disclaiming union was attempting to transfer its affiliation to the petitioning union. In the absence of such special circumstances or any actions by the disclaiming union that were inconsistent with its disclaimer, the Board found no basis for not giving the disclaimer full effect. The Board based its holding on the principle that a contract does not bar an election when the contracting union has properly disclaimed interest in the employees covered by the contract. *Id.* at 1129.

In *Dycus v. NLRB*, 615 F.2d 820 (9th Cir. 1980), *enfg. sub nom. Teamsters Local 42 (Grinnell Fire Protection)*, 235 NLRB 1168 (1978), the court affirmed the Board's finding that a union local did not breach its duty of fair representation by failing to process the grievance arising from an employee's discharge when the union had previously disclaimed further interest in representing the unit. The union had validly disclaimed its interest in representing a bargaining unit several months before a unit employee's discharge. Because the local did not represent the unit at the time of the discharge, it had no duty to process the grievance arising from the discharge. In reaching this conclusion, the court stated that an exclusive bargaining agent may avoid its statutory duty to bargain on behalf of the unit it represents by unequivocally and in good faith disclaiming further interest in representing the unit. The court held that a disclaimer will not be given effect if it is inconsistent with the union's conduct, or if it is made for an improper purpose, such as the evasion of the terms and obligations of a collective-bargaining agreement. The court agreed with the Board that the union's withdrawal as bargaining agent did not breach the duty of fair representation. The court stated that this duty is the corollary to a union's power and authority to act as the exclusive representative of a bargaining unit. When a union relinquishes its authority to do so, the corresponding duty of fair representation terminates. 615 F.2d. 826, *supra*.

In *NLRB v. Circle A&W Products Co.*, 647 F.2d 924 (9th Cir. 1980), *cert. denied* 454 U.S. 1054 (1981), the

court affirmed the Board's order requiring bargaining with a newly elected union where the incumbent union disclaimed representation solely over a union-security clause. In that case, a union, after losing a deauthorization election, disclaimed representation of a bargaining unit during the term of a collective-bargaining agreement. While the agreement with the first union was still extant, the employees selected a new union in a Board election. The employer refused to bargain with the new union, based on the Board's contract-bar rule, which provides that an existing collective-bargaining agreement not exceeding 3 years will bar a petition for redetermination of representation in most instances.

The court enforced the Board's order requiring bargaining. It held that, where a union disclaims representation during the term of an existing collective-bargaining agreement solely over a union-security clause and not in an attempt to avoid the agreement's terms, the employer must bargain with the newly elected union. The court noted that the contract-bar rule is intended to further the policy of preserving industrial stability but that the Board is also required to implement the policy of the Act to ensure that employees secure fair, adequate, and effective representation. The court stated that there will be circumstances, in addition to schism or union defunctness, in which a change of representation is necessary to implement that policy.

These cases make clear that a union may disclaim its role as a collective-bargaining representative and may do so even in apparent response to the employees' filing of a deauthorization petition or the loss of a deauthorization election. We further hold that a union may so inform employees without providing them with objective evidence that its continued representation of them would be infeasible. In rejecting the *Pinebrook* requirement for objective evidence that a union's continued representation of the bargaining unit would be infeasible, we find the dissent's analogy to *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), inapposite. In that case, the Supreme Court held that while an employer may lawfully close an entire business for antiunion reasons,<sup>3</sup> it may not threaten to close the business if employees seek to unionize.<sup>4</sup> In so doing, the Court created a narrow exception to employees' statutory protection against retaliation for their support of a union—an employer could lawfully liquidate his entire business for retaliatory reasons. At the same time, the Court maintained a clear prohibition against coercing employees in the exercise of their Section 7 rights by threatening plant closure. Subsequently, in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618–619 (1969), the Court crafted a similarly narrow

<sup>3</sup> 380 U.S. at 269–274.

<sup>4</sup> *Id.* at 274 fn. 20. In dictum, the Court also created an exception to its prohibition against threats of plant closure; i.e., an employer could announce a union-related decision to close already reached by management.

exception to the prohibition against threats of plant closure—in the event of unionization if the employer’s statement was “carefully phrased on the basis of objective fact” conveying the employer’s belief in the existence of “demonstrably probable consequences beyond his control.” Our dissenting colleagues argue that the same rule should apply to a union in the deauthorization context: The union may lawfully cease representation in the face of a deauthorization petition, but it may not threaten cessation in the event of a substantial loss in the deauthorization election, unless it accompanies its statements with objective evidence demonstrating that continued representation would be economically infeasible in the event of deauthorization.

We find that the analogy between plant closure statements and cessation of representation statements fails. Given the differences between a union’s continuing to provide representation and an employer’s continuing to operate a business, there would be no reason for constructing an exception applicable to predictions of union disclaimers analogous to the *Gissel* exception that permits employer predictions of plant closure based on objective fact and the employer’s belief in the existence of demonstrably probable consequences beyond the employer’s control. There is no necessary connection between unionization and the survival of a business, and thus it is necessary to show an objective factual basis for the connection in the particular case so as to avoid the suggestion that the employer will simply choose to close as a retaliatory measure. In contrast, there is a necessary connection between a union’s collection of dues and a union’s continued representation of employees. It is an economic reality that a union needs the assured payment of dues from at least some employees in order to afford continuing to represent them. *Automotive & Allied Industries Local 618 (Sears, Roebuck & Co.)*, 324 NLRB 865, 866 fn. 12 (1997). A union that loses a deauthorization election has no assurance that a sufficient number of employees will make regular payments on a voluntary basis. Thus, when a union says it may disclaim representation if it loses a deauthorization petition, this is a statement based on the objective reality of representation. Unlike plant closure statements, there is full symmetry between cessation of representation statements and the decision to cease representation in the deauthorization context.<sup>5</sup>

<sup>5</sup> However, as was the case in *Pinebrook*, if a union’s statements went beyond economic realities and indicated that, if employees voted for deauthorization, the union would continue to represent them but would not do so properly, such conduct would be unlawful.

Member Fox subscribes to the foregoing rationale, but she would also distinguish between the issue of an employer’s plant closure statements dealt with in *Gissel* and the issue here on an additional ground. The Act affirmatively protects employees from suffering adverse employment consequences on account of their support for a union, whereas employees do not have a legally protected right to representation by a particular labor union regardless of whether they financially

We apply these principles to the instant case. We find that the Respondent lawfully informed employees that if it lost the deauthorization election decisively, it would consider disclaiming recognition. We also find that it lawfully informed them of reasonable possible consequences of its disclaimer. As the judge noted, the Respondent did not indicate that it would remain as the unit employees’ representative but would fail to represent them properly or otherwise retaliate against employees because of the way they voted in the election. Accordingly, we find that the Respondent did not violate Section 8(b)(1)(A) of the Act and did not engage in conduct that warrants setting aside the election.

#### ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBERS HURTGEN AND BRAME, dissenting.

Unlike my colleagues, we would adhere to *Hospital Employees 1115 Joint Board (Pinebrook Nursing Home)*, 305 NLRB 802 (1991). If a union threatens to abandon representation of employees, in reprisal for their deauthorization of union security, we believe that the threat is unlawful and objectionable. Accordingly, we would find the Respondent’s conduct here to be unlawful and objectionable.<sup>1</sup>

Our colleagues start with the proposition that a union can disclaim representation of employees. They then leap to the conclusion that a union can threaten to do so. We agree with the first proposition. However, the second proposition is a non-sequitur, and we disagree with it.<sup>2</sup>

In essence, our colleagues reason that if a party can take an action, it follows that the party can state in advance that it will take that action. The reasoning is flawed. For example, an employer can go out of business in reprisal for employee efforts to unionize.<sup>3</sup> However, an employer may not tell employees that it will go out of business if they seek to unionize.<sup>4</sup> Similarly, a union may be able to cease representing employees in retaliation for their deauthorization vote, but it does not follow that the union can threaten to do so.

We would treat a statement about cessation of representation in the same way as the law treats statements about plant closure. As to the latter, there is a distinction

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support it. Because there is no Sec. 7 right to compel a particular union to represent employees, there is no need to specify stringent conditions that a union must satisfy before telling unit employees that it will not represent them if the unit does not assure continuing financial support for the representation.

<sup>1</sup> In the instant case, the Union threatened employees with loss of representation *and* the loss of contractual benefits.

<sup>2</sup> The cases cited by our colleagues simply hold that a disclaimer, if carried out, will be honored. They do not pass on the legality of the threat under Sec. 8(b)(1)(A).

<sup>3</sup> See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 269–274 (1965).

<sup>4</sup> *Id.* at 274 fn. 20.

between a threat and a prediction.<sup>5</sup> If the employer says to employees “if you unionize, I will close down,” that is an unlawful threat. However, an employer may predict the effects it believes unionization will have, if the prediction is based on objective fact to convey its belief as to demonstrably probable consequences beyond its control.<sup>6</sup> Thus, an employer can carefully explain to employees that if a union is selected and the union makes excessive demands, and if the employer is forced to agree to these demands, the employer may find it economically infeasible to stay in business.

Similarly, if a union says to employees that “if you deauthorize union security, we may stop representing you,” that is an unlawful threat. However, a union can carefully explain to employees that deauthorization may lead to a loss of dues income, and the loss of dues income may make continued representation economically infeasible.

Our colleagues say that a union can make the threat (to abandon representation if the employees vote for deauthorization), even without explaining to employees the alleged economic link between union security and continued representation. We disagree. In the absence of that explanation, employees would reasonably believe that the threatened abandonment of representation is in retaliation for their deauthorization vote, rather than a mere economic consequence of that vote. It is the same as the situation where an employer threatens to close in the event of unionization. Absent an explanation of an economic link between unionization and viability of the enterprise, the employees would reasonably believe that the threatened closure is in retaliation for unionization. With an explanation, the employees understand that closure may be an economic consequence of unionization.

Our colleagues say that there is no necessary connection between unionization and survival of a business, and that there is a necessary connection between payment of union dues and representation. Thus, they assert, a speaker must explain the economic link in the former situation, but need not do so in the latter situation. We disagree. The truth is that there is no *necessary* connection in either situation, and thus there must be an explanation of the economic link in both situations. With respect to union dues and representation, the issue in this case is whether there is a necessary connection between *forced* union dues (union security) and representation. Clearly, there is not. In right-to-work states, and elsewhere in contracts without union-security clauses, many unions represent many employees who are not subject to a union-security clause. Thus, there is no necessary economic connection between union security and representation. To the extent that there is an economic connection, the union should explain that connection to employees.

<sup>5</sup> See *Gissel*, 395 U.S. at 618–619.

<sup>6</sup> *Id.*

Finally, Member Fox asserts that there is no Section 7 right to compel a particular union to represent employees. That may be so, but it does not aid Member Fox’s position. The Section 7 right here is the right to file a deauthorization petition with the Board so as to avoid the payment of forced dues under union security. The retaliation is the threatened abandonment of representation. Member Fox has confused the Section 7 right with the conduct in retaliation therefor.

In the instant case, the Respondent did not accompany its statements with objective evidence demonstrating that continued representation would be economically infeasible in the event of deauthorization. Accordingly, we find that the Respondent violated Section 8(b)(1)(A) of the Act, and that it engaged in objectionable conduct that warrants setting aside the election.

*Howard I. Malkin, Esq.*, for the General Counsel.

*Michael J. Kralovec, Esq. (Nash, Lulich & Kralovec)*, of Chicago, Illinois, for the Respondent.

*Peter J. Ford, Esq.*, of Washington, D.C., for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Chicago, Illinois, on March 11, 1998. The charge was filed October 10, 1997,<sup>1</sup> and the complaint was issued December 19. The complaint alleges that Production and Maintenance Union, Local 101, an affiliate of Chicago Truck Drivers Union (Independent) (Respondent) violated Section 8(b)(1)(A) of the Act by threatening employees that it would withdraw as their collective-bargaining representative if the employees voted in a Board-conducted election to withdraw from Respondent the authority to enter into a union-security agreement within its contract with Bake Line Products, Inc. (the Employer). The complaint also alleges that Respondent threatened employees with loss of jobs, work, and benefits; that Respondent threatened employees that it would repudiate the contract with the Employer; and that Respondent threatened employees that it would not represent them, all if the employees voted to withdraw Respondent’s union-security authority. Respondent filed an answer that admitted the allegations of the complaint concerning the filing and service of the charge, jurisdiction, its labor organization status, and the agency allegations; it denied the substantive allegation of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Charging Party, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Employer, a corporation, is engaged in the manufacture and wholesale distribution of bakery products at its facility in Des Plaines, Illinois, where it annually sold and shipped goods valued in excess of \$50,000 directly to points outside the State of Illinois. Respondent admits and I find that the Employer is

<sup>1</sup> All dates are in 1997 unless otherwise indicated.

engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. Background

Respondent and the Employer are parties to a collective-bargaining agreement that covers a unit of about 850 production and maintenance, shipping, and receiving employees at the Employer's facility in Des Plaines, Illinois. That agreement contains a union-security provision that requires employees to make certain payments to Respondent. The failure of employees to make those payments could result in discharge. Respondent has represented the employees since about 1994. Local 15, United Food and Commercial Workers had previously represented the employees.

### B. The Election

Employee Efrain Jimenez filed a petition with the Board on August 27 to revoke Respondent's authority to enter into a union-security agreement with the Employer (the UD petition). After the parties stipulated to an election, the Board conducted an election on October 17. The results showed that the employees voted 327 to 203 against revoking Respondent's authority to enter into a union-security agreement. Petitioner filed objections to the election that mirror the allegations in the complaint. The Regional Director then consolidated the representation case with the unfair labor practice case.

### C. The Evidence

The Employer has employed Ricardo Palacios for about 11 years; he had been a steward for Local 15 when that organization represented the employees. He assisted in obtaining the signatures needed for the showing of interest to support the UD petition. Palacios testified that about a week after the petition was filed he overheard a conversation between employees and Ricardo Castaneda, Respondent's vice president and field representative; this conversation occurred at the Employer's facility. According to Palacios, Castaneda said that because three people filed the UD petition, "but mostly [Castaneda] considered Efrain Jimenez . . . that we were going to lose everything we gained with this beautiful union" including a wage increase, and that if they wanted they could leave any time they wanted to because they weren't going to pay any more union dues.<sup>2</sup> Castaneda also said, "We're trying to kick out the union." Palacios testified that he responded that the petition was filed just to stop the union dues and not to kick out the Union.

A meeting was held on September 21 at Respondent's meeting room. A large number of employees of the Employer were present.<sup>3</sup> Palacios attended the meeting. According to him, Louis Burton, Respondent's secretary and director of organizing, began the meeting by talking about the UD petition. According to Palacios, Burton said that the employees were going to start losing their raise, insurance, and everything else because of the person who filed the petition. Palacios testified that "the meeting started off throwing direct rocks about the petition and the person that filed the petition." Burton also stated, according to Palacios, that if the employees "sign the

petition and they stop the dues"<sup>4</sup> that Respondent would file a "disclaimer of interest." Because the Employer's work force is primarily Spanish speaking, Castaneda translated Burton's remarks from English to Spanish. According to Palacios, who gave his testimony in English but testified that he also speaks and understands Spanish, Castaneda did not accurately translate Burton's remarks. According to Palacios, Castaneda translated into Spanish that because of the persons who filed the petition the employees were going to lose their next wage increase and that if Respondent did not get the employees' money, it was going to "walk out" and not represent the employees. Palacios stated that when he disputed these assertions. George Ossey, Respondent's president, told him to shut up. Palacios testified that Ossey also pointed to him, Jimenez, and Isaac Paredes as the employees that made the petition and that the employees were going to lose a great union and everything we gained and that "he personally was going to get pay backs from everyone individually." Ossey said, according to Palacios, "We didn't pay union dues that they wouldn't have to represent us."

On September 21, Respondent sent employees in the unit a leaflet. Pertinent portions of the leaflet are set forth below:

The following is a summary of what took place at the Bake-Line Union meeting held on September 21, 1997.

The meeting opened with President George Ossey addressing the Union deauthorization petition was filed. He explained that those who file the petition did so for **personal gain ONLY** and that they were not interested in the welfare of their fellow co-workers at Bake-Line.

Ricardo Castaneda and Louis Burton explained that **a union deauthorization petition is filed to break up unions**. It weakens the union's bargaining position in future contract negotiations with the Company. It could cause you and your co-workers at Bake-Line to **lose over a million and a half dollars in increased wages and benefits in 1998** should [Respondent] be forced to disclaim interest in representing you because of support of this **self-serving petition**.

\* \* \* \*

On Friday, October 17, 1997

Keep your Union Strong

VOTE "NO" !!!!

\* \* \* \*

Respondent sent the leaflet in Spanish as well as English.

Palacios testified that 2 or 3 days after the meeting he was present in the cafeteria at the Employer's facility with other employees when Castaneda walked in. According to Palacios, Castaneda did not immediately see him because he was in the back. Castaneda said that Jimenez and his group of people made the petition to kick out the Union and not to stop union dues. Castaneda said that Respondent could walk out and that the employees were going to lose their scheduled wage increase. Palacios then interjected that the petition said in black and white that it was to stop dues and not to decertify Respondent, and that the employees were going to get their scheduled

<sup>2</sup> This is about as clear as I can decipher Palacios' testimony.

<sup>3</sup> Estimates run from 60 to 200 employees.

<sup>4</sup> Again, this is about as clear as Palacios' testimony can be made.

wage increase. Castaneda said that Respondent was going to walk out, that it was not going to represent the employees. During cross-examination, Palacios testified that at some point during this discussion he told Castaneda that Respondent had to represent the employees "by law." He also admitted that during the meeting of September 21 Burton mentioned that if the UD petition was successful it would send a signal to the Company that the work force was divided, and that it would weaken Respondent in negotiating with the Employer. At the trial, I presented Palacios with a copy of the leaflet set forth above and directed his attention to the paragraph beginning "Ricardo Castaneda and Louis Burton explained." I then asked Palacios whether that paragraph contained what Burton and Castaneda had said during the meeting concerning what would happen if the employees voted to get rid of the union-security clause; Palacios answered that it was.

Palacios gave an affidavit to the Board during the investigation of the matter. In that affidavit Palacios did *not* state that Ossey said at the meeting that he would "pay back" the employees who supported the UD petition.

The Employer has employed Beatrice Barragan for about 13 years. She assisted Jimenez in obtaining signatures on the showing of interest to support the UD petition. Barragan's native language is Spanish. Barragan attended the meeting of September 21. She testified that she arrived late; Ossey was addressing the employees at that time and Castaneda was translating his remarks into Spanish. According to Barragan, Castaneda said that they were very bothered and upset because all of this was coming about through the actions of Palacios, Jimenez, and Paredes, who were supporting the UD petition for personal reasons, and Castaneda gave certain additional details on this matter. Barragan testified that Burton then spoke next; Castaneda continued to translate into Spanish. Burton, through Castaneda, said that they were going to have an election very soon and that the contract would be at risk in the election along with the employees' raise and their jobs. He explained, according to Barragan, that if the election resulted in stopping the monthly dues Respondent would use this as a disclaimer of interest. She testified that Burton said that America was a free country and the employees could choose the union that they wish, but that if Respondent lost the election, it was going to "pick up our things and go"; that the employees would not have representation at all, and that the employees would lose their jobs and their raise. According to Barragan, Ossey also said that America was a free country. Ossey also said that the employees could choose whatever they wanted and that nobody likes to work for free. In response to my question, Barragan then clarified that Castaneda said that if Respondent lost the election, the employees would lose their contract, their raise and "possibly" their jobs because Respondent would not be representing them and no one likes to work for free. Castaneda said that the employees could call the Labor Board to see that he was not lying to them about the disclaimer of interest.

Barragan testified that the day after the meeting she had a conversation with Burton at the Employer's facility; they spoke in English. According to Barragan, Burton asked if Barragan's questions had been answered at the meeting the day before, and Barragan said no. Burton then asked what questions did she have. Barragan asked questions about insurance and seasonal or temporary workers. Burton said that Respondent was having problems because of the UD petition. Barragan volunteered that she was one of the employees that helped get the signatures

for the petition. Burton then asked why she did that. Barragan said that she did it because she was not happy with things and because Respondent had not done anything for the employees. Burton then explained how Respondent was trying to obtain low cost insurance for employees. They then discussed the specifics of Barragan's problems with the Employer's attendance policy. According to Barragan, she then asked if it was true that the employees could lose their jobs or the contract. Burton answered, "Yes." Burton said that Barragan could go to the Labor Board to learn about the disclaimer of interest, and that if Respondent lost the election the Employer would be very happy because the employees would not have any representation and Respondent would pick up their things and go.

The Employer has employed Jose Savala for about 6 years. Savala testified that he had a conversation with Castaneda at the Employer's facility after the UD petition was filed; other employees were present. According to Savala, Castaneda said that if the employees voted against Respondent they would lose the benefits that they had and the wage increase that was due them. Savala stated that he asked Castaneda if he had any documents from the Labor Board to show that the employees were going to lose their benefits; Castaneda did not respond. Castaneda then asked if Savala was one of the "activists" that was trying to get the election. Savala answered no he was not; he wanted to know what was happening concerning the election.

The Employer has employed Jimenez, the UD petitioner, for about 8 years. He also attended the meeting held on September 21. Jimenez stated that he understood Ossey to say that there had been a petition started in the Labor Board by some person and that it was for very personal reasons. Ossey said that it was going to affect all of them in the next bargaining session and the contract, that if they lost the election the contract would be null and void and therefore employees would not get the next raise, that the employees basically would be at the mercy of the Employer for it to do to the employees what it liked because the employees would have no representation. Ossey explained that if Respondent lost the election it could disclaim interest, and if it did Respondent would leave and would not represent the employees anymore. Ossey also said that the employees would then be at the mercy of the Employer and the Employer could get rid of the employees.

Burton and Castaneda are responsible for negotiating the contract between Respondent and the Employer; they also process grievances raised by unit employees. Burton credibly testified that he learned that a UD petition was being circulated among the employees in about mid-August. At a regularly scheduled stewards meeting, they discussed the negative effect the UD petition would have on the bargaining unit as it related to Respondent being able to resolve grievances and bargain for a new contract since the petition could cause a bitter struggle within the bargaining unit and weaken Respondent's ability to negotiate the kind of contract it had negotiated in the past. Burton also told the stewards that if a substantial percentage of the bargaining unit voted in favor of revoking Respondent's union-security authority that Respondent had the right to disclaim interest. Burton stated it came to his attention that the UD petition supporters had told employees that if the petition was successful the employees would not have to pay dues but Respondent would still have to continue to represent them.

Concerning the September 21 meeting, Burton testified that Ossey opened the meeting by stating that he felt that the UD

petition had been filed because of the self-serving interests of Jimenez, Paredes, and Palacios. Ossey identified Palacios as someone who had never supported Respondent, and that all they were doing was hurting “their own people.” Burton denied that Ossey made any threats at the meeting. Burton testified that he then addressed the employees and told them the difference between dues and fees, members and nonmembers. Employee Sara Garcia asked him to explain exactly what Respondent’s rights were to disclaim interest. Burton replied that if an overwhelming majority of the employees voted in favor of the UD petition; Respondent would decide whether to disclaim interest in representing the employees. He told the employees that this was America and they had the right to be represented by any union they wanted. He told employees that if they wanted to verify Respondent’s right to disclaim interest they could call the Labor Board. Burton also explained to the employees the consequences of Respondent’s disclaimer. He told them that the contract with the Employer would cease to exist and that one of the most important provisions in the contract was the “just cause” clause, but that they would become employees “at will” and could then be fired by the Employer without good cause. He explained that they had a 75-cent an hour wage increase coming in January, which the new owners of the Employer might not feel obligated to fulfill. He denied that anything was said that employees would lose their jobs or benefits if they voted for the UD petition. He also denied that anyone directly stated that Respondent would withdraw as the collective-bargaining representative of the employees if they voted for the UD petition. On cross-examination, Burton admitted that he told employees during the meeting that a UD petition was not a petition to stop dues; instead, he voiced his understanding that it was to give employees the right to decide whether they wanted to be union members or “nonunion members.” He understood “nonunion members” to be employees who did not pay dues but who would be charged an assessment. Burton told employees that the assessment was usually two-thirds of the dues.<sup>5</sup>

Burton further stated that he did have a conversation with Barragan at the Employer’s facility. He asked Barragan whether she understood what had taken place at the September 21 meeting and whether she had any questions. Barragan then raised a number of personal concerns. Burton did not recall Barragan asking him anything about a disclaimer of interest, but that he might have suggested that Barragan call the Labor Board if she had questions concerning the UD petition. Burton, who was present throughout the trial, admitted that the testimony of Barragan “was pretty much factual.”

Casteneda testified that at the September 21 meeting he translated the remarks made by Burton and Ossey from English to Spanish. Casteneda denied that any threats were made at this meeting or at any other time during the course of the UD petition. In the affidavit that Casteneda gave during the investigation of this case, Casteneda corroborated Burton’s version of what was said at the meeting.

#### *D. Credibility Findings*

Turning first to the September 21 meeting, I conclude that the most reliable evidence of the content of that meeting was

<sup>5</sup> The remarks concerning “nonunion members” clearly are not consistent with existing law. However, they are not alleged to be unlawful in the complaint, nor does the General Counsel so contend in his brief. I shall not further address this matter.

the leaflet Respondent subsequently distributed to employees that summarized the content of the meeting I note in particular that when I asked Palacios whether the leaflet was consistent with what was said at the meeting, he acknowledged that it was. I further note that no employee testified that after they received the leaflet and read it that it contained a message at odds with what was actually said at the meeting. I next conclude that Burton’s testimony is the most credible concerning the September 21 meeting. Burton’s testimony concerning the meeting is not inconsistent with the summary of the meeting contained in the leaflet. Importantly, portions of the testimony of the General Counsel’s own witnesses, particularly portions of the testimony of Barragan and Jimenez, corroborated Burton’s testimony. Finally, my observation of the demeanor of the witnesses convinces me that Burton’s description of the meeting is the most factually accurate. I do not credit the testimony of the General Counsel’s witnesses to the extent that it indicates that Respondent made threats that if it lost the UD election Respondent would do anything other than consider disclaiming recognition, and then predicted the possible consequence on employees of employer conduct once Respondent was off the scene.

Turning next to Palacios’ testimony concerning the remarks he attributed to Casteneda both before and after the September 21 meeting, I do not credit that testimony. I acknowledge that Casteneda simply testified in conclusory fashion that he made no threats and that his testimony in this regard was not particularly persuasive, but the record as a whole persuades me that Palacios’ testimony concerning the details of what was said is not worthy of belief. First, I note that Palacios was a combative witness who appeared more interested in advancing his own agenda than merely reciting the truth as he knew it. The inconsistency with his affidavit shows me that he has the ability to exaggerate his testimony. I have also assessed his demeanor as a witness.

Turning now to Barragan’s testimony concerning the conversation she had with Burton, I note that Burton did not entirely dispute the factual nature of the conversation. I also conclude that Barragan was attempting to truthfully recall the conversation. In context, however, I conclude that Burton’s remarks to Barragan concerned what might happen if Respondent disclaimed interest and no longer represented the employees and Burton’s responses dealt with what the Employer might or could do if there no longer was a contract or a union to deal with. I conclude Burton’s remarks to Barragan did not deal with a situation where Respondent would remain as the representative of the employees after the UD election and then engage in reprisals against the employees.<sup>6</sup>

Turning to Savala’s testimony concerning the conversation with Casteneda, I do not credit that testimony. I have concluded above that at the meeting of September 21 and in the subsequent leaflet Respondent was careful to phrase the possible consequences of a defeat in the UD election to the possibility that it might disclaim interest and the possible effect that the disclaimer might have on the employees due to the Employer’s ability to deal with employees in a unilateral fashion. I conclude that it is unlikely that Casteneda would have deviated from that program by making the abrupt remarks attributed to him by Savala.

<sup>6</sup> At the hearing the General Counsel conceded that this was the case, and nothing in his brief indicates that he has changed his position in this regard.

In sum, I conclude that during the UD election campaign, Respondent told employees that if it lost the UD election by a decisive margin it would consider disclaiming recognition and that this would leave the employees unrepresented and render the collective-bargaining contract with the Employer null and void. Respondent further told employees that in the absence of the contract the Employer might not give them the next scheduled wage increase and would be free to fire employees without good cause.

### III. ANALYSIS

The first issue that I address is whether a union may lawfully tell employees that it may disclaim interest in representing employees if it loses a UD election. In order to answer that question, I need first address whether a union can, in fact, disclaim interest under those circumstances. Critical to the result in this case is the proper interpretation of the Board's holding in *Hospital Employees 1115 Joint Board (Pinebrook Nursing Home)*, 305 NLRB 802 (1991). A review of prior cases is necessary to reach that interpretation.

The Board has held that a union may, as a general rule, unequivocally disclaim interest in representing employees. *Dycus v. NLRB*, 615 F.2d 820, 826 (9th Cir. 1980), enfg. sub nom. *Teamsters Local 42 (Grinnell Fire Protection)*, 235 NLRB 1168 (1978); *American Sunroof*, 243 NLRB 1128 (1979). There are recognized exceptions to this rule, *Mack Trucks, Inc.*, 209 NLRB 1003 (1974); *East Mfg. Corp.*, 242 NLRB 5 (1979), but those exceptions are not involved in this case and no party contends otherwise. Under such circumstances, the contract in effect between the disclaiming union and employer becomes null and void. *American Sunroof*, supra.

In *Pinebrook*, supra, a three-member panel of the Board concluded that a union violated Section 8(b)(1)(A) by making certain statements during the course of a UD petition. Then-Members Devaney and Raudabaugh held as follows:

We adopt the judge's finding that the Respondent violated Sec. 8(b)(1)(A) by threatening employees that it would no longer represent them if they voted to deauthorize the union-security provisions of its collective-bargaining agreement with the Employer. In this regard, we assume that a union could cease representing employees, particularly if it became economically infeasible to represent them. (See the discussion in *Teamsters Local 42 (Grinnell Fire Protection)*, 235 NLRB 1168, 1169 (1978). We further assume that a union could inform employees of this possible economic consequence. However, in the instant case, the

Respondent failed to provide the bargaining unit employees with objective evidence that without the agreement's union-security provisions, it would not be economically feasible for it to represent the employees. Absent such objective evidence, the Respondent's preelection threat to walk away from its representational obligations if the election resulted in deauthorization constitutes restraint and coercion of the employees Sec. 7 right to participate in the deauthorization election. See, e.g., *Steelworkers Local 1397 (U.S. Steel Corp.)*, 249 NLRB 848 (1979).

*Pinebrook*, supra, fn. 1.

Then Chairman-Stephens concurred. He stated (id. at 802):

Nothing in the Act necessarily prevents a union from abandoning its role as collective-bargaining representative or informing employees that it will no longer act as their

bargaining representative should the employee decide to revoke the union-security provisions of the contract. [Citations omitted.]

However, then-Chairman Stephens found a violation based on his conclusion that the union in that case had, on at least one occasion, threatened employees that it would remain their bargaining representative but would not properly represent them if they voted for deauthorization. The General Counsel and the Charging Party argue that *Pinebrook* compels the finding of a violation in this case. I disagree.

First, it is clear that *Pinebrook* did not overrule prior Board precedent. Indeed, it is not the Board's usual practice to overrule prior cases by the votes of two of a three-member panel. The General Counsel concedes as much in his brief. Thus, the general rule remains that unions are free to disclaim interest in representing employees without violating the Act. The question then becomes, what may a union tell employees concerning its intent to disclaim interest. The general rule here is that if an employer or a union may lawfully do something they may lawfully tell employees about what they may lawfully do. This symmetry appears rooted in several sound policy considerations. First, it promotes easier understanding of the law, a significant matter. Further, it promotes the free flow of information to employees and this assists employees in exercising their rights under the Act with as much information as possible. To that extent the rule promotes the policies of the Act. To deprive employees of information concerning what an employer or union may lawfully do would leave them in the dark concerning the lawful possible consequences of the exercise of their Section 7 rights. The facts of this case show why this is so important. I have set forth above how Respondent had concluded that supporters of the UD petition had been telling employees that if they voted in favor of the petition, they would not have to pay dues, yet Respondent would have to continue to represent them. As indicated, that is not an accurate statement of the law. Yet, the General Counsel would prohibit Respondent from correcting that inaccurate statement and employees thus would be voting based on misinformation.

Does the opinion of Then-Members Devaney and Raudabaugh in *Pinebrook* operate as a Board compelled exception to the general rule? I conclude that it does not; instead, I conclude that that opinion is, in reality, a dissenting view of what the law should be. I note that no prior case has indicated that a union may disclaim interest only if it is economically required to do so. In neither *Grinnell* nor *American Sunroof* did economic feasibility appear to be a concern. Nor do there appear to be sound policy reasons to so restrict a disclaimer, for a union may desire to disclaim interest for a host of valid reasons that have nothing to do with economic feasibility. Further, how would a union be able to show objectively that it would be unable to afford to represent employees prior to the UD election. As the General Counsel himself points out in his brief, even if a union loses the UD election, enough employees may continue to pay dues voluntarily so that the union could financially afford to represent the employees. Moreover, an analysis of that opinion shows that it is rooted in a notion that has previously been rejected by the Board. Specifically, the opinion of Then-Members Devaney and Raudabaugh refers to the union's "threat to walk away from its representational obligations" (emphasis added). However, the Board has previously rejected the notion that a union has an obligation to continue to repre-

sent employees. In *Grinnell*, supra at 1169, the then full Board considered that matter and stated:

The “coercion found by our dissenting colleague is rooted without explanation in an assumed duty of a collective-bargaining representative to continue to represent a unit. . . . Depriving the unit of the benefits of the collective-bargaining agreement by withdrawing as representative can be coercive as a matter of law only if the unit has a continuing right to those benefits. And if the unit has that right it can only be because a collective-bargaining representative has that duty. Without that duty, the proposition that [the employee] was coerced by the incumbent’s withdrawal evaporates. . . . Withdrawal is not a breach of the duty of fair representation. For that duty is the corollary to an exclusive representative’s power and authority. [Case cites omitted.] The representative having disclaimed that power and authority, the predicate for the duty fails.

The Board thus made clear that there is no general obligation for a union to continue to represent employees, a notion that the opinion of Then-Members Devaney and Raudabaugh relied on. For these reasons, I conclude that that opinion does not represent the current state of Board law on the matter.

Returning to Then-Chairman Stephens concurring opinion, I have concluded above, as a matter of fact, the at no time did Respondent ever couple a statement that it would remain their representative with a threat that as such representative it would fail to represent employees properly or otherwise retaliate against employees because of the way they voted in the UD election. Thus, Then-Chairman Stephens’ opinion does not apply to the facts of this case.

Having rejected the General Counsel’s argument that *Pinebrook* dictates the finding of a violation in this case, I examine his other arguments in support of the complaint. The General Counsel, in his brief, “concedes” that Respondent could have disclaimed interest upon the filing of the UD petition or it could have waited until after the election and disclaimed interest then. But, the argument continues, Respondent did not actually disclaim interest, instead it only “threatened” to do so and thereby violated the law. In support of this argument the General Counsel cites *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965). The argument is that just as an employer may lawfully go out of business but may not lawfully threaten to do so, so a union may lawfully disclaim interest but may not lawfully threaten to do so. This argument has some initial appeal to it, but ultimately it is not persuasive. I have explained above the significant policy reasons that serve to undermine the application of such a rule to the facts of this case. But the simplest answer to the General Counsel’s argument is that it is not consistent with Board law. All three Board Members in *Pinebrook* agreed that, at least under certain circumstances, a union could tell employees that it intended to disclaim interest. Thus, *Pinebrook* itself rules out this argument.

Although not specifically raised by the General Counsel, I consider the impact of the fact that in this case Respondent did not tell employees that it *would* disclaim interest if it lost the UD election, it merely told them that it might disclaim interest, depending on decisiveness of the vote. I conclude that this does not make the statement unlawful. As conceded by the General Counsel, a union may wait until after the election to disclaim interest. As further conceded by the General Counsel, events occurring up to the election, such as the number of employees who remain willing to voluntarily pay dues, may impact on the decision to disclaim. It follows that a union may lawfully tell employees that it may disclaim interest after a UD election, depending on the circumstances.

Having determined that Respondent can lawfully tell employees that it may disclaim interest, it follows that the other statements made by Respondent to the employees also are not unlawful. Respondent told employees that if it disclaimed interest, then the its contract with the Employer would be null and void; this is an accurate statement of the law. Respondent also told employees that they might not receive their next scheduled wage increase, and that the Employer may fire them without having good cause. Because an employer may act unilaterally in the absence of a recognized collective-bargaining agent, these statements also are not unlawful. Although the statements were couched in campaign propaganda terms, this does not serve to convert them into unlawful remarks. Accordingly, I find no merit to the allegations of the complaint.

It also follows that the Respondent has not engaged in objectionable conduct. I recommend that objections to the conduct of the election be overruled and the results of the election be certified.

#### CONCLUSIONS OF LAW

1. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent did not engage in any unfair labor practice alleged in the complaint.
4. Respondent has not engaged in conduct that warrants setting aside the election in Case 13–UD–433.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>7</sup>

#### ORDER

The complaint is dismissed.

<sup>7</sup> 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.