

**Pearson Education, Inc. and Union of Needletrades,
Industrial and Textile Employees, Midwest Re-
gion, AFL-CIO-CLC.** Case 25-CA-26182

October 31, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN
AND WALSH

On December 29, 2000, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent, Pearson Education, Inc., filed exceptions and a supporting brief. The General Counsel and the Charging Party filed briefs in opposition to the Respondent's exceptions, and the Respondent 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, and conclusions as modified below.

On August 13, 1997, a representation election was held among the Respondent's "full and regular part-time warehouse and distribution center employees." The Charging Party Union lost the election. The Regional Director for Region 25, however, set aside the election based on the Charging Party's Objection 2, one of eight objections filed by the Charging Party.¹ The Board ordered a new election, held on June 11, 1998, which the Charging Party won.

The Respondent subsequently refused to recognize and bargain with the Charging Party. On October 30, 1998, the Board issued an order finding that the Respondent's refusal violated Section 8(a)(5) and (1) of the Act and directing the Respondent to recognize and bargain with the Charging Party.² The Respondent filed a petition for review of the Board's Order in the United States Court of Appeals for the District of Columbia Circuit. The court granted the Respondent's petition and remanded the case to the Board for further consideration.³ In response, the Board ordered that a hearing be held before an administrative law judge to consider all eight of the Charging Party's original election objections to determine whether the first election was properly set aside. We now consider the judge's recommended decision.⁴

¹ Objection 2 alleged the Respondent distributed a leaflet threatening to withdraw a promised wage increase if employees selected union representation. Neither the Regional Director nor the Board reached seven additional objections filed by the Charging Party.

² 327 NLRB No. 17 (1998) (not reported in Board volumes).

³ *Macmillan Publishing Co. v. NLRB*, 194 F.3d 165 (D.C. Cir. 1999).

⁴ The Charging Party withdrew four of its objections and the judge did not make a finding on a fifth objection (Objection 1). Therefore, the judge passed on three objections, which he had renumbered Objec-

tion 2, 3, and 4. Renumbered Objection 2 is the same Objection 2 considered in the Board's prior decision.

Revisiting the Charging Party's Objection 2, the judge found that the Respondent's distribution of the leaflet threatening withdrawal of a promised wage increase, just days before the election, was objectionable and independently sufficient to set aside the election. We agree for the reasons set forth by the judge. As the judge found, the leaflet "explicitly states that the promised wage increase will be put in jeopardy if the employees choose the Union." As such, it "clearly interfered with the [employees'] exercise of free choice" in the election. See, e.g., *Flamingo Hilton-Laughlin*, 324 NLRB 72, 111 (1997), enfd. in pertinent part 148 F.3d 1166 (D.C. Cir. 1998) (threatened withdrawal of promised wage increase "is a heavy suppression" of Sec. 7 rights).⁵

The judge also sustained the Charging Party's Objection 3. Objection 3 alleged that the Respondent engaged in impermissible electioneering by displaying an anti-union poster near the polling area on the day of the election. The judge found the poster objectionable, relying on *Peerless Plywood Co.*, 107 NLRB 427 (1953), which prohibits captive-audience campaign speeches within 24 hours of an election. The *Peerless Plywood* rule, however, does not apply to posters or other campaign literature. *Id.* at 430; *Myrna Mills, Inc.*, 133 NLRB 1740, 1743 (1961). Nevertheless, we agree with the judge's conclusion that the poster was objectionable.

In evaluating allegations of objectionable electioneering, the Board considers a number of factors to determine whether the conduct reasonably tended to interfere with employee free choice. Those factors include the nature and extent of the electioneering, whether it was conducted by a party to the election or by employees, whether it was conducted in a designated "no electioneering" area, and whether it was contrary to the instructions of the Board agent. See *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118-1119 (1982), enfd. 703 F.2d 876 (5th Cir. 1983).

Applying the *Boston Insulated* factors to this case, we find the poster objectionable. First, the Respondent itself put up the poster. Second, with respect to the nature and extent of the electioneering, the poster was approximately two feet by three feet and depicted a list of strikes in which the Charging Party had engaged over the last several years. Third, the poster was hung within an area curtained off for the election—an area every employee had to pass in order to vote. Although the parties failed to designate this area as a formal "no electioneering" area, the poster clearly was located in the "customary

tions 2, 3, and 4. Renumbered Objection 2 is the same Objection 2 considered in the Board's prior decision.

⁵ Chairman Hurtgen, in agreeing with his colleagues' disposition of this case, finds it unnecessary to pass on Objections 3 and 4.

area at or near the polls”; thus, it was in the equivalent of a no-electioneering area. See *Bally’s Park Place, Inc.*, 265 NLRB 703 (1982). Fourth, while the Board agent did not prohibit posters at or near the polls, Union Representative Cronin expressly warned the Respondent prior to the opening of the polls that the Charging Party considered the poster objectionable. Based on our consideration of these factors, we agree with the judge that the poster was objectionable.

Finally, the judge also sustained the Charging Party’s Objection 4, which alleged that the Respondent engaged in objectionable conduct by threatening employees that negotiations would “start at zero” if they selected union representation. For the reasons stated by the judge, we agree with this finding. The Respondent’s statements effectively threatened employees with the loss of their promised wage increases and existing benefits and left them “with the impression that what they ultimately receive depends in large measure on what the Union can induce the employer to restore.” *Plastronics, Inc.*, 233 NLRB 155, 156 (1977). Moreover, the Respondent did not dispel the effect of its threat through additional communications, such as an explanation that “any reduction in wages or benefits will occur only as a result of the normal give and take of collective bargaining.” *Id.*; see also *Mercy General Hospital*, 334 NLRB 100, 104 (2001) (statement that bargaining would start at “ground zero” and employees “wouldn’t have anything” found objectionable).

Accordingly, we agree with the judge that the first election was properly set aside and that the Respondent was properly ordered to bargain with the Charging Party Union based on the results of the second election and the Union’s certification.⁶

ORDER

The National Labor Relations Board reaffirms its original Order reported at 327 NLRB No. 17 (1998), and orders that the Respondent, Pearson Education, Inc., Lebanon, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in that Order.

⁶ The Respondent contends the voting unit is no longer appropriate due to “changed circumstances,” including (1) a change in its ownership; (2) the relocation and consolidation of its two facilities into a single facility; (3) the installation of new equipment; and (4) substantial employee, supervisory, and managerial turnover. We reject this contention. Many of these changes occurred prior to the June 11, 1998 rerun election, upon which the Charging Party’s certification is based, and were previously rejected by the court as a basis for upsetting that election. See *Macmillan Publishing*, *supra* at 167. In any event, whether these changes occurred before or after the rerun election, they do not warrant reexamination of the certified unit. See *R & S Truck Body Co.*, 334 NLRB No. 58 fn. 2 (2001) (not reported in Board volumes), and cases cited there.

Joanne C. Mages, Esq., for the General Counsel.
Gregory J. Utken and Todd M. Nierman, Esqs. (Baker & Daniels), of Indianapolis, Indiana, for the Respondent.
Barry A. Macey, Esq. (Macey, Macey & Swanson), of Indianapolis, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. The Union of Needletrades, Industrial and Textile Employees, Midwest Region, AFL–CIO–CLC (the Union or UNITE) sought in 1997 to organize certain warehouse and distribution center employees of Macmillan Publishing, Inc.

An election petition was filed by the Union on June 10, 1997, and an election was held on August 13, 1997. The Union lost the election by the vote of 78 to 75.

Thereafter, the Union filed eight objections to the election. The Regional Director for Region 25 relying on only one of the eight objections and making no findings regarding the other seven objections set aside the election results and ordered a new election. The Board affirmed the Regional Director.

A second election was held on June 11, 1998, which the Union won by a vote 58 to 52 and the Union was duly certified as the exclusive collective-bargaining representative of the employees in the unit.

Thereafter Macmillan Publishing, Inc. refused to recognize and bargain with the Union and failed and refused to turn over certain information to the Union, which the Union had requested. Macmillan did so in order to test the certification.

Unfair labor practice charges were filed by the Union and a complaint issued. On October 30, 1998, the Board granted the General Counsel’s Motion for Summary Judgment finding that Macmillan violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) when it refused to recognize and bargain with the Union and when it failed and refused to turn over certain information to the Union. The Board ordered Macmillan to recognize and bargain with the Union and turn over requested information to the Union. 327 NLRB No. 17 (1998) (not reported in Board volumes).

Macmillan appealed the Board’s decision to the U.S. Court of Appeals for the District of Columbia Circuit. The issue before the court was whether the Regional Director was correct in setting aside the results of the August 13, 1997 election, which the Union lost. If he was correct then Macmillan violated the Act as the Board found but if he was wrong in setting aside the results of that election then Macmillan did not violate the Act and had no duty to recognize and bargain with the Union.

The court on November 12, 1999, remanded the case to the Board for further proceedings. 194 F.3d 165 (D.C. Cir. 1999).

On April 24, 2000, the Board ordered “that a hearing be held before an Administrative Law Judge on all of the Union’s objections” to the August 13, 1997 election. The Regional Director for Region 25 was ordered to arrange such a hearing and authorized to issue notice of such a hearing.

The hearing on remand was held before me on June 19–21, 2000, in Indianapolis, Indiana.

Briefs were submitted on August 16, 2000, on behalf of counsel for the General Counsel, Respondent, and the Charging Party Union.

At the outset of the hearing the name of the Respondent was changed from Macmillan Publishing, Inc. to Pearson Education, Inc. because in November 1998 Viacom sold Macmillan, Inc., d/b/a Macmillan Publishing, USA and Macmillan Publishing, Inc., became Pearson Education, Inc.

Union Objections to the August 13, 1997 Election

The Union filed eight objections to the election. At the hearing before me on June 19, 2000, the Union said that because of the passage of time they were prepared to go forward on only four of these objections, namely Objections 1, 2, 7, and 8.

I have renumbered the four objections we went to hearing on as Objections 1, 2, 3, and 4.

They are as follows:

Objection 1: The employer interfered with the employees' free choice and destroyed the requisite laboratory conditions by promising employees a wage increase to induce them to vote against the Union.

Objection 2: The employer interfered with the employees' free choice and destroyed the requisite laboratory conditions by threatening employees with the loss of the promised wage increase as well as the loss of other benefits if they selected the Union as their bargaining representative.

Objection 3: The employer interfered with the employees' free choice and destroyed the requisite laboratory conditions by engaging in campaign activity within close proximity of the polls on the day of the election.

Objection 4: The employer interfered with the employees' free choice and destroyed the requisite laboratory conditions by making oral statements and distributing literature that misrepresented the law regarding the rights, duties and obligations of the parties in the collective bargaining process.

The Regional Director had set aside the August 13, 1997 election and ordered a new election based solely on Objection 2 and did not address any of the other objections.

Objection 1

Objection 1 alleges that "the employer interfered with the employees' free choice and destroyed the requisite laboratory conditions by promising a wage increase to induce them to vote against the Union."

The bargaining unit is as follows:

All full-time and all regular part-time warehouse and distribution center employees employed by the Respondent at its Northwest Boulevard and Rockville Road, Indianapolis, Indiana facilities, including employees occupying the job classifications of Picker/Packer, Stocker/Trucks and Supervisor, BUT EXCLUDING all Order Management employees (including employees who occupy the classifications of New Title Coordinator, New Title Assistant, Proof of Delivery Clerk, Sales Support Coordinator and Sales Support Representative), all Customer Operations employees (including employees

who occupy the classifications of 800 Line Representative and Customer Service Representative), all clerical employees, salespersons, professional employees, guards and supervisors as defined in the Act."

The Union sought to represent the above-described unit of employees. These employees worked at one of two different facilities.

The two facilities, Northwest Boulevard and Rockville Road, were located in Indianapolis and Respondent was relocating to a new single facility in Lebanon, Indiana, more than 20 miles north of Indianapolis.

Three categories of employees were going to be relocated. They were category I, category II, and category III employees. Category I employees were employees who would be in the bargaining unit, category II employees were office workers, and category III employees were sales personnel.

In 1996 none of the employees received a pay raise. The move to Lebanon was scheduled for the beginning of 1998. During the critical period between the filing of the union election petition on June 10 and the election on August 13, 1997, Respondent announced that there would be raises implemented after the move to Lebanon. Employees in category II and category III, none of whom were included in the bargaining unit, would be getting small adjustments to their pay to offset the extra commuting costs to Lebanon but the employees in category I, i.e., those designated by the Board after hearing to be in the bargaining unit, would be getting significantly higher raises after the move to Lebanon compared to the category II and III employees.

President Scott Flanders announced the raise at a group meeting in late July 1997 and when asked by an employee if what he orally announced could be put in writing answered in the affirmative.

The written announcement of the raise for employees included in the bargaining unit was published on August 1, 1997, just 12 days before the August 13, 1997 scheduled union election.

The announcement of the raise was as follows:

I am giving you this memo to put forth the wage plan we announced for Lebanon. Employees in the positions of Picker/Packer, Stocker/Trucks, Janitors, Distribution Coordinators and Supervisors will receive a \$1.10 per hour increase effective with the opening of the Lebanon facility. We are planning to open the facility on January 1, 1998. Subsequent pay increases will be delivered through the merit increase program that all Simon & Schuster employees enjoy and it is planned you will receive an increase of at least \$.15 on April 1, 1998 for a total minimum increase of \$1.25 your first year in Lebanon. Shift bonuses of \$.30 and \$.50 are planned to remain at the current amounts.

The Macmillan bonus plan which pays up to \$500.00 when Macmillan meets its stated objectives will remain unchanged for 1997 and includes employees as of September 30th of the 'bonus' year.

This is in addition to the benefits of our new Lebanon facility: the increased job security that this investment in

the Indianapolis area represents, the significantly improved work environment, and a state of the art operation.

This wage plan represents the fulfillment of our earlier commitment to you and our desire for you to be as excited about the move to Lebanon as we are. Please don't hesitate to ask us any questions you have. We will do our best to get you prompt answers."

The Union argues that the promise of a wage increase was designed to undercut the Union and destroy the laboratory conditions for an election.

Relying on the Supreme Court's decision in *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964), the Board has described its rule governing preelection grants of wage or benefit increases as follows:

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). The Board has held that the rationale of *Exchange Parts* is applicable to objection cases. [Citation omitted.]

Our standard in pre-election benefit cases is an objective one. See, *Gulf States Cannery*, 242 NLRB 1326 (1979). To determine whether granting the benefit would tend unlawfully to influence the outcome of the election, we examine a number of factors, including: (1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit. In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits granted during the critical period are coercive. It has, however, permitted the employer to rebut the inference by coming forward with an explanation, other than the pending election, for the timing of the grant or announcement of such benefits." *B & D Plastics, Inc.*, 302 NLRB 245, 245 (1991).

Respondent claims that a raise was necessary in order to convince the employees designated by the Board to be in the bargaining unit, many of whom lived in the inner city of Indianapolis, to relocate to Lebanon. Respondent claims it did a wage survey and concluded that a larger raise was needed for category I employees to entice them to stay with Respondent and make the move to Lebanon because the wages for category II and category III employees were already comparable to the pay received by employees doing similar work in the Lebanon area.

Respondent claims that the timing of the announcement of the raise was basically unavoidable. Again, the raise for bargaining unit employees, was announced just 12 days before the election.

According to the testimony of Orson Mason, Shellye Kaplin, and Robert Thompson, all supervisors and agents of Respondent at the times material to this case, the employees who were to be in the bargaining unit were always going to get a raise in

order to induce them to transfer to Lebanon whether the Union was in the picture or not.

In April 1997 prior to the filing of the election petition Robert Thompson tasked Chloe Hartman to do a wage survey and report back to him. The results of the wage survey would help management decide how big a raise the employees should receive upon the move to Lebanon. Thompson had a target late of July when the Respondent would know what raise to give employees upon the move. Chloe Hartman was slow in getting the job done and indeed left Respondent's employ in June 1997. Shellye Kaplin took over for her. According to Thompson Hartman's delay pushed the process back approximately 1 month. In other words Hartman was slow in getting the data together that was needed to decide what raise was necessary. Hartman did not testify.

Suffice it to say Respondent decided to give very high raises to the employees who were in the designated bargaining unit in late July and announced the raise in writing on August 1, 1997. According to Thompson there was no reason to delay making the announcement and as soon as Respondent was able to do so it did make the announcement.

The raise was not to be effective until after the move to Lebanon, which was scheduled for January 1998, a full 5 months in the future.

Even assuming that the promise of a wage increase did not destroy the laboratory conditions for the election what happened just days before the election certainly did destroy those laboratory conditions as the Regional Director correctly concluded.

Objection 2

Objection 2 alleges that "the employer interfered with the employees free choice and destroyed the requisite laboratory conditions by threatening employees with the loss of the promised wage increase as well as the loss of other benefits if they selected the Union as their bargaining representative."

As noted above Respondent announced on August 1, 1997, just 12 days before the election, that after the move to Lebanon in January 1998, the category I employees, i.e., those employees who would be in the bargaining unit would be getting significant wage raises of more than 10 percent. And this, the promised raise, would be significantly higher than the raises to be given other employees who would also be transferring to Lebanon.

Respondent, also as noted above, promised this significant wage increase to the category I employees because, according to the testimony of Orson Mason, it wanted to incentivize the employees to make the move to Lebanon.

Within a few days, at the most, before the election on August 13, 1997, Respondent distributed to all employees the following leaflet:

"WHAT DO YOU HAVE TO LOSE?

HOW ABOUT:

\$2,522.00 next year!

\$1.10 per hour

\$1.25 per hour

<u>x 40 hours per week</u>	<u>x 40 hours per week</u>
\$44.00 per week	\$50.00 per week
x 13 weeks =	x 39 weeks =
\$572.00 in Jan.–Mar	\$1950.00 Apr.–Dec.

For a total of \$2,522.00 next year

Without a union, Macmillan will be free to proceed ahead with the announced wage increases for the Lebanon move.

With a union, since all wages and benefits would be subject to negotiation no one can predict what the final wage package would be.

WHY TAKE THE RISK?

VOTE NO!

The Regional Director had relied on this distribution as being sufficient, in and of itself, to warrant setting aside the results of the August 13, 1997 election and ordering a rerun election. I believe he was correct. The Union won the second election, which was held on June 11, 1998, by a vote of 58–52. The second election took place after the move to Lebanon had occurred and after the employees had received the promised wage increases.

The juxtaposition of a significant wage increase being promised on August 1, 1997—just 12 days before the election—followed 2 or so days before the election with the leaflet that suggests to employees who had not had a raise since 1995 that if they voted for the union they risked losing \$2522 just the next year alone and cautions them with the words “Why take the Risk? Vote No!” clearly interfered with the exercise of free choice.

The issue of whether the election should be set aside turns on whether the employer’s conduct had a reasonable tendency to interfere with employee free choice. See, e.g., *NLRB v. Superior Coatings, Inc.*, 839 F.2d 1178, 1180 (6th Cir. 1988); *Diner’s Drive-In*, 280 NLRB 971, 972 (1986). The Board reasonably finds that employee free choice has been compromised when the election is tainted by conduct or statements that tend to induce employees to vote not based “upon conviction, but upon fear or upon any other improperly induced consideration.” *Zieglers Refuse Collectors, Inc. v. NLRB*, 639 F.2d 1000, 1005 (3d Cir. 1981); *General Dynamics Corp.*, 250 NLRB 719, 722–723 (1980).

In evaluating the Employer’s statements, the Board must take into account “the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969). The Board applies an objective test to determine whether alleged misconduct has a reasonable tendency to coerce employees. Under that test, the issue is not whether an employer’s statement or conduct in fact coerced the employees but whether it had a reasonable tendency to do so. See *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

Here, there can be no doubt that the Employer’s leaflet would reasonably be expected to cause the employees to fear the consequences of voting for union representation because the leaflet explicitly told employees that in doing so they were risking \$2522. The leaflet created the situation whereby employees, when marking their ballots, would necessarily have to confront the fear they felt concerning the potential loss of the promised wage. Issuance of the leaflet, then, guaranteed that some degree of fear of economic loss would accompany employees into the polling booth. Inducing employees to vote based upon fear rather than conviction is objectionable conduct requiring that the election be set aside.

The leaflet is coercive in that it explicitly states that the promised wage increase will be put in jeopardy if the employees choose the Union. See *Pepsi-Cola Bottling Co.*, 315 NLRB 882, 892–893 (1994). The threat was reinforced by the small print of the leaflet which stated that, “*without* a union, [the Company] will be free to proceed ahead with the announced increases for the move [to Lebanon]” but “[w]ith a union, since all wage and benefits would be subject to negotiation, no one can predict what the final wage package will be. WHY TAKE THE RISK?” This language leaves the clear impression that if the employees select the Union, “what they may ultimately receive depends upon what the union can induce the employer to restore.” *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), accord: *TRW-United Greenfield Division v. NLRB*, 637 F.2d 410, 420 (5th Cir. 1981). Conveying this message is coercive conduct because it sends the clear message that, in the absence of the Union, the Company is willing to grant the raise, but if the Union wins the election, the Company will pay only what the Union can force it to pay.

The conduct at issue must be evaluated in the context of “the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.” *NLRB v. Gissel Packing Co.*, supra at 617. Here, the leaflet advised employees that they were risking a wage increase that had just been promised them. The promise of the wage increase heightened the employees’ awareness of the source of their benefits. *NLRB v. Exchange Parts Co.*, supra at 409. When, within a matter of days after the promise was made, the employer advised employees that the raise might “dry up” if they selected the Union, the employees could reasonably interpret the message as a naked display of the fist that had been previously covered by the velvet glove of the wage increase promise.

The Employer contends that the leaflet was not a threat but was instead an accurate statement of what happens in bargaining. Given the context just described and given the format of the leaflet itself, which emphasizes the risk of loss through the size of the type and the placement of the words on the page, it is more reasonable to conclude that employees interpreted the leaflet as a threat of wage loss rather than an exposition on the bargaining process. As such, the leaflet is clearly grounds for overturning the election because the Board has held that where an employer threatens to withdraw a wage increase that it has promised during the same election campaign, the employer’s conduct “is a heavy suppression of employees’ rights to engage

in protected activities.” *Flamingo Hilton-Laughlin*, 324 NLRB 72, 111 (1997), *enfd.* in relevant part 148 F.3d 1166, 1175 (D.C. Cir. 1998).

Moreover, contrary to the Employer’s argument, the small print of the leaflet does not contain an accurate explanation of the bargaining process or the impact of the process on the previously promised wage increase. The leaflet carried the clear message that if the employees selected the Union, the Company would not “be free” to implement the raise because “all wages and benefits would be subject to negotiation.” This is not true, however, because as the raise was promised before the election and before the employer had any duty to bargain, it would have the right and the duty to implement the raise at the scheduled time if the Union won the election.

This point is explicitly made in *Advo System Inc.*, 297 NLRB 926 (1990). There, in response to an employee’s question whether he would receive his scheduled pay raise, the employer responded that if the union won the election, “everything would be negotiable.” The administrative law judge concluded that this response constituted a violation of Section 8(a)(1), and the Board affirmed. The judge reasoned as follows:

The Board rule is that if a wage increase is scheduled to take effect at a particular time (in this case, Rose’s raise was due at the end of May 1998 presumably following the election) and if, at that time, a question concerning representation is pending, the employer, in the face of the actually scheduled wage increase, would be obligated to grant the increase. This result is in accordance with the familiar principle that . . . “an employer, in deciding whether to grant benefits while the representation election is pending should decide that question as it would if a union were not in the picture.” Thus, by operation of law, [the employer], in such a case, would have been obligated to grant the increase at that time.” *Arrow Elastic Corp.*, 230 NLRB 110, 113 (1977), *enfd.* 573 F.2d 702 (1st Cir. 1978) [A]ccepting Boatman’s testimony that he answered the unnamed employee’s question at the shift meeting in May, 1998 (whether he would get a pay increase if the Union got in) that . . . “under those circumstances, everything would be negotiable,” such an answer is inconsistent with the above rule. Everything is not negotiable . . . As noted in *Arrow Elastic Corp.*, *supra*, everything is not negotiable. The question should have been decided as if the Union were not in the picture. A legally correct answer by Boatman would have been that if the pay increase that the employee was talking about were actually scheduled, the employee would receive the pay increase. Absent such a precise answer, Boatman should have answered that Respondent would be guided by the principle that the granting of benefits would be decided as if the Union were not in the picture with the pending election. Even this more general answer would have been satisfactory. To answer the question, however, that “everything is negotiable,” reasonably leaves in the minds of the employees (who are not law professors or grammarians) that even scheduled pay increases would be “negotiable.” . . . Boatman’s statement, whether a threat or merely a coercive statement tending to

tending to interfere with Section 7 rights of the shift employees, under *Arrow Elastic Corp.*, violated Section 8(a)(1) of the Act. 297 NLRB at 940.

If a raise is scheduled before a union wins a representation election, the union, after the election, does not have to bargain to have the employer implement the raise. The raise should go into effect as if the union were not in the picture. If theory, the union, could bargain away the raise. As the raise exceeded 10 percent and healthy negotiated raises in the time period were in the vicinity of 3 percent, the Union would have had no incentive to do so. Moreover, although the Union could legally bargain away the increase that is not what the leaflet says. The message of the leaflet is that the Union would have to bargain to get the employees the raise, and this is simply not true.

In the instant case, as in *Advo System, Inc.*, the Employer, in the leaflet, mischaracterized the law and advised employees that they would get the raise if the union lost the election but risked losing the raise if the Union won because everything would be negotiable. For the reasons stated in *Advo System*, this statement interfered with the employees’ exercise of their Section 7 rights. Accordingly, the Regional Director was correct in concluding that the election should be set aside.

Objection 3

Objection 3 alleges that “the employer interfered with the employees’ free choice and destroyed the requisite laboratory conditions by engaging in campaign activity within close proximity of the polls of the day of the election.”

On August 13, 1997, the day of the election, Union Representative Pat Cronin observed a poster, which was in plain view of all persons who were going to vote. In order to get to the polling place the employees who would be voting had to pass by this poster which was 2 by 3 feet and contained on it a list of strikes over the last several years before the election in which the striking employees were members of the very same union seeking to represent Respondent’s employees.

The Board prohibits electioneering at the polls as it prohibits captive audience meetings within 24 hours of the election. *Peerless Plywood Co.*, 107 NLRB 427 (1953).

Prior to anyone voting Union Representative Cronin told Respondent’s attorney that he found the poster objectionable. Respondent’s attorney, who is not either of Respondent’s attorneys in the instant case, refused to honor Cronin’s request to remove the poster. He told Cronin to file an objection, which Cronin did.

At the hearing before me management official Orson Mason testified that the poster was hung high on the wall and had been there throughout the period of time between the election petition being filed in early June and the election and he was sure everyone had seen it so often it was something you wouldn’t even notice. On the other hand during the campaign the Employer warned employees about strikes, which it claimed occurred only when unions were on the scene and if there was a strike employees don’t get paid, lose health insurance, don’t get unemployment, can be permanently replaced and if an employee doesn’t strike may see his or her car vandalized and be subject to harassment. See Respondent’s Exhibits 8, 9, and 10.

The poster, I find, and the circumstances under which it was displayed, coupled with the threat of loss of wage increases if the Union gets in warrant setting aside the results of the August 13, 1997 election.

Objection 4

Objection 4 alleges that “the employer interfered with the employees’ free choice and destroyed the requisite laboratory conditions by making oral statements and distributing literature that misrepresented the law regarding the rights, duties and obligations of the parties in the collective bargaining process.”

Three of the witnesses for the Charging Party were Tami Jo Benton, Richard Williams, and Jacqueline Brauss.

Benton was fired in November 1998 and may be perceived to have a motive to fabricate but I found her credible when she testified that at a group meeting of employees presided over by supervisors John Lytle and Richard Krivacic that Lytle when asked if the employees would still get the raises if the Union was voted in answered in the negative. Another employee at the meeting said that Scott Flanders, the president, had said the employees would still get the raise even if the Union was voted in. Respondent’s supervisor, Orson Mason, was called into the meeting and when asked if Flanders said the employees would get the raise whether the union was voted in or not replied, “I don’t remember, but I don’t believe you will, because when we go to negotiate, if the union gets in, we start at zero.” This statement corroborates the threat that later appears in the leaflet that is distributed to all employees and is the subject of Objection 2.

Lytle, Krivacic, and Mason all deny that “negotiations start at zero” or words to the effect were ever said by them or any member of management during the campaign. Mason claims he said if the Employer is committed to a wage increase it would be part of the baseline, which is the point at which negotiations begin. He did not say, however, whether or not the employer was committed to the wage increases. Hence a reasonable person would assume he or she could lose the raise if the Union wins the election.

Dick Williams, who worked for Macmillan and is now with Pearson Education, Inc., credibly testified that he heard Orson Mason say that if the Union got in that employees lose benefits and everything goes to zero. Mason denied he said this or heard other management official ever say it.

Williams also credibly testified that after the written announcement about the raise to be given after the move to Lebanon Corey Baudy, a floor manager and statutory supervisor, said that if the union got in the employees would not get the promised wage increases upon the move to Lebanon. Baudy said this in Williams’ presence and in the presence of other employees. Corey Baudy did not testify.

Williams also credibly testified that Manager and Statutory Supervisor David Kern told him in the presence of another employee that if the Union was voted in the employees would not get the promised wage increases when they moved to Lebanon. David Kern did not testify.

Williams contacted the Union and asked the Union to clarify the Employer’s obligations with regard to the promised wage increases. The Union position statement is in the record as

Respondent’s Exhibit 4. Several copies of Respondent’s Exhibit 4 were given by the Union to the 10 employees who were members of the organizing committee but Respondent’s Exhibit 4 was not distributed to all the employees.

Just a day or so before the election Williams received Charging Party’s Exhibit 2—the “What do you have to lose” leaflet—and credibility testified that he observed female employees in the shop crying over the possible loss of their wage increases if the union got selected.

Jacqueline Brauss worked for Macmillan and currently works for Pearson Education, Inc. Like the other employees she attended three small group meetings and two larger meetings where management talked to the employees about the upcoming election. Brauss was unclear on some of her testimony and even testified at one point on direct examination as follows: “I’m so bad on remembering things. I really apologize for it.” She also testified that at some meetings she didn’t pay attention and once even wrote a letter to her sister during the meeting. Accordingly, while I’m sure Brauss tried to tell the truth, I give no weight to her testimony.

The credited testimony of Benton about Supervisor Mason’s statements and Williams’ credited testimony about Supervisors Mason, Baudy, and Kern coupled with the threat of loss of wage increases in the leaflet distributed just a couple of days before the election and electioneering by the employer on the very day of the election again warning of strikes conclusively manifest that the results of the first election were correctly set aside.

Conclusion

The results of the first election were properly set aside and a new election properly ordered by the Regional Director. The results of the second election were 58 to 52 in favor of the Union. There are no outstanding objections to the second election.

The Union was certified as the exclusive collective-bargaining representative of a unit of employees. Again Respondent, in order to test that certification, refused to recognize and bargain with the Union and failed and refused to turn over certain information to the Union, which all parties agree was relevant to and necessary for the Union to carry out its collective-bargaining responsibilities.

The Decision and Order of the Board in *Macmillan Publishing, Inc.*, 327 NLRB No. 17 (1998) (not reported in Board volumes), accordingly, is reinstated. The name of the Respondent should be corrected to read Pearson Education, Inc.

Respondent’s Motion to Dismiss Complaint

Respondent made a motion to dismiss complaint when the hearing before me opened on June 19, 2000. I denied the motion.

Respondent’s motion to dismiss complaint and the affidavit of Brett McCollum in support of the motion are in evidence as Respondent’s Exhibits 1 and 2.

Respondent moved to dismiss the complaint because of substantial changes in operations and significant turnover in employees since the first election on August 13, 1997.

However, all the assertions made in its motion to dismiss were brought to the attention of the Board in a pleading prior to the Board’s April 24, 2000 remand to the Regional Director.

The Board limited the remand to the administrative law judge as follows "It is ordered that a hearing be held before an Administrative Law Judge on all of the Union's objections."

As a result I denied Respondent's motion to dismiss.

ORDER

Absent further proceedings before the Board or courts, Respondent should comply with the Board's Decision and Order of October 30, 1998. See 327 NLRB No. 17 (1998) (not reported in Board volumes).