Curwood, Inc., A Division of Bemis Company, Inc. *and* Graphic Communications Union, Fox Valley Local 77-P, AFL–CIO, CLC. Cases 30–CA–15245–1 and 30–RC–6203–04

August 21, 2003

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND ACOSTA

On February 2, 2001, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a supporting brief. The General Counsel and the Charging Party filed briefs opposing the Respondent's exceptions, and the Respondent filed a reply brief. The Respondent also filed a brief opposing the General Counsel's cross-exceptions.

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

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order and adopts the recommended Order as modified.[2]

The Respondent manufactures flexible film packaging for snack foods in Oshkosh, Wisconsin. The Charging Party Union sought to represent the Respondent's production workers for purposes of collective bargaining. It conducted an organizing campaign during the late winter, spring, and summer of 2000.[3] Employee retirement benefits were a primary issue in the campaign. The Union filed an election petition on May 8, and the election took place on July 20–21. The Union lost the election by a vote of 386 to 257.

The judge found that the Respondent unlawfully solicited employees' grievances and made unlawful promises, threats, and other statements. He also found that these statements, made in various documents made available to employees during the election campaign, interfered with the election.[4] Most of the violations the judge found related to the Respondent's attempt to counter the Union's organizing drive by promising improved pension benefits to the employees.

We agree with much of the judge's decision, including his recommendation for a new election. However, for the reasons discussed below, we will reverse his findings that the Respondent (1) unlawfully threatened that customers and jobs would be lost if the employees chose the Union; (2) unlawfully solicited grievances in a June 12 memorandum to employees; and (3) unlawfully solicited employee grievances and unlawfully interrogated employees in a June 30 letter. Finally, we find no merit in the General Counsel's cross-exceptions to the judge's failure to address four additional grievance solicitation allegations arising from a July 18 "question and answer" document distributed to employees.

A. The Alleged Threat of Loss of Customers and Jobs

In the penultimate paragraph of a June 30 letter sent to each of the production employees, the Respondent stated:

> Being unionized is also viewed negatively by our customers. They are concerned about potential work stoppages and product interruptions, which would harm their business. That is why we say remaining union-free affects our business and our livelihood.

Analyzing this language under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the judge found that it constituted an unlawful threat of reprisal—specifically, a threat that anti-union customers would abandon the Respondent, and consequently employees would lose jobs, if the Union were chosen to represent the employees. We disagree.

In conveying its customers' concerns about possible unionization, the Respondent's June 30 letter contained no threat of reprisal. Furthermore, the Respondent provided objective material reflecting its customers' concerns. See *Gissel*, supra, 395 U.S. at 618. The material consisted of written inquiries from large customers such as Nestle, Nabisco, Kraft, and Minute Maid, asking whether the Respondent's products were produced in unionized plants. Some of the inquiries specifically raised concerns about "possible interruption in receipt of materials" and "continuity of supply" in the event of a work stoppage. Contrary to the judge, the fact that the Respondent's customers also sent similar letters to other

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

[2] In addition to the matters discussed below, we shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

[3] All dates hereafter are in 2000.

[4] The Respondent has not argued that the election should not be set aside even if the Board affirms some or all of the judge's 8(a)(1) violation findings. Thus, Member Schaumber finds that he need not decide here whether the Board's standard for setting elections aside ought to be revisited.

suppliers cuts against the violation finding, not in favor of it. That the Respondent's customers routinely and generally ask their suppliers about their contingency plans in the event of union-related supply disruptions underlines just how much of a concern such disruptions really are for those customers.[5]

The Board's decision in *Tri-Cast, Inc.*, 274 NLRB 377 (1985), makes clear that the Respondent's statement here was lawful. In *Tri-Cast*, the employer told employees that if, as a result of unionization, it had to bid higher or customers felt threatened because of strikes, the company would lose business and jobs. The Board found that the employer had accurately represented what others outside its control might do. The Board said:

> Higher bids or customer feelings of dissatisfaction because of problems caused by union strikes can lead to lost business and lost jobs. [274 NLRB at 378.]

The Board found no objectionable conduct in "[m]aking these reasonable possibilities known to employees." The facts in the instant case militate even more strongly against finding the Respondent's statement unlawful. In *Tri-Cast*, supra, the employer had not actually received concerns from customers. Here, the Respondent received expressions of concern from various customers.

Seeking to distinguish *Tri-Cast*, our dissenting colleague emphasizes that the employer there phrased its statements in terms of what its customers *might* do if employees unionized. But *Tri-Cast* does not stand for the proposition that the *only* permissible statements about customer loss are those expressed in the conditional. In *Tri-Cast*, the employer reasonably talked about what its customers might do because it had not actually received concerns from customers. Here, the Respondent had received such concerns, and, thus, reasonably dispensed with the conditional mood.

Because the Respondent's statement contained no unlawful threat, we reverse the judge's unfair labor practice finding and dismiss this allegation.

B. The June 12 Grievance-Solicitation Finding

The complaint alleges that by a memorandum to employees, dated June 12, the Respondent unlawfully solicited grievances. The judge found that the June 12 memo "memorialized an unlawful solicitation of grievances with the implication that they would be resolved without the need for a union." Setting aside the variance between the violations alleged and found, we find that the record supports neither violation.[6]

In the second and third paragraphs of the June 12 memo, the Respondent stated as follows:

> During the meetings, a number of you raised very good issues in regard to the comparison of benefits between senior and junior employees under the BRP. The company has continually made improvements to your benefit package over the years. Such changes in the past have included adding the company match to the BIIP, adding the performance match to the BIIP in 1997, and providing more investment options. It is not uncommon for us to make improvements when needed and when financially prudent. When improvements are made, they are made on a going forward basis, not a retroactive basis. We have never reduced or taken away an existing retirement benefit.
>
> A lot of good ideas, thoughts and concerns came out during the employee meetings that we, quite frankly, had not thoroughly considered. We appreciate your honest reactions and input. While our target implementation date remains January 1, 2001, we are still in the process of compiling the questions and answers that came to light during our meetings. As we go forward

[5] The dissent argues that the Respondent is not entitled to rely on its customers' inquiries because they were not produced until the hearing. See *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1342 (2000). Because this argument is advanced sua sponte by the dissent, rather than the parties, we do not reach it.

[6] Our dissenting colleague seems to think that we are reversing the judge *because* the violation found was not alleged. She contends that (a) the violation found was "closely connected to the subject matter of the complaint and has been fully litigated"; (b) the Respondent was not "prejudiced by the General Counsel's failure to formally allege the violation the judge found"; (c) the complaint "clearly put the Respondent on notice of a possible violation based on the promise made in the June 12 memo"; and (d) *Graham-Windham Services*, 312 NLRB 1199 (1993), in which the Board upheld a violation finding despite its deviation from the theory that had been alleged in the complaint, is "indistinguishable" from the instant case. These contentions are beside the point. We are not reversing the judge's violation finding on due process grounds because of its variance from the violation alleged in the complaint. Rather, while we note that variance, we find it unnecessary to rely on it in reversing the judge because, on the merits, the record fails to support either the violation alleged or the violation found.

However, since his dissenting colleague has raised the due process issue, Member Schaumber does not agree with her view that the complaint provided sufficient notice. Again, the judge found that the June 12 memo "memorialized an unlawful solicitation of grievances" that had taken place at employee meetings held a few days earlier, June 5–8. In finding that the complaint put the Respondent sufficiently on notice in this regard, Member Liebman points out that par. 11 of the complaint refers to those June 5–8 employee meetings. What she fails to point out, however, is that the complaint *expressly excludes* par. 11 from the scope of the alleged violations. Complaint par. 16 alleges that the Respondent violated Sec. 8(a)(1) "[b]y the conduct described above in pars. 7, 10, 12, 13, 14, and 15." By mentioning the June 5–8 meetings in par. 11 and then excluding par. 11 from the alleged violations, the complaint made it clear that the Respondent's conduct at those meetings was not at issue.

> with this implementation, it is critical that the transition into the BRP works as a benefit to all employees and does not have any adverse, unintended consequences.

It is plain that this language contains no solicitation of grievances. Thus, the violation alleged is without merit.

The violation found is equally meritless. The language quoted above refers to employee meetings, which were held June 5–8. The judge found that during those meetings the Respondent engaged in unlawful solicitation of grievances, which it "memorialized" in its June 12 memo. But the Respondent did not solicit grievances at the June 5–8 meetings. It merely permitted employees to ask questions about the Bemis Retirement Plan (BRP) at an informational meeting concerning the newly announced plan. Permitting questions is not soliciting grievances. But even if it were, the Respondent's conduct in this regard was consistent with a procedure that had been established before the onset of the Union's campaign. It is a long-settled principle that an employer does not commit an unfair labor practice when it has a past practice of soliciting employee complaints and merely continues that practice during an organizing campaign. See, e.g., *Lasco Industries*, 217 NLRB 527, 531 (1975). Further, apart from the conformity of these meetings with past practice, the record evidence does not support any theory that the Respondent implicitly promised to remedy the complaints that senior employees were affected inequitably under the BRP.[7]

The June 12 memo referred to employee meetings held on June 5, 6, 7, and 8 regarding the Respondent's previously announced transfer of the production employees to the BRP, a more generous retirement-benefit program. Audra Mead, the Respondent's human resources manager, provided undisputed testimony that historically when the Respondent changes or adds a fringe benefit it holds informational meetings for the employees. The employees attending are free to ask questions. During the meetings, the Respondent records their questions and concerns to determine if there are "patterns or subject matter that maybe we hadn't covered well enough for the employees." The employees are told that their questions are being written down, and that a "question-and-answer" document will be created and circulated subsequently. Mead confirmed that this was the nature of the meetings held June 5–8, and that a question-and-answer document was distributed a few weeks later.

Employee Brian Easton testified that he attended the June 6 meeting. He said that the employees asked many questions about the BRP, and that because the Respondent's managers could not answer all of them, they encouraged the employees to write down their additional questions and submit them after the meeting. Easton also stated that he, among other employees, complained that the BRP would be less favorable to senior employees because they would not get the maximum benefit from the plan by the time they retired. As the meeting ended, Easton approached Mead and asked whether financial adjustments could be made for older employees to resolve the problem he had raised. Mead responded that there were no plans to make any changes at that time.

In her testimony, Mead confirmed that the problem Easton had raised came up repeatedly at the June 5–8 meetings. She responded at the meetings that there was no plan to make adjustments for senior employees at that time.

Thus, Easton and Mead both testified that Mead told employees at the meetings that the Respondent did not plan to resolve this issue. Accordingly, we reject the judge's finding that the June 12 memo implicitly promised that senior employees' problem concerning maximum benefits under the BRP would be solved without the need for a union. See, e.g., *Kinder-Care Learning Centers*, 284 NLRB 509, 516 (1987), enfd. mem. 855 F.2d 861 (9th Cir. 1988) (employer rebutted the inference of an implicit promise to resolve by stating that it could not promise to remedy its employees' grievances).

C. The June 30 Letter: Alleged Grievance Solicitation and Interrogation

The judge found that in a June 30 letter to employees the Respondent unlawfully solicited employee grievances and interrogated employees. We reverse both of the judge's findings and dismiss the underlying allegations for the reasons that follow.

The June 30 letter expressed disappointment that the Respondent's maintenance employees had been excluded from the voting unit by the Regional Director. In addition, the letter advised that the exact time and place of the election would be communicated at a later time, and that the Respondent was legally required to provide a list of the production workers' names and addresses for the Union's use. Further, the Respondent said that it would explain its views on unionization to the employees at a later time. The letter also urged that every employee cast a vote, which "will be confidential." In the final paragraph the Respondent stated the following:

> I [i.e., the Respondent's Site Director, Sam Smith] am enclosing a self-addressed, stamped envelope and a

[7] However, we agree with the judge that the Respondent's earlier announcement of the BRP benefit and its repetition of the announcement in the June 12 memo violated Sec. 8(a)(1). We also agree that the Respondent violated Sec. 8(a)(1) in the June 12 memo by blaming the Union's campaign and the pending election for its inability to give the employees more benefits.

> blank sheet of paper. If you have questions, I highly encourage you to write them down and return them in the envelope provided. It is not necessary to sign your name on any question you would like answered. I will do my best to respond to every question prior to the vote.

The judge found that this last paragraph solicited employees' grievances with an implicit promise to resolve them, violating Section 8(a)(1). He relied largely on employee Easton's testimony that Easton understood this part of the letter as an invitation to tell the Respondent what his problems were and to ask what the Respondent could do to make him happy. In addition, the judge found that the manner in which the Respondent solicited questions of the employees, i.e., a blank piece of paper and a stamped, self-addressed envelope, created the possibility that the Respondent would learn the identity and union views of responding employees. He found that the responses would allow the Respondent to gauge the depth of union support among the employees. The judge concluded that this amounted to an interrogation in violation of Section 8(a)(1). We find merit in the Respondent's exceptions to both of these unfair labor practice findings.

First, the judge incorrectly analyzed the grievance-solicitation issue. The standard for determining an 8(a)(1) violation is whether the employer engaged in conduct that reasonably tends to interfere with the free exercise of employees' Section 7 rights. See, e.g., *American Freightways Co.*, 124 NLRB 146, 147 (1959). This standard is objective; it does not take into account the subjective perceptions of individual employees. See, e.g., *Lackawanna Electrical Construction, Inc.*, 337 NLRB 458, 464 (2002); *Medcare Associates, Inc.*, 330 NLRB 935, 940 fn. 17 (2000). Thus, Easton's own impression of what the last paragraph of the letter meant is irrelevant. The context of the letter as a whole reasonably suggests that the Respondent was soliciting questions about the mechanics of the election process and about its own views concerning unionization. In the circumstances there is insufficient evidence that the Respondent's request for employee questions here implied a promise to resolve their grievances. Absent this promise, there is no unfair labor practice. See, e.g., *Reliance Electric Co*., 191 NLRB 44, 46 (1971), enfd. 457 F.2d 503 (6th Cir. 1972).

Second, we do not agree that the Respondent unlawfully sought to interrogate employees in this final paragraph of the letter. The relevant legal standard for unlawful interrogations is well established: the Board determines whether under all the circumstances the inquiry reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. See, e.g., *Greenfield Die & Mfg. Corp.*, 327 NLRB 237 (1998); *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

The response from employees that the Respondent sought in the June 30 letter was entirely voluntary. An employee receiving the letter could choose to respond or not, with no disciplinary implications attached to the choice. If an employee decided to reply, he could choose not to identify himself, as the Respondent pointed out in the letter. Further, the Respondent's appeal was not directed at gauging the level of union support among the production workers. As we have said, the context of the overall document indicates that the Respondent's interest related to election mechanics and its own view of the organizing campaign. Questions about either of these subjects would not necessarily reveal individual employees' union sentiments or the strength of their support for the Union. Considering all the relevant circumstances, we conclude that this paragraph of the June 30 letter was neither coercive nor threatening, and did not restrain or interfere with employees' Section 7 rights.

D. The General Counsel's Cross-Exceptions: Additional Solicitation Allegations

The Respondent distributed a document dated July 18 that recited employee questions and the Respondent's answers. This material was gleaned from several meetings that the Respondent had conducted earlier in July with the production employees to discuss the pending election and to persuade them to vote against union representation. In his cross-exceptions, the General Counsel argues that four of the question-and-answer sets in the July 18 document represent unlawful grievance solicitations, and he further argues that the judge failed to account for them in his decision. We disagree on both counts. The judge did account for these allegations in his decision by recommending that the complaint be dismissed "insofar as it alleges violations of the Act not specifically found." Moreover, for the following reasons, the four question-answer sets did not constitute grievance solicitations.

We will address these allegations in groups of two. The first group reads:

> *Q. Why don't employees have input in decisions regarding benefits?*
>
> A. The National Labor Relations Board has ruled that it is illegal for employers to negotiate with employees over wages and benefits. The NLRB has declared that company-dominated labor unions are illegal. However, we recognize we need to do a bet-

ter job of explaining how changes are decided upon and what is considered when decisions are made.

Salaried employees have the same concern. The challenge is, how do we gather and consider input from more than one thousand employees on extremely complex, government regulated benefits?

Q. Why didn't the company start meetings sooner?

A. The company did not receive notification from the NLRB that the election was going to be conducted July 20 and July 21, 2000, until Friday, June 30, 2000, at 4:30 p.m. Earlier discussions with the NLRB led the company to believe the election would not take place until the first week in August. If that had been the case, we would have had more time to meet with employees. Due to scheduled vacations, we felt we would have missed too many people if we had begun the meetings during the week of July 4th. Therefore, we opted to begin meetings the week of July 10, 2000. We scheduled enough meetings to meet with all employees on three separate occasions. In addition, we are making every effort to respond to everyone's questions and will continue to do so until the election is over.

Quite simply, we find nothing in either of these question-and-answers that would constitute a solicitation of grievances accompanied by a promise—explicit or implicit—to resolve them. Therefore, the relevant allegations are dismissed.

The second group of questions and answers reads:

Q. Why are policies different from one department to the next? This breeds inconsistency.

A. Being union-free has allowed employees flexibility in determining guidelines for some workplace policies. Every department has different needs based on equipment and crewing needs. A number of years ago, employees requested they be allowed to determine such things as how vacancies are covered within each department or whether or not to use plant or department seniority for vacation eligibility.

Some employees prefer everything in black and white. However, the employees polled in 1994, told the company they wanted to have the latitude to determine these things on a department-wide basis.

If employees now prefer to have all policies the same from one department to the next throughout the complex, you don't need to vote for a union.

The company can easily make all workplace policies the same across the board; however, that will eliminate the flexibility many of you have come to enjoy.

Q. You say we allow up to 20 percent off on vacation. That's not true in the Rewind Department at BSF. Why can't we have a full 20 percent off?

A. Part of the issue in the Rewind Department is that it has not been fully staffed. It is our understanding that, as a result of department meetings, employees decided to go with the same number off on each shift, even though crewing levels vary from shift to shift. If employees would like to reconsider this decision, they should contact John Durrant.

The Respondent provided testimonial evidence shedding light on these two question-and-answers. Human Resources Manager Mead testified that certain personnel policies are self-determined by employees within their departments, based on a practice established long before the Union's campaign. The examples she gave were policies covering start-and-stop worktimes, vacation, overtime, and personal holidays. The procedure is for the employees to decide among themselves what the policy will be for the department, and then to notify their department supervisor. The specific example Mead used was vacation policy in the rewind department: should the consensus among the rewind employees be to change the vacation policy, they would notify Supervisor Durrant and the change would be implemented. Mead's testimony was undisputed, and was corroborated by Site Manager Sam Smith.

Thus, understood in the appropriate context, there are no implicit promises here to resolve problems raised in the employees' questions. Both of the Respondent's answers merely refer to the employees' previously established authority to resolve problems themselves. Accordingly the allegation is dismissed.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Curwood Inc., a Division of Bemis Company, Inc., Oshkosh, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a), insert the following two paragraphs 1(a) and (b) in its place, and reletter the final paragraph accordingly.

"(a) Announcing and promising improvements in pension or other benefits in order to discourage union support.

"(b) Blaming the Union for the absence of further benefits."

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

MEMBER LIEBMAN, dissenting in part.

The majority errs in two respects.[1] First, its conclusion that the Respondent's June 30, 2000 letter did not unlawfully threaten employees with the loss of their jobs, if they chose to unionize, is inconsistent with the Supreme Court's decision in *NLRB v. Gissel Packing*, 395 U.S. 575, 618 (1969). *Gissel* requires that employer predictions about the effects of unionization be "carefully phrased on the basis of objective fact," which is not the case here. Second, the majority errs in reversing the judge's finding that the Respondent unlawfully promised, through its June 12, 2000 memorandum, to resolve employee grievances solicited earlier. The Board's decision in *Graham-Windham Services*, 312 NLRB 1199 (1993), makes clear that we can and should find a violation here, where the Respondent essentially promised a benefit to remedy prior grievances.

A. The Threat of Lost Jobs

At issue is the penultimate paragraph of the June 30 letter that the Respondent sent to the production workers. It states in part:

> Being unionized is also viewed negatively by our customers. They are concerned about potential work stoppages and product interruptions, which would harm their business. That is why we say remaining union-free affects our business and our livelihood.

As the judge found, employees could reasonably have understood these statements as a threat that they inevitably would risk their jobs if they selected union representation, because the Respondent would lose its customers who disapproved of unionization.

The Respondent's statement does not pass the test set out by the Supreme Court in *Gissel*:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased *on the basis of objective fact* to convey an employer's belief as to *demonstrably probable* consequences beyond his control.

395 U.S. at 618 (emphasis added). Here, the Respondent had no objective factual basis for the claim that its customers viewed unionization negatively, much less for the implicit claim that they would withdraw their business from the Respondent simply because employees unionized. Employees, who are "particularly sensitive to rumors of plant closings," reasonably could have understood the statement not as an "honest forecast," but as a "coercive threat," in the words of the *Gissel* Court. Id. at 619.

The Respondent asserts that certain customer correspondence formed an objective basis for its predictions. That argument fails, for two reasons. First, as the judge found, the June 30 letter did not refer to objective evidence of customers' supposed sentiments, nor did the Respondent make any contemporaneous showing to employees. Rather, it provided customer correspondence that assertedly supported the statement *at the hearing*. This "later-produced" or "after the fact" evidence does not satisfy the *Gissel* standard. See *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1342 (2000). See also *Savers*, 337 NLRB 1039, 1040 (2002) (Member Liebman, dissenting). If the objective basis for the statement is not evident when the statement is made, the employees obviously cannot discern whether it is a threat or a legitimate prediction.

Second, the correspondence belatedly offered by the Respondent simply does not support the Respondent's claims. The correspondence inquired about which of the Respondent's plants were unionized,[2] the termination dates of collective-bargaining agreements, and any history of work stoppages. As the judge found, these were no more than routine business inquiries manifesting a customer interest in continuous product flow in the event of a strike. Nothing in any of these documents reflected that the Respondent's customers held a "negative" view of unionization. The correspondence contains no hint that the Respondent's customers would walk away simply because employees unionized. Indeed, Sam Smith, the Respondent's site director, whose testimony introduced the documents into evidence, indicated that in his 19 years with the Company he was not aware that the Respondent had ever lost any customers because unionized plants manufactured some of its products.

Lacking an objective factual basis in the customer correspondence cited at the hearing, the Respondent's statement exceeded any permissible prediction and constituted a threat of reprisal in violation of Section 8(a)(1). See, e.g., *Tellepsen Pipeline Services Co.*, 335 NLRB 1232, 1233 (2001); *Reeves Bros., Inc.*, 320 NLRB 1082, 1083 (1996). It neatly illustrates the "brinksmanship"

[1] I agree with my colleagues concerning the unfair labor practices they have found in this case, and I agree that a new election is required. I also agree with their reversal of the judge's unlawful-interrogation finding involving the Respondent's June 30, 2000 letter. I find it unnecessary to pass on the judge's unlawful-solicitation finding in the June 30 letter. See, infra.

[2] The Respondent maintained unionized plants at other locations.

that the *Gissel* Court referred to in cautioning each employer to avoid "conscious overstatements he has reason to believe will mislead his employees." *Gissel*, supra, 395 U.S. at 620.

Tri-Cast, Inc., 274 NLRB 377 (1985), cited by the majority for support, is distinguishable. In that case, the employer explained to its employees that if it had to bid higher because of unionization, or if customers felt threatened because of strikes, it would lose business and jobs. The Board emphasized the conditional "if" in the employer's remarks and concluded that they amounted to a permissible statement of "reasonable possibilities" due to unionization. Id. at 378. However, *Tri-Cast* has never stood for the proposition that an employer may concoct an antiunion attitude on the part of its customers in order to discourage unionization.

That is precisely what the Respondent did here. It offered a simple equation: unionization meant lost jobs, because of customers' antiunion views. Because there was no objective factual basis for making this equation, the Respondent's statement violated Section 8(a)(1). See *Tawas Industries*, 336 NLRB 318, 321–322 (2001).

B. The June 12 Memorandum

The majority reverses the judge's finding that in a June 12 memorandum the Respondent unlawfully promised to resolve grievances raised earlier by employees. The Board's decision in *Graham-Windham Services*, supra, however, strongly supports finding a violation here.

In *Graham-Windham Services*, the Board affirmed the judge's finding that the employer unlawfully promised benefits that effectively would have remedied employee grievances raised months earlier. Acknowledging that the complaint alleged an unlawful grievance solicitation, the Board concluded that the violation actually found was reasonably encompassed by the complaint allegation, that it was fully litigated, and that the Respondent failed to demonstrate that it had been prejudiced. Describing the matter as a "slight variance in phraseology," the Board pointed out that "[o]ffering to remedy previously stated grievances by promising benefits does not significantly differ from soliciting grievances and implicitly promising to remedy them, the wording of the complaint." 312 NLRB at 1200.

This case is indistinguishable. The essence of a solicitation-of-grievance violation is not the solicitation itself but the promise, express or implied, to remedy the problem drawn out by the solicitation. See, e.g., *Capitol EMI Music*, 311 NLRB 997, 1007 (1993), enfd. 23 F.3d 399 (4th Cir. 1994); *Columbus Mills*, 303 NLRB 223, 227 (1991). The complaint here is replete with allegations of unlawful promises and solicitations.[3] Thus, the issue raised by the promise in the June 12 memo is "closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990) (footnote citations omitted). In addition, the Respondent has not shown that it was prejudiced by the General Counsel's failure to formally allege the violation the judge found. See, e.g., *Baytown Sun*, 255 NLRB 154 fn. 1 (1981).

Accordingly, based on the pleadings and the record, the judge appropriately found that the relevant passage in the June 12 memo (quoted in the majority's opinion) "memorialized" the Respondent's solicitation of grievances at employee meetings held a few days earlier and implicitly promised to resolve them. His finding is entirely consistent with *Graham-Windham Services*, supra.

The Respondent's defense of this conduct, endorsed by my colleagues, is meritless. The Respondent has never denied that it solicited employee complaints at the June meetings.[4] Rather, it contends that this conduct was consistent with its past practice. Contrary to my colleagues' view, however, the Respondent cannot rely on its prior practice of holding informational meetings on new fringe benefits to insulate it from its unlawful conduct here. When an employer significantly alters its past manner and methods of solicitation during an organizing drive, its prior practice provides no justification for its conduct. See, e.g., *House of Raeford Farms*, 308 NLRB 568, 569 (1992), enfd. mem. 7 F.3d 223 (4th Cir. 1993), cert. denied 511 U.S. 1030 (1994).

To begin, the solicitation here was part of a context of unfair labor practices designed to persuade the employees that pension improvements were available without the assistance of the Union. This unlawful conduct distinguishes the situation from the Respondent's past practice. See *Eddyleon Chocolate Co.*, 301 NLRB 887, 899

[3] The complaint clearly put the Respondent on notice of a possible violation based on the promise made in the June 12 memo. Par. 11 of the complaint alleges that the Respondent met with employees in informational meetings on June 5–8. Par. 12 alleges that the Respondent solicited employee questions and complaints in the June 12 memo. The complaint also alleges, among other things, that the Respondent: solicited employee grievances and promised them benefits on April 7; promised employees pension improvements on May 30 and in the June 12 memo; solicited employee grievances on June 30; promised pension improvements on July 13; and promised to correct employee grievances on July 18.

[4] In stating that no grievances were solicited at the meetings, the majority contradicts the record. The testimony of Audra Mead and Brian Easton, described in the majority opinion, establishes quite clearly that the Respondent's purpose in holding the meetings was to draw out questions and complaints about the Bemis Retirement Plan, and that is exactly what occurred.

(1991). In addition, the June 12 memo marked a digression from the Respondent's usual practice. This was not the traditional "question-and-answer" document that normally circulated within a few weeks of meetings of this kind. The June 12 memo issued 4 days after the final meeting; it focused exclusively on the senior employees' complaint; and it suggested that the Respondent would resolve the problem. The Respondent provided no evidence that it previously took this approach in following up on its informational meetings.

Contrary to the majority's view, finally, it is immaterial that Audra Mead, the Respondent's human resources manager, told employees at the June meetings that the Respondent could do nothing about the senior employees' problem. What matters, rather, is the later promise made in the June 12 memo.

Accordingly, I would adopt the violation found by the judge in connection with the June 12 memo. Based on this view, I find it unnecessary to consider the remaining five grievance-solicitation allegations addressed by my colleagues. Further violations of this kind would be cumulative and would not affect the appropriate remedy.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT announce and promise improvements in pension or other benefits in order to discourage union support.

WE WILL NOT blame the Union for the absence of further benefits.

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

CURWOOD, INC., A DIVISION OF BEMIS COMPANY, INC.

Richard F. Czubaj, Esq., for the General Counsel.
Kevin J. Kinney, Esq. and *Eugene M. Linkmeyer, Esq. (Krukowski & Costello),* of Milwaukee, Wisconsin, for the Respondent.
Thomas D. Allison, Esq. (Allison, Slutsky & Kennedy), of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This consolidated case was tried in Oshkosh, Wisconsin, on December 6 and 7, 2000. The complaint in Case 30–CA–15245–1 alleges that Respondent violated Section 8(a)(1) of the Act by various statements and conduct, most of which were also alleged as objections to a Board-conducted election, held on July 20 and 21, 2000, which the Charging Party Union (the Union) lost. The representation case (Case 30–RC–6203–04) was consolidated for hearing with the unfair labor practice case. The General Counsel seeks a remedial order for the unfair labor practices and the Union seeks an order overturning the election and directing a new one. The Respondent filed an answer essentially denying the allegations of the complaint and in the objections. The parties filed posttrial briefs, which I have read and considered.

Based on the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with an office and three manufacturing facilities in Oshkosh, Wisconsin, known as its South Campus, is engaged in Oshkosh and elsewhere throughout the United States in the manufacture of flexible film packaging. I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. The union organizing campaign begins and Respondent reacts

In September 1997, Respondent distributed a document to the employees at Respondent's South Campus in Oshkosh, as well as to Respondent's other unrepresented hourly employees. In that document, Respondent informed the employees that their pension benefit rates in the Bemis Hourly Retirement Plan (BHRP) would increase by a certain amount on January 1 of the next 3 years, including January 1, 2000. No further dates for future increases were mentioned.

In part because of dissatisfaction with those pension benefits, the Oshkosh employees began, in February 2000, to discuss whether they should seek union representation. In March, employees began to distribute and sign authorization cards. Respondent's management officials became aware of the union

activity in March when certain literature passed out in the plants came to their attention and employees spoke to supervisors about the activity. At union meetings in March, the Respondent's pension and health benefits were prime topics of discussion, with the pension benefits being the major topic.

On April 7, 2000, Respondent sent a letter to all Oshkosh employees, which stated at the outset that Respondent was aware that union cards were being circulated at the plants and in organizational meetings. The letter continued by stating that Respondent knew that two issues of concern to the employees were pension and health care benefits. Respondent pointed out that employee meetings had been held recently to address health care concerns and that Respondent's quality program at affordable rates had been "accomplished without a union."

In the April 7 letter, Respondent also referred to the September 1997 pension benefits document, stating that work had been under way since 1999 to improve pension benefits even more, effective January 1, 2001. The letter continued by stating that "pension improvements will be announced in late spring to early summer, this year. This has been in the works and improvements will continue to be made without union intervention."

The letter went on to list other improvements that the Respondent had provided without a union and "will continue to provide." Respondent also stated that it would continue to "recognize your valued input, listen to your concerns, and routinely address those areas of interest." The document concluded, "We urge you not to sign a card. If you have any questions or concerns, we ask that you contact your superintendent, supervisor, or [any of the 6 management officials who signed the document]."

On May 1, 2000, the Respondent distributed another document addressed to its Oshkosh employees as a followup to its April 7 letter. It stated that it had been comparing the BHRP pension plan with the Bemis Retirement Plan (BRP) and concluded that the BRP was "an improvement over the BHRP." The more generous BRP applied mostly to salaried personnel, although it apparently had recently been applied to some hourly workers. The Oshkosh employees were of course covered under the less generous BHRP. In its May 1 distribution, Respondent told employees that it would be conducting informational meetings "on this topic" and that the dates for the meetings would be posted the next week. Those meetings did not take place until June 2000, after the Union filed an election petition.

2. The election proceedings

On May 8, 2000, the Union filed petitions seeking to represent certain of Respondent's Oshkosh-based employees, not including its maintenance employees. A representation hearing was conducted on the petitions on May 23 and 24. An issue in the representation hearing was whether the maintenance employees would be included in the election unit. The Union wanted them excluded and the Respondent wanted them included. In a June 20 Decision and Direction of Election, which was not appealed, the Regional Director excluded the maintenance employees. Pursuant to that decision, an election was scheduled to be held on July 20 and 21, in the following unit, which all parties agree is an appropriate unit:

> All full-time production employees, including quality assurance employees, warehouse employees, truck drivers, and general workers employed by the Employer at its Bemis Converter Films, Bemis Specialty Films, and Curwood Specialty Films facilities at Oshkosh, Wisconsin, but excluding all part-time employees, maintenance employees, office clerical employees and all professional employees, guards and supervisors as defined in the Act.

3. Respondent's preelection distributions

Between the time the election petition was filed and the date of the election, the Respondent distributed, by letter to the homes of employees, by inserting in employee paychecks or by posting on bulletin boards at work, other documents addressed to the employees. The contents of some of those documents were alleged to be unfair labor practices and formed the basis of union objections to the election.

On May 30, Respondent notified the employees of the retirement plan meetings to which it had alluded in its May 1 letter to employees. After specifically referring to that letter, the May 30 document stated that Respondent was "pleased to announce" that the BRP, an improvement of and a change from the existing retirement plan, would be "implemented effective January 1, 2001." The employees who had been covered under the old BHRP would retain their earned credits under that plan, but would begin earning new benefits under the BRP the next January. The Respondent then set forth a schedule for mandatory informational meetings for different groups of employees at various times from June 5 through 8, 2000.

On June 12, still another document was distributed to employees reporting on the early June meetings that had been conducted on the new pension plan. Those meetings included both production and maintenance employees. Officials of Respondent answered questions that had been raised by employees in the meetings, particularly from those who had substantial seniority under the old plan and might not work long enough under the new plan to accumulate significant benefits under that plan. Respondent pointed out that it had never taken away existing retirement benefits and that the addition of the new plan would be an improvement for all employees. It noted the concerns which employees had unexpectedly expressed in the meetings; and it proceeded to "compile the questions and answers that came to light during our meetings" to assure that as it went "forward with this implementation" the new plan would work "as a benefit to all employees" and would have no "adverse, unintended consequences."

In the June 12 distribution, Respondent also referred to the pending representation election. It said that, because of the pending election, Federal labor law "restricts" its ability to "change, add to or subtract from the various components of both the BHRP, as well as the BRP." It gave an example, stating that there would be advantages to "adding additional dollars to the current BHRP funding level," but that Respondent would be "restricted from making such an improvement at this time." The Respondent ended the document by repeating its statement that it was considering the input of employees at the retirement

meetings but that it was restricted by law from making changes that had been suggested by employees.

On June 30, the Respondent sent a letter to all employees, addressed to them individually, at their homes, notifying them about the Board's June 20 Decision and Direction of Election, lamenting that the Board was excluding the maintenance employees from the unit and that the Union, by law, could contact employees at their homes. The remainder of the letter was a campaign effort to get the employees to vote against the Union. The letter, which was signed by Sam Smith, the Bemis-Oshkosh site director, ended as follows:

> Most importantly, we want to make sure you understand the Company's position regarding unions. A union would limit our overall flexibility—flexibility to run the business and flexibility to address personal situations on an individual basis without third party interference. Being unionized is also viewed negatively by our customers. They are concerned about potential work stoppages and product interruptions, which would harm their business. That is why we say remaining union-free affects our business and our livelihood.
>
> I am enclosing a self-addressed, stamped envelope and a blank sheet of paper. If you have questions, I highly encourage you to write them down and return them in the envelope provided. It is not necessary to sign your name on any question you would like answered. I will do my best to respond to every question prior to the vote.

On July 13, 2000, in a document addressed to the maintenance employees but distributed generally in the work areas of nonmaintenance employees, Respondent announced an increase in BHRP benefits for the maintenance employees. Production employees eligible to vote in the election, who were also covered under the BHRP, did not get the increases, which were labeled "transition benefits" and were to be effective on January 1, 2001. In announcing the new benefit, the Respondent specifically mentioned the "feedback" it had received from employees in the June retirement meetings. It stated that it learned from those meetings that the changeover from the BHRP to the BRP would adversely impact the pensions of more senior employees "since they may not have as many years to earn benefits under the BHP as shorter term employees." The Respondent ended by stating that it "was pleased to offer this transitional benefit enhancement to recognize the service of long term employees who may not have the opportunity to maximize their benefit under the BRP."[1]

The Respondent held a number of meetings with employees prior to the election to discuss the election and to campaign for a vote against union representation. On July 18, 2 days before the election, the Respondent distributed a document to employees providing a list of questions and answers about the election issues, setting forth its position against union representation. At the conclusion of the document, Respondent asked employees to notify it of any remaining unanswered questions and promised to "continue responding to your questions to the fullest extent the law will allow."

4. The election results

The results of the election were 257 votes for and 386 votes against the Union. There were 2 void and 14 challenged ballots, which do not affect the results. The Union filed timely objections to the election, all but one of which mirror the unfair labor practice allegations in the complaint.[2]

B. Discussion and Analysis

1. Impression of surveillance

The General Counsel contends that, in the April 7 letter, Respondent's statement that it was "aware that union authorization cards are being circulated at the plants and at organizational meetings," along with its statement that "two issues of concern are healthcare and pension benefits" created an unlawful impression of surveillance of union activities. Relying on the testimony of its only witness, employee Brian Easton, the General Counsel argues that Respondent could only have obtained that information by covert means. That argument, however, reads too much into Easton's testimony. Easton simply testified that he personally was unaware of significant open union activity in the plant before April 7, although he conceded there was some; and that early union meetings were not generally open to all employees. That testimony does not address whether employees knew or suspected that management officials had learned of the concerns of employees through illegitimate means. Nor does it contradict the testimony of Human Relations Manager Audra Mead that, in March, she learned from employees and supervisors, who were reporting what they were told by other employees, of union meetings and concerns mentioned at those meetings. She also learned from those sources and from her own observation that union authorization

[1] In finding that the document was generally distributed to all employees and was not limited to maintenance employees, I specifically credit the testimony to this effect of employee Brian Easton, who impressed me as an honest and credible witness. As indicated later in this decision, I do not credit the testimony of the two management witnesses who were unable to refute Easton's testimony about how the document was actually distributed, but who testified that the document was intended to be delivered only to the maintenance employees. I believe to the contrary that Respondent intended the document to fall into the hands of the electorate, production employees who worked side-by-side with the maintenance employees and who had the same concerns about the new pension plan.

[2] The one objection that was not also alleged as an unfair labor practice was Objection 8. That objection alleged that Supply Side Supervisor Steve Koehler coercively interrogated employee Cheryl Proctor in her work area 2 days before the election. Proctor testified that, on that occasion, she called Koehler over to her machine because it was not functioning properly. At some point, according to Proctor, Koehler asked what she thought about the Union and whether certain specifically named employees were going to vote for the Union. She also testified that Koehler remained in the area when two other fellow employees came up to her and asked her basically the same questions Koehler did. Neither of these employees testified. Koehler did, however, and he denied interrogating Proctor as she testified. I found Koehler the much more credible witness. His testimony, unlike Proctor's, was candid, detailed, and understandable in context. I cannot credit Proctor's testimony. Accordingly, the Union's objection based on the alleged interrogation is overruled.

cards were being distributed, some in the plants. She also observed and noted other union distributions in March. I have no reason to discredit her testimony in this respect; and there was no showing that she obtained the information she did by unlawful means. Nor did the Respondent's statements in the April 7 letter delve into details of union meetings or covert activities. They simply set forth what was general knowledge and would not cause employees to believe that Respondent was monitoring their union activities. The situation here is, thus, distinguishable from the circumstances in *Ichikoh Mfg., Inc.,* 312 NLRB 1022, 1023 (1993); and *United Charter Service*, 306 NLRB 150, 151 (1992), cases cited by the General Counsel and the Union. The Respondent did not therefore violate the Act by creating the impression of surveillance as set forth in paragraph 7 of the complaint. See *Burlington Times*, 328 NLRB 750 (1999).

2. Announcement and promise of improved pension benefits

The announcement, promise, or grant of benefits in order to discourage union support is unlawful. As the Supreme Court has stated, "[T]he 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). See also *Burlington Times, Inc.,* supra; *KOFY TV*, 332 NLRB 771, 772–773 (2000); *Acme Bus Corp*., 320 NLRB 458 (1995); *Dealers Mfg. Co.,* 320 NLRB 947 fn. 4 (1996); and *NLRB v. Wis-Pak Foods, Inc.,* 125 F.3d 518 (7th Cir. 1997).

The evidence in this case clearly shows that Respondent promised unspecified improved pension benefits on April 7, 2000, after it learned of the union campaign, which had as one of its two major concerns improved pension benefits. The improved benefits were explicitly tied to the nascent union campaign, which was mentioned at the very outset of the April 7 letter. Although some of the details of the improvements were left for later, the letter suggested that the improvements would be implemented the following January. This was the first the employees had heard of such improvements and they were the first pension improvements announced to employees since September 1997. There is no doubt that the April 7 announcement was timed and indeed intended to blunt the union effort. The thrust of the letter was that the promised pension improvements, as well as other improvements, past and future, were and could be secured without a union. The April 7 announcement was thus clearly unlawful. That announcement, in a somewhat different form, was reiterated on May 1, 2000, when Respondent identified the improvements more specifically as possible coverage under the more generous BRP. But, even in that announcement, the Respondent said only that it was "evaluating" the BRP in comparison to the BHRP, which presently covered the Oshkosh employees. Nor did Respondent specifically say that the BRP coverage would actually be implemented.[3]

After the Union filed its election petition, the Respondent continued to advertise its new pension improvements in detailed meetings with employees and in other written announcements on May 30 and June 12, basically reiterating the unlawful April 7 announcement in somewhat greater detail. The union-based reasoning and motivation behind the April 7 announcement obviously infected the announcements of May 30 and June 12. On May 30, the Respondent announced that the BRP would be implemented for the Oshkosh employees, effective January 1, 2001. This was the first time that that particular announcement was made and the first definitive announcement of a specific change in pension benefits. The June 12 distribution was clearly an election campaign document, reinforcing the message that the pension improvements first announced on May 30 were meant to dissuade employees from selecting the Union. In these circumstances, I find that the April 7, May 30, and June 12 distributions amounted to unlawful announcements and promises of benefits to discourage union support, in violation of Section 8(a)(1) of the Act.

In its brief, Respondent defends the April 7 announcement promising improved pension benefits by making a short and conclusory reference to record evidence suggesting that the "pension issue was under review since late 1999" and that conversion to the BRP pension plan was "approved by corporate on March 27, 2000" (R. Br. 14). That evidence does not explain away the union-based tenor of the April 7 letter. Nor does it establish a legitimate business-based reason for the announcement. Indeed, the witness whose testimony provides the basis for Respondent's defense, Human Resources Vice President David Vierthaler, was not credible.

The April 7 announcement of improvements, with no mention of conversion to the BRP, was directed only to the Oshkosh employees, who had recently initiated a union campaign—a fact highlighted in the April 7 letter. Respondent offers no reason why the Oshkosh employees were singled out for improvements at this time, thus failing to rebut the obvious reason—the onset of the union campaign. Even Respondent's evidence suggests that union considerations hastened the announcement of pension improvements for the Oshkosh employees. An e-mail exchange between Vierthaler and Bemis Corporate Benefits Manager Geof Workinger, who was stationed in Minneapolis, Minnesota, shows a number of unresolved cost issues about possible pension improvements for Oshkosh em-

[3] The Respondent argues in its brief (Br. 14) that the April 7 letter was a virtual "*guarantee* of pension improvements [emphasis in original]." The objective evidence refutes that argument. The letter did not specify the forthcoming benefits, state that they were guaranteed or that any final decisions had been made. Moreover, the author of the letter, Vice President Vierthaler, conceded that the purpose of the letter was simply to tell employees that Respondent was "looking at" pension improvements. In any event, I fail to see how Respondent's position changes the impact of the April 7 letter. The letter certainly displayed the fist in the velvet glove that the Supreme Court so aptly described in *Exchange Parts*, supra. Without benefit of the Respondent's argument, the General Counsel did not allege that the April 7 letter amounted to a grant of benefits. Nor did the General Counsel specifically allege that the May 1, 2000 announcement to employees amounted to a separate violation of the Act. Since, however, that announcement referred to the April 7 letter, it had the some rationale and intent: to blunt the union effort.

ployees as late as March 23, 2000. There is no doubt that union considerations were paramount at that time. Respondent admittedly knew of the union activity in Oshkosh at this time, according to both Vierthaler and Mead. Indeed, there is a reference in the March 23 e-mail of a need to have the Oshkosh pension benefits be comparable to those of another of Respondent's plants, whose employees were represented by a union.

The Respondent's attempt to show that the decision to convert the Oshkosh employees to the BRP pension plan was made on March 27, 2000, is also unavailing. First of all, there is no showing that any such decision was devoid of any union considerations; it is more likely than not that any such decision was based on a desire to blunt the union effort, as shown by the tenor of the April 7 announcement. More to the point, however, Respondent's contention rests on the uncorroborated testimony of Vierthaler, whom I do not credit. According to Vierthaler, the decision to place the Oshkosh employees under the BRP was made during a March 27 meeting in Oshkosh between Curwood President Henry Thiesen, Vierthaler himself, and Workinger and Bemis Vice President Gene Seashore, both of whom came in from Minneapolis for the meeting. Neither Thiesen, Seashore, or Workinger testified in this trial and Respondent submitted no documentary support for the decision that was allegedly made at the meeting, even though the commitment to convert the Oshkosh employees to the BRP would cost Respondent about an additional $1.4 million a year.[4]

Other reasons support my decision not to credit Vierthaler's testimony. He was quite emphatic that the final decision to convert the pension plans was made on March 27. But the April 7 letter, which he admittedly wrote, made no mention of the conversion to the BRP or of a final decision on any improvements. Actually, Vierthaler testified that his purpose in that letter was simply to tell employees that Respondent was "looking at" pension improvements. His testimony and the language in the letter thus contradict the notion that a decision was already made. The letter was replete with references to the union campaign—a circumstance that supports my view that whatever internal deliberations took place in March about some kind of pension improvements were in response to the union effort. But its references to pension improvements were general in nature—another factor supporting my view that, in the March deliberations, Respondent had not finally decided what kind of pension improvements would help blunt the union effort. Indeed, in a May 3 e-mail from Andrea Gardner, a Bemis corporate benefits manager, to Workinger, who allegedly attended the March 27 meeting, she notifies him of "our intent to implement" the BRP plan as of January 1, 2001. Workinger, who, in responding, copies Seashore, who also allegedly attended the March 27 meeting, replies, "Thank YOU!" A trier of fact need not be so gullible as to believe that Workinger and Seashore had to be told about something they allegedly already knew. Moreover, I discerned an overall evasiveness and lack of candor in Vierthaler's demeanor, especially with respect to the April 7 letter that he composed. To the extent that his testimony may be thought to suggest that union considerations played no part in the March deliberations that led to the April 7 letter, I reject that testimony as not credible. Nor can I credit Vierthaler's testimony about a corporate policy to "migrate" all pensions for all unrepresented employees at all of Respondent's plants before the Union came on the scene in Oshkosh. Although there may have been plans to do that or even some isolated instances of applying the BRP to hourly employees, the circumstances of such migration were unclear, particularly in view of the absence of any documentary corroboration. In short, I cannot rely on any of Vierthaler's testimony on any significant issue in this case, unless it is an admission against interest.

In these circumstances, Respondent's defense to the timing and announcement of improved benefits in the April 7 letter does not establish a legitimate nonunion business reason for the improvements announced in the letter. The letter itself, which was laced with references to the union campaign, mentioned no legitimate business reasons for the improvements or for their announcement at this particular time.[5]

3. Implicit promise of enhanced transitional pension benefits

The General Counsel alleges that the July 13 announcement of enhanced BHRP benefits only for the maintenance employees, who had been excluded from the election unit by the Board some 3 weeks before, amounted to an implicit promise that the same benefits would come to the production employees if they rejected the Union. This pension benefit is separate and apart from the benefit attached to application of the BRP to all Oshkosh employees. That benefit applied to both production employees and maintenance employees and would be operative in the future. Veteran employees were still covered for past service under the BHRP. But, in the employee meetings in early June about the new BRP coverage, veteran employees complained that their coverage under the BRP would not be so valuable because they would not work very many years under the new plan. They sought better benefits under the BHRP, which would provide them with the bulk of their retirement benefits. Armed with that information, Respondent announced a "transitional BHRP benefit improvement" for the maintenance employees but not the production employees.

The announcement, which was addressed only to the maintenance employees, was widely distributed to production employees who would be voting in the election the very next week. As I have indicated above at footnote 1, I reject Respondent's contention that it was not responsible for such wide distribution and intended only a limited distribution to the maintenance employees. Even if it did not authorize the wide distribution, Respondent did nothing to limit dissemination of the announcement, even though one of its witnesses testified he knew it would be widely distributed and that there would be some anger among the production employees if they learned of the announcement. Indeed, Respondent made no attempt, as it

[4] Documentary evidence shows an estimate of $214,000 per year, but that figure did not take into account necessary benefit adjustments due to future wage increases.

[5] Respondent's defense to the May 30 and June 12 repetitions of the April 7 promised improvements is based on the same defense it provided to the April 7 letter. It is similarly unavailing.

did in its June 30 letter to employees about the Board's decision and direction of election, to notify the maintenance employees of their new benefits by letter addressed to their homes. Respondent should reasonably have foreseen the dissemination of the announcement; after all, the production employees, who vastly outnumber the maintenance employees, work side-by-side with them. In these circumstances, Respondent's failure to limit the announcement can fairly be said to have been deliberate.

More importantly, the timing of the announcement—1 week before the election—makes it clear that Respondent intended to influence the votes of the production employees. Those employees obviously had the same objections as did the maintenance employees to the impact of the conversion to the BRP on veteran employees covered by the BHRP. In this respect, Respondent was simply delivering on its unlawful April 7 promise that it would make benefit improvements without a union and its unlawful June 12 statement that BHRP enhancements were precluded by the pendency of the election, a matter discussed in more detail later in this decision. The message was as clear as it could be that, if the production employees rejected the Union, they would get the same transitional benefit as the maintenance employees. The July 13 announcement was thus both discriminatory and an unlawful promise of benefits in violation of Section 8(a)(1) of the Act. See, in addition to cases cited above, *Yale Industries*, 324 NLRB 848, 849 (1997).[6]

Respondent does not offer a rational explanation for the timing of the July 13 announcement or for why, in view of Respondent's knowledge of the potency of its effect on the electorate, the announcement was not made in a private letter to the homes of the maintenance employees. But, relying on the testimony of Vierthaler and Oshkosh Site Director Sam Smith, Respondent argues that the announcement was motivated solely by an effort to retain skilled maintenance employees. There is no evidence connecting the so-called transitional pension benefits with any retention problems, but I reject any suggestions to that effect in the testimony of Vierthaler and Smith. Their testimony that this had nothing to do with the union campaign was not credible.

According to Smith, sometime in June or July 2000, he secured Vierthaler's approval to grant enhanced BHRP benefits to Respondent's senior maintenance people. This was allegedly occasioned by his concern that he could not retain maintenance employees. He said he was understaffed in maintenance employees. But that had been true for some time and it does not explain the timing of the July 13 announcement. Moreover, Respondent was also understaffed in other job categories, including in the rewind department. Smith also testified that one maintenance employee left at about this time and that had some bearing on Smith's concern. But Smith testified in a conclusory manner without meaningful detail; and his demeanor revealed a reluctance to tell all he knew about this issue.

[6] The General Counsel has not specifically alleged that the July 13 announcement amounted to an unlawful discriminatory grant of benefits. Nor does the General Counsel ask that the same benefits be provided to the production employees as a remedial matter.

Vierthaler also testified about the circumstances behind the July 13 announcement, but his testimony on this issue was no more credible than his testimony about the April 7 letter, discussed above. He explicitly related the enhanced benefits to employee complaints about the prospective application of the BRP on veteran employees covered under the BHRP. He also mentioned the loss of a maintenance employee at about this time. According to Vierthaler, the maintenance employee left for higher wages, but Vierthaler did not know if the employee was replaced or even whether Respondent tried to replace him. Indeed, the maintenance employee who left would not even have qualified for the transitional benefit. No further details were provided concerning the relationship between the promised transitional benefits and maintenance employee retention. Nothing else in Vierthaler's testimony adequately explains why Respondent did what it did on July 13, just 1 week before the election.

4. Blaming the Union for the absence of further benefits

Somewhat related to the above-unfair labor practices dealing with announcements and promises of benefits is the General Counsel's contention that, in its otherwise unlawful June 12 distribution, Respondent held out further benefits, especially of the kind eventually announced to the maintenance employees, but blamed the Union and the pendency of the election for its failure to grant those benefits. It is, of course, axiomatic that, in deciding whether or not to grant benefits during an election campaign, an employer must act as if there were no union in the picture. Blaming the Union or the pendency of a union campaign for the failure to grant benefits is a separate violation of Section 8(a)(1) of the Act. See *KOFY*, supra at 20–21, and *NLRB v. Industrial Erectors, Inc.*, 712 F.2d 1131, 1135 (7th Cir. 1983).

This is exactly what Respondent did in its June 12 distribution to employees. After reiterating an unlawful promise of BRP coverage, it observed that there was reason to improve existing BHRP benefits, but that could not be done because of the pendency of the election. Respondent had been alerted to the need for BHRP improvements because of Respondent's solicitation of the views of employees, a matter discussed in greater detail later in this decision. And, still later, Respondent actually announced the implementation—for only the maintenance employees—of the very changes the employees suggested after their views were solicited. That announcement, as indicated above, was unlawful. In this context, Respondent's suggestion to voters that further improvements of the type later given to the maintenance employees were not possible because of the pendency of the election was clearly violative of the Act.

In an astonishing act of legal legerdemain, Respondent parses the language of the June 12 distribution and contends that it did not blame the Union for anything and did not say that further benefits were prohibited (Br. 20–22). According to Respondent, it simply said Federal law restricted its ability to grant further benefits, language it contends was a correct statement of the law. I disagree. First, employees are not lawyers. As the Supreme Court has stated, an "assessment of the precise scope of employer expression . . . must be made in the context of its labor relations setting . . . . [Balancing Section 7 rights

and employer freedom of expression] 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). Second, Respondent's language was less a statement of existing law than a perversion of it. Unlike in *Noah's Bay Area Bagels*, 331 NLRB 188 (2000), cited by Respondent (Br. 21), there was no indication in the June 12 letter that the improved benefits Respondent was holding out would simply be deferred until after the election, without regard to the outcome. Instead of discussing benefits that were normally due and carefully telling employees that it needed to postpone them to avoid creating the appearance of interfering with the election, Respondent brazenly raised the possibility of new and further improvements in order to influence the outcome of the election. See *Jefferson Smurfit Corp*., 325 NLRB 280, 289 (1998); and *Atlantic Forest Products*, 282 NLRB 855, 858 (1987).

5. Solicitation of grievances, complaints, and questions

The General Counsel has also made a series of allegations that portions of the unlawful April 7 and June 12 distributions, as well as other distributions made on June 30 and July 18, were violative of the Act because they unlawfully solicited the views of employees. Absent a past practice of inviting grievances and resolving them when a union is not on the scene, an employer who first solicits employee grievances during a union campaign, with the implication that they will be resolved without the need for a union, violates Section 8(a)(1) of the Act. The solicitation of grievances during a union campaign constitutes an implied promise that they will be remedied, but that inference is rebuttable. See *Torbitt & Castleman, Inc*., 320 NLRB 907, 909 (1996); and *Capitol EMI Music*, 311 NLRB 997, 1007 (1993).

The General Counsel alleges that one portion of the April 7 letter was unlawful because Respondent promised to recognize the valued input of employees, listen to their concerns, and routinely address areas of interest. Earlier in the letter, Respondent referred to meetings it had held in the past with employees about health care issues, in which employees had participated to offer their views. There is no suggestion that the health care meetings had anything to do with the union campaign. Nor was the language used specific enough to amount to a solicitation of grievances. Accordingly, I can see nothing separately unlawful in Respondent's general language promising to consider employee concerns. Also alleged as unlawful is that portion of the April 7 letter in which Respondent urges employees not to sign an authorization card and asks them to contact a supervisor if they have any questions or concerns. In his brief (Br. 7), the General Counsel equates the above statement with coercive interrogation that seeks to probe the depth of union support. I am not convinced that is how employees would view Respondent's remarks. Here again, I find nothing sinister in the Respondent's language. I shall also dismiss these allegations of the complaint.[7]

More troubling are the allegations based on the otherwise unlawful June 12 distribution and the June 30 letter, which notified employees of the Board's decision and direction of election. In the former, Respondent reported on the early June meetings called to discuss the promised conversion to the BRP retirement plan. Those meetings revealed a problem in the conversion for senior people who were covered under the BHRP. Respondent promised to make sure that those views would be considered. Indeed, they were, to an extent, since the maintenance employees received enhanced transitional BHRP benefits as a result of employee input at those meetings. As discussed above, the announcement of those transitional benefits was unlawful. In view of the several illegal announcements and promises with respect to pension benefits, I find that the Respondent's June 12 distribution memorialized an unlawful solicitation of grievances with the implication that they would be resolved without the need for a union. Although Respondent had had employee input meetings before the Union came on the scene, these recent meetings and Respondent's use of them in the June 12 distribution were far from normal. Those meetings and Respondent's use of them in the June 12 distribution were part and parcel of its effort to mold and sell its pension improvements to discourage union support. The Respondent thereby violated Section 8(a)(1) of the Act.

Similarly, the June 30 letter explicitly sought general employee input on unspecified matters, including apparently the union campaign, which was discussed immediately before the request for employee input. Significantly, the Respondent included, in a letter to the employees' homes, a self-addressed stamped envelope and a blank sheet of paper. This was unusual. There is no evidence that Respondent invoked that kind of method for soliciting grievances in the past. Here, of course, it was done in connection with Respondent's campaign to defeat the Union. The impact of Respondent's approach is clear. Employee Easton understood Respondent's use of the self-addressed envelope and the blank sheet of paper to be an invitation to tell Respondent "what was bothering me [and] what the company could do to make me happy." (Tr. 86.) Respondent's conduct clearly invited grievances with the implication that they would be resolved without a union. Indeed, the Respondent's approach was doubly intrusive because it also invoked something akin to coercive interrogation. Even though employees were permitted to submit questions without signing their names, they clearly were free to sign their submissions. The Respondent's invitation thereby made it possible for it to learn of the identified employee's union views; but, even without identification, the submission would tell Respondent the depth of the employees' views and what it would take to turn

[7] I likewise dismiss the allegation, in par. 15 of the complaint, that the tail end of the July 18 question-and-answer distribution amounted to an unlawful promise to correct employee complaints. The Respondent simply asked employees to notify it of any remaining unanswered questions about the union campaign and promised only to continue responding to questions "to the fullest extent of the law." Respondent's language was general and innocuous and certainly not violative of the Act.

them around. I find Respondent's conduct in this respect an unlawful solicitation of grievances and probe of union support in violation of the Act.[8]

6. Threats of loss of work if employees selected a union

The General Counsel alleges that a passage in the June 30 letter violated the Act because it threatened a loss of work if the employees selected the Union. The passage addressed by the complaint allegation is that which states that "[b]eing unionized is also viewed negatively by our customers. They are concerned about potential work stoppages and product interruptions, which would harm their business. That is why we say remaining union-free affects our business and our livelihood."[9]

All parties agree that the legality of the above language is to be assessed in light of the Supreme Court's decision in *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969). In that case the Court set forth the following standard for employer speech on union organizational issues:

> [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control . . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment.

On their face, Respondent's June 30 remarks strongly imply that if the employees choose to unionize Respondent would lose customers and employees would lose their jobs. Respondent professed to know that its customers viewed unionization "negatively," and, as a result, might pull their work if a union won bargaining rights. Thus, the issue becomes whether Respondent's statement was a reasonable prediction based on objective and available facts. I find that the statement was not a prediction but an unlawful threat. See *Reeves Bros., Inc*., 320 NLRB 1082, 1083 (1996); and *SPX Corp*., 320 NLRB 219, 221–223 (1995).

Although Respondent gave no elaboration of its statement to the employees prior to the election, at the trial it submitted evidence to justify the statement. That evidence not only fails to support Respondent's position but it establishes that Respondent misrepresented the available facts. There is no evidence that customers viewed unionization negatively or mentioned that asserted fact to Respondent at any relevant time. Respondent seems to concede the point since in neither of its briefs to me does it defend the statement that customers viewed unionization "negatively." Instead, it continuously makes reference to the "concerns" of the customers.

Here are the facts as developed at the trial: Several documents were received in evidence through Site Manager Sam Smith that purported to support Respondent's position on customer reaction to unionization. Those documents, however, were routine, periodic requests by large customers such as Nestle, Nabisco, Kraft, and Minute Maid, which asked basically whether its products were produced in unionized plants, when labor contracts expired and whether there had been work stoppages in the past. Although Smith testified that these requests were made yearly, two of the documents were dated in 1995 and 1996. One of the documents, dated March 28, 1998, was a confidential form agreement between Kraft and its suppliers that ran almost 30 pages and asked many other questions in addition to those about union contracts. The purpose of those requests seems to have been a desire to assure a continuous flow of products. But similar requests were made to other suppliers for these major customers and there is no evidence that the requests were motivated by any "negative" views on unionization by those major customers. Nor were the customer requests prompted by the union campaign underway among the Oshkosh employees. Indeed, in three of the four instances in which Respondent submitted answers, Respondent told its customers that their products were being manufactured at both union and nonunion plants. Some of Respondent's, and the parent Bemis' plants are unionized. Thus, customers knew, even before their most recent requests for information, that their products were being manufactured at some of Respondent's unionized plants. Significantly, Site Manager Smith testified that he was not aware that Respondent ever lost a single piece of business because customers' products were being manufactured at one of its unionized plants. On the contrary, it appears that one major customer actually took work away from one of Respondent's nonunion plants, although the record is silent as to the reason for this loss of business. In these circumstances, I find that Respondent has been unable to establish, by objective and ascertainable fact, that customers would pull their work out of Respondent's Oshkosh facility if the employees voted for the Union.

It is clear therefore that Respondent used alleged but unsupported customer negativity toward unions to create a fear in the minds of employees that work would be lost unless the Union was rejected. This was a threat of reprisal. At the very least, Respondent engaged in the type of "brinksmanship" and "conscious overstatement" condemned by the Supreme Court in *Gissel* (395 U.S. at 620).

7. The representation case

As I have indicated, the Union's objections mostly track the alleged unfair labor practices. In view of the unfair labor practices that I have found above, I find that the objections coextensive with those unfair labor practices are sustained. The Re-

[8] It is unclear whether the General Counsel meant to allege that other parts of Respondent's distributions and letters amounted to unlawful solicitation of grievances. In view of my specific findings set forth above, however, any further findings would be cumulative and would not affect the remedy.

[9] Respondent repeated essentially the same message both in meetings leading up to the July 18 question-and-answer distribution and in the distribution itself.

spondent has thus interfered with employee free choice and the election must be overturned. All but one set of the unfair labor practices were committed after the election petition was filed and thus constitute objectionable conduct. Even the April 7 letter, which was sent to employees before the petition was filed but after the union campaign began, is relevant to the election objections. That letter is appropriately considered as background and gives meaning to subsequent postelection conduct that was the subject of objections. It is well settled that prepetition conduct is considered by the Board in an objections context if there is "significant post-petition conduct related to or continuing from pre-petition events." *Textron, Inc. v. NLRB*, 638 F.2d 957, 960 (6th Cir. 1981), citing *Parke Coal Co*., 219 NLRB 546 (1976).

CONCLUSIONS OF LAW

1. By announcing and promising improvements in pension benefits in order to discourage union support; blaming the Union for the absence of further benefits; soliciting grievances with the implication that they would be resolved without a Union, and probing the union views of employees; and threatening the loss of work if employees voted for the Union, the Respondent violated Section 8(a)(1) of the Act.

2. The above violations are unfair labor practices within the meaning of the Act.

3. By committing the violations set forth above, Respondent interfered with the election of July 20 and 21, 2000, thus, requiring the election to be set aside.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Curwood, Inc., a Division of Bemis Company, Inc., Oshkosh, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Announcing and promising improvements in pension or other benefits in order to discourage union support; blaming the Union for the absence of further benefits; soliciting grievances with the implication that they will be resolved without a union and probing the union views of employees; and threatening the loss of work if employees vote for a union.

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

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

(a) Within 14 days after service by the Region, post at its Oshkosh, Wisconsin facilities, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 7, 2000.

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

IT IS ALSO ORDERED that Case 30–RC–6203–04 be severed and remanded to the Regional Director to conduct a new election when he deems it appropriate.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[10] 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.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."