Fisher Island Holdings, LLC, Fisher Island Club, Inc., and Fisher Island Community Association d/b/a Fisher Island *and* Freight Drivers, Warehousemen & Helpers, Teamsters Local Union 390, AFL–CIO. Cases 12–CA–23440 and 12–RC–8941

September 30, 2004

DECISION, ORDER, AND DIRECTION OF THIRD ELECTION

BY MEMBERS LIEBMAN, WALSH, AND MEISBURG

On June 4, 2004, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as discussed below,[2] and to adopt the recommended Order, except that the attached notice is substituted for that of the administrative law judge.[3]

Contrary to our dissenting colleague, we adopt the judge's finding that the Respondent violated Section 8(a)(1) of the Act and engaged in objectionable conduct by conveying the impression that unionization would be futile and by threatening to withhold future wage increases if employees unionized.

Facts

After the Union lost a second election held on September 18 and 19, 2003,[4] the Union filed objections and unfair labor practice charges based on preelection speeches given by the Respondent's chairman, John Melk. Melk gave three captive audience speeches on the 2 days before the election. The three speeches were identical in content; Melk read them from a prepared text. He gave the first speech in English on September 16, and the next day the speeches were translated into Creole and Spanish. Approximately 80 employees attended each of the three speeches, which were held in the Respondent's ballroom mansion.

In his opening remarks, Melk referred to the organizational campaign as "a very negative event for us all" that had "given management a wake-up call" regarding its need to communicate better. He stated "the last vote was very disappointing and makes me very angry at the Teamsters." He further stated, "I have always valued our employee group, have supported wage increases despite large financial losses, and I have mentioned our valued employees in every resident letter and magazine interview. During management meetings, I have always discussed our valued employees. I guess what we missed, was communicating this to you!"

Melk then told employees that providing services to the residents of Fisher Island accounted for their employment. He continued with a short personal history, commenting that he had "locked horns with [the Teamsters] in the past and [he's] walked away the winner." He then referred to Fisher Island having "lost millions" in the "past couple of years" and that he "*will* not-*cannot* allow that to continue, union or not." He further stated, "Teamsters don't sign your pay checks or pay for your benefits—I do" and that he would be "directing and controlling" the Company's negotiations. Melk noted that he had done his homework and knew his legal rights and then stated:

> In negotiations, I know I have the absolute, legal right to reject each and every proposal the Teamsters might make which I think is bad for my business. That includes saying "no" changes in policy, procedure *and extra money*.
>
> I will bargain in good faith, I promise that. I will listen and consider anything said. That's the law, and I follow the rules. But let me be real clear—I *will absolutely reject* any Teamster proposal that will ultimately cost Fisher Island more money. That is also a promise.

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

[2] We find it unnecessary to determine whether the Respondent's unlawful statements to employees fell within the scope of Objection 1 or Objection 3. As the judge found, the Respondent's conduct provides an adequate basis for setting aside the second election even assuming that this conduct fell outside of the scope of the Union's objections. *White Plains Lincoln Mercury,* 288 NLRB 1133 (1988) (in a combined unfair labor practice/representation proceeding, the Board has authority to set aside an election based on unfair labor practices that were not specifically alleged as objectionable conduct). Further, the Respondent has not excepted to the judge's finding that Objection 1 encompassed the unlawful statements.

[3] We shall substitute a new notice to conform with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

[4] The Union prevailed in an election held on July 30 and 31, 2003. The parties agreed to set that election aside.

> I *will do nothing* to increase costs and make a bad situation even worse.

After noting that, in negotiations, each party has the right to make proposals but that neither party is obligated to agree, Melk repeated, "I've already told you I will not agree to any changes that will cost Fisher Island more money."

The second election was held the day after the last speech. The Union lost the election, 134 to 127, with 2 challenged ballots.

Analysis

We agree with the judge that Melk violated Section 8(a)(1) and engaged in objectionable conduct by conveying to employees the impression that unionization would be futile, and by threatening employees with loss of future pay raises if they elected the Union. This finding is based on the combined effect of two of Melk's statements: that he had supported wage increases in the past despite large financial losses, and that he would absolutely reject any union proposal that would increase the Respondent's costs. Based on Melk's past support of wage increases, the judge found, and we agree, that the "prospective refusal to agree to any proposal that would cost more money" constituted a threat to withhold future pay raises that the Respondent would have otherwise granted in the absence of union representation, and further communicated to employees that unionization would be futile.

Our dissenting colleague contends that Melk's statements were neither objectionable nor unlawful. He finds that Melk was merely truthfully informing employees that the Respondent would not enter into agreements that would worsen its financial situation. However, our colleague has failed to consider Melk's comments within the context of his entire speech. Melk did not merely inform employees that the Respondent was losing money and that he would not make bargaining decisions that would increase costs. Rather, after reminding employees that he had supported wage increases in the past despite financial losses, he told employees that when negotiating with the Union he would "do nothing to increase costs" and would not agree to any changes that would cost more money. Additionally, Melk told employees that he would be the one who would control negotiations, that the union campaign was a "negative event," that he was angry at the Union, and that he had defeated the Teamsters in the past. In these circumstances, we find that employees would have reasonably understood Melk's comments to be an assertion that the Union would be unsuccessful in effecting any changes in their wages or benefits.

Our dissenting colleague also contends that Melk's speech was not coercive because he expressed a willingness to bargain in good faith and "follow the rules." However, such statements do not negate the coercive effect of the speech as a whole. *Paoli Chair Co*., 231 NLRB 539 (1977) ("Mere expressions of the intention to 'abide by the law' and 'bargain in good faith' do not insulate an employer's campaign statements from further scrutiny."). We find that the Respondent's general statements that it would bargain in good faith and "follow the rules" do not render lawful its more specific statements that it would "absolutely reject" any proposal that would increase costs.

Finally, we disagree with our colleague that nothing in Melk's speech would suggest he was precluding "the usual horse trading that takes place in collective bargaining." Unlike our colleague, we find that, in the broader context of Melk's entire speech, employees could reasonably interpret Melk's statements that he would absolutely reject any Union proposal that would "ultimately cost . . . more money," "increase costs," or "cost . . . more money" as demonstrating the Respondent's intransigence and indicating that the Respondent would reject any union proposal to increase wages or benefits. In effect, then, employees could reasonably believe that Melk was planning to take a fixed position during negotiations, and that any effort on the part of the Union to negotiate over this issue would be futile.

Accordingly, we affirm the judge's finding that Melk's speech violated Section 8(a)(1) and constituted objectionable conduct that warrants setting aside the election.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Fisher Island Holdings, LLC, Fisher Island Club, Inc., and Fisher Island Community Association d/b/a Fisher Island, Miami, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

[Direction of third election omitted from publication.]

MEMBER MEISBURG, dissenting.

In my view, the speech made by the Respondent's chairman, John Melk, was neither unlawful nor objectionable, and I would not set aside this election because of it. Melk articulated legitimate business concerns regarding financial losses, provided specific assurances that the Respondent would bargain in good faith, and did not present a position that precluded the ability of the Respondent to bargain in good faith.

First, the speech made it clear that the Respondent was losing substantial amounts of money, and that its losses could not be allowed to continue, "union or not." In light of those circumstances, Melk stated that the Respondent would not make decisions at the bargaining table that would "increase costs and make a bad situation even worse." Surely an employer, faced with such business adversity, is permitted to truthfully inform its employees that it will not enter into agreements in collective bargaining that will worsen the situation.

Second, Melk expressed his readiness to comply with his obligations under the Act in all respects. He explicitly stated that he was not making threats or promises, and that the Respondent would bargain in good faith, "follow the rules," and "listen to and consider anything said" by the Union.

Third, nothing in Melk's speech indicated that bargaining would be futile. In that regard, he stated only that the Respondent would reject proposals that increased its "ultimate" costs. Such a statement does not preclude the usual horse trading that takes place in collective bargaining, or prohibit reallocation of costs to provide for certain benefits, so long as ultimate costs are not increased.

For the foregoing reasons, I dissent.[1]

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 a 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 threaten you with loss of pay raises if you select the Union as your collective-bargaining representative.

WE WILL NOT threaten that it would be futile to select Freight Drivers, Warehousemen & Helpers, Teamsters Local Union 390, AFL–CIO, or any other union as your collective-bargaining representative in that we would not agree to any bargaining proposal that would increase costs.

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

FISHER ISLAND HOLDINGS, LLC, FISHER ISLAND CLUB, INC., AND FISHER ISLAND COMMUNITY ASSOCIATION D/B/A FISHER ISLAND

Susy Kucera, Esq., for the General Counsel.
Jonathan J. Spitz and *Lawrence F. Glick, Esqs.,* for the Respondent.
D. Marcus Braswell Jr., Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in Miami, Florida, on April 21, 2004, pursuant to a consolidated complaint that issued on January 29, 2004.[1] The complaint alleges various threats to employees in violation of Section 8(a)(1) of the National Labor Relations Act that were made in a preelection speech to employees. On February 6, 2004, the Regional Director issued an order that directed a hearing on objections in Case 12–RC–8941 and consolidated that case for hearing with the unfair labor practice case. Respondent's answer denies all violations of the Act. I find that the Respondent did threaten loss of pay raises if the employees selected the Union as their collective-bargaining representative and that selection of the Union as their collective-bargaining representative would be futile.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Fisher Island (the Company or the Employer), is a Florida corporation engaged in real estate development and the hospitality business from its office at Fisher Island, Miami, Florida. The Company, in conducting its business, annually purchases and receives goods and materials valued in excess of $50,000 directly from points located outside the State of Florida. The Company admits, and I find and con-

[1] This case is readily distinguishable from cases where an employer, without either factual basis or conveying to employees a sense of the give and take of collective bargaining, states that bargaining will "begin from scratch" and that unionization will ultimately result in a loss of benefits

[1] All dates are in 2003 unless otherwise indicated. The charge in Case 12–CA–23440 was filed on September 29, and was amended on November 26.

[2] The Respondent, in its brief, refers to the Company's financial condition and asserts that "take-aways" had occurred prior to the Union's petition and that this had been "discussed in recent meetings" with employees. My decision is based upon the record evidence as it was adduced at the hearing. There is no evidence of "take-aways" or discussion of "take-aways."

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

The Respondent admits, and I find and conclude, that Freight Drivers, Warehousemen & Helpers, Teamsters Local Union 390, AFL–CIO (the Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Company operates a residential community and recreational facility, including restaurants, a hotel, and a golf course, on Fisher Island, Miami, Florida. Fisher Island employs approximately 600 employees of whom approximately 300 are included in the appropriate unit (the unit).[3] Following the filing of the representation petition in Case 12–RC–8941, the Employer and the Union entered into a Stipulated Election Agreement that was approved by the Regional Director for Region 12 on July 3. Thereafter, on July 30 and 31, an election was conducted in which a majority of the employees selected the Union as their collective-bargaining representative. The Company filed objections, and the parties entered into a stipulation providing that the first election be set aside and that a second election be held on September 18 and 19. In the second election, the Union failed to receive a majority of the valid votes cast. The Union filed the unfair labor practice charge herein alleging, inter alia, that the Respondent had threatened the employees in preelection speeches given to employees on September 16 and 17. The Union also filed objections to the election that are coextensive with several of the unfair labor practices alleged in the complaint. One objection that is not the subject of a complaint allegation was withdrawn.

Prior to both elections, John Melk, chairman of Fisher Island Holdings, LLC, addressed the employees. The only allegations in this case relate to remarks that Melk is alleged to have made in September. Prior to the July 30 and 31 election, Melk had addressed the employees, first the early shift and then the late shift, with two interpreters present at each meeting. The interpreters translated Melk's remarks into Spanish and Creole. Melk was not satisfied with that procedure. Prior to the September election, Melk held three meetings, giving the same speech at each meeting. He addressed the English-speaking employees on September 16, and on September 17 he gave the same speech twice with a single interpreter each time. The first time the speech was translated into Creole. The second time, it was translated into Spanish.

All witnesses agreed that there was no speech given on the day of the election. In the absence of any evidence supporting the complaint allegation relating to alleged threats on September 18, I dismissed that allegation at the conclusion of the General Counsel's case.

B. The Alleged Unfair Labor Practices

1. Facts

The General Counsel presented three witnesses, none of whom required an interpreter, but two of whom testified that English was not their native language. Each testified to threats that they asserted they heard in the remarks of Chairman Melk.

Employee Alexander Fernandez attended the meeting for English speaking employees on September 16. The record does not establish whether Fernandez, who spoke accented English, is a native speaker of English. Fernandez recalled that Chairman Melk stated that he would "not negotiate anything that has to do with money with the Teamsters." On cross-examination, he acknowledged that Melk stated that he would negotiate in good faith, but that he also stated "he would not negotiate anything that has to do with money with the Union." He recalled that Melk, at one point in the speech, said, "No more Mr. Nice Guy." When questioned by counsel for the Respondent, Fernandez agreed that Melk was talking about negotiations when he made that comment. On redirect examination, he testified that the comment "came out of the blue." Regarding a possible strike, Fernandez recalled that Melk referred to his right to "hire other employees and that he does not have to hire us back until those employees leave." Fernandez recalled that Melk commented that he was not making money on the restaurants

[3] The unit is:

All full-time and regular part-time General Maintenance and Engineering Employees (including Safety Maintenance, Golf Cart Mechanic, A/C Tech., Electrician, Electrician Asst., Carpenter, I.T. Asst., Engineering Supervisor, Golf Course Mechanic), Landscape Employees (including Irrigation Tech., Lead Spray Tech., Equipment Operators, Landscape Mechanic, Spray Tech., Tree Surgeon, Interior Plant Person, Grounds Maintenance Attendant), Hotel and Housekeeping Employees (including PBX Operators, Laundry Attendants, Room Attendants, Houseman, Public Area Attendants, Turn Down Attendants, Floor Attendants, Reservations, Ft. Desk/Night Auditor, Front Desk, Club Concierge, Service Bar Attendant, Bell Person Valet, Lead Bell Person), Spa and Beauty Salon Employees (including Spa Front Desk, Fitness Coordinator, Instructor Trainer, Fitness Weight Room Attendants, Fitness Trainer, Massage Therapists, Aesthetician, Spa Tech, Floor Care Specialist, Housekeeping Attendant, Manicurist, Hair Stylist, Shampoo Attendant), Restaurant and Catering Employees (including On-call Food Servers, Catering, On-call Bartender, Receiving Clerk, Receiving Supervisor, Deli Attendant, Stock Attendant, Market Clerk, Porto Cervo Asst. Mgr., Bar Back, Bartender, Broiler Cook, Bus Person, Cook, Dishwasher, Floor Care Specialist, Food Runner, Food Server, Fry Cook, Golf Grill Leader, Golf Grill Restaurant Chef, Grill Cook, Hostess/Host, Lead Cook, Line Supervisor, Night Cleaner, Pantry Attendant, Pastry Cook, Prep Cook, Room Service Attendant, Porto Cervo Sous Chef, Utility Attendant, Utility/Busser), Drivers, Mailroom Attendants, Lead Beach Attendant, Pool/Beach Attendant, Club Employees (including Aviary Asst., Locker Room Attendant, Bag Room Service, Golf Ranger) employed by the Employer. EXCLUDING: All other employees, Superintendent, Asst. Superintendent, Director, Asst. Director, Outside Operations Supervisor, Lead Foreman, Irrigation Supervisor, Landscape Foreman, Facilities Mgr., Asst. Chief Engineer, First Asst. Golf Professional, I.T. Mgr., I.T. Asst. Mgr., I.T. Coordinator, Security Captain, Security Mgr., Mailroom Supervisor, Hotel Mgr., Hotel Services Mgr., Asst. Reception Mgr., Executive Housekeeper, Housekeeper Supervisor, Beach Service Mgr., Bell Captain, F&B Receiving Supervisor, F&B Analyst, Banquet Mgr., Banquet Sous Chef, Garde Mgr., Vanderbilt Chef De Cuisine, Vanderbilt Sous Chef, Vanderbilt Bakery Supervisor, Restaurant Mgr., Executive Steward, Asst. Exec. Steward, Trattoria Asst. Mgr., Beach Club Asst. Mgr., Beach Club Chef, Porto Cervo Chef, Marina Mgr., Dockmaster, Administrative Assistants, Market Mgr., Asst. Market Mgr., Aviary Consultant, Golf Grill Supervisor, Boutique Coordinator, Salon Mgr., guards and supervisors as defined in the Act.

that operated on Fisher Island, "so it would be better for him to close down all the restaurants and . . . let everyone go." Fernandez is the only witness who recalled that comment.

Employee Manuel Menendez attended both the meeting for English speaking employees on September 16, and the meeting for Spanish speaking employees on September 17. He acknowledged that Melk was reading the speech that he gave. He recalled that, in the speech, Melk stated that, if the Union won the election, "I'm no more Mr. Nice Guy," but he did not recall what Melk said either immediately before or after that statement. Menendez testified that Melk informed the employees that if they struck they would be replaced and "never [come] back [to] work for me." Menendez testified that Melk also stated that he would not negotiate with the Union and, if the Union won the election, there would be "no more raises . . . in the future."

Employee Alfonso Morgan also recalls attending two meetings. At the first meeting he recalled comments about the Union being "a thief," with Melk referring to a newspaper article in that regard. At the second meeting, at which there was a Spanish interpreter, Morgan recalled statements to the effect that Melk "would try to fire us and hire [other] peoples to work in the island." He also recalled Melk saying that he would "no longer be Mr. Nice Guy." On cross-examination he agreed that the foregoing comment was made in the context of negotiations.

Melk testified that he read the same speech that had been prepared in consultation with his attorney at all of the meetings. He acknowledged that he edited the speech, and the copy of the speech received into evidence reflects minor deletions and additions. Claude Rousseau, the interpreter who translated Melk's statements into Creole at the meeting on September 17, testified that he reviewed the written text, which had already been translated in Creole, a day or two prior to the meeting to assure its accuracy. Rousseau did not recall whether the minor deletions and additions had been made when he originally received the document. Regardless of when they were made, he conformed the Creole version, making the deletions and additions. He recalled no occasion when Melk deviated from the text when making the speech. In addition to the prepared speech, Melk made separate opening and closing remarks. There was no written Creole translation of these remarks, and Rousseau simply translated them as they were spoken. Melk testified that he wrote these remarks either the day before or the morning of the speech and gave it to the "attorneys and they gave it to the translators." There is no evidence that the statements in those opening remarks were reviewed in conjunction with the statements made in the prepared speech, nor is there any evidence that there was any consideration of the significance of the opening remarks as they related to statements in the prepared speech.

The General Counsel argues that I should credit the testimony of the employee witnesses whenever there is a conflict between that testimony and the written speech. The difficulty I have in doing so is that, with only two exceptions, none of the employee witnesses corroborated one another. In assessing their testimony, I am satisfied that all three witnesses testified truthfully regarding what they believed that they heard. As the foregoing summary of their testimony reflects, the only comment upon which the witnesses fully corroborate one another is the "no more Mr. Nice Guy" comment. Fernandez's testimony regarding the restaurants and Morgan's testimony regarding the Union being a thief is uncorroborated. Melk did address the employees prior to the first election, and he acknowledged that he may have made comments regarding restaurants and referred to a newspaper article relating to the Teamsters in that speech. The complaint does not allege a threat of partial closure or disparagement of the Union. Morgan's testimony that Melk referred to firing employees and Menendez's testimony that Melk referred to striking employees never coming back is contradicted by the written speech as well as the testimony of Fernandez that Melk stated, in referring to a strike, that he did "not have to hire us back until those [replacement] employees leave." I find that Melk did read his opening remarks, the speech, and the closing remarks.

In his opening remarks, Melk referred to the organizational campaign having "given management a wake-up call" regarding its need to communicate better. He stated his disappointment with the outcome of first election and continued, stating:

> I have always valued our employee group, have supported wage increases despite large financial losses, and I have mentioned our valued employees in every resident letter and magazine interview. During management meeting[s], I have always discussed our valued employees. I guess what we missed was communicating this to you!

Melk then began the speech itself, referring to the fact that providing services to the residents of Fisher Island accounted for the employment of the employees and explaining that the agreement to hold a second election occurred because the voting times were incorrectly stated on the notices for the first election. He continued with a short personal history and then referred to Fisher Island having "lost millions" in the "past couple of years" and that he "*will* not-*cannot* allow that to continue, union or not." [Emphasis in the text.] Turning to negotiations, he stated that he would be "directing and controlling" the Company's negotiations. Melk noted that he had done his homework and knew his legal rights and then stated, as written in the speech:

> In negotiations, I know I have the absolute, legal right to reject each and every proposal the Teamsters might make which I think it is bad for my business. That includes saying "no" to changes in policy, procedure and extra money. I will bargain in good faith, I promise that. I will listen and consider anything said. That's the law, and I follow the rules. But let me be real clear—I *will absolutely reject* any Teamster proposal that will ultimately cost Fisher Island more money. This is also a promise. I *will do nothing* to increase costs and make a bad situation even worse. [Emphasis in the text.]

After noting that, in negotiations, each party has the right to make proposals but that neither party is obligated to agree, Melk repeated, "I've already told you I will not agree to any changes that will cost Fisher Island more money."

2. Analysis and Concluding Findings

The complaint alleges that, on September 16, the Respondent informed its employees of the futility of selecting the Union and the inevitability of a strike, impliedly threatened its employees with unspecified reprisals, and threatened its employees with loss of work and pay raises if they selected the Union as their bargaining representative and that, on September 17, the Respondent informed its employees of the futility of selecting the Union, impliedly threatened its employees with unspecified reprisals, and threatened its employees with discharge if they selected the Union as their bargaining representative.

Insofar as the same speech was given at all three meetings, I find that all of the foregoing allegations were fully litigated. There is no probative evidence of a threat that a strike was inevitable. The only evidence relating to a threat of loss of work are the remarks that Fernandez attributed to Melk regarding the closing of the restaurants. I have not credited his uncorroborated testimony that those comments were made on September 16 or 17. There is no evidence of any threat of discharge, and the testimony of Fernandez that Melk referred to replacement of strikers, not discharge, is consistent with the text of the speech which refers to the possibility, not inevitability, of an economic strike and the rights of the Company in that circumstance. I shall recommend that the foregoing allegations be dismissed.

The General Counsel argues that the "no more Mr. Nice Guy" remark threatens unspecified reprisals. The remark does not appear in the speech that I have found that Melk read. Even if I were to find that Melk did deviate from the written text and make the foregoing remark at some point in the speech, Fernandez agreed that the statement was made in the context of negotiations and his testimony that the comment came "out of the blue" does not establish that it was made in any other context. Menendez did not place the statement in any context. Morgan agreed with counsel for the Respondent that negotiations were the context in which it was mentioned. *Alterman Transport Lines, Inc.*, 308 NLRB 1282 (1992), cited by counsel for General Counsel is inapposite. In that case the Board affirmed without comment the finding of the administrative law judge that the "no more Mr. Nice Guy" comment made by a supervisor implied "other unspecified retaliation" when it was coupled with "an implicit admission that work was being denied local drivers because of their union activity." Id. at 1287. In *Star Fibers*, 299 NLRB 789 (1990), the Board specifically held that, when such a statement relates "to the posture . . . [the respondent] would take during negotiations with the Union," it does not threaten the imposition of adverse working conditions and does not violate the Act. Thus, even if I were to find that the comment was made, the record does not establish that it was made in any context other than the context of negotiations. I shall recommend that the allegation regarding a threat of unspecified reprisals be dismissed.

The written text that Melk admits he read confirms the testimony of Menendez that Melk informed the employees that there would be "no more raises . . . in the future" if they selected the Union as their collective-bargaining representative. In his opening remarks, Melk pointed out that, in the past, prior to the advent of the Union, he had "supported wage increases despite large financial losses." In the speech, he told the employees that, if they selected the Union as their collective-bargaining representative, he would "absolutely reject any Teamster proposal that . . . [would] ultimately cost Fisher Island more money." Melk informed the employees that he would be "directing and controlling" the Company's negotiations. He stated unequivocally that he would "not agree to any changes that will cost Fisher Island more money."

The General Counsel argues that the foregoing comments threatened loss of pay increases and the futility of selecting the Union.

The Respondent argues that Melk "tied the risk of negotiations to the objective financial health of the Employer" and that he "never said that he would not agree to union proposals." The Respondent's brief notes that Melk informed employees that Fisher Island had lost "millions" and that he "cannot allow that to continue, *union or not*." [Emphasis added in the brief.]

Contrary to the argument of the Respondent, the "risk" of negotiations to which Melk repeatedly referred was his prospective refusal to agree to any Union proposal that would increase costs. The speech text to which the brief refers regarding "union or not" does not relate to negotiations but to losses. Melk's "*will* not-*cannot* allow that to continue, union or not," [emphasis in the text] does not dictate an absolute rejection of union bargaining proposals. His commitment not to permit losses to continue would certainly include initiatives for revenue enhancement. When turning to negotiations, Melk did, as the Respondent points out, modify the word "costs" with the adjective "ultimate." He did this on one of the three occasions in which he stated that he would not agree to any union proposal that would increase costs. He did not mention costs unrelated to union bargaining proposals such as the wages of nonbargaining unit employees. In arguing that the Respondent never stated that it "would not agree to union proposals," the Respondent's brief fails to acknowledge Melk's statement, "I've already told you I will not agree to any changes that will cost Fisher Island more money."

The Respondent, in its brief, cites *Textron, Inc.,* 176 NLRB 377 (1969), for the proposition that Melk's statements relating to costs were lawful expressions of opinion privileged under Section 8(c) of the Act. In *Textron*, the Board held that an employer's statement to the effect that "the Union could do no more for the employees than the employer was now doing for them" was lawful. Id. at 380. The statements made in Melk's prepared speech, when taken together with the comments he added in his opening remarks, effectively informed employees that their employer's past support of wage increases despite large financial losses would cease if they, the unit employees, chose the Union as their collective-bargaining representative because the Respondent was going to "absolutely reject" any proposal that would "cost . . . money." Unlike the statements in Textron, Melk's statement did not advise the employees that the Respondent could not do "more . . . than [it] was now doing." It threatened that the Respondent would do less.

Fernandez testified that Melk said "he would not negotiate anything that has to do with money." Although that specific statement is not in the speech, Melk stated three times that he would not agree to any proposal that would cost money. A

prospective refusal to agree, stated to employees as an inalterable position, is inimical to the collective-bargaining process and violates the Act. In *Gerry's I.G.A.*, 238 NLRB 1141 (1978), enfd. 602 F.2d 1021 (1st Cir. 1979), the Board specifically affirmed the administrative law judge's determination that the employer violated Section 8(a)(1) of the Act by threatening to refuse to bargain in good faith when it stated to employees that a test administered to them, the psychological stress evaluation (PSE) test, was "[no] more negotiable than the locks on the doors." The judge explained:

> Even if, as Gerry testified, he added that the Unions had a right to raise the subject for discussion, any discussion had on it could only be pointless, because the clear import of the entire context was that just as Respondent could never be persuaded to forgo the locks on the doors it would never agree to give up the test. Such a position in respect to a mandatory subject of bargaining "tends to convey to employees a sense of futility about the value of prospective collective bargaining and, in consequence, improperly restrains their freedom of choice in regard to collective representation," especially in light of the other violations herein. *Tommy's Spanish Foods, Inc.*, 187 NLRB 235, point 1 [(1970)]. Id. at 1153.

The foregoing principle was reaffirmed by the Board in *Aquatech, Inc.*, 297 NLRB 711 (1990). In that case the employer, Ben Fisco Jr., stated to employees that, if the employees selected the union as their collective-bargaining representative, he "would refuse to agree to a union shop or dues checkoff . . . at the bargaining table." In finding that the foregoing pronouncement violated the Act, the administrative law judge stated:

> While it is true that the Act does not require that parties agree, "it does require that they negotiate in good faith with the view of reaching an agreement if possible." *NLRB v. Highland Park Mfg. Co.*, 110 F.2d 632 (4th Cir. 1940). When Fisco asserted that he would not accept a union shop or dues checkoff, he conveyed to the employees his unwillingness to approach bargaining with the spirit of compromise or flexibility necessary to reach agreement. In effect, he implied that he would not bargain in good faith. Such statements, which suggest the futility of selecting a bargaining representative, are unlawful under Section 8(a)(1). Id. at 713.

Although, as the Respondent's brief points out, Melk stated that he would "bargain in good faith" and that he would "listen and consider anything said" in negotiations, those affirmations were belied by his virtually contemporaneous statement that he would "absolutely reject any Teamster proposal that . . . [would] ultimately cost Fisher Island more money." Although asserting that he would "listen and consider," Melk's repeated statements regarding his determination to "not agree to any changes" that would cost money establish that he would be listening with a closed mind and that any consideration would be a mere formality: he would not be willing to change his position. In the words of Administrative Law Judge Bernard Ries in *J. P. Stevens & Co.,* 239 NLRB 738 (1978):

> [The Respondent] . . . simply was not disposed to ever change its mind. This is certainly not to say that the Company was not keenly aware of the nature of its statutory obligations to the Union . . . . [W]hat is missing . . . is any sense that Respondent intended to extend itself beyond the first layer of requisite formalities and reach to the heart of Section 8(a)(5)—a true willingness to hear, consider, and change its mind. Id. at 749.

The effect of the Respondent's prospective refusal to agree to any proposal that would cost Fisher Island any money would deny wage increases to employees. Melk had, prior to the advent of the Union, "supported wage increases despite large financial losses." His avowed change of position, from supporting increases to absolutely rejecting any proposal by the Union that would cost money, threatened a loss of pay raises if employees selected the Union as their collective-bargaining representative. The prospective refusal to agree to any proposal that would cost money threatened employees that selection of the Union would be futile. The foregoing threats violated Section 8(a)(1) of the Act.

C. The Objections to the Election

I have found that, after the petition was filed, the Employer violated Section 8(a)(1) of the Act by threatening loss of pay raises if the employees selected the Union as their collective-bargaining representative and that selection of the Union would be futile. The foregoing findings are predicated upon the Employer's prior support of wage increases "despite large financial losses," coupled with its prospective rejection of any union proposal that would cost money. I find that the foregoing prospective rejection of any proposal that related to an economic issue that would increase costs, alleged in the complaint as a threat of futility, informed employees that the Employer would not bargain in good faith, the predicate for achieving a collective-bargaining agreement. I find that the foregoing prospective refusal is encompassed in Objection 1, which alleges that the Employer threatened employees that "no collective-bargaining agreement would ever exist between the parties." Objection 2 alleges a threat to replace workers and Objection 3 alleges a threat to cut the pay of employees. Consistent with my decision, I find that the statements relating to replacement were made in the context of remarks relating to an economic strike. There is no evidence of a threat to cut pay, only to cease granting raises. Thus, Objections 2 and 3 are overruled. Objection 1 is sustained.

The Employer's statements that threatened to cease granting wage increases and threatened futility by informing employees that the Employer would not bargain in good faith regarding any economic issues occurred during the critical preelection period and were not isolated or de minimus. They were made to all employees at the meetings held on September 16 and 17 before the election on September 18. Even if I were to have found that the prospective refusal to bargain was not encompassed in Objection 1, the foregoing violations of Section 8(a)(1) interfered with the election. "The Board has long held that unfair labor practices that have been litigated in a consolidated unfair labor practice/representation proceeding can form the basis for setting aside the election even though those matters were not raised by the objections. *White Plains Lincoln*

Mercury, 288 NLRB 1133 (1988)." *Toys-R-Us, Inc.*, 300 NLRB 188, 190 (1990).

I find that the foregoing conduct encompassed by the Petitioner's Objection 1 and the unfair labor practices found herein occurred during the critical preelection period and interfered with the employees' free choice of representation and that the election must be set aside and a new election held.

CONCLUSION OF LAW

By threatening loss of pay raises if its employees selected the Union as their collective-bargaining representative and threatening its employees that selection of the Union as their collective-bargaining representative would be futile in that the Respondent would not agree to any bargaining proposal that would increase its costs, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and post an appropriate notice.

In view of the diversity of the work force, I recommend that the notice be translated into either French or Creole and into Spanish.[4]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Fisher Island, Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening loss of pay raises if its employees selected the Union as their collective-bargaining representative and threatening its employees that selection of Freight Drivers, Warehousemen & Helpers, Teamsters Local Union 390, AFL–CIO, as their collective-bargaining representative would be futile in that the Respondent would not agree to any bargaining proposal that would increase its costs.

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

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

(a) Within 14 days after service by the Region, post at its facility at Fisher Island, Florida, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 12, 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 September 16, 2003.

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

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

IT IS FURTHER ORDERED that the election is set aside and Case 12–RC–8941 is severed from Case 12–CA–23440 and remanded to the Regional Director to conduct a third election when she deems the circumstances permit a free choice.

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[4] The record does not reflect the languages into which the notices of election were translated. I am mindful that the written language best understood by speakers of Creole is often French, their school language. See *Palm Garden of North Miami*, 327 NLRB 1175, 1189 fn. 29, 1192 (1999). The Regional Director shall determine whether the notice would be more effective if translated into French rather than Creole.

[5] 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.

[6] 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."