UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 05-6026-ag

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD

Respondent

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, AFL-CIO (“the Union”) to review and set aside, in part, a Decision and Order issued by the National Labor Relations Board (“the Board”). The Board’s order dismissed, in part, an unfair labor practice complaint against Stanadyne Automotive Corp.

("the Company") alleging several violations of Section 8(a)(1) of the National Labor Relations Act, as amended ("the Act"). The Board's Decision and Order issued on August 24, 2005, and is reported at 345 NLRB No. 6. (A 319.)[1]

The Board had jurisdiction over the proceeding below under Section 10(a) of the Act (29 U.S.C. § 160(a)), which empowers the Board to prevent unfair labor practices. This Court has jurisdiction under Section 10(f) of the Act (29 U.S.C. § 160(f)), as the complaint alleged that unfair labor practices were committed in Windsor, Connecticut. The Union's petition for review, filed on November 10, 2005, was timely because the Act imposes no time limits on the filing of petitions for review.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board rationally concluded that the Company's warning to its workforce against harassing fellow employees did not violate Section 8(a)(1) of the Act.

2. Whether the Board rationally concluded that the Company's remarks regarding the negative effects of unionization constituted protected free speech that did not violate Section 8(a)(1) of the Act.

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[1] "A" references are to the pages of the Joint Appendix prepared by the Union. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

3. Whether the Board rationally concluded that the Company's announcement of a pension benefit increase did not violate Section 8(a)(1) of the Act because it was based on a legitimate business objective and consistent with established practice.

STATEMENT OF THE CASE

The Union conducted an organizing campaign at the Company's facility in 2000, resulting in a June 29 representation election which the Union lost. The Union filed an unfair labor practice charge including allegations that the Company acted unlawfully during the preelection period by warning employees not to harass coworkers, discussing the potential negative effects of unionization, and announcing a pension benefit increase. The Union also alleged that the Company unlawfully maintained a rule prohibiting employees from discussing the Union. The Board's General Counsel issued a complaint alleging that those actions violated Section 8(a)(1) of the Act. (A 14; 23-25.) After conducting a hearing, the administrative law judge issued a decision finding that the Company violated the Act as alleged. The Company filed exceptions and the Board issued its decision, reversing the administrative law judge and dismissing each allegation of the complaint. (A 3, 4-9.), except for the judge's finding that the Company's rule

restraining employee discussions violated the Act.[2] (A 3-4, 5-6, 19.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Union Conducts an Organizing Campaign; the Company Receives Reports of Improper Behavior by Some Union Supporters And Warns Employees Against Harassment of Any Type

The Company manufactures automotive parts at its Windsor, Connecticut facility. (A 14; 23-p.1, 29.) In January 2000, the Union began an organizing campaign at the facility, and on May 15, filed a petition with the Board seeking a representation election. The Board scheduled the election for June 29. (A 3, 14; 33-35.)

During the campaign, the Company received unsolicited reports of improper behavior. There was vandalism in the parking lot. There was also prounion grafitti and a message reading "kill [Company President William] Gurley" on restroom walls. One employee called the police to report another employee who allegedly grabbed her arm while union literature was being distributed. (A5; 197, 200-01.)

On June 6, during a campaign meeting with employees, Company President Gurley said that he had learned that some, but not all, union supporters were

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[2] The Company has complied with the portion of the Board's order finding that the Company unlawfully restricted employee discussions about the Union. Accordingly, that finding is not before the Court.

harassing their fellow employees. He stated that employees "can disagree with the [c]ompany position; can be for the Union; and can be for anything you want to, but no one should be harassed." He went on to say that "[h]arassment of any type is not tolerated by this company and will be dealt with." (A 4; 37, 55-56.)

B. The Company Discusses the Potential Negative Effects of Unionization

On June 21, the Company met with groups of employees from various shifts. Each meeting featured the same presentation by President Gurley and Managers Art Caruso and Ron Binkus, which they delivered from written scripts. The speakers discussed potential consequences of unionization, including strikes, strike violence, and plant closures, specifically mentioning violence and plant closures that occurred during strikes by the Union at other company plants. Binkus and Caruso also described their prior personal experiences regarding these matters. (A 5-7; 60-87.)

Gurley emphasized that, contrary to the Union's promises, the Union could not guarantee increases in wages or benefits or other improvements, as the law only required that "the company sit down and negotiate in good faith with the

union." (A 5; 61.) Gurley then went on to state:

> However, *if* after *negotiating* we were not willing to accept the Union's proposals or the Union were not willing to accept the company's proposals, then the Union only has two options that I know of: (1) It can *accept* the company's offer, *or* (2) It can call you out *on strike* in order to try to get Stanadyne to agree to its proposals.

(A 5; 61-62 (emphasis in original).)

Gurley then introduced Caruso and Binkus as employees with 35 years and 32 years of service, respectively, who would speak of their own personal experiences. (A 5; 62.) Caruso explained the potential ramifications for employees in the event of a strike. He said that pay would stop, that striking employees would be ineligible for unemployment compensation, and that the Company would be entitled to hire permanent replacements and could legally cease health insurance contributions during an economic strike. Caruso then referred to a claim by the Union that strikes do not occur very often, stating that, "research shows they happen often, but to the extent they happen even once, one is *too* many." He added that, "[a]lthough strikes are not inevitable, everyone knows that *where unions exist, strikes occur*." (A 5; 63-66.) (emphasis in original).)

Referring to the Union, Caruso then stated that "this particular local, #376, has, unfortunately, been involved in a number of strikes," and "from what I can find out, there are very few local unions who are more 'strike happy' in

Connecticut than the UAW Local 376." (A 6; 66-67.) Caruso then gave examples of several plants at which the Union called a strike, including two of Stanadyne's facilities. Caruso discussed the length and consequences of the strikes, including customers lost by Stanadyne and work that was transferred to other facilities. Caruso also read aloud excerpts from a newspaper article in which employees involved in one of the strikes complained about their union leadership and the detrimental effects of the strike. (A 6; 66-73.)

Binkus spoke next. He described his work history with the Company, contrasting his experience at union and nonunion facilities. He offered personal examples of the Union's restrictions on movement between job classifications at a unionized plant, as well as his views about a strike that occurred there. Binkus described an oral strike vote at a union meeting, during which he felt intimidated into abandoning his plan to vote "no," as did other employees, and he offered personal knowledge of current company employees who felt intimidated enough to hide their "vote no" buttons. He also described incidents of intimidation, sabotage, and violence that occurred each time a collective-bargaining agreement was about to expire at a facility where he had previously worked, including an event involving a bomb squad's defusing of a "device" that an employee had found. Binkus then explained that a strike at another Stanadyne plant resulted in the death of a guard who was struck in the head during an altercation with union employees.

(A 6; 73-78.) Binkus then stated:

> The action we take as individuals does, at times, result in something completely unplanned. Let's not let any unplanned action take place here. Violence, threats, intimidation, and a death are not things that happen just on TV or something you read somewhere about another company. They happened at UAW locations at former Stanadyne facilities. Of my 32 years with Stanadyne, the last 10 have been the best, not that the current job is easy, but the environment we are in is so much better. You can keep the environment here union free. Do not place yourself in a violent environment, vote "*no.*"

(A 6; 78-79.) (emphasis in original).)

Caruso then spoke again. He stated: "I agree with Ron's comments. No one, union or management, want[s] to see violence occur, but when you place yourself in that type of environment, people do things that they normally would not. I am not saying that those things will happen in the future, but in a union environment, those things have happened." Caruso cited values that have contributed to the Company's success, stating that he witnessed such values being sacrificed when the Union got involved, and he urged employees to vote "no." (A 6; 79-80.)

Gurley was the last speaker. He noted that, although the message was not pleasant, employees must be aware of the facts in deciding how to vote. In his remarks, Gurley emphasized:

> I want to be very clear on this point. The discussions today are in no way intended to be a prediction of future events. It is impossible for anyone to say what will happen if the Union is successful on June 29. I do not know what will happen relative to possible strikes. No one

> knows. Nor are these comments intended to be threats. Our presentation has simply been facts and recollections about actual events.

(A 6; 81.) Gurley mentioned that, for the first time in his managerial career, a personal threat had been made against him during the campaign. He added: "Union members also have means to threaten and coerce fellow members. *Please be careful of the path you take, you may not like where it ends*." (A 6; 82.) (emphasis in original).) Gurley then reminded the employees that the election would be confidential, unlike the oral strike vote discussed by Binkus, and concluded the meeting with a question and answer session. (A 6; 82.)

At the conclusion of the questions, Gurley unveiled a large sign. The sign was a response to employee concerns regarding job security, an issue discussed by the Union during the campaign. (A 6; 98, 121, 123, 125, 210-11.) The sign displayed seven photographs of closed plants, with a heading at the top reading: "These are just a *few* examples of plants where the UAW *used to* represent employees." Across each photograph was the word "CLOSED" in large red block letters, with the date of closing below each photograph. Below the photographs, the sign asked, "Is this what the UAW calls job security?" It concluded with "VOTE NO!" at the bottom. Copies of the sign were displayed throughout the plant during the week before the election. (A 6; 90-93.)

C. The Company Announces an Increase in Its Pension Benefit

One way the Company attracts and maintains a skilled work force is by offering a competitive benefit program. Pursuant to that program, twice a year, Company Compensation and Benefits Manager Richard Lurie studies surveys that collect and compile information from other employers regarding their current wages and benefits. The most important of these surveys is one prepared by the Connecticut Business and Industry Association ("CBIA"), a local business association. Based on his research, Lurie submits a report to management indicating whether he recommends any changes. (A 8; 147-49, 150-51.) Lurie followed this procedure in determining whether to recommend changes to employees' benefits in 1997, 1998, 1999, and 2000. (A 157-59, 163, 164, 168-70.)

If, based on Lurie's recommendation, the Company changed wages or benefits, it typically made the change effective on January 1 or July 1. About one or two weeks before the effective date, the Company would communicate the increase to employees by posting a notice on a bulletin board. (A 9; 153-55.) The Company had granted periodic increases in pension benefits in January or July since 1959. (A 8; 119.)

In 1996, after reviewing its competitors' practices, the Company determined that it must improve its pension benefit to remain competitive. It therefore decided

to make incremental increases in that benefit until it reached $21, the highest category in the CBIA survey. (A 8; 160-61.) Consequently, in 1997, it increased the monthly benefit to $18 for each year of credited service, and in 1999, increased it to $19. (A 8, 18; 119.)

In mid-June 2000, shortly before the representation election, the Company posted a notice to employees announcing an increase in the pension benefit from $19 to $21. (A 8; 88, 131-32, 141-42.) As in previous years, the Company implemented the increase at the facility on July 1 following the announcement. It granted the same increase to employees at all its other facilities. (A 8; 108, 109, 116, 175-76.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Battista and Member Schaumber; Member Liebman dissenting in part) concluded, contrary to the administrative law judge, that the Company's warning against harassment of fellow employees was a lawful response to reports of unprotected activity, and that its statements about strikes, strike violence, and plant closures were lawful attempts to inform employees of the negative effects of unionization, protected by Section 8(c) of the Act (29 U.S.C. § 158(c)). (A 4-8.)[3] The Board further

[3] Member Liebman would have found that the Company's prohibition of harassment and June 21 speeches about potential downsides of unionizing constituted threats in violation of Section 8(a)(1) of the Act (29 U.S.C.

concluded, also reversing the administrative law judge, that the Company's announcement of a pension benefit increase was justified by a legitimate business objective and consistent with past practice. (A 8-9.) Accordingly, the Board found that those actions did not violate Section 8(a)(1) of the Act and dismissed the corresponding allegations of the complaint. (A 5, 8, 9.)

SUMMARY OF ARGUMENT

Where the Board finds that allegedly unlawful conduct does not violate the Act and dismisses complaint allegations, its determination must be affirmed on review unless it has no rational basis. Here, the Board rationally concluded that the Company's warning against harassment of fellow employees, its statements regarding the negative effects of unionization, and its announcement of a pension increase did not violate Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)).

First, the Company did not unlawfully threaten employees with reprisals for union activity by prohibiting harassment of fellow employees. Applying standards set forth by the Board in *Martin Luther Memorial Home, Inc. d/b/a Lutheran Heritage Village – Livonia*, 343 NLRB No. 75, 2004 WL 2678632 (2004), the Board accurately concluded that the prohibition did not specify union activity and would not reasonably be construed by employees to do so. The Board also accurately noted that there is no evidence that the Company promulgated the

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§ 158(a)(1)). (A 10-13.)

prohibition in response to *protected* union activity or that it was enforced against any employee for engaging in union organization.

Second, the Company's remarks to employees regarding the negative effects of unionization were not threats, but lawful communications protected by the free speech provision of Section 8(c) of the Act (29 U.S.C. § 158c)). The remarks -- consisting of observations about strike activity and responses to the Union's promises of job security -- did not constitute predictions of negative consequences. And even if construed as predictions, they were within an employer's protected right to state what he reasonably believes to be the likely economic consequences of unionization that are outside his control.

Finally, the Company did not act unlawfully by announcing a pension benefit increase during the Union's organizing campaign. The Company rebutted any inference of unlawful motivation by demonstrating that the grant of the increase was based on legitimate business reasons. It also demonstrated that it implemented and announced the increase pursuant to well established patterns and practices that predated the Union's campaign.

ARGUMENT

THE BOARD RATIONALLY CONCLUDED THAT THE COMPANY'S WARNING AGAINST HARASSMENT OF FELLOW EMPLOYEES, STATEMENTS REGARDING THE NEGATIVE EFFECTS OF UNIONIZATION AND ANNOUNCEMENT OF A PENSION BENEFIT INCREASE DID NOT UNLAWFULLY COERCE EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS UNDER THE ACT

A. Standard of Review

Under Section 10(c) of the Act (29 U.S.C. § 160(c)), the Board's General Counsel must carry the burden of establishing an unfair labor practice by a preponderance of the evidence. Unless that burden is met, the Board is required by Section 10(c) to dismiss the complaint. Where, as here, the Board finds that the allegedly unlawful conduct does not violate the Act, and accordingly dismisses complaint allegations, judicial review is extremely limited. As this Court has recognized, the Board's conclusion that a party did not violate the Act "must be upheld unless it has no rational basis." *Williams v. NLRB,* 105 F.3d 787, 790 (2d Cir. 1996). *See also American Postal Wrkrs. U., AFL-CIO v. NLRB,* 370 F.3d 25, 27 (D.C. Cir. 2004). Under the rational basis test, a reviewing court may reverse the Board's dismissal only where the evidence "require[s]" the Board to find a violation of the Act. *Amal.Clothing Wkrs. v. NLRB,* 334 F.2d 581, 581 (D.C. Cir. 1964).

The Board's findings of fact are conclusive so long as they are supported by substantial evidence on the record as a whole, even if "the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477, 488 (1951). The Board's legal conclusions may not be disturbed so long as they are "reasonably defensible." *Ford Motor Co. v. NLRB,* 441 U.S. 488, 496-97 (1979); *Williams v. NLRB,* 105 F.3d at 790. In short, "[i]t is not necessary that [the Court] agree that the Board reached the best outcome in order to sustain its decisions." *United Steelworkers of America, AFL-CIO-CLC, Local Union 14534 v. NLRB,* 983 F.2d 240, 244 (D.C. Cir. 1993).

B. The Company's Warning Against Harassing Fellow Employees In Any Way Was Not a Threat of Reprisal for Engaging In Protected Union Activity

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in [S]ection 7."[4] Accordingly, an employer may not lawfully promulgate or maintain a rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *See, for example, NLRB v. Vanguard Tours,*

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[4] Section 7 of the Act (29 U.S.C. § 157) guarantees employees "the right to self-organization, to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection . . . ."

Inc., 981 F.2d 62, 66-67 (2d Cir. 1992) (rule prohibiting employees from discussing wages and hours unlawful).

In *Martin Luther Memorial Home, Inc. d/b/a Lutheran Heritage Village – Livonia,* 343 NLRB No. 75, 2004 WL 2678632 (2004) ("*Lutheran Heritage*"), the Board established standards for determining whether a given rule has a reasonable tendency to produce such a chilling effect. Recognizing its obligation to "give [the challenged] rule a reasonable reading," the Board stated that it "must refrain from reading particular phrases in isolation, and . . . must not presume improper interference with employee rights." 2004 WL 2678632 at *1. Accordingly, the Board rejected any analytical approach that would require it to find a violation in every case where a rule could conceivably be interpreted to have a chilling effect upon Section 7 activity. *Id.* at *3.

Instead, the *Lutheran Heritage* analysis examines such rules on a case-by-case basis. The initial inquiry is whether the rule explicitly restricts activities protected by Section 7. If so, the rule is unlawful. If not, the finding of a violation depends upon the showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id.* at *1-*2.

Applying this standard to the facts in *Lutheran Heritage*, the Board found that the employer's handbook rule prohibiting "[h]arassment of other employees and any other individuals in any way" was not unlawful on its face and would not be construed by a reasonable employee to prohibit conduct protected by the Act. *Id.* at *4. The Board recognized that "employers have a legitimate right to establish a 'civil and decent work place'" and "to adopt prophylactic rules banning" conduct such as abusive or threatening language because "employers are subject to civil liability under federal and state law should they fail to maintain 'a workplace free of racial, sexual, and other harassment' . . . ." *Id.* at *2 (quoting *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB,* 253 F.3d 19, 27 (D.C. Cir. 2001), *denying enf. in pertinent part to* 331 NLRB 291 (2000).

The Board has subsequently applied the *Lutheran Heritage* analysis on a case-by-case basis. *Compare Fiesta Hotel Corp. d/b/a Palms Hotel and Casino,* 344 NLRB No. 159, 2005 WL 1985977 at *1, *7-*9 (2005) (rule lawful that prohibits "conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow [employees] or patrons") with *KSL Claremont Resort, Inc.*, 344 NLRB No. 105, 2005 WL 1452400 at *1 (2005) (rule unlawful that prohibits "negative conversations" about associates and managers because it would chill employees' right to discuss complaints that affect working conditions).

Applying the *Lutheran Heritage* test to the facts herein, the Board correctly concluded (A 5) that President Gurley's statement prohibiting harassment of fellow employees did not unlawfully restrict the employees' protected union activities. Initially, the statement did not *explicitly* restrict protected activity. To the contrary, it prohibited harassment "*of any type.*" Because policies in that case and the case at bar both were general anti-harassment prohibitions reaching beyond mere union activity, the Union erroneously claims (Br. 18-19) that *Lutheran Heritage* is inapposite.

Nor did the Company's anti-harassment prohibition run afoul of any of the three remaining requirements in the *Lutheran Heritage* test. First, as the Board observed, employees would not reasonably construe Gurley's statement to prohibit protected activity. For Gurley not only prohibited *all* types of harassment, but accompanied that prohibition with the explicit reassurance that the employees were free to support the Union, disagree with the Company's position, and support any position they desired as long as they did not harass anyone. Second, there is no evidence that Gurley made the statement in response to protected union activity. Instead, as the Board pointed out, he made it in reasonable response to reports of "harassing conduct that is not protected by the Act," such as vandalism and graffiti

that included a "Kill Gurley" message on a restroom wall.[5] (A 5.) As the Board observed, these events, together with the Company's obligation under state and federal laws to address workplace harassment, made it reasonable for the Company to "react to reports of harassment by informing employees that such conduct will not be tolerated." (A 5.) Finally, there is no evidence or contention that the Company ever applied its rule against harassment to restrict the exercise of protected employee rights. (A 5.)

The Union (Br. 17-18) cites several cases in which the Board *formerly* found that employer rules prohibiting "harassment" were subject to interpretation as banning protected union activities. As the Union concedes, however (Br. 18-19), the Board in *Lutheran Heritage* effectively overruled such precedents by announcing new standards. And in doing so, the Board specifically declined to read "particular phrases in isolation" and to brand the word "harassment" as a magic word that automatically connotes interference with protected activity when prohibited. *Lutheran Heritage*, 2004 WL 2378632 at *1, *4.

[5] There is no basis for the Union's contention (Br. 20-21) that Gurley's prohibition of harassment could only be understood as banning protected union activity because he attributed acts of harassment to "some union supporters" and offered no independent evidence of such acts. This contention ignores the language and reassurances within Gurley's remarks. Moreover, the restroom walls containing the "Kill Gurley" writing were also vandalized with prounion writings in similar locations. (A 196-97.) Thus, there was a factual basis for Gurley's statement. In any event, the Union cites no caselaw or other grounds for requiring

Equally unpersuasive is the Union's claim (Br. 19, 20) that employees could construe Gurley's remarks as directed at protected union activity because he gave no "further definition" of harassment and his reassurances regarding their right to support the Union did not specify their right to "aggressively proselytize for the Union." The *Lutheran Heritage* test requires no such details. As noted above (p. 16-17), the rule approved by the Board in *Lutheran Heritage* simply prohibited "[h]arassment of other employees, supervisors and any other individuals in any way." In sum, the Union's contentions ultimately ignore *Lutheran Heritage*'s caution against "presuming interference with employee rights" and finding a violation "whenever the rule could conceivably be read" to cover protected activity.

C. The Company's Remarks Regarding the Negative Effects of Unionization were Protected by Section 8(c) of the Act

As this Court has long recognized, "'an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board.'" *Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419, 1427 (2d Cir. 1996) (quoting *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617 (1969) ("*Gissel*")). That right is protected by Section 8(c) of the Act (29 U.S.C. § 158(c)), which allows the employer to express "any views, argument, or opinion

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an employer to present evidence of its reasons for establishing a facially nondiscriminatory workplace rule.

. . . if such expression contains no threat of reprisal or force or promise of benefit." In balancing the employer's Section 8(c) free speech rights with the employees' Section 7 rights, the Supreme Court in *Gissel* emphasized that an employer "may even make a prediction as to the precise effects he believes unionization will have on his company." Such a prediction is protected under Section 8(c) as long as it is "carefully phrased on the basis of objective fact to convey [the] employer's belief as to demonstrably probable consequences beyond his control," and contains no "implication that [the] employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him . . . ." *Id.* at 618.

Applying those principles here (A 7-8), the Board rationally concluded that the Company's June 21 speeches and posters were within its free speech right to communicate its "general views about unionism" and "specific views about a particular union," and were not "threats of economic reprisal to be taken solely on [its] own volition." *Gissel*, 395 U.S. at 618-19 (quoting *NLRB v. River Togs, Inc.*, 382 F.2d 198, 202 (2d Cir. 1967). As the Board observed (D&O 5), the Company's speakers "made clear that they were not making threats or predictions about the future." To the contrary, President Gurley explicitly stated that the discussions were in no way intended to be a prediction of future events regarding possible strikes. Gurley's comments about strikes were limited to pointing out the

Union's option to strike in the event that good faith collective-bargaining negotiations failed. Caruso never predicted that strikes were inevitable. To the contrary, he stated that they were *not* inevitable.

Furthermore, the Board correctly observed that even if the Company's message might be construed as a prediction, it was carefully phrased on the basis of objective fact to convey its belief as to demonstrably probable consequences beyond its control, and therefore protected by Section 8(c) under *Gissel*. Thus, Caruso's general discussion of the likelihood of strikes was limited to broad statements that strikes happen often where unions exist. Moreover, Caruso attributed his statements regarding the strike history of the Union herein to examples where the Union had called strikes at several plants, including two of the Company's. As the Board observed (A 7-8), these were legitimate "counterarguments to the Union's campaign theme of job security" and were based on objective facts about previous strikes by the Union to show that "strikes occurred more frequently than the Union led employees to believe."[6]

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[6] There is no merit to the Union's suggestion (Br. 28-29) that the Company should be required to provide evidence that its description of events was accurate. For where, as here, predictions are based on common sense and experience, the *Gissel* "objective fact" standard does not require the employer to prove that demonstrable probability of the consequences of unionization be confirmed by extrinsic proof. *See Benjamin Coal Co.*, 294 NLRB 572, 581-82 (1989) (collecting cases). *See, in particular, NLRB v. Village IX,* 723 F.2d 1360, 1368 (7th Cir. 1983)

The Board also correctly applied this analysis to the Company's statements and posters discussing the consequences of strikes that *had* occurred. As noted above, Gurley reassured the employees that he was not predicting future events regarding strikes, and, as the Board observed (A 7), the statements themselves were not predictions, but simply facts and recollections about actual events providing concrete examples of negative outcomes for employees represented by the Union. *See Manhattan Crowne Plaza*, 341 NLRB No. 90, 2004 WL 940788 *1, *2 (2004). And even if the Company's messages could be construed as predictions, they were protected by Section 8(c) as objectively based statements regarding demonstrably probable consequences beyond its control. *Gissel*, 395 U.S. at 618. As the Board noted (A 7), and as shown above (p. 9), the Company's speakers "did not claim that the Union had caused any plants to close," but "simply recited the facts that these were unionized plants and that they had closed." In any event, the Board accurately observed that even an inference of union causation in those instances would not suggest to employees that the closures "were volitional retaliatory acts by the [Company]." (A 7.)

The Union's criticism (Br. 29-30) of the Company's posters depicting unionized plants that had closed is also unwarranted. As the Board noted in finding a virtually identical poster lawful in *EDP Medical Systems, Inc.*, 284

(predictions based on common sense and experience do not require the employer to

NLRB 1232, 1264 (1985), an employer's poster responding to a union claim of job security by depicting companies that had closed as a result of unionization does not suggest that it would close if the union came in. Instead, it is within the employer's protected "right to give employees information with respect to industry conditions, and was merely stating 'economic reality' by informing employees of these events." *Id*. In the instant case, the poster was a reasonable response to the Union's claims that a union presence would guarantee job security.

In general, the Union's contention (Br. 26-31) that the Company's statements and posters were unprotected by Section 8(c) of the Act relies heavily on the asserted similarity between the facts herein and those in the *Sinclair* case, one of the three consolidated cases decided within the *Gissel* decision. *See NLRB v. The Sinclair Co.*, 397 F.2d 157 (1st Cir. 1968); *Gissel,* 395 U.S. at 575, 580, 587-90, 616-20. That reliance is misplaced.

In *Sinclair*, the employer's statements during the 30-day period prior to the election included a direct and powerful message that unionization would result in a plant shutdown and job loss at *its* facility. 397 F.2d at 159-61. The employer's literature and speeches repeatedly reminded the employees of a previous strike at its plant at a time when most of them worked there, and stated that the new union in the current campaign could again close their department and the entire plant

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"develop detailed advance substantiation").

with a strike. *Id*. The employer also reminded the employees that it was in a precarious financial condition and suggested to employees that they were unlikely to obtain other employment because of their ages and limited education if the plant shut down. *Id*. Moreover, the employer's message occurred after it had already threatened employees with these ominous messages.[7] Contrary to the Company's primarily factual observations here, the communications in *Sinclair* were specific predictions of plant closure and personal threats of job loss against employees at their own facility. As the First Circuit observed, the employer's comments were designed to impress upon employees that the earlier strike had "left the company in a state of continuing financial difficulty" and that another strike could close the plant and leave them jobless because of their personal shortcomings. *Id.* To the contrary, here, the Company's comments made no such personal attack on employees, focusing instead on the common sense possibilities of choosing union representation.

In short, the record fully supports the Board's finding that the Company's June 21 communications consisted of examples rather than predictions and, in any event, were lawfully based on objective facts supporting probable consequences beyond its control. As such, they were well within the free speech rights protected

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[7] The Board relied on the employer's November conduct, but took this earlier conduct into account as background. *Sinclair*, 397 F.2d at 159 n.5 and 160 n.7; *The Sinclair Co.*, 164 NLRB 261, 262-63 (1967).

by Section 8(c) of the Act under the *Gissel* standards.

D. The Company's Announcement of a Pension Benefit Increase was Based on a Legitimate Business Objective and Consistent with Its Established Practice

In some circumstances, an employer's grant of increased benefits during the period prior to a representation election can violate Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). *NLRB v. J. Coty Messenger Service*, 763 F.2d 92, 96 (2d Cir. 1985). As this Court has long emphasized, however, "the granting of normal and regular increases in employee benefits are not to be held to be an unfair labor practice merely because a union drive is in progress, a result which would work to the detriment of the very people whom the Act seeks to protect." *NLRB v. Yokell*, 387 F.2d 751, 756 (2d Cir. 1967). Accordingly, an employer who grants such an increase does not violate the Act when it is "merely following an established practice of pay raises predating a union campaign." *NLRB v. Curwood, Inc.*, 397 F.3d 548, 554-55 (7th Cir. 2005). *Accord Mercy Hospital*, 338 NLRB 545, 545 (2002) (grant of benefits not unlawful where pursuant to an established policy from which employer did not deviate upon advent of the union). The timing of an employer's announcement of an increase may also violate Section 8(a)(1), even if the increase itself is lawful, and the standard for determining the lawfulness of the announcement's timing is essentially the same as for the grant itself. *Mercy Hospital,* 338 NLRB at 545.

Applying these principles here, the Board was warranted in concluding (A 9) that the Company "successfully rebutted any inference" of unlawful motivation in granting the 2000 pension increase. As the Board explained, "the evidence demonstrates that the [Company] followed its usual procedures with regard to both the decision to grant the . . . increase and the timing of its announcement." (A 9.) Specifically, the record evidence demonstrates that the Company legitimately increased its pension benefit to remain competitive with other employers in the recruitment and retention of talented employees. Pursuant to that policy, the Company had granted pension increases since 1959. Moreover, the Company followed an established pattern in both granting and announcing the increases it implemented between 1996 and 2000. Twice a year, it reviewed its employee benefits, compared them with those of its competitors based on an examination of surveys, and decided whether to grant any increases. These reviews resulted in an increase to $18 in 1997 and an increase to $19 in 1999. (A 88, 108-10, 116-18, 119, 131-32, 141-42, 147-49, 150-51, 153-55, 160-62, 175-76.)

The 2000 increase to $21 was the critical step in the Company's objective of attaining parity with other employers' pension benefits. For as shown above, the Company determined in 1996 that parity could be achieved only by increasing that benefit to $21, the highest category in the CBIA survey. The Company also

followed an established pattern in *announcing* the 2000 increase. As the Board noted (A 9), the Company typically announced its July 1 benefit increases one or two weeks before their effective date, and did precisely that in 2000. (A 88, 108-15, 116-18, 119, 131-32, 141-42, 175-76.)

There is no basis for the Union's contention (Br. 34-36) that substantial evidence does not support the Board's finding of an established pattern in granting benefits. First, the Union argues (Br. 35) that the Board improperly found that the Company maintained an established practice because it granted pension increases of different amounts and percentages in different years. This contention ignores the plain fact that the Company regularly and repeatedly based both the timing and the amount of such increases on surveys of information regarding competitive benefit rates, guided by the necessity to achieve parity. This practice did not require a slavish granting of a fixed increase on a fixed yearly schedule to function as an established practice. *See Washington Fruit & Produce Co.*, 343 NLRB No. 125, 2004 WL 3038095 *1, *55 (2004) (increase lawful where employer "put into motion a course of action whose natural end was the . . . benefit").

Similarly unpersuasive is the Union's contention (Br. 34-36) that the increase was unlawful because it was "substantially larger" than past increases. That argument must fail because, as noted above, the record includes substantial evidence that in 1996 the Company chose to reach its $21 objective through

increases in succeeding years, but not *identical* increases and not in *every* year. In 1997, it granted a substantial $3 increase to begin catching up after 7 1/2 years without an increase. In 1998, it granted no increase at all because of the substantial 1997 increase, a decision to increase wages instead, and concern over the Company's debt picture. (A 119,168-69,187.) In 1999, the Company increased the benefit by $1. And in 2000, because of its continuing difficulties in recruiting talented employees, the Company decided to reach to the highest CBIA category of $21 by granting a $2 increase. (A 170.) Thus, the Company relied on legitimate business reasons in determining the amount of an increase, as well as the decision whether to grant one at all. The Union cites no evidence challenging the legitimacy of the Company's objective or its methods of achieving it. Thus, the Board properly declined to "second-guess the [Company's] business goal, regardless of whether its plan set forth specific amounts or a general objective." (A 9.)

Finally, the Union asserts (Br. 32) that the Board improperly reversed the administrative law judge's "discredit[ing]" of benefit manager Lurie's testimony that the Company "had decided in 1996 to increase pensions to the level announced in 2000." As the Board noted, however, the judge did not discredit that testimony, but simply failed to "definitively credit" it. (*See* A 9 n. 8, A 18.) In any event, it is undisputed that the Company in 1996 merely established the

objective of reaching the $21 level. It did not specify the year it planned to reach it. Accordingly, the $2 increase in 2000 was consistent with the 1996 plan, as the Board concluded. Finally, as the Board pointed out, the judge based his finding of a violation on the Company's timing of its *announcement* of the increase, not on the earlier *decision* to grant the increase. (A 9 n. 8, A 18-19.) Thus, the judge's crediting or discrediting of testimony regarding the timing of the initial *decision* to grant the increase was not an essential part of his reversed finding.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court deny the Union's petition for review.

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WILLIAM M. BERNSTEIN
Senior Attorney
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2997

RONALD E. MEISBURG
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

AILEEN A. ARMSTRONG
Deputy Associate General Counsel

FRED B. JACOB
Supervisory Attorney

National Labor Relations Board

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