Leland Stanford Jr. University and Stanford University *and* United Stanford Employees, Local 680 Service Employees International Union AFL–CIO. Case 32–CA–153

March 2, 1979

DECISION AND ORDER

BY MEMBERS PENELLO, MURPHY, AND TRUESDALE

On July 20, 1978, Administrative Law Judge Stanley Gilbert issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and briefs, and Respondent filed cross-exceptions to the Administrative Law Judge's Decision along with a brief in response to the contentions of the General Counsel and the Charging Party.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

STANLEY GILBERT, Administrative Law Judge: Based upon a charge filed on February 16, 1977, by United Stanford Employees, Local 680 Service Employees International Union, AFL–CIO, hereinafter referred to as the Union, the complaint herein was issued on January 19, 1978. The complaint alleges that Leland Stanford Jr. University and Stanford University Hospital, hereinafter referred to respectively as the university and the hospital and collectively as Respondents, violated Section 8(a)(1) and (5) of the Act. Respondents, by their answer, deny that they engaged in conduct violative of the Act as alleged.

Pursuant to notice a hearing was held in San Jose, California, on April 4, 1978, before me. Appearances were entered on behalf of all parties, and briefs were timely filed by said parties which have been carefully considered.

Based upon the entire record in this proceeding and my observation of the witnesses as they testified, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENTS

The university, an entity exercising corporate powers under the laws of the State of California, operates a private nonprofit institution of higher learning. During the past calendar year, the university had gross revenues in excess of $1 million from all sources, exclusive of contributions not available for use for operating expenses, and purchased goods valued in excess of $50,000 directly from suppliers located outside the State of California.

The hospital, a private, nonprofit, California corporation, operates an acute-care teaching hospital in Palo Alto, California. During the past calendar year, the hospital had gross revenues in excess of $250,000 and purchased goods valued in excess of $50,000 directly from suppliers located outside the State of California.

Respondents jointly operate the Stanford University Medical Center, which includes the hospital and the Stanford School of Medicine. The university has control of the operations of the hospital and its labor relations policies.

[1] We agree with the Administrative Law Judge's finding that Respondents did not violate Sec. 8(a)(1) of the Act by administering to their unrepresented employees, who were the object of the Union's organizing efforts, an opinion survey which, *inter alia*, solicited their grievances concerning certain working conditions. In reaching this result the Administrative Law Judge properly concluded that the survey was conceived for legitimate business reasons and was not designed in response or opposition to the Union's organizing effort. See, e.g., *Litton Dental Products Division of Litton Industrial Products, Inc.*, 221 NLRB 700 (1975). In this regard, the Administrative Law Judge also found that the grievances were not solicited in a "pre-election contest." We disagree with this latter finding. Thus, at the time the survey was distributed, the parties herein were still in the midst of a long, unresolved representation case involving the unorganized employees. However, notwithstanding the fact that, technically, the survey was undertaken in a "pre-election context," we find that the timing of Respondents' action does not, by itself, suggest that the use of the survey was designed to undermine the Union. The record is clear that for a considerable period of time, both prior and subsequent to the distribution of the survey, there was no active campaigning on the part of either the Union or Respondents and no election was scheduled or imminent. Thus, the situation here, while technically arising in a preelection context, is distinguishable from those cases where the timing of the employer's conduct made it reasonable to infer that the actions were taken for the purpose of eroding employee support for the union. See, e.g., *Montgomery Ward & Co., Incorporated*, 225 NLRB 112, 118 (1976) (implied promise of benefits made by the employer a few days before the election); *The May Department Stores Company*, 191 NLRB 928 (1971) (employer's discussions with employees were held a few weeks before the election); *Tom Woods Pontiac, Inc.*, 179 NLRB 581 (1969) (employer solicited employee grievances 1 week after the consent election agreement).

We also agree with the Administrative Law Judge's finding that the distribution of the survey directly to unionized employees without consulting the Union did not violate Sec. 8(a)(5) as it was not designed for, nor did it have the effect of, eroding the Union's position as the employees' exclusive bargaining agent. In reaching this result, we particularly note that, shortly after the survey was administered, Personnel Director Ronald Twomey sent a memorandum to the unionized employees making it clear that Respondents had no intention of bargaining directly with the employees and that Respondents fully recognized the legal rights of the Union as the employees' exclusive bargaining representative for purposes of negotiating employees' wages, hours, and other working conditions.

As is admitted by Respondents, they are joint employers.[1] As is also admitted by Respondents, each of them is, and at all times material herein has been, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

As is admitted by Respondents, the Union is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Background Information and Undisputed Facts

This case concerns three surveys submitted in February 1977 to employees at the Stanford University Medical Center, which is "jointly operated" by Respondents.[2]

The medical center is located on the campus of the university and includes the hospital, clinics, and the Stanford University Medical School, hereinafter referred to as the medical School. The hospital employs approximately 3,100 persons and its personnel policies, practices, and employee relations are formulated and administered under the direction of the medical center personnel director, Ronald D. Twomey. The medical school, an academic school of the university, employs approximately 1,200 persons; and another 100 or so persons are employed at the clinics, which provide outpatient care to patients of the medical school faculty. Personnel policies, practices and employee relations at the medical school and clinics are under the direction of the director of personnel for the university who works in conjunction with Twomey in order to coordinate the policies and practices of the hospital and medical school.

Approximately 1,300 of the employees at the medical center are members of a union: The Committee for Recognition of Nursing Achievement (CRONA) represents approximately 950 registered nurses at the hospital; Stanford University Medical Center Engineering Association represents approximately 95 maintenance employees at the hospital; and the Union, the Charging Party herein, represents about 250–300 employees at the medical school, of which approximately 125–200 are "life science technicians." The employees represented by the Union are part of a 1,400-person universitywide bargaining unit.[3]

The facts set forth in the following numbered paragraphs were stipulated by the parties:

1. On September 6, 1974, the Union filed a petition for an election at the hospital with Region 20 of the National Labor Relations Board. This petition was given Case 20–RC–12323. On September 16, 1974, Stanford United Medical Technologists filed a petition for an election at Stanford University Hospital with said Region. This petition was given Case 20–RC–12345. On September 18, 1974, Stanford University Medical Center Engineering Association filed a petition for an election at the medical center with said Region. This petition was given Case 20–RC–12348. On November 1, 1974, Stanford University House Staff Association filed a petition for an election at the medical center with said Region. This petition was given Case 20–RC–12436. On November 1, 1974, the Union filed for an election at the hospital with said Region. This petition was given Case 20–RC–12435. Finally, on January 24, 1975, California Licensed Vocational Nurses Association filed a petition for election among all licensed vocational nurses employed at the hospital or clinics with Region 20. This petition was given Case 20–RC–12567.

2. On November 4, 1974, following preliminary investigation, a representation hearing commenced on all of the above cases.

3. In December 1974 the hearing was recessed so that the parties could explore the possibility of entering into a consent election agreement.

4. On January 24, 1975, an Agreement for Consent Election covering Cases 20–RC–12323, 20–RC–12345, 20–RC–12348, 20–RC–12435, and 20–RC–12436, was approved. An Agreement for Consent Election in Case 20–RC–12567 was approved on January 29, 1975. These consent agreements provided for elections among the designated employees on April 10, 11, and 12, 1975. (It appears that approximately 1,600 hospital and clinic employees were involved in the election in which the Union participated.)

5. On April 9, 1975, the Union filed an unfair labor practice charge against the university and hospital. That charge was given Case 20–CA–10117.

6. On April 17, 1975, following the aforesaid elections scheduled for April 10, 11, and 12, 1975, the Union filed timely objections to the conduct of the elections in Cases 20–RC–12323, 20–RC–12345, 20–RC–12348, 20–RC–12435, and 20–RC–12567. Many of the objections raised had also been alleged by the Union as unfair labor practices in the charge in Case 20–CA–10117.

7. Towards the end of November 1975 the Regional Director for Region 20 concluded the investigation of both the unfair labor practice charge and election objections filed by the Union. At that time, the Regional Director concluded that the 8(a)(2) allegations posed novel issues which should be submitted to the Regional Advice Branch of the Office of the General Counsel.

8. In March 1976 the Regional Advice Branch directed issuance of a complaint, absent a settlement by the parties.

9. On June 21, 1976, the Regional Director issued a Report on Objections, order consolidating cases, and complaint and notice of hearing. The hearing on the complaint and objections was set for September 28, 1976.

10. On September 1, 1976, counsel for the university requested a month's postponement of the hearing because of pending negotiations for a contract with the Union for the

[1] Respondents, in their answer, deny the allegation in the complaint that they are a single integrated enterprise. In view of the admission that they are joint employers, it does not appear necessary for the purposes of this proceeding to make a finding with respect to said allegation. It is noted that none of the briefs filed mentioned the issue raised by said allegation and denial.

[2] As conceded in Respondent's brief.

[3] In 1973, the Union was certified to represent technical, maintenance, and service employees of the university. Since 1973, two collective-bargaining agreements have been executed by the Union and the university: the first effective from September 1, 1973, through August 31, 1976, and the second from September 1, 1976, through August 31, 1979.

bargaining unit represented by it.

11. On September 6, 1976, pursuant to that request, the hearing was rescheduled for November 8, 1976.

12. Settlement discussions with the Union were initiated by Stanford University in October 1976.

13. On November 4, 1976, the university, the Union, and counsel for the General Counsel reached an agreement on terms of a settlement with respect to all issues raised by the complaint and objections, save an election date. The Regional Director then postponed the hearing scheduled for November 8, 1976, indefinitely pending conclusion of the settlement discussions. The parties were unable, however, to reach an agreement regarding a date for the election.

14. On December 1, 1976, Alan Longman, attorney for the General Counsel for the matters described in paragraphs 9 through 13 above, sent all parties a proposed settlement agreement. At the suggestion of counsel for the university, the settlement left determination of the election date to the Regional Director.

15. On December 6, 1976, the university signed the settlement agreement and returned it to the counsel for the General Counsel. The Union's representatives refused to sign the settlement agreement.

16. On January 27, 1977, counsel for the General Counsel met with representatives from Alianza Latina and Black Advisory Committee, two affirmative action committees alleged to be labor organizations in the complaint described in paragraph 9 above, to seek their waiver of any rights which might be affected by the settlement. Both of these groups refused to give such a waiver.

17. On January 31, 1977, counsel for the university met with counsel for the General Counsel and the Regional Attorney for Region 20. The Regional Attorney advised at that time that the Regional Director was unwilling to approve the settlement over United Stanford Employees' objection without waivers from the Alianza Latina and Black Advisory Committee. The Regional Attorney advised counsel for Stanford that the case would, therefore, be put back on calendar for a hearing.

18. In February 1977 the university administered an employee opinion survey to employees at the medical center.

19. On February 15, 1977, the Union filed an unfair labor practice charge against Stanford which was numbered Case 20–CA–12481 (now Case 32–CA–153), and which is the subject of this proceeding.

20. On February 24, 1977, the Regional Director rescheduled the hearing on the cases referenced in paragraphs 5–9 above for June 13, 1977.

21. In May 1977 settlement discussions were renewed by counsel for the General Counsel, and tentative agreement was reached on June 10, 1977. The settlement agreement was signed by the parties on June 13, 1977, and approved by the Regional Director on July 8, 1977. These settlement agreements provided for elections at the medical center in Cases 20–RC–12323, 12435, 12345, and 12567 on February 2–4, 1978.

The Survey

Twomey credibly testified that he discussed his intended use of an opinion survey (when he was interviewed prior to entering his job in May 1976) to develop a "data base with employees to manage more effectively." Following is an outline of his credited testimony as to the origin and development of the three surveys which were administered respectively to the hospital, clinics and medical school in February 1977. It is noted that all three were substantially identical for the first 77 questions (referred to as the "core questions" or "core comments") and that the remaining questions were tailored to fit the three different facilities. The core questions were taken from a standardized survey, are highly interrelated, and can be evaluated on the basis of "national normative data." They were originally developed by Rensis Likkert, a well known designer of tests on the faculty of the University of Michigan. Likkert's questions were modified by Dr. Edward Giblin, a specialist in organizational opinion surveys for use by Arthur Young & Company, an international accounting and management consultant firm, for servicing its clients. Twomey was employed for 2 years by Arthur Young & Company as "national director for health care consulting" and he modified the questions slightly so that the survey could be applied to hospitals. While so employed he used the survey for approximately 20 organizations engaged in dispensing medical services ("medical centers, hospitals").

After he joined the medical center he began discussing plans for a survey with administrative personnel. In mid-October 1976, at their request, he met with a delegation of employees represented by the Union including its then president, and at the meeting they complained "that top management supervision should play a more active role in trying to encourage" the representatives of the university bargaining with the Union "to be more considerate of the demands" of the Union. In response Twomey told them of the plans for a survey designed to elicit feelings of employees including members of the Union, and when the president of the Union asked to participate in it, he explained that it would not be appropriate for him to do so since the survey would be made available to all personnel at the medical center. There was no protest by the Union about the planned survey until February 10, 1977.

Prior to the distribution of the survey to personnel of the medical center between February 7 and 25, 1977, Susan Paulsen, the university's manager of employee relations, by letter dated January 31, 1977, advised the then president of the Union, Anne Schlagenhaft, of the plan to distribute "an employee opinion survey . . . to all Medical Center employees," and enclosed an "advance copy." While said advance copy did not coincide with the three surveys which were subsequently distributed, it does not appear that the differences are of any materiality to the resolution of the issues herein. On February 10, 1977, Schlagenhaft called Paulsen and objected to the survey. She stated that she had been advised that the administration of the survey might be an unfair labor practice and asked Paulsen not to proceed with it. Paulsen responded that it was the university's position "that there was nothing unlawful about the survey." By letter to Paulsen dated February 14, Schlagenhaft detailed the basis for the contention that the survey would be unlawful: in effect, that it would bypass the Union in dealing with the employees the Union repre-

sents, and that it would undermine the Union's organizational efforts among unrepresented employees by implying that the university would "remedy any dissatisfaction" the survey might uncover. She concluded her letter by offering to furnish any information sought "conserning working conditions at Stanford." After receipt of Schlagenhaft's letter, Paulsen, by telephone and a letter dated February 28, attempted to explain the purpose of the survey and to reassure her of the lawful intent ("not to interfere with or bypass the Union"). On March 11, 1977, Twomey sent a memo to all medical school employees in which he stated, in effect, for the benefit of those "who are members of the collective bargaining unit" represented by the Union, that "the survey was neither designed nor will it be used in derogation of any legally recognized rights of your union," and that the university "recognizes and reaffirms its responsibilities to deal with" the Union as its "exclusive representative" as to wages, hours, and working conditions.

The surveys were made available to all personnel in the medical center, including administrators, physicians, supervisors, and employees (represented and not represented by labor organizations). Notices were sent to all said personnel, in effect, urging them to participate in the survey. In one notice it is stated:

> THIS IS YOUR OPPORTUNITY TO PARTICIPATE IN EFFORTS TO IMPROVE OUR WORKING ENVIRONMENT.

In another it is stated:

> Share your Attitudes, Opinions and Feelings About All Aspects of Your Working Relationship with Stanford University Hospital;

and also:

> YOUR OPINIONS ARE NECESSARY IN PLANNING FOR IMPROVEMENT!

Personnel who were willing to participate went to designated rooms where they filled out the questionnaire and dropped it into a ballot-box type of receptacle. Of approximately 4,400 persons to whom the surveys were made available, approximately 1,800 participated: in the hospital 1,570 out of 3,088; in the clinics 55 of 117; and in the medical school 195 of 1,200.

The Issues

The issues, according to the pleadings herein, are:

1. Whether Respondents violated Section 8(a)(1) of the Act by soliciting employee grievances (from employees in units where petitions for an election had been filed by the Union) and impliedly promising to resolve said grievances by the administration of the surveys.

2. Whether Respondents violated Section 8(a)(5) and (1) of the Act by administering a survey. It is alleged in the complaint that said section was violated by:

(a) Undermining the Union's position as the exclusive bargaining representative of certain of the employees by administering an opinion survey questionnaire to said employees concerning wages, hours, and conditions of employment.

(b) Dealing directly with employees represented by the Union in derogation of the Union's status as their exclusive bargaining representative by administering an opinion survey questionnaire to said employees concerning wages, hours, and conditions of employment. (However, in his brief General Counsel states that the issue is whether said section was violated by Respondents "unilaterally administering an opinion questionnaire to its employees [represented by the Union] without first bargaining with" the Union.)

In its brief the Union states the following:

> The theory of the complaint in this case is that the survey violated Section 8(a)(1) of the Act in the unrepresented unit[s] by soliciting grievances at a time when there was an election case pending and at a time when the Charging Party was engaged in organizing activity. In addition the survey violated Section 8(a)(5) of the Act by undermining the position of the Charging Party as bargaining representative because it solicited grievances from employees represented by the Union and sought to obtain information to be used in dealing with the Charging Party during pending negotiations.

In contrast to the above, Respondents state in their brief that the issues herein are:

> 1. Is it unlawful to survey opinions of unrepresented employees concerning their work environment where representation petitions have been pending for 2-1/2 years, where no active organizing has occurred for nearly 2 years and where elections are unlikely to be held for another 2 years or more?
>
> 2. Is it unlawful to include represented employees in an institution-wide survey concerning employee and managerial attitudes toward the work environment when the represented employees are covered by an existing collective-bargaining agreement which will not expire for over 2-1/2 years, and when no negotiations for revisions of the agreement affecting said employees are either underway or proposed by either party?

Resolution of the Issues

To a great extent the parties reveal their contentions by the wording of what they consider the issues to be. Although the General Counsel seems to have altered the theory of the violation of Section 8(a)(5) from what is alleged in the complaint to that of "unilaterally administering" the survey "without first bargaining with" the Union, he does not develop this contention sufficiently to persuade me that an employer must first bargain with the Union before he can submit a questionnaire to his employees who are represented by a union. While it would appear that a questionnaire *per se* is not a matter which can be equated with wages, hours, terms, or conditions of employment and is not a mandatory subject of bargaining; I do not pass upon this question.

The record discloses that the Union was notified in October 1976 (over 2 months prior to the surveys) through its president that a survey was planned, and when he asked to

participate in it he was told that it would be inappropriate for the Union to do so in view of the fact that the Union represented only a minor segment of the personnel to whom the survey would be submitted. The Union did not press its request and made no request to bargain about the use of the survey. It did nothing until February 10, 1977, when Schlagenhaft protested the administering of the survey. I am of the opinion that the issue of a violation of Section 8(a)(5) of the Act is framed by the allegation in the complaint and the contentions of the Charging Party and Respondents as revealed by their statements of the issue. It is noted that no case was cited which supports the theory that an employer must bargain with a union before taking a survey of its employees. It is also noted that Respondents' brief did not touch upon the issue raised by the General Counsel's theory, since they could not have anticipated it. It is further noted that the one case cited by the General Counsel with respect to the issues of a violation of Section 8(a)(5)[4] does not deal with said theory, but, rather, deals with the issue of whether the solicitation of grievances, in the circumstances of that case, constituted an "attempt to erode a union's bargaining position by engaging in a direct effort to determine employee sentiment rather than to leave efforts to the agent of the employees." Whether such a finding could be made herein, it appears, is the issue to be resolved. The Union was notified of the intention to administer a survey well in advance and neglected to pursue any right it might have had to bargain about its use. I am not satisfied that, in the circumstances, the Respondents were required to bargain about the use of the survey when Schlagenhaft protested its use a few days after Respondents commenced administering it.[5]

The Alleged 8(a)(1) Violation

As set forth hereinabove, Agreements for Consent Election based upon petitions filed by the Union in the latter part of 1974 were entered into in January 1975 for bargaining units in the hospital and clinics; elections were held in April 1975; timely objections thereto were filed also in April 1975; also in April 1975 an unfair labor practice charge was filed; in June 1976 the Regional Director issued a Report on Objections, order consolidating cases and complaint and notice of hearing; and, as of February 1977, the month in which the surveys were administered, the above matters had not proceeded to hearing. It would appear appropriate to find that, at the time the surveys were administered, Respondents could reasonably have assumed that it would be at least a year or more before the matters involved in the hearing would be resolved and new elections, if ordered, could be held.

The survey distributed to hospital personnel contained 119 questions and to the clinics 117 questions. Next to most questions were five choices ranging in degree from, for example, "very dissatisfied" to "very satisfied." While at least a dozen of the questions related to satisfaction with pay or terms and conditions of employment (including some of the core questions) as well as a last question inviting any comment or suggestion, the questions were designed for the most part to determine the effectiveness of management. In view of the nature of some of the questions (relating to pay and tenure and conditions of employment) and the above-quoted statements on the notices of the survey indicating that it was for the purpose of making improvements, I am of the opinion that the questions relating to pay and terms and conditions of employment constituted solicitation of grievances and the notices implied the possibility that they would be remedied.

There remains, however, the issue of whether or not, in the circumstances of this case, such conduct violated Section 8(a)(1) of the Act. It is noted that in their brief Respondents contend that the circumstances were such that their conduct did not interfere with, restrain, or coerce employees within the meaning of Section 8(a)(1) of the Act. In their brief Respondents clearly concede that the solicitation of grievances accompanied by an expressed or implied promise of benefits *in order* to interfere with employees' rights to organize is unlawful. They also apparently concede that it may be inferred from the timing of such an action that it was *designed* to interfere with said rights. However, they argue, in effect, that it should be inferred from background information as to the origin of the survey and the reason for implementing it, that it was not *designed* to interfere with said rights. It is further argued, in effect, that it should be inferred from the timing of the surveys (i.e., the prospect that elections would not be held for a considerable period of time and the lack of any organizational activities at, and for some time prior to, the time material herein) that there was no attempt to interfere with said rights, nor could such an effect be reasonably foreseen.

The General Counsel in urging a finding of a violation of Section 8(a)(1) of the Act relies on two cases: *Tom Wood Pontiac, Inc.*, 179 NLRB 581 (1969), and *The Miller Press*, 197 NLRB 574 (1972).

It is noted that the *Tom Wood* case involved an "opinion survey" not unlike the survey in this case. It is also noted, however, that the survey in the cited case was administered 1 week after the respondent therein entered into a Stipulation for Certification Upon Consent Election. The Board found that the conducting of the survey "in a preelection context" violated Section 8(a)(1) of the Act. It is further noted that the Board found that respondent's conducting of the survey was "for the purpose of undermining union organizational efforts."

In the *Miller* case the respondent therein engaged an industrial psychology firm to conduct a survey of its employees concerning their opinions of working conditions. The Board affirmed that portion of the Administrative Law Judge's Decision in which he found that the survey violated Section 8(a)(1) of the Act. It is noted, however, that the Judge found that said respondent "acted only because it was made aware of union activity in the plant and only because it opposed the unionization of its employees," and, in addition, from the circumstances surrounding the taking of the employee attitude survey therein, it "*was calculated* to and tended to inhibit" employees in the exercise of their rights under Section 7 of the Act. (Emphasis sup-

[4] *Obie Pacific, Incorporated*, 196 NLRB 458 (1972).

[5] It is noted she was notified that it would be implemented approximately a week prior thereto.

plied.)[6] It is further noted that the Administrative Law Judge stated (at 582):

> It is not unlawful for an employer to solicit employee grievances during a union's organizational campaign, "so long as 'the discussions [about grievances] avoided any attempt by tbe company to imply promises of benefit if the union was defeated.' " nor does the use of opinion surveys per se violate Section 8(a)(1); but the solicitation is unlawful if it is "accompanied by an express or implied promise of benefits *specifically aimed* at interfering with, restraining, and coercing employees in their organizational effort." [Emphasis supplied.]

Cases cited by Respondents, including *ITT Communications, a Division of International Telephone and Telegraph Corporation*, 183 NLRB 1129 (1970), support the conclusion that surveys, even though they solicit grievances and impliedly promise benefits, do not violate Section 8(a)(1) of the Act unless it be found that they had *as a purpose* that of undermining the organizing activities on behalf of the Union. In the *ITT Case*, the Board stated (p. 1129):

> The solicitation of employee grievances by an employer is not illegal unless accompanied by an express or implied promise of benefits *specifically aimed* at interfering with, restraining, and coercing employees in their organizational effort. [Emphasis supplied.]

Now the specific question to be resolved is whether or not the surveys, and particularly the questions therein relating to wages and terms and conditions of employment, had as an object thereof to undermine the organizing efforts of the employees on behalf of the Union. The answer to said question requires an analysis of the circumstances.

It is apparent from the credited testimony of Twomey that, before he even entered the position of director of personnel of the medical center, he contemplated using a survey as a tool to aid him in effective management should he be appointed to the position. Further, it is apparent from his credited testimony that he had previously used similar surveys as a management consultant at a number of medical facilities. It is quite clear, therefore, that the idea of using the surveys was not *originated* because of the employee's organizing activities on behalf of the Union, as the survey was found to be in the *Miller* case, *supra*. Nor were the surveys administered in a "preelection context" as found in the *Tom Wood* case, *supra*. In said cited case the survey was instituted 1 week after a Stipulation for Certification Upon Consent Election. In the instant case the matter of elections had been dormant for almost 2 years and could reasonably be expected to remain so for at least another year, pending resolution of objections to the elections and the aforementioned unfair labor practice complaint. Thus, in my opinion, it cannot be found that the surveys were administered in a "preelection context." It can be speculated that improvements or benefits which Respondents might incorporate in the wages or terms and conditions of employment as a result of information elected by the surveys would affect employees adherence to the Union if, or when, elections were held. It would appear, in the circumstances of this case, that it would be unreasonable to hold that for a period of years (between the election in April 1975 and the possibility of election in 1978 or later)[7] the Respondents would be prohibited to take action to find and remedy problems in order to improve employees' morale and effectiveness of operations. I have not overlooked the argument that at the time the surveys were administered employees were engaged in organizing activities on behalf of the Union. The testimony with regard to such activities consisted of meetings led by an employee representative of the Union, but without any indication that the meetings concerned compaigning for votes in favor of representation by the Union; dissemination of a newsletter, again without showing that it was directed at such a campaign; and union members assisting employees in processing grievances. I am satisfied that for a considerable period of time prior to, during, and after the surveys there was no active campaigning (in prospect of elections being held) carried on either on behalf of the Union or the Respondents. (It is noted that there was no mention of the Union or union representation in the surveys.) Consequently, it is found that the surveys were not administered in a "preelection context."

Based upon the above findings of fact, Decisions of the Board, and analyses, it is concluded that the General Counsel has failed to prove by a preponderance of the evidence that Respondents violated Section 8(a)(1) of the Act by administering the surveys in February 1977.

The Alleged 8(a)(5) Violation

With respect to the allegation of a violation of Section 8(a)(5), the one case relied upon by both the General Counsel and the Charging Party is *Obie Pacific, Inc., supra*. As indicated hereinabove, the finding of a violation in that case hinged upon a finding that the solicitation of grievances therein constituted "an attempt to erode the Union's bargaining position." The facts found in said case reveal that the respondent therein was attempting "to obtain the opinion of employees for subsequent presentation to the Union as a basis for obtaining a concession as to a revision of article II(f)" of the collective-bargaining agreement.

Apparently, in order to bring the facts of the instant case within the ambit of those in the cited case, both the General Counsel and the Charging Party refer to the provisions in the existing bargaining agreement with respect to employees falling within the classification of "life science technicians" of which apparently approximately 100 or more are represented by the Union under said agreement. In effect they argue that said agreement left a "substantial 'open' issue" as to the classification and wages of said technicians to be "resolved" during the "second year" of the agreement It appears that they would have me infer that the obtaining of information from said technicians constituted "an attempt to erode the Union's bargaining position" with respect to said technicians. I am not so persuaded. The collective-bargaining agreement provides for a

[6] *The Miller Press, supra*, 582 583.

[7] It is noted that the elections were eventually held in February 1978 as a result of a settlement which could not have been anticipated at the time of the surveys in February 1977.

"Classification Committee" composed of three representatives selected by the university and three "workers" selected by the Union, the purpose of which is "to investigate, study and make recommendations on classification specifications as provided in this agreement." The agreement further provides that within *2 years* of the execution of the agreement the university will develop revised specifications for the life science technicians and present them to the classification committee for its recommendations. It further provides that the Union's disagreement with the university as to the life science technicians' classification and pay scale may be made the subject of a grievance under the procedures set forth in the agreement with the ultimate right of arbitration. Assuming that the university is able to glean from the survey in which life science technicians participated their views as to wages and other terms and conditions of employment, the survey does not, in view of the time element (approximately a year and a half before the committee's recommendations were due) and the interposition of the committee in the process (which can only make recommendations) constitute "an attempt to erode the Union's bargaining position" within the purview of *Obie Pacific, Inc., supra.* There is no indication that the recommendations of the committee are binding upon either the university or the Union. In the circumstances, it does not appear appropriate to find that the survey in which employees represented by the Union could participate constituted an attempt to "erode" the Union's bargaining position. In addition, I do not believe it appropriate to find that by administering the survey Respondents were seeking to enlist employees' aid in support of Respondents' bargaining position with respect to the classification of life science technicians.

A case relied upon by the Charging Party is *Dow Chemical Co.*, 536 F.2d 550 (3d Cir. 1976); (on remand) 227 NLRB 1051 (1977). That case involved a "Speak Out" program which the Board concluded "violated Section 8(a)(5) of the Act by soliciting and adjusting grievances . . . without providing the Union an opportunity to be present at the adjustment." The *Dow Chemical* case, on its facts, is so dissimilar to the instant case that its holding cannot be applied herein. The element of adjustment of grievances without the opportunity afforded to the Union to be present at the adjustment is wholly lacking in the instant case.

As to the allegation that the administering of the surveys constituted "direct dealing" with the employees whom the Union represented or sought to represent, I am of the opinion that the facts herein will not support said allegation. There was no attempt to "deal with" employees with respect to their wages or terms and conditions of their employment, but at the most an attempt to elicit information from them with respect thereto which would provide Respondents with possible elements of discontent and impliedly promised the possibility of benefits. As stated hereinabove, I am of the opinion that such conduct, without more,[8] cannot be found to be violative of either Section 8(a)(1) or (5) of the Act.

There is nothing in the record viewed as a whole that would warrant a finding that the surveys were calculated to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them under Section 7 of the Act, not even Respondents' conduct subsequent to the surveys. It appears that the only action Respondents took as a result of the information they obtained from the surveys was to (1) upgrade the quality of food and expand the seating capacity of the cafeteria; (2) increase the dissemination of information regarding the affirmative action plan; (3) upgrade their publication, "Memo"; and (4) upgrade the supervisory development program. As stated in Respondents' brief, "these changes were at most changes in form rather than substance" and were not violative of the Act. *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976); *The Trading Port, Inc.*, 224 NLRB 980, 983 (1976). It is noted that there is neither any allegation nor contention that Respondents engaged in any conduct subsequent to the surveys that was violative of the Act.

It is further noted that Respondents contend that, had they violated Section 8(a)(5) and (1) of the Act by administering the survey to employees represented by the Union, no remedy for such conduct would be required in view of their memorandum to said employees, in effect, "disavowing" any intention to bypass the Union and assuring them that all legal obligations to bargain with their representative would be met. In support of said contention Respondents cite *Fleetwood Trailer Co.*, 118 NLRB 1355, 1356 (1957). While, in view of the findings hereinabove, it would appear unnecessary to consider the contention, nevertheless it is observed that it lacks merit. The memorandum did not *repudiate* their alleged unlawful act (as was found the respondent did in the cited case), but merely constituted an assurance that their alleged unlawful act was not intended to accomplish any unlawful effects.

Upon the basis of the foregoing findings of fact and upon the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Respondents are joint employers, each of whom is, and at all times material herein has been, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.
2. The Union, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.
3. The General Counsel has failed to prove by a preponderance of the evidence that by including employees whom the Union was seeking to represent among the employees to whom surveys were administered in February 1977 Respondents violated Section 8(a)(1) of the Act.
4. The General Counsel has failed to prove by a preponderance of the evidence that by including employees represented by the Union among employees to whom a survey

[8] That is, in circumstances which warrant a finding that it is "calculated" to interfere with, restrain, and coerce employees with respect to their rights guaranteed under Sec. 7 of the Act. *Central Diagnostic Laboratory*, 206 NLRB 754, 764 (1973).

was administered in February 1977 Respondents violated Section 8(a)(5) and (1) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER [9]

The complaint herein is dismissed in its entirety.

[9] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.