

**York Division, Borg-Warner Corporation and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW. Cases 9-CA-10252 and 9-RC-11382**

June 2, 1977

**DECISION, ORDER, AND DIRECTION OF SECOND ELECTION**

BY CHAIRMAN FANNING AND MEMBERS  
PENELLO AND WALTHER

On February 25, 1977, Administrative Law Judge Robert A. Giannasi issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

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 brief and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge and to adopt his recommended Order.

**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 Respondent, York Division, Borg-Warner Corporation, Madisonville, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

IT IS FURTHER ORDERED that the election held on April 15, 1976, in Case 9-RC-11382 be, and it hereby is, set aside, and that Case 9-RC-11382 be, and it hereby is, remanded to the Regional Director for Region 9 for the purpose of conducting a new election at such time as he deems appropriate.

[Direction of Second Election and *Excelsior* footnote omitted from publication.]

<sup>1</sup> The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

**DECISION**

**STATEMENT OF THE CASE**

ROBERT A. GIANNASI, Administrative Law Judge: The consolidated hearing in these cases, held on September 23 and 24, 1976, is based on the following: an unfair labor practice charge in Case 9-CA-10252 and objections to conduct affecting the results of the election in Case 9-RC-11382 filed by the above-named Union on April 20, 1976; a complaint issued on June 28, 1976, in Case 9-CA-10252; a supplemental decision issued on July 22, 1976, by the Regional Director for Region 9 which consolidated certain objections and challenges filed by the Union in Case 9-RC-11382 with the complaint in Case 9-CA-10252 for the purpose of hearing, ruling, and decision by an Administrative Law Judge. The complaint alleges that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act. Respondent filed an answer denying the commission of the alleged unfair labor practices. The Union's objections to conduct affecting the results of the representation election allege in substance that Respondent engaged in conduct which interfered with the holding of a free and fair election and constitute grounds for setting aside the election. The Union also challenged the votes of nine employees on various grounds.

Upon the entire record,<sup>1</sup> from my observation of the demeanor of the witnesses, and having considered the posthearing briefs submitted by General Counsel and Respondent, I make the following:

**FINDINGS OF FACT**

**I. THE BUSINESS OF RESPONDENT**

Respondent is a Delaware corporation engaged in the manufacture of heating and air-conditioning equipment at its plant in Madisonville, Kentucky. Respondent annually had a direct inflow of products valued over \$50,000 shipped to it from points located outside the State of Kentucky. I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

**II. THE LABOR ORGANIZATION INVOLVED**

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, herein called the Union, is admittedly a labor organization within the meaning of Section 2(5) of the Act.

**III. THE UNFAIR LABOR PRACTICES**

On April 15, 1976, the Respondent's employees voted in a Board-conducted election and rejected the Union by a vote of 149 to 143. The question presented in this case is whether, during the period before the election, the Respondent's representatives violated Section 8(a)(1) of the Act by the following conduct and, by such conduct, so

<sup>1</sup> Respondent moved to have the official transcript corrected in certain particulars. This motion was unopposed. Item 3 does not accord with my recollection of the testimony. I therefore grant the motion except as to item 3.

interfered with the election to require it to be set aside; interrogating employees about their union activities; requesting employees to wear "Vote No" buttons and not to wear union insignia; promising a promotion to an employee if he would discontinue his union activities; solicitation of employee grievances to undercut the Union; promising employees relief from excessive overtime to discourage union support; and threatening employees that, if they voted for the Union, negotiations would start from "scratch" or "zero," that employees might lose benefits through collective bargaining, and that wages and benefits would be frozen during negotiations for a contract.<sup>2</sup>

A. *Interrogations, Promises of Benefits, and Interference With Protected Activity*

1. Interrogations of employee applicants

During the last part of February 1976, Edward Payton was interviewed by Personnel Director Rod Johnson for a position with Respondent. During that interview, Johnson told Payton that Respondent operated a nonunion plant and would like to keep it that way. He then asked Payton how he felt about the Union. Payton replied that he had not worked for a union so he did not know. Johnson also interviewed Ronnie Payton. During that interview, Johnson brought up the subject of the Union, telling Payton that there would be an election at the plant in April 1976. He asked Payton his opinion of the Union.<sup>3</sup>

It is well established that interrogation of employees or employee applicants concerning their union sympathies violates Section 8(a)(1) of the Act. *F. M. Broadcasting Corp.*, 211 NLRB 560 (1974); *Rochester Cadet Cleaners, Inc.*, 205 NLRB 773 (1973). Here the credited testimony clearly shows such unlawful interrogation. No lawful purpose was shown for the questions and no assurances were given that the information elicited would not cause reprisals. Indeed, it appears that Respondent's purpose for the questions and Johnson's accompanying statements was to discourage union support and activity among prospective employees. In these circumstances, I find that Johnson's questions were coercive and violative of Section 8(a)(1).

2. Interrogations of employee concerning a theoretical strike

On March 30, 1976, Department Supervisor Jim Guenther approached employee Ronnie Payton while he was at

<sup>2</sup> Also presented by the supplemental decision of the Regional Director is the issue of whether nine employees, whose ballots were challenged, properly voted in the election. Seven employees whose votes were challenged by the Union were hired after March 14, 1976, the last day of the payroll period immediately preceding the March 17, 1976, decision by the Regional Director directing the election. They, therefore, were not eligible to vote in the election. As to the remaining two challenges, the evidence at this hearing shows, and I find, that Roy Villines, a paint technician, and James Robinson, an employee on sick leave, were eligible to vote. Accordingly, I overrule the challenges to their votes. Villines' job classification, that of paint technician, is properly within the election unit. He has no supervisory responsibilities; he received the same fringe and other benefits as other employees; and he works side by side with other unit employees. James Robinson has been incapacitated because of a work-related injury and is receiving insurance compensation. He had a reasonable expectancy of recall at the time of the election.

his work station and, pointing to Payton's two union buttons, asked how he felt about them. Payton responded that he thought the Union could bring about better benefits for employees. Guenther replied that he thought the employees had the best benefits available, and then questioned Payton as to what he would do if there were a strike that lagged on for a couple of weeks and Payton had six mouths to feed. On or about April 1, 1976, Payton was also approached at his work station by Supervisor Gene Townsend, who pointed to Payton's union buttons and asked how he ever got involved in the Union. Payton responded that he thought it could bring about better benefits for employees. Townsend told Payton that Respondent was the best in the area or among the best in benefits, and if the Union came in benefits would still have to be negotiated from zero. Townsend then asked Payton what he would do if there were a strike. Employee Ronald Cardwell was present during part of this conversation, and heard Townsend ask Payton how he got involved in the Union. Townsend also asked employees why they thought they needed a union.<sup>4</sup>

Interrogation of employees as to what they would do in the event of a strike, especially when asked in the absence of any actual strike threat, is coercive and violates Section 8(a)(1) of the Act. *W. A. Sheaffer Pen Company, a Division of Textron, Inc.*, 119 NLRB 242 (1972), aff'd. 486 F.2d 180 (C.A. 8, 1973). There was no lawful purpose for the inquiries by Townsend and Guenther as to the union sympathies of employees, nor were there assurances against reprisals. Accordingly, I find that the interrogations of employees Payton and Cardwell tended to coerce employees and were violative of the Act.

3. Other interrogation and interference with the wearing of union buttons

On or about April 1, 1976, Cardwell was asked by Supervisor Roger Pollert how he felt about the Union. When Cardwell answered that he felt pretty good about it, Pollert asked him why and pressed him for examples of how the Union could help the working man and also asked him if he wanted more holidays or wages. Cardwell answered that he wanted seniority rights and job descriptions. Pollert then stated that employees already had those benefits. Cardwell disagreed, but Pollert continued questioning him and, Cardwell told Pollert about a job-related complaint. Also at about this time, Pollert spoke to employee Roger Dawson and commented on the fact that

<sup>3</sup> These findings are based on the credited testimony of the Paytons who impressed me as reliable witnesses. Johnson denied that the Union was mentioned in the interview, but he testified that he tells any prospective employee that Respondent is a nonunion operation and intends to stay that way. Johnson further testified that if employees do not bring up the subject of a union at their employment interviews he brings it up, noting that Respondent is a nonunion operation and intends to stay that way, and that this causes a majority of the applicants to make some comment of their own on the matter. I find it likely, in view of his admitted concern about unions in employment interviews, that Johnson questioned the Paytons as they testified.

<sup>4</sup> Townsend could not recall the details of the above conversations. Guenther denied questioning Payton about his union button. As indicated above, I found Payton to be a truthful witness and I credit him. I also credit Cardwell, whom I found to have testified reliably on this issue.

Dawson was still wearing his union buttons. He also asked if Dawson thought the Union would solve all of his problems. This caused Dawson to respond that he felt it would solve some of his problems. Pollert concluded that in his opinion it would just create more.<sup>5</sup>

On April 6, 1976, Johnson asked employee Frankie Reagor why she was voting for the Union, since she was wearing a union button. She responded to Johnson saying that she was doing so because she wanted to. Johnson then asked her if Respondent had not been good to her, and Reagor replied that she was thinking of others.<sup>6</sup> Thereafter, on April 8, Reagor was called to the office by Department Manager Scott Boxer. Once in the office, Boxer asked Reagor why she was voting for the Union. Reagor had been wearing a union button for between 2 and 4 days. Reagor declined to discuss the matter on company time without a witness, and the conversation was terminated.<sup>7</sup>

On April 14, Supervisor Dean Harper asked employees Katherine Crowley and Pamela Sims why they were wearing "yes" stickers. He also asked why they were for the Union or what the Union could do for them. After their responses, Harper asked Crowley if she believed there would be a strike if the Union came in.<sup>8</sup>

On April 12, 1976, while employee Edward Payton was at his work station in the paint room, his supervisor, Dean Harper, asked him and a fellow employee how they felt about the Union. Payton said he thought it would be a good idea. Harper then asked if they thought the Union would get in, and Payton replied that he hoped it would.<sup>9</sup>

On April 12, 1976, Delores Jarvis was called to see her supervisor, Charles Lowery, in his office. When she arrived at the office, Lowery asked Jarvis why she was wearing a union button and did she have a problem. Jarvis told Lowery that it was based on her feelings about her job and Respondent. Lowery then asked her to explain what she meant and Jarvis did so. Thereafter, Lowery asked Jarvis to remove her union button, which she did. During the conversation, Jarvis told Lowery she felt she was being treated unfairly by the team leader, and that she had considered going to see Plant Superintendent Doug Vick. Lowery then told Jarvis that it was a good thing she didn't do that wearing her union button. During the conversation, Lowery told her she was being considered for a team leader job, which pays 20 cents more per hour, and has the advantage of the incumbent not having to stay actively

working at one job for 8 hours. She said she did not want the job.<sup>10</sup>

On April 14, following the interview during which Supervisor Lowery prevailed upon her to forgo wearing her union button, Jarvis noticed that another employee was wearing three "Vote No" buttons. She then called Lowery over to where she was working and asked him why that employee was allowed to wear "Vote No" buttons, whereas Lowery did not want employees to wear the union buttons. Lowery replied, saying, "Well, if you want to wear a Vote No button, that is fine. Do you want one?" At that time, Lowery had a box of such buttons on his desk within about 8 feet of where they were standing.<sup>11</sup>

During the week of April 12, 1976, Supervisor Terry Jones approached employee Ula Dean Tyson in her work area, and asked her to wear a "Vote No" button, handing one toward her. According to Tyson, Jones had a handful of such buttons at that time.<sup>12</sup>

In accordance with the above findings, I find and conclude that Respondent violated Section 8(a)(1) of the Act by interrogating employees about their union sympathies and activities. In addition some of the confrontations discussed above occurred in the context of discussion of employment benefits or in the formality of an office interview with supervisors, thus highlighting their coercive effect. Even though some of the employees were known union supporters, Respondent's inquiries and requests tended to probe the strength of their union support. Respondent's conduct in restraining employees from wearing "Vote Yes" buttons and at the same time requesting them to wear "Vote No" buttons was also unlawful. Such conduct compels employees to make a choice or exhibit the depth of their pro- or antiunion feeling in front of management officials and thus constitutes a subtle form of coercive interrogation. See *Bancroft Manufacturing Company, Inc., Croft Aluminum Company, Inc., Croft Ladders, Inc., Croft Metal Products, Inc., and Lemco Metal Products, Inc.*, 189 NLRB 619, 629 (1971); *Kawneer Company, a Division of American Metal Climax, Inc., Appliance Products Division*, 164 NLRB 983, 995 (1967), enfd. in relevant part 413 F.2d 191 (C.A. 6, 1969); *The Faulhaber Company*, 191 NLRB 326, 329 (1971). In any event, such conduct requires the overturning of an election even if it is not found to be an unfair labor practice because it creates an atmosphere which precludes a truly free

<sup>5</sup> The above is based on the testimony of Cardwell and Dawson, whom I credit as reliable witnesses on this issue. Pollert did not deny the conversation with Dawson. He testified that he did have a conversation substantially like that related by Cardwell but could not recall asking Cardwell "any question" or "how [the conversation] came about."

<sup>6</sup> The above is based on the credited testimony of Reagor. I do not credit Johnson's contrary testimony. In response to a question about Reagor, he testified that the conversation dealt with her personal problems and not the Union. He then defensively volunteered that he could not have questioned Reagor about the Union because she was an obvious union supporter. In view of answers such as this and his demeanor throughout his testimony, I believe Johnson's testimony was contrived and unreliable.

<sup>7</sup> The above is based on Reagor's testimony. I was particularly impressed with Reagor's demeanor as a witness. She was recalled as a witness after Boxer had testified that the above conversation dealt with the death of Reagor's son. She effectively rebutted that testimony. Boxer's testimony seemed to me to be contrived. He sought to explain away all conversations with Reagor by saying he never talked to her about the Union, but that he only talked to her about her son and her attendance problem. I do not credit Boxer's testimony.

<sup>8</sup> The testimony of Sims and Crowley was substantially the same. I credit their testimony. By his own admission, Harper could not recall the specifics of this conversation.

<sup>9</sup> Harper did not deny this conversation in his testimony.

<sup>10</sup> The above is based on the credited testimony of Jarvis. Lowery also testified about this conversation. He said that he noticed Jarvis had a union button and asked her how he had failed. He also testified that she took the button off and that he asked her if she thought a union was needed and if she had a problem. He denied asking her to take the button off or talking about the team leader job, although he testified he did so on an earlier occasion. I credit Jarvis who was much more detailed in her testimony and impressive as a witness. Much of Lowery's testimony supports Jarvis but I cannot believe she would have removed her union button, as Lowery testified, without any reason. It is more likely that she did so because of Lowery's remarks, as she testified.

<sup>11</sup> Lowery did not deny this conversation in his testimony.

<sup>12</sup> Jones was not called as a witness.

election. See *The Chas. V. Weise Co.*, 133 NLRB 765 (1961).

4. Other interrogation and promises of benefits directed to employees Buchanan and Cardwell

The General Counsel alleges that employee Larry Buchanan was unlawfully questioned on April 6 when he was at the Ramada Inn for a union organizational meeting. He testified that he encountered Supervisor James Daniels in the Shamrock Room and that Daniels offered Buchanan a drink. When Buchanan refused, Daniels asked him if he had to attend a union meeting. Daniels' account of the encounter is somewhat different. He denies asking whether Buchanan had to attend a union meeting. I find that, even if the interrogation occurred as alleged, it was not coercive, particularly since it was a chance meeting away from the plant in a social context, and, in my view of the testimony of both witnesses, it was made and taken in a friendly joking manner.

The General Counsel also alleges that Supervisors Tom Lutz and Nick Popowich unlawfully interrogated employee Ronald Cardwell on the day of the election, April 15. Cardwell testified that Lutz asked him how the election would come out and he replied he thought the Union would win by 80 percent to 20 percent. Lutz laughed and asked what he thought he could gain with the Union. Cardwell responded by reciting benefits, and Popowich said he did not know what they would get because they would start with two goose eggs. Lutz and Popowich both testified that Cardwell initiated the conversation by predicting a union victory by a wide margin. I was favorably impressed by the testimony of Lutz and Popowich which was in essence mutually corroborative. I therefore do not find there was unlawful interrogation in this conversation. Moreover, the context of conversation did not suggest coercion. My view of the testimony is that this discussion, which I find was initiated by Cardwell, was typical employee banter and taken in a friendly manner by all concerned.

In late March 1976, Buchanan approached his supervisor, Scott Boxer, for the purpose of informing Boxer that he desired to resign from the position of team leader. Boxer mentioned that he considered Buchanan to be a good management prospect. Boxer went on to say that Buchanan had good management ability and that if he would dedicate himself to company goals he would go a long way in the Company. At this point, Buchanan asked if that meant that if he gave up his union activities he would go up in the Company. Boxer replied in the affirmative.<sup>13</sup>

While Buchanan was on his way to the water fountain on April 15, election day, he encountered Rod Johnson. As Buchanan walked by Johnson, Johnson pointed to Bu-

<sup>13</sup> Boxer could not recall the latter statement but testified that he had many conversations with Buchanan about his management potential. As I indicated above, I found Boxer not to be a reliable witness. I thought Buchanan's testimony on this issue was straightforward and accurate.

<sup>14</sup> Johnson's contrary testimony on this issue is discredited. As in other aspects of his testimony he seemed anxious to go beyond the scope of the questions and give self-serving explanations, I found him to be a totally unreliable witness.

<sup>15</sup> The above is based on the testimony of employees Payton and Buchanan whom I credit as straightforward reliable witnesses on this issue.

chanan's union T-shirt and said that Buchanan knew better than that, asked why Buchanan did not take it off, and stated that Buchanan was a good management prospect.<sup>14</sup>

The General Counsel asserts that the two conversations with Buchanan amounted to promises of benefit to discourage his active union support and leadership position.

Johnson's statement to Buchanan was not unlawful in context. His remarks were innocuous and did not constitute a promise of benefit in exchange for abandonment of the Union. Buchanan's own testimony leads me to the conclusion that the remarks were made in a manner in which they could not have been taken seriously.

The crucial evidence in the Boxer-Buchanan conversation is Boxer's affirmative reply to Buchanan's question as to whether, if he gave up his union activities, he could get a promotion. This is a clear promise of benefit and it is unlawful notwithstanding that the subject may have been initiated by Buchanan. See *Medo Photo Supply Corporation v. N.L.R.B.*, 321 U.S. 678, 683 (1944).

B. Solicitation of Employee Grievances

During the first week of April 1976, Plant Manager Dean Couch spoke to the employees at team meetings, including some which combined the tubing, welding, and wiring departments all in one meeting. Couch conducted question and answer sessions at the meetings. He asked the employees if there were any questions that he might be able to answer concerning problems in the departments. Couch did not attend team meetings very often, and did not normally conduct such meetings. It was also very unusual to have more than one team at a meeting.

On or about April 8, a notice was posted on the bulletin board stating that Plant Manager Couch would be in the cafeteria the following day to answer any questions individual employees might have pertaining to the Union or other matters. The following day, employee Buchanan visited the cafeteria and spoke with Couch, bringing up the subjects of seniority, job posting, and bidding procedures. Couch responded, saying he agreed there had been problems in those areas and that Respondent was reviewing the policies and was going to try to do better. Such meetings were unusual at Respondent's plant.<sup>15</sup>

The Board has held that, in the absence of an established program, the holding of meetings at which employees are encouraged to air their grievances or problems constitutes solicitation of those grievances and an implied promise of corrective action if employees will reject the Union, thus violating Section 8(a)(1) of the Act. *Shulman's Inc., of Norfolk*, 208 NLRB 772 (1974), reversed on other grounds 519 F.2d 498 (C.A. 4, 1975); *Ring Metals Company*, 198 NLRB 1020 (1972); *Reliance Electric Company, Madison*

Couch's testimony did not substantially conflict with their testimony. He testified that he called or attended a number of team meetings in early April to answer questions concerning the union campaign. Although Couch did testify that it was unusual to combine teams for a single meeting as he did, he did not testify in detail about these meetings. I consider this unusual in view of Couch's almost total recall when testifying about speeches he gave to assembled employees. Accordingly, to the extent that Couch's testimony contradicts or deviates from that of Payton and Buchanan, I discredit his testimony.

*Plant Mechanical Drives Division*, 191 NLRB 44, 46 (1971), *affd.*, 457 F.2d 503 (C.A. 6, 1972). The meetings held on a three-team basis as well as the April 9 meeting for all employees in the cafeteria were clearly attempts to solicit grievances. Such meetings were not held pursuant to established policy and they were held in the midst of a union campaign. The sole purpose for which they were held was to encourage employees to state their grievances and problems and to imply that Respondent would resolve grievances if employees would reject the Union. Thus, Couch stated that Respondent was reviewing certain practices complained of and was going to try to do better. Indeed, it appears that, as a result of his conversations with employees, Couch learned of complaints about overtime and he subsequently promised relief therefrom in a manner which clearly left the impression that such relief would be forthcoming if the Union were rejected (*infra*, sec. III,c). In accordance with the cases cited above, I find that Respondent's solicitation of grievances and implications that they would be corrected without a union violated Section 8(a)(1) of the Act.

### C. Promises of Relief From Excessive Overtime

Plant Manager Dean Couch spoke to assembled employees advising them to vote against the Union in the upcoming election. He spoke four times, on March 29 and 30, and again on April 13 and 14, 1976. In at least three of these meetings, Couch said that employees had been complaining to him about working too much overtime and that Respondent was going to cut out overtime. Such testimony came from four employees—Cardwell, O'Nan, Dawson, and Covington—whom I found to be truthful witnesses on this issue. Couch himself admitted he spoke about overtime in his speeches of March 29 and 30, telling employees that he knew they were tired of working so much overtime and that this was the second most common question asked of him when he talked to employees. He testified he told employees that "in order to try to find some reasonable level of overtime work we are continuing to hire people just as fast as we are able to hire them." According to Couch, this discussion was before and unconnected with his antiunion speeches, discussed *infra*, section III, D, par. 1. I do not credit Couch's testimony insofar as it conflicts with that of the employees named above and insofar as he asserts that his overtime talk was unconnected to the antiunion speech. As to the former, I note that the employees were still employed and testified against their employer's interests. As to the latter, I note that overtime was a significant issue in the plant at this time, that Couch admittedly learned of the issue in employee meetings, and, as I have already found, Couch unlawfully solicited grievances in an effort to defeat and undercut the necessity of a union.

<sup>16</sup> The above is based on the composite testimony of employee witnesses whom I credit. Couch's testimony about the speeches was not substantially in conflict with the versions of employee witnesses. For example, Couch admitted that he had told employees that if the Union won bargaining rights negotiations would start from scratch. Couch further testified that he had told employees that negotiations could take some period of time, but he could not recall specifically how many months he had said. On cross-examination, Couch stated that he had said to the employees that it would not be unusual to take 6 to 9 months, and that there were cases on record

Thus, I find that the employee meetings conducted by Plant Manager Couch were for the specific purpose of putting forth Respondent's campaign position and arguments. In at least three of those meetings, Couch seized the opportunity to promise employees relief from excessive overtime, a matter he knew to be one of the foremost complaints that his employees had about their working conditions. This constituted a promise of correction of their grievances and an improvement in their working conditions, in an attempt to win their support in defeating the Union, and, therefore, constitutes a violation of Section 8(a)(1) of the Act.

### D. Threats To Bargain From Scratch or From Zero

The evidence in this case also shows that in the four speeches to assembled employees on March 29 and 30 and April 13 and 14, Plant Manager Couch informed employees that if the Union got in, bargaining would start from "scratch" or "zero," and that he emphasized this in various ways such as reference to "two goose eggs," and holding up a blank sheet of paper. He stated that present benefits were the best in the area, but that if the Union came in all benefits would be frozen during the period of negotiation, which he stated could take a long time, from 6 to 9 months or even longer. He also said that, even though an annual wage survey came up in August, if negotiations were going on at the time, nothing could be done about it. Couch did not specifically say that benefits would be lost or taken away.<sup>16</sup>

Couch also referred in his speeches to a union leaflet which had been distributed to employees and was received into evidence in this proceeding as Respondent's Exhibit 1. That leaflet set forth accurately the rights of employees guaranteed under Federal law. At the bottom of that leaflet was the following statement:

#### You Will Not Lose Any Of Your Present Benefits.

This was emphasized and followed by the explanation "Your management is aware that it would be a violation of Federal law to refuse to continue your present benefits just because you exercise your legal right to form a union." Respondent issued another leaflet mailed to employees on April 2, 1976, answering the union leaflet with quotes from court and Board decisions including *Ludwig Motor Corp.*, 222 NLRB 635 (1976), which Respondent relies on in this proceeding to support its contention that the Couch speech was proper. Couch testified that he told employees in his speeches that the union leaflet was misleading because it

that had gone 12 months or longer. Couch also testified that he gave assurances to employees that Respondent could not, by law, interfere with their rights.

However, I found Couch's testimony on the speeches to be so self-serving and designed to fit a particular mold as not to be a reliable recitation of what actually was said in the speeches. Thus, I specifically do not credit his denial that he referred in his speeches to upcoming wage surveys. Nor do I credit his version of what was said in the speeches to the extent that it conflicts or differs with that of employee witnesses.

suggested that employees would not lose any of their present benefits.<sup>17</sup> He said benefits are not lost through an election but through negotiations whereby a union trades some existing benefits for other different contract clauses. He then mentioned the "bargaining from scratch" remarks.

In considering all the testimony concerning the Couch speeches, including that of employee witnesses who were unable to recall exactly how Couch referred to the union leaflet, I am convinced that Couch plucked a statement from the leaflet out of context in an attempt to utilize the "loss of benefits" issue in his speech. Thus, the Union told employees in the leaflet that present benefits could not be lost because employees chose to form a union, but the Union's position was treated by Couch as a guarantee that benefits would not be lost through negotiations. I am also convinced that this subtle and misleading change in emphasis by Couch was made in an attempt to place his "bargaining from scratch" speech on the same legal footing as the speech considered by the Board in *Ludwig*. As I point out *infra*, that case is distinguishable. More importantly, however, Couch's remarks are to be considered in the context in which they were made. A significant factor in assessing the context of the remarks and whether they were coercive in effect is Couch's subtle and misleading reference to the union leaflets. The following language of the Supreme Court is apropos:

[A]n employer, . . . can easily make his views known without engaging in "brinkmanship" when it becomes all too easy to "overstep and tumble [over] the brink," *Wausau Steel Corp. v. N.L.R.B.*, 377 F.2d 369, 372 (7th Cir., 1967). At the least he can avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees. [*N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575, 620 (1969).]

The Board has held that statements by an employer to the effect that negotiations or bargaining will begin from scratch, and other statements indicating that the employees' selection of a union to represent them will result in the loss or possible loss of existing benefits, constitute violations of Section 8(a)(1) of the Act and a basis for setting aside an election. *Textron, Inc. (Talon Division)*, 199 NLRB 131, 134 (1972); *Astronautics Corporation of America*, 164 NLRB 623 (1967); *Saunders Leasing System, Inc.*, 204 NLRB 448, 454 (1973), modified 497 F.2d 453 (C.A. 8, 1974); *Monroe Manufacturing Company, Inc.*, 200 NLRB 62, 71 (1972); *Herb A. Cook and Joan D. Cook d/b/a Golden Hours Convalescent Hospitals*, 182 NLRB 796, 803 (1970).

I find from the entire record in this case that Respondent's dominant statements and those which were recalled most consistently and with the greatest clarity by all the witnesses who testified about the Couch speeches involved a reference to existing employee benefits, and what would happen to them in negotiations if the Union were selected to represent the employees. Although Couch did not specifically say that existing benefits would be taken away, he emphasized the possible loss of benefits. Even though he

tied this loss of benefits to the onset of negotiations, he did so in such a way as to suggest that selection of the Union would likely lead to this result. Thus, he hammered home his point that once a union obtains bargaining rights benefits start from zero by waiving a blank sheet of paper. He predicted that negotiations would last from 6 to 9 months and informed employees that during that period they would have to forgo any planned or established program for the improvement of their wages or benefits, such as the annual wage review which was to take place in a few months. Finally, the speech was not made in isolation but in the context of numerous other unfair labor practices found herein which demonstrated Respondent's propensity to engage in coercive conduct to defeat the Union.

In these circumstances, I find that the clear implication of Respondent's speech was that selection of the Union would result in a loss of existing benefits which would have to be restored in bargaining. In addition, I find that Respondent's statements about frozen benefits during lengthy negotiations had the effect of reinforcing the above implication and of making clear the futility of selecting a union which would face the difficulties it predicted in negotiating a restoration of those benefits with Respondent. As the Board has stated:

While an employer is entitled to tell his employees that he will bargain hard, Section 8(c) does not protect the expression of an intention to make bargaining demands that will place in jeopardy the employees' existing benefits, where, as here, the clear implication is that he will make such demands merely because he is required to deal with a union so that the only way the employees can be certain of retaining their existing benefits will be to reject the union. [*Textron, supra* at 135.]

Respondent's attempt to place Couch's speech on a par with one considered lawful by the Board in *Ludwig Motor Corp., supra*, is not persuasive. That case is distinguishable in its facts. First of all, the union leaflet which allegedly prompted Couch's remarks was in no way comparable to the exaggerated and repeated emphasis by the union in *Ludwig* that existing benefits would be guaranteed and improved upon after bargaining. Thus Couch's remarks were so misdirected and out of proportion to the union leaflet to which he referred as to negate any possible inference that he was simply responding to an exaggerated or untruthful union position. Secondly, unlike in *Ludwig*, Couch did not frequently and emphatically state in his speech that the Respondent would bargain in good faith. On the contrary, he made clear to employees that Respondent's position would be such that negotiations would take a long time and would place in jeopardy existing benefits or normal increases. And finally, unlike in *Ludwig*, Couch's speech herein was made in the context of numerous other unfair labor practices, including the solicitation of grievances and promises of benefit, which, in my opinion, created an atmosphere of employer coercion and interference even apart from the Couch speeches.

<sup>17</sup> In litigation, Respondent also made the assertion that the leaflet was misleading because it purported to be an official government document. This was not Couch's point in his speech.

*E. Respondent's Contentions Concerning Lack of Actual Coercion Are Unmeritorious*

Presumably in an effort to show that the Respondent's unfair labor practices did not have an adverse effect on the election, Respondent also asserts that I should consider testimony that some employees may not have felt coerced by the actual interrogations or other conduct of or statements by Respondent.<sup>18</sup> It is clear that in assessing violations of the Act, the question of whether employees actually felt coerced as a subjective matter is not significant; the Board and the courts have made the determination that certain conduct, as an objective matter, has a reasonable tendency to coerce in its effect and for that reason it is prohibited.<sup>19</sup> This objective standard is also utilized in assessing whether conduct has polluted the atmosphere for a free election.<sup>20</sup> Respondent also cites cases involving election misconduct which does not violate Section 8(a)(1) to support its position that subjective evidence of coercion or noncoercion is relevant or significant in determining whether an election should be overturned. Those cases involved employee misconduct not attributed to either party or employer misconduct which, although not constituting a violation of the Act, such as alleged misrepresentation, sometimes results in the overturning of an election. Those cases are thus distinguishable from the instant case where numerous and serious violations of Federal law were committed by Respondent's admitted agents.

IV. THE OBJECTIONS TO THE ELECTION

Inasmuch as the objections to the election related to statements and conduct found to constitute unfair labor practices, it follows that the election should be set aside and another one conducted when the Regional Director determines the time to be appropriate. I so recommend.

CONCLUSIONS OF LAW

1. The Respondent has engaged in various unfair labor practices within the meaning of Section 8(a)(1) of the Act.
2. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Since I have found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, I will recommend that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies 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 issue the following recommended:

ORDER<sup>21</sup>

York Division, Borg-Warner Corporation, Madisonville, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Questioning employees concerning their union membership, sympathies, or desires.

(b) Promising employees benefits or relief from oppressive working conditions if they abandon support for the Union.

(c) Soliciting grievances from employees and implying their resolution in order to discourage support for the Union.

(d) Threatening employees that bargaining will begin from scratch or from zero and that benefits will be frozen during negotiations if the Union is selected as bargaining representative of the employees.

(e) Requesting employees to remove union buttons and to wear "Vote No" buttons.

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

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

(a) Post at its Madisonville, Kentucky, plant copies of the attached notice marked "Appendix."<sup>22</sup> Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaint be dismissed insofar as it alleges unfair labor practices not found herein.

IT IS FURTHER RECOMMENDED that the election conducted in Case 9-RC-11382 on April 15, 1976, be set aside and that the Regional Director for Region 9 conduct a rerun election at a time he deems appropriate.

<sup>18</sup> Some evidence was permitted or appeared in the record on this issue, as well as other issues which Respondent alleges are significant, such as campaign statements that employees had certain rights which could be asserted without employer interference and that employees openly talked about the Union at the plant. None of this evidence negates the fact that Respondent's agents did in fact engage in conduct which had the tendency to coerce employees as I have found above.

<sup>19</sup> *Mon River Towing, Inc. v. N.L.R.B.*, 421 F.2d 1, 10 (C.A. 3, 1969); *N.L.R.B. v. E. S. Kingsford d/b/a Kingsford Motor Car Co.*, 313 F.2d 826, 832 (C.A. 6, 1963); *N.L.R.B. v. Illinois Tool Works*, 153 F.2d 811, 814 (C.A. 7, 1946); *G.H.R. Foundry Division, The Dayton Malleable Iron Company*, 123 NLRB 1707, 1709 (1959).

<sup>20</sup> *N.L.R.B. v. Clearfield Cheese Co., Inc.*, 322 F.2d 89, 93-94 (C.A. 3, 1963).

<sup>21</sup> 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.

<sup>22</sup> In the event that 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."

## APPENDIX

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

After a hearing at which all sides had the opportunity to present their evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, and we are ordered to post this notice and comply with what it says.

The National Labor Relations Act gives all employees these rights:

- To engage in self-organization
- To form, join, or help unions
- To bargain collectively through a representative of their own choosing
- To act together for collective bargaining or mutual aid or protection
- To refrain from any and all of these things.

WE WILL NOT do anything, either directly or indirectly, that interferes with these rights.

WE WILL NOT question employees concerning their union membership, sympathies, or desires.

WE WILL NOT promise employees benefits or relief from oppressive working conditions if they abandon support for the Union.

WE WILL NOT solicit grievances from employees nor imply their resolution in order to discourage support for the Union.

WE WILL NOT threaten employees that bargaining will begin from scratch or from zero and that benefits will be frozen during negotiations if the Union is selected as bargaining representative of the employees.

WE WILL NOT request employees to remove union buttons and to wear "Vote No" buttons.

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

YORK DIVISION, BORG-  
WARNER CORPORATION