lawful agreement unlawful as the majority in effect holds. In the absence of any provision expressly making the Union's lack of approval the final determinant of whether in a particular case a former employee shall be restored to his former seniority status, it is only reasonable to conclude that the Employer has not foregone its right to negotiate with the Union on that issue. Indeed, such negotiation would seem to be a matter of right under the terms of the grievance and arbitration clause, which provides:

> All grievances, differences, disputes, or claims arising between the parties hereto and relating to the terms of this agreement, shall be settled promptly by negotiations between the Employer and the employee or union representative. . . .

Viewed in this light, the provision accords all former employees their former seniority status unless the parties mutually agree otherwise and as such it is a lawful provision.[18]

In our opinion, any other construction of the provision before us attributes to the Employer a willingness to forego in the administration of the collective-bargaining agreement, principles it was unwilling to recede from in bargaining for the contract. Accordingly, we find that the provision relating to the restoration of seniority is a valid clause, and that the contract is a bar.

As the contract was properly executed prior to the filing of the petition [19] it constitutes a bar to an election of representatives at this time.

[18] *North East Texas Motor Lines, Inc.*, 109 NLRB 1147, 1150.

[19] We find that the rule of the *General Electric X-Ray Corporation*, 67 NLRB 997, does not apply because Petitioner's initial request for recognition was defective in that it was in respect to an inappropriate unit, and the Petitioner was not in compliance at the time.

The DeVilbiss Company *and* Richard Glenn Platt, Petitioner *and* International Union, United Automobile, Aircraft & Agricultural Implement Workers of America and its Local Union No. 1237, UAW-AFL-CIO.[1] *Case No. 6-RD-119. April 27, 1956*

SECOND SUPPLEMENTAL DECISION AND DIRECTION

On November 30, 1955, pursuant to a Supplemental Decision, Order, and Second Direction of Election,[2] an election by secret ballot was conducted under the direction and supervision of the Regional Di-

[1] The AFL and the CIO having merged, we amend the identification of the Union's affiliation.

[2] 114 NLRB 945.

rector for the Sixth Region among the employees of the Employer in the unit found appropriate by the Board. Following the election, the Regional Director served on the parties a tally of ballots which showed that of approximately 44 eligible voters, 41 cast valid ballots, of which 21 were cast for and 20 against the participating labor organization. There was 1 challenged ballot. This challenge was sufficient to affect the results of the election.

On December 7, 1955, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America and its Local No. 1237, UAW–AFL–CIO, herein called the UAW, filed timely objections to conduct affecting the results of the election. In accordance with the Rules and Regulations of the Board, the Regional Director investigated the objections and the challenge and, on January 23, 1956, served upon the parties his report on objections and challenged ballot in which he recommended that the objections and the challenge be overruled. Thereafter, the UAW filed timely exceptions to the Regional Director's report on objections and challenged ballot. On February 23, 1956, the Regional Director served upon the parties a supplemental report on objections in which he recommended that the UAW's sixth exception be overruled as it is in the nature of a postelection challenge. The UAW also filed exceptions to this supplemental report.

The Board has considered the UAW's objections, the Regional Director's report on objections and challenged ballot and his supplemental report on objections, and the UAW's exceptions to these reports. Upon the entire record in the case, we hereby adopt the findings, conclusions, and recommendations of the Regional Director.[3]

The Objections

Objection 1: The UAW contends that the Petitioner advised fellow employees that the plant would go out of business or leave town if the UAW were retained as bargaining agent. The Regional Director's report reveals that one employee averred that the Petitioner at an anti-UAW meeting stated that the Company would leave town if the UAW were retained as bargaining agent. The Petitioner denies making such statement and his denial is corroborated by some other employees present at the meeting. The UAW argues that the Petitioner's remarks created an atmosphere in which a free and untrammeled choice of representatives could not be attained, citing *The Falmouth Company.*[4] Contrary to the UAW, we do not think that the facts in this present proceeding warrant the application of the *Falmouth* decision. In that case, the employer's employees were

[3] As the Regional Director's reports, the exceptions, and briefs adequately present the issues and positions of the parties, the UAW's request for oral argument is denied.

[4] *The Falmouth Company,* 114 NLRB 896.

admonished by local businessmen via mail and personal contacts that the employer would leave town if the AFL won the ensuing election. The local newspaper carried this same threat. The employees were, in fact, on all fronts barraged by verbal and written warnings. Although this conduct was not specifically ascribed to the employer, the Board felt that the total effect of this campaign against the AFL created an environment that was not conducive to the holding of a free election. In the instant case the election air was not so beclouded; therefore we do not view the *Falmouth* case as controlling. Moreover, we deem it unnecessary to determine the truth or falsity of the UAW's contention, as we find that such statement, even if made by the Petitioner, did not constitute a threat of reprisal which was within the power of the Petitioner to carry out.[5] The alleged statement was in the nature of campaign propaganda which the employees were capable of evaluating. As there is no evidence that the Petitioner was acting in behalf of the Employer, we cannot hold the Employer liable for such utterances.[6] Accordingly, we overrule the objection.

Objections 2, 4, and 5: These objections refer to a speech made by the Employer's general manager several days before the election in which, the Union contends, he misrepresented certain facts.

The Regional Director's report discloses that on November 28, 1955, the general manager spoke to the employees at a meeting called by the Employer. In his speech the general manager alleged that: The Union asked the Employer to deduct $7.50 in dues per month instead of the $2.50 authorized by the employees; a UAW representative declared that there would be a strike and Toledo would walk out in sympathy, if the Employer did not yield to their demands; the contract at the Toledo plant netted the employees only 15 cents instead of 22 cents as claimed by the Union.

The UAW contends that the first statement was only a half-truth as the levy of additional dues was to last only for a period of 4 months. As to the general manager's second allegation, the UAW claims that its representative did not make such a statement and that the general manager misrepresented the position of the Union. In regard to the Employer's third statement, the Regional Director's report reveals that the discrepancy between the Employer's and the UAW's net increase totals resulted from the Employer's omission of a guaranteed wage allowance provision in the Toledo contract.

The Regional Director concluded that even if all the assertions attributed to the Employer's general manager were so made, these remarks fall within the scope of legitimate campaign propaganda and are not so misleading as to justify ordering a new election.

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[5] *Otis Elevator Company*, 114 NLRB 1490; *Kresge-Newark, Inc.*, 112 NLRB 869.
[6] *Morganton Full Fashioned Hosiery Company*, 107 NLRB 1534.

The customary policy of the Board was set forth in *Stewart-Warner Corporation*,[7] where it was said, "The Board does not undertake to police or censor propaganda used in the elections it conducts, but rather leaves to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate untruthful statements." We do not believe that the Employer's statements impaired the free and untrammeled expression of choice by the employees herein. Therefore, assuming the correctness of the UAW's interpretation of what the general manager said, we find that his representations were not so misleading and false as to justify setting aside the election.[8] According, we overrule objections 2, 4, and 5.

Objection 3: The Union contends that the general manager in his November 28 speech criticized the Union and favored the Independent.[9] The Regional Director's report reveals that the general manager in answer to UAW leaflets concerning independent unions stated that independents have 1,800,000 members and information in regard to them could be procured through national headquarters in Washington, D. C. The general tone of this speech was anti-UAW, but no threats or coercive remarks were made. The Regional Director recommended that this objection be overruled.

The Board has previously held that an employer's expression of preference without accompanying threats or promises of benefits does not warrant our setting aside an election.[10] Accordingly, we overrule the UAW's objection.

Objection 6: The UAW alleges that the Employer further aided the Independent Union and the Petitioner by: (a) Furnishing a mailing list; (b) permitting the Petitioner to receive and make telephone calls in and out of the plant; (c) permitting them to canvass the plant and pass out literature during working hours; (d) meeting with the Independent's officers during working hours and then granting two additional half-day holidays for which the Petitioner and Independent took credit; (e) allowing the Petitioner to leave the plant during working hours.

The Regional Director reports that the UAW failed to submit any evidence in support of its contentions (c) and (e). In regard to the UAW's allegation (a), the Regional Director's investigation reveals that the Petitioner did receive a mailing list. However, the Petitioner denied receiving it from the Employer. In either event, absent a request by the UAW for a mailing list or a showing that such

[7] *Stewart-Warner Corporation*, 102 NLRB 1153, 1158

[8] *Horder's, Incorporated*, 114 NLRB 751. *Stewart Warner Corporation, supra;* cf *The Gummed Products Company*, 112 NLRB 1092

[9] United Independent Atomizer Workers.

[10] *Rheem Manufacturing Company*, 114 NLRB 404; *Westinghouse Electric Corporation*, 110 NLRB 332

a request would have been futile, furnishing an RD Petitioner with a mailing list is not in itself sufficient grounds for setting aside an election.[11] Accordingly, we find no merit in this contention. As to contention (b), the Regional Director's report shows that while the Petitioner did make and receive telephone calls during working hours, this practice was also followed by other employees. Furthermore, the Union provided no evidence that their adherents were restricted in this regard. In view of these facts, we find this contention without merit.[12]

In reference to the Union's contention (d), the Regional Director reports that one employee testified that she saw the Petitioner and the Independent's president meet with employer representatives in the lunchroom. Shortly thereafter the Employer announced two new half-holidays, before Christmas and New Year's, respectively. The Petitioner and the Independent deny that such a meeting took place. Furthermore, there is no evidence that the Petitioner or the Independent took credit for obtaining the holidays. The Regional Director recommended that this objection be overruled. As the UAW has not furnished sufficient evidence to support its objection, we agree with the recommendation of the Regional Director and overrule the objection.

Objection 7: The UAW claims that the Employer advised certain employees that they would receive more money without a union. The Regional Director's report reveals that the only evidence in support of this objection is the testimony of 1 employee that 2 other workers told him the Employer had stated that the employees would receive more money without a union. We agree with the Regional Director that the UAW has not presented sufficient evidence to support its objection. Accordingly, we overrule the objection. The UAW in its exceptions contends that the factual issues raised by their objections require a hearing for their determination. But the exceptions do not state any facts or issues not considered in the Regional Director's report, nor does the UAW claim that the Regional Director's findings are inaccurate or that proof offered to him was overlooked or rejected. In view of the foregoing, we find that the Union's objections and exceptions do not raise any substantial and material issues with respect to the conduct of the election and they are hereby overruled.[13]

The Challenged Ballot

Donald Reichard was challenged by the UAW as a supervisor. The Regional Director's investigation discloses that Reichard is employed as a setup man. The Regional Director found no evidence that he has

[11] *Morganton Full Fashioned Hosiery Company, supra.*
[12] *Rheem Manufacturing Company, supra.*
[13] *Benton's Cloak & Suit Company,* 97 NLRB 1327.

any authority to hire, discharge, discipline, or otherwise affect the status of employees or to make effective recommendations. Reichard does transfer 14 conveyor-line employees to designated subassembly jobs whenever operations on the line cease; however, these assignments are of a purely routine nature and do not require the exercise of independent judgment. The Regional Director recommended that the challenge to this ballot be overruled and that his ballot be opened and counted. In its exceptions, the UAW reiterates its position that Reichard is a supervisor, urges that a hearing be conducted to determine Reichard's employment status, and alleges that the Regional Director's report is incomplete and that a hearing will afford the UAW its only means of obtaining full and complete information. The UAW also claims that if Reichard's ballot is opened, the identity of the voter will be disclosed as only a single challenge is involved, and that the ballot should be held void or a new election should be directed. We find no merit in either of these contentions. Although the UAW questions the Regional Director's conclusion in regard to Reichard's employment status, it does not offer any new facts in support of its allegation. It is evident that the UAW's request for a hearing is simply for the purpose of developing a case to support its assertion. We shall accordingly adopt the Regional Director's recommendation,[14] and hereby overrule the challenge to the ballot of Donald Reichard. In reference to the UAW's second contention, the Board has previously held that a challenged ballot otherwise valid shall be opened and counted although in certain circumstances the secrecy of the ballot will be unveiled if the challenged ballot is opened and counted.[15] As we have overruled the challenge to Reichard's ballot and, as the outcome of the election depends on the consideration of this ballot, we adopt the Regional Director's recommendation that the ballot of Donald Reichard be opened and counted.

The UAW's final contention in its exceptions to the Regional Director's original report is that the Board is without jurisdiction to certify the results of the election as the election was conducted in a unit containing guards and other employees, thereby making it inappropriate under Section 9 (b) (3) of the Act.[16] In its exceptions to the Regional Director's supplemental report the UAW claims that the Board's agent erred by allowing guards to vote in the above-mentioned election and that the Board's agent was required *sua sponte* to challenge these guards.

[14] *Preston Trucking Company, Inc.*, 115 NLRB 750.

[15] *American Partition Corporation*, 100 NLRB 1; *Waterbury Companies, Incorporated*, 93 NLRB 1011.

[16] Section 9 (b) (3) states in part as follows: "*Provided*, That the Board shall not . . . decide that any unit is appropriate for such purposes" (i. e., collective bargaining) "if it includes, together with other employees, any individual employed as a guard. . . ."

The Regional Director in his supplemental report reveals that the bargaining unit in which the Board directed an election specifically excluded guards as defined in the Act. Moreover, the eligibility list used in the election was prepared by the Employer and checked by the Petitioner and the UAW prior to the election. The only challenge raised by the UAW before the election was to the ballot of Reichard, discussed above.

This exception concerns the eligibility of certain employees to vote, and is in the nature of a postelection challenge, which the Board does not recognize regardless of the alleged status of the individuals involved.[17] The Board has held that its agents are not required to challenge voters of their own volition unless they have knowledge that such employees are ineligible to vote.[18] We agree with the recommendation of the Regional Director and hereby overrule the UAW's exception. Accordingly, the employees challenged in this respect are, for purposes of the election results, to be considered as properly included in the unit.

[The Board directed that the Regional Director for the Sixth Region shall, within ten (10) days from the date of this Direction, open and count the ballot of Donald Reichard and serve upon the parties a supplemental tally of ballots.]

[17] *N L R. B.* v *Tower Company*, 329 U S 324; *Sears Roebuck and Co*, 114 NLRB 762
[18] *Balfre Gear & Manufacturing Company*, 115 NLRB 19.

Better Monkey Grip Company *and* Upholsterers' International Union of North America, AFL–CIO. *Case No. 16–CA–814. April 30, 1956*

DECISION AND ORDER

On January 11, 1956, Trial Examiner Arthur E. Reyman issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts his findings, conclusions, and recommendations with the modifications and exceptions noted below.

We agree with the Trial Examiner that the Respondent discharged Whaley because he gave testimony adverse to its interests in an earlier