

**Unifirst Corporation and Laundry Workers Union
Local 66L, a/w Union of Needletrades, Industrial
& Textile Employees, AFL-CIO, CLC.**
Cases 1-CA-39267 and 1-CA-39321

February 28, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On March 18, 2003, Administrative Law Judge Wallace H. Nations issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.¹

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions² only to the extent consistent with this Decision and Order.

I. FACTS

The Respondent operates a commercial laundry facility in Indian Orchard, Massachusetts; employees at this location have been represented since the 1950s. In late 2000 or early 2001,³ the Union proposed a midterm change to the collective-bargaining agreement slated to expire on October 1: the Respondent would shift money it paid into the Union's pension plan to the Union's health and welfare fund. The Respondent rejected the proposal on February 5. In March, the Union prepared and distributed leaflets criticizing the Respondent for refusing the midterm change. Angry over omissions in the leaflet, Steve Harr, the general manager of the Indian Orchard facility, met and discussed with employees the Union's criticisms, using bullet points drafted by Peter Kraft, the Respondent's attorney.

In early July, employee Mary Holmes filed with the Board a decertification petition signed by 21 employees. After Harr learned of the petition, he spoke with William Coe, the Respondent's director of human resources. Coe

explained what Harr could and could not do or say during the pendency of the decertification petition, using the acronyms TIPS (threaten, interrogate, promise, spy) and FOE (facts, opinions, evidence). Shortly afterwards, Holmes and two other employees (Olga Centeno and Dorothy Depalo) requested a meeting with Harr. They met in Harr's office and asked questions about the decertification process, including what would happen if the employees decertified the Union. Harr declined to answer, but requested that employees gather questions and submit them in writing. In mid-July, Harr met in his office with a larger group of employees that became known as "the committee." Harr described that the purpose of the committee was to keep employees informed; Harr asked again for employees to provide their questions in writing. At the meeting, Harr emphasized that he could not make promises. On July 19, Harr held a meeting with employees to announce that the Board had scheduled the decertification election for August 16.

On August 2 and 3, Harr and Coe held three meetings with employees—in English, Spanish, and Portuguese—delivering the same presentation at each.⁴ Coe, the primary speaker, testified he and Harr often referred to TIPS and FOE, and frequently said they could not promise anything. Coe passed out several documents regarding wages and benefits (including the Respondent's current 401(k) and profit-sharing plans for nonunit employees), explained how benefits such as a 401(k) plan worked, and answered employee questions. Coe testified that employees asked him whether they could have the 401(k) plan if they were still with the Union, and he responded that the Union historically negotiated to have the Respondent pay into the Union's pension plan and that the Respondent would be unwilling to contribute to both the union pension plan and the 401(k) plan. Some employees testified to the effect that Coe and Harr said employees could get profit sharing and the 401(k) plan if they voted the Union down, but that employees would not have those benefits if they kept the Union because those benefits were available only to unrepresented employees.

On August 8, the Respondent learned that the Union had filed unfair labor practice charges, postponing the decertification election, and Harr so notified employees. After a union meeting on August 17, employee and committee member Dorothy Depalo circulated a petition demanding that the Respondent hold its own election. Harr received a copy—with 40 employee signatures—on August 20. Afterwards, Coe, Harr, and Kraft met at the

¹ The Respondent sought to reply to the General Counsel's answering brief, but the Board denied the Respondent's motion. *Unifirst Corp.*, 341 NLRB 1 (2004). Member Schaumber notes that he dissented and would have granted the Respondent's motion.

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

³ All dates are 2001, unless otherwise noted.

⁴ Employee Maria Fatima Rebelo translated for the Portuguese meeting, and Centeno translated for the Spanish meeting.

Indian Orchard facility and decided to conduct a poll in lieu of the Board election. Kraft announced the poll in a letter sent on August 27 to the Union's business agent. On August 28, Coe met with employees to discuss the poll procedure and encourage employees to vote. He again explained TIPS and FOE, but was interrupted by a union steward, who wanted to know what employees would get if they voted the Union out. Coe testified that he said he could only give facts and opinions, and that his opinion was that the employees would be better off without the Union.

The Respondent conducted its poll on August 31. There were 21 votes favoring continued union representation, and 37 votes opposed. Based on the poll results, Kraft sent a letter on September 4 informing the Union's attorney that the Respondent was withdrawing recognition. Because of its withdrawal of recognition, the Respondent also refused to respond to the Union's August 17 information request.

II. THE JUDGE'S DECISION

The judge found the Respondent violated Section 8(a)(1) by making impermissible promises of benefits to employees. The judge recognized that employers may make truthful statements about benefits available to their represented and unrepresented employees, compare benefits at their unionized and nonunionized facilities, and opine that employees would be better without a union. However, the judge found the Respondent violated Section 8(a)(1) because it indicated that employees could only obtain certain benefits by decertifying the Union.⁵

The judge credited the testimony that Coe and Harr told employees, during their August 2 and 3 meetings, that the Respondent's 401(k) and profit-sharing plans would only be available to employees if they decertified the union. Distinguishing the Board's decision in *TCI Cablevision of Washington*, 329 NLRB 700 (1999), relied on by the Respondent, the judge concluded that these statements were unlawful despite the Respondent's repeated disclaimers that it could not promise anything. However, the judge found that all other statements made and materials presented at the August 2 and 3 meetings were permissible under Section 8(c).

Based on his finding that the Respondent made impermissible statements, the judge also found the Respondent violated Section 8(a)(1) by polling employees' sentiments in an atmosphere tainted by an unremedied unfair

labor practice.⁶ Alternatively, the judge found the Respondent also violated Section 8(a)(1) by polling employees while the decertification petition was pending. Finally, because the judge found the poll tainted by the Respondent's unfair labor practices and thus in violation of Section 8(a)(1), he further found that Respondent's subsequent reliance on the poll results to withdraw recognition, withhold requested information, and refuse to bargain all violated Section 8(a)(5).

III. THE RESPONDENT'S EXCEPTIONS

The Respondent argued that the judge erred in crediting witnesses called by the General Counsel despite their inconsistent, confused, and contradictory testimony, and compounded that error by also disregarding these same witnesses' testimony that the Respondent repeatedly stated it could not and was not making promises. Second, the Respondent argued the judge erroneously relied on a Board case reversed in the circuit court and disregarded other directly applicable Board decisions that dismissed similar allegations. Consistent with this precedent, the Respondent stressed that its management continually and clearly expressed its inability to make promises and carefully tailored its presentations to fit within the guidelines articulated in Board decisions.

Regarding the judge's alternative conclusion that the Respondent violated Section 8(a)(1) by polling employees while a decertification petition was pending, the Respondent maintained that Board precedent allows an employer to withdraw recognition when a decertification petition is blocked, so long as the employer has the requisite evidence. *Atwood & Morrill Co.*, 289 NLRB 794 (1988). Essentially, the Respondent argued that the August 17 petition provided a sufficient basis to lawfully withdraw recognition under the Board's "actual loss" standard articulated in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 723 (2001), but that the Respondent instead chose to poll according to the Supreme Court's suggestion in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359, 364-365 (1998).

IV. ANALYSIS

We find merit in the Respondent's exceptions, although we acknowledge that the facts may be read to present a close case. After examining the record as a whole, we find the General Counsel has not met his burden of establishing by a preponderance of the evidence that the Respondent's statements to employees were

⁵ For support, the judge cited the Board's decision in *Selkirk Metalbestos*, 321 NLRB 44, 51 (1996), but failed to note that the Board's 8(a)(1) finding was reversed by the Fifth Circuit in *Selkirk Metalbestos v. NLRB*, 116 F.3d 782 (5th Cir. 1997).

⁶ The judge recognized, however, that the Respondent complied with the first of the four criteria for lawful polling described in *Struksnes Construction Co.*, 165 NLRB 1062 (1965).

unlawful. Thus, we find the Respondent's actions were lawful, and we dismiss the complaint.⁷

Under extant Board law, employers may make truthful statements to employees concerning benefits available to their represented and unrepresented employees, may compare wages and benefits at their unionized and non-unionized facilities, and may offer an opinion, based on such comparisons, that employees would be better off without a union. *TCI Cablevision*, supra at 700. However, an employer violates Section 8(a)(1) when it promises, either explicitly or impliedly, improved benefits contingent on employees giving up union representation. See *Bakersfield Memorial Hospital*, 315 NLRB 596, 600 (1994). Similarly, an employer violates Section 8(a)(1) when it threatens that benefits will not be available if the employees are represented by a union. See *Libbey-Owens-Ford Co.*, 285 NLRB 673 (1987) (adopting administrative law judge's conclusion that the implementation of a benefit restricted to nonunion employees violated Sec. 8(a)(1)).

In *TCI Cablevision*, the employer stated, while a decertification election was pending, that a 401(k) plan was available to most of its employees, but that no union had been able to negotiate the plan into a contract. When asked at one point if the unit employees would receive the plan if the union was voted out, the employer answered affirmatively, but subsequently made clear that it was making no promises. *Id.* at 700. The Board concluded the employer had not unlawfully implied promises of benefits. The Board also stressed that "the [e]mployer did not tell employees that the only way to receive the 401(k) benefit was to oust the [u]nion." *Id.* at 700–701. Instead, the Board pointed to the fact that the employer "accurately reported that its nonrepresented employees received the benefit" and the employer "never said that it would never agree with the [u]nion to have such a plan." *Id.* at 701; see also *Langdale Forest Products Co.*, 335 NLRB 602 (2001); *Viacom Cablevision*, 267 NLRB 1141 (1983) (finding no unlawful promise of benefits).

With this precedent in mind, we emphasize that the General Counsel bears the burden of establishing by a preponderance of the evidence that the Respondent unlawfully promised unit employees certain benefits if

⁷ The complaint alleged that the Respondent's statements at the August 2 and 3 meetings were a promise of benefits if the employees voted the Union out, in violation of Sec. 8(a)(1). The complaint separately alleged that the Respondent, in effect, threatened employees by telling them they could not have profit sharing and 401(k) with the Union. In his decision, the judge consolidated his discussion of these 8(a)(1) allegations and made a single finding that the Respondent at the August meetings made unlawful statements and promises to employee in violation of Sec. 8(a)(1). We reverse the judge's finding.

they voted to decertify the Union or unlawfully threatened that they would not receive the benefits if they retained the Union. See *Wild Oats Market*, 339 NLRB 81, 84–85 (2003) (finding the General Counsel did not meet the burden of establishing the employer unlawfully promised benefits). As detailed below, the record evidence developed on this issue is equivocal.

The Respondent's witness Coe testified that neither he nor Harr ever said during the three August meetings that the unionized employees could not have the 401(k) or profit-sharing plans. The judge does not discredit his testimony but finds that Coe did not make himself clear.⁸

The General Counsel's witness, Hilda Maria Martinez, testified about the "Portuguese" meeting. Her testimony was the only evidence introduced by the General Counsel and relied on by the judge that would support the judge's finding of a violation. Martinez testified that the Respondent's representatives purportedly said "those were benefits that we will be able to obtain only through the company, not through the Union." However, the Respondent's representatives spoke in English, which was then translated for the audience by employee Maria Fatima Rebelo into Portuguese.⁹ Martinez spoke neither language. According to the judge, "[w]hat [Rebelo] heard is what [employees in attendance] heard," and Rebelo, the only other employee to testify about the "Portuguese" meeting, did not corroborate Martinez' testimony that the Respondent's representatives said the benefits were available "only through the company, not through the union."¹⁰

The judge failed to cite any testimony from the "Spanish" meeting that would support his finding that Coe or Harr said that the only way to receive the profit-sharing

⁸ Our dissenting colleague insists that any fair reading of the judge's decision demonstrates that the judge discredited Coe and Harr. We disagree. The judge never explicitly discredited the testimony of Coe and Harr, and he specifically credited portions of it in his decision.

⁹ Unfortunately, much of this case seems to involve statements that may have been "lost in translation." The Respondent and the majority of the employees were communicating through translators, and much of the hearing before the administrative law judge involved communication through translators. Since resolution of the legal issues involved in cases such as this depends on the precise words an employer uses, Member Schaumber notes the inherent difficulties in evaluating testimony in these circumstances and points out in this regard that the judge found that all of the written materials distributed by the Respondent at the meetings were lawful under Sec. 8(c).

¹⁰ Martinez, who was apparently credited by the judge, testified that Rebelo would also translate the Portuguese into Spanish for her to understand during the meeting. Rebelo, in contrast, did not testify that she translated into Spanish for Martinez.

We also disagree with our dissenting colleague's assertion that Rebelo's affidavit corroborates Martinez' testimony. Rebelo's affidavit does not indicate that either Coe or Harr said that the benefits at issue were only available through the Respondent and not through the Union.

and 401 (k) plans was to vote the Union out. A review of the transcript reveals that, according to the uncorroborated testimony of a single witness, Ulises Torres, Harr responded to a question of whether employees could have both the union pension plan as well as the 401(k) plan by saying the only way the employees could have the 401(k) plan was if the Union was voted out.¹¹ However, Torres testified that he attended no meetings in early August. The judge concluded that Torres apparently mixed up the dates of the meetings, but Torres gave an explicit reason—his wife’s illness—for why he had not attended any meetings in early August. The judge does not address that conflict in Torres’ testimony. Moreover, Torres’ testimony as to what occurred at the meeting he did attend conflicts with the testimony of other witnesses as to what occurred at the August meetings. For example, Torres testified that there were no handouts or flip charts at the meeting while every other witness contradicted that testimony. Torres’ testimony is confused and, on the whole, unreliable, which is perhaps why the judge failed to mention it in finding the Respondent’s statements to be unlawful.

The only other testimony regarding the alleged “only way to receive benefits” comment was from Denys Camacho, who also attended the “Spanish” meeting. She testified, in response to a question about whether she believed the nonunit benefits were better, that she “felt confused because—at that time, because [Harr] was talking about opinions, facts, opinions, facts and [Harr] was writing on the blackboard but at the same time, [Harr] was giving us papers that said that we could only get those things if we got rid of the Union.” This testimony simply does not support a finding about what was said by Respondent at the meeting.¹² Camacho was asked only for her *opinion* as to the benefits she received. Moreover, the judge found the materials presented by the Respondent at the meeting—the papers Camacho referred to—were lawful under Section 8(c).

As for the “English” meeting, the evidence offered fails to establish that Coe or Harr’s statements at that meeting were unlawful. Neither Holmes nor Depalo indicated in their affidavits¹³ that Coe or Harr said decer-

tification was the only way employees could get the benefits. Holmes stated that “[Harr] said we could not get profit sharing or 401(k) with the Union because it was not offered.” Depalo’s affidavit was more specific, stating “Coe and Harr said that if we were nonunion, we would automatically be into profit sharing, and that 401(k) would be up to us, if we wanted to be in it. I do not recall anyone asking if we could have those benefits with the Union. Nothing was said about whether employees could or could not have benefits with or without the Union.”

The General Counsel’s case thus rests at bottom on Martinez’ testimony about the Portuguese meeting. To find that the General Counsel sustained its burden would necessitate discrediting the Respondent’s denials, which the judge did not do, and discrediting or ignoring the testimony of the translator, Rebelo, who did not substantiate what Martinez claimed was said. Viewed in full, we conclude that the General Counsel has not met his burden, as the evidence fails to establish by a preponderance of the evidence that the Respondent conveyed to its employees that decertification was the only way certain benefits would be available to them.¹⁴ We find this situation similar to *Wild Oats Market*, supra at 84–85, where the Board adopted the judge’s dismissal of allegations of implied promises of benefits because of the inconsistent and inconclusive nature of the testimony. *Id.* at 84–85. Likewise, we observe that the General Counsel did not establish the facts the Board found so critical in *TCI Cablevision*: that the Respondent told employees that the *only way* they could get certain benefits was to decertify

Holmes to testify, the Respondent and the General Counsel agreed the affidavits would be introduced into the record.

¹⁴ In the “Portuguese” meeting, Rebelo indicated Harr referred to the 401(k) plan as “the company policy,” referring to the pension plan the nonunit employees were then receiving. Additionally, Rebelo acknowledged that the Respondent’s representatives indicated unit employees “could not have the both [of the pension plans],” and that Coe said the employees could not have “two pies,” meaning two pensions. This testimony is consistent with the conclusion that Harr and Coe were *not* pressing decertification, but instead explaining to a confused work force that they could have either the union pension plan or the 401(k) plan, but not both. As for the “Spanish” meeting, both Claudio and Denys Camacho testified that, in answering the question of whether employees could have both the union pension plan and the 401(k) plan, Coe and Harr said employees could not have the 401(k) plan because “the Union is a business.” This testimony is consistent with Coe’s testimony that, in answering the question, he explained that when a union negotiates contributions to its own pension plan (which he explained the Union had previously negotiated), the Respondent would not be willing to make additional contributions to a 401(k) plan and a profit-sharing plan. Negotiations with the Union were not discussed. Neither Coe nor Harr ever said that they would never negotiate such benefits with the Union. Finally, as noted above, the record contains overwhelming evidence that the Respondent repeatedly indicated it could not make any promises about benefits.

¹¹ It is unclear whether the judge relied in part on Torres’ testimony; the judge does not specifically mention it in finding that Harr and Coe’s statements at the August meetings were unlawful.

¹² We disagree with our dissenting colleague’s explanation of Camacho’s reference to the “papers” as being affected by Respondent’s statements. Our dissenting colleague draws an unwarranted inference as to what was said at the meeting based on Camacho’s interpretation of papers the judge found to be lawful.

¹³ Neither Holmes nor Depalo testified at the hearing. After the General Counsel indicated he would request a subpoena be issued for

the Union, or that the Respondent said that it would never agree with the Union to have certain benefits. Contrary to the judge, we find that the instant case is analogous to *TCI Cablevision*. As in *TCI Cablevision*, the Respondent accurately reported to its represented employees that they historically did not participate in the 401(k) plan available to nonunit employees; furthermore, the Respondent explicitly and repeatedly disclaimed an ability to promise improved benefits if the employees voted to decertify. Although the employer in *TCI Cablevision* provided additional information—that the union had not been able to obtain the 401(k) plan for the unit employees through negotiations—we do not see that difference as dispositive.¹⁵ We therefore reverse the judge's finding that the General Counsel met his burden of establishing the alleged violation by a preponderance of the evidence.

The judge premised his finding that the Respondent unlawfully polled employees principally on his finding that the poll was tainted by the Respondent having committed an unfair labor practice.¹⁶ Since we have reversed that predicate finding, we also reverse the judge's conclusion that the Respondent violated Section 8(a)(1) by polling employees about their union sentiments, in violation of *Struksnes Construction*.

We also reverse the judge's alternative conclusion that the Respondent violated Section 8(a)(1) by polling employees while a decertification petition was pending. Board decisions have consistently held that an employer presented with evidence that a majority of unit employees no longer support the union may lawfully withdraw recognition from the union, even if a decertification petition is pending. *Langdale Forest Products Co.*, supra at 602 fn. 4; *Alcon Industries*, 334 NLRB 604 (2001); *Brown & Root U.S.A.*, 308 NLRB 1206 (1992); *Atwood & Morrill Co.*, supra; *Master Slack Corp.*, 271 NLRB 78 (1984). Since an employer presented with evidence of actual loss of majority status may lawfully withdraw recognition even if a decertification petition is pending, an

employer presented with the same evidence could, a fortiori, take the lesser step of lawfully polling employees.¹⁷

We disagree with our dissenting colleague that *Struksnes* is to the contrary. That case dealt with the lawfulness of a poll that was taken to determine whether a union which sought recognition had majority status. No certification election petition had been filed with the Board. The Board concluded that, “[t]he purpose of the polling in these circumstances is clearly relevant to an issue raised by a union’s claim for recognition and is therefore lawful.” *Struksnes*, supra at 1063. The Board suggested that “[o]n the other hand,” a poll during the pendency of a Board election petition would not serve a legitimate purpose and would be unlawful. *Id.* at 1063. By contrast, the Respondent here wished to withdraw recognition from an incumbent Union based on the employee petition showing the Union’s apparent loss of majority status. As noted above, with that evidence alone the Respondent could have lawfully withdrawn recognition, even with a decertification petition pending. *Atwood & Morrill Co.*, supra. However, to do so would involve the risk of violating Section 8(a)(5). That is, if the Union were found not to have lost its majority status, the Respondent would be guilty of an 8(a)(5) violation. Thus, the Respondent polled its employees for the purpose of avoiding a violation of the Act.

In our view, the Respondent’s conduct here was entirely consistent with the Supreme Court’s suggestion in *Allentown Mack* that an employer that *could* lawfully withdraw recognition might want to poll first to secure conclusive evidence that the union in fact lost majority support, as well as to maintain good employee relations, which otherwise might be harmed by an abrupt withdrawal. *Allentown Mack Sales & Service*, supra at 364–365. Stated another way, an employer that *could* lawfully withdraw recognition *should* be able to lawfully poll its employees, provided it complies with the procedural safeguards articulated in *Struksnes*.

Our colleague says that the Respondent *could have* continued recognizing the Union, even if the Union had lost majority status. However, an employer, in that situation, may well find it imprudent and destabilizing to continue recognizing a union that no longer has the support of a majority of the employees. In our view, where, un-

¹⁵ There was some evidence that the Respondent indicated at its meetings that the Union consistently negotiated to have unit employees included in its own pension plan instead of the Respondent’s 401(k) plan. Where an employer compares wages and benefits between its represented and nonrepresented workforce, we see a difference between an employer affirmatively stating that decertification is the *only* way employees can obtain a certain benefit and an employer failing to affirmatively state that a union may be able to get a previously unavailable benefit through negotiation. The former is an unlawful act, while the latter is merely an omission of a statement which an employer has no duty to make.

¹⁶ As previously noted, supra fn. 6, the judge found the Respondent complied with the first four *Struksnes* factors for polling employees, and the General Counsel did not except to the judge’s findings.

¹⁷ In *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the Board clearly indicated that it was not deciding the question of whether the good-faith standard for polling should be changed to require a showing of actual loss. We do not need to address that question today, as the Respondent had evidence of actual loss before it conducted its poll, since it had been presented with a petition signed by a majority of unit employees. Chairman Battista and Member Schaumber also note that they did not participate in *Levitz Furniture Co.* and express no view as to whether it was correctly decided.

der circumstances such as those present, an employer makes the choice not to continue recognition, and wishes to make sure that a withdrawal of recognition would be lawful, that employer may lawfully poll its employees to make sure that the Union in fact no longer enjoys majority status.

The judge relied on dictum from a footnote in *Heritage Hall, E.P.I. Corp.*, 333 NLRB 458 (2001), a case in which the Board found a poll unlawful because it was conducted in an atmosphere tainted by unlawful conduct. In that dictum, the Board suggested that the employer could not have lawfully polled its employees while a union election petition was pending, even if there were no other unlawful conduct and even if the employer had observed the “procedural safeguards” articulated in *Struksnes*. Id. at 458 fn. 4.¹⁸ Apart from the fact that this was dictum, it was said in the context of a union seeking recognition through an election petition.¹⁹ As noted above, that situation differs from the instant one, where the Respondent was faced with an employee petition evidencing an apparent loss of majority support for the Union.

Because we find that the Respondent did not make impermissible promises of benefits and that its poll was lawful, its subsequent actions are likewise lawful, as the Respondent had evidence that the Union had actually lost majority support. Thus, we reverse the judge’s conclusions that the Respondent violated Section 8(a)(5) by withdrawing recognition, refusing to bargain, and refusing to comply with information requests.

ORDER

The complaint is dismissed.

MEMBER LIEBMAN, dissenting.

This case turns primarily on whether the Respondent’s officials unlawfully told employees that if they voted the Union out, they would have profit sharing and a 401(k) plan, but that if they kept the Union in, they could get

neither benefit. If this statement was made, then it was clearly unlawful¹ and tainted:

a subsequent employee petition opposing continued union representation;

the Respondent’s poll of employees, prompted by the petition; and

the Respondent’s withdrawal of recognition from the Union, based on the results of the poll.

The majority acknowledges that the “facts may be read to present a close case,” but it reverses the judge’s finding that the Respondent’s officials *did* make unlawful statements and so reverses the violations of the Act that depend on it. The majority also reverses the judge’s alternative conclusion that the Respondent’s poll violated Section 8(a)(1) because it was conducted while an election petition was pending before the Board. Contrary to the majority’s claim, the testimony of several witnesses—not just one—supports the judge’s finding as to the profit-sharing/401(k) statements. The judge’s alternative conclusion with respect to the poll, in turn, was mandated by our precedent, which the majority fails to heed.

I.

Profit-sharing and the 401(k) plans were addressed at three employee meetings conducted by the Respondent’s general manager, Steve Harr, and its director of human resources, William Coe, on August 2 and 3, 2001. One meeting was conducted in English, one in Spanish, and one in Portuguese. Describing the record evidence as “equivocal,” the majority concludes that the General Counsel failed to carry his burden of proof that the Respondent made unlawful statements. As explained below, the majority neglects much of the evidence that the judge relied on and inaccurately characterizes his decision.

A.

In section II,B,3 of his decision, the judge examined the evidence related to the employee meetings at which Managers Harr and Coe spoke, relying on translators to communicate with Spanish-speaking and Portuguese-speaking employees.

¹⁸ Chairman Battista notes that the dissent posits a hypothetical situation where a union has filed an RC petition for initial recognition, and the employer intends to voluntarily recognize the union. In his view, it may well be that an employer could poll in that situation. However, no cited cases deal with that situation, and he does not pass on it.

¹⁹ Our dissenting colleague points to *S.M.S. Automotive Products, Inc.*, 282 NLRB 36 (1986), as another instance where an employer poll was found to be unlawful because it was conducted at a time when a petition was pending. However, *S.M.S. Automotive* is similarly distinguishable from the present case, because that case involved a representation petition filed by a rival union seeking recognition, not a decertification petition filed by employees. *S.M.S. Automotive Products*, supra at 39.

¹ See, e.g., *Bridgestone/Firestone, Inc.*, 332 NLRB 575 (2000), affd. in relevant part mem. 47 Fed. Appx. 449 (9th Cir. 2002), and *Selkirk Metalbestos*, 321 NLRB 44 (1996), vacated 116 F.3d 782 (5th Cir. 1997).

Portuguese Meeting. With respect to the Portuguese meeting, the judge quoted from the pretrial affidavit of translator Maria Fatima Rebelo:

He said it was up to us if we vote the Union down, we could get profit sharing, 401(k) and health insurance. He did not promise anything. He said if we keep the Union in, we would not have profit-sharing or 401(k)—Union people do not have that. He said if we vote the Union out we could have profit sharing and 401(k), but it was all up to us. A person asked if we could keep the Union, could we get 401(k) and profit sharing. Steve (Harr) said no—because that was the Company policy without the Union.

The judge described Rebelo’s hearing testimony as “consistent with the quoted portion of her affidavit.” He observed that Rebelo’s account was “significant,” given her role as translator for the other employees: “[w]hat she heard is what they heard.” The judge also cited the testimony of employee Hilda Martinez, stating that “[s]he remembered Coe talking about profit sharing and 401(k) plans and that he said they were benefits they could only get through the Company and not the Union.”

Spanish Meeting. With respect to the Spanish meeting, the judge cited the testimony of Denys Camacho, Carmen Sanchez, and Claudio Camacho. He observed that:

Denys Camacho also testified that [manager] Harr was asked if the employees could have the 401(k) without the Union. According to her, Harr answered, “No, because the union is a business.”

....

Claudio Camacho testified in a similar vein to his wife.

....

Carmen Sanchez testified that she relayed Camacho’s question to Harr, and he answered simply, “no.”

The judge cited Manager Coe’s denial that either he or Manager Harr made the alleged statements about benefits and observed:

Evidently he [Coe] did not make himself clear because virtually every non-management witness in the proceeding heard him to say that these benefits were only available to non-union employees.

The testimony of employee Ulises Torres, discussed by the judge in an earlier portion of his decision (sec. II,B,2) is consistent with this observation. As the judge explained, Torres (who mistakenly placed the meeting in July) testified that

Harr told employees that if the Union were voted out, the employees would be able to get profit sharing and a 401(k) plan. He also testified that an employee asked if the employees could have the plan that the Respondent was offering with the Union still in place. According to Torres, Harr said, “No.”

English Meeting. With respect to the English meeting, the judge cited the affidavits of antiunion employees Dorothy Depalo and Mary Holmes, who did not testify at the hearing. Depalo’s affidavit recited that Harr and Coe stated that if the employees were nonunion, they would automatically be in the profit-sharing plan and would have the option of joining the 401(k) plan. According to Holmes’ affidavit, Harr stated that employees could get profit-sharing and the 401(k) plans without the Union, but could not get either benefit with the Union.

In sum, then, in the factual section of his decision, the judge specifically cited: the affidavit and testimony of translator Rebelo; the testimony of employees Torres, Martinez, Denys Camacho, Claudio Camacho, and Sanchez; and the affidavits of antiunion employees Depalo and Holmes. He acknowledged, but rejected, the denial of Manager Coe.

In the legal analysis section of his decision, the judge stated:

During the meetings of August 2 and 3, based on the credited testimony, Respondent told employees that they could only receive[] profit sharing and 401(k) benefits without the Union. Based on the credited testimony, Respondent promised that these benefits would be made available to employees if the Union were decertified.

....

Rebelo, Holmes, and Depaolo [sic], all witnesses who favored decertification, testified at trial and by affidavit that these statements were made In addition, all of the Union witnesses testified to the same type of comments. The testimony of almost all the witnesses except Coe and Harr establish[es] that in the meetings of August 2 and 3, Respondent made it clear that the *only* way the employees could have profit-sharing and a 401(k) plan was to decertify the Union.

Thus, the judge relied on the “credited testimony,” including that of Rebelo, Holmes, and Depalo, as well as that of “the Union witnesses.” And the judge clearly discredited the testimony of Managers Coe and Harr.

B.

The majority ostensibly proceeds through the record, demonstrating the shortcomings in the General Counsel's case. The majority finds:

(1) that the testimony of employee Martinez is not sufficient, because she attended a meeting at which the Respondent's officials spoke in English and had their remarks translated into Portuguese, while Martinez speaks only Spanish and her testimony was not corroborated by the translator, Rebelo;

(2) that the testimony of employee Torres was "confused and unreliable," because he apparently testified that he could not have attended the meetings given his wife's illness and because he testified, in conflict with other witnesses, that there were no hand-outs or flip charts at the meetings he did attend;

(3) that the testimony of employee Denys Camacho addressed only her belief that non-union benefits were better and that it did "not support a finding about what was *said* by Respondent at the meeting;"

(4) that the affidavits of employees Holmes and Depalo did not indicate that officials Coe or Herr "said decertification was the only way employees could get the [profit-sharing and 401(k)] benefits;" and

(5) that the judge did not discredit the Respondent's denials.

The majority observes that "[u]nfortunately, much of this case seems to involve statements that may have been 'lost in translation.'" It repeatedly invokes the Respondent's disclaimers that it could make no promises about benefits. Each step of the way, the majority errs.

C.

The majority's implicit premise—that the statements of Managers Coe and Harr were "lost in translation" and that this precludes finding a violation of Section 8(a)(1)—is mistaken. It is well established that an employer bears the risk that its statements will be translated in such a way that an employee who speaks a different language will reasonably understand the statements as coercive.²

² See, e.g., *API Industries*, 314 NLRB 706, 706 fn. 1 (1994); *Cream of the Crop*, 300 NLRB 914, 917 (1990). It is a reality that antiunion employers often chose their words carefully in an attempt to convey an unlawful message to employees—who will miss the legal niceties, but will grasp the employer's gist—while avoiding statements that are literal violations of the Act. See, e.g., *Langdale Forest Products Co.*, 335 NLRB 602, 603 (2001) (dissent). The need for translation complicates this strategy

The majority is wrong in insisting that the judge did not discredit Coe and Harr. Any fair reading of the judge's decision demonstrates otherwise. The judge clearly understood that he was presented with conflicting accounts of what was said at the employee meetings, and he rejected the account offered by the Respondent's managers. Thus, the judge based his finding of a violation on "the credited testimony," i.e., "the testimony of almost all the witnesses except Coe and Harr."

The majority is wrong, as well, in pointing to the Respondent's disclaimers. It is immaterial that an employer repeatedly professes that he cannot make promises, if in fact the employer expressly or implicitly indicates that specific benefits will be granted. *Michigan Products*, 236 NLRB 1143, 1146 (1978). Here, the record establishes that the Respondent made it clear to the unit employees that they would be granted profit sharing and a 401(k) plan if—but only if—they voted out the Union.

Finally, the majority errs in asserting that the credited testimony does not support finding a violation. On that score, of course, the Board's established policy is not to overrule a judge's credibility determinations unless the clear preponderance of the evidence demonstrates that they are incorrect.³ The majority fails to demonstrate that this high standard has been met here.

The majority asserts that Martinez' testimony about the Portuguese meeting was the only evidence introduced by the General Counsel and relied on by the judge that would support the judge's finding of a violation. The flaws in the majority's analysis are clear. Most obviously, the majority neglects the *affidavit* testimony of translator Rebelo (discussed and quoted earlier), whose account the judge rightly called "significant" given her role. That account does corroborate Martinez. And, as I have pointed out, the judge did discredit Managers Coe and Harr, despite the majority's view.

The evidence related to the Portuguese meeting, then, is itself sufficient to support the judge's finding of a violation. The other evidence cited by the judge provides further support, despite the majority's effort to parse the testimony very finely. That approach is inconsistent with the Supreme Court's admonition that we must assess an employer's statements based on how economically-dependent employees will likely understand them. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

The majority rejects the testimony of Ulises Torres about the Spanish meeting, calling it "confused and, on the whole, unreliable." Torres testified that Harr told the employees that the only way they could have a 401(k)

³ E.g., *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951).

plan was if the Union was voted out; that if the Union was voted out, the unit employees would be able to get profit sharing and a 401(k) plan; but that the employees could not have the plan that the Respondent was offering if the Union remained in place. The judge found that while Torres was confused about *when* Harr made these statements, he testified accurately and credibly about *what* Harr said. A careful examination of the record shows that the supposed “conflict” in Torres’ testimony about which meetings he attended, which the majority seizes on, is insignificant.⁴ That Torres may have erred with respect to whether materials were handed out at the meeting he attended is similarly unimportant.

The majority dismisses the testimony of Denys Camacho concerning the Spanish meeting because she was “asked only for her *opinion* as to the benefits she received” and because she referred to “papers that said we could only get those things [benefits] if we got rid of the Union,” while the judge found that these written materials were lawful. But, contrary to the majority, it is reasonable to infer that Camacho’s interpretation of the “papers” was based on what she heard the Respondent say to the audience at the same time that the papers were

⁴ Torres testified on direct examination by the General Counsel that he attended a meeting conducted by the Respondent prior to the polling (which was conducted on August 31, 2001). Torres was not asked on direct examination, and did not provide on his own, the date of this meeting. He did, however, testify that at the meeting he attended, Harr and Coe used an employee named Eunice to show how the 401(k) plan worked. (Coe subsequently testified that Harr used an example of a long-term employee named Eunice to demonstrate how the Respondent’s retirement plan worked at the August 2 and 3 meetings at issue in this case.) Nevertheless, the first question that the Respondent’s counsel asked Torres on cross-examination was “My understanding from your direct testimony is you went to a meeting on July the 19th, does that sound about right?” Torres simply answered yes.

Also on direct examination, Torres was asked if he was aware that there were “other meetings that took place” (the dates of these “other meetings” were not included in the question). Torres answered yes, but that he was not present “at the time” (again, however, no dates were specified). Nevertheless, on cross-examination, the Respondent’s counsel asked Torres “Can you tell us why you missed the meetings of early August?” Without challenging the time reference in the question, Torres answered simply that “at the time my wife was sick.” Torres was then asked why he had missed the meeting of August 28, to which he replied “she was sick.”

Based on this evidence, I agree with the judge that Torres’ testimony about what Harr and Coe said about the profit-sharing and 401(k) plans relates to the August 2–3 meetings in question, not a meeting on July 19. Thus, Harr used an employee named Eunice as an example at the August 2–3 meetings, and Torres testified that an employee named Eunice was used as an example at the meeting he attended prior to the August 31 polling. The references to Torres having attended a meeting on July 19 and having failed to attend meetings in “early August” were contained in the Respondent’s leading questions on cross-examination, with no basis in Torres’ earlier testimony on direct examination. And Torres reasonably appears to have offered his wife’s illness as the reason he failed to attend a meeting on August 28, not August 2 or 3.

being handed out. The majority explains away the testimony of Denys and Claudio Camacho that the Respondent’s managers said that employees could not have the 401(k) plan while represented by the Union, by invoking Coe’s testimony that he said only that the Respondent would not be willing to contribute to both the Union’s pension plan and to 401(k) and profit-sharing plans. The judge, however, discredited Coe—and, as I have said, if translation was a factor in the Camachos’ understanding of what was said, the Respondent remains liable.

As for the affidavits of Holmes and Depalo with respect to the English meeting, the majority asserts that “[n]either Holmes nor Depalo indicated . . . that Coe or Harr said decertification was the only way employees could get the benefits.” But the judge properly relied at least on Holmes’ statement that Harr both told employees “what you could get *without the Union*” and said that employees “could not get profit sharing or 401(k) *with the Union*.”

In sum, the majority’s reliance on *Wild Oats Markets*, 339 NLRB 81 (2003), is unavailing. There, the judge expressly rejected the testimony of the General Counsel’s witnesses as being confused and inconsistent, he found their recollection of the events in question to be poor, and he thus found the testimony of the General Counsel’s witness to be unreliable as proof of an unfair labor practice. *Id.* at 84–85. In this case, in contrast, the judge cast no aspersions on the testimony of the General Counsel’s witnesses. It was the Respondent’s witnesses he did not believe, and his determination is not refuted by the clear preponderance of the evidence.

II.

Because the judge correctly found that the statements of the Respondent’s managers violated Section 8(a)(1), he was also correct in finding that its subsequent poll of employees was tainted by unfair labor practices and that the Respondent unlawfully withdrew recognition from the Union. I necessarily disagree, then, with the majority’s reversal of the judge on these points.

The majority also errs in reversing the judge’s alternative holding with respect to the poll: that it was unlawful because it was taken while a decertification petition was pending. That holding follows directly from the Board’s leading case on employer polls, *Struksnes Construction Co.*, 165 NLRB 1062 (1967). There, after revising the Board’s rules for such polls—by imposing procedural safeguards and prohibiting polls taken in a coercive atmosphere created by unfair labor practices or otherwise—the Board stated:

[A] poll taken while a petition for a Board election is pending does not, in our view, serve any legitimate in-

interest of the employer that would not be better served by the forthcoming Board election. In accord with long-established Board policy, therefore, such polls will continue to violate Section 8(a)(1) of the Act.

Id. at 1063 (footnote collecting cases omitted). The Board has applied this rule where, as here, the pending Board election has been blocked by unfair labor practice charges. *Heritage Hall, E.P.I. Corp.*, 333 NLRB 458, 458 fn. 4 (2001); *S.M.S. Automotive Products*, 282 NLRB 36 fn. 2, 39, 45 (1986).

The majority's attempt to find a way around the clear rule announced in *Struksnes* is unpersuasive. First, the majority implies, incorrectly, the rule was a mere suggestion, because no election petition had actually been filed at the time of the poll in *Struksnes*. In fact, the Board has applied the *Struksnes* rule at least twice, in *Heritage Hall* and *S.M.S. Automotive Products*, supra. The majority in turn dismisses *Heritage Hall* as "dictum." But it badly misreads that decision.⁵

Second, the majority seeks to distinguish *Struksnes* and *Heritage Hall* by arguing that the rule applies only when a union has filed a representation petition with the Board seeking initial recognition from the employer—and not (as here) when employees have filed a *decertification* petition, seeking to end an incumbent union's representative status. In support of this distinction, the majority cites cases permitting an employer to withdraw recognition from a union unilaterally, when presented with evidence of a loss of majority support, even if a decertification petition is pending. Thus, "an employer presented with the same evidence [can], *a fortiori*, take the lesser step of polling employees." Indeed, says the majority, the Supreme Court in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359, 364–365 (1998), suggested polling as a legitimate tool for employers who wish to avoid liability under Section 8(a)(5) for withdrawing recognition from the union without first having

adequate evidence of the union's loss of majority support.

The majority's limiting gloss on *Struksnes* is unfounded. Nothing in *Struksnes* itself, which refers generally to polling "while a petition for a Board election is pending," Id. at 1063, limits the rule to representation petitions in the initial-recognition context. Nor do the Board's later decisions suggest such a limitation—just the opposite. In *S.M.S. Automotive Products*, the Board applied the *Struksnes* rule to invalidate an employer poll conducted in the face of a pending attempt by some employees to strip the incumbent union of its status, albeit not through a decertification petition, but rather a rival union's petition for a representation election. 282 NLRB at 36 fn. 2.

More important, the rationale for the *Struksnes* rule—that, when a petition is pending, a Board election better serves any legitimate employer interest in determining employee sentiment than an employer-conducted poll does—is equally applicable in the context of a decertification election petition. The majority points out that an employer is *free* to withdraw recognition even when a decertification petition is pending.⁶ But the employer certainly is not *required* to do so. As the Board explained in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 726 fn. 52 (2001), the pendency of the decertification petition insulates the employer from any charge under Section 8(a)(2) of the Act based on the recognition of a minority union.⁷ Thus, contrary to the majority's claim, an employer has no need to poll employees as a safeguard before unilaterally withdrawing recognition. The employer need not withdraw recognition at all; instead, he may safely continue to recognize the Union while awaiting the results of the Board's election. The Supreme Court's decision in *Allentown Mack*, supra, does not change the equation. It predates *Levitz*, where the Board reconsidered its approach to employers' unilateral withdrawal of recognition, in light of *Allentown Mack*. Nor, of course, does it involve the precise issue presented here.

⁵ In *Heritage Hall*, supra, the judge found that the employer's poll "did not comply with the established safeguards of *Struksnes* . . . particularly the requirement that the employer has not engaged in unfair labor practices and free of a coercive atmosphere." 333 NLRB at 466. The Board adopted the finding of a violation, but offered an *additional rationale*: the timing of the poll. It observed:

Regarding the judge's finding that the Respondent violated Section 8(a)(1) by conducting its own election after the Union filed the initial unfair labor practice charge here blocking the Board election, we stress that under *Struksnes Construction Co.*, 165 NLRB 1062 (1967), *the Respondent was prohibited from lawfully conducting its own election while the Union's election petition was pending even if the Respondent had complied with the procedural safeguards set forth in that case.* Id. at 1063.

Id. at 458 fn. 4 (emphasis added). The Board made clear, in other words, that the *Struksnes* rule prohibiting a poll while a petition is pending is a separate requirement.

⁶ A version of the majority's argument might also be made in the initial-recognition context: An employer is free to voluntarily recognize a union, even where a representation petition is pending. In turn, the employer might wish to poll employees beforehand, to avoid a violation of Sec. 8(a)(2), which prohibits recognition of a minority union. But under *Struksnes*, such a poll is prohibited, if a representation petition is pending.

⁷ My colleagues here "note that they did not participate in *Levitz Furniture Co.* and express no view as to whether it was correctly decided." But *Levitz* is Board law and must be followed, as my colleagues have properly recognized elsewhere. See, e.g., *Siemens Building Technologies, Inc.*, 345 NLRB 1108, 1108–1109 fn. 5 (2005) (applying *Levitz*).

In sum, the *Struksnes* prohibition against polling employees while a petition is pending remains the law, and it clearly applies to the facts here. The rule requires finding the poll here unlawful, even if (as the majority finds), the poll itself was not tainted by the Respondent's unfair labor practices. Short of overruling *Struksnes*, there is no way to reach the majority's result.

Christina Poulter-Elzeneing, Esq., for the General Counsel.
Daniel W. Bates, Esq. and *Peter R. Kraft, Esq.*, of Portland, Maine, for the Respondent.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Northampton, Massachusetts, on April 29 and 30 and May 1 and 9, 2002.¹ The charge in Case 1-CA-39267 was filed by Laundry Workers Union Local 66L, a/w Union of Needletrades, Industrial & Textile Employees, AFL-CIO, CLC (the Union) on August 2, 2001, and it filed amended charges in this case on September 13 and 21, 2001. The charge in Case 1-CA-39321 was filed by the Union on August 30, 2001. An order consolidating cases, consolidated complaint and notice of hearing (complaint) was issued March 20, 2002. The complaint alleges that UniFirst Corporation (Unifirst or Respondent) has engaged in certain conduct in violation of Section 8(a)(1) and (5) of the Act. Respondent has admitted certain allegations of the complaint, including the jurisdictional allegations, but has denied committing any of the alleged unfair labor practices.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, provides commercial laundry services at its facility in Indian Orchard, Massachusetts. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges and Respondent admits that Mark Breault is its production manager, Steven Harr is its general manager, and that William Coe is its director of human resources and that each is a supervisor and agent within the meaning of the Act. The complaint alleges that employee Maria Fatima Rebelo has acted as a translator for Respondent and is an agent of Respondent within the meaning of the Act. Respondent admits that Rebelo has acted as a translator, but denies that she is an agent within the meaning of the Act.

A. An Overview of the Case

The alleged unfair labor practices took place during an effort to decertify UNITE as the bargaining representative for the

approximately 67 production employees at UniFirst's Indian Orchard, Massachusetts (Springfield) facility. The effort to decertify the Union was initiated by an employee, Mary Holmes, who filed a decertification petition with the Board on July 9. An election was scheduled by the Regional Director for August 16, but was blocked by the unfair labor practice charges filed by the Union on August 2.

During July, Respondent's general manager, Harr, organized and conducted at least two and as many as five employee meetings in his office, the result of which was the establishment of a "committee" which solicited questions from employees pertaining to the decertification issue. It is alleged that during these meetings, Harr encouraged the members to solicit certain employees for the committee and to solicit questions. In addition, employees were asked to sign a petition allegedly announcing their support of the Respondent.

During the first week of August, Respondent held three meetings with employees at which it allegedly unlawfully promised improved benefits to employees if they voted the Union out. It shortly thereafter announced to employees that the election had been postponed because of the charges filed by the Union. A disgruntled member of the committee then gathered 40 employee signatures on a petition requesting that Respondent hold an election to vote out the Union. On August 31, acting on the petition, Respondent conducted a poll of employees at the Springfield facility, and as a result of that poll, withdrew recognition from the Union. Based on the withdrawal, Respondent has refused to provide the Union with necessary and relevant information the Union requested prior to the withdrawal of recognition and has refused to bargain with the Union.

The complaint alleges that Respondent has violated the Act by:

1. On or about July 16, and in or about early August, at the Indian Orchard facility, telling employees that if the Union were voted out, the anti-union employee committee at the facility would represent employees.
2. On or about August 2 and 3, by Coe, Breault, Harr, and Rebelo, at the Indian Orchard facility, promising employees better wages and benefits, including insurance, profit sharing and 401(k), if they voted the Union out.
3. On or about August 2 and 3, at the Indian Orchard facility, by Harr, Coe, Breault, and Rebelo, telling employees they could not have profit sharing and 401(k) with the Union.
4. On or about August 2 or 3, by Harr at the Indian Orchard facility, interrogating employees about their union sympathies and/or promising employees better benefits without a union.
5. In or about July or August, by Coe at the Indian Orchard facility, promising employees an improved anti-union employee committee if they voted the Union out.
6. On about August 2 and 3, at the Indian Orchard facility, in written materials distributed to employees, promising its employees better wages and benefits if they voted the Union out.

¹ All dates are in 2001, unless otherwise noted.

7. On or about August 31, at the Indian Orchard facility, interrogating and polling its employees in the Union described below in paragraph 8 about their union sympathies.

8. The Complaint alleges that the following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production employees of Respondent described in a collective-bargaining agreement between Respondent and the Union, effective by its terms from October 5, 1998, through October 1, 2001 (the 1998–2001 contract).

9. It further alleges that at all material times, the Union has been the designated collective-bargaining representative of the unit and at all material times until August 27, the Union has been recognized as such by the Respondent. This recognition has been embodied in successive collective bargaining agreements, the most recent of which is the 1998–2001 Contract.

10. The Complaint further alleges that at all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Unit.

11. On August 26, and September 4, The Respondent withdrew its recognition of the Union as the exclusive collective bargaining representative of the Unit.

12. Since August 27, Respondent has refused to meet and bargain with the Union as the exclusive collective bargaining representative of the Unit.

13. Since about July 16, the Union, by letter from its attorney, has requested Respondent furnish the Union with certain information necessary for and relevant to the Union's performance of its duties as the exclusive collective bargaining representative of the Unit.

14. Since about July 16 and August 17, the Respondent has failed and refused to furnish the Union with the information requested by the Union.

Based on the complaint and the evidenced adduced at hearing, the issues presented for determination are whether Respondent violated Section 8(a)(1) of the Act by:

1. through its General Manager Harr, by suggesting which employees should be asked to attend "committee" meetings and by sending a member of management to summon the UniTech shop stewards to a meeting?²

2. through Harr, by soliciting employee signatures on a membership list of the committee?

3. through Harr and Respondent's Human Resource Manager William Coe, by the statements they made during various meetings in July and on August 2, 3, and 28?

Whether Respondent violated Section 8(a)(5) of the Act by:

1. refusing to bargain with the Union by canceling the bargaining session on August 28, relying on a miscommunication, and by continuing to rely on the miscommunication

tion on August 24, in correspondence with the Union which fails to mention the decision to conduct a poll, which had already been made?

2. conducting a secret ballot poll of employees' support for the Union at a time when unfair labor practices were pending.

3. relying on the results of the August 31 poll in order to withdraw recognition of the Union and to continue to refuse to provide requested information and to bargain with the Union.

B. Fact Findings

1. Events leading to the filing of the decertification petition

UniFirst operates a commercial laundry facility at Indian Orchard, Massachusetts, which will be referred to as its Springfield facility. The employees at this facility were represented since the 1950s by Laundry Workers Local 66 until early in 2001, when the Laundry Workers merged with UNITE, which continued to represent the same employees. The Union represents two units at the Springfield facility. The larger unit is comprised of approximately 40–50 UniFirst production employees who launder industrial uniforms. The smaller unit is comprised of UniTech production employees, who launder garments worn in nuclear facilities. UniTech is a subsidiary of UniFirst. The two operations are located within the same building, but are separated due to the nature of the UniTech work. The two units share the same cafeteria and parking lot. The most recent contract between the Union and Respondent had a 3-year term from October 5, 1998, through October 1, 2001.

Both Union Business Agent Sean Munzert and Respondent's general manager, Steven Harr, testified that the relationship between the Union and Respondent had been non-confrontational and that access to the facility not a problem for the Union. There had been an unsuccessful decertification attempt at the Springfield facility in 1992.

In December 2000 or January 2001, the Union sought a mid-contract change relating to the pension fund. As a result of the merger between the two Unions, UNITE's pension fund was overfunded. The Union wanted to direct part of the pension contributions to its health and welfare fund, which needed the money. The Respondent contributed \$38 a month per employee to the pension plan and the Union wanted the Respondent to shift \$37 of this amount into the health and welfare fund. Munzert testified that the situation involved many companies and that the redirection of contributions was solicited at other plants represented by UNITE. He also testified that redirection of the funds would increase the employees health benefits without harming their pension benefits.

The parties discussed the Union's proposal and Respondent decided to decline to make the midcontract change and notified the Union of this decision in a letter dated February 5. Respondent's witnesses testified that the Company feared future liability if UNITE's pension fund subsequently became underfunded. The Respondent suggested that the Union bring the matter up again in negotiations for a new contract.

After receiving this rejection, the Union prepared a leaflet critical of the Company's decision in this regard and distributed it to employees in March. The leaflet fails to state that the Com-

² As will be discussed later, UniTech is a subsidiary of UniFirst.

pany would have shifted the payment of the \$37 from one fund to another. General Manager Harr became angry over this leaflet and after consulting with Respondent's counsel, Peter Kraft, met with unit employees. At this meeting, he pointed out to employees the proposed shift in contributions from one fund to the other, apparently leaving the impression that the pension fund would somehow suffer. According to Harr, following the meeting, he and other managers heard from employees that they were unhappy with the Union for not telling them about the transfer of funds. Two union stewards, Edwin Guerra and Olga Centeno, were particularly disappointed.

Some of the disappointed employees, led by employee Mary Holmes, a 6-year production worker, filed a decertification petition with the NLRB on July 9, 2001. Holmes sworn affidavit was introduced in evidence without objection. In it, she states that she prepared the petition at home, showed the blank petition to Respondent's production manager, got his approval of the document, and circulated the petition at the plant during working hours with his permission.

2. An employee "committee" is formed and meets with Harr

Harr testified that he heard rumors about employees circulating a petition to decertify the Union and that he contacted William Coe, Respondent's director of human resources. Coe told Harr that Harr could not get involved in the decertification effort. Subsequently, sometime between July 7 and 9, Harr received a copy of the decertification petition from Steward Olga Centeno. Harr faxed a copy of the petition to Kraft and Coe. Shortly thereafter, in a phone conversation, Coe explained to Harr what he could do and could not do using the acronyms TIPS and FOE.³ Shortly thereafter, Harr was approached at the plant by employees, Holmes, Dorothy Depaolo, and Centeno, who asked for a meeting. He did meet with them in his office. The employees asked him questions about the decertification process and what would happen in the event of decertification. Harr declined to answer; instead he asked that their questions be put in writing so they could be answered in an orderly fashion. He also suggested that since all three were in the UniFirst unit, they make the decertification petition known to the UniTech unit employees.

According to Harr, he met again with employees in his office a few days after the first meeting. This was in mid-July. At some point, these employees who were generally the employees actively supporting decertification became known as the "committee." At this second meeting, in addition to the three employees involved in the first meeting, employees Katherine Dewberry, Julio and Candy Abrew, and Maria Fatima Rebelo, and UniTech Shop Stewards Claudio Camacho and Jeanette Boily were in attendance.

Holmes affidavit states that before this meeting, Production Manager Breault went around to all members of the committee and called them together for the meeting in Harr's office. It is

³ TIPS stands for cannot "threaten, interrogate, promise or spy," and FOE stands for "[employer] can give facts, opinions and evidence" during conversations with employees.

not clear on the record who called the meeting, Harr or one or more of the committee members. Holmes stated that Harr spoke at the meeting and told the employees that the purpose of the committee was to keep the employees informed about what was going on. According to Holmes, the committee was told their role was "to let the people know that we were there to give UniFirst a chance to show what we could get if we were non-Union." Harr told them that if employees had questions, they could give them to the committee and it would give them to Harr to answer. Holmes also stated that Harr had prepared a document that he asked the employees to sign. The document said that we were organized to help the employees understand what could be offered them in a possible change over.

Depaolo was also at the second meeting and testified that she recalled Harr telling the committee to go out and tell employees that if they had any questions they should come to the committee or to him. She did not recall being asked to sign a document at the meeting.

Maria Fatima Rebelo, a UniFirst employee who later acted as a translator for Respondent, testified that she was also a member of the committee who met in Harr's office. She testified that the committee was formed to ask Harr and Breault what benefits the employees would receive without a union. Rebelo stated that Harr emphasized that he could make no promises.

Steward Claudio Camacho testified that he was asked to attend a meeting of the committee on July 16. He was invited evidently in response to his query to Edwin Guerra, a committee member and shop steward, as to why he and the other UniTech steward were not being asked to the meetings. According to Camacho, he was approached at his workstation by Breault and asked to come to Harr's office. Camacho testified that at the meeting, Harr asked the employees to sign a petition that said, "I am in agreement that the Company form a committee for the purpose of communicating what the employer was talking about—also, for the purpose of if we had any questions they could ask the committee and the committee would communicate to the company." Camacho declined to sign it. According to Camacho, Harr also said that the committee would represent the workers in the capacity of a union if the Union left.

General Manager Harr testified that this meeting took place, but denies that he asked anyone to sign any document and denies ever stating to a group of employees that the committee would take the place of the union if it were to be decertified.

Based on the testimony of several witnesses, Harr held another meeting with an unspecified number of employees on or about July 19. UniFirst employee Ullis Torres testified that he attended such a meeting and that the main issues discussed were 401(k) and profit sharing. Torres testified that at this meeting, Harr told the employees that if the Union were voted out, the employees would be able to get profit sharing and a 401(k). He also testified that an employee asked if the employees could have the plan that Respondent was offering with the Union still in place. According to Torres, Harr said, "No." According to Torres, Harr also instructed employees to write down their questions and give them to him, Breault, Guerra, or Centeno.

Employees Denys Camacho and Carmen Sanchez, both Uni-First employees, testified that a meeting for all employees occurred in mid-July. Camacho testified that at this meeting, Harr told employees about the committee. According to her, Harr stated that this group of people would represent the workers in case the Union did not exist anymore—that it would be like forming a union inside the Company.

Harr testified that he held a meeting for employees on July 19 to announce the election date set by the NLRB on the decertification petition and to discuss the process. I really believe that Torres has mixed up meetings in his mind and that the one his testimony primarily relates to took place on either August 2 or 3. The topics of the 401(k) and profit-sharing plans were a major part of these meetings and testimony similar to that given by Torres was given by several witnesses attending these meetings. I do not credit the testimony of Denys Camacho and her husband, Claudio, that in two separate meetings, Harr stated that the committee would represent the employees or that the committee would be like a union in the Company. They are the only witnesses making this allegation even though a number of witnesses that testified or whose affidavits were placed in evidence attended these meetings. Harr denies making such statements and I find him more credible than the Camachos.

3. Respondent holds three employee meetings to explain its nonunion benefits

General Manager Harr and Human Resources Director Coe held three employee meetings on August 2 and 3. One meeting was conducted in Portuguese, one in Spanish and one in English. The same presentation was made at each meeting. Harr and Coe do not speak either Portuguese or Spanish, and they relied on employees to translate for them during their presentations to Portuguese and Spanish-speaking employees. Coe testified that the Company used certified translators for written translations and that all oral translations are done by employees. Maria Fatima Rebelo translated for the meeting conducted in Portuguese and Olga Centeno translated for the meeting conducted in Spanish.

Harr and Coe testified that at each meeting, Harr would introduce Coe and Coe would then explain to the employees the principles of TIPS and FOE, described earlier. They would then review the written handout to employees that discuss wages, 401(k), and profit sharing, explaining the benefits, making clear that they were not “promising anything to the employees, stating that would be against the law.”

Coe testified that he explained how the 401(k) plan functioned with employee contributions and without. He testified that he recalled Harr using an example of a long-term employee named Eunice to demonstrate how the company’s retirement plan worked. Coe testified that he was asked, “How come union employees didn’t get that” referring to the profit-sharing program. Coe told employees that the Union wanted them to put money in the union pension fund instead, during contract negotiations. Coe also answered employee questions and stated that employees had questions about job security and health care. Coe testified that he gave the opinion that the Company’s health insurance package was better than the Union’s plan. He noted that the company’s plan covers more, but also costs much

more. He gave employees written answers to questions that had been passed to management by the committee and urged employees to read them.

Harr’s testimony about the three meetings is consistent with Coe’s testimony. According to Harr, at one meeting an employee asked if the employees could have the union pension and a 401(k) plan. Harr told the employee that there was only “one pie, not two pies” and that the Union had historically negotiated for a contribution to their pension fund. He offered his opinion that the employees would be better off without the Union.

a. The meeting held in Portuguese

Maria Fatima Rebelo translated at this meeting. She testified that she often translated into Portuguese and that during July and August 2001, she translated at three or four meetings. Rebelo testified that she would translate from the front of the room and would give the exact translation after each short statement by the speaker. She testified that she would ask for clarification if she did not understand what the speaker was saying.

She testified that Harr and Coe discussed the benefits employees could have if the Union were decertified. She testified that they gave employees a packet of written material. In her pretrial affidavit, she stated:

These papers referred to profit sharing, 401(k) and health insurance. He said it was up to us if we vote the Union down, we could get profit sharing and 401 (k). He did not promise anything. He said if we keep the Union in, we would not have profit sharing or 401(k)—union people do not have that. He said if we vote the Union out we could have profit sharing and 401(k), but it was all up to us. A person asked if we keep the Union, could we get 401(k) and profit sharing. Steve (Harr) said no—because that was the Company policy without the Union.

Her testimony is consistent with the quoted portion of her affidavit. Rebelo testified that Harr made it clear that he did not promise anything, that he was relying on the facts. She also testified that when Harr said it was up to the employees, he was referring to the (decertification) vote and that the employees could have better benefits without the Union. It is significant that Rebelo believes she heard what her testimony and affidavit indicates as she was the translator for the rest of the employees in attendance. What she heard is what they heard.

Employee Hilda Martinez attended this meeting. She remembered Coe talking about the profit-sharing and 401(k) plans and that he said they were benefits they could only get through the Company and not the Union. She testified that Harr told them that if the Union left, the employees could select a spokesperson to speak on their behalf with management.

b. The meeting held in Spanish

Denys Camacho, Carmen Sanchez, and Claudio Camacho all attended the meeting that was conducted in Spanish. Olga Centeno translated at this meeting. The testimony of these witnesses confirms that meeting was conducted in a manner similar to the meeting held in Portuguese and covered the same material.

Denys Camacho testified that Coe spoke about the health plan offered by Respondent and stated that while the premium would be more expensive, Respondent would help offset the cost by giving employees a raise. Denys Camacho also testified that, according to Harr, employees would begin to receive assistance for health care costs “as soon as we didn’t have a union.” According to her, Harr said that they would begin to participate in the profit-sharing plan “as soon as we didn’t have a union.” Harr and Coe deny making these statements and I credit their denial, Denys Camacho is the only witness to make these allegations and I do not find her credible.

Denys Camacho also testified that Harr was asked if the employees could have the 401(k) with the Union. According to her, Harr answered, “No, because the union is a business.” This could be fairly accurate. Coe and Harr indicated they told employees the Union historically bargained only for its own pension plan. Like a business, they would have an interest in the solvency of his plan. Claudio Camacho testified in a similar vein to his wife.

Carmen Sanchez testified that she said she relayed Camacho’s question to Harr, and he answered simply, “no.”

Coe testified that the question posed was whether the employees could have both the union pension plan and the 401(k) plan offered by the Company. Coe explained that when a Union wants contributions to its own pension plan, the Company is not going to offer the 401(k) and profit-sharing plans, as it is unwilling to make contributions to both types of plans. He denied that either he or Harr ever stated that the unionized employees could not have the 401(k) or profit-sharing plans. Evidently he did not make himself clear because virtually every nonmanagement witness in this proceeding heard him to say that these benefits were only available to nonunion employees.

Following this meeting, Harr went outside to smoke. He encountered the two Camacho’s and had a conversation with them. According to Claudio, Harr asked them how old they were and they told him 26. Harr then stated they were very young and both would have a lot of opportunities with the benefits the Company offered. The following exchange then took place:

Q. What else did he (Harr) say?

A. He asked me what my opinion was about what he had said at the conference, whether it was true or false.

Q. What was he referring to?

A. What they were offering at the meeting.

Q. And what did you say?

A. I told him I didn’t know because I was not 100% sure of what they were offering.

Q. Well, let me ask this. Did you know what they were offering you at the meeting?

A. Yes.

Q. So why did you tell Mr. Harr that you didn’t know?

A. Because he never said he was going to promise anything.

Q. Did he say anything else to you?

A. No.⁴

Contrary to the arguments of the General Counsel I do not find this casual conversation unlawful. Even accepting Camacho’s version of the conversation, Harr was only asking if Camacho believed Coe’s presentation of facts, not whether he was supporting the decertification effort or not.

Harr admitted the conversation took place but only recalled asking them if the meeting had been informative.

c. The meeting held in English

Dorothy Depaolo and Mary Holmes were English-speaking members of the committee. They both attended the English speaking meetings. In her affidavit, Depaolo avers that Coe and Harr told the attendees the facts about profit sharing and 401(k) and answered questions. She added that at no time did Respondent promise anything and that she told steward Guerra that he should tell the Union it was not true that Respondent was making promises.⁵

According to Depaolo, Coe, and Harr compared what employees at the UniFirst nonunion companies were making and showed them the difference. She averred that the two men said that if the employees were nonunion, they would automatically be in the profit-sharing program and have the option to be in the 401(k) plan. Holmes stated in her affidavit that at this meeting, Harr had some papers that showed what “we could get with profit sharing and 401(k).” According to Holmes, Harr said, “This is what you could get without the Union.” He added, “We could not get profit sharing or 401(k) with the Union because it was not offered.” She stated he also said that the medical insurance offered by Respondent was a better plan, but was not available with the Union.

C. Events Leading to Respondent’s Withdrawal of Recognition of the Union Following the Employee Meetings

On August 8, the Respondent received notice that the Union had filed unfair labor practice charges blocking the election and causing its postponement from the scheduled date of August 16. Harr notified employees of these occurrences.

Around August 16, the Union distributed a flyer announcing a meeting on August 17 to nominate new shop stewards. The flyer also had a cartoon, depicting management asking an employee to sit down for negotiations in an electric chair. Harr testified that Dorothy Depaolo was angry about the flyer and the fact that the election was blocked. Harr testified that she had never been a supporter of the Union because she lost her seniority in a corporate takeover. According to Harr, the union meeting was held on August 17 and he heard heated exchanges coming from those in attendance. Soon after the meeting, Depaolo began to circulate a petition demanding an election. In her affidavit, Depaolo stated that she circulated the petition to

⁴ Camacho left the stand shortly after this testimony and returned the next day to complete it. He attempted on the second day to change the meaning of what is quoted above. I do not credit this attempted change in testimony as it appears to have been coached by someone.

⁵ For a few days prior to this meeting, the Union had been distributing flyers accusing Respondent of making promises to employees with regard to wages and benefits.

get Respondent to hold its own “vote.” She also stated she was angry about the steward nominations and because the Union was bringing in organizers from North Carolina to meet with employees. Depaolo gave the signed petition to Breault who got it to counsel.

Harr testified that he received a copy of the petition from Centeno on about August 20, and faxed a copy of it to Coe and Kraft. The petition was signed by 40 of Respondent’s employees.

On August 14, Attorney Kraft agreed in a letter to have a bargaining session on August 28. Kraft testified that on August 20, while he was in Texas on a business matter, he received a voice mail message from Teresa Sullivan, the assistant to Anne Sills, counsel for the Union, stating that Sills would be on vacation on August 28. Kraft testified that he immediately left instructions for his assistant to schedule a meeting for him concerning another matter on August 28. Late the next day, Kraft received a second voice mail message dated August 21 from Sullivan, informing him he should disregard the message of the previous day as another attorney, Don Siegel, would be covering for Sills while she was on vacation. Kraft had a conversation with Siegel on August 28 during which he explained why he had to cancel the August 28 meeting. Kraft then sent a followup letter on August 24.

Coe, Harr, and Kraft met at the Springfield facility on August 23 or 24 to discuss the petition generated by Depaolo. At this meeting a decision was made to conduct an employee poll in lieu of the postponed election. On August 27, Kraft sent a letter to Munzert announcing that Respondent would conduct a poll on August 31. On August 28, Kraft received a letter from Siegel demanding that the poll be canceled.

On August 28, Coe held a meeting for all employees to explain the procedure for Respondent’s poll and to encourage the employees to vote in the poll. Coe testified that they reviewed TIPS and FOE and that he was interrupted by an employee who wanted to know what they (the employees) would get for wages and benefits if they voted the Union out. Coe testified that he told the employee that he could only tell him the facts and give his opinion. Coe told the employee that, in his opinion, they would be better off without the Union. According to Claudio Camacho, Harr spoke and told the employees that if they believed what Respondent was offering was better than what the Union was offering, they should vote for Respondent and vice versa. He also testified that Harr told the group that the benefits Respondent was offering were better than anything that the Union would be able to offer them.

Both Coe and Harr deny that Harr made any statements about Respondent’s benefits being better than what the Union could obtain for the employees. I credit their denials over the testimony of Camacho.

On August 31, Respondent held a poll in the cafeteria of the Springfield plant. A minister counted the ballots. The tally was 37 for Respondent and 21 for the Union. As a result of the tally, Kraft sent a letter to Siegel dated September 4, informing him that Respondent was withdrawing recognition from the Union based on the results of the poll.

D. The Union Makes Information Requests that Respondent Only Partially Responds to and then Refuses to Further Comply

On July 16 and August 17, the Union made written information requests that would have relevance to the upcoming negotiations for a new collective-bargaining agreement, the decertification issue or both. Respondent provided some of this information prior to the poll, but not all of it. Respondent makes no contention that the information requested is not necessary and relevant to the Union’s role as exclusive representative of the unit employees. It refuses to provide it because it withdrew recognition.

E. Conclusions About Whether the Respondent has Committed Unfair Labor Practices

1. Did Respondent violate Section 8(a)(1) of the Act by its involvement with the committee

I find that this issue must be resolved in favor of the Respondent based on the credited evidence. Respondent did not do anything with respect to the filing of the decertification petition. After its filing Harr was approached by a group of employees who had questions relating to what would happen if the Union were decertified. These employees asked to meet with him. He did meet and an informal committee came into existence. There is no showing that Harr formed the committee. He again met with the committee a few days later. In attendance at this meeting were two UniTech shop stewards, Claudio Camacho and Jeanette Boily. The two stewards were summoned to the meeting by a member of management. The fact is the two stewards, through Camacho, had requested they be allowed to attend. As noted earlier, there was no showing in the record as to who called the meetings. I will not find a violation of the Act in this regard.

Respondent, through Harr, suggested that the committee gather employee questions and submit them in writing. As the committee had its genesis in employees seeking information, I believe it would be obvious that this was a legitimate goal of the committee. Simply directing that questions be gathered in writing so they could be answered does not rise to the level of an unlawful direction of the committee’s activities. Harr also suggested they tell UniTech employees of the committee’s existence as all members of the committee at its inception were UniFirst employees. The committee was free to follow this suggestion or ignore it. Two witnesses, Mary Holmes and Claudio Camacho, testified that in the second meeting of the committee with Harr he asked those present to sign a document which said the undersigned were organized to help the employees understand what could be offered them in a possible change over. Unless that document is what is in evidence as Respondent’s Exhibit 4, there was no other document introduced that could be it. There was no evidence tying this exhibit to Harr. Respondent’s Exhibit 4 does not do anything but encourage those reading it to submit questions to the committee if they have any questions. Harr denied asking employees to sign any document or petition. I do not believe the record is sufficiently developed to make a finding that he did. I do not find that Respondent violated the Act based on the testimony of Camacho

and Holmes in this regard. I have previously in this decision discredited testimony that Harr stated that the committee would take the place of the Union if it were decertified, or that the committee would serve as the employees' representative if the Union was voted out. Thus, I find no violation of the Act in this regard.

2. Did Respondent violate Section 8(a)(1) of the Act by the actions of Harr and Coe at the August employee meetings

Section 8(c) of the Act permits an employer to make truthful statements concerning benefits available to its represented and unrepresented employees. For example, in *TCI Cablevision*, 329 NLRB 700 (1999), employees were told that the union had not succeeded in negotiating a 401(k) plan, a benefit the employer's unrepresented employees received. In that case, the Board found that the employer lawfully "informed employees of a 'historical fact'" (that its unrepresented employees received a 401(k) benefit). The Board, however, stated that "[critically], the Employer did not tell employees that the only way to receive the 401(k) plan was to oust the Union," and that the employer "never said it would never agree with the Union to have such a plan."

An employer also has the right to compare wages and benefits at its nonunion and unionized facilities. *Langdale Forest Products Co.*, 335 NLRB 602, 602 (2001), citing *TCI Cablevision*, supra; and *Viacom Cablevision*, 267 NLRB 1141 (1983). In addition, an employer can state its opinion, based on such a comparison, that employees would be better off without a union. *Langdale Forest Products*, supra. Absent promises or threats, the Board normally treats such comments as protected by Section 8(c).

However, the Board has long held that conditioning improved benefits on employees giving up union representation violates Section 8(a)(1) of the Act. In *Bridgestone/Firestone, Inc.*, 332 NLRB 575, 576 (2000), the Board found that the employer made unlawful promises of benefits in exchange for employee votes against union representation. It is also unlawful for an employer to state that employees can only obtain particular benefits by decertifying a union. For example, in *Selkirk Metalbestos*, 321 NLRB 44, 51 (1996), the Board upheld the administrative law judge, who found that promises of benefits immediately before an election tended to determine employees' union desires were unlawful and "particularly egregious when, as here, the employer advised . . . employees that the new benefit was available only to its unrepresented employees."

Based on these cases, I find that Respondent exceeded the permissible limits of Section 8(c) and made unlawful statements and promises of benefits to employees. During the meetings of August 2 and 3, based on the credited testimony, Respondent told employees they could only receive profit-sharing and 401(k) benefits without the Union. Based on the credited testimony, Respondent promised that these benefits would be made available to employees if the Union were decertified. As explained in *Selkirk Metalbestos*, it is unlawful to tell employees that particular benefits are available only to nonunion employees. This case is also distinguishable from *TCI Cablevision*, where the employer did no more than tell employees

that the union had been unable to achieve a 401(k) benefit in negotiations, here Respondent told employees that the only way to receive profit-sharing and a 401(k) plan was to vote out the Union.

Rebello, Holmes, and Depaolo, all witnesses who favored decertification, testified at trial and by affidavit that these statements were made and supplemented by the written material handed out at the employee meetings. In addition, all of the Union witnesses testified to the same type of comments. The testimony of almost all witnesses except Coe and Harr establish that in the meetings of August 2 and 3, Respondent made it clear that the only way the employees could have profit-sharing and a 401(k) plans was to decertify the Union. I find that, based on the case law, this statement was unlawful and violated Section 8(a)(1) of the Act. Respondent's repeated disclaimers that it could not promise anything are belied with respect to 401(k) and profit-sharing offers.

I find that the other material presented at the August 2 and 3 meetings are within the permissible limits of Section 8(c). *Viacom Cablevision*, 267 NLRB at 1141-1142.

3. Did Respondent violate the Act by canceling the August 28 meeting

I accept as true Counsel Kraft's explanation of the reason for the cancellation of the August 28 meeting. Consequently, I find the cancellation of this meeting was the result of a miscommunication between the parties and nothing more. I do not find that the cancellation in any way violated the act. The fact that Kraft's letter to Union Counsel Siegel does not note that the Respondent was considering holding an employee poll I find insignificant. The letter may well have been drafted prior to the decision to have a poll.

4. Did Respondent violate Section 8(a)(1) of the Act by polling unit employees in an atmosphere of unremedied unfair labor practices and did it violate Section 8(a)(5) by thereafter withdrawing recognition of the Union and refusing to supply requested information and by refusing to bargain

Under *Struksnes Construction Co.*, 165 NLRB 1062 (1965), an employer is permitted to poll employees about their union sentiments only if: (1) the poll's purpose is to determine the truth of a union's claim of majority status; (2) this purpose is communicated to the employees; (3) employer assurances against reprisal are given; (4) employees are polled by secret ballot; and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere. *Id.* at 1063. This last criterion is limited to unfair labor practices that can be shown to have caused the loss of employee support for the union.

Here, Respondent's August 27 notice to employees satisfied the first four requirements set forth in *Struksnes*. In addition, Respondent provided the Union with advance notice of the poll's time and place, as called for in *Texas Petrochemicals*, 296 NLRB 1057, 1063 (1989). Nevertheless, the poll was unlawful because it, and the petition which prompted it, were tainted by Respondents statements made in August that were

not protected by Section 8(c) of the Act, which were causally related to the loss of employee support for the Union.

According to *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 fn. 16 (1996), and *RTP Co.*, 334 NLRB 466, 469 (2001), the relevant factors in determining a causal relationship between unfair labor practices and loss of employee support for a union include: (1) the length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the violations, including the possibility of a lasting and detrimental effect on employees; (3) the tendency of the violations to cause employee disaffection with the union; and (4) the effect of the unlawful conduct on employee's morale, organizational activities, and union membership.

First, the unfair labor practices occurred within 2 weeks of the August 14 petition which was submitted by Depaolo. This petition, which a majority of employees signed, served as the basis on which Respondent conducted its poll 2 weeks later and subsequently withdrew recognition from the Union. In *RTP Co.*, supra, the Board found "close temporal proximity" where the unfair labor practice occurred 2 to 6 weeks prior to the petition on which the employer based its withdrawal of recognition. Second, Respondent's unlawful promises and statements regarding profit sharing and 401(k) improperly suggest to employees that they would be better off without the union. See *Detroit Edison*, 310 NLRB 564, 566 (1993), where the Board held that the employer's unfair labor practices "conveyed to employees the notion that they would receive more . . . without union representation. Such conduct improperly affects [the] bargaining relationship."

As to the final two factors, which address the effect of the employer's conduct on protected employee activity, this case is similar to *RTP Co.*, supra, where the Board found that an employer accusation that the union prevented a wage increase tended to alienate the employees from the union. See also *Bridgestone/Firestone*, supra at 576, where the Board found that employer promises of enhanced benefits in the absence of the union tended to discourage union activity "because such promises send the unmistakable message that union representation is not only unnecessary, but that it is an obstacle as opposed to a means, to achieving higher wages and benefits."

Here, it is fair to argue that Respondent's promises of improved benefits through profit sharing and 401(k) and that those benefits were only available without the Union, reasonably tended to cause employee dissatisfaction with the Union. In fact, it was not until Respondent committed its unfair labor practices that the Union lost majority support. In this regard, only 21 out of 67 unit members had signed the first antiunion petition. The August 14 petition was signed by 40 employees. It is reasonable to conclude that this increased employee dissatisfaction was directly tied to the unfair labor practices. I find these violations bear a causal relationship to the loss of employee support for the Union and render the Respondent's poll unlawful.

Respondent also violated Section 8(a)(1) of the Act by polling employees while the decertification petition was still pending. In *Struknes*, supra at 1063, the Board stated that:

A poll taken while a petition for a Board election is pending does not, in our view, serve any legitimate interest of the employer that would not be better served by the forthcoming Board election. In accord with long-established Board policy, therefore, such polls will continue to be found to violate Section 8(a)(1) of the Act.

See also *Bruckner Nursing Home*, 262 NLRB 955, 957 (1982) (in an initial organizing situation, once notified of a valid petition, an employer must refrain from recognizing any rival unions) and by *RCA Del Caribe*, 262 NLRB 963, 966 (1982) (the mere filing of an election petition by an outside, challenging union neither requires nor permits an employer to withdraw from bargaining or from the execution of a contract with an incumbent union). *Struknes*, *Bruckner*, and *RCA Del Caribe*, stand for the proposition that, in the face of a valid election petition, an employer may not resort to self-help. The Board's recent decision in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717, 726 (2001), is in accord with *Struknes* because, even though the Board in *Levitz* left to a later case the question of whether the current good-faith doubt standard for polling ought to be changed, it emphasized that Board-conducted elections remain the preferred way to resolve questions concerning employees' support for unions.

The Board applied this principle in *Heritage Hall, E.P.I. Corp.*, 333 NLRB 458 (2001). There, the union had filed a petition for an election to be held on December 8, 1995. On December 7, the union filed blocking charges. Even though the election was canceled, the employer conducted what it termed a "mock election," which was alleged to be an unlawful employee poll. The administrative law judge found the poll unlawful under *Struknes* because it had not been conducted in an atmosphere free of unfair labor practices or coercion. The Board stressed that under *Struknes*, the respondent was prohibited from lawfully conducting its own election while the union's petition was pending even if the respondent complied with the procedural safeguards set forth in that case. Like *Heritage Hall*, at the time of the poll an election was pending in this case. Accordingly, Respondent's poll was unlawful in this regard as well.

Having found the petition on which the poll was based tainted by Respondent's unfair labor practices and the poll unlawful and in violation of Section 8(a)(1), its subsequent reliance on the results of the poll to withdraw recognition, refuse to supply requested necessary and relevant information and refuse to bargain are similarly unlawful and in violation of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. UniFirst Corporation is an employer within the meaning Section 2(6) and (7).

2. Laundry Workers Union Local 66L, a/w Union of Needletrades, Industrial & Textile Employees, AFL-CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production employees of Respondent described in a collective-bargaining agreement between Respondent and the Union, effective by its terms from October 5, 1998, through October 1, 2001.

4. At all material times, the Union has been the designated collective-bargaining representative of the unit and at all material times until August 27, the Union has been recognized as such by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is the 1998–2001 contract.

5. Respondent has engaged in conduct in violation of Section 8(a)(1) by:

(a) On August 2 and 3, 2001, by Harr and Coe, stating to employees that Respondent's 401(k) plan and profit-sharing plan were only available to employees if the Union were to be decertified and impliedly promising these plans would be made available if the Union were decertified.

(b) By polling its employees' union support in an atmosphere tainted by unremedied unfair labor practices and while a Board election was pending.

6. Respondent has engaged in conduct in violation of Section 8(a)(5) of the Act by:

(a) Refusing to provide relevant and necessary information requested by the Union on July 16 and August 17, 2001.

(b) Withdrawing recognition of the Union as the exclusive collective-bargaining representative of the unit on September 4, 2001.

(c) Since September 4, 2001, refusing to meet and bargain with the Union as the exclusive collective-bargaining representative of the unit.

7. The unfair labor practices committed by Respondent are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondent did not commit the other unfair labor practices alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent should be ordered to recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the unit and, if an understanding is reached, to embody the understanding in a signed agreement. Respondent should be ordered to furnish the Union with the information requested on July 16 and August 17, 2001. In addition, the Respondent will make whole all employees who suffered financial loss as a result of unilateral changes to be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1978). Finally, Respondent should be ordered to post an appropriate notice to employees.

[Recommended Order omitted from publication.]