

Waters Distributing Company and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 537. Case 27-CA-2755¹

June 2, 1970

DECISION AND ORDER

BY CHAIRMAN McCULLOCH AND MEMBERS BROWN AND JENKINS

On December 31, 1969, Trial Examiner Herman Marx issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief, and the General Counsel filed a brief in reply to Respondent's exceptions.

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

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as herein modified.

1. The Trial Examiner found that Respondent violated Section 8(a)(1) of the Act by distributing a letter just prior to the election which enumerated various existing benefits, including sick pay, Christmas bonus, Christmas party, paid insurance, and paid vacation, and went on to state, "We can continue these benefits if we remain a non-union company." In adopting the Trial Examiner's finding we agree that these statements constituted an implied threat that benefits would be reduced or eliminated if a majority of employees voted for the Union in the election.

2. The Trial Examiner also concluded that the same letter further violated Section 8(a)(1) through promises of a group health program and a paid vacation if employ-

ees rejected the Union. Concerning the paid vacation, Respondent's statement in this regard was not alleged in the complaint or litigated as an unlawful promise of benefit. Moreover, in his answering brief, the General Counsel stipulates that this statement was consistent with Respondent's preexisting policy. Accordingly, we reverse the Trial Examiner, but only insofar as he finds that the reference to vacation policy constituted an unlawful promise of benefit.

The Trial Examiner, in addition to finding that the preelection letter's reference to group insurance constituted an unlawful promise of benefit, also found that Respondent subsequently violated Section 8(a)(1) by institution of such a plan shortly after the election and while the Union's objections were pending. In excepting to these findings, Respondent contends, *inter alia*, that it had intended to provide health coverage to its employees prior to the advent of the Union, had discussed this intention with employees, and had made contacts with various insurance companies in the interest of securing an appropriate health benefit plan. Respondent explains the timing of its implementation of the plan in the following terms: "That's the time that we had everything set up to go and that we had, that they [apparently the insurance carriers] set up a plan that they [apparently the employees] would like to take." We find no merit in Respondent's exceptions.

While the record reveals that, for some time, Respondent had been considering the establishment of a group insurance plan and had discussed this possibility with employees, such discussions dated back for a period of almost 6 years. Yet, prior to the filing of the election petition, no specific plan had been selected, nor did Respondent, at any time prior to the election, enter any binding commitment to provide insurance coverage. The uncertainty that existed among employees as to when or whether Respondent would grant such a program is evidenced by the discussion between employee Stanley and a union representative, in which Stanley made several inquiries concerning the Union's position on health and welfare programs, while indicating that Respondent had no such program. As a result of this conversation, Stanley executed an authorization card, resulting in the Union's representation of three of the five employees in the appropriate unit. Thereafter, on July 7, 1969, Respondent distributed the aforementioned letter, for the first time stating that a specific insurance program had been selected and that this benefit would be available, "Should we remain a non-union company." In the subsequent election, conducted on July 11, 1969, the Union was defeated by the margin of a single vote. In our opinion, the foregoing amply demonstrates that the preelection promise of an insurance program, like the threatened impairment of benefits, was calculated to influence the outcome of the election and violated Section 8(a)(1). Accordingly, and as we agree with the Trial Examiner for the reasons stated by him, that Respondent failed to offer any reasonable explanation for the timing of the subsequent grant of said benefit during the period when objections to the first election were pending, we further find that the coverage was put into effect in

¹ The complaint in the instant case was originally consolidated by the Regional Director with the related representation proceeding in Case 27-RC-3644 because the objections to the election therein raised issues of fact in common with the unfair labor practice proceeding. Since the election had been conducted under a consent-election agreement entered into by the parties pursuant to Sec 102.62 (a) of the National Labor Relations Board Rules and Regulations, Case 27-RC-3644 was upon issuance of the Trial Examiner's Decision severed from Case 27-CA-2755 and remanded to the Regional Director for determination. Thereafter we were administratively advised that the Regional Director by his supplemental report on objections dated March 5, 1970, has set aside the election conducted in Case 27-RC-3644

August 1969 in order to influence the employees' vote in the event that Union's objections resulted in a rerun election and that Respondent thereby further violated Section 8(a)(1) of the Act.

3. We also agree with the Trial Examiner's finding that the aforescribed unfair labor practices were calculated to undermine the Union's majority and could only be redressed effectively through the finding of an 8(a)(5) violation and the issuance of a bargaining order.² Although the preelection unfair labor practices were contained in a single communication, the threats involved covered a broad range of terms and conditions of employment. The insurance coverage, unlawfully promised before the election and unlawfully granted after the election, represented a benefit that had been a focal point of employee interest, and Respondent's action with respect thereto was likely to have had significant impact on the first, or any rerun, election. Clearly, the preelection unfair labor practices rendered the first election an inaccurate register of employee desire on the question of union representation, and, as the effects of the subsequent grant of insurance coverage could not be expunged through application of conventional Board remedies, it is highly unlikely that a second election would reflect a free and uncoerced employee choice. Accordingly, we are satisfied that the policies of the Act would not be effectuated through direction of a second election but that effect should be given to the card majority possessed by the Union before Respondent embarked on its unlawful course of conduct. We therefore find, in agreement with the Trial Examiner, that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain upon the Union's demand for recognition and by unilaterally establishing a health insurance program without consulting with the Union, as exclusive representative of its employees.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Waters Distributing Company, Denver, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

² *N.L.R.B. v Gissel Packing Company*, 395 U.S. 375.

DECISION OF THE TRIAL EXAMINER

STATEMENT OF THE CASE

HERMAN MARX, Trial Examiner: On July 11, 1969, pursuant to an agreement for a consent election under the Board's auspices in Case 27-RC-3644 between an employer known as Waters Distributing Company (herein

the Company or Respondent¹) and a labor organization named International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 537 (herein the Union), the Board conducted a representation election among the employees of the Company in an appropriate bargaining unit, with the result that of the five eligible voters, two voted in favor of the Union, and three against it.

The Union filed timely objections in the representation proceeding on July 17, 1969, alleging misconduct by the Company affecting the election results in that it had threatened its employees with loss of benefits, and had promised them benefits, to influence them to reject the Union, and had "favorably" changed benefits and working conditions for them in order to dissipate the Union's majority status. On the same date, the Union initiated Case 27-CA-2755 by filing an unfair labor practice charge against the Company, and on September 5, 1969, the Board's General Counsel issued a complaint based on the charge. As subsequently amended, the complaint alleges, in material substance, that the Union has been the collective-bargaining representative of the employees in the appropriate unit (notwithstanding the election results) at all times since May 22, 1969; that the Company has refused to recognize and bargain collectively with the Union as such representative, thus violating Section 8(a)(5) and (1) of the National Labor Relations Act² (herein the Act); and that the Company has violated said Section 8(a)(1) by threatening employees with reprisals, and promising and granting them rewards and benefits, in order to dissipate the Union's majority status and induce employees to refrain from membership in, or activities on behalf of, the Union.

The Company has filed an answer denying, in substance, the commission of the alleged unfair labor practices.

The complaint and the objections include substantially common allegations of unfair labor practices, and, following an investigation, the Regional Director for Region 27 issued a report on the objections, dated September 5, 1969, and, by an order bearing that date, directed that Case 27-CA-2755 and Case 27-RC-3644 be "consolidated for the purposes of hearing, ruling, and decision by a Trial Examiner."³

Such a hearing was held before me as duly designated Trial Examiner at Denver, Colorado, on October 28, 1969. The General Counsel and the Respondent appeared

¹ Waters Distributing Company is not a legal entity but a trade name for an individual, Donald Parker Waters, who owns and operates the enterprise, and is the actual employer involved here. In the absence of a motion by any party, I refrain from amending the caption of this proceeding or any pleading to reflect the individual's status as employer or respondent. Such a motion may appropriately be addressed to the Board following issuance of this decision. In any case, as used herein, the trade name and the terms "Respondent" and "Company" also refer to Donald Parker Waters, doing business as Waters Distributing Company.

² 29 U.S.C. 151, *et seq.*

³ Copies of the charge, the complaint, the Regional Director's report on the objections, his order of consolidation, and a notice of hearing in the consolidated proceedings have been duly served on the Respondent.

through respective counsel, and all parties were afforded a full opportunity to adduce evidence, examine and cross-examine witnesses, and submit oral argument and briefs.

Upon the entire record, from my observation of the demeanor of the witnesses, and having read an considered the briefs submitted to me since the hearing, I make the following findings of fact:

FINDINGS OF FACT

I. NATURE OF THE COMPANY'S BUSINESS; JURISDICTION OF THE BOARD

Donald Parker Waters (also Waters herein), under the trade name and style of Waters Distributing Company, is engaged in the sale and distribution of dairy products and other foods, at wholesale, in Denver, Colorado, where he maintains an office and place of business, including a warehouse; employs individuals in his enterprise; and is, and has been at all times material here, an employer within the meaning of Section 2(2) of the Act.

In the course and conduct of his business operations in Colorado, Waters "annually" purchases products worth in excess of \$50,000 from suppliers located outside that State and causes such products to be shipped into Colorado. By reason of said purchases and shipments, Waters is, and has been at all material times, engaged in interstate commerce and in operations affecting such commerce, within the meaning of Sections 2(6) and 2(7) of the Act. Accordingly, the Board has jurisdiction over the subject matter of this proceeding.

II. THE LABOR ORGANIZATION INVOLVED

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

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Prefatory Statement

As the record establishes, without dispute, all employees employed by Donald Parker Waters, doing business as Waters Distributing Company, at his business premises in Denver, Colorado, excluding all office clerical employees, salesmen, guards, professional employees, and supervisors as defined in the Act, constitute, and have constituted at all material times, a unit appropriate for the purpose of collective bargaining, within the meaning of Section 9(b) of the Act.

At all such times, the unit has consisted of five employees. These, as well as a sales manager, Ray Henson, who is not in the unit, work under the supervision of Waters. Henson, like Waters, is, and has been at all material times, a supervisor within the meaning of Section 2(11) of the Act.

In January 1969,⁴ Waters instructed Henson to secure information from several insurance companies regarding a group medical insurance program covering employees and management personnel of the enterprise. Henson, assisted by Waters' secretary, Bernice Rose (also, like Henson, not in the bargaining unit), complied, with the result that between the latter part of January and the early part of May various insurance agents submitted proposals to the management. The Company adopted none of these.

On May 14, an insurance agent named Middel undertook, in a conversation with Waters, to prepare a group medical insurance plan for submission to the employees in the unit, and in a subsequent conversation, held on May 17, agreed with Waters to meet with the employees for a discussion of the proposed program.

On May 20, Middel submitted such a plan to the Company, and, as agreed by him and Waters, he met with Waters and the employees on May 23. As the General Counsel and the Respondent have stipulated, "various plans" were discussed at the meeting. Details of the discussion do not appear, but, in any case, the stipulated fact is that "the employees made no decision as to the selection of a plan." (There is, in fact, no evidence that any plan was submitted to them for their "decision" on the occasion.)

About a week before the meeting, on May 16, two employees in the bargaining unit defined above, Pedro J. Arroyo and Santiago D. Montoya, completed, executed, and mailed cards to the Union, each of the two men thereby authorizing the organization to represent him as his "collective bargaining agent." The cards were received by the Union on May 19.

On May 22, a third employee in the unit, Ron Stanley, completed, signed, and gave the Union a card in its office, similarly authorizing the organization to act as his collective-bargaining representative. While at the office, apparently before signing the card, Stanley had a conversation with a representative of the Union, George Sersante, centering mainly on the Union's "health and welfare" program. Stanley stated that the Respondent had no such program, and asked Sersante whether the Union, in the event it secured "bargaining rights" as a result of execution of the card, would, in contract negotiations, attempt to secure application of the Union's medical insurance program, with which he had become familiar in another employment, to the Respondent's employees. Sersante replied that the Union would try to do so.

With the delivery of the third card, the Union held authorizations from a majority of the employees in the unit, and on the following day, May 23, the organization mailed a letter to the Company, stating that a majority of the employees in the unit had authorized the Union "to represent them on all matters pertaining to their wages, hours of work and other terms and conditions of employment," and that the Union was "in a position to prove" its representative status; and

⁴ Unless otherwise specified, all dates mentioned below occurred in 1969.

requesting a meeting at a specified date, time, and place for the purpose of negotiating an agreement covering terms and conditions of employment of the employees in the unit. The Company received the letter in "due course of the mails" or, in other words, on May 24 or 25.

On May 26, Henson, on behalf of Waters, prepared and mailed a reply to the Union, asserting that the Respondent had "a good faith doubt" that the Union then represented a majority of the employees in an appropriate bargaining unit, suggesting that the Union avail itself of the National Labor Relations Board's procedures "to resolve" the claim of representation, and stating that Waters was then out of the city, and that the Union's letter would be referred to him on his return.

The Union filed its representation petition in Case 27-RC-3644 with the Board's Denver Regional Office on June 6, and on June 19 Waters and the Union entered into an agreement for a consent election, to be held on July 11, under the Board's auspices.⁵

On July 7, which was payday for the employees in the unit, Waters placed in their respective pay envelopes identical copies of a letter addressed to "Dear Employee," and signed by him as "Don." The pertinent portions of the letter follow:

As owner of Waters Distributing Company, I feel you will find the following advantages in remaining non-union. We have a small concern and we are trying to build a good, solid company. We feel our employees are working to build the company, rather than just having a job.

* * *

With our personal interest in you as an individual, and as a small, non-union company, in the past we have paid our employees when they have been sick or absent from work for some reason. We have paid a bonus at Christmas time and held a company Christmas party. In addition, after working for the company for a year, you will receive two weeks vacation with pay. We can continue with these benefits if we remain a non-union company.

As you all know, three months ago you asked that we find a group health insurance for you. Each of you signed up for this benefit. After surveying all health insurance policies, we have presented to you the one which seems most beneficial. This policy would cover health and accident, disability and life insurance. Should we remain a non-union company, the company would pay for the individual employee's premiums for sickness, accident, disability and life insurance. You would pay the premium for coverage for the rest of your family. As

the company prospers, we hope to pay the entire amount for you. As [sic] the moment, however, we cannot begin the plan because of the possibility of an unfair labor practice charge.

The election was held on July 11 with the results previously mentioned, and was followed by the Union's objections under consideration here.

On July 28, Middel and Waters met again with the employees in the unit. It does not appear who initiated the meeting and details of what took place are scant, the record establishing no more than the stipulated fact that "the employees filled out applications for medical insurance and other benefits." However, as I infer from a stipulation in the record, the applications were for a group health, accident, disability, and life insurance policy which the Respondent put into effect on August 1, without any consultation with the Union. The policy covers all of the employees in the bargaining unit (but no dependents), as well as Waters, Henson, and Rose. The employees in the bargaining unit contribute nothing to the cost of the policy, the Respondent bearing the total premium cost.

B Discussion of the Issues, Concluding Findings

The General Counsel's allegations of unlawful promises and threats by the Respondent center on two of the three paragraphs excerpted above from Waters' letter of July 7. One of the two paragraphs in question in effect recalls for each recipient employee that he had received the "benefits" of paid time when absent for such a reason as illness, an annual Christmas bonus, and "a Company Christmas party", then promises that "in addition, after working for the Company for a year, you will receive two weeks vacation with pay", and closes with a statement that the management "can continue with these benefits if we remain a non-union company."

The letter makes no explicit reference to the election, but, taking its timing and setting into account, there can be no doubt that it was designed to influence the employees' votes in the election, which was then only a few days off. With that in mind, it is clear that the promise of a paid vacation was bait to induce the employees to reject the Union.

Moreover, the concluding sentence in the paragraph to the effect that the Respondent "can continue" the specified benefits if the enterprise remains "non-union" was directed to the same end. The statement was no privileged prediction that the economic consequences of unionization would preclude the continuance of the benefits, for the test for application of such a privilege is whether the language used was "carefully phrased on the basis of objective fact to convey (the) employer's belief as to demonstrable consequences (of unionization) beyond his control" (*NLRB v Gissel Packing Co.*, 395 U.S. 575, 618). The language in question conveys no meaning, "on the basis of objective fact," that the employees' choice of the Union as their bargaining representative would require the elimination of the existing benefits. On the contrary, the employees would

⁵ The form of execution of the agreement for the Employer is Waters Distributing Co. By Donald P. Waters, President. For reasons previously indicated, I treat the agreement as one between Waters as the Employer and the Union.

reasonably be warranted in reading the sentence, in its context, and in the light of the impending election, as a warning that what the Respondent "can" bestow, he "can" also withhold and as a threat to do the latter if they voted for the Union. The concluding sentence, like the promise of a paid vacation that preceded it, was, in short, coercive, and unlawful.

I reach the same result with the other paragraph in question, which contains a promise that in the event "we remain a non-union company," or, in other words, if the employees reject the Union in the election, the Respondent "would pay for the individual employee's premiums for sickness, accident, disability, and life insurance."⁶ To this is joined an intimation of an added reward, expressed as a "hope," to the effect that in the additional event that the Respondent's business prospered, he would assume the premium cost of including the employee's family in the insurance coverage.⁷

Summarizing the matter, I find that the Respondent interfered with, restrained, and coerced employees in the exercise of rights guaranteed them by Section 7 of the Act, thereby violating Section 8(a)(1) of the statute, as a result of (1) the promise of a paid vacation; (2) the statement to the effect that the specified benefits "can" be continued, provided the enterprise remained "non-union"; (3) the promise to pay the "individual employee's premiums" should the enterprise "remain . . . non-union"; and (4) the expressed "hope," partially conditioned as it was, by implication at least, on rejection of unionization, that the paid coverage would be extended to include the employees' respective families.⁸

⁶ In his brief, the Respondent, noting that insurance benefits provided by a contract between the Union and an association of employers in the same industry as the Respondent are substantially larger than those contemplated by him, views the relevant remarks as merely a factual comparison between the contractual benefits and those he had in mind. The short answer is that the letter makes no reference to the contractual benefits and that, contrary to the Respondent, it is not established that *all* of the unit employees were aware of these. But even if one assumes such knowledge, the fact remains that the plain thrust of the relevant statement is a promise of insurance benefits conditioned on rejection of the Union. The language used speaks for itself and is a clear interference with the electoral process, and the subjective guess, implicit in the Respondent's position, that the promise had no impact on the employees is beside the point.

⁷ There is no evidence to support the statement in the relevant paragraph that the employees had "asked" the management to "find group health insurance" for them or that each had already "signed up for this benefit." Waters testified that he did not himself discuss any of the insurance plans with any of the unit employees and that the various plans were submitted to them on July 26 (meaning, perhaps, at the meeting of July 28, attended by Middel). The stipulated fact is, moreover, that the employees signed applications for group insurance at the July 28 meeting, some 3 weeks after they were given copies of the July 6 letter. In any case, the self-serving statements in the letter that the employees "asked" that a group insurance plan be found and that they "signed up for this benefit" do not affect the results in this proceeding.

⁸ I find no effective point in a position, expressed by the Respondent's counsel at the hearing, that there is no evidence that the employees actually read the letter of July 6. It would seem to be obvious that the Respondent enclosed a copy of the letter in each employee's pay envelope on July 6 as a potent means of bringing the contents of the letter to the employees' attention in advance of the election and with an intended impact on the election results. In the absence of evidence to the contrary, it is fair to conclude, and I find, that each recipient employee became aware of the contents at some point after

These findings require denial of validity to the election results. Although the preelection misconduct was encompassed in a single communication to the employees, the language of promise and threat it contained covered a substantial range of terms and conditions of employment, some, at least, such as the paid vacation and group health insurance benefits, of manifest importance. The coercive statements warrant invalidation of the election results with or without evidence of the interest of any employee in the benefits, but it is nevertheless worth noting that the Union represented a majority of the unit as of the time of execution of an authorization card by Stanley on May 22 and that, on that occasion, he evinced an interest in securing medical insurance coverage through union representation.

I find that the allegations of the objections to the effect that the Company threatened a loss of benefits in the event of "acceptance of the . . . Union," by the employees, and promised a "gain of benefits conditioned upon rejection . . . of the . . . Union as the employees' bargaining agent," are sustained; and that by such conduct, found above to be unfair labor practices, the Respondent prevented a fair election. Accordingly, I shall recommend that the election be set aside.⁹

Moreover, I am in accord with a position of the General Counsel to the effect that it would be inappropriate to hold another election, that effect should be given to the Union's card majority, and that the Respondent has unlawfully refused to bargain with the Union. On that score, the Respondent's claim that it had, or has, a good-faith doubt of the Union's representative status is immaterial, for, under doctrine recently expressed by the Supreme Court in *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, the test of the continuing efficacy of the Union's card majority is not the Respondent's conception of the Union's status, but whether he has engaged in "practices which . . . have the tendency to undermine majority strength and impede the election processes. . . . If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue" (*id.* at 614-615).

Applying that test here, and taking into account the broad compass of benefits affecting the entire unit that were the subject of threat or promise, or both, in the letter of July 6, one could fairly argue that the unfair labor practices embodied in the letter were of sufficient gravity to preclude the "laboratory conditions" neces-

he received his copy and before he voted.

⁹ It is not clear what is meant by a claim in the objections that the Company "favorably changed the monetary benefits and working conditions of its employees." Obviously, the claim does not refer to the group insurance which was instituted some weeks after the objections were filed. Perhaps the reference is to the promise of paid vacations, but that falls within the scope of the allegation of "promises of . . . benefits," as to which findings have been made. In the absence of explication of the reference to "favorably changed . . . monetary benefits and working conditions," I treat the relevant allegations as surplusage, and make no findings thereon.

sary for a fair rerun election, but I deem it unnecessary to decide that point, for the Respondent's misconduct did not end with the letter, but was compounded by the timing of the group insurance policy which went into effect on August 1, while the objections to the results of the election were awaiting resolution.

It is beside the point that Waters had been interested in a group insurance program prior to any indication of prounion sentiment among his employees, and had previously been exploring the cost of such a program, for, granting the innocence of his prior interest, the question of his motive for putting the program into effect when he did still remains.

Asked to explain the timing of the alleged submission of the program to the employees "in late July" (meaning, presumably, at the July 28 meeting), he testified that "that's the time that we had everything set up to go and that we had, that they set up a plan that they would like to take." It is not quite clear whether by "they" he means his rank-and-file employees or his sales manager and secretary who had both been looking into various plans for him. If his reference is to the employees, there is no evidence, apart from his conclusional statement, that they "set up anything" before they "signed up" on July 28. Henson and Rose did not testify, and Waters admittedly did not discuss any of the "various plans" with any of the employees in the unit prior to July 28. What is more, we are not told what took place at the meeting of July 28, except that the employees "filled out applications," a fact that does not of itself establish the Respondent's claim, expressed in his brief, that "the employees chose to adopt an insurance plan which they, themselves, selected," and that "(i)t was not a plan selected by (the) Employer."¹⁰ Without implying that any participation by any or all of the unit employees in the choice of the plan would have the effect of exonerating the Respondent from the consequences of the timing and payment for the program, the sum of the matter is that the record amply warrants a conclusion, and I find, that the Respondent initiated and sponsored the insurance program which went into effect on August 1, and was responsible for its timing.

To say, as Waters does, that the plan was "submitted" at the July 28 meeting because "that's the time that we had everything set up" is practically meaningless in terms of the relevant issue, for the explanation leaves one in the dark as to the reason why the Respondent chose to put the insurance into effect while the objections were pending, rather than after their disposition. To be sure, Waters subsequently added that his sales manager and secretary were covered by other medical insur-

ance, that premium payments were due from them on that insurance on August 1, and that "one of the reasons" the new plan was put into effect on that date was "so they could save their payment on the one they were carrying" (by reason of their coverage by the new policy for which the Company would thenceforth pay). But this appears to me to be glib rather than candid. As is evident from his letter of July 6, Waters was aware that the institution of an insurance program during the pendency of a question of representation might be viewed as an unfair labor practice, and thus one would think that in the interests of a fair rerun election, in the event the objections were sustained, he would permit his secretary and sales manager to continue paying their own insurance premiums for a while longer. And if he wished to spare them the cost of premiums on their existing coverage after August 1, as he claims in effect, he could simply have assumed the cost pending the disposition of the objections. In short, I do not credit the reasons Waters offers for providing the insurance for the employees in the bargaining unit when he did.

The total record tells us the real reason. The Respondent's preelection misconduct, including a promise of a comprehensive group insurance program for his employees, without cost to them, and an intimation that such free coverage could in time be extended to their family members, had been followed by rejection of the Union by a majority of the unit by a margin of one vote. Then came the objections. If they were sustained, and another election ordered, the establishment of the program would probably be no less useful in subverting a second election than the promise of the program in undermining the first. Although it would appear from Waters' preelection letter that he visualized the possibility that a grant of such benefits in the setting of a question of representation might be regarded as an unfair labor practice, it is also likely that he felt it to be a risk worth taking, as was plainly the case with the unfair labor practices in which he engaged almost on the eve of the election. His failure to give a plausible explanation of the timing of the insurance policy adds weight to a conclusion that an ulterior motive underlay the action, and I am persuaded, and find, in the light of the full record, that the coverage was put into effect when it was in order to influence the employees' vote in the event the objections resulted in a rerun election; and that by such conduct, the Respondent interfered with, restrained, and coerced employees in the exercise of Section 7 rights, and thereby violated Section 8(a)(1) of the Act.

The Respondent makes no claim that the authorization cards were improperly secured; their language of designation of the Union as bargaining representative is clear and unequivocal; and, as the signatory employees constituted a majority of the relevant unit with the execution of the third card, I find that the Union was the duly authorized bargaining representative of all the employees in the unit as of the time of the bargaining request of May 23, and, of Henson's reply of May 26, which

¹⁰ On Waters' direct examination by his counsel he was asked "why the insurance plan which was ultimately adopted by the men was submitted to them in late July" and he gave the reply previously described. The reference to "the insurance plan ultimately adopted by the men" incorporated an alleged fact not in evidence, and was obviously improper, and, plainly, the reply, which purported to state the reason for the alleged submission of the insurance program to the men, will not support a finding that the employees, rather than the Company, "selected" the plan.

amounted to a refusal by the Respondent to recognize and bargain with the Union

The unfair labor practices that followed were tantamount to rejections of the collective-bargaining principle, and to refusals to bargain, and were of sufficient gravity to render it unlikely that a rerun election would be free of their taint, even if the Respondent is required by order of the Board to cease and desist from such practices in the future. To withhold a bargaining order in the face of the clear evidence of the Respondent's disposition to interfere with the electoral process is to invite additional frustration of the policies of the Act (*Gissel* at 610-611), and it appears to me that the way "to effectuate employee rights [here] is to re-establish the conditions as they existed before the employer's campaign" (*id* at 612). These conditions included representation by the Union of a majority of the unit, by force of the executed authorization cards, and I hold, in short, that that status should be given continuing effect.

In sum, as regards the bargaining issues, I find, for the reasons stated, that the Union is, and has been at all material times since May 22, 1969, the exclusive representative of the relevant unit for collective-bargaining purposes, within the meaning of Section 9(a) of the Act, and that by the refusals to bargain, including the establishment of the group insurance policy for such employees without consultation with the Union, the Respondent has violated Section 8(a)(5) of the Act, and has interfered with, restrained, and coerced employees in the exercise of Section 7 rights, thereby violating Section 8(a)(1) of the Act.

IV THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in Section III, above, occurring in connection with the operations of the Respondent described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V THE REMEDY

Having found that the Respondent has engaged in unfair labor practices violative of Sections 8(a)(1) and 8(a)(5) of the Act, and in misconduct affecting the results of the election, I shall recommend below that the Respondent cease and desist from the unfair labor practices found and take certain affirmative actions designed to effectuate the policies of the Act, and that the election be set aside.

CONCLUSIONS OF LAW

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

1 Donald Parker Waters, doing business as Waters Distributing Company, is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act.

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

3 All employees of Donald Parker Waters, doing business as Waters Distributing Company, employed at his business premises in Denver, Colorado, excluding all office clerical employees, salesmen, guards, professional employees, and supervisors as defined in the Act, constitute and have constituted at all times material here, a unit appropriate for collective bargaining, within the meaning of Section 9(b) of the Act.

4 The said Union is, and has been at all material times, the exclusive representative of all the employees in the aforesaid appropriate unit for the purposes of collective bargaining, within the meaning of Section 9(a) of the Act.

5 By refusing to bargain collectively with the Union, as the exclusive representative of the employees in such unit, as found above, the Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6 By interfering with, restraining, and coercing employees in the exercise of rights guaranteed them by Section 7 of the Act, as found above, the Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, I recommend that Donald Parker Waters, doing business as Waters Distributing Company, his agents, successors, and assigns, shall

1 Cease and desist from

(a) Promising, offering, or granting any benefit or improvement in any terms or conditions of employment in order to induce or encourage any employee to refrain from membership in, or support or activities on behalf of, any labor organization.

(b) Warning, threatening, or otherwise informing any employee in any manner, directly or indirectly, that any benefit or term or condition of employment may or will be withheld, denied, or altered in any manner if any employee joins, supports, or engages in any activity on behalf of any labor organization.

(c) Refusing to bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No 537, as the exclusive bargaining representative of his employees in a bargaining unit consisting of all employees employed by him at his business premises in Denver, Colorado, excluding all office clerical employees, salesmen, guards,

professional employees, and supervisors as defined in the National Labor Relations Act, with respect to wages, hours of work, and any other terms and conditions of employment of such employees.

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

2. Take the following affirmative action which, I find, will effectuate the policies of the Act:

(a) Upon request, bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 537, as the exclusive representative of the employees in the bargaining unit found appropriate above, with respect to their wages, hours of work, and any other terms and conditions of employment; and if an agreement is reached, embody it in a signed contract.

(b) Post in conspicuous places at his place of business in Denver, Colorado, including all places where notices to employees are customarily posted, copies of the said notice attached hereto. Copies of the said notice to be furnished by the Regional Director for Region 27 of the National Labor Relations Board, shall, after being signed by the said Respondent, or his duly authorized representative, be posted by him immediately upon receipt thereof, and maintained by him for 60 consecutive days thereafter in such conspicuous places. Reasonable steps shall be taken by the said Respondent to insure that said notices are not altered, defaced, or covered by any other material.¹¹

(c) Notify the said Regional Director, in writing, within 20 days from the receipt of this Decision, what steps the Respondent has taken to comply therewith.¹²

¹¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹² In the event that these recommendations are adopted by the Board, par. 2(c) thereof shall be modified to read "Notify the said Regional Director, in writing, within 10 days from the date of this order what steps the Respondent has taken to comply therewith."

APPENDIX

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

DONALD PARKER
WATERS, DOING BUSINESS
AS WATERS
DISTRIBUTING COMPANY
(Employer)

I hereby notify my employees that:

After a hearing at which all sides had an opportunity to present evidence and state their positions,

the National Labor Relations Board has found that I have violated the National Labor Relations Act, and has ordered me to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities

I WILL NOT promise, offer, or grant any benefit or improvement in any term or condition of employment in order to induce or encourage any employee to refrain from membership in, or support or activities on behalf of, any labor organization.

I WILL NOT warn, threaten, or otherwise inform any employee, in any manner, directly or indirectly, that any benefit or any term or condition of employment will be withheld, denied, or changed in any way if any employee joins, supports, or engages in any activity on behalf of any labor organization.

I WILL NOT refuse to bargain collectively regarding wages, hours of work, and any other term or condition of employment with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 537, as the exclusive bargaining representative of all my employees at my business premises in Denver, Colorado, excluding clerical employees, salesmen, guards, professional employees, and supervisors as defined in the National Labor Relations Act.

I WILL NOT in any other like or related manner interfere with any employee's exercise of any of his rights described above.

I WILL, upon request, bargain collectively with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 537, as the exclusive bargaining representative of all the employees in the said bargaining unit.

Dated _____ By _____
(Representative) (Title)

**This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material
If employees have any question concerning this notice**

or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 260, New Customs House, 721 19th Street, Denver, Colorado 80202, Telephone 297-3551