

**The Borden Manufacturing Company, Employer-Petitioner and Textile Workers Union of America AFL-CIO-CLC. Case 11-RM-173**

October 29, 1971

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

**BY CHAIRMAN MILLER AND MEMBERS  
FANNING AND JENKINS**

Pursuant to a Stipulation for Certification upon Consent Election executed by the parties, and approved by the Regional Director for Region 11 of the National Labor Relations Board on October 23, 1970, an election by secret ballot was conducted in the above-mentioned proceeding on November 12, 1970, under the direction and supervision of said Regional Director. Upon the conclusion of the election, a tally of ballots was furnished the parties, which showed that, of approximately 191 eligible voters, 185 ballots were cast, of which 86 were for, and 90 against, the Union, and 9 were challenged. The challenged ballots were sufficient in number to affect the results of the election. Thereafter, on November 18, 1970, the Union filed timely objections to conduct affecting the results of the election.

In accordance with the National Labor Relations Board Rules and Regulations, the Regional Director conducted an investigation, and on January 5, 1971, issued and served on the parties his Report on Objections and Challenges. In his report, the Regional Director recommended to the Board that the challenges to three ballots be sustained; that the challenges to six ballots be overruled; their ballots opened and counted and a revised tally of ballots rendered the Union's objections moot, a Certification of Representative issue. He further recommended that the Union's Objections 3, 4, 5, and 7 be overruled and, in the event that the resolution of the challenges did not render the remaining objections moot, a hearing be held for the purpose of resolving the conflict in evidence with respect to certain issues raised by Objections 1, 2, 6, and 8 and additional allegations which were entitled "Other Acts and Conduct" by the Regional Director in his report.

Thereafter, on January 25, 1971, the Employer filed timely exceptions, with a brief in support thereof, to the Regional Director's report with respect to the challenges of some ballots and the objections. On March 18, 1971, the Board issued its Decision and Direction, wherein it adopted the Regional Director's findings, conclusions, and recommendations.

Thereafter, on March 25, 1971, the aforementioned six challenged ballots were opened and counted. The

revised tally of ballots, copies of which were served on the parties, disclosed that of approximately 191 eligible voters, 86 cast ballots for, and 96 against, the Union.

On April 5, 1971, the Regional Director issued his Supplemental Report on Objections and Challenges and Notice of Hearing, wherein he directed that testimony be taken before a duly designated Hearing Officer for the purpose of resolving the issues raised by Objections 1, 2, 6, and 8, and by "Other Acts and Conduct."

Pursuant to the foregoing, a hearing was held before Robert C. Batson, Hearing Officer, at Goldsboro, North Carolina, on April 20, 21, and 22, 1971. All parties appeared and were given full opportunity to participate in the hearing, to introduce relevant evidence bearing on the issues, to examine and cross-examine witnesses, to argue orally on the record, and to file briefs.

On July 27, 1971, the Hearing Officer issued and served on the parties his Report and Recommendations on Objections, pertinent parts of which are attached hereto as an appendix, in which he recommended that Union Objections 1, 2, 6, and 8 be sustained, and that the election conducted on November 12, 1970, be set aside and a new election conducted. Thereafter, the Employer filed exceptions to the Hearing Officer's Report, with a brief in support thereof.

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

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed. The Board has considered the objections in question, the Hearing Officer's Report, the exceptions and brief filed by the Employer, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Hearing Officer.

We find, in agreement with the Hearing Officer, that Supervisors Brock and Brown threatened employees with discharge for passing out union literature in nonwork areas on nonworking time; that Plant Superintendent Funderburk promised employee Lanier that fringe benefits would be improved if the Union were voted out; that in its speeches to the employees prior to the election the Employer, in effect, promised the employees that it would be more generous in granting benefits if the Union were not there. On the basis of the foregoing we conclude, in agreement with the Hearing Officer and contrary to our dissenting colleague, that the Employer's conduct interfered with the laboratory conditions necessary for a fair election. According, we shall set aside the

election and direct that another election be conducted.

## ORDER

It is hereby ordered that the election conducted herein on November 12, 1970, in a unit of employees heretofore found appropriate, be, and it hereby is, set aside.

[Direction of Second Election<sup>1</sup> omitted from publication.]

CHAIRMAN MILLER, dissenting:

Contrary to my colleagues, it is my view that the Employer's preelection speeches, and letter of November 10, 1970, did not constitute a promise by the Employer to the employees that the Employer would give them more benefits if they voted the Union out. The letters and speeches were in response to a union campaign in which the Union repeatedly asserted that unless it was retained as the employees' representative, all benefits would be lost. To this, the Employer, in the letters at issue, repeatedly asserted that benefits would not be lost, and that it would continue its practice of granting improved benefits in line with those provided by competitors. Such statements, particularly in the context here, cannot be construed as improper or illegal, and instead are protected under Section 8(c) of the Act.

Moreover, I would not find that the Employer's restrictions on employees' distribution of union literature had any significant impact on the election, or affected the election results, since, as the Hearing Officer found, the employees on both sides were permitted a wide degree of latitude in distributing the literature, none was deterred from continuing his union activity, and only two instances of objectionable conduct were found in this respect in a unit of almost 200 employees.

The Hearing Officer, however, credited the testimony of one employee that Superintendent Funderburk promised increased holidays and improved insurance benefits if the Union were voted out. Such a promise is clearly improper, but the impact of one such statement during a campaign in a unit of almost 200 employees is insufficient to justify setting aside the election.

I would certify the results.

<sup>1</sup> In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236, *N L R B v Wyman-Gordon Co.*, 394 U S 759 Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 11 within 7 days after the date of issuance of the Notice of Second Election by the Regional Director. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances. Failure to

comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

## APPENDIX

### FINDINGS OF FACT

The Union's Objections 1, 2, 6, and 8 are:

Objection 1: Company supervisors threatened discharge to employees for passing out union literature on November 10, November 11 and November 12, 1970.

Objection 2: On various occasions, Company supervisors promised employees increase in fringe benefits if they voted against the Union.

Objection 6: [The] Company in captive audience speech made by E. B. Borden, President, offered promises of benefits if the people voted against the Union.

Objection 8: [The] Company, by means of a letter dated November 10, 1970, stated that if the Union wins the election that a strike would occur and that their voting for the Union was an exercise in futility. In addition to the above, the Employer engaged in other actions and conduct which created an atmosphere in which a free choice of a bargaining representative was impossible or highly improbably under the laboratory conditions the Board requires.

In addition the Hearing Officer was directed to consider the contents of speeches given by Personnel Director J. Harry Muir, Jr., and President E. B. Borden, Jr., on November 3, 9, and November 10 and 11.

In support of Objection 1, the Union presented testimony relating to three separate instances of supervisory interference with employees distributing union campaign literature in nonwork areas and on nonworking time.

Union witnesses Lawrence Ivey and Randolph Hill testified that on the evening of November 10, at approximately 10:22 p.m. they were standing at one of the plant entrances near the timeclock preparing to pass out to employees coming to work on the next shift some union campaign literature Ivey had obtained at the union hall previously. Second-shift Overseer Doster Brock came out of a working area and approached Ivey, in the presence of Hill, telling Ivey that he could not be doing that. (Passing out the union leaflets.) Ivey replied that he thought he had a right to do so and proceeded toward a pay telephone nearby where he called the union hall and ascertained from someone there that he could give out the union literature in nonworking areas. Ivey testified that as he was walking toward the telephone and Brock was walking away from he and Hill, Brock added that he would be fired. Ivey returned from this telephone

conversation and advised Hill that he had learned that they could give out the union leaflets in nonworking areas and that he and Hill then continued to pass out the leaflets. Hill corroborates the events set forth by Ivey except for the alleged comment by Brock that Ivey would be fired. Hill stated that he did not hear that comment allegedly made as Ivey and Brock were walking away.

Brock testified that he did approach Ivey and Hill in the timeclock area on that evening and advised them that they could not pass out the union literature there. He denies that he made any comment suggesting that they would be fired for doing so. Brock states that he then telephoned Personnel Director Harry Muir and apprised him of what these employees were doing. Muir told Brock that the employees did have a right to pass out the Union literature in nonwork areas and during nonworking time.<sup>3</sup> Brock, apparently, did not return to these employees and advise them that he had learned they had the privilege of passing out the literature there.

I am persuaded that this event occurred substantially as testified by Ivey, including Brock's comment that he would or could be fired for that activity. Under all of the circumstances, including the fact that this statement was made as Ivey and Brock were walking away from Hill, it is highly unlikely that Hill, a rather aged individual, did or could hear the comment made by Brock. The Employer contends and the record adequately supports, that the Employer did make every effort to educate its supervisors as to the rights of the employees during the campaign and as to what the supervisors could and could not say to the employees. Brock knew or should have known, that under the rules of the game, the employees were engaging in protected activity and had a right to distribute their union literature there. However, even though Brock was mistaken in his understanding of their right to do so, it had the effect of interfering with, and restraining, the employees in the exercise of their Section 7 rights. It is noted that Brock made no attempt to advise the employees of his error.

Approximately a month before the election Spinning Department General Overseer Mack Brown approached employee Judy Osborne at her work station and said, "Judy have you been passing out leaflets in the mill." Osborne replied, "not on the job." Brown retorted, "I said in the mill." At that point Osborne admitted that she had been passing out leaflets in the mill and Brown replied, "I would advise you not to do that anymore or I will have to send you home."

Brown's version of this event is that he went to

Osborne's work station and asked if she had been passing out leaflets in the mill. She replied that she had and Brown told her that he would advise her not to give anymore out and that she had replied, "All right." Brown testified that it had been reported to him that Osborne had been passing the leaflets out in the mill.

Two or three days prior to the election Brown observed Osborne sitting on a bench with another employee in the timeclock area. Osborne had some union literature in her hand at that time. Brown said, "Judy I thought I told you you couldn't do this." Osborne replied, "Well I know my rights." Brown said, "Well we'll see who is right then." Brown testified that he then proceeded to his office where he called Personnel Director Muir and was advised that she could give out the leaflets in smoking areas, bathrooms, canteen areas, and the timeclock area, etc. Brown states that he went back downstairs to tell Osborne that she was right but did not find her. Later that day he did see her and tell her that she was right and could pass out the union leaflets in the timeclock area.

Brown denies only that he told Osborne that he would have to send her home if she continued to pass out the leaflets.

As noted above, the record contains abundant evidence that the Employer had taken great pains to indoctrinate its supervisors in the rights of employee and what they could and could not do. In my opinion Brown, too, should have known that Osborne had a right to pass out union leaflets in the timeclock area and hence his purpose in telling her that she could not do so was to interfere with and inhibit her union activity. I am persuaded that Brown did tell Osborne, that he would have to send her home if she continued to pass out the leaflets. As in the case of Brock, this is a particularly appropriate comment, particularly if Brown honestly thought that Osborne was violating a company rule which would warrant her discharge.

The only logical interpretation of Brown's term "send you home" is that he would discharge her if she continued to pass out leaflets in the mill. This clearly constitutes a threat to discharge for engaging in protected union activity and is, *a fortiori* conduct which tends to interfere with the election.

The Union endeavored to establish disparate treatment in that procompany employees were permitted to distribute literature in these areas without interference from supervisors whereas, the prounion employees were not. This evidence merely establishes that employees on both sides were permitted a wide degree of latitude in distributing the literature and I am persuaded that the only two instances of interfer-

<sup>3</sup> The parties appear to agree that the timeclock area here was a nonwork area and that these employees were on nonworking time.

ence were those two cited above. Osborne testified that during the interim between the first and second events involving Mack Brown that she had passed out literature on three or four occasions without interference. Therefore, I am of the opinion that no pattern of disparate treatment has been established by this record with respect to campaigning in nonwork areas on nonworking time.

With respect to Objection 2 the Union adduced testimony from employee Joyce Lanier to the effect that on November 4, Plant Superintendent James Funderburk came to her work station and told her that when the Union was voted out the employees would get benefits, such as paid holidays and hospital insurance. With respect to the hospital insurance comment, Funderburk allegedly said, "It's hell when they take it out of my paycheck." According to Lanier this conversation lasted until Spinning Overseer Mack Brown called her away to show her a frame that had stopped. Brown then told her that she could go back and finish her conversation with Funderburk. It is noted that this event occurred on the day after the first of the plantwide speeches given by Personnel Director Muir and President Borden wherein various fringe benefits was the major topic.

Funderburk's version of this event is that he was in the Spinning Department doing some work on a "lapped up roller" and Lanier approached him and asked why the Company could not give a retirement plan while the Union was in effect at Borden. Funderburk replied that he was not in a position to talk to her about answering questions of that type at that time and that he, personally, could not give a retirement plan because he didn't have the authority to do so. Lanier continued to question Funderburk about holidays, at which time he told her that the Union had given up its right to bargain for paid holidays in the contract some years before. Funderburk states that he felt that Lanier was trying to lead him into making her a promise and that he told her that he could make "no promises, no threats and no spying." As a part of the Company's campaign Funderburk states that he adopted a policy of making himself available each day and that he tried to go through the plant at least two or three times a day and stop and talk to people and make himself available to answer employees' questions during the campaign. He states that the Company pretty well knew the employees who had definitely made up their minds and there was no possibility of changing them and he did not attempt to talk with these. He characterized Lanier as one of that type.

Funderburk testified that he had a policy of attempting to talk with employees daily and answer questions they had about the Union. Yet he states that he replied to Lanier's alleged inquiry as to why the

Company could not give a retirement plan while the Union was in effect at Borden by stating that he could not answer questions of that type at that time and that he personally could not give a retirement plan as he didn't have the authority to do so. The type of questions Lanier allegedly was asking of Funderburk do not appear to me to be designed to entrap him but rather appear to be designed to obtain information. For instance, her question as to why the Company could not give a retirement plan with the Union in was certainly a question which Funderburk could have answered by simply stating that they could give one during negotiations with the Union if the Union asked for it. While it is not my function to substitute what I think appropriate answers to questions should be, I find that Funderburk's denial of these statements is inconsistent with his asserted purpose of answering employees' questions. I am therefore constrained to credit Lanier's version of this conversation. While I am virtually certain that Funderburk did not use the word "promise" I am equally certain that he intended to and did convey to Lanier that the fringe benefits including retirement and hospital benefits would be better without the Union.

In further support of this Objection, the Union presented witness Charlie Bozeman who testified that on the day before the election his supervisor, Card and Frame Department Head Howard Green, came to his work station and apologized to him for not having had time to talk with him about his problems. Green allegedly reminded Bozeman that the election was coming up the next day and that he hoped that Green would vote right, that he hoped he would vote for the Company. Bozeman testified that Green continued as the reason why he should support the Company by stating that if Bozeman got in a jam and needed \$5, \$10, \$15, or \$20 that he (Green) would draw an order and he could get it at the office. This bit of evidence was not submitted to the Regional Director during his investigation. In my opinion this fact does not bar admission of the evidence in a Hearing on Objections providing it comes within the scope of the Objection under consideration. In my view, if this occurred it may constitute a promise of benefits, i.e., the benefit of obtaining loans from the company and hence would be within the scope of Objection 2.

On cross-examination Bozeman stated that he had not reported this event to anyone until the evening before at which time he told the Union's attorney about it. He stated that he approached the attorney about, "his case" and wanted to find out if he had one. He admits that during the interim he had been visited by various union representatives and yet had never mentioned this matter to them.

While Green was not presented by the Employer to

deny these allegations, based upon Bozeman's demeanor, his testimony with respect to how he came to proffer this bit of evidence and the utter lack of coherent continuity in his testimony, I find it inherently improbable that Green made such a promise to him.

In further support of its promise of benefits objection, the Union presented Francis VanHoy who testified that on the day before the election she and several other employees were in the canteen area when Personnel Director Muir came in and commented to the canteen owner and operator, Charlie Malpass, that "after all this is over I want to see some 10 cent drinks in here. I am tired of paying 15 cents."

Muir denied having made any such comments to Malpass.

Malpass, when called as a witness by the Employer, testified that he leased the canteen rights from the Employer for \$15 per week; that he made all purchases and that he alone determined the prices that he would charge for his merchandise. Malpass further corroborated Muir in that Muir had made any such comment to him.

VanHoy identified several other employees as having been present at this time, one of whom was Eunice Faircloth, who was subsequently called by the Employer as a witness. Neither the Petitioner-Employer nor the Union questioned Faircloth concerning this event. I am impressed with VanHoy's demeanor and direct manner of testifying and conclude that Muir likely made some comment concerning the price of the drinks. I cannot construe this, as a promise of benefits for rejection of the Union. Assuming that Muir made the statement as alleged by VanHoy, under all the circumstances here it amounts to no more than the expression of a desire on the part of Muir that the price of the drinks be reduced to a dime. This is not even, allegedly, conditioned upon which way the election went.

The Union adduced evidence relating to several other instances of alleged interference under its Other Acts and Conduct objection. Judy Osborne testified that approximately a month before the election, Supervisor Mack Brown approached her with a form designed for withdrawal from the Union. Brown allegedly approached her and stated that he had heard that she wanted one of those. Osborne told Brown that she did not want one and asked where he had heard that she wanted a form. A few days later, after she had been off from work due to sickness, Osborne went to Brown's office and told him that she wanted the form to get out of the Union. Brown gave her the form without comment which she signed and left in the office.

On cross-examination Osborne stated that she was not sure of the date Brown had approached her with

the form but correlated it to a period of time which she had worked between absences due to sickness. She stated that she had returned to work from a few days absence due to sickness when he approached her and that she rejected the proffered withdrawal form and was absent for a few more days. When she returned from the second absence she went to the office and signed the withdrawal form.

This testimony is in accord with that of Mack Brown. Brown states that he had been told by another employee that Osborne wanted to withdraw from the Union and based upon that, he approached her with the withdrawal form. Brown also places the date of this event as being between two periods of absences by Osborne due to sickness. The Employer submitted into evidence the attendance record of Osborne which shows *inter alia* that she was absent from work due to sickness from September 21 through September 25, returning to work on September 28, a Monday. It further shows that Osborne was absent from September 29 through October 2, returning to work on Monday, October 5. The withdrawal form which Osborne executed in Brown's office is dated October 5, 1970.

Osborne testified that it was during this second absence that she talked with a fellow employee on the telephone and was persuaded to withdraw from the Union. As noted above, she executed the withdrawal form on October 5, and the following date she rejoined the Union, although she did not sign another checkoff authorization.

Osborne's recollection as to the precise dates was understandably vague and her correlation of the date with periods of absences assisted in ascertaining the date this event occurred. Osborne's attendance record reflects that after she returned to work on October 5, she was not absent again until October 30. Clearly, the proffer of the withdrawal card by Brown occurred on September 28, the only day Osborne worked between the two periods of absence.

Clearly such a proffer of a withdrawal card, although made in good faith by Brown, and upon his information that Osborne wanted out of the Union, is still a form of solicitation. However, it appears that it occurred prior to the filing of the petition in this matter, on September 30, 1970.

Osborne related another event occurring the day before the election. She states that she was wearing a union T-shirt with the letters TWA imprinted across the front. Osborne started through an overhead passageway which is known to the employees as the "tunnel," which is in reality an enclosed walkway joining two sections of the plant across the street. As Osborne entered the "tunnel," she states that she encountered two Supervisors, Thaddeus Crawford and John Bob Kennedy. As she approached them,

Crawford stated, "I don't like that damn shirt you got on, but I like what's in it." Osborne states that she started to reply and Crawford said, "Wait—wait, now let's not get dirty."

Crawford substantially corroborates this version of the event stating that he told her that the shirt might not be the right one or the right thing, but "it sure looks good on you." He states that Osborne laughed and made some comment which he could not hear because it was obliterated by the noise of the opening electric doors as she proceeded on her way into the other plant. By either version of this event, it is clear that the object of Crawford's remarks to Osborne was to express appreciation for Osborne's appearance in the shirt and may be considered a mild form of flirtation. In any event, it is my opinion that his remark that he did not like the shirt, unaccompanied by anything else, would not constitute objectionable conduct.

The Hearing Officer was directed to consider the content of four speeches given by Personnel Director Muir and President Borden, along with a letter dated November 10, which the Employer sent to all employees, in the light of other evidence adduced at the hearing. The thrust of the Employer's election campaign obviously revolved around four speeches beginning on November 3, 1970, given by Personnel Director Muir and President Borden. According to Muir, this speech was delivered twice on the night of November 3, and three times on November 4, to 25 to 30 employees at a time.

In the first speech delivered by Muir, which is Appendix A of the Regional Director's Report on Objections and Challenged Ballots, dated January 5, 1971, Muir reviewed the period of time the Union had been representing the employees and advised the employees that during that period of time, not one material gain had been made. He asserted that the Company had always given wage increases in line with the carded yard industry, both before and after the Union got in, and would continue to do so. Muir contended that at the time the Company filed the petition in this case, the Union had only 25 percent of the employees as members and observed that only then did the Union send their "high-salaried organizer" to Goldsboro. He observed at that point that the Company cannot "knock out" the Union, but the employees could. He then proceeded to advise the employees that in 1954 the union had bargained away the right to bargain for paid holidays in return for keeping the checkoff. He stated that the Union charges that they would lose certain rights such as seniority, job posting rights, etc., was without merit. He opined that this was not true, that the Company would take away none of these rights as it was not a good practice to do so. He further observed that the

Company had always granted wage increases when the pattern was set in the carded yarn industry and that the Union had never obtained a wage increase or anything else for the employees. He pointed out that the Union could guarantee absolutely nothing inasmuch as it had "no jobs to offer, no security, no fringe benefits, no nothing except the possibility of strike, strife, and turmoil." He then asked the employees, "Don't you honestly believe that the Company can do more for you than the Union? After 24 years, don't you think it is time to make a change for the better?" He stated, "You have everything to gain and nothing to lose by voting it out," and continued to seek their agreement that the Company is in a better position of knowing your needs than an outsider. He then advised the employees as to salaries of various union representatives and asserted that that was the real reason the Union wanted to keep the Union in there.

There was a question and answer period after the speech in which employees inquired about, among other things, hospital and health insurance plans, pension and retirement benefits, etc., at which time Muir advised them that he could make no promises because of the Board election notices that were posted throughout the plant. In this or in later speeches, he encouraged the employees to give the Company a year to do for them the things the Union had not done in 24 years.

Muir's second speech was delivered to all employees in two or three different sections around November 9. He reiterated much of what he had stated in his first speech and observed that the Union had no power to protect their jobs, their earnings, their fringe benefits or anything else; only the Company could do that. He then stated that after 24 years the Union had done nothing and could guarantee absolutely nothing other than the possibility of strike, strife, and turmoil.

Muir's third speech was delivered on November 10 and 11, and it constituted the introduction of President Borden. Muir asked how many times had the Union actually stood in the way of the employees getting more in the way of progress of the Company? He asked the employees to think of the things that they might have been able to get which the Union swapped for the Union's demands to line union pockets instead of helping employees. He then pointed out that the Union could make all sorts of wild promises but it could not guarantee them a thing. "While the Company has every intention of living up to its legal and moral obligations, the law does not require the Company to give into anything the Union might demand where the Company in good faith does not want to give into such demands." He then observed that the only thing the Union could do to try to get its demands would be to call a strike. Muir then introduced President Borden.

Borden reviewed his own history with the Company and observed that questions in most of the minds of the employees who had not already rejected the Union was, "what will happen to us if the Union is voted out at Bordens?" He then discussed six areas in which questions had been asked and commented on the Company's intention with respect to them. As to seniority he stated that with or without a Union it would be virtually impossible and completely unfair to abandon the seniority practice and it was the Company's belief that the longer a person remained with the Company the more he should be regarded with first choice in job assignments. As to favoritism, Borden observed that he strongly disapproved of any favoritism being shown by any persons and would personally take immediate action to correct it when it might exist. On wages Borden observed that it had always been the policy of the Company to grant general wage increases comparable to those in the textile industry and that in his memory there had never been a wage decrease. As to life insurance, Borden stated that the Company provided each employee with fully paid life insurance and that there were no kickbacks to the Company on an insurance policy of any kind. On pension plans, hospital insurance, and paid holidays he observed that he could not understand why the Union kept pushing those items as something the Company should be ashamed of since the Union had been there for 24 years. He then observed that, "before an election we are not allowed by law to tell you what we might do without a Union. But it stands to reason that we must remain competitive and that we have to provide the same or better fringe benefits at this plant if we are to keep good people working." He stated, "I believe you would see quite a difference if we did not have a Union to impede our progress here." Borden then proceeded to discuss grievances and the way he felt about fairness in treatment of the employees. He stated that the open door policy they had had for years would be continued and observed; that as a matter of fact 90 percent of the grievances had been channeled through management rather than the Union for the past few years. In closing he asked the employees to consider the shameful lack of representation that they had gotten in over 24 years at great expense in dues money and, "I am asking you to give your Company a chance for this next year by marking your ballot, "NO" on Thursday. Remember that the ballots will be signed and the vote will be conducted in complete secrecy. You can still vote no whether you signed a Union card or not." His closing sentence

was, "Please give us this next year to do what the Union has not done in the 24 years."

After each speech an opportunity was given for questions, during which time questions were asked, particularly with regard to pension plans and insurance at which time Borden and the testimony reveals Muir repeatedly turned to the Board's official election notice which was posted in the area and pointed to that section which prohibits the making of promises during an election campaign, stating that the law would not allow them to make promises.

The letter distributed to all employees by the Employer on November 10, and attached to the Regional Director's Report on Objections as Appendix F, is essentially a continuation of the theme that had been established by the speeches. Here, the Employer again remarks that the law allows an Employer an absolute right to stand firm and not give in to Union demands just because the Union threatens to strike.

At the hearing the Employer urged that the Employer's comments in these speeches and letter were protected by Section 8(c) of the Act.<sup>4</sup> While Section 8(c) is not applicable to representation cases, the first amendment to the Federal constitution guaranteeing freedom of speech is. *Dal-Tex Optical Company, Inc.*, 137 NLRB 1789. The Board observed in *Dal-Tex* that Congress specifically limited Section 8(c) to the adversary proceedings involved in unfair labor practice cases and it has no application to representation cases. In assessing the interplay of Section 8(c) and the first amendment, the Board has observed that conduct which may interfere with the laboratory conditions for a fair election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1) of the Act. See *Pace, Inc.*, 167 NLRB 1089.

It would serve no useful purpose here to *recite* the entire text of the speeches again. They are attached to the Regional Director's Report on Objections dated January 5, 1971, as Appendixes A through D and F. I have read the speeches and the letter carefully and I am constrained to conclude that in the light of other evidence adduced at the hearing they constitute an unequivocal promise by the Employer to the employees that the Employer will give to the employees more benefits if they vote *the Union out*.

The Employer emphasized the fact that the Union could give the employees nothing; that all benefits are derived from the Employer. The central theme of the Employer, then, was to express to the employees that if the Union were not there, the Employer would be

labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit "

<sup>4</sup> Sec. 8(c) reads as follows. "The expressing of any views, argument, or opinion, or the written dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair

more generous in granting the benefits they were inquiring about. As noted above, this clearly constitutes a promise of substantial benefits for rejection of the union and *a fortiori* a threat that those benefits will not be given if the Union was retained as the bargaining agent.

In my opinion, these unequivocal promises of benefits made in the speeches and the letter had a substantial impact on the results of the election and warrants setting aside the election.

### CONCLUSIONS AND RECOMMENDATIONS

The Board and courts have often restated the premise that elections must take place under laboratory conditions to enable employees to freely express their views. *N.L.R.B. v. Houston Chronical Publishing Co.*, 300 F.2d 273 (C.A. 5, 1962). While laboratory conditions for an election must be maintained, the Board considers the facts of each case to determine whether the laboratory conditions have been breached.

As to Objection 1, I found that supervisors Brock and Brown threatened employees with discharge for passing out union literature in nonwork areas on nonworking time. It is immaterial here that Brock and Brown were laboring under the impression that the employees were violating a company rule, as they

were in fact engaging in protected union activity. The fact that Brown subsequently advised Osborne that he had been wrong, does not remove the element of interference it created.

It is unnecessary to consider here whether or not these two instances of objectionable conduct standing alone would warrant setting aside the election, in view of the other findings herein.

With respect to Objection 2, I have found that Plant Superintendent Funderburk promised employee Lanier that fringe benefits would be improved if the Union were voted out. This alone may not be sufficient to warrant setting aside the election. The gravamen of the Employer's objectionable conduct, in my opinion, rests on the unequivocal promises of benefits it made to the employees in the speeches and the letter. This is clearly not protected under Section 8(c) or the first amendment to the Federal constitution.

Having made findings of fact and conclusions based upon all credible evidence in the record, I conclude and find that the Union's Objections 1, 2, 6, and 8 are sufficient to raise substantial and material issues affecting the results of the election. Accordingly, I recommend to the Board that Objections 1, 2, 6, and 8 be sustained and that the election conducted on November 12, 1970, be set aside and a new election ordered.