AAA Lapco, Inc. *and* United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Local 2848. Cases 16–CA–4461 and 16–RC–5763

June 5, 1972

DECISION, ORDER, AND CERTIFICATION OF RESULTS

BY CHAIRMAN MILLER AND MEMBERS JENKINS AND KENNEDY

On February 15, 1972, Trial Examiner Stanley N. Ohlbaum issued the attached Decision in this proceeding. Thereafter, General Counsel filed exceptions and a supporting brief.

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

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and brief and has decided to affirm the Trial Examiner's rulings, findings, and conclusions and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that the complaint herein be, and it hereby is, dismissed.

CERTIFICATION OF RESULTS OF ELECTION

It is hereby certified that a majority of the valid ballots have not been cast for United Brotherhood of Carpenters and Joiners of America, AFL–CIO, Local 2848, and that said organization is not the exclusive representative of all the employees, in the unit herein involved, within the meaning of Section 9(a) of the National Labor Relations Act, as amended.

TRIAL EXAMINER'S DECISION

I. PRELIMINARY STATEMENT; ISSUES

STANLEY N. OHLBAUM, Trial Examiner: This proceeding under the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.* (Act), based on complaint issued by the Board's Regional Director for Region 16 on September 30 upon a charge filed on August 25, as amended on October 1, was tried before me in Dallas, Texas, on November 2 and 3, 1971,[1] with all parties participating throughout by counsel and afforded full opportunity to adduce testimonial and documentary proof, cross-examine, argue orally, propose findings and conclusions, and submit briefs. The record made at the trial, as well as briefs received on December 6, has been carefully considered.

Respondent Employer is charged with violation of Section 8(a)(1) of the Act through coercive interrogation of employees, reinstitution of an incentive pay plan, and threats to employees to terminate existing benefits, in order to deter its employees from union activity or adherence. Since these are to an extent[2] alleged to have occurred in the context of an upcoming union representation election, substantially they are also urged by the Charging Party to support its plea that the result of that election—adverse to the Union—be set aside.[3]

Upon the entire record[4] and my observation of the testimonial demeanor of the witnesses, I make the following findings and conclusions.

II. PARTIES; JURISDICTION

At all material times, Respondent Employer, a Texas corporation with office and place of business in Dallas, Texas, has there engaged in manufacturing kitchen cabinets and other articles. In the course of that business, during the representative year immediately preceding issuance of the complaint, Respondent purchased and received, directly in interstate commerce from States other than Texas, materials valued in excess of $50,000. During the same period, Respondent also manufactured, sold, and distributed products and services from the same plant valued in excess of $500,000, of which over $50,000 worth of products were shipped directly in interstate commerce to States other than Texas.

I find that at all material times Respondent has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7), that the above Union is a labor organization within the meaning of Section 2(5) of the Act, and that jurisdiction is properly asserted here.

[1] Unspecified years are 1971 throughout

[2] I e , to the extent allegedly occurring in the "critical period" between the Union's July 2 bargaining demand and the August 20 election Cf *Goodyear Tire and Rubber Company,* 138 NLRB 453, 454–455, *The Ideal Electric and Manufacturing Company,* 134 NLRB 1275, 1278

[3] Upon the parties' stipulation for certification upon consent election approved on July 22 (Case 16–RC–5763), a Board-conducted election among Respondent's 11223 Plano Road, Dallas, Texas, production and maintenance employees including truckdrivers was held on August 20, resulting in 45 votes against and 36 for union representation out of a unit of 94 eligible voters (4 challenged and 1 void ballot were insufficient to affect the results). The Union's objections to employer conduct affecting the election were timely filed on August 25 and were, on September 30, consolidated by the Regional Director for hearing with the complaint proceeding here. In relation to the Union's objections to this election, only a rerun election—and not a bargaining order (cf. *N.L.R B* v. *Gissel Packing Co.,* 395 U S 575)—is sought

[4] Trial transcript as corrected in respect to obvious and typographical errors

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent manufactures and distributes kitchen cabinets and counters, as well as bookcases, in and from its factory in Dallas, Texas, with a work force of around 130. Following union organizational activity at the end of June,[5] an election petition was filed by the Carpenters Union (Charging Party) with the Board's regional office on July 2. The actions on Respondent's part here alleged as violations of the Act and as reasons for setting aside the election of August 20 are said to have occurred between July 19 and August 18.

B. *Interrogation*

Respondent is alleged to have engaged in coercive interrogation of its employees on or about July 19, through former Plant Superintendent[6] Hobbs and Shipping Department Foreman Stonesypher.

General Counsel's only evidence in support of this allegation was the testimony of Respondent's former shipping employee Arrendondo, who, after about 3 months of employment, quit on the day the Union lost the election. According to Arrendondo, the kingpin of union organizational activities at the plant—including membership card distribution and handbilling, commencing at the end of June—after he had handbilled in the company parking lot during lunchtime in mid-July, former Plant Superintendent Hobbs told him that he was aware of this activity and that Arrendondo was active in the union campaign and asked him for a copy of the handbill or to describe its contents. Arrendondo promised him a copy.[7] Perhaps a week or two later (still according to Arrendondo), Arrendondo was called to Hobbs' office, where, in the presence of Arrendondo's immediate superior, Shipping Foreman Stonesypher, Hobbs asked him if he (Arrendondo) were working for the Union. When Arrendondo answered, "No, I'm working for you," Hobbs confronted him with a copy of a U.S. Department of Labor report—filed by the Union under statutory requirements—listing Arrendondo as an employee of the Union and asked Arrendondo whether he had been assigned to the Company to organize it from within. Arrendondo replied that he stood on his "rights under Section 7" and refused to answer. Arrendondo concedes that although Hobbs did not press the matter further but "let it go" at that, Arrendondo thereupon in effect challenged Hobbs "to discharge me if he wanted to," but Hobbs "said no, that he wasn't going to discharge me without a good reason." According to Hobbs (supported by Stonesypher, also no longer in Respondent's employ), when he showed Arrendondo the filed union report he merely asked Arrendondo—who had omitted to state in his application for employment with Respondent that he was or had been employed by the Union, and now refused to tell Hobbs the reason for the omission—whether he was the Arrendondo listed on the report, but Arrendondo replied, "I refuse to answer. I take the Seventh."[8] Hobbs additionally testified that when he had observed Arrendondo handbilling (inside, as well as outside, the plant) during working hours about a week previously, he asked Arrendondo not to pass out leaflets inside the plant during worktime without permission and asked for a copy of the handbill. At no time did Hobbs tell Arrendondo not to handbill. In his testimony, Arrendondo conceded that he was never told "not to do [anything] that [he was] doing with relation to [his] union activities," which he carried on openly and without restraint, and that at no time was any threat leveled at him by Respondent in connection with his union activities.

Arrendondo, who is listed in the Union's official reports to the U.S. Department of Labor as its employee,[9] entered Respondent's employ briefly and soon commenced to attempt to organize it under his Union. He left Respondent's employ on August 20, the day the Union lost the election. He impressed me as an unusually strong prounion partisan, whose testimony—seemingly changeable at times—should be evaluated within that frame of reference. However, upon the proof presented, determination of the issue concerning interrogation does not require credibility resolution,[10] since neither of the two described incidents involves violation of the Act. Hobbs' request for a copy of the handbill Arrendondo was openly distributing was totally noncoercive. So, too, was Hobbs' subsequent inquiry as to whether Arrendondo was in the Union's employ, based upon his being listed as such in the official report filed by the Union with the U.S. Government. Hobbs had the right to ask and was fully justified in asking these questions of Arrendondo, particularly since Arrendondo had apparently, for some reason he chose to keep secret, failed to disclose that employment among the previous employments which he listed on his application for employment with Respondent. Even so, as conceded by Arrendondo at the hearing, Hobbs did not press the matter any further. Arrendondo also conceded, during cross-examination, that his union organizational activities at Respondent's plant were unconcealed, that at no time during the episode in Hobbs' office did Hobbs ask him anything about those activities, and that at no time was he ever told by Respondent to desist therefrom. Furthermore, it is not claimed that Respondent at any time did, threatened to do, or even hinted that it would do anything because of or in relation to Arrendondo or his activities nor did it do so.

Upon the record presented, I find that it has not been established by substantial credible evidence that Respondent on or about July 19 interrogated employees in violation of the Act as alleged.

[5] General Counsel witness Arrendondo, the sparkplug of the activity, testified that union membership solicitation commenced on or about June 28

[6] Although the complaint (also Arrendondo's testimony) identifies Hobbs as Respondent's "Production Manager," Hobbs testified that his title was "Plant Superintendent" He is no longer in Respondent's employ.

[7] The foregoing is an approximation of the conversation according to Arrendondo, since he seemed to vary it each time he described it.

[8] Presumably a reference to Section 7 of the Act

[9] Arrendondo conceded at the hearing that he was on the Union's payroll as an employee from November 1968 to August 1970. He further conceded that he has also been in the employ of another union in addition to the Charging Party.

[10] To the extent of any possible lack of consistency between the testimony of Arrendondo and that of Hobbs, I credit Hobbs, who appeared to adhere to facts without embellishment.

C. *Reinstitution of Incentive Pay Plan*

It is alleged that Respondent also violated the Act by announcing to its employees, on or about August 2, "reinstitution" of its incentive pay plan conditioned on their abandonment of the Union.

It is undisputed that Respondent made an incentive wage payment to employees during the period between the Union's filing of its election petition and the election. It is also undisputed that it had made such payments at times prior to the filing of that petition. Under these circumstances, whether the payment violated the Act depends upon whether Respondent's underlying motivation in making it, or in the timing of its announcement, was to wean employees from the Union.[11]

Credited proof[12] establishes that Respondent had, for upwards of 2 years prior to the commencement of the unionizational activity, an incentive pay program featuring extra or "incentive" pay to employees, dependent upon employee productivity and company profits from sales. Since the Company's manufacturing operations do not involve stockpiling of inventories but are limited to filling actual orders, its incentive pay program is directly dependent upon its profits, which are in turn dependent in part upon employee productivity (including not only quantity or speed and quality of work, but also lack of spoilage and breakage). The Company's incentive wage payment system comes into play, specifically, when its costs of materials, direct labor, and shipping do not exceed 68 percent of net sales price. Under this program, a drop in orders or sales or a reduction in sales prices, for competitive or other reasons, could result in elimination of incentive wages for the period involved.

Incentive wages were paid monthly to Respondent's employees, based upon the antecedent quarter-annual period, during the 2 years to and including February 1971. At or about that time, the Company moved to a new plant at a moving cost of around $30,000. Following that move, in March, Company Executive Garver[13] explained to assembled employees the nature of the moving expense the Company had just undergone and that, although that expense would not be "charged against the incentive program," nevertheless no incentive was being paid because the Company was not then "operating at incentive rates," but he expressed the hope and held out the prospect of resumed incentive wage payments, particularly since employees were all now in the new plant located under a single roof with improved facilities. A month later, in April, Garver again met with and explained to the employees that although the Company's cost factors had not as yet sufficiently improved, there was basis for hope and even optimism regarding resumption of incentive wage payments, which if earned would thenceforth be paid in relation to a past month rather than quarterly period—thereby speeding up the resumption of such payments by reducing the former base or waiting period.

According to the credited testimony of Company Executives Garver and Knight (the latter, company president until almost the instant hearing)—both impressively credible witnesses, to my observation—under the Company's system, no incentive pay was earned (or paid) for March, April, or May, but it was again earned for June, which was paid on August 6, following a company oral and written announcement to that effect on or around July 21.[14] *Respondent's witnesses' testimony, indicating that these facts are derived not merely from their personal knowledge but from the Company's books and records, was unchallenged by General Counsel or the Charging Party, who neither sought nor requested production of or access to the company books or records.*

In view of my favorable impression of the testimonial quality of Respondent's witnesses as observed, the absence of any demonstration or indication[15] that their described testimony is false or inaccurate, and the unexplained failure of General Counsel or the Charging Party to attempt through company records to establish any facts contrary to this testimony of Respondent's witnesses, I credit their testimony and find that Respondent did indeed have an incentive wage system in effect for at least 2 years prior to the advent of the Union here; that Respondent's nonpayment of wage incentives for the period of March–May (1971) following its plant move was for economic reasons as described; and that Respondent's resumed payment of such incentive for June (1971) was likewise for economic reasons as described. I further find, in view of the record as a whole, that Respondent's payment on or about August 6[16] of the wage incentive for June, following its announcement on July 21, was in accordance with and on the same basis as its previous incentive payments and was reasonable, and that neither the making nor timing of that payment, nor the timing of the announcement of that payment, has been established by substantial credible evidence as required to have been coercive or intended as bait to lure employees from union activity or adherence.

It is accordingly concluded that Respondent has not

[11] *Motorola, Inc*, 163 NLRB 385, 392, fn 34, and cases cited, *Storktowne Products, Inc*, 169 NLRB 974, 980

[12] Testimony, to extent credited, of General Counsel witnesses Arrendondo, Golightly, Kinley, McDaniel, Starling, and Tom Webb; of Charging Party witness Ross; and of Respondent's witnesses Garver, Hobbs, Knight, and Mueller

[13] Then executive vice president, now acting president and chief operating officer

[14] According to Garver, no incentive wages were earned (or paid) for any month following June until the date of the instant hearing (November) because of a drop in production, "tremendous absenteeism," and shortages ascribed in part to "huge cutting errors" as well as "falsification of cutting tickets," resulting in company losses for every month since June *These allegations were unexplored by General Counsel and the Charging Party and there is no rational basis to discredit them*

[15] Although Respondent concedes that it announced to its assembled employees on July 26 that if things continued as they were going the wage incentive payments would again come into play, but that no incentive was paid for July, both Knight and Garver credibly explained at the hearing that production was greatly down at the very end of July and that company records—*available to, but not explored or sought by, General Counsel or the Charging Party*—so establish. I discredit the testimony of General Counsel witness Starling—Respondent's maintenance worker who impressed me as honest but confused—who alone of all witnesses testified (and insistently at that) that Company President Knight announced to the assembled employees in August that they would receive incentive pay for "June, July and August and September" Even aside from Starling's conceded recollectional infirmities and other testimonial shortcomings, it is farfetched that Company President Knight would announce incentive pay for periods (August and September) which had not yet occurred

[16] Testimony of General Counsel witness McDaniel

been shown to have violated the Act because of its resumed incentive wage payment for June 1971.[17]

D. *Threats to Terminate Existing Employee Benefits*

It is, finally, alleged that Respondent further violated the Act by threatening to terminate existing employee benefits if employees selected the Union to represent them. The threats in question are said to have occurred in remarks by various supervisors of Respondent, as well as in a speech by Respondent's President Knight, during the earlier part of the week of the August 20 representation election.[18] Nineteen witnesses—nine for General Counsel and the Charging Party and ten for Respondent—testified and an exhibit was introduced concerning this.

According to Respondent's shipping employee Duvall, several days before the August 20 election Shipping Foreman Stonesypher told him and four other employees —none, other than Duvall, any longer in Respondent's employ—that if the Union came in there would be "no more incentive" and that employees would "start from scratch." Foreman Stonesypher absolutely denies saying this. Since Stonesypher, no less than Duvall, impressed me as an essentially credible witness, I am presented with no rational basis for preferring or attaching more weight to Duvall's assertion than to Stonesypher's denial. He who carries the burden of proof—in this proceeding, General Counsel—must make out a sufficient case to persuade.[19] This the General Counsel has failed to do here. Cf. *Brotherhood of Painters, etc, Local 76 (Gomez Painting & Decorating Co.),* 182 NLRB 405. "The burden of proof is upon the General Counsel. When . . . the Trial Examiner is not persuaded by the testimony of the General Counsel's witnesses . . . the General Counsel has failed to meet that burden of proof." *Blue Flash Express, Inc.,* 109 NLRB 591, 592. I find that the incident in question has not been established by a fair preponderance of the substantial credible evidence. Under the circumstances, it is unnecessary to consider whether or not the words allegedly, but not here found to have been, uttered by Stonesypher were coercive or otherwise in violation of the Act.

It is undisputed that during the week of the election, supervisors met with groups of their subordinates and spoke to them generally on the question of the desirability of unionization. It is *not* claimed that such meetings or discussions were in and of themselves unlawful; it *is* claimed that certain remarks made by the supervisors constituted threats that existing employment benefits would be dropped in the event of unionization. Thus, employees Kinley, McDaniel, and Ross testified that a few days before the election Mill Foreman Mueller presented a talk to about a dozen employees about "union and non-union," with comparative pay charts. According to employee Kinley, when another employee asked if employees could wind up with less pay if unionized, Mueller replied that it was possible and that if the Union came in "negotiations will start at zero."[20] Employee McDaniel's version of this episode is that what Mueller said was that in the event of unionization "all of our benefits would be dropped and that they would start up from zero"; but, on cross-examination, McDaniel varied this by adding the word "bargaining," so that (according to McDaniel) what Mueller allegedly said was that in the indicated event "the Company would start *bargaining*[21] from zero"—a most important testimonial modification. Further, according to McDaniel, Mueller also informed the employees that "if we went on strike for economical reasons, that we could be permanently replaced." Employee Ross' version is that what Mueller said was that in the event of unionization employees would "start from scratch and also that all of our benefits would be cut out"; and that "subject to strikes, we could be permanently replaced."[22] In contradistinction to the foregoing, Mill Foreman Mueller testified that he did indeed address groups of employees under his supervision, telling them that in the event of unionization "bargaining would not necessarily begin at the present level of wages and benefits," but that "everything was negotiable," so that employees "might wind up with more . . . less . . . or the same" benefits and wages. Mueller denies using the expression "from scratch" and denies stating that employees would lose benefits or that the Company would attempt to drop existing benefits. He concedes informing the employees that if they struck for economic reasons they could be permanently replaced. Employee Eckerd—who, according to General Counsel witness Kinley, was present at the described episode with Mueller—testifying as Respondent's witness, essentially corroborated Supervisor Mueller rather than his fellow employees who testified as General Counsel witnesses. According to Eckerd, Mueller explained to his subordinates that they had the privilege of voting for or against the Union; that if the Union came in there "would have to be bargain[ing] . . . . It would start at whatever the company and the union got together and decided . . ."; Mueller said nothing "to the effect that [employees] would lose anything"; and, in response to an employee's question, Mueller answered that the bargaining "wouldn't necessarily have to begin at the present level" and "would be between the union and the company," starting "from zero on the . . . wages."

[17] Cf *Standard Coil Products, Inc*, 99 NLRB 899 Under the circumstances here described, the withholding, rather than the granting, of the June incentive wage payment might have been regarded as coercive and violative of the Act Cf *Federation of Union Representatives* v. *N L R B*, 339 F 2d 126, 129–30 (C A 2); *Dixie Broadcasting Company,* 150 NLRB 1054, 1073–76, *Waldoroth Label Corp*, 91 NLRB 673.

[18] No violation of the Board's proscription of preelection speeches, during the 24-hour period immediately preceding a Board-conducted election, is claimed to have occurred or is involved Cf *Peerless Plywood Company,* 107 NLRB 427

[19] Administrative Procedure Act, 5 U S C Secs 556(d) and 706(2)(E); *Consolidated Edison Co* v *N L R B*, 305 U S 197, 229, 230, *Willapoint Oysters* v *Ewing,* 174 F 2d 676, 690, 691 (C A 9), *N L R B* v *Bell Oil & Gas Co*, 98 F 2d 406, 410 (C A 5), *N L R B* v *A S Abell Co*, 97 F 2d 951, 958 (C A 4); Attorney General's Manual on the Administrative Procedure Act, 75 (1947)

[20] In repeating the story, Kinley added that Mueller also preceded this reply with the words, "You will lose the benefits you now have and [your negotiations will start at zero]" I have difficulty in lending unquestioning credence to such a possible amplificatory afterthought.

[21] Emphasis supplied.

[22] According to Ross, Mueller also remarked—in what specific context is not altogether clear—that if Ross (who at some previous time had indicated dissatisfaction with her part-time job) "wasn't satisfied" with her job she "could easily be replaced "

I have set out the foregoing at length to afford an illustration of the not unusual difficulty confronting a trier of fact in attempting to assess and choose between the credibility of rival witnesses who appear to be basically honest but who, lacking a recording or verbatim text or notes, have recollective differences as to precise words and phrases which were uttered sometime in the past. As is well known to all, varying even a single word may sometimes change the entire meaning of a phrase, sentence, or thought.

I was left with a strongly favorable impression of the testimonial demeanor of Mueller and Eckerd and also a generally favorable impression as to the others. On balance, my impressions—in part because of the essential corroboration of Mueller by Eckerd—would tend to preponderate toward Respondent's witnesses here. Certainly, however, I would be utterly without rational basis in preferring the version put forth by the witnesses of General Counsel, who, as already shown, must carry the burden of *preponderating* with his proof, which he has not done here.

Landreth, for about 2 years a somewhat itinerant employee of Respondent, "off and on" according to his way of putting it, testified for General Counsel that he and about 20 other employees—Landreth named 5, of whom only 1, Harper, testified, and he (Harper) as *Respondent's* witness—were told by Top Shop Supervisor Thompson that "if the union came in, we'd lose the benefits and that we would have to start from zero." Thompson, at the time of the hearing a rank-and-file employee, firmly denied saying that employees would lose benefits if the Union came in, but acknowledged telling his former subordinates (including Landreth and Harper) that "wages and benefits were negotiable if a union were successful in coming in the plant and that did not mean that they would start negotiating at our present level . . . [but] . . at zero" Harper, called by Respondent, was unable to support the testimony of either Landreth or Thompson. There is, thus, again presented a direct conflict between the testimony of Landreth and that of Thompson—a conflict which General Counsel (and, with the exception of Harper, also Respondent, who, however, does not have the burden of proof) did not even attempt to resolve through production of additional witnesses. Inasmuch as Thompson (as well as Landreth) impressed me favorably, I am again left with the impression that what occurred here was the familiar situation of honest clashes of recollection in the difficult testimonial endeavor of reconstructing precise words utilized on an occasion in the past which only later assumed great importance. Under the circumstances, there is no rational basis for preferring the testimony of Landreth over that of Thompson. I accordingly hold and find that as to this episode, as well, General Counsel has failed to sustain his burden of proof.

General Counsel witness Golightly testified that he and other employees were told by Shipping Foreman Swain[23] that "if the union came in, that if the employees should happen to go on strike" the Company would hire permanent replacements in their stead; that incentive pay would be "cut out" (varied on cross-examination to "scratched out"); and that "employees would start negotiating at a zero wage" (varied on cross-examination to "at a zero base" and also to employees would "drop everything . . . wages and benefits" and start negotiating from "zero base"). It was apparent that Golightly, who seemed a normally honest witness of usual quality, kept edging or trimming his attempted recollectional reconstructions. Whether or not the modifications, intentional or otherwise, as opposed to the original versions, were more precise is impossible for me to know. Golightly conceded that at no time did he hear any indication from the Company that any employee would be discharged for union sympathy or activity. Employee Tom Webb, a truckdriver like Golightly, who was not in the group with Golightly when it was addressed by Swain, testified that he (i.e., Tom Webb), his brother, Jerry Webb, and Worley were spoken to as a group of three by Swain.[24] According to Tom Webb on direct examination, Swain told them that in case of unionization "bargaining would start at zero and we would probably lose what benefits we had"; on cross-examination, however, Tom Webb was unable to recall any remark by Swain about "benefits" and indeed conceded that he (Webb) was unable to "remember exactly what words he [Swain] used," but he ascribed to Swain the remark that in case of unionization employees "wouldn't know whether the incentive would keep going or not." Concerning this incident, not only Swain testified, but also Jerry Webb and Worley, in other words, all of the other participants. Swain, a most impressive witness, denied saying what Tom Webb attributes to him; instead, he testified that he stated, in response to a question by Jerry Webb, that "collective bargaining started with a zero or an even keel and, depending upon negotiations, could go either up or down." The version of Swain, rather than that of Tom Webb, is supported by rank-and-file employees Jerry Webb and Worley, who were called as Respondent's witnesses. Thus, Jerry Webb swore that, in response to a question by him as to whether his wages could be dropped if the Union came in, Swain replied that "the bargaining power would start at zero . . . and go up from there," and that bargaining with a union starts not from where it now is but "from scratch." Flatly differing with his brother, Tom, Jerry Webb swore that Swain did *not* say that any benefits would be lost if the Union came in. (Jerry Webb further testified that he, Jerry Webb, openly announced at the meeting with Swain that he was in favor of the Union and would vote for it.) According to Worley, when Swain indicated that negotiations with a union "would start at zero level," Swain didn't say "exactly where zero level was," with some employees there indulging in "quite a bit of argument about where zero level was, and everyone had a different opinion about where it was at," with some of the view that "zero level was where [y]our present wages were" and others "that it started at minimum wage level." Also, according to Worley, when one of the employees asked whether incentive pay would no longer be maintained if the Union came in, Swain replied that he did not know since it would be "under debate." Upon the record presented, while not of the impression that Tom Webb deliberately or other

[23] Swain, as well as Stonesypher, is concededly a shipping foreman

[24] Seemingly this was because the three were at work out of town when Swain spoke to the others (including Golightly)

than mistakenly testified inaccurately, I credit the described version of Swain as essentially corroborated by Jerry Webb and Worley as preponderant.

On August 18, 2 days before the election, Company President Knight read a speech to assembled employees. The speech was recorded and its text is in evidence. Although, as with the supervisors' remarks, varying versions have been put forth in the testimony of employee witnesses[25]—with variations among the respective employees themselves—as to the contents of Knight's speech, since the text and a recording of the speech are available and have been stipulated and since I fully credit the testimony of Company Executives Knight and Garver that the speech as delivered corresponded substantially to the written text of the speech, it is unnecessary to winnow and sift from among, and to deal with, the various competing versions.[26] I find that the speech as delivered by Knight corresponded to the written text of that speech in evidence. (Resp. Exh 4)

In this preelection speech, Company President Knight referred to the upcoming election as "a matter of importance"; called attention to the fact that he was reading the speech and that it was being recorded so as to avoid issues of fact; invited anybody to leave the audience without penalty or fear of reprisal; mentioned the Union's staffs and executive salaries; pointed out that strikes, which had never occurred in the Company's history, sometimes occur with unions and can be costly to employees as well as management, including the possible necessity of permanent replacement of economic strikers; reminded them that employees' benefits from the Company had been improving over the years, with wages competitive, but that increased costs or work interruptions could affect competitive advantages which the Company presently enjoyed; indicated that employees possess adequate job security with good pay and an incentive system; pointed out that if the Union came in, "bargaining on wages, benefits, and working conditions does not start from the present level and go upward. All present wages, benefits, and working conditions are as much a subject of negotiation as are demands for additional wages, benefits and working conditions"; stated that employees' existing status had been acquired without union dues or similar payments; informed employees that the Company wished them "to hear both sides of this Union no Union story"; interposed a remark that, with regard to what he had just heard about "some threats of fights and violence," the Company's position was that while "we *will* tolerate" any "differences of opinions in matters like this union/no union," the Company would not tolerate threats or acts of violence, which are illegal; urged that employees "vote according to your own conscience" in the election and that it is "important that you vote . . . . By all means vote!"; and closed with the apology that it would be better now to avoid any questions or discussion with him.

After carefully reviewing this speech, I can perceive nothing unlawful in it. Employers, no less than unions, enjoy the right of free speech. All may, within the guarantees of the Act as well as Constitution, peaceably express viewpoints and vie for votes of employees preparing to ballot in representational elections, provided they refrain from threats, coercive blandishments, or substantial misrepresentations. *Thomas* v. *Collins,* 323 U.S. 516, 537-538; *N.L.R.B.* v. *Virginia Electric & Power Company,* 314 U.S. 469. And even if their actions do not amount to unfair labor practices under the Act, those who seek to influence employees' votes in a Board-conducted election may also not so pollute the election atmosphere as to convert what the Board wishes to preserve as the "laboratory conditions" under which its elections should be held into a huckstered sideshow or charade. *General Shoe Corporation,* 77 NLRB 124, 127. I can detect none of these conditions, threats, allurements, or misrepresentations in any of Respondent's words or actions here; there is, rather, indication of cautious restraint and concern for avoidance of overreaching or unfairness. While it is true that under certain circumstances, not necessary here to detail, an employer's assertions that in the event of unionization bargaining would start from "scratch" or "zero" have met with Board or court disapproval,[27] the surrounding factual contexts of those cases will disclose that they were characterized by other, if not substantial or pervasive, violations of the Act, unlike the situation here presented which is totally devoid of any unfair labor practice or even union animus. Here, as found, there were no coercive allurements nor threats or indications that any existing employee benefit would be withdrawn, lost, or reduced in the event of unionization; there was no interrogation or other direct or indirect interference with the employees' organizational activities or the Union's campaign, quite the contrary. Under the circumstances presented, no rational person could believe that in the event of unionization his wages would be reduced to "zero" or that he could be required to work for "zero wages." Respondent's indications—in part in answer to employees' questions—that negotiations with a union start from "zero," "zero base," or "scratch," were neither more nor less than the truth, at least in the well-understood vernacular.[28] As is well known, various matters are changingly balanced off against each other in the surge-and-ebb or give-and-take of the collective-bargaining process. The fact that something may start at "zero," whatever that may signify, does not mean that it will end there or even remain there long. In no way did Respondent indicate or even suggest that it would not, or that it would be unwilling to, bargain collectively in good faith. If a

[25] Arrendondo, Kinley, Ross, Starling, and Tom Webb

[26] It is of interest to note, however, that Arrendondo, seemingly the chief union protagonist, who testified in detail concerning the speech, conceded on cross-examination that it contained no mention of the subject of any loss of benefits by any employee

[27] See, e g, *N L R B* v *Marsh Supermarkets, Inc,* 327 F.2d 109, 111 (C A 7), cert denied 377 U S 944, *Astronautics Corporation of America,* 164 NLRB 623, *Federal Envelope Company,* 147 NLRB 1030, 1037–41, *Surprenant Mfg Co,* 144 NLRB 507, enfd as modified, 341 F 2d 756 (C A 6) But cf, e g, *Emerson Electric Company,* 177 NLRB 75, *Singer Company,* 176 NLRB 1089, enfd as modified, 429 F 2d 172 (C.A. 8), *Nutrena Mills, Division of Cargill, Inc,* 172 NLRB No. 24, *Wagner Industrial Products Company,* 170 NLRB 1413, *Trent Tube Company,* 147 NLRB 638, *Universal Producing Company,* 123 NLRB 548.

[28] So also were Respondent's statements as to the replaceability of economic strikers, which, even according to General Counsel witnesses, were carefully phrased, such as with a qualifying "if," so as to avoid indication or implication that there would be a strike or that Respondent would not bargain in good faith.

union is so convinced of the low level of understanding or high level of gullibility of its adherents or would-be constituents that it is truly apprehensive that it will lose an election because there is a real likelihood that they believe they would have to work for "zero wages" under the union, a union so believing can readily bring home to them the absurdity of such a fear, instead of—as here—remaining quiet about it (perhaps justifiably, in view of its absurdity) and then seeking to upset a lost election on that basis. This is not to say, as indicated above, that such statements by an employer in a frame of reference other than that here of substantial or pervasive violations of the Act or election offenses, would not play a role in warranting a different result than that here reached.

Under the circumstances here presented, it is found that Respondent did not violate the Act in any way through the speech delivered to its employees by President Knight on August 18, 1971.

IV. REFERRED ISSUES ARISING OUT OF THE AUGUST 20, 1971, BOARD ELECTION

While conduct not comprising an unfair labor practice may sometimes constitute sufficient basis for setting aside a Board-conducted election,[29] nevertheless the events here described, forming the only basis for the Union's objections[30] to the election which it lost on August 20 by a vote of 45 to 36, do not, in view of findings here made, add up to cognizable impropriety such as to justify disturbing the outcome of that election, which should accordingly be certified. Cf., e.g., *Virgin Islands Spinning Corp.*, 194 NLRB No. 147 (1972).

Upon the foregoing findings and the entire record, I state the following:

V. CONCLUSIONS OF LAW

1. At all material times, AAA Lapco, Inc., Respondent herein, has been and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2.. Jurisdiction is properly asserted in this proceeding.

3. It has not been established by a fair preponderance of the substantial credible evidence upon the record as a whole that Respondent on or about July 19, 1971, interrogated any of its employees in violation of the Act, as alleged in the complaint.

4. It has not been established by a fair preponderance of the substantial credible evidence upon the record as a whole that Respondent reinstituted, or timed or announced reinstitution of, its incentive pay plan, on or about August 2, 1971, in violation of the Act as alleged in the complaint.

5. It has not been established by a fair preponderance of the substantial credible evidence upon the record as a whole that Respondent on or about or between August 16–18, 1971, through any of its executives, supervisors, or agents, threatened to terminate any employee benefit if employees chose the Union as their collective-bargaining representative, as alleged in the complaint.

6. The complaint herein, dated September 30, 1971, should in all respects be dismissed.

7. None of the Union's objections filed on August 25, 1971, to conduct said to have affected the results of the election conducted under Board auspices on August 20, 1971, has been established by a fair preponderance of the substantial credible evidence upon the record as a whole or warrants the setting aside of said election, and said objections and each of them should be overruled and the results of said election certified in accordance with the official tally of ballots cast therein.

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:[31]

ORDER

It is hereby ordered that the complaint herein, dated September 30, 1971, be and the same is hereby in all respects dismissed.

It is further ordered that the union objections, filed on August 25, 1971, in Case 16–RC–5763, to conduct affecting the results of the election conducted therein on August 20, 1971, by or under auspices of the Board's Regional Director for Region 16, should be and are hereby overruled, and the results of said election should be certified in accordance with the official tally of ballots cast therein.

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[29] Cf., e.g., *Dal-Tex Optical Co.*, 137 NLRB 1782, *General Shoe Corporation*, 77 NLRB 124

[30] I.e., Objections I and II, the remaining objections (III and IV) having been withdrawn prior to this hearing Objections I and II deal only with interrogation and reinstitution of the incentive pay plan No objection was filed concerning any alleged threat to terminate any existing employee benefit, although Objection II does include general terms about "coerc[ion] to vote against the union."

[31] In the event no exceptions are filed as provided by Sec 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.