

Adams Super Markets Corp. and Local 371, United Food and Commercial Workers International Union, AFL-CIO. Cases 1-CA-20252 and 1-CA-20407¹

29 March 1985

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 20 May 1983 Administrative Law Judge William A. Gershuny issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,² findings,³ and conclusions and to adopt the recommended Order.

The Union began organizing the Respondent's seven grocery stores in 1981. On 7 May 1981, the day before the scheduled election, the Union withdrew the petition. In February 1982 the Union renewed its campaign. It filed a petition 23 August and lost the 22 October election by a 195 to 86 vote. The complaint allegations stem from various actions the Respondent took in September and October 1982. The judge dismissed all the allegations; we agree for the following reasons.

1. On 2 September 1982 Store Manager Parrot learned that employee Lefebvre, a part-time cashier, was passing out authorization cards while on duty. He took her aside and told her she could do what she wanted on her own time, but she could not solicit when she was engaged in work. Lefebvre testified that no-solicitation signs were posted in the store.⁴ The judge impliedly did not

credit Lefebvre's testimony that Parrot additionally asked her about and discussed other union activities. The judge did, however, specifically credit Parrot's testimony on this incident. We find no reason in the record before us to disturb this resolution and agree with the judge that the complaint allegations regarding the 2 September incident should be dismissed.⁵

2. On 28 September 1982 employee Damato met two union organizers in the Respondent's West Street store snackbar. Store Manager Parrot, Systems Coordinator Wager, and a unit employee entered and sat in a booth next to Damato and the organizers. Damato and the organizers left and walked through the store, followed by Parrot, Wager, and the unit employee. Damato and the organizers then briefly sat and stood about the Respondent's courtesy bench immediately outside the store while Parrot, Wager, and the unit employee watched.⁶ Damato testified that they followed and stared at them. In footnote 2 herein, we disavowed the judge's finding that her testimony was incredible. Damato's testimony does not, however, establish a violation. The alleged surveillance of Damato resulted from her openly meeting in the Respondent's store with outside union organizers. "[U]nion representatives and employees who choose to engage in their union activities at the employer's premises should have no cause to complain that management observes them." *Chemtronics, Inc.*, 236 NLRB 178 (1978), quoting from *Milco, Inc.*, 159 NLRB 812, 814 (1966). As this is the case here, we shall dismiss this allegation.

3. On 17 August 1982 the Respondent announced to employees that a new handbook would be ready by the end of September. The Respondent distributed the handbook to employees at meetings conducted 29 and 30 September, 3 weeks before the election. On 6 October 1981 the Respondent announced it was considering revising its medical insurance plan. In meetings with individual employees in July and August 1982, President Young replied to frequent complaints about the existing medical plan that he was looking into a revised plan. The Respondent announced the new insurance plan at meetings conducted 12 and 13 October, less than 10 days before the election. Both the new handbook and the new medical plan changed employee benefits. "The Board has long held that the granting of benefits during an election campaign is not *per se* unlawful where the employer can show that its actions were governed by factors

¹ Case 1-RC-17718, involving related objections to the 22 October 1982 election, was consolidated with this case for hearing. On 27 February 1984 the Union requested permission to withdraw its objections. On 20 April 1984 the Board issued an Order granting the Union's request, severing Case 1-RC-17718, and certifying the election results.

² The General Counsel has excepted to the judge's rulings and conduct at the hearing. We find, on the record before us, that the judge did not exhibit the type of bias, prejudice, or improper conduct that would warrant setting aside the attached decision and ordering a new hearing.

³ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings, except we do not agree that employee Damato's testimony about the 28 September 1982 alleged surveillance was "simply incredible." Her testimony that she and two union organizers were closely followed by Store Manager Parrot and Systems Coordinator Wager does not markedly differ from Parrot's credited testimony. We find below, however, that even accepting her testimony as true, it does not establish a violation.

⁴ The signs' text is not in evidence, and the record is not clear whether they referred only to outsiders or to employees as well. The record does not show whether no-solicitation signs were posted in other stores.

⁵ We also agree with the judge that the record does not show disparate enforcement of the no-solicitation policy against union solicitation.

⁶ Parrot testified that he observed and followed the organizers and that Damato was with them.

other than the pending election.” *American Sunroof Corp.*, 248 NLRB 748 (1980).

The Respondent had been considering changing both the handbook and the medical plan for nearly a year before it implemented the changes. The old medical plan had been an issue in the abortive 1981 union campaign and did not appear competitive in the industry. The Respondent began exploring new plans in late 1981 when it announced to employees it was looking into the matter. The old handbook published in September 1974 was out of date and no longer accurate. In late 1981 Senior Vice President Wineberg instructed the personnel manager to prepare a revised handbook.

Neither effort bore fruition until the height of the 1982 union campaign. The personnel director was unable to revise the handbook, and Wineberg explored obtaining outside help. In July Wineberg retained a consultant to prepare a new handbook. It also took time to solicit and consider a new medical plan. In the meantime, the Respondent was recruiting a new chief executive. On 8 June 1982 it hired President Young, who assumed office 12 July. During his interviews for the position, Young stressed the importance of fringe benefits; the Respondent assured him he would be allowed to upgrade them.

Once Young assumed office matters moved more swiftly. On 17 August the consultant sent a draft of the new handbook. Young approved various revisions and returned the revised draft to the consultant for review. The consultant approved the revisions and returned the handbook. The Respondent immediately had it printed and distributed it to employees. In early August Young met with the Respondent's board of directors to discuss the medical plan revision. On 10 August the directors authorized Young to proceed with a new plan as quickly as possible. On 21 September Young presented his proposals to the directors, who authorized him to proceed with either of two plans. On 28 September Young selected the new plan and discussed it with the agent. Young wanted the plan to take effect as soon as possible because the new plan, unlike the old self-insured plan, placed a cap on the Respondent's liability. The plan was made effective retroactively to 1 October. As soon as brochures explaining the new plan were available, the Respondent informed the employees about the plan.

Based on the above, we agree with the judge that the Respondent has shown that it changed the handbook and medical plans for legitimate reasons and not because of the Union's campaign. Thus, the Respondent has shown that it had business justification for making both the changes; that it had long planned the changes; that it encountered

delays; that it announced and made the changes upon completing the plans; that Young's assuming office affected the timing of the changes; and that it had economic justification for not delaying announcing the medical plan until after the election. Accordingly, we shall dismiss the relevant aspects of the complaint.⁷

4. The General Counsel contends that the Respondent unlawfully promulgated a no-solicitation rule, a contention that the judge did not directly address. The new handbook contains the following solicitation policy:

In the interest of the convenience of the continued good-will of our customers and for the protection of our employees, there shall be no solicitation or distribution of literature of any kind by any employee during actual working time of the employee soliciting or the employee being solicited. (This does not apply during break and meal periods.)

Persons who are not employees may not solicit or distribute literature for any purposes on Company property at any time.

There shall be no solicitation or distribution of literature of any kind by any person in any customer service areas or shopping areas of the store during those hours when the store is open for business.

The rule is facially valid. *Our Way, Inc.*, 268 NLRB 394 (1983). The only issue is whether the Respondent's promulgating the handbook rule during the Union's campaign violated the Act. We find that it did not. The old handbook did not contain a no-solicitation rule, but did tell employees not to “interfere with the work of others trying to do their job.” As found by the judge and as discussed above regarding the 2 September incident, the Respondent had a no-solicitation rule posted in at least the West Street store. The new handbook rule amplified or clarified the Respondent's existing no-solicitation policies and was not a promulgation of a new rule. *Lebanon Apparel Corp.*, 243 NLRB 1024, 1031 (1979). Moreover, an employee handbook containing rules for employee conduct is a usual and reasonable place to include a no-solicitation rule. As we have found that the Respondent published the new handbook for legitimate reasons unrelated to the union campaign, we also find that the Respondent lawfully published the no-solicitation rule. Accordingly, we shall dismiss this allegation of the complaint.

⁷ Member Dennis finds it unnecessary to reach the issues the Chairman raises in his concurrence because, under either his position or current precedent, the Respondent has not violated the Act

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

CHAIRMAN DOTSON, concurring and dissenting.

I concur with my colleagues' decision to dismiss the complaint. I do not agree, however, with the analysis utilized in dismissing the allegation that the Respondent violated Section 8(a)(1) by effecting changes in its employees' terms and conditions of employment prior to the election.¹

The record reveals that 3 weeks before the election the Respondent distributed a new employee handbook that effected certain changes in employee benefits and that 10 days before the election the Respondent announced revisions in the medical insurance plan that improved the program. In evaluating whether these actions violated Section 8(a)(1), both the judge and my colleagues focused their analysis almost exclusively on the Respondent's justification for its actions. Thus, the judge stated that "the granting of benefits to employees during known union organizational activity raises a presumption of intent to interfere with employee freedom of choice, in the absence of credible evidence establishing that the decision was determined by factors other than the pendency of the election." He then set about examining the Respondent's justification for the changes. Similarly, my colleagues state that the Respondent changed benefits prior to the election and, quoting *American Sunroof Corp.*,² that "the granting of benefits during an election campaign is not *per se* unlawful where the employer can show that its actions were governed by factors other than the pending election." Then, like the judge, they set about evaluating the Respondent's justification for the changes. Accordingly, the judge, explicitly, and my colleagues, implicitly, apply a presumption³ that an employer's change of benefits prior to an election is unlawful. I cannot agree.⁴

It is a fundamental precept of our Act that when an employer is alleged to have acted unlawfully by *detrimentally* affecting an employee's terms and

conditions of employment, one of the decisive issues is the employer's intent or motive.⁵ The burden for establishing an employer's unlawful intent or motive rests squarely and unequivocally on the General Counsel. *Wright Line*, 251 NLRB 1083.

Plainly an employer can also violate the Act by *favorably* affecting an employee's or a group of employees' terms and conditions of employment. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). In such cases, however, the presence of unlawful intent or motive is no less a necessary element than it is in cases where employees are detrimentally affected. Thus, in *Exchange Parts* the Court stated, "The precise issue is whether [Section 8(a)(1)] prohibits the conferral of such benefits, without more, *where the employer's purpose is to affect the outcome of the election.*" 375 U.S. at 406 (emphasis added). Also, in response to the claim that such conferrals of benefits must be accompanied by other acts of interference and restraint, the Court held that (375 U.S. at 410).

Other unlawful conduct may be an indication of the *motive* behind a grant of benefits while an election is pending, and to that extent *it is relevant to the legality of the grant*; but when as here the *motive* is otherwise established, an employer is not free to violate Section 8(a)(1) by conferring benefits simply because it refrains from other, more obvious violations. [Emphasis added.]

If, as is clearly the case, an employer's unlawful intent or motive is a necessary element for the finding that a benefit increase violates the Act, I am unable to comprehend why the General Counsel is discharged from establishing that element as part of the *prima facie* case that a violation was committed.⁶ As noted, the General Counsel is not relieved of that obligation in cases where employees are affected detrimentally. Indeed, it is an essential tenet of Board jurisprudence that the General Counsel must establish each necessary element of an unfair

¹ See former Member Kennedy's concurring and dissenting opinion in *Wintex Knitting Mills*, 216 NLRB 1058, 1059 (1975), with which I agree

² 248 NLRB 748, 748 (1980)

³ Although my colleagues avoid use of the term "presumption" it is implicit in their analysis. Under their stated standard, the granting of benefits is not *per se* unlawful "where the employer can show" it was motivated by other factors. Absent such a showing therefore, the changes would be *per se* unlawful. Such an analysis clearly establishes a presumption

⁴ I have no quarrel with the conclusion that the Respondent successfully demonstrated that its actions were not intended to influence the election. My quarrel is with the unwarranted presumption that required the Respondent to shoulder that burden

⁵ As the Board stated in *Wright Line*, 251 NLRB 1083, 1083 (1980)

In resolving cases involving alleged violations of Section 8(a)(3) and, in certain instances, Section 8(a)(1), it must be determined, *inter alia*, whether an employee's employment conditions were adversely affected by his or her engaging in union or other protected activities and, if so, *whether the employer's action was motivated by such employee activities* [Emphasis added.]

⁶ Nothing less is achieved by the majority's analysis. For under its rule, an employer that presents no evidence concerning its motive would be found in violation of the Act on a showing that a petition was pending and benefits were increased. Interestingly, application of such an analysis to a reduction in benefits would presumably result in a finding that an employer violated Sec. 8(a)(1) if the parties rested after stipulating that the employer received an election petition and employees' insurance benefits were reduced. So far as I know, such is not the law

labor practice. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Absent an articulated basis for the maintenance of a presumption that relieves the General Counsel of its obligation⁷ to establish a necessary element of an unfair labor practice, i.e., unlawful intent or motive, I can only assume that the majority believes that the inference is warranted because the employer's intent is either inferred or irrelevant. Surely this is not the type of case where unlawful motive is properly inferred because the action is inherently destructive of employees' Section 7 rights. Cf. *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). The Board has never so held, and even if it did, such a holding clearly is contrary to the Supreme Court's *Exchange Parts* decision discussed above.⁸ Nor at this late date can it be seriously contested that the employer's intent is irrelevant.⁹ Concededly there are certain alleged 8(a)(1) violations where the employer's intent or motive, be it lawful or unlawful, is irrelevant. Here, however, where the violation turns on the evidence of the Employer's intent, any analogy to cases where motives is irrelevant would be specious.

In summary, I am unable to adopt the majority's standard for determining whether an employer's grant of benefits during the pendency of an election petition violates Section 8(a)(1). In my view, the General Counsel bears the burden of proving each and every necessary element of the alleged unfair labor practice including the element that the employer's action was intended to influence the employee's election choice. If the General Counsel makes a prima facie showing of a violation, then, and only then, would I require the employer to come forward with evidence to rebut the prima facie showing.

In the instant case, I would find that the General Counsel failed to establish a prima facie case. There is no credited evidence of union animus, no contemporaneous violations of the Act, and no credited evidence that the benefit increases were, in any way, aimed at affecting how the employees voted in the election. For these reasons, I concur with my colleagues' result.

⁷ The majority's rule not only relieves the General Counsel of part of its burden, it also imposes a corresponding burden on the employer to establish a negative, i.e., that its actions were not aimed at influencing the employees' election choice.

⁸ Of course, even if benefit grants were ruled to be inherently destructive, unlawful intent or motive would remain a necessary element of the unfair labor practice. *P. W. Supermarkets*, 269 NLRB fn 5 (1984), and accompanying text.

⁹ Some earlier cases, see, e.g., *Goodyear Tire & Rubber Co.*, 170 NLRB 539, 547 (1968), stated that the employer's motive was not controlling because the employer's action allegedly violated Section 8(a)(1). But see *Admiral Semmes Hotel*, 154 NLRB 338, 350 (1965), where motive was viewed as a necessary element of the alleged violation.

DECISION

STATEMENT OF THE CASE

WILLIAM A. GERSHUNY, Administrative Law Judge. A hearing was conducted in Pittsfield, Massachusetts, on April 6-7, 1983, on complaints issued November 9 and December 20, 1982, alleging a number of 8(a)(1) violations during the course of an election campaign. Identical objections were consolidated for hearing.

The principal issue is whether the Employer's issuance of a new employee handbook and its announcement of a new medical insurance plan shortly before the election unlawfully interfered with the conduct of that election and requires that a new election be conducted.

On the entire record, including my observation of witness demeanor, I make the following

FINDINGS OF FACT AND CONCLUSION OF LAW

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The complaints allege, the answers admit, and I find that Respondent is an employer subject to the Act and that Local 371 is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

A. Background

The Employer operates seven supermarkets in north-west Massachusetts, with approximately 325 employees in the unit sought to be represented.

In 1981, the Union launched an organization campaign and, by order of the Regional Director dated April 10, 1981, an election was scheduled for May 8. On May 7, the Union withdrew the petition, informing the Employer that it would be back.

In early 1982, another campaign was initiated by the Union and a new representation petition was filed on August 23, 1982. At the October 22, 1982 election, the Union lost by a vote of 195-86.

This second campaign was a relatively clean one. The principal thrust of the complaints and the objections is the issuance of a new handbook on September 29-30 which admittedly effected certain changes in employment and the announcement of an improved medical insurance plan on October 12-13, effective retroactively to October 1. Both had been in preparation long before the filing of the second representation petition on August 23. The remaining two allegations each involve only a single incident, a single employee, and a single store manager.

B. The September 2 Incident

The credible evidence is that on September 2, at the West Street store, Store Manager Parrott was told by an employee that part-time cashier Lefebvre was passing out union cards while on duty at a cash register. Upon questioning by him, she admitted doing so, was advised that she could do whatever she wanted on her own time, but not while engaged in work, and was warned that disciplinary action could be taken if her conduct was repeated. No warning was placed in her personnel file. Le-

febvre testified that there were no-solicitation signs posted at the store.

Based on my observation of his demeanor on the witness stand, Parrott appeared trustworthy and his testimony was convincing and consistent with a hearing record which reflects a campaign free from employer interference with campaign activities on the part of its 325 employees at seven widely scattered stores.

The General Counsel's evidence purporting to establish disparate enforcement of a no-solicitation rule falls well short of the mark. Not only was the testimony vague and unconvincing, it either related to solicitations for charitable purposes or failed to establish certain essential elements: that the activity occurred during a relevant period, that it was observed by management; and that it was engaged in by employees and/or supervisors while on duty and not on break or other free time.

The Employer's actions in this regard are not unlawful and paragraphs 8(b)(i)-(v) and 9 of the complaint are dismissed.

C. The September 28 Incident

The credible evidence is that on September 28, two union organizers were having coffee at the West St. store's small, public snack bar with bakery employee Damato, who was on break. Present also at the snack bar on break were a number of other employees, including Store Manager Parrott and Supervisor Wager. The latter two, joined by a bargaining unit employee, sat in a booth next to that occupied by Damato and the organizers. Since the beginning of the campaign, each store was visited daily by 1 or 2 organizers and, when the campaign first began, each was visited by approximately 12 organizers en masse. When the organizers and Damato left the booth, Parrott and Wager (accompanied by the bargaining unit employee) followed them out of the store to observe if the organizers stopped to talk with other employees on duty. Outside, some of the two groups sat on a bench, others stood and smoked, and Parrott occupied himself with rounding up shopping carts and the like. At no time did Parrott or Wager, as alleged, engage in or give the appearance of engaging in surveillance of Damato's union activities or her socializing with the union organizers. What they did do—observe union organizers in the store to ensure that the business of the store was not interfered with—is not unlawful.

Again, I credit the testimony of Parrott for reasons set forth above. Damato's testimony, on the other hand (they were "following" us and were "staring" at us), was simply incredible given the record in this case which clearly depicts an employer intent on not interfering with the union activities of its employees.

Accordingly, paragraph 8(e) of the complaint must be dismissed.

D. The Handbook and Insurance Plan

Prior to August 23, 1982, when the petition was filed, Respondent had both an employee handbook and a medical insurance plan. Following the first aborted union campaign in 1981, Respondent undertook to revise both and its efforts were nearing completion when the petition

was filed. Deciding that it was "damned if it did and damned if it didn't," Respondent decided to do what was "right" for its employees and put each into effect when completed. Thus the handbook was distributed at meetings conducted on September 29-30, 3 weeks before the election, and the insurance plan was announced at meetings conducted on October 12-13, less than 10 days before the election.

1 The handbook

It is uncontroverted that the new handbook effected changes in employee benefits: a broader definition of "full-time employee," resulting in the availability of company benefits to 34 former part-time employees, and the granting of personal leave days, an expanded number of vacation days and limited jury duty pay. It also contained a no-solicitation rule which the General Counsel concedes is not unlawful. According to the testimony of employee Lefebvre (called by the General Counsel), there was an existing rule applicable to employees already posted at the West St. store; the store manager does not recall one; and no other evidence was offered to indicate whether such a rule was posted at the other six stores. However, all employees were advised by the Union that card solicitation was not to be engaged in if it interfered with work.

In late 1981, Senior Vice President Wineberg directed the personnel manager to begin a revision. After several months when it became apparent that the latter lacked the expertise to do such a revision, Wineberg sought the names of consultants. Two were interviewed and one, Jackson, was retained in July 1982. By early August, Jackson submitted a typed draft to Wineberg. Several days later, by letter dated August 17 (1 week before the petition was filed), Respondent's new president (as of July 12) Donald Young advised employees that the handbook revision project was nearing completion and that "we will have a new guidebook by the end of September."

Jackson's draft was reviewed and edited by company officials and returned to Jackson on August 24 by letter which asked for his review "as quickly as possible" and noted that "Local 371 has petitioned the NLRB for an election as of Friday, August 20, 1982." Actually, the petition was filed on August 23; it had been mailed on August 20.

At store meetings conducted on September 29 and 30, at which attendance was *not* compulsory, the handbook was distributed.

Respondent's decision to issue the handbook was based on the advice of counsel and represented what Wineberg considered to be a "damned if you do (i.e. publish the handbook), damned if you don't" (i.e. withhold new benefits which the employees had been promised prior to the filing of the Union's second representation petition) position.

2 The medical insurance plan

Learning from the Union's aborted 1981 campaign that the employees wanted improved medical insurance benefits and wanting, in any event, to remain competitive

with other employers, Wineberg, in an October 6, 1981 letter to employees, announced that the Company's efforts in this regard had begun. Over the next 6 months, a number of proposals were solicited and considered. In the meantime, Respondent was recruiting candidates for president. At Young's interviews with the Company, such benefits were discussed and, when he was hired on June 8, Young was assured he could upgrade them. When he assumed office on July 12, Young immediately began a lengthy series of meetings with employees, during which employees frequently voiced complaints about the current medical insurance plan. Young assured them he was looking into it. In early August, Young and others met with the board of directors to discuss the issue and, on August 10, Young was authorized to proceed with a plan as soon as possible. By letter of August 17 (1 week prior to the filing of the petition), Young told all employees that the "company has been working for some time on an updated and vastly improved employee guidebook, while at the same time, we are carefully reviewing all of our benefit programs so we can make the appropriate revisions in our new guidebook" and that "we are in the process of completing this project."

On September 21, the board authorized Young to select one of two proposals being considered, on September 28, Young and Wineberg selected a plan; and on October 5, finalized its details: one, that it would have an effective date retroactive to October 1 and, two, that it would have certain benefit levels. The selection of October 1, rather than November 1, did not, in Young's view, pose any administrative obstacles since the existing plan was carried by Respondent as a self-insurer and thus the normal changeover confusion would be avoided insofar as the employees were concerned. The new plan was first presented to employees at store meetings on October 13-14, less than 10 days before the scheduled election. Young considered delaying announcement of the plan until after the election, but decided to do "what was right for the employees," since it was his style to tackle a problem and implement its solution when found.

E. Discussion

Board precedent by now is clear that the granting of benefits to employees during known union organizational activity raises a presumption of intent to interfere with employee freedom of choice, in the absence of credible evidence establishing that the decision was determined by factors other than the pendency of the election. See, e.g., *Baltimore Catering Co.*, 148 NLRB 970 (1964). That presumption is overcome where the decision-making process was fully under way prior to the union activity. *Greenbrier Valley Hospital*, 265 NLRB 1056 (1982). Of course, the institution of an organizational drive by a union does not prevent management from taking reasonable measures in the operation of its business. *NLRB v. M. H. Brown Co.*, 441 F.2d 839 (2d Cir. 1971). And while an employer such as Respondent here often is put in a "damned-if-you-do, damned-if-you-don't" situation (since the granting or the withholding of benefits may constitute unlawful interference), it nevertheless must make its business decisions precisely as it would have had the

union not been in the picture. *Marines' Memorial Club*, 261 NLRB 1356 (1982).

Applying these principles to the record evidence, I find and conclude that the benefit changes effected by issuance of the new handbook on September 29-30 and the new insurance benefits announced on October 12-13 were for a legitimate business purpose and not for the antiunion purpose of interfering with the October 22 election.

The evidence is overwhelming and uncontroverted that a revision of both the handbook and the insurance plan were decided on in the fall of 1981, almost 1 year prior to filing of the petition on August 23, 1982. During that year, handbook revisions were attempted by in-house personnel and, that failing, were completed by outside consultants. It was in the final revision stages when the petition was filed and, indeed, one week prior to the petition, employees were told that the project was nearing completion and that "we will have a new guidebook by the end of September." That announced goal was in fact met and the revised handbooks were disseminated to employees on September 29-30. The Company *did* return the final draft to the consultant on August 24 with a request for finalization "as soon as possible" and a reference to the recent filing of the petition, but even that does not indicate an effort to accelerate issuance of the handbook. On the contrary, it is more suggestive of an effort to meet the timetable announced to the employees prior to the filing of the petition.

Similarly, employees were told in October 1981 that company efforts to revise employee insurance benefits had begun. That process was delayed by the hiring of a new president who insisted upon complete authority over benefit upgrading to remain competitive in the industry. In a series of July meetings, the president met with and assured employees he was studying the problem and, by letter of August 17 (1 week prior to the petition), he was able to reassure employees that the evaluation process was continuing and that "we are in the process of completing this project." Details of the new insurance plan were not finalized until October 5. The plan itself, with a retroactive date of October 1, was announced on October 13-14, 3 months after the president took office and less than 10 days prior to the scheduled election. Here, unlike the case of the handbook, the new insurance plan had no announced deadline, employees for months were aware only that a revised plan was imminent.

Whether the selection of an October date for conferral of improved health benefits was intended to—or had the effect of—swaying the election depends ultimately on its justification. Two appellate decisions are instructive in this regard. In *NLRB v. Styletek*, 520 F.2d 275 (1st Cir. 1975), the court found that the granting of benefits was lawful, but that their announcement 2 weeks before the election was unlawful. Noting that it might have reached a different result (as Chairman Miller also noted), that the employees had been told generally (before filing of the petition) of an ongoing study of job categories and wage rates and that the company's explanation (the study was concluded and the time for announcement had ar-

rived) was neither "transparent nor implausible," the court reasoned (520 F.2d at 282):

The August date was generally consistent with the way matters had been handled. But the company, either innocently or deliberately, got itself into the bind. We think when an employer, without having some fairly rudimentary factual explanation for the timing, announces benefits after the petition for election is filed and two weeks before a representation election, it must take the chance that the Board will ascribe to it improper motives. Here Foster took over three months before announcing the actual details of the wage plan; the timing was within his grasp; and to the extent the Board misapprehends the motives, if indeed that be the case, the company must rightly bear the burden.

In *NLRB v. M. H. Brown*, supra, the court of appeals rejected the Board's finding of unlawful grant of wage and fringe benefits. Those benefits were decided upon prior to the filing of the petition, but announcement was delayed until after the petition. In addition, the benefit changes were made retroactive to a date prior to the petition. Noting that the benefits were for a valid business purpose (meeting competition), the court found that the Board's finding that the increase was not previously planned was not supported by substantial evidence.

Here, there is no evidence of union animus. Here, the decision to upgrade the insurance program was announced long before the petition and, from the time the new president was hired, was a matter of high priority within the Company. Here, the ultimate decision involved the review of several complex proposals by officials inexperienced in weighing their relative merits. Here, ultimate authority lay with Respondent's board of directors and there is nothing in this record to suggest that the timing of their late September meetings was related to the upcoming election. Here, there was good reason to announce the new plan as soon as possible, since the existing plan, unlike the new one, had no cap on company liability. Indeed, from the standpoint of impact on the employees, neither the date of announcement nor the plan's retroactive effect could have interfered with their freedom of choice in the election, for each employee long since knew that improved benefits were on the way.¹

ORDER

It is ordered that the complaint be dismissed and the objections be overruled.

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.