Longview Fibre Paper and Packaging, Inc. *and* Association of Western Pulp and Paper Workers. Cases 27–CA–21082, 27–CA–21233, and 27–RC–8534

March 9, 2011

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER AND PEARCE

On December 17, 2009, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed exceptions and a combined brief in support of the judge's decision and the General Counsel's exceptions. The Respondent filed an answer to the General Counsel's exceptions.[1]

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as further discussed below, and to adopt the recommended Order as modified.[2]

We agree with the judge that the Respondent violated Section 8(a)(1) of the Act and engaged in objectionable conduct by threatening employees with the loss of previously scheduled improvements to the paid time off (PTO) system if the Union won the election; threatening employees with withholding, and failing to announce, the amount of a predetermined annual wage increase if the Union won the election; threatening employees with the loss of their annual wage increase if the Union won the election; and threatening employees that if the Union won the election, employees would automatically be foreclosed from participating in their current company pension plan.[3]

In finding that the Respondent violated Section 8(a)(1) and engaged in objectionable conduct by threatening employees with the loss of improvements to their PTO, the judge relied on the testimony of the Respondent's president, Frank McShane, about his statements at two captive audience meetings held in November 2008, as well as on the Power Point slides that he presented at the meetings. Although the Respondent had previously announced that improvements to the PTO would go into effect on January 1, 2009, McShane testified that he told employees that if the Union won the election, the PTO would be "part of the subject for negotiation." McShane further testified that if the Union won the election, it was his intent not to implement the planned PTO changes until bargaining had occurred. McShane's testimony is consistent with the testimony of employees Steven Scott and Kent Kenison, who provided greater detail about what McShane told employees concerning the planned change in the PTO. Scott testified that McShane said that if the Union was voted in, the PTO system would not change on January 1, 2009, but would instead be negotiable. Kenison testified that McShane told employees that if the Union was voted in, employees would not be getting their PTO. The employees' testimony concerning what McShane told them is consistent with McShane's admitted intent not to implement the planned PTO changes until bargaining had occurred if the Union won the election. The record testimony is also consistent with the Power Point slides shown to employees. The slides indicated that if the Union lost the election, the planned PTO improvements would occur; if the Union won the election, however, the 2009 PTO benefits could not be predicted because they would become part of the bargaining process.

We also adopt the judge's finding that the Respondent did not violate Section 8(a)(1) of the Act by soliciting grievances from employees and promising to remedy them; holding a "brainstorming" meeting, and adopting one of the proposals from the "brainstorming" meeting concerning a change in the graveyard shift schedule. In doing so, we agree with the judge that the Respondent met its burden of showing that its efforts to address employee complaints about shift scheduling were consistent with its long-term past practice of soliciting and addressing employee complaints. The Respondent's manner and method of soliciting grievances in this case did not deviate significantly from the Respondent's practices prior to the Union's organizational campaign that utilized a variety of methods to ascertain employees' concerns, solicit suggestions, and address issues as they arose. Compare *Mandalay Bay Resort & Casino*, 355 NLRB No. 92, slip op. at 1–2 fn. 6 (2010) (finding solicitation of grievances

[1] On May 26, 2010, the Board granted the General Counsel's Motion to Strike an additional reply brief filed by the Respondent.

[2] We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). We shall also modify the judge's Conclusions of Law, recommended Order, and notice to correct an inadvertent omission.

[3] We also adopt, for the reasons set forth in his decision, the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by maintaining until January 1, 2009, in its written company pension plan, an eligibility provision that automatically foreclosed employees from participating if they were represented by a union.

and implied promise to remedy them objectionable where employer did not establish a prior consistent practice of soliciting grievances and implicitly promising to remedy them and, in unprecedented fashion, critical-period solicitations were made by high-level managers).

AMENDED CONCLUSIONS OF LAW

1. Add the following as Conclusion of Law 3(e).

"(e) Threatening employees that if the Union won the election, employees would automatically be foreclosed from participating in their current company pension plan."

2. Substitute the following for Conclusion of Law 6.

"(6) By the conduct as set forth above in Conclusions of Law 3(a), (b), (c), and (e), the Respondent has improperly interfered with the representation election conducted by the Board in Case 27–RC–8534. Accordingly, I recommend that the election be set aside and a new election be conducted at a date and time to be determined by the Regional Director for Region 27."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Longview Fibre Paper and Packaging, Inc., Spanish Fork, Utah, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

1. Add the following as paragraph 1(e) and reletter the subsequent paragraph.

"(e) Threatening employees that if the Union won the election, employees would automatically be foreclosed from participating in their current company pension plan."

2. Substitute the following for paragraph 2(a).

"(e) Within 14 days after service by the Region, post at its Spanish Fork, Utah facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 3, 2008."

IT IS FURTHER ORDERED that Case 27–RC–8534 is severed and remanded to the Regional Director for Region 27 for the purpose of conducting a second election as directed below.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during the period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Association of Western Pulp and Paper Workers.

To ensure that all eligible voters 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 that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care*

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Facility, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the 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.

Dated, Washington, D.C. March 9, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT threaten you with a loss of your paid time off plan (PTO) if you support the Association of Western Pulp and Paper Workers (the Union), or any other union.

WE WILL NOT threaten you with withholding and failing to announce the amount of a predetermined wage increase if you support the Union, or any other union.

WE WILL NOT threaten you with a loss of your annual wage increase if you support the Union, or any other union.

WE WILL NOT maintain in our company pension plan an eligibility provision that automatically prohibits you from participation if you are represented by the Union, or any other union.

WE WILL NOT threaten you that if the Union won the election, you would automatically be foreclosed from participating in your current company pension plan.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law, including the right to vote for the Union, or any union, to represent you in collective bargaining with us.

LONGVEW FIBRE PAPER AND PACKAGING, INC.

Nancy S. Brandt, Esq., for the General Counsel.
Jerome L. Rubin, Esq., of Seattle, Washington, for the Respondent/Employer.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Spanish Fork, Utah, on October 20 and 21, 2009. This case was tried following the issuance of an Order Consolidating Cases, amended consolidated complaint, and notice of hearing (the complaint) by the Regional Director for Region 27 of the National Labor Relations Board (the Board) on July 31, 2009. The complaint was based on a number of original and amended unfair labor practice charges, as captioned above, filed by the Association of Western Pulp and Paper Workers (the Union, the Charging Party, or the Petitioner). It alleges that Longview Fibre Paper and Packaging, Inc. (the Respondent or the Employer) violated Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.[1]

Pursuant to a petition filed by the Union in Case 27–RC–8534, and a Decision and Direction of Election issued by the Regional Director on October 16, 2008, an election by secret ballot was conducted on November 13 and 14, 2008,[2] among a unit of the Employer's employees. Following the election, the Union filed timely objections to conduct affecting the results of the election (the objections). Thereafter, the Regional Director for Region 27 issued an Order Directing Hearing on Objections to the Election Outcome, Order Consolidating Cases, and notice of hearing. In his Order on Objections, the Regional Director, among other findings, ordered that three objections be consolidated with the complaint for purposes of trial before an administrative law judge.[3] Accordingly, I heard the objections

[1] All pleadings reflect the complaint and answer as those documents were finally amended at the hearing. In its answer and amendments thereto, the Respondent admits the various dates on which the enumerated original and amended charges were filed by the Union and served on the Respondent as alleged in the complaint.

[2] All dates refer to 2008, unless otherwise noted.

[3] In his Order, the Regional Director approved the Union/Petitioner's request to withdraw Objs. 1, 5, and 6, and ordered that Objs. 2, 3, and 4 be heard in this combined proceeding.

to the election at the same time as I heard the unfair labor practice allegations in this combined matter.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses,[4] I now make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent, a State of Washington corporation, with an office and place of business in Spanish Fork, Utah (herein called the Spanish Fork facility), has been engaged in the business of manufacturing paper products. Further, I find that in the course and conduct of its business operations just described, the Respondent annually purchases and receives at its Spanish Fork facility, goods, materials, and services valued in excess of $50,000 directly from points and places outside the State of Utah.

Accordingly, I conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES AND ALLEGED OBJECTIONABLE CONDUCT

A. The Issues

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act during the Union's organizing campaign by threatening employees with the loss of a paid time off plan (PTO); by withholding the amount of a predetermined wage increase; by threatening employees with the loss of their annual wage increase; and by informing the employees that if represented by the Union, they would automatically be foreclosed from participating in their present pension plan and 401(k) plan. For the most part, the objections to the election track these alleged unfair labor practices. Additionally, the complaint alleges that the Respondent violated Section 8(a)(1) of the Act by maintaining an employee eligibility provision in its pension plan that foreclosed employees from participating if they were members of a union; by soliciting grievances from employees and impliedly promising to remedy said grievances; by holding a "brainstorming" meeting with employees during which grievances were solicited with implied promises to remedy said grievances; and by, thereafter, adopting one of the proposals from the "brainstorming" meeting, specifically implementing a change in the shift schedule of graveyard employees.

The Respondent takes the position that its conduct neither violated the Act, nor served as a basis for overturning the results of the election.

B. The Undisputed Facts

In the representation matter before me, Case 27–RC–8534, the Union filed a representation petition for an election on September 3, 2008, and the election took place on November 13 and 14, 2008.[5] As was reflected on the tally of ballots, the results of the election were that of the 135 valid votes counted, 77 votes were cast against representation by the Union, and 58 votes were cast in favor of the Union. There were 4 challenged ballots.[6] (GC Exh. 1(I).)

It was during the "critical period" from the filing of the petition on September 3 to the time the election concluded on November 14, that the alleged objectionable conduct and certain of the alleged unfair labor practices were committed. Additionally, in her posthearing brief, counsel for the General Counsel argues that the Respondent's alleged unfair labor practices occurring after the election, namely the solicitation of grievances and promises to remedy said grievances, including a "brainstorming group" meeting, and the implementation of a graveyard shift change, were committed during a second "critical period," which commenced as of the date of the first election.[7]

To a large extent, the facts in this case are not really in dispute. The Respondent, in addition to being in the timber and lands business, manufactures heavy duty paper products at a large pulp and paper mill in Longview, Washington, where the Employer is based. Additionally, the Respondent manufactures corrugated boxes at a number of plants throughout the Western part of the United States, including at the Spanish Fork facility. Most of the Respondent's facilities are unionized, with two

[4] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.,* 369 US 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

[5] Pursuant to a Decision and Direction of Election issued by the Regional Director for Region 27 on October 16, 2008, an election by secret ballot was conducted on November 13 and 14 among the employees in the following appropriate unit: All full-time and regular part-time production, maintenance, and warehouse employees, custodial employees, lead employees, local truckdrivers, ink kitchen, print die mounters, maintenance clerks, shipping clerk and receiving clerk employed by the Employer at its Spanish Fork, Utah facility; excluding all other employees, managerial employees, office clerical employees, the printing plate maker, the print and die clerk, guards, and supervisors as defined by the Act. (GC Exh. 1(d).)

[6] Challenged ballots were insufficient in number to affect the outcome of the election.

[7] Any such second "critical period" is premised on the General Counsel's contention that the commission of objectionable conduct by the Respondent warrants the setting aside of the first election and the holding of a new election, creating a second "critical period" following the first election. *Star Kist Caribe, Inc.,* 325 NLRB 304 (1998).

exceptions being the Spanish Fork facility and another box plant located at Cedar City, Utah.

In the recent past, there has been a significant amount of attrition in the Respondent's managerial and supervisory hierarchy. For a period of time, including during the summer and fall of 2008, Frank McShane was the Respondent's president and chief operating officer, based at the Respondent's corporate offices in Longview, Washington. He left the Respondent's employ in February 2009. At the time of the election, the highest ranking official working at the Spanish Fork facility was the Respondent's vice president, Todd Price. Next in line was Plant Manager Dave Wride. Neither man is currently employed at the facility.

The Union's organizational campaign officially began with the filing of the representation petition on September 3, 2008. However, even before that date the Respondent began to hold a series of "informational meetings" with employees at the Spanish Fork facility where "Power Point" presentations were shown to the assembled employees and company officials were available to make oral presentations and answer questions. Such meetings were held specifically on August 14 and 15, September 25 and 26, October 27 and 28, and November 10 and 11, 2008. The principal management speaker at most of these meetings was Frank McShane, who came from the Respondent's corporate offices specifically to participate, with David Wride occasionally speaking. The Power Point presentation slides shown at these meetings are all in evidence. (Jt. Exhs. 1–4.) On each of the above dates two or three meetings were held so as to accommodate the employees working the various shifts. Employees were required to attend and were paid for their attendance.

Prior to January 2009, most of the Respondent's production, maintenance, and warehouse employees worked on a three-crew shift rotation schedule. However, numerous employees testified that for years there had been much disagreement over what type of schedule would be best for the Spanish Fork facility's business operation and for the employees' life styles. In any event, as of January 1, 2009, the rotating crews were eliminated and employees were assigned to straight day, swing, and graveyard shifts, starting Monday morning and ending Sunday morning. In late April 2009, following the "brainstorming meeting," one of the issues in this case, the graveyard schedule was changed slightly, by having the graveyard workers start work on Sunday night, instead of Monday morning, to allow those workers to start their weekend on Friday morning instead of Saturday morning. Finally, in mid-September 2009, the shift schedule was changed back to the rotation schedule that had been in effect prior to January 2009.

In June 2008, apparently prior to any organizing efforts by the Union, the Respondent announced a series of benefit changes, all of which were scheduled to take effect as of January 1, 2009. These changes included medical insurance cost increases, changes to the pension and 401(k) plan, and changes to the paid time off (PTO) plan. Regarding the PTO plan, the Respondent's policy had previously been that an employee with 4 weeks accrued PTO could only take 1 week in single day-at-a-time increments. The remaining 3 weeks had to be taken in blocks of at least 1 week. However, in the June 2008 announcement, the Respondent informed its employees that it intended to change this policy starting January 1, 2009 to allow employees to take all their accrued PTO one-day-at-a-time. This apparently was a change that the employees had been seeking for some time. The announced changes to the pension plan, which was to "freeze" it at its present level, and to the medical insurance plan, which was to begin increasing employee contributions, were not well received by the Spanish Fork facility's employees, and were what appears to have precipitated the organizing campaign.

The complaint alleges in paragraphs 5(a)–(d) that at the employee meetings held on November 10 and 11, 2008, Frank McShane made certain statements, either orally or through other communication, presumably the Power Point slides, which constituted a violation of Section 8(a)(1) of the Act. Accordingly, the substance of these alleged statements will be discussed at length in the disputed facts and analysis section of this decision.

It is uncontested that during the critical period, and apparently for some time prior, the Respondent maintained a pension plan, the summary plan description of which indicated that it was established for the benefit of all employees "who are not represented by a union that bargains with the Company." (Jt. Exh. 5.) Further, the same statement is essentially repeated in the complete version of the pension plan (the summary plan description and plan document), which was in effect during that period of time. (Jt. Exh. 6.) A number of employees indicated that they had access to the pension plan and/or the summary, and would, therefore, have had access to the above-quoted language. However, as of January 1, 2009, the Respondent's pension plan was amended to reflect that employees are not eligible to participate if they are "covered under a collective bargaining agreement where retirement benefits were the subject of good faith bargaining which does not provide for retirement benefits under this Plan." (Jt. Exh. 7.)

The Respondent's history of granting a general wage increase for the employees at the Spanish Fork facility is also undisputed. For many years, the Respondent has announced a general wage increase by interoffice memorandum sometime between mid-October and mid-November, with payment of the increase retroactive to October 1. Although there have been some deviations in the amount of the increase, for most recent years it has been 3 percent. It appears that the Respondent followed that practice in 2008. The Respondent announced the 2008 increase by posting a memorandum the afternoon of the vote count (November 14), which informed the employees that they were getting a 3-percent increase, retroactive to October 1, 2008. (Jt. Exhs. 8–13.) However, the General Counsel contends that certain statements made by the Respondent's agents on November 10 and 11, 2008, regarding the general wage increase constituted a violation of the Act, and those will be discussed in detail in the disputed facts and analysis section of this decision.

As noted above, the Union lost the election, but filed a number of timely objections to the results. In February 2009, the Respondent's corporate communications manager, Laura Prisc, visited the Spanish Fork facility and had a series of meetings with employees one-on-one and also in small groups. The pur-

pose of her visit was apparently to follow up on some employee complaints, in particular employee displeasure with the new three shift production schedule.

On March 12, 2009, Corporate Human Resources Manager Rick Howell also visited the facility, with the intention of completing the work that Prisc had started. Local management selected a number of employees for Howell to meet with, and he held a meeting with those employees referred to as the "brainstorming group." As with Prisc, Howell seemed interested in employee complaints, specifically the displeasure with the three shift production schedule. During the brainstorm meeting, he received suggestions from the assembled employees regarding their production schedule type preferences, and subsequently followed the meeting with telephone calls to a number of the employees who attended the meeting and were to canvass their fellow workers. In a memorandum to Dave Wride dated March 14, updated March 25, 2009, Howell summarized the production scheduling options that the employees had suggested. (Jt. Exh. 14.) However, Wride testified that the final decision was his alone to make. In any event, Wride decided to only change the existing three shift production schedule slightly, affecting only the graveyard shift workers. This change was in fact one of the proposed production shift changes recommended by certain of the "brainstorming group."

The General Counsel alleges in complaint paragraphs 7, 8, and 9 that the Respondent unlawfully solicited grievances from employees, impliedly promised to remedy said grievances, and did actually remedy an employee grievance, all as a result of the actions taken by Prisc, Howell, and Wride regarding the displeasure expressed by the employees over the shift production schedule. These issues will be dealt with in detail in the following section of this decision.

C. The Disputed Facts and Analysis

The complaint alleges that the Respondent, through its president, Frank McShane, committed a number of unfair labor practices when speaking with and presenting a Power Point display to assembled employees at captive audience meetings held on November 10 and 11, 2008. As noted earlier, there is no question that McShane was the principal management speaker at a number of meetings with employees held on those dates, shortly before the election on November 13 and 14. McShane and a number of employee witnesses all testified that the method of presentation used by McShane was to put up each individual slide, after which he would comment on the subject of the slide and take questions from the employees in the audience. The parties have moved into evidence all the slides used by the Respondent in the various meetings held from August through November. McShane was present and participated in almost all those meetings. However, as is reflected in complaint paragraphs 5(a)–(d), it was only at the meetings held on November 10 and 11 where McShane's conduct is alleged to be unlawful. Further, only certain slides from those meetings, in conjunction with McShane's oral statements, are alleged to constitute a violation of the Act. (Jt. Exh. 4.)

It is alleged in paragraph 5(a) of the complaint that McShane threatened employees with the loss of the recently implemented paid time off plan (PTO), if they voted in favor of the Union. As noted earlier, it is undisputed that in June 2008, the Respondent announced a number of benefit changes to be effective on January 1, 2009. One of those changes, which employees had apparently sought for some time, was to allow employees to take all accrued paid time off days in single day-at-a-time increments, rather than requiring that with the exception of the first week, all subsequent time be taken in weekly increments. It appears that at the time of the November meetings the PTO plan had not yet changed, but was scheduled to do so as of January 1, 2009.

While a number of employee witnesses appearing on behalf of the General Counsel testified about what McShane had to say regarding the PTO plan, I believe that the best evidence comes from McShane himself, whose testimony in this regard essentially constituted admissions against interest. According to McShane, when he was questioned by employees about what would happen with the new PTO plan if the Union won the election, he responded that the PTO, like wages and benefits, "are really part of the subject for negotiation." He told them that as of the date of the meeting, "[I] can't tell you what [the PTO plan] would look like . . . until we've gone through the negotiation process." This statement was consistent with McShane's theme throughout the election campaign, essentially that everything was open to negotiation if the Union won the election, and that the Employer would not know until the negotiations were concluded what the wages and benefits would be for the employees. He often compared negotiations to a "pie," saying that each piece of the pie, whether wages or benefits, had a cost, and until the whole pie was done and its cost known, the Employer would not know what each individual piece of the pay would cost or would look like.

Further, his statement regarding the PTO plan was consistent with the Power Point slides that were shown to employees in November. A pair of consecutive slides mentioning the PTO was part of the presentation. On the first slide it indicated at the top, "A Choice Between the Known," meaning the system that was scheduled to go into effect on January 1, 2009. Further down the page, where the PTO was referenced, it said, "PTO Usage Restrictions: May take all PTO one day at a time; all must be prearranged." (Jt. Exh. 4, p. 23.) This, of course, was the changed policy to go into effect in a few months, which had been announced in June, and which was a change long sought after by the employees. The following page was headed, ". . . [ellipse existing in text] and the Unknown (Bargaining)." Then, under PTO and PTO in days, there were question marks ("?"). (Jt. Exh. 4, p. 24.) This was intended to mean that if the Union won the election and bargaining commenced, it was uncertain what the ultimate PTO plan, if any, would provide.

The Respondent defends the slide presentation and McShane's statements as merely explaining the reality of the situation, with all wages and benefits ultimately depending upon the negotiation process, assuming the Union were to win the election. Counsel for the Respondent does not consider such "truthful" statements about the bargaining process to constitute threats to the employees. On the other hand, counsel for the General Counsel contends that McShane's statements and the slide presentation constituted an unlawful threat to take-

away from the employees what they had been promised in June and was to become effective in January 2009, namely the new, sought after PTO plan. As such, counsel argues it constituted the threat of a loss of benefit for the employees if they voted in favor of the Union.

In this regard, the law is clear. It is unlawful to tell employees that an employer intends to withhold an announced benefit if the union wins the election. In *Earthgrain Baking Cos.,* 339 NLRB 24, 28 (2003), enfd. 116 Fed.Appx. 161 (9th Cir. 2004), the Board stated that, "in the midst of an on-going union organizing or election campaign, an employer must proceed with an expected wage or benefit adjustment as if the organizing or election campaign had not been in progress. *Grouse Mountain Lodge,* 333 NLRB 1322, 1324 (2001); *America's Best Quality Coatings Corp.,* 313 NLRB 470, 484 (1993); *Atlantic Forest Products, Inc.,* 282 NLRB 855, 858 (1987)." However, proceeding with the expected benefit was precisely what the Respondent did not intend to do in the case before me. Both orally and by way of the slide presentation, McShane informed the employees that if the Union won the election, the announced and employee desired change to the PTO plan would not go into effect as promised on January 1, 2009. Rather, the employees were told that the PTO plan, and all other issues, would be subject to the negotiation process.

The Employer was linking the implementation of the new PTO plan to the upcoming election. Although it was previously announced that the improved PTO plan would go into effect on January 1, 2009, employees where told at the November meetings that if the Union won the election, the plan would not go into effect, but instead the issue would be negotiated with the Union. This constituted a not very subtle warning and threat that if the employees wanted to see the new PTO plan implemented on January 1, 2009, they should vote against the Union. This threat interfered with, restrained, and coerced them in the exercise of their Section 7 rights. As such, I find that the Respondent's action constituted a violation of Section 8(a)(1) of the Act, as alleged in paragraph 5(a) of the complaint.

Paragraph 5(b) of the complaint alleges that on November 10 and 11, 2008, McShane told employees that the Respondent was withholding the amount of their predetermined wage increase until after the election to induce employees to vote against the Union. It is further alleged in paragraph 5(c) that at the same time McShane threatened employees with the loss of their wage increase if they voted in favor of the Union. Once again, McShane's oral comments and the Power Point slide presentation for those dates must be examined. It is also necessary to view what the employees were told in November in conjunction with the Employer's past practice. As was noted above, the Respondent had for many years announced, sometime between mid-October and mid-November, a general wage increase for the production employees at the Spanish Fork facility, to be effective January 1, 2009, retroactive to October 1, 2008. In most years, the increase had been 3 percent.

One of the Power Point slides shown to employees at the preelection captive audience meetings in November 2008 was captioned "Questions & Answers." The slide then asks the question, "If a Union isn't voted in, when would we find out about our General Increase *and* would it be retroactive?" The slide answers the question by first indicating it is a "delicate subject" because of the union campaign, and that it is "illegal" for the Respondent to "promise" the employees "anything." The slide continues answering the questions as follows: "However, once the election has concluded and if we are Union-Free we will treat Spanish Fork like other Hourly Non-Union plants. We would communicate our General Increase decision in a very timely manner as we have already completed our review process." Regarding the issue of retroactivity, the slide states that "we wouldn't do anything differently from what we have done historically." (Jt. Exh. 4, p. 20.)

It is important to note that the slide makes it clear that as of November 10 and 11, 2008 (the dates of the presentation), the Respondent had already "completed" the general wage increase review process. That meant that as of those dates, the Respondent knew the percentage increase that the employees would get as of January 1, 2009, the historic date the increase became effective, and further that, as indicated in the slide, the increase would be retroactive to the first day of October 2008. However, the slide also made it clear that the increase would only be communicated to the employees once the "election has concluded and if we are Union-Free." Under those circumstances, the slide promised the information would be released to the employees in a "timely manner."

In my view, the reasonable conclusion one would draw from the language of the slide was that if the Union lost the election that the employees would be quickly told the amount of the general increase, which they would subsequently receive, retroactive to October 1. However, if the Union won the election, the wage increase, the amount of which was already determined, would not be announced, would be withheld, and would not be retroactive to the first day of October.

Such a reading of the slide is consistent with the Respondent's argument and McShane's repeated statements to the employees that if the Union won the election every issue, including wages and benefits, would be negotiable. Several other slides shown to the assembled employees on November 10 and 11 are in conformity with the Employer's approach. One slide, previously examined, captioned "A Choice Between the Known. . . .," shows the general increases given over the last 5 years as 3 percent, with the present year as "TBD." (Jt. Exh. 4, p. 23.) The very next slide, also previously examined, captioned ". . . and the Unknown (Bargaining)," shows besides the heading of "General Increase," a "?" (question mark). (Jt. Exh. 4, p. 24.) It is fairly obvious that the idea, which the Respondent is attempting to leave with the reader through the two Power Point slides, is that under the current nonunion arrangement, the employees are likely to be getting a 3-percent general wage increase. However, if the Union wins the election, bargaining will commence, and whether a wage increase will be granted, and if so, for how much, is unknown, as it will be the subject of that bargaining.

While a number of employee witnesses testified on behalf of the General Counsel regarding McShane's statements on November 10 and 11, 2008, his own testimony is the best evidence of what he had to say about the general wage increase, as once again those statements appear to be admissions against the Respondent's interest. McShane's testimony was consistent with

the Power Point slides. He admits telling the assembled employees that the Employer had "completed" the wage increase review process, but he did not inform the employees as to the amount of the wage increase that had been decided upon.

McShane testified that as of the November dates, the Employer had decided that the increase was to be 3 percent, but had also decided that if the Union won the election, the increase would "not be implemented" until it understood, through the bargaining process, "the full impact of all the potential costs." With the exception of telling the employees that precisely 3 percent had been decided upon, he informed them of the Respondent's deliberative process. Specifically, he told them that if the Union won the election, everything would become the subject of bargaining including any general wage increase, the amount of which would not be known until all costs were decided. Of course, this was consistent with McShane's statements regarding the PTO plan, and with the analogy that negotiations could be viewed as a "pie," with each piece of the pie constituting an individual cost to be included in the overall cost. He acknowledged that the "?" (question mark) on the slide next to the reference "General Increases" was intended to "convey" the message that the amount of the wage increase, if any, was dependent on the collective-bargaining process. (Jt. Exh. 4, p. 24.)

Finally, McShane acknowledged that on November 14, immediately after learning that the Union had lost the election, he directed that the employees be notified that the wage increase was to be 3 percent, retroactive to October 1, 2008. The Respondent was able to act immediately, as the decision to increase wages 3 percent had previously been made. This led to the posting of a notice around the facility advising of the new wage rate and entitled "General Wage Increase and Benefit Changes." (Jt. Exh. 13.)

As noted earlier, it is clear under Board law that during an organizing campaign an employer must proceed with an expected wage or benefit increase as if the union organizing or election campaign had not been in progress. See, e.g., *Earthgrains*, supra. Further, the Board has made it equally clear that during an election campaign an employer acts improperly when it attributes a wage increase postponement to the union. In *Atlantic Forest Products,* 282 NLRB 855, 858–859 (1987), the Board, agreeing with the administrative law judge, found certain statements in an employer's newsletter unlawful as, "such statements suggest an 'immediate [wage] increase without a union but a delay for an indefinite period of negotiations for an uncertain increase with a union.'"

The issue in the case at hand is governed by the holding in the above two-cited cases. The oral statements of McShane and the Power Point slides heard and viewed by the assembled employees on November 10 and 11, 2008, were obviously intended to leave employees with the impression that if they wanted their regular yearly general wage increase, they should vote against the Union. Otherwise, the collective-bargaining process would apply, and it was uncertain whether that negotiating process would result in a wage increase at all, and if so, for how much.

Further, the Respondent's actions were not insulated by any statements that the postponed implementation of a wage or benefit increase was not dependent on the results of the election, and the sole purpose for the postponement was to avoid the appearance of influencing the outcome of the election. *KMST-TV, Channel 46,* 302 NLRB 381, 382 (1991). In fact, in the case before me, no such exculpatory statements were made. Rather, the Respondent was laying the entire blame for the delay in receiving the wage increase, or in potentially not receiving it at all, on the collective-bargaining process, which process would only be triggered by the Union winning the election.

While at first glance complaint paragraphs 5(b) and (c) seem repetitious, further analysis does show subtle differences. Paragraph 5(b) alleges the "withholding" of the predetermined wage increase until after the election to induce employees to vote against the Union as a violation of the Act. As noted above, the Respondent, through McShane, acknowledged to its employees on November 10 and 11, that the review process was completed and the amount of the increase determined, but refused to release the information until after the election, and only assuming the Union lost, eliminating the need to engage in the collective-bargaining process. Further, the Respondent's slide presentation promised releasing the sought after information "in a very timely manner" in the event the Union lost. True to its word, that is precisely what the Respondent did, immediately upon learning the results of the election. In my view, by telling the employees that it was going to withhold information on the wage increase until after the results of the election were known, and if the Union won, perhaps indefinitely, the Respondent interfered with the exercise of its employees' Section 7 rights.

In regard to complaint paragraph 5(c), the Respondent is alleged to have threatened employees with the "loss" of their annual wage increase if they voted in favor of the Union. This allegation takes the "withholding" of the increase to its ultimate possible end. Based on the statements made by McShane and the Power Point presentation of November 10 and 11, employees were left to ponder the possibility that the collective-bargaining process might result in the parties agreeing to no wage increase at all for the foreseeable future. Certainly, McShane's explanation of the bargaining process was designed to cause the employees to fear that the overall cost of negotiating a contract might result in no increase in wages. Since the past practice was to grant such an increase, and as the employees had already been told that the Employer had decided on an increase, the Respondent's actions in suggesting that said wage increase might not be given timely and could ultimately be lost entirely were designed for the purpose of frightening the employees with the prospect of a union victory in the election.

Based on the above, I conclude that the Respondent's actions, as alleged in complaint paragraphs 5(b) and (c), interfered with, restrained, and coerced its employees in the exercise of their Section 7 rights. Accordingly, I find that in so doing the Respondent has violated Section 8(a)(1) of the Act.

In complaint paragraph 5(d) it is alleged that at the captive audience meetings in November 2008, McShane communicated to the employees that if the Union was selected as their bargaining representative, they would automatically be foreclosed from participating in their present pension plan and 401(k) plan.

It is undisputed that during the critical period employees had access to certain documents, which specified the eligibility for participation in the Employer's pension plan. As noted above, a summary pension plan document stated, "This Plan was established by Longview Fibre Company for all employees who are not represented by a union that bargains with the Company." (Jt. Exh. 5.) Further, the full pension plan document, referenced as summary plan description and plan document, contained essentially the same language regarding eligibility for participation in the plan. It stated, "If you are an employee who is not represented by a union that bargains with the Company, you will become a member of this Plan after completing one year of qualifying service before reaching age 61." Later on that same page in the document it stated, "If you were formerly represented by a union that bargained with the Company, you will become a member of this Plan at such time as you cease to be so represented and have accumulated one or more years of qualifying service before reaching age 61." (Jt. Exh. 6, p. II-1)

At the hearing, one employee witness, Calvin Robertson, testified at some length about receiving the full pension plan document approximately a year after he was hired, at around the time that he became eligible to participate in the pension plan. He testified that at the November 2008 captive audience meeting that he attended, McShane informed the employees that the company pension plan was different from the union pension plan, and that if the Union won the election, the represented employees would be "transitioning" from the company plan to the union plan. According to Robertson, McShane indicated that the union pension plan was not as good as the company plan. When McShane testified he spoke about the Respondent's pension plan and the changes to the plan that had been announced to the employees in June 2008, to be effective January 1, 2009. However, he did not deny nor comment about the statements that he had allegedly made regarding union represented employees losing eligibility for the company plan.

I credit Robertson's testimony regarding what McShane had to say about the pension plans. Robertson seemed credible, his testimony was not denied by McShane or any other witness, and it was inherently plausible and consistent with the documentary evidence. As previously noted, the Respondent's pension plan documents in effect at the time unambiguously states that employees who are represented by a union for collective-bargaining purposes are not eligible for the company pension plan. Further, the Power Point slide presentation shown to the employees at the November 10 and 11 meetings essentially gave the same message.

One of the slides, under the heading "Questions and Answers," dealt with the company pension plan. It repeated the Respondent's recurring theme that since all issues would be the subject of collective bargaining, there was no way to know what a negotiated pension plan might look like. However, the slide went on to say that, "The Salaried Pension Plan that is currently in place *specifically excludes employees covered under a collective bargaining agreement.* LFPPI maintains a separate plan for Union employees." (Underscoring as in the original.) (Jt. Exh. 4, p. 21.)

Under Board law, the language in the two company pension plan documents (Jt. Exhs. 5, 6.), the language in the Power Point slide presentation (Jt. Exhs. 4, p. 21.), and McShane's statements of November 10 and 11 regarding the company pension plan are all unlawful as communication to employees that they would automatically be foreclosed from participating in the existing company pension plan if the Union won the election. In *Lynn-Edwards Corp.,* 290 NLRB 202, 205 fn. 16 (1988), the Board held that language in an employer's handbook and ESOP[8] plan summary that eligibility for the plan was for "[a]ll full-time employees, except those covered by collective bargaining agreements" was unlawful.

The Board contrasted this with *KEZI, Inc.,* 300 NLRB 594, 595 (1990), where it reached a contrary result because the language excluded from the 401(k) plan "employees who are members of a collective-bargaining unit with whom retirement benefits were the subject of good-faith bargaining." The Board went on to say that the plan language "indicates that the exclusion of unit employees is triggered only by the completion of good-faith bargaining—not by the mere commencement of bargaining on this topic." Further, the Board found the language appropriate because it "made the unit employees aware that they would be eligible for this 401K plan prior to negotiations and that before they can be excluded from the 401K plan, there must have been full good-faith negotiations about retirement benefits. . . ."

The above two-cited cases make a clear distinction between plan language that appears to suggest that employees are "automatically" foreclosed from inclusion in the plan simply because they are represented by a union bargaining on their behalf, which is unlawful, and language that indicates that only after the completion of good-faith bargaining may represented employees be excluded from the plan, which is not unlawful. In the matter before me, the language communicated to the unit employees in writing and through McShane's oral statements falls under the first category. They are unlawful statements because the employees are being told that if they are represented by the Union for purposes of collective bargaining, they cannot be eligible for the company plan. Although the Respondent makes frequent references to the collective-bargaining process and the uncertainties of negotiations throughout its Power Point presentation, such references do not unambiguously assure the employees that good-faith bargaining will need to specifically cover the pension plan and be concluded *before* a determination is made that they are ineligible for the company plan.[9]

I am of the view that the oral statements made by McShane, the written pension plan documents, and the slide presentation were intended to cause the employees to fear that if the Union won the election, they would automatically be foreclosed from participation in their present company pension plan. This course of conduct interfered with the unit employees' exercise

[8] Employee stock option plan.

[9] Although the Power Point presentation makes reference to pension benefits being the "subject of bargaining," the process is not fully explained. (Jt. Exh. 4, p. 21.) Further, the statements in the plan documents that union represented employees are ineligible to participate in the company plan make no reference at all to the collective-bargaining process. (Jt. Exhs. 5, 6.)

of their Section 7 rights. Accordingly, I conclude that the Respondent's actions constituted a violation of Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(d).[10]

The complaint alleges in paragraph 6 that between September 3, 2008, and January 1, 2009, the Respondent maintained an employee eligibility provision in its pension plan in which some employees participated that foreclosed employees from participating if they were members of a union. For the most part, the substance of this allegation was covered above in the discussion of complaint paragraph 5(d). As I have already concluded, the Respondent maintained in its pension plan summary document (Jt. Exh. 5.) and in the full pension plan document (Jt. Exh. 6.) language that was unlawful as it informed the unit employees that they would automatically be foreclosed from participating in their present pension plan if they were represented by a union. See *Lynn-Edwards Corp.,* supra*; KEZI, Inc.,* supra.

Interestingly, the Respondent must have decided that the language in question was unlawful, because as of January 1, 2009, the Respondent amended its pension plan document to remove the offending language. The amended language now reads that an employee is ineligible to participate in the company pension plan if he/she "is covered under a collective bargaining agreement where retirement benefits were the subject of good faith bargaining which does not provide for retirement benefits under this Plan." (Jt. Exh. 7.) Such amended language does appear to be in compliance with the Board's holding in the *Lynn-Edwards Corp.* and *KEZI, Inc.* cases.

In any event, I conclude that from at least the start of the critical period on September 3, 2008, until January 1, 2009, the Respondent interfered with the Section 7 rights of its employees by maintaining an employee eligibility provision in its company pension plan that foreclosed employees from participating if they were represented by a union. Accordingly, I find that by its action the Respondent violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 6.

The remaining substantive allegations in the complaint, paragraphs numbers 7, 8, and 9, all involve alleged conduct by the Respondent following the election of November 13 and 14. It is the General Counsel's position that this conduct occurred during a "second critical period," which commenced at the time of the election, since the Respondent had committed objectionable conduct during the original critical period. As will be more fully discussed below, I have found that certain of the unfair labor practices committed by the employer during the original critical period also constituted objectionable conduct warranting a new election. Under such circumstances, the Board has held that a second critical period begins at the time of the first election and ends at the time of the second election. *Star Kist Caribe, Inc.,* 325 NLRB 304 (1998). Accordingly, I will view the Respondent's postelection conduct in that context.

Complaint paragraphs 7, 8, and 9 are all factually related. The General Counsel is alleging that in February 2009, the Respondent's Corporate Communications Manager, Laura Prisc, solicited employee grievances and impliedly promised to remedy said grievances during a visit to the Spanish Fork facility (par. 7). Further, it is alleged that some 2 weeks later Corporate Human Resources Manager Rick Howell held a "brainstorming group meeting" for certain employees at the facility where he solicited grievances from employees and impliedly promised to remedy said grievances (par. 8). Finally, it alleged that in late April 2009, Plant Manager David Wride adopted one of the proposals that employees had made during the "brainstorming group meeting" to implement a change to the graveyard employees' shift schedule (par. 9).

There is really no factual dispute regarding these allegations. As is detailed in the undisputed facts section of this decision, employees have historically disagreed among themselves regarding the type of shift schedules they preferred. There have been numerous changes to the shift schedules over the years as management tried different approaches to efficiently operating the facility, servicing their customers, and satisfying employee desires. No system satisfies all the employees and, so, some continue to complain no matter which shift schedule is in effect.

There appears to be no doubt that Prisc came to the Spanish Fork facility from the corporate headquarters for the purpose of meeting employees and listening to their complaints. She met with them individually and in small groups. While she apparently heard complaints on various subjects, not unexpectedly, there were a number of employees who complained about the existing shift schedule. It seems that Howell's visit several weeks later was intended to address the shift schedule complaints in particular. A group of employees was selected by management to meet with him, which was referred to as the "brainstorming group." During the meeting, Howell sought suggestions from the employees and votes were taken to determine which shift schedule was the most popular. Following the meeting, Howell contacted a number of the participants by phone to find out whether their fellow employees had voiced any preference. The results of his study were furnished by Howell to Plant Manager Wride through a written memorandum dated March 14 and 25, 2009. (Jt. Exh. 14.) Subsequently, Wride made what appears to be a rather minor change in the shift schedule of the graveyard employees. He testified that the final decision was his, but that he considered those suggestions that had been made by the employees. The change which he ultimately decided on had, in fact, been one of the suggestions raised at the "brainstorming group meeting."

There is a long line of Board and court cases that stand for the proposition that an employer with an established practice of soliciting and resolving employee grievances may continue that practice during an organizing campaign. *Johnson Technologies, Inc.,* 345 NLRB 762, 764 (2005) ("It is well established that an employer with a past practice of soliciting employee grievances may continue such a practice during a union's organizational campaign"); *TNT Logistics North America, Inc.,* 345 NLRB 290 (2005) (no violation during ongoing union organizing campaign where employer had a past practice of soliciting grievances through an "open door" policy); *Wal-Mart*

[10] While complaint par. 5(d) mentions both the pension plan and 401(k) plan, the evidence presented in this case by counsel for the General Counsel was limited exclusively to the existing pension plan. Accordingly, regarding this complaint allegation, my decision is limited to the finding of a violation regarding only the pension plan.

Stores, Inc., 339 NLRB 1187, 1187 (2003) ("An employer who has a past policy and practice of soliciting employees' grievances may continue such a practice during an organizational campaign"); *Wal-Mart Stores, Inc.,* 340 NLRB 637, 640 (2003) ("It is well established that an employer with a past practice of soliciting employee grievances through an open door or similar-type policy may continue such a policy during a union's organizational campaign."); *Curwood, Inc.,* 339 NLRB 1137 (2003), affd. in part, vacated in part 397 F.3d 548 (7th Cir. 2005) (employer's continued practice of allowing employee questions did not violate the Act); see also *MacDonald Machiney Co.,* 335 NLRB 319 (2001). Of course, the question that must be answered in the case before me is whether the Respondent had such a past practice at its Spanish Fork facility.

Based on the evidence presented at the hearing, I am of the view that the Respondent did have a history of soliciting employee suggestions, concerns, complaints, and positive comments, and of resolving complaints when possible. The most obvious examples of its past practice were two detailed surveys taken of employee attitudes by Intermountain Human Resource Manager William Bundrock in 2006 and 2007. In his capacity as human resource manager, he has responsibility for three of the Respondent's box plants, including the Spanish Fork facility. Upon being hired almost 4 years ago, Bundrock met with every employee at Spanish Fork. He testified that he discussed at length with each employee "what they felt they needed . . . any concerns that they had."

Of particular significance, in both 2006 and 2007, Bundrock conducted a written survey of all the employees at the facility. (R. Exhs. 1, 2(a)–(d), & 5.) The 2006 surveys themselves were entitled, "Employee Satisfaction Survey." (R. Exh. 5.) Among other information, the surveys solicited employees for suggestions and changes that they would like to see made. The surveys asked employees for a wide variety of information about their jobs and working conditions. As an example, one question asked was, "What changes would you make to improve overall working environment or your motivation?" (R. Exh. 5.) The employee responses were thereafter furnished to management to determine what appropriate action should be taken in response to the employee's feedback, suggestions, and complaints. One of the employee suggestions from the survey was to institute written job descriptions for various jobs and a testing system for promotion to those jobs. According to Bundrock, those suggestions were implemented. (R. Exh. 3, corrugator stacker operator.) These interactions between Bundrock and the employees were conducted long before the start of the Union's organizing campaign.

Former Plant Manager David Wride testified that throughout his tenure with the Respondent in various supervisory positions, he was regularly involved in communication with employees on the plant floor to determine what changes employees needed to more effectively perform their jobs. As an example, he mentioned employee complaints about excessive heat in the summer months, which resulted in the Employer installing large fans, evaporative coolers, and drinking fountains throughout the facility. Another employee suggestion implemented by the Respondent was to use a "floating holiday" unique to each employee instead of a general holiday on Founders Day.[11] Such suggestions by employees were the result of group meetings held by the Respondent from time-to-time. These meetings predated the Union's organizing campaign by a number of years.

Employee witness Steven Scott testified on behalf of the General Counsel. However, on cross-examination he acknowledged that for years before the union campaign David Wride had the habit of walking through the plant every morning talking to employees and asking them how their jobs were going and what could be done to improve working conditions or productivity at the plant. According to Scott, he always had suggestions and Wride would listen to them. He recalled one particular incident in 2005, where he suggested to Wride that a safety hazard existed with scrap material building up around his machine. As a direct result of Scott's suggestion, the Employer built a scrap conveyor directly underneath the stacker machine to eliminate any safety concerns. Further, Scott testified that in past years, on a fairly regular basis, approximately quarterly, management would call employee meetings, run by the plant manager, or some company official from headquarters, where employees would be encouraged to make suggestions. However, he testified that there had not been one of these meetings in a number of years.

Counsel for the Respondent has demonstrated that the Employer's efforts to encourage employees to make suggestions, for the Employer to listen to those suggestions, and to act on them positively when possible were not a recent phenomenon. I was especially impressed with the testimony of employee Scott, who although called to testify by the General Counsel, candidly testified about the Respondent's past practice of actively soliciting employee suggestions and complaints and acting on them when possible. It seems to me that the efforts by Prisc, Howell, and Wride to address employee complaints regarding the plant shift schedule were merely part of a long-term past practice by the Employer of addressing employee complaints.

As Wride noted in his testimony, the actual change made to the shifts of the graveyard employees was rather minor, affecting approximately 30 employees who had the start of their workweek changed from Monday night to Sunday night. Wride acknowledged addressing the graveyard shift employees' complaints when adjusting the schedule, but he also indicated that in making the change he needed to address production and customer concerns. All the witnesses who testified about the problems with the shift schedule acknowledged that this was a contentious issue that the employees were always arguing about among themselves. As a matter of fact, recently the schedule has been changed again, this time returning to rotating shifts, the system that had been in effect prior to January 1, 2009.

I am of the opinion that the actions of Prisc, Howell, and Wride in addressing the employee complaints about the shift schedule and in actually implementing a change in the schedule did not constitute unlawful solicitation of grievances and im-

[11] Founders Day is a Utah State holiday to honor the pioneer settlers of the State.

plied promises of benefit in an effort to coerce the employees into abandoning their support for the Union. The Respondent had a long history of soliciting employee complaints and then attempting to address them. These recent actions by the Respondent's agents did not constitute a violation of the Act, as they merely conformed to the Respondent's past practice. Accordingly, I hereby recommend that complaint paragraphs 7, 8, and 9 be dismissed.

D. Summary of Unfair Labor Practice Findings

In summary, I have found that the Respondent violated Section 8(a)(1) of the Act, as alleged in complaint paragraphs 5(a), (b), (c), (d), and 6. Further, I have recommended that complaint paragraphs 7, 8, and 9 be dismissed.

IV. THE REPRESENTATION CASE

As reflected in the Regional Director's Order Directing Hearing on Objections to the Election, there are three objections to the election, numbered 2, 3, and 4, which are referred to the undersigned for resolution. These objections are coextensive with certain allegations in the complaint where I have already concluded that unfair labor practices were committed by the Respondent. Accordingly, I will not restate the issues underlying these matters, but only the conclusions previously reached.

Objections number 2, 3, and 4 all concern the actions and statements of the Respondent's president, Frank McShane, at captive audience meetings held on October 28 and November 11. As I have previously found that McShane committed the unfair labor practices alleged in the complaint at the meetings held on November 10 and 11, it is unnecessary to consider whether the same conduct was engaged in by McShane at the meetings on October 28.[12]

Objection number 2 alleges that McShane made certain threatening comments regarding a loss of the new paid time off plan (PTO) if the Union won the election. As noted above, I have concluded that McShane's threats regarding the PTO constituted a violation of Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(a). Accordingly, I find merit to this objection.

Objection number 3 alleges that McShane threatened not to announce and/or to withhold the general wage increase if the Union won the election. I previously concluded that McShane's threats to employees to withhold the predetermined wage increase, to not announce it, and to not distribute it constituted violations of Section 8(a)(1) of the Act, as alleged in complaint paragraphs 5(b) and (c). Accordingly, I find merit to this objection.

Objection number 4 alleges that McShane threatened employees with a loss of the company 401(k) plan and replacement with an inferior plan if the Union won the election. Previously, I concluded that McShane threatened that if the Union won the election, employees would automatically be foreclosed from participating in their current company pension plan in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraph 5(d).[13] Accordingly, I find merit to this objection.

As found by the undersigned, the Respondent has committed unfair labor practices during the critical period between the filing of the petition and the election. It is well settled that conduct during the critical period that creates an atmosphere rendering improbable a free choice warrants invalidating an election. See *General Shoe Corp.,* 77 NLRB 124 (1948). Such conduct is sufficient if it creates an atmosphere calculated to prevent a free and untrammeled choice by the employees. As the Board stated, "In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *General Shoe Corp.,* supra at 127.

I have found that the Respondent has committed numerous and significant unfair labor practices during the critical period, which unfair labor practices also constitute objectionable conduct. The Board has traditionally held that conduct violative of Section 8(a)(1) of the Act is also conduct which interferes with the exercise of a free and untrammeled choice in an election. As such, it serves as a basis for invalidating an election. According to the Board, conduct which is violative of Section 8(a)(1) of the Act is, "a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election." *Playskool Mfg. Co.,* 140 NLRB 1417 (1963); see also *IRIS U.S.A., Inc.,* 336 NLRB 1013 (2001); and *Diamond Walnut Growers, Inc.,* 326 NLRB 28 (1988). Further, the Board has held that this is also "because the test of conduct which may interfere with the 'laboratory conditions' for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)(1)." *Dal-Tex Optical Co.,* 137 NLRB 1782 (1962). See also *Overnite Transportation Co.,* 158 NLRB 879 (1966); and *Excelsior Underwear,* 156 NLRB 1236 (1966).

Contrary to the position taken by counsel for the Respondent in his posthearing brief, none of the unfair labor practices committed by the Respondent during the critical period would constitute a de minimis exception to that general proposition as recognized by the Board. *Bon Appetit Management Co.,* 334 NLRB 1042 (2001); and *Caron International, Inc.,* 246 NLRB 1120 (1979). Section 8(a)(1) violations fall within the de minimis exception only when these violations "are such that it is virtually impossible to conclude that they could not have affected the results of the election. *Super Thrift Markets,* 233 NLRB 409, 409 (1977), cited in *Sea Breeze Health Care Center,* 331 NLRB 1131 (2000).

In the matter at hand, McShane was the Respondent's president, and a visitor from the Respondent's corporate headquar-

[12] The complaint alleged that McShane's unlawful conduct occurred at the captive audience meetings of November 10 and 11. It did not allege unlawful conduct by McShane at the meetings in October. The Union did not offer its own evidence on the objections, separate and apart from that evidence offered by the General Counsel as to the alleged unfair labor practices. Accordingly, there was rather limited evidence offered at the hearing regarding what transpired at the October meetings, and that only as background information.

[13] On a related allegation, complaint par. 6, I found that the Respondent unlawfully maintained a written provision in its company pension plan that automatically denied eligibility to employees who were represented by a union.

ters. He was obviously a very important official in the Respondent's hierarchy. Because of his position, his words to the assembled employees on November 10 and 11, 2008 would have carried great weight. Further, his statements regarding the employees' PTO plan, pension plan, and general wage increase concerned critical matters of wages and benefits that employees would naturally have been very concerned about. McShane's not so veiled threats to restrict those wages and benefits if the Union won the election were of the kind designed to make employees hesitant to support the Union, and would have clearly affected the results of the election. Thus, despite the significant majority of employees who voted against the Petitioner, I do not believe "that it is virtually impossible to conclude that the election outcome has been affected." *Thrift Markets,* supra.

I conclude that the unfair labor practices committed by the Respondent during the critical period constituted objectionable conduct that interfered with the free choice of employees in the election. Such conduct constitutes grounds for setting aside the election. These were significant unfair labor practices and objections, which would clearly have had a tendency to seriously inhibit the employees' willingness to engage in union activity, and would likely have created an atmosphere unconducive to a free and untrammeled choice by the employees. The Employer's conduct destroyed the laboratory conditions required by the Board. Therefore, I recommend that the election be set aside and a new election conducted.

CONCLUSIONS OF LAW

1. The Respondent, Longview Fibre Paper and Packaging, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Association of Western Pulp and Paper Workers, is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act.

(a) Threatening employees with the loss of their paid time off plan (PTO) if the Union won the election.

(b) Threatening employees with withholding and failing to announce the amount of a predetermined annual wage increase if the Union won the election.

(c) Threatening employees with the loss of their annual wage increase if the Union won the election.

(d) Maintaining until January 1, 2009, in its written company pension plan, an eligibility provision that automatically foreclosed employees from participating if they were represented by a union.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not violated the Act except as set forth above.

6. By the conduct as set forth above in Conclusions of Law 3(a), (b), and (c), the Respondent has improperly interfered with the representation election conducted by the Board in Case 27–RC–8534. Accordingly, I recommend that the election be set aside and a new election be conducted at a date and time to be determined by the Regional Director for Region 27.

REMEDY

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

The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act.

As the Respondent has already amended its company documents to expunge any language suggesting that employees who are represented by a union are automatically foreclosed from eligibility in its pension plan, it will not be necessary to order it to do so.

In the complaint, the General Counsel seeks an Order requiring the Respondent, in addition to the traditional notice posting remedy, to send its employees the Board's notice "in or as an attachment to an electronic mail message in the same manner as the Respondent sends announcements or other messages to employees." However, at the hearing no evidence was offered regarding the manner in which the Respondent normally sends announcements or other messages to employees. Counsel for the General Counsel did not raise this issue at the hearing, and in her posthearing brief she did not specifically seek this extraordinary remedy. As there is no evidence of record to support a contention that such an extraordinary remedy is in any way warranted in this case, I shall not require electronic posting. Based on the evidence of record, the traditional physical notice posting is adequate to remedy the Respondent's unfair labor practices.

Additionally, as indicated above, I have found that the Respondent engaged in objectionable conduct affecting the results of the election in Case 27–RC–8534. I recommend, therefore, that the election in this case held on November 13 and 14, 2008, be set aside, that a new election be held at a date and time to be determined in the discretion of the Regional Director for Region 27, and that the Regional Director include in the notice of the election the following language:

NOTICE TO ALL VOTERS

> The election held on November 13 and 14, 2008, was set aside because the National Labor Relations Board found that certain conduct of the Employer interfered with the employees' free exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this Notice of Election. All eligible voters should understand that the National Labor Relations Act gives them the right to cast ballots as they see fit and protects them in the exercise of this right free from interference by any of the parties.[14]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

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[14] *Lufkin Rule Co.,* 147 NLRB 341 (1964).

[15] 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.

ORDER

The Respondent, Longview Fibre Paper and Packaging, Inc., Spanish Fork, Utah, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Threatening employees with the loss of their paid time off plan (PTO) if the Union won the election.

(b) Threatening employees with withholding and failing to announce the amount of a predetermined annual wage increase if the Union won the election.

(c) Threatening employees with the loss of their annual wage increase if the Union won the election.

(d) Maintaining in its written company pension plan, an eligibility provision that automatically foreclosed employees from participating if they were represented by a union.

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

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Spanish Fork, Utah, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 3, 2008.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the Regional Director for Region 27 shall set aside the representation election in Case 27–RC–8534, and that a new election be held at a date and time to be determined in the discretion of the Regional Director.

Dated at Washington, D.C. December 17, 2009

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT threaten you with a loss of your paid time off plan (PTO) if you support the Association of Western Pulp and Paper Workers (the Union), or any other union.

WE WILL NOT threaten you with withholding and failing to announce the amount of a predetermined wage increase if you support the Union, or any other union.

WE WILL NOT threaten you with a loss of your annual wage increase if you support the Union, or any other union.

WE WILL NOT maintain in our company pension plan an eligibility provision that automatically prohibits you from participation if you are represented by the Union, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law, including the right to vote for the Union, or any union, to represent you in collective bargaining with us.

LONGVIEW FIBRE PAPER AND PACKAGING, INC.