United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 1, 2002

TO : Rosemary Pye, Regional Director
Ronald Cohen, Regional Attorney
Paul Rickard, Assistant to Regional Director
Region 1

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: UniFirst Corporation
Cases 1-CA-39267 & 1-CA-39321

512-5006-5063
512-5042-0133-8000
512-5048-0160-8300
518-2067
518-4020

These Section 8(a)(1), (2), and (5) cases were submitted for advice as to whether UniFirst (UniFirst or the Employer) unlawfully dealt with an employee committee, and whether it conducted an unlawful employee poll.[1]

We conclude that the Section 8(a)(2) allegation should be dismissed, absent withdrawal, because the Employer was not "dealing with" the employee committee, and therefore it did not constitute a Section 2(5) labor organization. However, the Employer's poll of unit employees violated Section 8(a)(1) because it was conducted in an atmosphere tainted by unfair labor practices that are causally related to the loss of employee support for the Union. We also conclude that the poll independently violated Section 8(a)(1) because it was conducted while a Board election was pending.

BACKGROUND FACTS

UNITE Local 66L (the Union) represents approximately 67 production employees at the Employer's Indian Orchard, Massachusetts plant. The parties' most recent collective-bargaining agreement was effective by its terms from October 5, 1998 through October 1, 2001.

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[1] The propriety of seeking Section 10(j) relief will be addressed by separate memorandum from the Injunction Litigation Branch.

During the relevant time period, employees circulated two anti-Union petitions. Mary Holmes prepared the first in early July 2001.[2] Before soliciting employee signatures, Holmes showed it to production manager Mark Breault, who granted her request to solicit signatures on work time. Thereafter, Holmes and employee Olga Centeno spent thirty minutes of work time gathering employee signatures. Holmes obtained 21 employee signatures, and on July 9 she filed a decertification petition (the RD petition) with the Region. On July 27, the Region approved the Stipulated Election Agreement and scheduled an election for August 16.[3]

Dorothy Depalo prepared and circulated the second anti-Union petition on August 17, which a majority of employees signed. Depalo then gave the petition to Breault, who said he would forward it to the Employer's attorney. There is no contention that the Employer assisted Depalo or was otherwise aware of this petition.

After the RD petition was filed, but before the August 17 anti-Union petition was circulated, employees asked Holmes what would happen if the Union were decertified. Holmes suggested that employees form a group (the Committee) to which employees could bring their questions. She gave Breault a list of the employees involved, whom Breault then approached on the plant floor and invited to meet with him and general manager Steve Harr. According to Holmes, Harr said that the Committee's role was to keep employees informed, not to "downgrade" unions or make the Employer look better, and that the Committee's function "was to let people know [it was] there to give UniFirst a chance to show [employees] what we could do if we were non-Union." Harr instructed Committee members to bring employee questions to him and he would get answers. Depalo corroborated Holmes in this regard, testifying that Harr told Committee members to tell employees to bring questions "to us or him...and he'd get answers."

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[2] All dates are 2001 unless otherwise indicated.

[3] Case 1-RD-1970. The election has been blocked since August 2, when the charge in Case 1-CA-39267 was filed. During its investigation, the Region learned of the Employer's no-solicitation policy, set forth in both its employee handbook and in the now-expired collective-bargaining agreement, and obtained testimony that the Employer prohibits employee socialization on work time. The Region has thus concluded that the Employer unlawfully assisted Holmes and Centeno by allowing them to circulate the petition on work time.

Between early July and mid-August, UniFirst met four or five times with Committee members, who received their regular wages while attending. At one such meeting, an employee asked if employees could have a committee if the Union were decertified. Harr said that would be fine, and human resources director William Coe described such a committee at another Employer facility.

The Employer also held several employee meetings during this time. At a July 16 employee meeting, Harr announced that the RD petition had been filed and that its purpose "was to see who was going to stay with the Union, or who wanted to stay with the benefits the company offered." He explained that any questions employees had about the benefits they would receive without the Union should be directed to him, Centeno, or employee Edwin Guerra, because they were "part of a committee the company had started." Harr said that the Committee "was formed to represent the employees to [UniFirst,] that if the Union was out, the Committee would represent the employees...," and that in his opinion employees would be better off without the Union.

On August 2 and 3, the Employer held employee meetings in English, Spanish, and Portuguese. At each meeting the Employer distributed various documents, including Employer responses to employee questions, four of which the Union alleges are unlawful:

> Q. The $38 that UniFirst pays into the union, will it be put into our pay, or will UniFirst keep it?
> A. You would be part of the UniFirst 401(k)/profit sharing program. The $38 would be shifted into that. I have handouts to describe how those accounts would grow.
>
> Q. Will something be done to help older employees retiring to match the monies we get from 401(k)?
> A. Older employees will not receive any additional monies, but, like all employees, their retirement wealth will grow faster and larger in the UniFirst program than any pension program.
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> Q. Will our pay be equalized according to year-end and based on the higher paid production worker? Give merit raises according to job performance? (sic)
> A. UniFirst employee's (sic) performance is evaluated at least once a year in January for a merit increase. The UniFirst wage scale is very flexible. It is a merit-based system that pays employees based upon the job they do, the years of service, and their performance and quality. There are no limitations to the system such as increases

by steps on certain dates or an employee "hitting a ceiling" on pay.

Q. Be able to take requested vacation away? (sic)
A. Your vacation is scheduled upon seniority and will consistently set (sic) that way. UniFirst's vacation earnings are different from the union, they are:

UniFirst Vacation	Union Vacation
2 weeks after 1 year	1 week after 1 year
3 weeks after 7 years	2 weeks after 2 years
4 weeks after 14 years	3 weeks after 8 years
	4 weeks after 15 years

Employee accounts of what the Employer said at the August 2 and 3 meetings vary. Thus, [*FOIA Exemption* 7(D)] the Employer said it could not make promises. However, [*FOIA Exemption* 7(D)] the Employer told them they could not receive profit sharing or 401(k) so long as the Union represented them; [*FOIA Exemption* 7(D)] those benefits would be available to them without the Union; and [*FOIA Exemption* 7(D)] the Employer said that without the Union, employees would receive the same benefits that the bosses have now, that employees would receive annual raises, and that employees could choose employees to represent them before management.

The Employer spoke to several employees individually as well. On July 23, Breault called Carmen Gonzalez, who had been on vacation, into his office. Breault asked her if she had heard what had happened with the Union. He went on to explain that without the Union, employees "could" receive better wages, insurance, and benefits, including profit sharing and 401(k). Breault also spoke with Palmeira in late July, telling her that the Employer offered better benefits than the Union and asking her how her family's small business would fare if it were unionized.[4] And, after the early August Spanish-language meeting, Harr called the Comachos aside, asked them whether the Employer had presented the facts, noted that they were young, and said that he felt the Employer's benefits would be better for them.

On August 27, 10 days after a majority of employees signed Depalo's anti-Union petition and she presented it to management, the Employer informed the Union that it no

[4] Breault denies that the conversation with Palmeira occurred.

longer enjoyed majority employee support. The Employer also informed the Union that it planned to conduct a poll and that unless the Union prevailed, the Employer intended to recognize the Union only until the expiration of the parties' collective-bargaining agreement.

Also on August 27, the Employer distributed a notice to employees about the poll. The notice stated, among other things, that the poll was intended to determine whether UniFirst should continue to recognize the Union, that employee participation was strictly voluntary, that the poll would be conducted by a neutral third party, that voting would be by secret ballot, and that employees would suffer no reprisals whether or not they chose to participate.

On August 28, the Union demanded that the poll be canceled. On August 29, the Employer wrote to the Union explaining its legal basis for the poll and inviting the Union to the facility while the poll was being conducted.

On August 30, the Union filed the charge in Case 1-CA-39321, alleging that the Employer violated Section 8(a)(1) and (2) by promising benefits if employees voted to decertify the Union and by forming the Committee.

On August 31, Reverend Garret Johnson conducted the poll, which the Union lost 37 to 21. On September 4, the Employer advised the Union that, based on the poll, it would no longer bargain with the Union, and would recognize the Union for purposes of contract administration only until the expiration of the parties' agreement. Since that date the Employer has not responded to outstanding Union information requests.[5]

The Employer contends that the Committee was merely a means by which it answered employee questions. The Employer also asserts that its statements and literature constituted protected speech under Section 8(c). Thus, the Employer argues, it made no promises and only compared Union benefits to benefits its unrepresented employees received. The Employer specifically denies saying that profit sharing and 401(k) were not options with the Union, or that without the Union employees would receive the same

[5] The charge in Case 1-CA-39321 was subsequently amended to allege an additional Section 8(a)(1) violation concerning the poll and Section 8(a)(5) violations concerning the Employer's withdrawal of recognition and its refusal to furnish the Union with requested information or to bargain with the Union.

benefits as management. In this regard, an Employer position statement asserts that it must offer profit sharing and 401(k) to all unrepresented employees to comply with ERISA and "the Plan trust documents." However, the Region has found no evidence that this was ever explained to employees, nor does the Employer claim to have done so. Finally, the Employer argues that Depalo's petition provided a lawful basis for it to conduct the poll, and that it lawfully withdrew recognition from the Union based upon the poll.

DISCUSSION

An employer's withdrawal of recognition based upon an employee poll is only valid if the poll represents the sentiment of an uncoerced majority of the unit. The Union contends that the poll, and the petition which prompted the Employer to poll, did not reflect the views of an uncoerced majority of unit employees for two reasons: first, the Employer's interaction with the Committee constituted unlawful assistance under Section 8(a)(2); and second, the Employer made unlawful statements and engaged in conduct which tainted the expression of employee sentiment. We disagree with the first argument but find merit in the second.

Since the Employer was not "dealing with" the employee committee, it did not constitute a Section 2(5) labor organization, and thus we conclude that the Section 8(a)(2) allegation should be dismissed, absent withdrawal. However, the Employer's employee poll violated Section 8(a)(1) because the petition on which it was based was signed, and the poll was conducted, in an atmosphere tainted by unfair labor practices causally related to the loss of employee support for the Union. We further find that the poll independently violated Section 8(a)(1) because it was conducted while a Board election was pending.

A. The Committee was not a Section 2(5) labor organization because the Employer was not "dealing with" the Committee.

In deciding whether an employer has violated Section 8(a)(2) by meeting with an employee group, the Board must determine whether the committee is a Section 2(5) "labor organization," and if so, whether the employer has dominated or interfered with its formation or administration.[6] The Board and the courts have generally

taken an expansive view of what constitutes a labor organization under Section 2(5).[7] As the Board reiterated in Electromation, three essential elements must be present: (1) that employees participate in the organization or committee; (2) that the committee exists for the purpose, in whole or in part, of "dealing with" the employer; and (3) that these dealings concern statutory subjects such as grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.[8] A fourth element may include a showing that the employees participating in the committee are acting in a representational capacity.[9]

Here, the evidence shows that Committee members met with the Employer on four or five occasions, and relayed employee questions to management. Thus, employees clearly participated in the Committee and the Committee appears to have acted in a representational capacity. The issue, therefore, is whether the Committee was "dealing with" the Employer over terms and conditions of employment.

In Cabot Carbon, the Supreme Court held that the term "dealing with" is not synonymous with the more limited term "bargaining with," and must be interpreted more broadly.[10] The Board has since made clear that "dealing with" exists when an employer and a group of its employees engage in consultations looking toward the resolution of grievances or the improvement of terms and conditions of employment.[11]

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[6] Electromation, Inc., 309 NLRB 990 (1992), enfd. 35 F.3d 1148 (7th Cir. 1994).

[7] NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959); Ona Corp., 285 NLRB 400 (1987); American Tara Corp., 242 NLRB 1230, 1241 (1979); Ryder Distribution Resources, 311 NLRB 814 (1993).

[8] 309 NLRB at 994. Accord: E.I. du Pont & Co., 311 NLRB 893, 894 (1993); EFCO Corp., 327 NLRB 372, 375 (1998), enfd. 215 F.3d 1318 (4th Cir. 2000) (Table).

[9] Electromation, 309 NLRB at 994.

[10] 360 U.S. at 210-211.

[11] See, e.g., Ona Corp., 285 NLRB at 405 (employee action committee that made proposals to the employer regarding vacations and floating holiday schedules); Predicasts, Inc., 270 NLRB 1117, 1121-22 (1984) (personnel committee that made recommendations to the employer on working conditions and grievances); St. Vincent's Hospital, 244 NLRB 84, 86 (1979) (employee council that made proposals to management regarding employees' facilities and benefits).

The concept of "dealing with" thus involves a "bilateral mechanism," i.e., "a pattern or practice in which a group of employees, over time, makes proposals to management, [and] management responds to these proposals by acceptance or rejection by word or deed...."[12] On the other hand, the element of "dealing with" is ordinarily missing in an adjudicatory group which meets to decide employee grievances; a "brainstorming" group which makes no proposals and merely develops a group of ideas; a committee whose only purpose is sharing information with the employer; and a "suggestion box" procedure where individual employees make specific proposals to management.[13] Additionally, the Board examines what a committee actually does, rather than what it was created to do.[14] Thus, in EFCO, the Board found "dealing with" as to three committees formed by the employer to make proposals for management's consideration and acceptance or rejection, and in practice did just that.[15] However, the Employee Suggestions Screening Committee, which did not actually formulate proposals or present them to management, was thus found not to be a labor organization.[16] Although the employer's announcement of the committee's formation stated that it would recommend the best employee suggestions to management, the Board looked to the committee's actual performance, rather than its written policy, and concluded that the committee did not in fact "recommend" or provide

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[12] E.I. du Pont, 311 NLRB at 894.

[13] See E.I. du Pont, 311 NLRB at 894; Sears, Roebuck & Co., 274 NLRB 230 (1985); Mercy-Memorial Hospital, 231 NLRB 1108 (1977); General Foods Corp., 231 NLRB 1232 (1977); John Ascuaga's Nugget, 230 NLRB 275 (1977), enfd. in relevant part 623 F.2d 571 (9th Cir. 1980), cert. denied 451 U.S. 906 (1981).

[14] See, e.g., EFCO, 327 NLRB at 376 n. 15, citing Electromation, 309 NLRB at 996 ("[p]urpose is a matter of what the organization is set up do to, and that may be shown by what the organization actually does") and Keeler Brass Co., 317 NLRB 1110, 1114 n. 16 (1995) (even though stated policy was that grievance committee decisions were final, in practice they were not, and therefore the respondent engaged in dealing with the committee).

[15] EFCO, 327 NLRB at 375-376.

[16] Id. at 376.

an opinion about the adoption or modification of any of the suggestions.[17]

Applying these principles here, we conclude that the Committee was not "dealing with" the Employer regarding terms and conditions of employment, because there is no evidence of a "bilateral mechanism" by which the Committee made proposals to which the Employer indicated it would respond or, in fact, acted upon. Rather, the facts show that the Committee merely gathered and communicated employee questions to management.[18] Thus, this case is distinguishable from Reno Hilton,[19] where the Board found it clear that committees or their members made proposals or requests concerning work terms and conditions to which the employer responded by acceptance or rejection; minutes of committee meetings revealed that proposals, requests, or concerns regarding numerous terms and conditions of employment were raised; and the employer signaled its intention to address those issues and in some cases took action in response. Further, the Committee at issue here merely served as a means to gather employee questions and forward them to management; there is no evidence that it made proposals or recommendations. In light of the Committee's actual function, we conclude that the Employer's statements that the Committee could represent them before management if the Union were decertified are insufficient to establish that the Committee was a labor organization.

Because we find that the Committee is not a Section 2(5) labor organization, we need not reach the issue of whether the Employer unlawfully dominated or interfered with the Committee.[20]

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[17] Id. at 376 n. 15.

[18] See, e.g., E.I. du Pont, 311 NLRB at 894 (where committee exists for purpose of sharing information with employer, it would ordinarily not be a labor organization; that is, if committee makes no proposals to employer, and employer simply gathers information and does with it what it wishes, element of dealing is missing and committee would not be a labor organization).

[19] 319 NLRB 1154, 1156-1157 (1995).

[20] Cf. Benjamin Coal Co., 294 NLRB 572, 575, 609 (1989) (employer unlawfully assisted committee, which was held to be a Section 2(5) labor organization, by condoning participation of management agent and by employer's owner conveying opinion that he decided to utilize committee as conduit for presentation of his own views, which also sent

B. The Employer violated Section 8(a)(1) because it polled unit employees in an atmosphere of unremedied unfair labor practices.

Under Struksnes Construction,[21] an employer is permitted to poll employees about their union sentiments only if: (1) the poll's purpose is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) employer assurances against reprisals are given, (4) employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.[22] This last criterion is limited to unfair labor practices that can be shown to have caused the loss of employee support for the union.[23] The employer must also

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strong message that committee held management's imprimatur as a labor organization in which employee participation was welcomed); and Waste Management of Utah, 310 NLRB 883, 883, 892 (1992) (employer engineered formation of committees, found to be Section 2(5) labor organizations, in order to get employee input so the employer could correct past mistakes; "classic case of domination and interference" in violation of Section 8(a)(2) where employer dictated committee size and membership, set meeting times, presided over meetings, decided which ideas merited inclusion in summaries, unilaterally decided which changes to implement, and dissolved one of the committees when he decided it had no further use).

[21] 165 NLRB 1062 (1965).

[22] Id. at 1063.

[23] See, e.g., Lee Lumber & Building Material Corp., 322 NLRB 175, 177 n.16 (1996), affd. in relevant part and remanded 117 F.3d 1454 (D.C. Cir. 1997); and RTP Corp., 334 NLRB No. 69, slip op. at 3 (2001), both citing Master Slack Corp., 271 NLRB 78, 84 (1984) (relevant factors in determining a causal relationship between unfair labor practices and loss of employee support for a union include: length of time between unfair labor practices and withdrawal of recognition; nature of violations, including possibility of lasting and detrimental effect on employees; tendency of violations to cause employee disaffection; and effect of unlawful conduct on employees' morale, organizational activities, and union membership).

provide the union with reasonable advance notice of the time and place of the poll.[24]

Here, the Employer's August 27 notice to employees satisfied the first four procedural requirements set forth in Struksnes, and the Employer provided the Union with reasonable advance notice of the poll's time and place under Texas Petrochemicals. However, the poll was unlawful because it, and the petition that prompted it, were tainted by Employer statements not protected under Section 8(c), and by the Employer's promises of improved benefits, which are causally related to the loss of employee support for the Union.

Section 8(c) permits an employer to make truthful statements concerning benefits available to its represented and unrepresented employees. For example, in TCI Cablevision,[25] employees were told that the union had not succeeded in negotiating a 401(k) plan, a benefit its unrepresented employees received. The Board found that the employer lawfully "informed employees of a 'historical fact'" (that its unrepresented employees received 401(k)), and stated that "[c]ritically, the Employer did not tell employees that the only way to receive the 401(k) plan was to oust the Union," and that the employer "never said it would never agree with the Union to have such a plan." Id. at 700-701.

An employer also has the right to compare wages and benefits at its nonunion and unionized facilities.[26] Furthermore, an employer can state its opinion, based upon such a comparison, that employees would be better off without a union.[27] Absent accompanying promises or threats, the Board normally treats such comments as protected by Section 8(c).[28]

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[24] Texas Petrochemicals Corp., 296 NLRB 1057, 1063 (1989), enfd. in relevant part and remanded 923 F.2d 398 (5th Cir. 1991), rehearing denied 931 F.2d 892 (5th Cir. 1991) (Table).

[25] 329 NLRB 700 (1999).

[26] Langdale Forest Products Co., 335 NLRB No. 51, slip op. at 1 (2000), citing TCI Cablevision, 329 NLRB 700, above, and Viacom Cablevision, 267 NLRB 1141 (1983).

[27] Langdale Forest Products, 335 NLRB No. 51, slip op. at 1.

[28] Ibid (Internal citations omitted.).

However, the Board has long held that conditioning improved benefits on employees giving up union representation violates Section 8(a)(1). For example, in Morgan Services,[29] the Board held that the employer's statement to the effect that if the union were decertified, it would establish a joint employer-employee board to review dismissals, constituted an unlawful promise of a significantly different grievance machinery than existed under the union contract, and one which was not available to all of the employer's unrepresented employees. Likewise, in Bridgestone/Firestone, Inc.,[30] the Board found that the employer made unlawful promises of improved benefits in exchange for employee votes against union representation.

It is also unlawful for an employer to state that employees can only obtain particular benefits by decertifying a union. For example, in Selkirk Metalbestos,[31] the Board upheld the ALJ, who found that promises of benefits immediately before an election, intended to determine employees' union desires, were unlawful and "particularly egregious when, as here, the employer advise[d]...employees that the new benefit [was] available only to its unrepresented employees."

Applying these principles here, we conclude that the Employer exceeded the bounds of Section 8(c) and made unlawful statements and promises of benefits to employees. Thus, the evidence reveals that at the August 2 and 3 meetings the Employer told employees they could only receive profit sharing and 401(k) without the Union. As explained in Selkirk, it is unlawful to tell employees that particular benefits are only available to non-Union employees. We therefore find TCI Cablevision distinguishable, because unlike that case, where the employer did no more than tell employees that the union had been unable to achieve a 401(k) benefit in negotiations, the Employer here told employees that the only way to receive profit sharing and 401(k) was to vote out the Union. In addition, we conclude that the Employer's post-meeting comments to the Comachos to the effect that they would be better off with the Employer's benefits and without the Union lost the protection of Section 8(c)

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[29] 284 NLRB 862, 864 (1987).

[30] 332 NLRB No. 56, slip op. at 2 (2000).

[31] 321 NLRB 44, 45, 51 (1996), vacated 116 F.3d 782 (5th Cir. 1997) (per curiam).

because they occurred in the context of unlawful statements the Employer made at the meeting.[32]

We next conclude that the Employer unlawfully promised improved benefits if employees voted to decertify the Union.[33] First, under Bridgestone/Firestone the Employer's statements at the August 2 and 3 group meetings that without the Union employees would have "the same benefits that the bosses have now" and would receive annual raises were unlawful promises of benefits. As in Bridgestone/Firestone this statement went beyond a comparison and constituted an explicit promise of benefits for decertifying the Union.
The Employer's written response concerning wages, distributed at the August 2 and 3 meetings, was not a lawful comparison, but a promise that if the Union were decertified employees would receive better wages than those the Union offered.[34] Thus, the response, that employee performance "is evaluated at least once a year in January for a merit increase," and that unlike the collective-bargaining agreement, this flexible system placed no limits on pay, virtually guarantees better raises if the Union is decertified.[35]

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[32] Cf. Langdale Forest Products, above.

[33] In this regard, we note that despite testimony that the Employer told employees it could not make promises, "[i]t is immaterial that an employer professes that he cannot make any promises, if in fact he expressly or impliedly indicates that specific benefits will be granted." Michigan Products, 236 NLRB 1143, 1146 (1978).

[34] See, e.g., Bridgestone/Firestone, 332 NLRB No. 56, slip op. at 2 (unlawful promises of enhanced benefits if employees went nonunion). Cf. Viacom Cablevision, 267 NLRB at 1141-1142 (no violation where employer, in response to employee requests for information, did no more than "truthfully inform the employees of wages enjoyed by other employees...and made statements of historical fact about yearly increases...given elsewhere in the past.")

[35] However, we find that the written answers pertaining to the Employer's 401(k) plan and vacation benefits were simply an explanation of those benefits in response to specific employee inquiries, and were thus lawful. See Coca-Cola Bottling Co., 318 NLRB 814, 814 (1995) ("It is well settled that an employer may lawfully inform employees of the wages and benefits its nonunion employees receive and respond to requests for information from employees about such benefits."); and Duo-Fast Corp., 278 NLRB 52, 52 (1986) (employer lawfully provided a "straightforward

We further find that the Employer made unlawful implied promises of a benefit on July 16 and again in early August, when it stated that the Committee would represent employees to the Employer if the Union were decertified.[36] Thus, we regard these statements as an implicit acknowledgement that although the Committee as then constituted was not a Section 2(5) labor organization, the Employer would transform the Commmittee into a "bilateral mechanism" if the Union were decertified. The Employer also specifically told employees that the Committee would represent them before management. Thus, unlike the permissible question gathering function the Committee at that time served, the Employer promised an improved committee that would take the place of the Union. Therefore, we conclude that these statements were unlawful under Bridgestone/Firestone as well.

In addition, we find that under Morgan Services, Coe's explanation during a meeting between Committee members and the Employer that such a committee was in place at another (but apparently not every) nonunion UniFirst facility, was an unlawful promise of a benefit not necessarily available to all of its unrepresented employees.

[*FOIA Exemptions* 2 and 5

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explanation concerning insurance coverage in the event of a change in union representation").

[36] The fact that these promises were implied rather than express makes them no less pernicious. See Bakersfield Memorial Hospital, 315 NLRB 596, 600 (1994).

[37] [*FOIA Exemptions* 2 and 5 .]

[38] [*FOIA Exemptions* 2 and 5

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We next find that under Master Slack, the above unfair labor practices were causally related to the subsequent loss of employee support for the Union, rendering the poll unlawful under Struksnes. First, the unfair labor practices occurred within four weeks before the August 17 petition, which a majority of employees signed, and which served as the basis on which the Employer two weeks later conducted its poll and subsequently withdrew recognition from the Union.[39] Second, the Employer's unlawful promises of benefits and statements regarding profit sharing and 401(k) improperly suggested to employees that they would be better off without the Union.[40] As to the last two factors, which address the effect of the Employer's conduct on protected employee activity, we conclude that the Employer's promises of improved benefits and statements that profit sharing and 401(k) were not available so long as the Union represented employees reasonably tended to cause employee disaffection with the Union.[41] In fact, it wasn't until the Employer committed these unfair labor practices that the Union lost majority support. In this regard, only 21 out of 67 unit employees had signed the first anti-Union petition, and all of the unfair labor practices at issue occurred prior to Depalo's August 17 petition. Thus, we conclude that the employees' disaffection, demonstrated both in the second anti-Union petition and in the poll, was clearly tied to these violations. [*FOIA Exemptions* 2 and 5]

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[39] See, e.g., RTP Co., 334 NLRB NO. 69, slip op. at 3 (relying on Master Slack, Board found "close temporal proximity" where unfair labor practices occurred between two and six weeks prior to petition on which employer based withdrawal of recognition).

[40] See, e.g., Detroit Edison Co., 310 NLRB 564, 566 (1993) (employer's unfair labor practices "conveyed to employees the notion that they would receive more...without union representation. Such conduct improperly affects [the] bargaining relationship.").

[41] See, e.g., RTP Co., 334 NLRB NO. 69, slip op. at 4 (employer accusation that union prevented a wage increase would tend to alienate employees from the union); Bridgestone/Firestone, 332 NLRB No. 56, slip op. at 2 (promises of enhanced benefits in absence of union tend to discourage union activity "because such promises send the unmistakable message that union representation is not only unnecessary, but that it is an obstacle, as opposed to a means, to achieving higher wages and benefits.")

[*FOIA Exemptions* 2 and 5, cont'd.

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[*FOIA Exemptions* 2 and 5

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[*FOIA Exemptions* 2 and 5

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C. The Employer's poll was also unlawful because it was conducted while a Board election was pending.

We conclude that in addition to and separate from the theory of violation set forth above, the Employer violated Section 8(a)(1) by polling employees while the decertification petition was still pending. In Struksnes, the Board stated that

> a poll taken while a petition for a Board election is pending does not, in our view, serve any legitimate interest of the employer that would not be better served by the forthcoming Board election. In accord with long-established Board policy, therefore, such

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[42] [*FOIA Exemptions* 2 and 5

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> polls will continue to be found to violate Section 8(a)(1) of the Act.

165 NLRB at 1063. We note that this proposition is consistent with the Board's pronouncements in Bruckner Nursing Home,[43] and RCA Del Caribe,[44] in which the Board redefined the doctrine set forth in Midwest Piping, 63 NLRB 1060 (1945). Thus, Struksnes, Bruckner and RCA Del Caribe stand for the proposition that in the face of a valid election petition, an employer may not resort to self-help. Significantly, the Board's recent Levitz[45] decision is also in accord with Struksnes in this regard. Thus, even though the Board in Levitz left to a later case the question of whether the current good-faith doubt standard for polling ought to be changed, it emphasized that Board-conducted elections remain the preferred way to resolve questions concerning employees' support for unions.[46]

The Board recently applied this Struksnes principle in Heritage Hall, E.P.I.[47] There, the union had filed a petition for an election to be held on December 8, 1995. On December 7, the union filed blocking charges. Even though the election was canceled, the Employer conducted what it termed a "mock election," which was alleged to be an unlawful employee poll. Id., slip op. at 6. The ALJ found the poll unlawful under Struksnes because it had not been conducted in an atmosphere free of unfair labor practices or coercion. Id., slip op. at 9. As to this finding, however, the Board stated,

> we stress that under Struksnes...the Respondent was prohibited from lawfully conducting its own election while the Union's petition was pending even if the

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[43] 262 NLRB 955, 957 (1982)(in an initial organizing situation, once notified of a valid petition, an employer must refrain from recognizing any rival unions).

[44] 262 NLRB 963, 965, 966 (1982) (mere filing of an election petition by an outside, challenging union neither requires nor permits employer to withdraw from bargaining or executing contract with incumbent union; "as before, a timely filed petition will put an incumbent to the test of demonstrating that it is still the majority choice for exclusive bargaining representative").

[45] 333 NLRB No. 105 (2001).

[46] Id., slip op. at 7.

[47] 333 NLRB No. 63 (2001).

> Respondent had complied with the procedural safeguards set forth in that case.

Id., slip op. at 1 n.4. [Emphasis added.] Like Heritage Hall, an election -- blocked by charges -- was pending at the time of the poll here. Accordingly, the Employer's poll was unlawful in this regard as well.

D. Conclusion

As set forth above, we find that the Committee was not a Section 2(5) labor organization. Therefore, absent withdrawal, the Region should dismiss the Section 8(a)(2) charge. However, we agree that the Employer's poll was unlawful because it failed to satisfy the requirements set forth in Struksnes.[48] We also find that the poll was unlawful under Struksnes because it was conducted while a Board election was pending. Thus, absent settlement, the Region should issue a Section 8(a)(1) complaint alleging both theories of violation with respect to the poll.

B.J.K.

[48] In light of this conclusion, we reject the Employer's assertions that Depalo's petition privileged it to poll employees, and that it lawfully withdrew recognition from the Union based upon the poll results.