

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**NEWBURG EGGS, INC.**

**and**

**Cases 3-CA-27834  
3-RC-11918**

**UNITED FOOD AND COMMERCIAL WORKERS,  
LOCAL 342**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS  
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46(d) of the Rules and Regulations of the National Labor Relations Board ("Board"), 29 C.F.R. 102.46(d), Counsel for the Acting General Counsel ("General Counsel") hereby submits this Answering Brief in response to Respondent's Exceptions to the Decision and Supplemental Decision of Administrative Law Judge Robert A. Ringler, dated April 27, 2011 and June 14, 2011 respectively, in the above-captioned cases. General Counsel respectfully submits that, for the reasons set forth below, Respondent's exceptions should be denied.

**BACKGROUND**

This matter arises out of charges filed by United Food and Commercial Workers (hereinafter referred to as the "Union") which were consolidated and heard at a hearing before Administrative Law Judge Robert A. Ringler (hereinafter referred to as the "ALJ") on February 7, 2011, pursuant to a Second Amended Complaint and Notice of Hearing that issued on January 11, 2011. (G.C. Exh. 1(a), 1(k)).<sup>1</sup> The ALJ issued a Decision on April 27, 2011 [JD-(ATL)-13-11] (hereinafter referred to

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<sup>1</sup> The original Complaint in this matter issued on November 24, 2010, and an Amended Complaint issued on December 1, 2010. (G.C. Exh. 1(c), 1(f). An Order Directing Hearing on Objections, and Order Consolidating Cases and Notice of Hearing in Cases 3-CA-27834 and 3-RC-11918 issued on December 2, 2010. (G.C. Exh. 1(h)).

as the “Decision”) and a Supplemental Decision on June 14, 2011 [JD-(ATL)-17-11] (hereinafter referred to as the “Supplemental Decision”).

The ALJ found that Respondent violated Section 8(a)(1) of the Act when, in a meeting on July 15, 2010, it solicited and remedied employees’ grievances and when, in another meeting on July 22, 2010 it implied to employees that it would be futile for them to select the Union as their collective-bargaining representative. The ALJ also found that Respondent violated Section 8(a)(1) of the Act on July 25, 2010 when it informed employees that it hired a bilingual human resources manager to remedy their grievances. Finally, the ALJ found that the Respondent violated Section 8(a)(1) of the Act on July 27, 2010 by telling employees it was granting them a benefit and by impliedly promising future benefits after the election.

As detailed below, Respondent excepts to these findings.

**Respondent’s General Exception 1:**

A hearing in this matter was held before the ALJ on February 7, 2011. At the close of the hearing, the ALJ advised the parties that post-hearing briefs were due no later than March 14, 2011 and to “consult with the Board’s rules for guidance on filing briefs.” (Tr. at 94). On April 27, 2011, the ALJ issued a Decision which noted, at page 2, n. 2, that the Respondent failed to submit a post-hearing brief. On May 4, 2011, the Respondent filed a Motion for Reconsideration of Decision (“Motion for Reconsideration”) with the Board on the grounds that its “post hearing brief was e-filed with the Region 3 Office in Buffalo, and not with the Division of Judges” and “[a]s a result, Judge Ringler never received the brief and did not consider it in rendering his decision.” (Resp. Motion at 2). On May 25, 2011, the Board granted Respondent’s Motion for Reconsideration and remanded the case to the ALJ for “reconsideration of his April 27, 2011 decision after reviewing the Respondent’s post-hearing brief.” On June 14, 2011, the ALJ issued a Supplemental Decision affirming his April 27, 2011 Decision and noting that Respondent’s post-hearing brief “failed to raise any new matters that were not previously considered.” (Supplemental Decision at 2).

Respondent excepts generally to the findings contained in both the Decision and the Supplemental Decision issued by the ALJ, without providing a specific basis for the exception. In this regard, Respondent's general exception should be disregarded because it fails to meet the requirements set forth in the Board's Rules. Specifically, Section 102.46(b)(1) of the Board's Rules states:

Each exception (i) shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; (ii) shall identify that part of the administrative law judge's decision to which objection is made; (iii) shall designate by precise citation of page the portions of the record relied on; and (iv) shall concisely state the grounds for the exception.

Furthermore, Section 102.46(b)(2) provides that "[a]ny exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded."

Respondent broadly asserts that it excepts to both the findings in the original Decision and the holding of the Supplemental Decision "for the reasons set forth herein." (Resp. Exceptions p. 1-2) Respondent does not specify whether "herein" refers to the paragraph labeled "General Exception No. 1" or to the document as a whole. Under the Board's Rules, any exception that is not specifically enumerated and argued by Respondent is deemed waived. See, e.g., *Holsum de Puerto Rico*, 344 NLRB 694, fn. 1 (2005) (where the Board disregarded Respondent's exception, which "merely recited the findings excepted to and cited to the judge's decision without stating on what grounds the purportedly erroneous findings should be overturned" because it did not meet the minimum requirements of Section 102.46(b) of the Board's Rules).

Respondent cannot simply except to the entirety of the ALJ's decision by means of a general exception; rather, it must "set forth specifically the questions of procedure, fact, law, or policy to which exception is taken." *ACS, LLC*, 345 NLRB 1080, fn. 3 (2005) (in which the Board stated, "[i]n light of the Charging Party's failure to specify any other areas of disagreement with the judge's decision, we consider the Charging Party's general exception to be waived as to all other portions of

the judge’s decision.”) Here, Respondent attempts to insert a catchall exception that would obviate the need for specific exceptions. Since each specific exception will be addressed in turn, there is no need for a general exception and it should be disregarded for failing to meet the requirements of Section 102.46(b)(1).

Finally, the ALJ’s failure to consider the Respondent’s post-hearing brief, despite resulting from Respondent’s own error, was fully redressed by the Board’s Order granting its Motion for Reconsideration and remanding the matter to the ALJ. Respondent now excepts to the ALJ’s Supplemental Decision because it “simply states that the original decision should stand in its entirety.” Respondent provides no other specific grounds for this exception aside from its apparent overall disagreement with the ALJ’s findings. The Supplemental Decision, however, specifically explains that “[Respondent’s] brief failed to raise any new matters that were not previously considered ... failed to demonstrate that the findings of fact contained in the decision were flawed, or should otherwise be revised ... furthermore ... the brief failed to cite any legal precedent or advance any connected argument, which was not previously considered or addressed.” (Supplemental Decision p. 2). For all of the above reasons, Respondent’s General Exception 1 should be denied.

**Respondent’s General Exception 2:**

Respondent excepts to the ALJ’s denial, at the hearing, of its request to review the pretrial *Jencks* statements of General Counsel witness Reina Campos Saravia and to call her for examination regarding those statements. After Ms. Saravia was questioned by counsel for the Acting General Counsel on direct examination, Respondent cross-examined her without requesting *Jencks* statements. Thereafter, Ms. Saravia was questioned on redirect and on re-cross before being excused by the ALJ. During General Counsel’s direct examination of its next witness, Indiana Blandon, Respondent belatedly requested *Jencks* statements for Ms. Saravia. The ALJ denied the Respondent’s request and instead suggested that it make an offer of proof, which Respondent declined to do. (Tr. 64-69).

As the Board has previously explained, “Section 102.118 of the Board’s Rules and Regulations is a prohibition on the release of Board and General Counsel files without permission. Subsection 102.118(b)(1) is a specific exception to that prohibition. It provides for the release of a witness statement, after that witness has testified, for use in cross-examination of that witness. After that limited purpose is served, the exception no longer applies and the prohibition of the Rule is restored.” *Wal-mart Stores*, 339 NLRB 64 (2003). Moreover, “the plain meaning of Section 102.118(b) ... limits the purpose of disclosure to cross-examination.” *Id.* The Board has repeatedly held that a respondent must request *Jencks* statements of a particular witness before or immediately after it commences cross-examination of that witness; and if it fails to request the statements at that time, it is not entitled to them under Rule 102.118(b)(1). See, e.g., *Army Aviation Center*, 216 NLRB 435 (1975); *Walsh Lumpkin Drug Co.*, 129 NLRB 294, 295-96 (1960); *SBC California*, 344 NLRB 243, fn. 3 (2005). Once the respondent has completed its cross-examination of a witness, it is no longer entitled to *Jencks* statements for that witness. Moreover, if respondent later calls that same witness and asks for production of the statement, the General Counsel does not have an obligation to produce it. *Film Inspection Service, Inc.*, 144 NLRB 1040, 1041 fn. 1 (1963).

Respondent contends it did not request Ms. Saravia’s *Jencks* statements because General Counsel, by Alfred M. Norek, represented during a conversation with Respondent’s counsel, Aryeh Lazarus, that such statements did not exist. Respondent plainly misrepresents the facts. Mr. Norek recounted, on the record, that he had a conversation with Mr. Lazarus prior to the hearing in which Mr. Lazarus asked whether the General Counsel would be offering witness affidavits into evidence at the hearing. Mr. Norek replied in the negative. At the hearing, Respondent claimed that the question Mr. Lazarus posed to Mr. Norek was not whether the witness affidavits would be offered, but whether any witness affidavits existed. The record clearly reveals the parties’ dispute as to the substance of their conversation regarding the *Jencks* statements. (Tr. 64-69, 83-84, 91-94).

Respondent's argument is a feeble attempt to circumvent the consequences of its failure to request *Jencks* material at the proper time. First, the General Counsel is under no obligation to disclose the existence or the content of *Jencks* statements at any time prior to the hearing.<sup>2</sup> Second, counsel is only obligated to produce *Jencks* statements at the hearing upon motion by the Respondent. 29 C.F.R. §102.118; *Ra-Rich Manufacturing Corporation*, 121 NLRB 700, 701 (1958). Thus, Respondent bears the ultimate burden of requesting *Jencks* material at the appropriate time or waiving its right to such material.

As the ALJ noted, it is not incumbent upon the judge or opposing counsel to remind the Respondent to make such a request. Here, Respondent forfeited its right to the statements at issue when it failed to request them at the proper juncture. Moreover, Respondent declined the ALJ's invitation to make an offer of proof as to the additional testimony it hoped to elicit from the witness. The ALJ correctly ruled that Respondent's request for the *Jencks* statements was untimely, and as such, Respondent's exception should be denied.

**I. Respondent's Solicitation and Remediation of Grievances on July 15 and July 25, 2010 Violated the Act (Respondent's Specific Exceptions 1(a) and 1(b), and Respondent's Exceptions to Objections 6, 7, 14, 17, and 26).**

Respondent excepts to the ALJ's findings that it violated Section 8(a)(1) of the Act when its plant manager, Joel Halpert, solicited and remedied employees' grievances at a meeting on July 15 and when Halpert told employees on July 25 that Respondent had hired bilingual human resources manager Patricia Finley to correct the "problems" it was having with employees. Arguing that the testimony given by the two General Counsel witnesses is insufficient to establish a violation of the Act, Respondent instead describes the circumstances that allegedly gave rise to the July 15, 2010 meeting. (Resp. Specific Exception 1(a), p. 3) However, there is no record evidence to support

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<sup>2</sup> See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), in which the U.S. Supreme Court held that release of witnesses' statements prior to unfair labor practice hearings necessarily "would interfere" in a statutory sense with the Board's "enforcement proceedings" and thus the Board is not required to disclose such statements prior to hearing.

Respondent's factual claims about the genesis of the July 15 meeting; and even if such evidence existed, it would be irrelevant to the events of July 15. As such, the portion of Respondent's Specific Exception 1(a) which describes the June 1, 2010 meeting held by its labor consultant Michael Rosado should be stricken as it is irrelevant to the matter at hand and plainly unsupported by any record evidence.

In its supporting brief, Respondent misquotes *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964) as stating that the determination of whether an employer's grant of benefits during the pendency of an election violates the Act depends upon "whether the express or implied promise of benefits ... was given for the purpose of influencing the employees' vote in the election ..." (Resp. Specific Exception 1, p. 3). It is well established that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not depend on an employer's motive or whether the coercion succeeded or failed. Rather, the test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act. *Sikorsky Aerospace Maintenance*, 356 NLRB No. 144, slip op. at 4 (April 27, 2011), citing *American Freightways Co.*, 124 NLRB 146, 147 (1959).

Absent a previous practice of doing so, the solicitation of grievances during an organizational campaign accompanied by an express or implied promise to remedy such grievances violates the Act. *Sikorsky*, supra at 4; *Laboratory Corp. of America Holdings*, 333 NLRB 284 (2001); *Maple Grove Health Care Center*, 330 NLRB 775 (2000). The record is undisputed that prior to July 2010, Respondent had no practice of holding meetings to inquire whether employees had any problems with their working conditions. (Tr. 34-38, 73-75). In fact, the lack of communication between employees and management was a major problem at Respondent's plant, due in large part to the language barrier between the mostly Spanish-speaking employees and management who spoke little or no Spanish. (Tr. 25-26; G.C. Exh. 11, p. 2; G.C. Exh. 12, p. 2). Furthermore, the testimony is clear

that during the July 15 and July 25 meetings, Respondent both solicited and explicitly promised to remedy employees' grievances. It did this both by agreeing to employees' specific requests and by informing employees that it recognized its mistakes and was "correcting" them by hiring Finley.

In determining whether a grant of benefits is unlawful, the Board has drawn the inference that benefits granted during the critical period are coercive, but has allowed the employer to rebut the inference by coming forward with an explanation, other than a pending election, for the timing of the grant or announcement of such benefits. *Waste Management of Palm Beach*, 329 NLRB 198, 199 (1999), citing *Lampi, L.L.C.*, 322 NLRB 502 (1996). The burden is on the employer to rebut the inference of an implied promise to remedy grievances by, for example, establishing that it had a past practice of soliciting grievances prior to the critical period, or by clearly establishing that the statements at issue were not promises. See *Mandalay Bay Resort & Casino*, 355 NLRB No. 92, slip op. at 2 (August 17, 2010).

In regards to the July 15 meeting, Respondent claims "Halpert did not solicit grievances, but rather responded as the employees presented them." (Resp. Specific Exception 1(a), p. 3). This exception is negated on the merits by the record evidence and by the ALJ's factual findings. Both Saravia and Blandon testified that Halpert offered to resolve employees' problems at the July 15 meeting. (Tr. 33, 70; Decision p. 3). Specifically, Saravia testified that Halpert said he was "willing to resolve whatever problems we, the employees, had." (Tr. 33) Blandon testified similarly that Halpert told employees "if we have problems, we could tell him because Patty [Finley] was there now to help us." (Tr. 70). With these statements, Halpert not only solicited employees' grievances but reassured them that their grievances would be resolved, both directly ("willing to resolve whatever problems we ... had") and by implication ("Finley [i]s there now to help").

In response to Halpert's offer to resolve employees' problems, Saravia asked not to be moved from her work location. Blandon asked Halpert to fix a broken piece on her machine through which chlorine fumes escaped and to be trained to work in the "breaking room," where employees sit while

they work, since her job required her to stand all day. Another employee, Nubia Cisneros Camacho, asked Halpert to remove the ceiling on her machine so that the fumes from the machine could escape upward. During the meeting, Halpert unequivocally agreed to grant these requests. (Tr. 33-38, 70-72). Thereafter, in another meeting on July 25, Halpert explicitly informed employees that the Respondent knew its mistakes and had “corrected” them by hiring bilingual Human Resources Manager Patricia Finley. (G.C. Exh. 11, p. 2). This conduct, which occurred less than two weeks before the election, violated the Act.

Respondent claims it would have been remiss not to repair employees’ potentially hazardous machines; however, the Board has previously found that “although some of the employee suggestions [at a meeting held by the employer] concerned increased safety, such matters ... constituted grievances of the employees, and the Respondent’s solicitation of such grievances and its implied promise of remedial action violated Section 8(a)(1).” *Joe’s Plastics*, 287 NLRB 210, 211 (1987). Blandon testified that she had previously asked Halpert to fix her machine and it had not been done. (Tr. 74-75). Cumulatively, the timing of the repairs and the fact that Respondent had no prior practice of soliciting grievances but began doing so only two weeks before the election clearly establishes that Respondent’s conduct violated the Act. Moreover, Respondent’s unlawful conduct encompassed more than just the repairs it made to employees’ machines; it also included the solicitation of grievances and the granting of employees’ other requests, such as not changing work locations and being trained to work in the “breaking room.” Respondent contends its policy has always been to consider a request for change of work location; however, this assertion is completely unsupported by any evidence in the record. Respondent did not call any witnesses or offer any documents into evidence that would substantiate such a claim. As such, it failed to rebut the inference that the benefits were granted with an unlawful motive. On this basis, the exceptions listed above should be denied.

**II. Respondent's July 22, 2010 Statements Indicating the Futility of Bargaining Violated the Act (Respondent's Specific Exception 2(a) and Respondent's Exceptions to Objections 1, 17, 23, and 26).**

Respondent excepts to the ALJ's finding that it violated the Act when, in a meeting on July 22, 2010, Rosado and Finley implied to employees that it would be futile for them to select the Union as their bargaining representative. The Board has long held that an employer's statements which indicate the futility of voting for a union or engaging in unionization in general violate Section 8(a)(1) of the Act. Where an employer indicates that it is he who controls what will or will not be done, irrespective of the union's presence, such futility is made clear. Specifically, an employer's statement that it is in complete control over the outcome of negotiations constitutes a threat of futility and is not consistent with a commitment to good-faith bargaining. See, e.g., *Smithfield Foods*, 347 NLRB 1225, 1230; *The Swingline Company, Et Al.*, 256 NLRB 704, 716 (1981).

Here, Rosado's statements to employees that during contract negotiations "the operation remains in the hands of the company" and "no outside organization can have any impact on the operation" violated Section 8(a)(1). Finley's statement that Respondent's owner is "the only one who has the final say" about what is "good for the company and good for the employees" also violated the Act under the same premise. Rosado's and Finley's remarks clearly conveyed to employees that their choice of union representation would be futile because the result of negotiations was foreordained and the Union, even if legitimately elected, could not "have any impact." *Smithfield Foods*, supra at 1229; *Swingline*, supra at 716. Moreover, when Finley and Rosado told employees that "the operation remains in the hands of the company," "no organization has the right to change this or tell the company they have to change this or do that," and that Respondent's owner is "the only one who has the final say," they indicated to employees that the Respondent was in complete control over the outcome of negotiations even if employees selected the Union as their collective-bargaining representative, implying that such a selection would be futile.

Second, the Board has found repeatedly that an employer's threats to move or relocate its facility violate the Act. "It has long been recognized that a threat of plant closure made in the context of a union organization campaign is a potent weapon of an employer in interfering with its employees' Section 7 rights." *Swingline*, supra at 716; *Aircraft Hydro-Forming Inc.*, 221 NLRB 581, 590 (1975). Here, Rosado's statement that "if I am the owner of this operation ... if I want to make changes here, in my operation ... to revoke to another, uhh, state, to another city ... changes in production, in operation – they are the company's" clearly suggested to employees that the Respondent could close and move its operation to another state. (G.C. Exh. 10, p. 2). Rosado's use of the word "revoke," although imprecise, nonetheless successfully transmitted Respondent's message.<sup>3</sup>

Finally, it is undisputed that an employer is free to make a wide range of statements based on objective, factual predictions. See, e.g., *TVI, Inc., d/b/a Savers*, 337 NLRB 1039 (2002); *Deer Creek Mining Co.*, 308 NLRB 743 (1992). However, he is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisals to be taken solely on his own volition." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 619 (1942); *NLRB v. River Togs, Inc.*, 382 F.2d 198, 202 (2d Cir. 1967).

Rosado's statement to employees that the Respondent could move its operation to another state was not linked to any objective, fact-based prediction of the consequences of unionization or to "demonstrably probable consequences beyond his control." Rather, it was presented as an option that the Respondent could exercise at its discretion, implying that employees could lose their jobs if they exercised their Section 7 rights. In this context, the remark constituted an unlawful threat of reprisal.

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<sup>3</sup> It should be noted that Rosado acknowledged, during the course of this meeting, that he speaks Spanish "a little loosely." Specifically, he stated "you understand me, right? I speak Spanish a little loosely but it is very important you receive the message..." (G.C. Exh. 10, p. 1).

**III. Respondent's Grant of Benefits and Implied Promise of Future Benefits on July 27, 2010 Violated the Act (Respondent's Specific Exceptions 3(a) and 4(a), and Respondent's Exceptions to Objections 14, 15, 17, and 26).**

The ALJ correctly found that Respondent violated Section 8(a)(1) of the Act by unlawfully granting benefits when, in a meeting on July 27, 2010, President and Chief Executive Officer Moses Goldstein announced the hiring of Patricia Finley. Respondent contends that Finley's hiring was not a benefit to employees because she was hired to "help alleviate the communication barrier." In light of Halpert's prior statements that the company "was having a problem" and that it was "correcting" its mistakes by hiring Finley, it is quite clear that the company understood Finley's hiring would be considered a benefit by employees. (G.C. Exh. 11, p. 2). In fact, Respondent's decision to announce Finley's hire at a meeting only two days before the election suggests it knew employees would perceive it as such. Goldstein specifically acknowledged this when he remarked:

[O]ne of the reasons ... why some of the people voted yes last time and maybe some of the people have some complaints ... is because we never had good communication ... for that reason, I would like to announce now ... that's why I hired Patty [Finley], especially for human resources so she has time to talk to all the people and she understands your language ... and she can help everybody with whatever they need. And that's also again a cost, it's going to cost me but it's not going to cost you anything. (G.C. Exh. 12, p. 2)

Respondent again references a series of events that allegedly occurred prior to the July 15 meeting and for which there is no support in the record, contending that "irrespective of the Union campaign, the communication barrier between the employer and the employees was creating a tumultuous work environment." (Resp. Specific Exception 3(a), p. 7). Counsel for the Acting General Counsel respectfully requests that this portion of Respondent's Exception be stricken as there is absolutely no evidence in the record to support such an assertion. Additionally, as the ALJ noted, Respondent failed to call any witnesses or otherwise introduce any evidence to rebut the inference of unlawful motive that attaches to a grant of benefits during a union campaign. Given this, the ALJ's finding should be sustained.

The timing of Respondent's hire of Finley and its announcement of her hire unequivocally conveyed to employees that Respondent had the power to redress their grievances, eliminating the need for a Union. Respondent, by promising, announcing, and granting benefits to unit employees within the critical pre-election period, violated Section 8(a)(1) of the Act.

Finally, the ALJ correctly ruled that Goldstein's July 27 remarks to employees violated the Act by impliedly granting benefits. The Board has previously held that a range of statements which imply that benefits will follow a union's defeat violate the Act. See, e.g., *The Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069 (2004) (employer violated the Act by stating that it had asked employees, during the last union election, to give it a chance; that employees had given it that chance when they rejected both unions and that it had not done enough since that election to make things better); *Sunset Coffee & Macadamia Nut Co-Op of Kona*, 225 NLRB 1021 (1976) (employer violated the Act by telling employees at a pre-election campaign meeting that he would have "good news" for them after the election).

Respondent claims Goldstein was simply requesting an opportunity to prove himself, and that he "did not state, or even imply that he would provide 'help' after the election." However, Goldstein made repeated references to "helping" the people during his speech: stating, for example, that Finley "can help everybody with whatever they need;" that he is "only here to help the people;" and that he could not "believe ... the people ... believe that an outside person could help them more than [he] can." (G.C. Exh. 12, p. 2). These comments could reasonably be understood by employees as implying that additional benefits, or "help," would be forthcoming after the impending election. An employer's promise of benefits need not be detailed or specific to be violative of the Act. Promises that an employer "would someday better itself" and offer employees "more" have been found sufficient to constitute an unlawful promise of benefits. *JFB Mfg., Inc.*, 208 NLRB 2, 6 (1973). Clearly, Goldstein's remarks constituted more than a simple plea that employees allow him to prove himself; the remarks contained an implied reference to his earlier promises and his subsequent

delivery on those promises. The inference that he could, and would, “help” employees once again as he had after the last election is hard to miss, and was clearly invoked to influence the election at hand. Thus, his remarks constitute a violation of the Act.

Lastly, Respondent contends Goldstein’s statements were not unlawful because they were countered by disclaimers that “this time” he was not “offering anything.” (Resp. Specific Exception 4(a), p. 8; G.C. Exh. 12, p. 1-2). The Board has previously addressed this issue and found Respondent’s argument without merit. Specifically, “it 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.” *Hospital Shared Services*, 330 NLRB 317, 318 fn. 6 (1999), citing *Michigan Products*, 236 NLRB 1143, 1146 (1978). See also *Windsor Industries*, 265 NLRB 1009, 1016 (1982); *Heartland of Lansing Nursing Home*, 307 NLRB 152, 156 (1992) (employer does not rebut inference that it is promising to remedy grievances which it has solicited merely by reiterating repeatedly that it cannot make any promises, where other comments are not in accord with those disavowals). In this case, Goldstein’s pro forma disclaimers that he was “not offering anything” were contradicted by his repeated suggestions that if employees were to “trust” him and vote “no” in the coming rerun election, benefits would again be forthcoming as in the last election. These statements contained an implied reiteration and renewal of earlier promises and as such, were unlawful.

**IV. The ALJ Properly Concluded that Respondent’s Conduct Interfered with Employees’ Free Choice and thus a New Election is Warranted. (Respondent’s Exceptions to Conclusions regarding Objections).**

Respondent excepts to the ALJ’s determination that its conduct warrants setting aside the July 29, 2010 election and ordering a new election. Where, as here, a representation proceeding and an unfair labor practice case have been consolidated and an unfair labor practice found, the Board generally takes the position that “the election must be set aside unless it is virtually impossible to conclude that the misconduct could have affected the election results.” *Jurys Boston Hotel*, 356 NLRB No. 114, slip op. at 6 fn. 8 (March 28, 2011), citing *Clark Equipment Co.*, 278 NLRB 498,

505 (1986). See also *Safeway*, 338 NLRB 525, 526 fn. 3 (2002). This is based on the Board's longstanding policy that "[c]onduct violative of Section 8(a)(1) is, *a fortiori*, conduct which interferes with the exercise of a free and untrammelled choice in an election." *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786-1787 (1962).

In determining whether misconduct could have affected the results of the election, the Board considers the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors. *Enola Super Thrift*, 233 NLRB 409 (1977). Here, the extent of Respondent's misconduct – which constituted multiple violations of Section 8(a)(1) – was clearly sufficient to preclude a fair election. As to quantity, the ALJ found a total of six separate unfair labor practices in the brief two-week period leading up to the election. Of those six, two occurred at a meeting attended by virtually all of Respondent's employees. (Decision p. 6-9). Thus, Respondent's unlawful message was effectively disseminated to its entire workforce by its highest ranking officer only two days before the election.

Respondent cites the "number of employees in the bargaining unit subject to the misconduct" and the "extent of dissemination of the misconduct among the bargaining unit" as two of the factors the Board considers in determining whether to set aside an election. (Resp. Exception to Conclusion regarding Objections, p. 11). Here, all of Respondent's employees were subjected to at least two instances of misconduct. Respondent also cites the "proximity of the misconduct to the election date" as a factor the Board considers. In this regard, all of the misconduct at issue took place in the two weeks immediately preceding the election. In fact, the meeting at which Respondent's President and CEO addressed all its employees occurred only two days before the election. While not determinative, this clearly weighs in favor of setting aside the election. Respondent also cites "the effect, if any, of misconduct by the opposing party" of which, in this case, there was none. Finally, it notes that "the closeness of the final vote" is a factor the Board reviews. Here, the election results were 41 votes for the Union; 77 against; with 10 challenged ballots and 2 void ballots.

As evidenced by Ms. Saravia's testimony, the incidents at issue here are only the latest in a continuum of unlawful conduct through which the Respondent has attempted to prevent its employees from exercising their Section 7 rights. (Tr. 26-31). The evidence clearly establishes that Respondent's misconduct rose to the level of affecting the election. As such, the ALJ's Decision and Supplemental Decision sustaining the Union's objections and ordering a new election should be affirmed.

### **CONCLUSION**

In light of the above, no other conclusion is possible but that the Respondent's conduct violated Section 8(a)(1) of the Act. As such, Respondent's exceptions should be overruled and the conclusions set forth in the ALJ's Decision and Supplemental Decision should be affirmed.

**WHEREFORE**, for the reasons set forth above, Counsel for the Acting General Counsel respectfully requests that the Board deny Respondent's Exceptions to the Decision of the Administrative Law Judge in their entirety.

**DATED** at Albany, New York this 25<sup>th</sup> day of July 2011.

Respectfully submitted,

/s/ Brie Kluytenaar  
**BRIE KLUYTENAAR**  
Counsel for the Acting General Counsel  
National Labor Relations Board  
Region Three, Albany Resident Office  
Leo W. O'Brien Federal Building  
11A Clinton Avenue, Room 342  
Albany, New York 12207-2366  
Tel.: (518) 431-4159

## STATEMENT OF SERVICE

I hereby certify that on July 25, 2011, I electronically filed Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision in Case 3-CA-27834 with the Executive Secretary of the National Labor Relations Board using the NLRB E-Filing System, and I hereby certify that I provided copies of the same document via electronic mail (e-mail) to Jay F. Jason, counsel for Newburg Eggs, Inc., and Jonathan Friedman, counsel for United Food and Commercial Workers, Local 342.

**DATED** at Albany, New York this 25th day of July, 2011.

Respectfully submitted,

/s/ Brie Kluytenaar

**BRIE KLUYTENAAR**

Counsel for the Acting General Counsel  
National Labor Relations Board  
Region Three, Albany Resident Office  
Leo W. O'Brien Federal Building  
11A Clinton Avenue, Room 342  
Albany, New York 12207-2366  
Tel.: (518) 431-4159