Newburg Eggs, Inc. *and* United Food and Commercial Workers, Local 342. Cases 3–CA–27834 and 3–RC–11918

December 31, 2011

DECISION, ORDER, AND DIRECTION OF THIRD ELECTION

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

On April 27, 2011, Administrative Law Judge Robert A. Ringler issued the attached decision. On June 14, 2011, Judge Ringler issued a Supplemental Decision, also attached.[1] The Respondent filed exceptions with supporting argument, and the Acting General Counsel filed an answering brief.

The National Labor Relations Board has considered the decisions and the record in light of the exceptions[2] and brief and has decided to affirm the judge's rulings,[3] findings, and conclusions only to the extent consistent with this Decision, Order, and Direction of Third Election.[4]

This case presents allegations that the Respondent violated Section 8(a)(1) of the Act, and engaged in objectionable conduct, by statements it made at employee meetings prior to the second election on July 29, 2010.[5] As explained below, we adopt the judge's findings of objectionable and unlawful conduct in certain respects, and we reverse or find it unnecessary to pass on other such findings.[6]

[1] The judge's April 27 decision stated that the Respondent failed to submit a posthearing brief. It was subsequently discovered, however, that the Respondent's brief was erroneously filed with the Board's Regional Office instead of with the Division of Judges. The Respondent thereafter filed a Motion for Reconsideration of Decision, which the Board granted, remanding the case to the judge for reconsideration after reviewing the Respondent's brief. The judge subsequently issued a supplemental decision, finding that the Respondent's brief failed to raise any matters that were not previously considered, and that the original decision should stand in its entirety.

[2] In the absence of exceptions, we adopt pro forma the judge's recommendation to overrule Union Objections 2, 3, 9, 11, 12, 20, and 22.

[3] The Respondent contends on exception that the judge abused his discretion in ruling that its request for witness Reina Campos-Saravia's pretrial statement, after Campos-Saravia had been excused from the witness stand, was untimely. In so ruling, the judge rejected, as implausible, the Respondent's claim that the Acting General Counsel had previously represented that no pretrial statement existed. As explained below, we find that any such error by the judge was a harmless one.

Chairman Pearce finds that the judge's ruling was not an abuse of discretion. Specifically, he finds no basis for disturbing the judge's conclusion that the Respondent's contention was "implausible." Moreover, even assuming, arguendo, that the judge's ruling was an abuse of discretion, Chariman Pearce finds that it was ultimately harmless error. Employee Indiana Blandon, whose affidavit the Respondent did receive, testified similarly to Campos-Saravia regarding the Respondent's solicitation of grievances. Thus, any consideration of Campos-Saravia's testimony would not affect the adoption of the judge's finding of an unlawful and objectionable solicitation of grievances.

Member Becker finds it unnecessary to pass on the Respondent's exception because, even assuming the judge erred, any error was harmless for the reasons that Chairman Pearce states.

Member Hayes would affirmatively find that the judge's ruling was an abuse of discretion. Whatever counsel for the Acting General Counsel said to Respondent's counsel before the hearing, Respondent's counsel evidently believed that counsel for the Acting General Counsel had denied that any witness statements existed. So believing, Respondent's counsel did not ask for Campos-Saravia's statement before beginning to cross-examine her. After Campos-Saravia was excused, Respondent's counsel sought to confirm his belief, learned that there was a statement after all, and asked for the statement and for Campos-Saravia to be recalled to the stand. The judge refused Respondent's requests. As there is no such thing as prehearing discovery for respondents in Board proceedings, the judge's ruling denied the Respondent its sole opportunity to learn what Campos-Saravia had said during the investigation of the charge. Under these circumstances, Member Hayes finds that the Respondent's interest in reviewing Campos-Saravia's statement outweighed any minor disruption to the progress of the hearing that recalling her to the stand might have occasioned. To the extent that *Walsh Lumpkin Wholesale Drug Co.*, 129 NLRB 294, 296 (1960), enfd. 291 F.2d 751 (8th Cir. 1961) (per curiam), cited by the judge, is to the contrary, Member Hayes would overrule it. Nonetheless, Member Hayes also finds that the judge's ruling, although in error, was harmless error, for the reasons stated above by Chairman Pearce.

[4] We shall modify the judge's recommended Order to conform to our findings herein, and to include the Board's standard remedial language for the violations found. We shall also substitute a new notice to conform to the Order as modified.

In addition, we shall delete from the judge's recommended Order the requirement that the notice be read to employees by a Board agent, in English and Spanish, in the presence of the Respondent's current president and plant manager. We find that the Respondent's conduct is insufficient to warrant this extraordinary remedy. See *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

[5] The tally of ballots for this election showed 41 for and 77 against the Union, with 2 void ballots and 10 challenged ballots, an insufficient number to affect the results.

[6] We adopt the judge's finding that the Respondent engaged in objectionable conduct and violated Sec. 8(a)(1) by soliciting grievances on July 15, 2010, when Plant Manager Joel Halpert asked employees to report their work-related problems to him and promised to train employee Indiana Blandon to work in the "breakers" area of the facility. We find it unnecessary to pass on the judge's additional solicitation of grievance findings, as any such findings would be cumulative and would not affect the remedy or the direction of a new election.

We adopt the judge's recommendations to sustain Union Objections 6, 7, and 14, which correspond to the unfair labor practices found by the judge and adopted herein. We therefore set aside the results of the July 29, 2010 election and direct that a third election be held. See *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB 347, 354 (2006). Having adopted the judge's recommendations to sustain these objections, we find it unnecessary to pass on the judge's recommendations to sustain Objections 17, 23, and 26. Member Hayes agrees that the election must be set aside and a third election directed, but based solely on Objections 6 and 7 alleging an objection-

1. We agree with the judge that the Respondent engaged in objectionable conduct and violated Section 8(a)(1) by announcing that the Respondent had hired a bilingual human resources manager to improve workplace communication.

The record shows that, at an employee meeting on July 27, 2010,[7] the Respondent's president and CEO, Moses Goldstein, announced the hiring of Patty Finley as a bilingual human resources manager.[8] In announcing the hiring, Goldstein first identified the lack of communication as a problem employees experienced at the workplace. He then presented Finley's hiring as a solution to the problem by conveying that it would enhance employees' ability to communicate with managers and thereby improve their working conditions.[9] Goldstein added that Finley's hiring was "going to cost me but it's not going to cost you."

In these circumstances, employees would reasonably construe Goldstein's comments as an announcement of improved working conditions. Such an announcement during the critical period is impermissible. See, e.g., *Parts Depot, Inc.*, 332 NLRB 670, 672 (2000), enfd. mem. 24 Fed. Appx. 1 (D.C. Cir. 2001) (adopting judge's finding that employer violated Section 8(a)(1) by asking employee whether terminating the warehouse manager would "stop" the union, as it constituted an unlawful offer to improve working conditions).[10] For this reason, we adopt the judge's finding.[11]

2. The judge also found that the Respondent engaged in objectionable conduct and violated Section 8(a)(1) by promising employees future unspecified benefits if they voted against union representation. We disagree.

At the July 27 meeting, Goldstein said, among other things:

> The first thing . . . [is that] we're not threatening anybody and we're not offering anything and everybody has the right to vote whichever way they want. I'm just here to give . . . my honest advice. . . . [and] thank . . . all the people . . . on the last vote . . . for the support and the trust . . . I couldn't say what [I'd] . . . give you [last time] but I said, I promise you're going to get something and I kept my promise. . . . And I hope that this time even though I'm not offering anything because I gave . . . whatever the company could do, I still hope . . . the people that voted last time no, they're going to vote this time also no . . . .
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> In January, . . . I was almost losing the company and I had to put [in] a lot of money [and] . . . borrow from the banks . . . to save the company. . . . [T]he benefits that we gave . . . is the best that I can do . . . . Now I would like to talk . . . to the people that voted yes . . . I'm sure a big part . . . voted yes . . . because they didn't trust me that I'm going to give them something. Now that I've proved myself, that I did give benefits, like we said the holidays and personal days and the bonus and the raises, I'm sure that they're going to . . . vote no. I can't believe that the people . . . believe that an outside person could help them more than I can help. . . . And the difference is that when I help, it doesn't cost you anything, if they . . . help you, they charge you. . . .
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> . . . .
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> [G]ive me one more chance . . . everybody should vote no, to make sure they don't come again. . . .

The judge found that, collectively, these comments implied that employees would receive future benefits if they voted against the Union. In finding a promise of benefit, the judge explained that if Goldstein had not intended such a message, he would not have referenced

able solicitation of grievances. He would overrule Objection 14, alleging an objectionable grant of benefits, as he would not find the corresponding unfair labor practice for the reasons he states below.

[7] All dates hereafter are in 2010 unless otherwise noted.

[8] The Acting General Counsel introduced transcripts of this meeting and one on July 22 as an exhibit. The transcripts are English translations of statements by Finley and Labor Relations Consultant Michael Rosado, who spoke to employees in Spanish. Goldstein spoke in English, and Finley translated his remarks into Spanish.

[9] Goldstein said that Finley "understands [Spanish]" and "can help everybody with whatever they need."

[10] We find no merit to our dissenting colleague's contention that Finley's hiring is not an employee benefit because it "redounds to everyone's benefit." This contention ignores the fact that "[t]he relevant inquiry is whether employees would view the change in working conditions as a benefit to them." *Sun-Mart Foods*, 341 NLRB 161, 163 (2004). Thus, the benefit is not removed from the realm of unlawful or objectionable conduct simply because it would also be enjoyed by others. Moreover, our colleague's contention ignores the fact that Goldstein very clearly presented Finley's hiring as an improvement in working conditions that would benefit employees without any corresponding benefit accruing to the Respondent.

[11] Member Hayes would reverse the judge's finding. The complaint alleged that the Respondent, by Goldstein, implied that it was granting employees a benefit by hiring Patty Finley. Respondent's hiring of Finley was not an employee benefit. Finley was hired to bridge the communication divide between its English-speaking managers and its largely Spanish-speaking workforce. An employer may lawfully hire someone to improve communication within the workplace. Doing so is not an employee benefit; it redounds to everyone's benefit. Consequently, saying that one has done so does not imply a grant of a benefit —and reasonable employees would understand as much. See *Sun Mart Foods*, 341 NLRB 161, 167 (2004) (Member Schaumber, dissenting) (observing that by "employee benefit," the Board traditionally contemplates something "that inures directly to the advantage of, and is limited to, the employees themselves").

his "earlier largesse" in asking for "another chance" in the upcoming election.[12]

Contrary to the judge, we find that the comments did not convey a promise of future benefits. Goldstein made no specific promises of benefits. To the contrary, he explicitly stated that he was not offering any benefits, and that the Respondent had already given everything it could. Thus, Goldstein's comments actually emphasized that this time, no additional benefits would be forthcoming.

In context, Goldstein's statements would not reasonably be understood as a promise of benefits. See, e.g., *Noah's New York Bagels*, 324 NLRB 266, 267 (1997) (finding employer's request that employees give it a second chance not unlawful). *Reno Hilton*, 319 NLRB 1154 (1995), cited by our colleague, is distinguishable. There, the employer did promise benefits when it said, "[G]ive me a chance, *and I'll deliver*." Id. at 1156 (emphasis added). We therefore reverse the judge's finding of objectionable and unlawful conduct in this regard.[13]

3. The judge found that the Respondent engaged in objectionable conduct and violated Section 8(a)(1) by expressing to employees that voting for union representation would be futile. We disagree.

Michael Rosado, the Respondent's labor relations consultant, and Human Resources Manager Finley spoke at a July 22 meeting with employees concerning the upcoming election. Rosado's remarks included the following statements:

> Another . . . very important point . . . negotiating a contract you are thinking a lot about raises, benefits, all this, but no one thinks about operation. The operation remains in the hands of the company. No outside organization can . . . impact . . . the operation . . . if I am the owner of this operation, and an organization comes in, my only obligation is to try and reach an agreement but if I want to make changes . . . in my operation, change departments, . . . change different things in the schedule, they are . . . changes in production, in operation—they are the company's. No organization has the right to change this or tell the company they have to change this or do that. . . .

Finley then said:

> [N]o one says how to manage the company, it is always the owner. He will be the only person that says . . . it's good for the company and good for the employees or not. If [Goldstein] decides that it's not good for the company or that the company is losing money, then he will be the only one who has the final say. . . .

Rosado spoke again, saying:

> Don't forget that negotiating is asking for something. It is all asking, so this is coming here and asking the company and the company always has the right to say yes or no. . . .

The judge found that Rosado and Finley's comments reasonably left employees with the impression that collective bargaining would be an exercise in futility. The judge found that the statements conveyed that the Respondent was in sole control of negotiations, and that employees would obtain through bargaining only what the Respondent unilaterally chose to bestow.

Contrary to the judge, we find that Finley and Rosado's statements did not express the futility of collective bargaining. Rather, their statements more reasonably conveyed descriptions of some of the parameters of good-faith bargaining. Thus, Rosado correctly pointed out to employees that there are operational matters that fall outside the scope of an employer's duty to bargain, and Finley's follow-up comments reiterated and elucidated this point. Further, Rosado's comments about saying 'yes' and 'no' indicated that the Respondent would be within its rights to bargain hard about mandatory subjects of bargaining, and would not necessarily have to accept the Union's proposals. Such expressions, without more, do not suggest an intent not to negotiate in good faith with the Union; nor do they suggest that the outcome of negotiations would be foreordained. See *Alamo Rent-A-Car, Inc.*, 338 NLRB 275, 276 (2002). Accordingly we reverse this finding by the judge.[14]

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[12] Goldstein's prior promise and grant of benefits, which included increased wages, bonuses, and paid holidays and personal days, were encompassed in the Union's objections to the first election. These objections were settled by the parties' stipulation for a rerun election.

[13] Contrary to his colleagues, Chairman Pearce would adopt the judge's finding that Goldstein impliedly promised employees future benefits. The Chairman finds that, in the context of the other unlawful and objectionable statements, Goldstein's repeated references to the prior grant of benefits while pleading for "another chance," suggested that future benefits would be forthcoming if employees voted against union representation. See generally *Reno Hilton*, 319 NLRB 1154, 1156 (1995) (finding unlawful the employer's request that employees give the employer "a chance, and I'll deliver.")

[14] Contrary to his colleagues, Chairman Pearce finds that, when considered in context with the Respondent's other unlawful and objectionable conduct, Rosado and Finley's comments conveyed that the employees would not gain anything through collective bargaining. He would therefore adopt the judge's findings that these comments conveyed that union representation would be futile.

ORDER

The National Labor Relations Board orders that the Respondent, Newburg Eggs, Inc., Woodridge, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting grievances from employees and impliedly promising to remedy them in order to discourage employees from selecting union representation.

(b) Announcing improved working conditions to employees in order to discourage employees from selecting union representation.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed 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 Woodridge, New York facility copies of the attached notice marked "Appendix" in both English and Spanish.[15] Copies of the notice, on forms provided by the Regional Director for Region 3, 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.[16] 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 July 15, 2010.

(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.

[15] 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."

[16] For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.

DIRECTION OF THIRD ELECTION

A third 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 Third 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 second election 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 date of the second election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by United Food and Commercial Workers, Local 342.

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 Third Election. *North Macon Health Care 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 if proper objections are filed.

Dated, Washington, D.C. December 31, 2011

Mark Gaston Pearce, Chairman

Craig Becker, Member

Brian E. Hayes, 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 solicit grievances from you and promise to remedy them in order to discourage you from selecting union representation.

WE WILL NOT announce improved working conditions to you in order to discourage you from selecting union representation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

NEWBURG EGGS, INC.

Brie Kluytenaar and *Alfred Norek, Esqs.,* for the Acting General Counsel.
Jay Jason and *Aryeh Lazarus, Esqs. (Tarshis, Catania, Liberth, Mahon & Milligram, PLLC),* for the Respondent.
Jonathan Friedman, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was tried in Monticello, New York, on February 7, 2011. The charge in this proceeding was filed by the United Food and Commercial Workers, Local 342 (the Union) on October 21, 2010.[1] The charge resulted in the issuance of a series of complaints against Newburgh Eggs, Inc. (the Respondent or the Company), which culminated in the second amended complaint (the complaint) dated January 11, 2011. The Union also filed several objections to the Company's conduct at an election conducted by the National Labor Relations Board (the Board) on July 29. The objections were based on the same evidentiary record as the complaint and were, as a result, consolidated to be heard simultaneously with the complaint.

The complaint alleges that the Company violated Section 8(a)(1) of the National Labor Relations Act (the Act) by, inter alia: soliciting and remedying grievances from employees before the July 29 election; telling employees that selecting the Union as their representative would be a futile act; granting employees benefits prior to the election; and implying to employees that they would be granted future benefits, if they voted against unionization.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the brief filed by the counsel for the Acting General Counsel,[2] I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, operates an egg processing plant at its Woodridge, New York plant. Annually, in conducting its operations, it purchases and receives at its Woodridge plant goods and services valued in excess of $50,000 directly from points located outside of New York State. Therefore, the Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Company distributes whole eggs and liquefied egg products from its Woodridge plant. Its work force is predominantly comprised of Spanish-speaking employees, who are not fluent in English. It is run by Moses Goldstein, president and chief executive officer. Joel Halpert serves as the plant manager. Grace Patricia Finley, who is bilingual in Spanish and English, is the human resources manager.[3]

On August 18, 2009, the Union filed a petition with the Board seeking to represent the Company's production and

[1] All dates are in 2010, unless otherwise stated.
[2] The Union and the Company failed to submit posthearing briefs.
[3] The Company stipulated that Finley was an agent within the meaning of Sec. 2(13) of the Act.

maintenance employees at its Woodridge plant. (GC Exhs. 2–3.) On October 1, 2009, the Board held an election, which the Union lost.[4] (GC Exh. 4.) Thereafter, the Union filed objections to the Company's preelection conduct, which the parties settled by entering into a stipulation for a rerun election. (GC Exhs. 5–6.) A rerun election was then conducted on July 29, which the Union also lost.[5] (GC Exh. 8.) Following this defeat, the Union filed objections to the July 29 election, which are at issue herein.

The complaint and objections are based upon a series of captive-audience meetings held at the plant shortly before the July 29 election. These meetings occurred on July 15, 22, 25, and 27. Goldstein, Halpert, Finley, and labor relations consultant Michael Rosado spoke at these meetings.

B. July 15 Meeting

Reina Campos-Saravia, who has worked for the Company for 5 years, testified via an interpreter that she and 25 coworkers attended the July 15 meeting. She related that Halpert primarily spoke and his comments were translated into Spanish by Finley.[6] She recalled Halpert asking employees to share their work-related problems and offering his help. She stated that she responded by asking him to not transfer her from her current work area. She recounted Indiana Blandon, a coworker, asking him to train her to work in the "breakers" area of the plant,[7] and repair her assigned machine.[8] She recollected Nuvia Cisneros-Camacho requesting him to repair her workstation.[9] She stated that, within days, the Company fulfilled all of their requests. She added that, before July, the Company had never asked employees to share their workplace issues.

Indiana Blandon, who has worked for the Company since May 2008, testified via a translator that she attended the July 15 meeting. She recalled Halpert stating:

> If employees had any problems, we could tell him because [Finley] was there . . . to help us.

She confirmed that the Company responded to her concerns by promptly repairing her machine and training her to work in the "breakers" area.[10] She stated that she previously asked the Company to repair her machine and was ignored.

I found Campos-Saravia and Blandon credible; they were consistent, reliable, and candid. I will also draw an adverse inference from the Company's unexplained failure to rebut their testimonies. See *Douglas Aircraft Co.,* 308 NLRB 1217 (1992) (failure to call a witness "who may reasonably be assumed to be favorably disposed to the party, [supports] an adverse inference . . . regarding any factual question on which the witness is likely to have knowledge").

C. July 22 Meeting

The transcript of the July 22 meeting provided:[11]

> ROSADO: . . . . [Y]ou are going to be negotiating a contract. . . . this takes a long time. . . . A strike can occur. . . . if you do not accept the offer of the company. . . . You have the right to go out on strike but the company also has the right to continue its operation. . . . and . . . you can be permanently replaced. . . .
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> No outside organization can . . . impact . . . the operation . . . if I am the owner of this operation, and an organization comes in, my only obligation is to try and reach an agreement but if I want to make changes . . . in my operation, change departments, to revoke to another . . . state, to another city, change different things in the schedule, they are . . . changes in production, in operation—they are the company's. No organization has the right to change this or tell the company they have to change this or do that. . . .
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> FINLEY: [N]o one says how to manage the company, it is always the owner. He will be the only person that says . . . it's good for the company and good for the employees or not. If [Goldstein] decides that it's not good for the company or that the company is losing money, then he will be the only one who has the final say. . . .
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> ROSADO: Don't forget that negotiating is asking for something. It is all asking, so this is coming here and asking the company and the company always has the right to say yes or no. . . .
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> (GC Exh. 10 (grammar as in original).)

D. July 25 Meeting

The transcript of the July 25 meeting provided:[12]

> FINLEY:. . . . [I]f the union does come, . . . things can improve, . . . get worse, or . . . remain the same. . . . Let's say . . .the union . . . get[s] a ten cent raise for the employees. In 40 hours, that's $4.00 a week. In four weeks, you would earn a $16.00 increase. If you have to pay . . . union [dues], assuming you pay . . . $30.00, you are losing $14.00. Now . . . where is the benefit in that? . . . .
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> The other thing is the union security clause. . . . [T]he people who disagree with the union are going to be forced to enroll in the union. This means they will be forced to pay dues. . . .
>
> HALPERT:. . . . We know our mistakes. We are correcting our mistakes. We [were] . . . having a problem . . . communicating with the people because of our language. Now we correct this, [Finley's] . . . so close . . . to the people now . . . .
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> (GC Exh. 11 (grammar as in original).)

[4] The tally resulted in 43 employees voting for, and 80 voting against, unionization.

[5] The tally resulted in 41 employees voting for, and 77 voting against, unionization.

[6] Goldstein was present, but, did not address the employees.

[7] In the "breakers" area, eggs are broken and liquid contents are collected.

[8] She asked him to solder certain metal ductwork, which was emitting hot chlorine gas.

[9] This repair involved the removal of a piece of metal.

[10] She was interested in the "breakers" area because it involved sedentary work.

[11] The transcript is an English translation of a meeting, where Finley and Rosado spoke to employees in Spanish.

[12] The transcript is an English translation of a meeting, where Finley spoke to employees in Spanish. Finley also translated Halpert's comments into Spanish.

E. July 27 Meeting

In order to provide background information for the July 27 meeting, Campos-Saravia explained that, after the first election, she was summoned to a meeting on October 4, 2009. She related that the meeting occurred on the shop floor and was attended by 60 workers. She recalled Halpert distributing bonus checks to employees worth 8 hours of pay and congratulating them for their support in the election.[13] She added that, on October 27, 2009, she was called to another meeting with 150 coworkers, where workers received 11 paid leave days and $100 bonuses. She related that the Company never previously offered paid leave or bonuses.

The transcript of the July 27 meeting provided:[14]

> GOLDSTEIN: The first thing . . . [is that] we're not threatening anybody and we're not offering anything and everybody has the right to vote whichever way they want. I'm just here to give . . . my honest advice. . . . [and] thank . . . all the people . . . on the last vote . . . for the support and the trust . . . I couldn't say what [I'd] . . . give you [last time] but I said, I promise you're going to get something and I kept my promise. . . . And I hope that this time even though I'm not offering anything because I gave . . . whatever the company could do, I still hope . . . the people that voted last time no, they're going to vote this time also no . . . .
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> In January, . . . I was almost losing the company and I had to put [in] a lot of money [and] . . . borrow from the banks . . . to save the company. . . . [T]he benefits that we gave . . . is the best that I can do . . . . Now I would like to talk . . . to the people that voted yes . . . I'm sure a big part . . . voted yes . . . because they didn't trust me that I'm going to give them something. Now that I've proved myself, that I did give benefits, like we said the holidays and personal days and the bonus and the raises, I'm sure that they're going to . . . vote no. I can't believe that the people . . . believe that an outside person could help them more than I can help. . . . And the difference is that when I help, it doesn't cost you anything, if they . . . help you, they charge you. . . .
>
> I also think . . . one of the reasons . . . why some . . . people voted yes last time and . . . have some complaints . . . is because we never had good communication. . . . I hired Patty [Finley] . . . so she has time to talk to all the people and . . . understands your language . . . and . . . can help everybody with whatever they need. And that's . . . a cost, it's going to cost me but it's not going to cost you. . . .
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> [G]ive me one more chance . . . everybody should vote no, to make sure they don't come again. . . .
>
> FINLEY: . . . . Communication . . . has been very bad. You have been right . . . but now the communication is direct. I understand you. . . .
>
> (GC Exh. 12 (grammar as in original).)

[13] She received a $57 check.

[14] The transcript is an English translation of a meeting, where Finley spoke to employees in Spanish. Finley also served as Goldstein's translator.

III. ANALYSIS

A. Solicitation of Grievances

The Company violated Section 8(a)(1) when Halpert solicited and remedied grievances on July 15,[15] and informed employees that it had hired Finley, who is bilingual, to remedy their grievances on July 25.[16] In *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), the Board held that an employer violates Section 8(a)(1) under the following circumstances:

> Where, . . . an employer, who has not previously had a practice of soliciting employee grievances or complaints, adopts such a course when unions engage in organizational campaigns . . . there is a compelling inference that [it] is implicitly promising to correct those inequities . . . discover[ed] . . . and likewise urging . . . employees that the combined program of inquiry and correction will make union representation unnecessary.

See also *Laboratory Corp. of America Holdings*, 333 NLRB 284, 284–285 (2001).

On July 15, Halpert asked employees to allow him to remedy their problems. They responded by making various training, repair, and other requests, which were promptly remedied. On July 25, Halpert informed employees that Finley was hired to provide ongoing help with their grievances. Given that there is no evidence that the Company had a prior practice of soliciting and remedying employee grievances, Halpert's solicitation of grievances, followup remedial action, and statements regarding Finley were unlawful.

B. Futility of Bargaining

The Company violated Section 8(a)(1), when Rosado and Finley implied to employees at the July 22 meeting that it would be futile for them to select the Union as their collective-bargaining representative.[17] The Board has held that, barring outright threats to refuse to bargain in good faith with an incoming union, the legality of any particular statement depends upon its context. See, e.g., *Somerset Welding & Steel, Inc.,* 314 NLRB 829, 832 (1994). Statements made in a coercive context are unlawful because they, "leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore." *Earthgrains Co.,* 336 NLRB 1119, 1119–1120 (2001); see, e.g., *Smithfield Foods,* 347 NLRB 1225, 1230 (2006) (statement from highest official that company was in complete control of future negotiations was unlawful); *Aqua Cool*, 332 NLRB 95, 95 (2000) (statement that employees were unlikely to win anything more at the bargaining table than other employees unlawfully implied that unionizing would be futile).

On July 22, Rosado told employees:

> [I]f I am the owner of this operation, and an organization comes in, my only obligation is to try and reach an agreement but if I want to make changes here, in my operation . . .

[15] This allegation is listed in par. VI(a) of the complaint.

[16] This allegation is listed in par. VI(b) of the complaint.

[17] These allegations are listed in pars. VIII and IX of the complaint.

> change different things in the schedule, they are . . . changes in production, in operation . . . they are the company's. No organization has the right to change this or tell the company they have to change this or do that. . . .
>
> (GC Exh 10.) At the same meeting, Finley added:
>
> [N]o one says how to manage the company, it is always the owner. He will be the only person that says well, it's good for the company and good for the employees or not. If [Goldstein] decides that it's not good for the company or that the company is losing money, then he will be the only one who has the final say. . . .

Id. I find that these comments, when taken as a whole, reasonably left employees with the impression that collective bargaining would become an exercise in futility because the Company was in sole control over negotiations. Or put another way, these comments conveyed to employees that they would solely obtain in bargaining what the Company unilaterally chose to bestow. I find, therefore, that such comments were unlawful.

C. Granting of Benefits

The Company violated Section 8(a)(1) when, on July 27, Goldstein told employees that he was giving them a valuable Company-paid benefit by hiring Finley, who would communicate with them in Spanish and help them address and remedy their grievances.[18] An allegation that an employer has unlawfully granted benefits in response to union organizational activity is analyzed under *NLRB v. Exchange Parts*, 375 U.S. 405 (1964). In *NLRB v. Exchange Parts*, the Supreme Court held that, "the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union," interferes with their protected right to organize.[19] Moreover, "[a]lthough 8(a)(1) allegations are typically analyzed under an objective standard, and motive is irrelevant, see *American Freightways Co.*, 124 NLRB 146, 147 (1959), the 8(a)(1) analysis under *Exchange Parts* is motive-based." *Network Dynamics Cabling*, 351 NLRB 1423, 1424 (2007), citing *Hampton Inn NY-JFK Airport*, 348 NLRB 16, 18 fn. 6 (2006). In other words, the motive for the conferral of benefits during an organizational campaign must be designed to interfere with union organizing. Id. Under settled Board precedent, "[a]bsent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act." *Yale New Haven Hospital*, 309 NLRB 363, 366 (1992); see also *Kanawha Stone Co.*, 334 NLRB 235 fn. 2 (2001).

I find that the Company hired Finley, in order to interfere with the Union's campaign. First, the timing of her hiring was suspicious, inasmuch as she was hired shortly before the July 29 election. Second, the Company understood that her hiring would be perceived by its mostly Spanish-speaking work force as a substantial benefit, which would enhance their ability to communicate with their employer and undercut their need for a Union representative. Goldstein openly admitted this understanding, when he stated:

> [O]ne of the reasons . . . why some . . . people voted yes last time and . . . have some complaints . . . is because we never had good communication . . . . For that reason, I would like to announce . . .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 … can help everybody with whatever they need.
>
> (GC Exh 12.) Lastly, the Company, which did not call any witnesses or present any evidence, failed to demonstrate that it had a legitimate business reason that was unconnected to the Union's organizational campaign, or otherwise explain the suspicious timing of Finley's hiring. As a result, I find that her hiring was unlawfully timed to interfere with the Union's campaign.

D. Implied Promise of Future Benefits

The Company violated Section 8(a)(1) of the Act, when Goldstein impliedly promised employees future benefits on July 27.[20] The Board has held that, when an employer solely asks for an opportunity to prove itself, without suggesting that benefits would be forthcoming following the election, such commentary is lawful. See *Noah's New York Bagels,* 324 NLRB 266, 267 (1997), citing *National Micronetics*, 277 NLRB 993 (1985). However, employer requests for the chance to prove itself, which are accompanied by express or implied promises of benefits, are unlawful. See, e.g., *Reno Hilton Resorts Corp*., 319 NLRB 1154, 1156 (1995) (preelection plea to "give me a chance and I'll deliver" is unlawful); *Sunset Coffee & Macadamia Nut Co-Op of Kona*, 225 NLRB 1021, 1021 (1976) (announcement that there would be "good news" after election is unlawful).

I find that Goldstein implicitly promised employees that the Company would grant benefits after the July 29 election. On July 27, he stressed that he kept his earlier promise to grant benefits after the first election. He added that he could not "believe that the people . . . believe that an outside person could help them more than [he] can." (GC Exh. 12.) He also implored employees to give him "one more chance." These comments collectively implied that additional benefits might follow after the election, as long as employees allowed Goldstein to continue to "help" them, instead of the Union. If Goldstein did not intend to imply such a message, he would not have cited his earlier largesse, petitioned for another chance or promised ongoing "help" after the election.[21] Therefore, I find that employees could have reasonably interpreted the above-described array of comments to mean that, if they trusted the Company and voted "no," they would receive unspecified rewards.[22] I find,

[18] This allegation is listed in par. VII(a) of the complaint.

[19] See also *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545 (2002) ("an employer cannot time the announcement of the benefit in order to discourage union support, and the Board may separately scrutinize the timing of the benefit announcement to determine its lawfulness").

[20] This allegation is listed in par. VII(b) of the complaint.

[21] A pledge of ongoing "help" is sufficiently comparable to a promise of "good news." See Sunset Coffee, supra.

[22] I also find that Goldstein's introductory comment that he is not presently offering workers anything was rendered almost meaningless

as a result, that Goldstein's comments were unlawful.

IV. THE REPRESENTATION CASE

A. Objections

On August 4, the Union filed 26 objections to the Company's conduct during the critical period, i.e., the period between the initial election on October 1, 2009, and the rerun election on July 29. (GC Exh 1(h)); *Star Kist Caribe, Inc.,* 325 NLRB 304 (1998) (second critical period runs from first election to second). Many of these objections duplicate the complaint allegations, which I have already analyzed and found unlawful.

At the hearing, the Union withdrew several objections,[23] and provided oral argument concerning its rationale for the remaining objections. Although the Company was invited to respond to these objections, it failed to present any witnesses,[24] offer oral argument or submit a posthearing brief.

1. Objection 1

Objection 1 alleged that, during the critical period, the Company implied that, "it was futile for [employees] . . . to vote for the Union." The Union asserted that this objection was based upon comments made at the July 22 meeting, which I have found unlawful. I find, therefore, that this objection is valid.

2. Objections 2 and 12

Objection 2 alleged that, during the critical period, the Company, "portray[ed] the selection of the Union . . . as an economic hazard which would result in the loss of jobs." Objection 12 stated that the Company "threatened retaliation for union support." The Union explained that these objections were based upon Rosado's discussion of strikes and permanent replacement on July 22.

Rosado lawfully explained to employees that economic strikes and permanent replacement were possibilities. See *Novi American,* 309 NLRB 544 (1992) (comments about possible strike not coercive); *Eagle Comtronics, Inc.*, 263 NLRB 515, 516 (1982) (statements about economic strikers being potentially replaced not coercive). As a result, I find that these objections lack merit.

3. Objection 3

Objection 3 three alleged that, within 24 hours of the election, the Company held a captive audience meeting and told employees to vote "no." I find that this objection lacks merit, inasmuch as there is no evidence that the Company held a meeting within 24 hours of the July 29 election.[25]

4. Objections 6 and 7

Objections 6 and 7 alleged that, during the critical period, the Company solicited and adjusted grievances. The Union averred that this objection was based upon the July 15 meeting and connected events, which I have found unlawful. Accordingly, I find merit to these objections.

5. Objection 9

Objection 9 alleged that, within 24 hours of the election, the Company allowed certain employees to conduct pro-Company electioneering and polling. The Union failed to provide evidence supporting this objection; thus, I find that it lacks merit.

6. Objection 11

Objection 11 alleged that, during the critical period, the Company distributed leaflets and played videos, which implied that employees' job security "would be jeopardized if they supported the Union." The Union alleged that this objection was based upon the Company's distribution of leaflets and video presentation on July 22. The Union, however, failed to adduce witness testimony or other evidence concerning these matters. Moreover, the transcript of the July 22 meeting solely cited a video presentation, but, failed to describe its contents. This objection, therefore, lacks merit.

7. Objection 14

Objection 14 alleged that, during the critical period, the Company granted employees benefits, in order to persuade them to vote against unionization. The Union explained that this objection was based upon the July 25 and 27 statements regarding Finley's hiring, which I have found to be unlawful. I, thus, find merit to this objection.

8. Objection 15

Objection 15 alleged that, during the critical period, the Company implied that employees would receive certain unspecified benefits after the election, if they voted against unionization. The Union asserted that this objection was based upon Goldstein's July 27 comments, which I have found unlawful. I will, as a result, sustain this objection.

9. Objection 17

Objection 17 alleged that, during the critical period, the Company, "conducted captive audience speeches on worktime . . . [and] made improper anti-union representations and provided employees with 'benefits' not previously received." The Union asserted, without providing greater specificity, that this objection was based upon the July 15, 22, 25, and 27 meetings.

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by his later discussion of his prior grant of benefits, plea for another chance and offer of ongoing help.

[23] The union withdrew Objections 4, 5, 8, 10, 13, 16, 18, 19, 21, 24, and 25.

[24] At the start of the hearing, the Company's attorney announced, "[W]e don't intend to call any witnesses." Tr. 21. After Campos-Saravia was cross-examined and released, the Company's attorney belatedly realized that he neglected to request her *Jencks* statement. Upon recognizing his oversight, he requested her *Jencks* statement and accused counsel for the Acting General Counsel of misrepresenting the statement's existence, which opposing counsel vehemently denied. Tr. 64-67. Following a ruling that the request for the statement was untimely (see, e.g., *Walsh Lumpkin Wholesale Drug Co.*, 129 NLRB 294, 296 (1960); *Earthgrains Co.,* 336 NLRB 1119, 1122 (2001); *SBC California*, 344 NLRB 243, 243 fn. 3 (2005)), and that the misrepresentation claim was implausible, the Company's attorney sought to recall Campos-Saravia as his own witness. In responding to a request for an offer of proof regarding her testimony, he responded, "I would be calling [Campos-Saravia] solely to question her about what's in the affidavit." Tr. 68–69. His request to recall this witness was, as a result, rejected as an attempt to evade the earlier *Jencks* ruling. He later rested, without seeking to call any additional witnesses.

[25] Cf. *Peerless Plywood Co.*, 107 NLRB 427 (1953) (speeches to massed assemblies within 24-hours of an election are unlawful).

Given that I have found that certain comments made at these meetings were unlawful, I find that this objection, although superfluous, is valid.

10. Objection 20

Objection 20 alleged that the Company granted monetary and leave benefits to employees, who voted against unionization. It is undisputed that the Company provided such benefits after the first election and that the Union previously filed objections concerning this issue. (GC Exh. 5 (Objections 18–19).) On March 17, however, the Company and the Union entered into a Stipulation for a Rerun Election, which settled the objections, set a rerun election and waived the Union's right to refile identical objections following the rerun election:

> The parties agree that the conduct alleged in the Petitioner's objections filed on October 8, *shall not constitute a basis for objections to set aside the rerun election engendered by this Stipulation*, and the parties waive their right to file objections based upon such alleged conduct.
>
> (GC Exh. 6, par. 7 (emphasis added).)

The Union failed to adduce any evidence that the Company provided monetary and leave benefits after October 2009, or in a manner beyond that previously alleged in its earlier objections. I find, therefore, that this objection is simply a reiteration of prior objections that were settled and waived. Accordingly, this objection lacks merit.

11. Objection 22

Objection 22 alleged that, during the critical period, the Company told employees that, "they would suffer from an adverse change in working conditions," if they unionized. The Union asserted that this objection was based upon two matters: (1) the July 22 strike and permanent replacement comments; and (2) the July 25 statements that employees might receive a net decrease in wages, if they failed to secure a negotiated raise that offset their new union dues. As discussed under Objections 2 and 12, the strike and permanent replacement comments were lawful. The union dues comments, which occurred 4 days before the election, were also lawful. These comments, which were solely campaign propaganda, were verifiable. See *York Furniture Corp.,* 170 NLRB 1487 (1968) (dues-related comments occurring 4 days before an election did not invalidate the election, where such comments were campaign propaganda that could be independently verified); *Kalin Construction Co.,* 321 NLRB 649, 652 (1996). Accordingly, I find that this objection lacks merit.

12. Objection 23

Objection 23 alleged that, during the critical period, the Company advised employees during a captive audience meeting that the Union would cause the plant to close or relocate. The Union contended that Rosado, unlawfully threatened employees with plant closure on July 22, when he stated that if the Company "want[ed] to. . . revoke[26] to another . . . state, to another city, . . . they are the company's [decisions]." (GC Exh. 10.) The Board has held, while an employer is free to make predictions regarding the foreseeable economic consequences of unionization, a plant relocation prediction must be carefully phrased on the basis of *objective* facts, in order to avoid implying that the prediction is a threat of retaliation rather than objective and reasonable opinion. *Eldorado Tool,* 325 NLRB 222, 222–223 (1997).

I find that Rosado's statement was a veiled threat that the Company might relocate, if it unionized. Rosado failed to support his prediction with objective facts. He also failed to explain that relocation was not being entertained, and that he was solely raising relocation in order illustrate the difference between mandatory and nonmandatory bargaining subjects. I find, as a result, that this objection is valid.

13. Objection 26

Objection 26, a catchall objection, generally alleges that the Company "interfered with . . . [employees'] ability to exercise their free . . . choice in the election." Given that I have already found that several objections are valid, I find that this objection, although duplicative, is legitimate.

B. Conclusion

In sum, I find that Objections 1, 6, 7, 14, 15, 17, 23, and 26 are valid, and that the conduct underlying these objections, much of which violated Section 8(a)(1), prevented employees from exercising a free choice during the July 29 election. Accordingly, I recommend that the election be invalidated. See *General Shoe Corp.,* 77 NLRB 124 (1948) (conduct during the critical period that precludes free choice warrants invalidating an election).[27] Moreover, the Board has traditionally held that 8(a)(1) violations serve as a basis for invalidating an election. See, e.g., *IRIS USA, Inc.,* 336 NLRB 1013 (2001); *Diamond Walnut Growers, Inc.,* 326 NLRB 28 (1988); *Playskool Mfg. Co.,* 140 NLRB 1417 (1963).

Even though the Union lost the first two elections by substantial margins, I nevertheless recommend that the results of the second election be set aside and a new election be held. The unfair labor practices (the ULPs) and other objectionable conduct committed by the Company were serious and created an atmosphere, which made the exercise of free choice improbable. In addition, if a third election were not held, the Company would, ironically, be the beneficiary of its ongoing pattern of illegal conduct. Employees, as a result, should be afforded an opportunity to exercise their protected right to vote in an untainted election.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of

[26] "Revoke" means, "to annul by recalling or taking back." See http://www.merriam-webster.com/dictionary/revoke. I find that Rosado's usage of "revoke" in the phrase, "revoke [the company] to another . . . state," awkwardly communicated plant relocation.

[27] "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.

Section 2(5) of the Act.

3. The Company violated Section 8(a)(1) of the Act by:

(a) Soliciting, remedying, and impliedly promising to remedy grievances, in order to discourage employees from selecting the Union as their collective-bargaining representative.

(b) Expressing to employees that it would be futile for them to select the Union as their collective-bargaining representative.

(c) Granting employees benefits, in order to discourage them from selecting the Union as their collective-bargaining representative.

(d) Impliedly promising employees unspecified benefits, in order to discourage them from selecting the Union as their collective-bargaining representative.

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

5. By the foregoing violations of the Act, which occurred during the critical period before the second election, and by the conduct cited by the Union in Objections 1, 6, 7, 14, 15, 17, 23, and 26, the Company has prevented the holding of a fair election, and such conduct warrants setting aside the election conducted on July 29, 2010, in Case 3–RC–11918.

REMEDY

Having found that the Company 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 Company is ordered to distribute appropriate remedial notices electronically via email, intranet, internet, or other appropriate electronic means to its production and maintenance employees, in addition to the traditional physical posting of paper notices on a bulletin board. See *J. Picini Flooring*, 356 NLRB No. 9 (2010).

In addition to the traditional remedies for the 8(a)(1) violations found herein, counsel for the Acting General Counsel has requested additional remedies to cure the effects of the Company's unlawful conduct. Specifically, counsel seeks an order "requiring that a Board agent read the notice to employees in English and Spanish during worktime in the presence of Respondent's representatives." For several reasons, I find that this request is appropriate. First, given that the forthcoming rerun election will represent the Board's third attempt to conduct an untainted election, a reading of the notice will ideally foster the environment required for a fair and final election result. Second, inasmuch as the Company's employees are mostly not fluent in English, a notice reading will present an effective way to share and distribute information amongst a somewhat insular work force. Lastly, a notice reading will counteract the coercive impact of the instant ULPs, which were committed by high-ranking management officials. See *Consec Security*, 325 NLRB 453, 454–455 (1998), enfd. 185 F.3d 862 (3d Cir. 1999) (participation of high-ranking management in ULPs magnifies the coercive effect). Accordingly, I conclude that a Board agent should read the notice to production and maintenance employees in English and Spanish during worktime, in the presence of the Company's current president and plant manager. See *Mcallister Towing & Transportation Co.*, 341 NLRB 394, 400 (2004) ("[T]he public reading of the notice is an 'effective but moderate way to let in a warming wind of information and . . . reassurance. [citations omitted].'").

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[28]

ORDER

The Respondent, Newburgh Eggs, Inc., Woodridge, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting, remedying, and impliedly promising to remedy grievances, in order to discourage employees from selecting the Union as their collective-bargaining representative.

(b) Expressing to employees that it would be futile for them to select the Union as their collective-bargaining representative.

(c) Granting employees benefits, in order to discourage them from selecting the Union as their collective-bargaining representative.

(d) Impliedly promising employees unspecified future benefits, in order to discourage them from selecting the Union as their collective-bargaining representative.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed 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, physically post at its Woodridge, New York facility, and electronically distribute via email, intranet, internet, or other electronic means to its production and maintenance employees who were employed by the Respondent at its Woodridge, New York facility at any time since July 15, 2010, copies of the attached notice marked "Appendix"[29] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be physically 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 July 15, 2010.

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[28] 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.

[29] 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."

(b) Within 14 days after service by the Region, hold a meeting or meetings during working hours, which will be scheduled to ensure the widest possible attendance of production and maintenance employees, at which time the attached notice marked "Appendix" is to be read to its employees by a Board agent in English and Spanish in the presence of its current president and plant manager.

(c) 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.

IT IS FURTHER ORDERED that the Regional Director for Region 3 shall set aside the representation election conducted in Case 3–RC–11918, and that a new election be held at a date and time to be determined by the Regional Director.

Dated, Washington, D.C., April 27, 2011.

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 ask you to tell us your problems at work, fix your problems at work, or promise to fix your problems at work, in order to persuade you to vote against the Union in an election.

WE WILL NOT tell you that it would be useless or pointless for you to choose the Union as your representative.

WE WILL NOT give you benefits, in order to persuade you to vote against the Union in an election.

WE WILL NOT promise to give you benefits after the election, in order to persuade you to vote against the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL hold a meeting or meetings during working hours and have this notice read to you and your fellow workers in English and Spanish by an agent of the National Labor Relations Board in the presence of the Company's current president and plant manager.

NEWBURG EGGS, INC.

Brie Kluytenaar and *Alfred Norek, Esqs.,* for the Acting General Counsel.
Jay Jason and *Aryeh Lazarus, Esqs. (Tarshis, Catania, Liberth, Mahon & Milligram, PLLC),* for the Respondent.
Jonathan Friedman, Esq., for the Charging Party.

SUPPLEMENTAL DECISION

ROBERT A. RINGLER, Administrative Law Judge. On February 7, 2011,[1] this consolidated case was tried in Monticello, New York. On April 27, a decision issued (the decision), which found, inter alia, that Newburg Eggs, Inc. (the Respondent or the Company) violated Section 8(a)(1) of the National Labor Relations Act (the Act). The decision, which also sustained several objections to the Company's conduct prior to an election, found that such conduct warranted setting aside the election results and conducting a new election.

In footnote 2, the decision indicated that the Company's counsel failed to submit a posthearing brief (the brief). Following the issuance of the decision, it was discovered that the brief was errantly filed with the Region 3 field office, instead of the Division of Judges. Upon discovering this error, counsel contacted the office of the chief administrative law judge, and asked for the decision to be rescinded and reissued, following due consideration of the errantly filed brief.

By letter dated May 4, the chief administrative law judge responded:

> I understand . . . your office has been in communication with my Executive Assistant . . . about the e-filing of your brief in the above consolidated case . . . . As [the] Judge . . . pointed out in his decision, Respondent did not file a brief with the Judges Division. The e-mail confirmation you provided . . . shows that your brief was improperly filed with Region 3 of the NLRB. The Board's Rules provide that briefs to administrative law judges must be timely filed with the Judges Division. And the e-filing instructions on the Board's web-site permit the e-filer to select the appropriate office with which to file a document. In this case, the e-filer selected Region 3. The Judges Division never received a copy of the Respondent's brief, either directly from the Respondent or from Region 3.

It is regrettable that your brief was not considered by [the] Judge . . . , but I am satisfied that the brief was never properly placed before [the] Judge . . . . I would note that, pursuant to Rule 102.46 of the Board's Rules, you may file exceptions to [the] . . . decision with the Board, along with a supporting brief. Any further questions in this regard should be addressed to the Board, through the office of the Executive Secretary.

The Company, subsequently, filed a Motion for Reconsideration of Decision with the National Labor Relations Board (the Board), which was opposed by the other parties to this proceeding.

On May 25, the Board issued the following Order:

> The Motion for Reconsideration of Decision filed by Respondent . . . is granted. Accordingly, this matter is remanded to

[1] All dates are in 2011, unless otherwise stated

> [the] Administrative Law Judge . . . for reconsideration of his April 27, 2011 decision after reviewing the . . . brief.

Based upon the entire record, which now includes the errantly filed brief,[2] I find that the decision remains correct and should stand in its entirety. The brief failed to raise any new matters that were not previously considered. The factual record in the underlying consolidated cases, which consisted mainly of transcripts of recorded meetings and other documentary evidence, was essentially undisputed. Moreover, the Company failed to call any witnesses, and the two witnesses presented by its opposition were highly credible. I find, therefore, that the brief failed to demonstrate that the findings of fact contained in the decision were flawed, or should otherwise be revised. I find, furthermore, that the brief failed to cite any legal precedent or advance any connected argument, which was not previously considered or addressed. I find, as a result, that the decision should stand in its entirety.[3]

Dated, Washington, D.C., June 14, 2011

[2] The brief has now been placed in the correct electronic folder.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order, which were fully set forth in the decision dated April 27 and are incorporated herein by reference, 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.