

the exclusive representative of all employees in the bargaining unit described below with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All production and maintenance employees at our seed cleaning plant at Hollister, California, including drivers, helpers, warehousemen, and packers, but excluding office clerical employees, farm truckdrivers, guards, and supervisors as defined in the Act.

WALDO ROHNERT Co.,
Employer.

Dated----- By-----
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office (703 Market Building, 830 Market Street, San Francisco, California; Telephone Number, Yukon 6-3500, Extension 3191) if they have any question concerning this notice or compliance with its provisions.

Haynes Stellite Company, Division of Union Carbide Corporation and United Steelworkers of America, AFL-CIO

Haynes Stellite Company, Division of Union Carbide Corporation and United Steelworkers of America, AFL-CIO, Petitioner. *Cases Nos. 25-CA-1353 and 25-RC-1966. March 5, 1962*

DECISION AND ORDER

On October 16, 1961, Trial Examiner Sydney S. Asher, Jr., issued his Intermediate Report in the above-entitled proceedings, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom, as set forth in the Intermediate Report attached hereto. He also recommended that the objections to conduct affecting results of election, filed by the Petitioner, be overruled. Thereafter, the Respondent, the General Counsel, and United Steelworkers of America, AFL-CIO,¹ each filed exceptions to the Intermediate Report and supporting briefs, and the Respondent filed a brief in reply to that of the Union.

¹ Hereinafter referred to as the Union.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Leedom, Fanning, and Brown].

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record² in these cases, and hereby adopts the findings, conclusions,³ and recommendations of the Trial Examiner with the following modifications.

1. The General Counsel alleged that certain statements made by the Respondent's representatives during the course of otherwise uncoercive speeches violated Section 8(a)(1) of the Act and interfered with the conduct of the election. The Trial Examiner rejected this contention and recommended dismissal of this allegation of the complaint. However, we find merit in the General Counsel's exceptions to these findings and recommendations.

As set forth in the Intermediate Report, the Respondent, throughout the period of the Union's organizational and preelection campaigns, conducted an active campaign of its own in which it took the position that its Kokomo plants should remain ununionized and urged the employees to vote against union representation.⁴ During the period from January 31 to February 13, 1961, immediately after the signing of the stipulation for certification upon consent election and before the election itself,⁵ the Respondent held 33 meetings⁶ of groups of 35 to 90 employees, each of which was addressed by either Fred C. Kroft or Glen H. Shelton, Respondent's works manager and assistant works manager, respectively. During the course of the prepared speeches at each meeting, the following statement was read:

Customers are buying products on the basis of prices, delivery, and dependability. The facts are that in some cases we are the sole source of supply at present for some of our customers. We have been told that we would not continue to be the sole source of

² Contrary to the Respondent's contention, the Regional Director's report on objections to the election was properly included in the record. See Section 102.69(f) of the Board's Rules and Regulations, Series 8, as amended.

³ The General Counsel contends that the Trial Examiner improperly discredited Zirkle's testimony with respect to an alleged incident on October 28, 1960. It is the Board's established policy not to overrule a Trial Examiner's resolutions as to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions were incorrect. Such a conclusion is not warranted here *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545, enfd. 188 F. 2d 362 (C.A. 3).

⁴ It is not alleged that either this campaign or the employee meetings at which the disputed statements were made interfered with the election or violated Section 8(a)(1) of the Act.

⁵ The cutoff date for objections to consent elections is the date of execution of agreement. *Tennessee Packers, Inc.*, 123 NLRB 1755.

⁶ These meetings were pursuant to the Respondent's practice of holding such meetings at the beginning of each year to make a progress report and to answer questions of employees.

supply if we become unionized, due to the ever present possibility of a work stoppage due to strikes or walkouts.

The Trial Examiner found that in fact one customer, for whom the Respondent was the sole source of supply of a particular type of metal, had told the Respondent's vice president that if the plants became unionized it (the customer) would have to look for an alternative source of supply. However, the General Counsel contends, and we agree, that the above-quoted statements, although couched in the form of a prediction, contain a clear threat of loss of employment by the employees if they selected the Union.

The statements involved herein indicate that a loss of orders, and hence of jobs, would result merely by virtue of the employees' designation of the Union, and were accompanied by constant references to the probability of strikes if the Union won the election. Further, we find, contrary to the Trial Examiner, that the Respondent materially misrepresented the facts when it stated that "some of [its] customers" would seek other sources of supply, whereas only one customer had so informed the Respondent.⁷ It is also highly significant that the Respondent failed to name the customers involved or supply any other information.⁸ In addition, the statements were made by high-ranking supervisors to all the employees in the plant during the course of a strenuous preelection antiunion campaign, so that their effect was felt throughout the plant. Under these circumstances, we are convinced that the Respondent was making its constant references to the withdrawal of orders for the purpose of implanting in the employees a fear that a loss of jobs would inevitably follow a union victory. Accordingly, we find that these numerous statements were coercive⁹ and that the Respondent thereby violated Section 8(a)(1) of the Act. We further find that they substantially interfered with the employees' freedom of choice. Hence, we shall set aside the election held on February 17, 1961.¹⁰

⁷ We disagree with the Trial Examiner that the discrepancy between the fact and the misrepresentation was "a mere matter of degree, not of substance." While the possible loss of some orders from one customer might have slight impact on employees, the statement that a number of customers might cease doing business with the Respondent, even if only in part, certainly implies that there would be a far more substantial economic impact and a greater number of employees would be affected.

⁸ Cf. *Super Sagless Spring Corporation*, 125 NLRB 1214, 1226; *Neco Electrical Products Corporation*, 124 NLRB 481, 487; *The Zeller Corporation*, 115 NLRB 762.

⁹ *Nebraska Bag Company, et al., d/b/a Nebraska Bag Processing Company*, 122 NLRB 654; *Aeronca Manufacturing Corporation*, 118 NLRB 461, 463-465; *A. J. Showalter Company*, 64 NLRB 573, 579. The Trial Examiner is in error in his view that the decision in *Neco Electrical Products Corporation, supra*, overruled the *Nebraska Bag* and *Aeronca* decisions.

¹⁰ The coercive effect of the implicit warning that the employees might lose their jobs if the Union were selected was not neutralized by the subsequent statement at each meeting that the employees had the right to join or not to join a union as they wished and the Respondent had not, in the past, taken any reprisal against any employee because of his views. Cf. *A. J. Showalter Company, supra*, 579.

2. We find, in agreement with the Trial Examiner, that the Respondent, by the statements of Foremen Donson and Bentley to employee Durham on February 20 and April 3, 1961, respectively, threatening him with loss of promotional opportunities and economic benefits because he supported the Union, interfered with, restrained, and coerced Durham in the exercise of his rights guaranteed by Section 7 of the Act and thereby violated Section 8(a)(1) of the Act.

3. The amended complaint alleged that coercive statements were made by Respondent's agent, Art O. Simpson, "on or about February 20, 1961," and counsel for the General Counsel stated during the hearing that it was contended that the incident occurred during the week beginning February 20. The evidence reveals that Simpson made such statements to employee George Hayes but that the conversation took place early in March 1961.

We cannot agree with the Trial Examiner that this variance between the date as alleged and the date as established by the evidence is fatal to this portion of the amended complaint.¹¹ The Respondent was apprised of the issue¹² and had full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Hayes appeared as a witness for the General Counsel and was available for cross-examination by the Respondent. However, the Respondent limited its defense to the establishment of the date on which the statements were made. There is thus undenied testimony by Hayes¹³ which establishes that in early March 1961, Simpson told Hayes that Hayes had ruined his chance for promotion in the department because of his sympathies for the Union and that Simpson at that same time made other similar statements. These statements are clearly coercive and constitute interference with Hayes in the exercise of his right to join or refrain from joining a labor organization. Accordingly we find, contrary to the Trial Examiner, that the Respondent has violated Section 8(a)(1) of the Act by virtue of Simpson's conduct.

ORDER

Upon the entire record in these cases, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Haynes Stellite Company, Division of Union Carbide Corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

¹¹ Cf. *Atlanta Metallic Casket Company*, 91 NLRB 1225, 1230-1231.

¹² Prior to the hearing the General Counsel served upon the Respondent a notice of intention to move to amend the complaint in this respect.

¹³ Hayes' testimony was not discredited by the Trial Examiner.

(a) Threatening its employees with loss of jobs, promotional opportunities, or other economic benefits if they join, remain members of, support, or assist United Steelworkers of America, AFL-CIO, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form labor organizations, to join or assist United Steelworkers of America, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

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

(a) Post at its plants in Kokomo, Indiana, copies of the notice attached hereto marked "Appendix."¹⁴ Copies of such notice, to be furnished by the Regional Director for the Twenty-fifth Region, shall, after being duly signed by an authorized representative of the Respondent, be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for the Twenty-fifth Region, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the election held on February 17, 1961, in Case No. 25-RC-1966, be, and it hereby is, set aside, and that such proceeding be, and it hereby is, remanded to the Regional Director for the Twenty-fifth Region for the purpose of conducting a new election at such time as the Regional Director determines that the effects of Respondent's unfair labor practices and interference with the election have been remedied.

MEMBER LEEDOM dissenting in part:

Contrary to my colleagues, I would find that Respondent's statement concerning possible loss of orders did not either violate the Act or interfere with the election. This statement was not made in the

¹⁴In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

context of any contemporaneous interference with the employees' rights; it contained no threat that the employees would lose anything by reason of any action which Respondent might take. It merely informed the employees of what others might do if the employees selected the Union. The statement, thus, was no more than the type of prediction which the Board has held to be permissible under the Act.¹⁵ Nor is the statement any less permissible because the Respondent failed to name the customers involved or supply any other information; or because the statement may have permitted an erroneous inference,¹⁶ or was made by high-ranking supervisors to all employees in the plant. In my opinion, any one of these factors, or all of them together, cannot convert a lawful expression of facts, views, and opinion into an unlawful threat of reprisal.

I would, therefore, find, in agreement with the Trial Examiner, that the statement here in issue did not violate the Act and that the election should not be set aside. Otherwise, I agree with my colleagues' disposition of the issues in this case.

¹⁵ *Super Sagless Spring Corporation, supra*; *Neco Electrical Products Corporation, supra*, 482; *The Zeller Corporation, supra*. Compare *Nebraska Bag Processing Company, supra*, in which the statement was made in the context of other substantial interference, including a prior threat that the Respondent would change its method of operation; *A. J. Showalter Company, supra*, in which the statement was accompanied by a threat that the Respondent would close its operation. Cf. *Aeronca Manufacturing Corporation, supra*, in which I dissented.

¹⁶ As a reading of the text of the statement will disclose, there is no basis for a conclusion that Respondent indulged in the type of deliberate misrepresentation which the Board has held warrants setting aside an election.

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT threaten our employees with loss of jobs, loss of promotional opportunities, or loss of other economic benefits if they join, remain members of, support, or assist United Steelworkers of America, AFL-CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form unions, to join or assist United Steelworkers of America, AFL-CIO, or any other union, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bar-

gaining or other mutual aid or protection, or to refrain from any and all such activities.

HAYNES STELLITE COMPANY, DIVISION
 OF UNION CARBIDE CORPORATION,
Employer.

Dated _____ By _____
 (Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office (150 West Market Street, Indianapolis, Indiana; Telephone Number, Melrose 2-1551) if they have any question concerning this notice or compliance with its provisions.

CONSOLIDATED INTERMEDIATE REPORT

Pursuant to a stipulation for certification upon consent election in Case No. 25-RC-1966, an election by secret ballot was conducted on February 17, 1961, by the Regional Director,¹ among the employees of Haynes Stellite Company, Division of Union Carbide Corporation, Kokomo, Indiana, herein called the Respondent, in the stipulated unit. The tally of ballots showed that, of approximately 1,661 eligible voters, 1,092 had voted against, and 381 for, United Steelworkers of America, AFL-CIO, the Petitioner, herein called the Union, and that 49 ballots were challenged. The challenged ballots were insufficient in number to affect the outcome of the election. Thereafter the Union filed six specific objections to conduct affecting the results of the election. On March 31, 1961, the Regional Director issued his report on objections to conduct affecting results of election, in which he recommended that objections Nos. I through V be overruled and that objection No. VI be sustained. Thereafter the Respondent filed exceptions to the Regional Director's report, and a brief in support thereof.

Meanwhile, on February 24, 1961, the Union had filed charges against the Respondent in Case No. 25-CA-1353. On April 28, 1961, the General Counsel² issued a complaint alleging that the Respondent had violated Section 8(a)(1) of the National Labor Relations Act, as amended (61 Stat. 136), herein called the Act. The Respondent filed an answer denying the commission of any unfair labor practices. On May 5, 1961, the Regional Director issued a supplemental report on objections affecting results of election, recommending that Case No. 25-RC-1966 be remanded to him so that it could be consolidated for hearing with Case No. 25-CA-1353. No objections to the Regional Director's supplemental report having been filed, the Board, on June 2, 1961, remanded Case No. 25-RC-1966 to the Regional Director. Thereafter, on June 5, 1961, the Regional Director consolidated Case No. 25-RC-1966 with Case No. 25-CA-1353.³

Pursuant to notice, a consolidated hearing was held before Sydney S. Asher, Jr., the duly designated Trial Examiner, on June 13 and 14, 1961, at Kokomo, Indiana. All parties were represented and participated fully in the hearing. At the close of

¹ The term "Regional Director," as used herein, refers to the Director of the Twenty-fifth Region of the National Labor Relations Board.

² The term "General Counsel," as used herein, refers to the General Counsel of the National Labor Relations Board and his representative at the hearing

³ Meanwhile, on May 15, 1961, the Respondent had filed a demand for bill of particulars in Case No. 25-CA-1353. The General Counsel then filed a bill of particulars (in partial compliance with the Respondent's demand) and an opposition to the remainder of the Respondent's demand. On May 19, 1961, Trial Examiner George L. Powell denied the Respondent's demand for bill of particulars, insofar as it had not already been complied with by the General Counsel.

the General Counsel's case, the Respondent moved to dismiss the complaint for lack of proof; ruling thereon was reserved. This motion is now disposed of in accordance with the findings, conclusions, and recommendations contained herein. On July 31, 1961, the General Counsel and the Respondent filed briefs which have been duly considered.

Upon the entire record in these cases,⁴ and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent is, and at all material times has been, a New York corporation, with places of business at Kokomo, Indiana,⁵ where it is engaged in the manufacture and sale of nonferrous alloy products. During the 12 months prior to April 28, 1961, the Respondent shipped from its Kokomo plants to destinations outside the State of Indiana products valued at over \$50,000.

The Respondent's answer admits, the Board has found,⁶ and it is now found, that the Respondent is, and at all material times has been, engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act for the Board to assert jurisdiction over its operations.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent's answer admits, and I find, that United Steelworkers of America, AFL-CIO, is, and at all material times had been, a labor organization within the meaning of the Act.

III. THE SUBSTANTIVE ISSUES

Objection No. VI, the only objection to conduct affecting the election of February 17, 1961, litigated herein, alleges that the Respondent announced to its employees that the Respondent had been advised by its customers that these customers would go elsewhere and not deal with the Respondent if it became unionized. Paragraph numbered 5(a) of the complaint alleges that the Respondent threatened its employees with loss of employment should the Kokomo plants be unionized.

It is clear from the record that objection No. VI and paragraph numbered 5(a) parallel one another, both referring to the identical alleged conduct. However, the remaining allegations of the complaint relate to matters not covered by the objections. In view of the absence of complete identity of the issues raised by the foregoing objections and the complaint, such issues will be separately considered.

A. The objections to the election

1. Facts

So far as the record shows, the Respondent's Kokomo plants have never been organized. The Union made previous attempts to organize the Respondent's employees at Kokomo, without success.⁷ The Union's present campaign commenced in the spring of 1960. The Union distributed handbills and union buttons. The campaign culminated in the filing of the instant petition on January 10,⁸ the stipulation for certification upon consent election signed and approved on January 25, and the election held on February 17. Throughout this campaign the Respondent took the position that its Kokomo operations should remain nonunionized. By letters to its employees and notices posted on bulletin boards, or put in pay envelopes, it urged them to vote against union representation.⁹ The legality of statements contained in these communications is not challenged here.

⁴ The transcript was corrected in certain respects on October 5, 1961.

⁵ The Respondent maintains two operations in Kokomo. One, located on Lindsey Street, is referred to in the record as the Lindsey Street plant or the main plant. The other, located on West Deffenbough Road, is referred to in the record as the wrought alloy plant. Both plants are involved herein.

⁶ *Haynes Stellite Division, Union Carbide Corporation*, Case No 25-RC-1815, Decision and Order issued June 30, 1960 (not published in NLRB volumes).

⁷ See, for example, *Haynes Stellite Division, Union Carbide Corporation, supra*; Case No. 35-RC-1619; and Case No 13-RC-3451 (not published in NLRB volumes).

⁸ All dates hereafter refer to the year 1961, unless otherwise noted.

⁹ One such notice contained the following statement: "you now have your American right to vote exactly as you please . . . you are perfectly free to vote as you see fit"

At this time Caterpillar Tractor Company, herein called Caterpillar, was a substantial customer of the Respondent. With regard to a particular type of metal, the Respondent was then Caterpillar's sole source of supply. During the organizing campaign referred to above, but before preparation of the speeches described below, a representative of Caterpillar stated to C. G. Chisholm, the Respondent's vice president in charge of marketing, that if the Respondent's Kokomo plants became unionized, Caterpillar would have to look elsewhere for other sources of supply. This fact became known to Fred C. Kroft, the Respondent's works manager, and Glen H. Shelton, the Respondent's assistant works manager.¹⁰

It had been customary for the Respondent to hold meetings of its employees shortly after the start of the year to make a progress report and to answer their questions. On December 6, 1960, the Respondent notified its employees that such meetings would be held "after the first of the year." This was followed by a notice inviting employees to submit, anonymously, written questions which they desired to have answered at the meetings. Questions were submitted by employees in response to this invitation. A prepared speech was then drafted, and a schedule of meetings set up so that every employee in both plants would have an opportunity to attend. The meetings were held from January 31 to February 13 on company property during working time; attendance was optional. Kroft made 17 of the speeches and Shelton 16. Each meeting lasted 3 to 4 hours, and the groups addressed ranged in size from approximately 35 to about 90. The subjects covered included the Respondent's sales record, changes in capital investments, objectives, policies, personnel matters, future prospects, etc. A generally optimistic economic picture for 1961 was portrayed. The media used included graphs, charts, and slides. Opportunity was given to ask questions from the floor. The portion of the prepared text here in issue read as follows:

Several questions were received concerning the Steelworkers' Union and the Company. Let's consider these questions.

1. Is it true that our customers that are unionized buy similar products elsewhere simple [sic] because we do not belong to a union?
2. Comments are being made that Stellite doesn't get some business because we are not union. Is this true?

* * * * *

In answer to the question concerning the sale of our products and the Union, the answer is no, we are not losing business because we do not have a union.

Customers are buying products on the basis of prices, delivery, and dependability. The facts are that in some cases we are the sole source of supply at present for some of our customers. *We have been told that we would not continue to be the sole source of supply if we become unionized*, due to the ever present possibility of a work stoppage due to strikes or walkouts. [Emphasis supplied.]

* * * * *

The National Labor Relations Board Act gives *you* the right as an American citizen to join a union if *you wish*. The Act also gives you the right, as an American citizen, not to join if you don't wish to. There has never been any reprisal, coercion [sic], or intimidation by your Company against any employee because of his views.

Richard E. Durham, an employee and a witness for the General Counsel, testified that in a meeting held at the wrought alloy plant, beginning about 3 p.m. on January 31, Shelton stated that one of the Respondent's customers had informed it that if the Respondent became unionized the customer would have to look for an additional source of supply of a certain metal, because the customer could not take the chance of a strike at the Respondent's plant. On cross-examination Durham was read the text quoted above and admitted that, although he could not recall Shelton's exact words, it was "something similar to that."

Employee Rexford L. Ballard, a witness for the General Counsel, testified that he attended a meeting in the wrought alloy plant which began about 11 p.m. on

¹⁰ Neither Chisholm nor Caterpillar's representative testified. The finding of fact regarding this statement by Caterpillar's representative is based upon the undenied and credited testimony of Kroft and Shelton (neither of whom was present when the statement was made) with respect to what Chisholm told them concerning it. The General Counsel's brief properly refers to this as "hearsay." But as this testimony was received without objection, it must "be considered and given its natural probative effect." *Diaz v U.S.*, 223 U.S. 442, 450. See also Wigmore, Code of Evidence (3d Ed 1942) 25

February 1. He further testified that Shelton stated that a few of the Respondent's customers "were a little worried about . . . where their sources of supply would come from if we became unionized because they couldn't afford to take the chance of work stoppages."

Employee Ralph E. Prifogle, a witness for the General Counsel, testified that he attended a meeting held in the main plant, beginning at 3 p.m. on February 1. He further testified that Shelton stated that the Respondent has been informed by one of its customers, for whom it was the only source of supply, that if the Respondent became organized the customer would have to look for another company to purchase from to insure a firm delivery date, and that the Respondent might lose one customer if organized.

Shelton testified that, at all 16 meetings which he addressed, he read the quoted portion of the prepared speech word for word, because management felt the subject was "vitally important to all employees, and to make certain that the same text given to each and every employee." His testimony in this respect was reasonable and convincing, and is credited.¹¹

Employee William Tanner, a witness for the General Counsel, testified that he attended a meeting in the main plant which began between 3 and 4 p.m. on January 31. He further testified that Kroft stated that a certain customer had informed the Respondent that the customer would have to look elsewhere for its products because they could not depend on firm delivery dates in the event of a strike or slowdown at the Respondent's plant.

Four employees called as witnesses for the General Counsel described a meeting held in the main plant, which began about 8 a.m. on a date between January 31 and February 13, and was addressed by Kroft. Robert Atkinson testified that an employee who worked in the yard asked from the floor if the Respondent would lose any customers if the employees went into the Union, and that Kroft replied that the Respondent probably would lose a "couple" of customers if that happened. He further testified that Kroft did not otherwise mention the Union, except to say that there had never been a union in the plant. Homer O. Clark testified that Kroft said nothing about customers, but did say that if the Union "got into" the Respondent's plants, there would be no business because the employees "would be out on strike half the time and couldn't get the work out." Clark further testified that an employee from the yard asked Kroft a question from the floor. Glen M. Dukes testified that Kroft stated that the Respondent "might lose one customer if the Union got in because we might not get the goods out on time." Herman O. Bess testified that somebody asked Kroft if there would be more orders if the Respondent had a union and that Kroft responded no, there would not, adding that there were customers "who would quit using [the Respondent's] products if they had [a union] in there," or words "similar to that."

Kroft testified that, at all 17 meetings which he addressed, he read the quoted portion of the prepared text word for word, and added nothing, because "we felt that this particular part was most important, and because we wanted to give it exactly the same." He denied that, at any meeting he addressed, any employee had raised any question from the floor regarding this portion of the speech. Kroft's denial in this respect was in effect corroborated by the testimony of John Morris, industrial relations representative for the Respondent, who was present at the meeting attended by Atkinson, Clark, Dukes, and Bess. Kroft impressed me as a sincere and forthright witness, and I credit his testimony, as partially corroborated by that of Morris.¹²

All witnesses for both sides agreed, and I find that at no meeting was the name of the customer in question given or asked for, nor did the speaker comment about or refer to the possibility of any loss of employment.

¹¹ I am aware that in a prehearing affidavit Shelton stated: "I did not read this text word, but I did not depart from its meaning in any respect." I note, however, that this referred to the entire speech, not just the portion pertaining to the Union.

I do not consider that the testimony of the General Counsel's witnesses conflicts with that of Shelton, except Prifogle's testimony that Shelton said the Respondent might lose one customer if organized. I am convinced that Prifogle in this respect, was reciting his personal reaction or interpretation rather than the words actually used by Shelton.

¹² Even if Kroft had stated, in answer to a question from the floor, that the Respondent probably would lose a few customers if the Union came in, as testified by Atkinson, Dukes, and Bess, such a statement might well have been in addition to the prepared text on this subject.

2. Conclusions

The General Counsel maintains that the issue in connection with the Respondent's remarks is whether it was actually making a prediction (that customers would withdraw patronage) or using language couched in the form of a prediction to conceal coercion. He argues that the Respondent's coercive purpose is shown by "the falsification of the number of accounts involved," and further by the Respondent's failure to reveal to its employees the identity of the customer involved so that they "could make their own evaluation of the customer's statement," thus forcing them to accept the Respondent's statement "at face value."

Let us turn first to the question of the truth of the Respondent's statements. The General Counsel contends that the quoted statement in the text was "false" because it "clearly connotes more than a single customer was involved." It is true that such an interpretation of the remarks is not unreasonable. However, whether one or more than one customer was involved is a mere matter of degree, not a difference in substance.¹³ In either event, the amount of available work would be reduced. Moreover, the remarks were susceptible of an interpretation contrary to that contended for by the General Counsel—namely, that the possibility of loss of orders was limited to a single customer. Indeed, the General Counsel's witnesses Durham, Prifogle, Tanner, and Dukes so understood them. While the Respondent's message was phrased in such a way that it might possibly have amounted to some slight "puffing," I find that it was neither deliberately false nor materially misleading. On the contrary, I conclude that it substantially correctly and accurately reported to the employees the gist of what Caterpillar's representative had, in fact, told Chisholm.

We come then to the General Counsel's argument that, by failing to reveal to the employees the name of the customer involved, the Respondent compelled its employees to accept its story at face value and prevented them from making their own independent evaluation (presumably on such matters as the importance of the customer's purchases in relation to the entire sales picture, and the propensity of the customer for making idle threats, or lack thereof). To support his position in this regard, the General Counsel cited the *Aeronca* and *Nebraska Bag* cases.¹⁴ In *Aeronca*, a representation case, the Employer's business consisted primarily of manufacturing parts for Boeing Aircraft Company. During the preelection period, representatives of the Employer repeatedly stated to employees that a union victory would result in Boeing and other customers withdrawing orders, which would cause a loss of production and jobs. The Board majority noted that

the Employer at no time informed its employees of any statements or communications from Boeing or other customers on which its warnings of withdrawal of orders were based, so that, as far as the employees were concerned, the references to the loss of jobs following a Petitioner victory emanated from the Employer . . . which the employees had to accept at face value.¹⁵

The Board majority therefore found that the statements contained threats to the employees and were coercive; the election was accordingly set aside. In *Nebraska Bag*, a combined complaint and representation case, the Board found that the Respondent violated Section 8(a)(1) of the Act in numerous respects and set the election aside. Among the conduct relied upon was the statement of a supervisor to employees that if the union came in the employers would "go wholesale" and lose the business of a large customer, and the statement of a company official to an employee that a representative of an important customer was in the plant and the employers would probably lose its contract if the union won the election. It should be noted that the Trial Examiner therein referred to "a planned and deliberate course of action by employers to discourage" employees from supporting the union,¹⁶ and that the Board found that the respondent had discharged five employees for union activity.

The Respondent cites *Neco Electric Products Corporation*, 124 NLRB 481, a complaint case. There a supervisor, in response to a question by an employee

¹³ Compare the General Counsel's statement in his brief that "whether the remarks were directed to customers withdrawing their business altogether and seeking a second source of supply . . . amounts to little more than a matter of degree. In either event the amount of available work would be reduced."

¹⁴ *Aeronca Manufacturing Corporation*, 118 NLRB 461, and *Nebraska Bag Processing Company*, 122 NLRB 654, petition for enforcement withdrawn 268 F.2d 214 (C.A. 8).

¹⁵ *Aeronca Manufacturing Company*, *supra*, 464

¹⁶ *Nebraska Bag Company*, *supra*, 672.

during an election campaign, stated that the respondent might lose two of its biggest customers (which he named) if the union came in, that these two customers would not do business with a union company for fear of a shortage of products due to a strike, and that if the respondent lost these two big orders there might possibly be a cutback in operations to 3 or 4 days a week. This took place in the context of other conduct by the respondent violative of Section 8(a)(1) of the Act. The Trial Examiner found the supervisor's statement described above coercive. The Board reversed him on this point, saying:

We find that these statements are no more than predictions of possible future actions of third parties, should the Union win the election. As the statements contained no threats that the Respondent would take any steps to induce the happening of the future events, we find that they were privileged under Section 8(c) of the Act and therefore do not constitute violations of Section 8(a)(1).¹⁷

Neither the Trial Examiner nor the Board mentioned the *Aeronca* or *Nebraska Bag* cases.

As I read *Neco*, the Board's underlying rationale there seems to conflict with that of the Board majority in *Aeronca* and that of the Board in *Nebraska Bag*. In my opinion *Neco*, the more recent case, therefore overruled the principle enunciated in *Aeronca* and *Nebraska Bag sub silentio*. Accordingly, I deem myself bound by *Neco* and find that the quoted part of the speeches of Shelton and Kroft to the assembled employees was merely a prediction of possible future actions by third parties should the Union win the election. As they contained no threat that the Respondent would take any steps to induce the happening of these predicted future events, I consider them as falling within the protection of Section 8(c) of the Act. It follows and I find, that the objections lack merit, and that the General Counsel has failed to prove the allegations of paragraph numbered 5(a) of the complaint.

It may be, however, that I am mistaken in my view that *Neco* overruled *Aeronca* and *Nebraska Bag*. It may be that all three cases are still good law and can be reconciled. If this be so, then it is highly significant that in none of the three does it appear that the employer referred to or disclosed any communication he had received from customers. Moreover, in *Aeronca* and *Neco* there was mention of the possibility of the curtailment of employment. Here, on the contrary, the Respondent truthfully advised the employees of the receipt of a communication from the customer, and made no prediction that loss of work might result. Here, also, the statement about customers was made in the very same speech which contained a virtual assurance that no employee would be discriminated against because of his pronoun sympathies. In view of these differences, it seems to me that the instant case is a stronger case for dismissal than any of the three cited cases. Accordingly, even if *Neco* did not overrule *Aeronca* and *Nebraska Bag*, I would nevertheless find the statements herein not coercive, and the objection based thereon groundless.¹⁸

B. The unfair labor practices

1. The Zirkle incident

Paragraph numbered 5(b) of the complaint, as amended at the hearing, alleges that in October 1960 the Respondent, through its agents L. E. Denny and A. G. Schwenger, promised an employee promotions and economic benefits if he refrained from membership in or support of the Union, and threatened loss of promotional opportunities and economic benefits if he became or remained a union member or assisted the Union. The answer admits that Denny and Schwenger were supervisors of the Respondent at all material times, but denies that they engaged in the conduct alleged. The General Counsel does not contend that any employee was denied any promotion to any job he otherwise would have merited, because of his union activities.

Donald L. Zirkle, an employee of the Respondent, had long been an active adherent and proponent of the Union, and this was known to the Respondent.

In October 1960 there was a temporary vacancy in the annealing department at the wrought alloy plant for group leader, a supervisory job outside the appropriate unit. Employee George Hayes was chosen to fill this temporary vacancy. Zirkle, who worked in that department at the time, felt he had been unjustly passed over,

¹⁷ *Neco Electrical Products Corporation, supra*

¹⁸ Compare *The Zeller Corporation*, 115 NLRB 762, 766-767. See also *Ken-Lee, Inc.*, Case No. 10-RC-4578, Supplemental Decision and Order Directing Hearing, issued January 6, 1961 (not published in NLRB volumes).

and decided to apply for transfer out of the department. Between 8 and 10 a.m., on October 28, 1960, he went to the office of A. G. Schwenger, the Respondent's industrial relations representative in the wrought alloy plant. Zirkle told Schwenger he felt he had no chance for promotion in the annealing department and wanted to transfer to a different department. He related to Schwenger some experiences he had had the previous year.¹⁹ At Schwenger's suggestion, Zirkle then filed a formal transfer request. Schwenger also suggested that Zirkle talk to Lewis E. Denny, the Respondent's manager of industrial relations, and Schwenger's immediate superior. Accordingly, that afternoon Zirkle, Denny, and Schwenger met in Schwenger's office. There is a conflict as to what occurred at this meeting.

Zirkle testified that he stated that he had been "by-passed" for the temporary group leader's job and wanted to transfer out of the annealing department; he again explained what had happened the previous year. Zirkle further testified that, during the conversation, Schwenger said that if Zirkle could prove to them that he did not need the Union, he "would more than likely be reconsidered . . . for the promotion to group leader." On cross-examination he testified that neither Denny nor Schwenger made any threats or promises to him.

Denny testified that Zirkle said that somebody else had been appointed temporary group leader in the annealing department, and that he would have liked to have had an opportunity to prove himself on that job. He discussed what had occurred to him in 1959. Denny replied that among the various factors considered in making such a promotion was the candidate's "ability to interpret company policy and transmit it to the employees." Zirkle responded that there was nothing wrong with the Respondent's policies but he felt that the employees needed a union to represent them. The conversation then turned to Zirkle's employment record before he came to work for the Respondent. Denny denied that either he or Schwenger stated that if Zirkle demonstrated that he did not need a union he would get a chance at a group leader's job. Denny further testified that neither he nor Schwenger responded to Zirkle's statement that he thought the Respondent's plants should be organized, and that he (Denny) was "being consciously careful not to make any false steps about unions" in this conference because he knew of Zirkle's active interest in the Union. Finally Denny testified that, in the normal course of events, a transfer from one department to another does not require his approval. Schwenger's testimony regarding this incident substantially corroborated that of Denny. Schwenger further testified that promotions to group leader are passed upon by the foremen, general foremen, and either the assistant superintendent or the superintendent, but not by anyone in industrial relations.

In determining what actually occurred at the afternoon meeting of October 28, 1960, attended by Zirkle, Denny, and Schwenger, it is possible that Zirkle's testimony was colored, consciously or unconsciously, by chagrin and disappointment arising from his apparent conviction that he had been shabbily treated by the Respondent because of his prouinion sympathies.²⁰ Be that as it may, from my observation of the witnesses' demeanor while testifying, I credit the version of Denny and Schwenger as more accurate than that of Zirkle. Accordingly I find that neither Denny nor Schwenger made the statement attributed to Schwenger by Zirkle. It follows, and I find, that the General Counsel has failed to establish by a fair preponderance of the evidence the allegations of paragraph numbered 5(b) of the complaint.

¹⁹ Merely as background, and not as proof of unfair labor practices, the General Counsel elicited from Zirkle the following undented testimony regarding events which occurred more than 6 months before the service of the instant charge. In 1959, Zirkle had been passed over for a temporary opening in the group leader's job in the annealing department. He conferred with Foster S. Bentley, superintendent of the rolling department, and asked why he had not been selected. Bentley replied that Zirkle was disloyal. When Zirkle asked: "Do you mean union activities?", Bentley answered, "Yes." Zirkle then went to Charles Hollingsworth, then industrial relations representative at the wrought alloy plant, who also stated that the Respondent could not consider Zirkle for a group leader's job because of his interest in the Union. Next Zirkle conferred with Ed Nicklaus, superintendent of the wrought alloy plant. Nicklaus "backed up" the statements of Bentley and Hollingsworth. Finally, Zirkle met with Nicklaus, Bentley, and his own foreman. In this meeting Zirkle was again told that he had not been "considered for a group leader's job because of the disloyal charges they had" against him. Thereafter Zirkle went to the Board's Regional Office but never filed any unfair labor practice charges against the Respondent.

²⁰ Whether the discrimination he believed had been practiced against him was real or fancied is not here in issue.

2. The Hayes incident

Paragraph numbered 5(c) of the complaint, added at the hearing, in part alleges that during the week of February 20 the Respondent, through its agent, Art O. Simpson, threatened employees with loss of promotional opportunities and economic benefits if they became or remained union members or assisted the Union. In response to the Respondent's demand for more specificity the General Counsel stated orally on the record that this alleged conduct occurred about 10 a.m., during the week beginning February 20. The Respondent orally admitted on the record that Simpson, foreman in its annealing department, was a supervisor and its agent, but denied the commission of the unfair labor practices alleged.

George Hayes, an employee in the annealing department, had in October 1960 temporarily replaced the group leader, as related above. Prior to the election of February 17 he openly wore a union button on three occasions.

As part of the General Counsel's case-in-chief, Hayes testified that Simpson approached him at work at approximately 10 a.m. during the week of February 20, and said: "George, you kind of ruined your chances of being promoted in this department²¹ . . . because of your sympathies for the Union," and that when Hayes pointed out: "Well, Art, you don't know how I voted," Simpson replied that "they" felt that Hayes was pronoun. Hayes further testified that Simpson, in this conversation, "indicated that if I would show more loyalty to the Company within a period of 1 to 2 years, I would once again be considered for any future promotions that might be available." By way of defense, the Respondent introduced a stipulation that the Respondent's official records "show that in this period the last day Hayes worked was February 16 and the date of his return to work was March 1st." On rebuttal, the General Counsel recalled Hayes to the stand. He then testified that he had been ill between February 16 and March 1, and that the conversation he had related on the General Counsel's case-in-chief occurred within 30 days after February 17.

The Respondent does not contend, nor do I believe, that Hayes intentionally gave false testimony during his first appearance on the witness stand. His mistake in dates may well have been innocent. But the fact remains that the Respondent proved conclusively that the conversation he described could not have occurred during the week specified in the amended complaint, as orally enlarged and explained by the General Counsel at the beginning of the hearing. If, as Hayes later testified on rebuttal and as the General Counsel maintains, the conversation took place some weeks thereafter, the Respondent was not obliged to meet this new evidence by producing Simpson, for the incident would then fall outside the period set forth in the amended complaint, and the General Counsel made no effort to amend it further. In this posture of the case, I conclude that the General Counsel has failed to prove by a fair preponderance of the evidence that portion of paragraph numbered 5(c) of the amended complaint which refers to Simpson.

3. The Durham incidents

The remainder of paragraph numbered 5(c) of the amended complaint alleges that the Respondent "threatened employees with loss of promotional opportunities and economic benefits if they became or remained union members" or assisted the Union. This was alleged to have occurred through its agent, Tom H. Donson, during the week of February 20, and through its agent, Foster S. Bentley, during the week of April 3. The Respondent orally admitted on the record that Donson, foreman of its forge shop department, and Bentley, general foreman of its forge, hot rolling, cold rolling, and annealing departments, were its agents and supervisors, but denied the alleged conduct.

Employee Richard E. Durham, a manipulator operator in the forging department, participated in the Union's campaign and openly wore a union button. He acted as an observer for the Union at the election of February 17, and for this reason had been absent from work on Thursday, February 16, and Friday, February 17. He had been requested to come in to work on Saturday, February 18, but had not done so because he was sick. He neglected to call in to the plant to report his illness.

When Durham reported for work at 3 p.m. the following Monday, February 20, he was summoned to Donson's office where he conferred with Donson in the presence of two forgers, Kieth Martin and Milford Groce.²² Donson first stated that he was

²¹ The only job higher in classification than Hayes' was group leader

²² The Respondent conceded at the hearing that, in February, Martin and Groce were supervisors. Martin left before the end of the conference

sorry, but that he would have to "write Durham up."²³ Durham replied that he expected to receive some disciplinary action for his failure to call in on Saturday. Donson then said that he was surprised that Durham had taken off Thursday and Friday, and that he had not realized that Durham felt so strongly toward the Union that he "would lose work over it." He asked what Durham thought he gained by the Union and if he had not been treated fairly in the forging department? Durham replied that he had been treated fairly in that department, but there were some other departments of the Respondent he would not care to be in. Donson asked why the employees in the forging department felt so strongly toward the Union, remarking that it would help him if he could "straighten out the men" because it "reflected" on him. Donson further stated that Durham was not too far from a higher-rated job, and that if one became available, Durham probably would not be considered for it because of his strong prouunion sympathies.

On April 3, shortly after 3 p.m., Durham and Groce went to Donson's office to discuss the rotation of men on a certain operation. Donson and Bentley were there. After settling the problem under discussion, Groce remarked that he could not understand Durham's attitude, and that Durham "wasn't too far down the line from a press operator job." Bentley then stated, "That depends on how you look at it" and that with Durham's attitude toward management he "wouldn't be available for the job." When Durham asked what he meant, Bentley explained that the Respondent was considering placing the press operator's job in the group leader category, and if that occurred, Durham "wouldn't be eligible for the job since [he] was favorable of the Union." In response to further inquiry by Durham, Bentley inquired: "Suppose that [you] had a business of [your] own, would [you] hire someone who was against the way the company manages their personnel?" When Durham answered: "Well, no," Bentley stated: "That should answer your question."²⁴

From the foregoing, it is concluded that on February 20 the Respondent, through its agent, Donson, made it clear to Durham that the Respondent would not consider him for promotion to a higher-rated nonsupervisory job because he favored the Union so strongly. Again on April 3—some weeks later—the Respondent, this time through its agent, Bentley, advised Durham that he was not deemed "eligible" for press operator (then a rank-and-file job) for the same reason. It is clear, and I find, that both these statements threatened Durham with loss of promotional opportunities and economic benefits because he had supported the Union, as alleged in paragraph numbered 5(c) of the amended complaint. These threats therefore constituted interference with, restraint, and coercion of Durham in his exercise of protected concerted activities, in violation of Section 8(a)(1) of the Act.²⁵

IV. THE REMEDY

It has been found that the Respondent threatened Durham with loss of promotional opportunities and economic benefits if he became or remained a union member or assisted the Union. The Respondent, pointing to the size of its employee complement,²⁶ contends in its brief that this constitutes "at most an extremely isolated instance insufficient to support an unfair labor practice charge." I cannot agree. There were two separate illegal threats made to Durham, several weeks apart. Moreover, the persons who made the threats were no more minor supervisors, but the foreman of an entire department and his superior, the general foreman of several departments. I therefore conclude that the matter is serious enough to warrant the issuance of a remedial order, although in my opinion the order should be narrow in scope.²⁷

Upon the basis of the foregoing findings of fact, and upon the entire record in these cases, I make the following:

²³ There is no contention herein that this reprimand was discriminatory.

²⁴ The findings of fact regarding the Durham incidents of February 20 and April 3 are based upon the undenied and credited testimony of Durham, Donson, Bentley, Martin, and Groce did not testify, and the Respondent offered no explanation for not calling any of them as witnesses.

²⁵ The charges herein were filed February 24, prior to the incident of April 3 related above. But the fact that the incident took place after the filing of the charges does not prevent the basing of a finding of violation thereon. *N.L.R.B. v. Fant Milling Company*, 360 U.S. 301.

²⁶ The tally of ballots shows approximately 1,661 eligible voters. The Board found on June 30, 1960: "The Wrought Alloy Plant has approximately 435 employees and the Main Plant has approximately 1250 employees"—a total of about 1,685. See *Haynes Stellite Division, Union Carbide Corporation*, Case No. 25-RC-1815, *supra*.

²⁷ *Neco Electrical Products Corporation, supra*, 482-483.

CONCLUSIONS OF LAW

1. Haynes Stellite Company, Division of Union Carbide Corporation, is, and at all material times had been, an employer within the meaning of Section 2(2) of the Act.

2. United Steelworkers of America, AFL-CIO, is, and at all material times has been, a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening its employee, Richard E. Durham, with loss of promotional opportunities and economic benefits because he engaged in protected concerted activities, thereby interfering with, restraining, and coercing him in the exercise of rights protected by Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The above-described unfair labor practices tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce, and constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The General Counsel has failed to sustain the allegations of paragraphs numbered 5(a) and 5(b) of the complaint, and that portion of paragraph numbered 5(c) of the complaint which refers to Art O. Simpson.

6. The record herein does not establish that the Respondent interfered with the freedom of choice of its employees in the election of February 17, 1961.

[Recommendations omitted from publication.]

United Plant Guard Workers of America and Houston Armored Car Company, Inc. *Case No. 23-CC-82. March 5, 1962*

DECISION AND ORDER

On June 29, 1961, Trial Examiner Reeves R. Hilton issued his Intermediate Report in the above-entitled proceeding, finding that Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Rodgers, Fanning, and Brown].

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and the brief, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the modifications noted below.¹

The Trial Examiner found that the picketing engaged in by the striking employees of the Houston Armored Car Company violated Section 8(b)(4)(i) and (ii)(B) of the Act. He also found that the handbilling engaged in by Respondent was violative of Section

¹ The Respondent's request for oral argument is denied, as the record, including the exceptions and brief, adequately present the issues and the positions of the parties.