

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

M & M RESTAURANT SUPPLY

and

Cases 9-CA-34651-1
9-CA-34808-1, -2, -3
9-CA-34947
9-RC-16851

GENERAL TEAMSTER, SALES & SERVICE
AND INDUSTRIAL UNION, LOCAL NO. 654,
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO

Eric J. Gill, Esq.,
for the General Counsel.
Martin R. Lentz, Esq., (Pelino & Lentz, P.C.),
of Philadelphia, Pennsylvania, for Respondent.
Mr. Roy Atha,
for the Union.

DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Dayton, Ohio, on October 7 and 8, 1997. The charge in case 9-CA-34651 was filed February 19, 1997, the amended charge in case 9-CA-34651-1 was filed April 9, 1997 and the complaint was issued April 14, 1997. The charge in case 9-CA-34808-2 was filed April 15, 1997, the charge in case 9-CA-34808-3 was filed May 8, 1997, the charge in case 9-CA-34974 was filed June 2, 1997; the amended charge in case 9-CA-34808-1 was filed July 30, 1997, the amended charge in case 9-CA-34974 was August 5, 1997; a consolidated, amended, complaint (the complaint) was issued August 5, 1997. The report on objections to election in case 9-RC-16851 was issued August 6, 1997. The complaint alleges that M & M Restaurant Supply (Respondent) violated Section 8(a)(1) of the Act by interrogating employees concerning their union activities and sympathies, impliedly threatening employees with discharge because of their union activity, removing union literature from a bulletin board, impliedly promising employees a benefit in order to discourage employees' union activities, and revising the schedule of employees in the warehouse in order to persuade the drivers to vote against the General Teamsters, Sales & Service and Industrial Union, Local No. 654, affiliated with the International Brotherhood of Teamsters, AFL-CIO (the Union). The complaint also alleges that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally instituting a new scheduling format, implementing a revised pick-load system, and revising the freezer premiums for warehouse employees.

Respondent filed a timely answer which admitted the allegations of the complaint concerning the filing and service of the charges, jurisdiction, labor organization status, the appropriateness of a warehouse unit of employees, and the Union's 9(a) status concerning that unit; it denied the substantive allegations of the complaint. At the hearing, the parties admitted

that the individuals described in paragraph 4 of the complaint, with the titles described in Respondent's answer to that paragraph, with the addition of Douglas York, coordinator, are all supervisors within the meaning of Section 2(11) of the Act and agents of Respondent with the meaning of Section 2(13) of the Act.

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On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

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I. Jurisdiction

Respondent, a corporation, is engaged in the wholesale warehousing and distribution of food and related items at its facility in Springfield, Ohio, where it annually purchases and receives goods valued in excess of \$50,000 directly from points located outside the State of Ohio. Respondent 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 and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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II. Alleged Unfair Labor Practices

A. Background

Respondent warehouses and distributes some 600 food and related products to approximately 374 McDonald's restaurants in the Southern Ohio, Northern Kentucky, Indiana, and West Virginia area. It employs approximately 140 employees there in the classifications of warehousemen, driver, maintenance, and office workers. On December 27, 1996, after a Board-conducted election, the Union was certified as the collective-bargaining representative for a unit of warehouse employees. Respondent thereafter recognized the Union and bargaining for a collective-bargaining agreement commenced. Respondent and the Union also stipulated to an election among the employees in a drivers unit. That election was conducted by mail ballot during the period from March 24, 1997 through April 8, 1997.² The Union lost the election by a vote of 11 to 37, with 2 challenged ballots. The Union thereafter filed timely objections to the election, which were then consolidated with the unfair labor practice proceeding.

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B. *The 8(a)(1) Allegations*

The complaint alleges that Respondent unlawfully interrogated employees concerning their union activities and sympathies. In early 1997, Randy Hile was employed by Respondent as a truckdriver. During this period of time the organizing campaign among the drivers was underway and there was daily discussion among employees and with Respondents' supervisory personnel on this subject. Hile did not wear any union buttons or insignia or otherwise visibly indicate his support or lack of support for the Union. In February, John Foster, distribution coordinator, delivery, and an admitted supervisor and agent of Respondent, told Hile that he thought union was not a good idea and he related his past experiences with unions. He asked Hile on an almost daily basis during that period what Hile's viewpoint was concerning the Union.

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¹ Respondent's unopposed motion to correct errata in the transcript is granted; that motion is received in evidence as ALJ Exh. 1.

² All dates are in 1997 unless otherwise indicated.

Hile responded that he was undecided. These conversations occurred in the employees' breakroom. During this same period of time Richard DeLay, transportation manager, and Jerold Richards, distribution manager, delivery, also asked Hile his viewpoint concerning the Union. Hile also told them that he was undecided. They asked Hile how the other drivers felt about the Union, and Hile answered that he did not know. At some point Hile told DeLay that if things did not change, DeLay would have a union to deal with.³

In resolving this allegation, I consider the totality of relevant circumstances to determine whether the interrogations were unlawful. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); *Rossmore House*, 269 NLRB 1176 (1984). I note that these conversations occurred on the work floor as opposed to a location more obviously coercive such as a supervisor's office. I also note that these interrogations were part of lawful, ongoing, discussions among employees and supervisors concerning the merits of unionization. On the other hand, Hile had not taken an open position concerning the Union, and the evidence does not show that he initiated the discussions about the Union. The evidence establishes that three different supervisors participated in the interrogations, thereby demonstrating to Hile the importance Respondent must place on the questioning. Those supervisors included Richards, one of the higher level supervisors at the facility. Finally, and perhaps most importantly, was the repetitive nature of the interrogations despite Hile's continuous noncommittal responses. Under all the circumstances, I conclude that these interrogations reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights and thereby violated Section 8(a)(1) of the Act.

Employee Downey also gave testimony concerning an alleged interrogation by Foster that occurred sometime before Christmas, 1996. The parties agree that Respondent and the Regional Director had an agreement that resolved all unfair labor practice allegations that occurred before December 23, 1996. Because the General Counsel was unable to establish that this matter occurred after the critical date, I granted Respondent's motion to strike this testimony. The General Counsel does not press this matter further in his brief.

The complaint alleges that Respondent unlawfully removed union literature from a bulletin board. On March 23, David Gheen, distribution coordinator, delivery, and an admitted supervisor and agent, removed a piece of union literature from a bulletin board. The Respondent maintains two bulletin boards which are located in the corridor that leads to the employee breakroom. These bulletin boards are separated by a timeclock. Respondent

³ These facts are based on the testimony of Hile. I recognize that Hile was no longer employed by Respondent at the time of the hearing and that he was discharged due to an allegation of narcotics use. I also note that Hile was somewhat vague concerning precisely when these events happened. However, my questioning of Hile as well as my observation of his demeanor as a witness convinces me that his testimony concerning the content of these conversations is worthy of belief. Respondent's witness Foster admitted that he told Hile that he felt Respondent did not need a union and that he related to Hile a prior experience he had with a union, but he denied interrogating Hile concerning his union sentiments. However, the denials were unconvincing. Likewise, I do not credit the testimony of DeLay. His testimony at times was evasive and, considering demeanor, it was not persuasive. Richards' testimony was still less convincing. He testified that he approached Hile on one occasion during the union campaign to see how things had gone on Hile's route, and Hile brought up the subject of the Union and Hile volunteered how the Union would not be able to help solve certain problems that Hile had just experienced at work, but that he never brought up the subject of the Union with Hile.

maintains these bulletin boards exclusively for its use; information such as employee work schedules, new bidding opportunities, and notices of “clean” stock deliveries is posted by the supervisory personnel. Safety information such as tornado alerts and fire drills is likewise posted by supervisory personnel. An employee in the human resources also posts monthly notices of employee birthdays on these bulletin boards. However, employees are not allowed to post matters of personal concern without permission, and there is no evidence that permission was requested to post the union literature or that Respondent has permitted employees to post matters of personal concern on these bulletin boards. Respondent also maintains another bulletin board inside the breakroom where employees are permitted to post matters of personal concern such as sympathy cards.⁴

The General Counsel argues that Respondent’s conduct in removing union literature from the bulletin board violates the Act. However, it is clear that there is no Section 7 right for employees to use an employer’s bulletin board. It is only where an employer permits employees to post matters of personal concern on its bulletin boards that it is prohibited from discriminating against the posting of union literature. *Eaton Technologies*, 322 NLRB 848, 853 (1997). Here, the General Counsel has failed to establish that Respondent permitted the bulletin boards at issue to be used by employees for posting of matters of personal concern. To the contrary, the evidence shows that those bulletin boards were used exclusively by Respondent for its own purposes. *Fairfax Health System*, 310 NLRB 299 (1993), cited by the General Counsel, only serves to highlight the insufficiency of the evidence in this case to establish a violation. I conclude that this allegation of the complaint should be dismissed.

The complaint alleges that Respondent unlawfully threatened an employee with job loss because of the employee’s support for the Union. In early 1997, Stanley Muse was employed by Respondent as a truckdriver; he has been employed by Respondent for approximately 9 years. By way of important background in understanding the facts involved in this allegation, after the election among the warehouse employees in December, 1996, approximately three supervisory coordinators were released by Respondent. Muse signed a union authorization card, wore a union button on his jacket, and two union buttons on his hat while at work and Richards and DeLay noticed Muse’s open support for the Union. He was also an observer for the Union at the ballot count after the election. In February, Muse told Matthew Edwards, distribution coordinator, delivery, and an admitted supervisor and agent for Respondent, that Edwards would also lose his job also if the Union succeeded in organizing the drivers. Edwards reported this conversation to his superiors⁵ Respondent thereafter filed a charge with the Board concerning this matter.

On April 12, shortly after the results of the election among the drivers was announced, Muse had another conversation with Edwards. This conversation occurred in the coordinators area at the facility just as Muse had come in from a delivery. Edwards said “here comes the big union organizer.” Edwards proceeded to give the exact tally of the vote and said that he hoped Muse could drive a truck better than he could organize unions, and that Muse could not

⁴ These facts are based on the undisputed testimony of General Counsel’s witness Jerry Moore, who has been employed by Respondent for 15 years. I conclude his testimony in this regard is fully credible.

⁵ The facts in the preceding sentences are based on the testimony of Edwards. Although Edwards’ testimony was at times hesitant, I conclude that his testimony, especially in response to questions I asked, was truthful. Also, his testimony was consistent with the inherent probabilities based on the record as a whole. I do not credit Muse’s unconvincing denial that he made these remarks.

“organize his way out of a wet paper bag.” Edwards then asked if Muse remembered when Muse had told him that his job was in jeopardy. Muse got angry and got in Edwards’ face, asking if Edwards was threatening him. Edwards responded that Muse had threatened him.⁶

5 It is clear that threats of discharge or other reprisals because of union activity are
unlawful. *Carry Companies of Illinois*, 311 NLRB 1058 (1993). In this case I have concluded
above that shortly after the election results were announced, Edwards made disparaging
remarks about Muse’s support for the Union and then reminded Muse of Muse’s earlier remarks
10 about Edward’s job being in jeopardy if the Union won the election. Edwards’ remarks were a
not to subtle threat to Muse that Muse’s job was now in jeopardy because of his open support
of the Union and since the Union had lost the election. Although it is understandable that
Edwards might be angered by Muse’s apparently unprovoked and certainly arrogant remark
concerning Edwards’ job security, that fact does not legally serve to justify Edwards’ conduct.
15 Muse is not a supervisor of Respondent or an agent of the Union capable of effectively fulfilling
such a “threat.” Also, Edwards’ response was not directed to Muse’s remark, but instead was
directed at Muse’s union activity. The cases cited by Respondent are not dispositive of this
issue. In *The Scott & Fetzer Co.*, 249 NLRB 396 (1980), reversed on other grounds, 691 F.2d
20 288 (6th Cir. 1982), the Board did not rely on the judge’s alternate finding that the interrogation
was not coercive; instead, it relied only on the judge’s primary finding refusing to credit the
testimony concerning the alleged interrogation. *Id.*, at fn. 2. Likewise, in *Keister Coal Co.*, 247
NLRB 375 (1980), the Board did not directly pass on the judge’s dismissal of certain allegations
since no exceptions were filed to those findings. *Id.*, at fn. 2. The Act permits Muse to support
the Union without a threat of discharge, even if made in understandable anger, hanging over
his job. I therefore conclude that Respondent violated Section 8(a)(1) of the Act by threatening
25 Muse with discharge because he had supported the Union.

The complaint alleges that Respondent interrogated an employee concerning his union
activities and whether he had filed a charge with the Board, and impliedly promised that
employee a benefit in order to discourage union activity. Roger Downey is employed as a
30 driver for Respondent; he has been employed by Respondent since December 1994. At some
unspecified time before May 1, Downey filed two or three charges with the Board. On about
May 1, Downey received a telephone call at home from Richards. Richards asked why Downey
had filed a charge. Downey pretended not to know what Richards was talking about. Richards
commented that he wanted to be able to trust his drivers, and asked if the Union was doing
35 something by filing a charge that Downey knew nothing about. Downey volunteered to call a
Board agent and Union Representative Roy Atha to see what was happening, but Richards
pleaded with him not to do so; Richards explained that if Downey contacted the Board or the
Union, another charge would be filed against him. Downey then volunteered to call his own
attorney, but Richards asked that he not do that either. During the course of this conversation,
40 which lasted about one-half hour, Richards said that Respondent was considering hiring an
outside source to do mediation work concerning disputes between the drivers and Respondent.
Richards explained that this would be similar to how a “mediator” resolves differences between
a union and an employer. These statements were made in a context where Richards was
attempting to show how Respondent was trying to do things that would please the drivers so
45 that they would not feel the need to have a union represent them. During this conversation
Downey and Richards also discussed other disputes that Downey had with Respondent,
including his allegation that he had been improperly denied a wage increase.⁷

⁶ The facts concerning this conversation are based on a composite of the testimony of Muse and Edwards; their testimony concerning this incident is not in conflict in any fundamental way.

⁷ These facts are based on the testimony of Downey. Although he was a combative witness

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5 The Board has held that interrogations of employees concerning their cooperation with
the Board's processes may violate the Act. *Bradford Coca-Cola Co.*, 307 NLRB 647, fn. 2
(1992). Examining the specific circumstances surrounding Richards' questioning of Downey
concerning why he had filed a charge with the Board, I note that Richards called Downey at his
home. This certainly tended to give a sense of urgency to the subject matter. Richards also
raised the matter of being able to trust employees, thereby implying that Respondent felt that
filing charges with the Board may be inconsistent with that value. I also note that Downey was
hesitant to quickly admit that he had in fact filed a charge. Also during the conversation
10 Richards expressed his fear that other charges might be filed against him if Downey disclosed
the content of the conversation to the Union or the Board. Finally, as described below, this
conversation included an unlawful promise of benefit. These circumstances convince me that
the interrogation was coercive and therefore violated Section 8(a)(1) of the Act. Respondent
argues that Richards' call to Downey was an understandable reaction stemming from Richards'
15 belief that the subject matter of the charge had already been resolved. However, even if
Respondent had a legitimate reason for questioning Downey concerning the charge that he had
filed, Respondent was obligated to do so in a manner that minimized the coercive nature of the
inquiry. *Johnnie's Poultry Co.*, 146 NLRB 770 (1964). Respondent failed to do so. *Quality
C.A.T.V.*, 278 NLRB 1282 (1986), cited by Respondent is not on point. In that case the judge
20 declined to credit the testimony of the General Counsel's witnesses concerning the incident at
issue. Here, I have decided to credit the testimony of Downey, to the extent described above,
concerning this matter.

25 The General Counsel also contends that Richards unlawfully impliedly promised a
benefit to Downey during this conversation. In the complaint, the General Counsel alleges that
the benefit was promised in order to discourage employees' union activities. However, in his
brief the General Counsel argues that the benefit was promised in order to induce Downey to
withdraw his charge, citing *Culley Mechanical Co.*, 316 NLRB 26 (1995). I find no merit to the
argument made by the General Counsel in his brief; however, I do find merit to the allegation as
30 described in the complaint. As described above, during the conversation with Downey,
Richards indicated that Respondent was considering using a third party to resolve disputes with
employees. He indicated that this would be similar to what unions and employers frequently
use to resolve disputes. There is no evidence linking this implicit offer to the withdrawal of the
charge; instead the offer was made in a context of how Respondent was trying to
35 accommodate the wishes of the drivers without the need for a union. In essence, Richards
indicated that Respondent might grant employees a benefit that frequently results from
unionization if the employees agreed to forego a union. It is well settled that an employer may
not grant benefits to employees in order to dissuade them for seeking to have union

40 who was clearly upset by what he perceived to be mistreatment at the hands of Respondent, I
have determined to credit his testimony to the extent set forth above. Richards' testimony was
again unpersuasive. He admitted that he called Downey at home after the charge was filed
because he was surprised; he thought that the pay raise matter that was the subject of the
charge had been resolved. Richards further testified that he merely asked Downey if he was
45 aware that a charge had been filed on that matter and that Downey denied knowledge of the
charge and offered to try and stop it, but Richards told Downey not to do anything. According
to Richards, it was Downey who raised the subject of a mediator, commenting that he liked the
way there would be a third party reviewing Richards' decision if there was a union. Particularly
unconvincing was Richards' explanation as to why he found it necessary to call Downey at once
at home on the subject as opposed to talking to Downey in the normal course when Downey
appeared at work.

representation. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). While I recognize that the election among the drivers had been completed at the time Richards made these remarks, the Union had filed objections to the election so that another election remained a palpable possibility. I therefore conclude that Respondent violated Section 8(a)(1) of the Act by impliedly promising an employee a benefit in order to dissuade employees from supporting a union.

The complaint also alleges that Respondent unlawfully impliedly threatened an employee with loss of his job if he supported the Union. Larry Johnson has worked for Respondent for over 7 years as a driver. Johnson was an active supporter of the Union, calling a number of employees from his home to encourage them to support the Union. On about February 18, as Johnson was clocking out to go home, David Gheen, distribution coordinator, delivery, approached him and said that Garry Schuler, distribution coordinator, delivery, wanted to talk to him. Schuler then approached Gheen and Johnson and told Gheen to make sure that Johnson had all of his paper work turned in. This alarmed Johnson since this was not standard procedure. The three then went into a conference room. Gheen said that they had reports that Johnson had been calling the drivers at home and discussing the Union with them. Gheen said that the drivers were upset and Respondent was also upset that he was calling them. Gheen said that there was no need for a union there. Schuler said that if Johnson was not happy there, he should find a job somewhere else. Gheen and Schuler said that they were talking to Johnson for his own benefit. Johnson replied that he was a free man, and what he did in his own home was his business.⁸

It is well settled that an employer may not threaten an employee with discharge for engaging in union activities. Johnson's activity in calling fellow employees at home in an effort to persuade them to support the Union is a classic example of employee conduct that is protect by the Act. Respondent has failed to produce any evidence that Johnson engage in activity that would deprive him of the Act's protection. *Orbit Lightspeed Courier Systems*, 323 NLRB No. 59 (Mar. 31, 1997), slip op at 18. The mere fact that employees may have been upset that Johnson had called them certainly is inadequate to establish any misconduct on the part of Johnson. Indeed, a certain amount of discomfort is typically felt by employees in the give and take of a union organizing campaign, and it not a matter that Respondent may attempt to regulate. An employer may not threaten an employee with discharge because the employee engaged in conduct protected by the Act. *Caterair International*, 309 NLRB 869, 879 (1992). Schuler's comment that if Johnson was not happy working for Respondent, he should find a job elsewhere, amounts to such a threat. It couples unhappiness of working for Respondent with union activities, when, of course, an employee need not be unhappy with his or her job just because the employee seeks union representation, and Schuler's remarks suggest that Johnson should resign merely because he is engaging in union activity. I conclude that Respondent violated Section 8(a)(1) of the Act by threatening Johnson with discharge because he had engaged in union activity.

C. *The 8(a)(5) Allegations*

⁸ These facts are based on the testimony of Johnson. Because of his demeanor and the consistency of his testimony, I have determined to credit that testimony. I note that Gheen, an admitted agent of Respondent who was present at the meeting with Johnson, did not testify at the trial, nor was his failure to do so explained. I infer that such testimony would have been adverse to Respondent. Concerning the testimony of Schuler, he admitted that he spoke to Johnson about Johnson's calls to other employees at home to gain support for the Union. Schuler's testimony was otherwise an obvious, but unpersuasive, effort to minimize the impact of this conduct.

5 The complaint alleges that Respondent unlawfully instituted a new scheduling format for
its warehouse employees⁹ and also revised its pick-load system resulting in the elimination of
the freezer premium paid to employees. In early 1997, employees in the warehouse worked a
10-hour-per-day, 4-day-per-week schedule; they had worked this schedule for about 3 or 4
years. The warehouse employees were generally pleased with this arrangement. Also at that
time employees in the warehouse operated under a system whereby they would pick items for
an order in their own specified area in the warehouse. After each employee picked the items
from his or her area, another employee would "stage" the items for loading, and then the
10 products would be loaded on the truck. Respondent was dissatisfied with this system because
it felt it was inefficient and there was difficulty identifying those employees responsible for
errors. As part of this system, there were employees who regularly worked in the freezer area.
These employees, classified as "freezer pickers," basically spent their entire day working in the
freezer. For this they received a premium of 20 cents per hour. Employees bid on, and were
15 selected for, these positions. Employees who were not classified as "freezer pickers" did not
receive the freezer bonus, even though they sometimes worked in the freezer for up to 40
percent of their time.

20 During this period of time Respondent and the Union were in the process of negotiating
a collective-bargaining agreement for the warehouse employees; they had met on four
occasions during February. However, on February 19, the parties agreed to suspend
negotiations due to the pending election among the drivers. The parties felt that if the Union
was successful in organizing the drivers, then they would negotiate both contracts at one time.
As part of this arrangement, the Union requested, and Respondent agreed, to extend the
25 certification year for the warehouse employees unit for the period of time the negotiations were
suspended.

30 As indicated, Respondent services McDonald's restaurants. This results in seasonal
patterns in volume of work, since those restaurants are busiest during spring through fall. This
has caused Respondent to adjust its work force accordingly. In the spring, 1997, Respondent
was experiencing some unexpectedly heavy volume of work. For example, for the week of
March 16, records show that Respondent's volume of business was 113.1 percent of what had
been budgeted. At about the same time, Respondent was advised that McDonald's was going
to start a promotion called "C-55." Documents describe this program as guaranteeing service
35 to customers within 55 seconds and selling certain McDonald's products at the cost of 55 cents,
among other features to this program. Respondent estimated that this program would cause
Respondent to handle an average of about 6000 additional case of products each week for the
9-month duration of the program. This compares to a volume almost 165,000 cases of
products handled for the week of March 16, for example. In other words, Respondent
40 anticipated that the C-55 program would increase its already unexpectedly high business by
between 3-4 percent. In order to meet these increased needs of McDonald's, Respondent
would have to begin the increased deliveries by April 20.

45 In response to these events, Respondent determined that it could better utilize its facility
by changing its operations from basically two 10-hour-shifts to three 8-hour-shifts, thereby using
the full 24 hour day. At the same time Respondent determined that it would be more efficient to
change the manner in which products were picked and loaded. It was not satisfied with the old
system whereby an employee would pick product from a particular area, another employee

⁹ The complaint also alleges that Respondent engaged in this conduct in order to dissuade
the drivers from voting for the Union in the upcoming election.

would pick product from another area and so on, the products would then be readied for shipment or "staged," and then loaded onto a truck. Respondent determined that it would be more efficient if each employee picked and staged all products. This would also permit Respondent to more easily identify employees who had made errors. This is referred to as the new "pick/load" system.¹⁰

On March 21, Joe Cassabon, distribution manager, order fulfillment, faxed and mailed to Roy Atha, the Union's secretary-treasurer, a memorandum that states as follows.

Due to recent volume changes caused by the seasonal nature of our customer base, we are implementing a change to our warehouse schedule beginning Sunday, April 13, 1997. Additionally, this schedule will provide an opportunity, staffing wise, to test other methods of operation. We intend on utilizing a pick/load method, which encompasses selecting products and loading the trailers by the same individual. The combination of the new schedule along with the implementation of these new methods will provide M & M with greater productivity and less wasted or indirect time in servicing our customer.

Bidding for the new schedule will take place by seniority starting at noon on Thursday, March 27, 1997. Enclosed is some additional information associated [sic] to this schedule change. If you have any questions, please contact Marshall Sadler or myself.

After this was sent, Sadler, vice president, center manager, called Atha and asked if Atha wanted to meet to discuss the matters raised in the memorandum. Atha indicated that he did, so on about March 24, Respondent and the Union met to discuss the proposed changes. Atha and Martin Warner, employee and union steward, were present for the Union; Sadler, Cassabon, and Rick McCoy, warehouse manager, were present for Respondent. At this meeting, a number of documents were supplied by Respondent to the Union. Those documents explained the details of how Respondent intended for the new schedule and pick/load systems to work. Of significance in the freezer pay issue, the documents indicated that under the new system, employees would begin picking in the freezer area and then proceed to other specified areas in the facility. The documents also specified the reasons for the changes, consistent with what has been described above, and listed the efficiencies Respondent expected to gain from the changes. In addition, the documents contained the actual bids and shifts that employees would select from. Significantly, there was no longer a bid for the full-time freezer picker position. The contents of these documents were discussed and reviewed with the union at the meeting. In addition, Sadler explained the C-55 program and the anticipated impact on the Respondent's operations. The representatives for the Union indicated that the schedule changes would be very unpopular with the warehouse employees, and Sadler acknowledge that he knew that, but claimed that the changes were nonetheless necessary. Atha stated that he recognized that Respondent had the right to make the changes, but he objected that Respondent was timing the schedule change for the warehouse employees to influence the upcoming election among the drivers. Sadler denied that those considerations

¹⁰ These facts are based on the testimony of Cassabon and Sadler. Their testimony was largely uncontested, supported by appropriate documentation, and was otherwise credible.

had anything to do with the changes; he claimed that they were needed for business reasons. Atha suggested that Respondent then delay the posting of the bids until after the drivers had finished voting in the mail ballot election. Sadler agreed to consider the suggestion and get back to Atha. The meeting ended. The Union did not request to meet again, and other than
 5 the matter of delaying the start of the bidding process, the Union made no proposals.¹¹

After the meeting, Respondent considered the Union's suggestion and decided to delay the start of the bidding process among the warehouse employees from March 27 to April 8, after the drivers would have voted. Sadler called Atha by telephone and advised Atha of
 10 Respondent's decision in this regard. Sadler asked if this resolved the issue, and Atha said yes.¹²

Although Respondent delayed the start of the bidding process by employees, it announced the planned changes and actually posted the bids prior to the close of voting in the drivers elections. Thus, employees were fully aware of the changes while the drivers were in
 15 the process of voting, even though the warehouse employees did not actually start bidding until afterwards. Respondent explained that it could not totally delay all aspects of the changes until after the voting and still meet its commitments under the C-55 program.

Before the implementation of this change, employee Moore was told by Douglas York, coordinator, and an admitted supervisor and agent for Respondent, that Respondent was preparing to make the schedule change. Moore was surprised and asked why, because it seemed to him that the employees were working well under the old system. York explained
 20 that this was something he had been told Respondent was going to do for business reasons and to improve the deliveries to the stores. Moore then had another conversation on the same topic with Cassabon. Cassabon confirmed that there was going to be a change; that Respondent was going back to an 8-hour, 5-day-per-week schedule. Moore asked why, and Cassabon explained that it was needed to provide better delivery service to the stores. Moore expressed his concern that the new system might cause certain problems. Cassabon
 25 responded that it was something that had to be done and that they would work their way through any problems that developed. Moore then again expressed his feelings concerning the new schedule to York.
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35 ¹¹ These facts are based on the testimony of Cassabon and Sadler. However, I do not credit Sadler's testimony that Atha specifically agreed to the implementation of the changes if Respondent would delay the start of the bidding process; this testimony is not corroborated by Cassabon. I have considered the testimony of employee and Union Steward Martin Warner, but I conclude that it is uncertain, hesitant, and at times conclusory concerning the important
 40 details of what was said at this meeting. Atha, in his testimony, admitted that Sadler said that the reason the change was needed was because of the new McDonald's promotional campaign and that after Atha accused Respondent of attempting to affect the election among the drivers, Sadler volunteered to delay the posting of the bids for the new system until all the drivers had voted. Atha further admitted that they discussed the pick/load method, but that he deferred to
 45 Warner since Warner understood the process better. Warner, however, denied that there was any discussion of the proposed pick/load system. On balance, I conclude that the testimony of Cassabon and Sadler is generally more credible than that of Atha and Warner concerning this meeting.

¹² This is based on the testimony of Sadler. Atha did not deny that the telephone call took place, nor did he specifically deny the content of that conversation. Under these circumstances, I credit Sadler's testimony.

The changes were implemented April 13. As a result of the changes, there no longer were any “freezer picker” positions, since all employees were to begin picking in the freezer area and then move on to other areas. After the changes were implemented, employee Warner asked Cassabon why the employees were no longer receiving the freezer premium pay.

5 Cassabon explained that no employees were working a full day in the freezer any more. Warner protested that the employees felt that they should still be getting the extra pay since they still had to regularly work in the freezer area. On May 16, Warner filed a grievance over this matter, claiming that after the change all employees worked in the freezer area yet no one was receiving the extra pay. On May 23, Respondent denied the grievance, stating that in the
10 past the freezer bonus was paid only those employees classified as “freezer selectors” who worked in the freezer a full shift; after the changes no employee worked in the freezer the entire shift, and thus did not qualify as “freezer selectors.”

After the drivers’ election, the parties resumed bargaining for a contract for the
15 warehouse employees. By September 15, the parties had reached tentative agreement on such a contract. During negotiations, Respondent proposed to continue the freezer premium for employees selected as full-time freezer pickers. However, in their tentative agreement there is no provision for freezer pay.

20 Before making changes in terms and conditions of employment of employees represented by a labor organization, an employer must first give notice to the union and provide it with an opportunity to bargain over the proposed changes. *Tuskegee Area Transportation System*, 308 NLRB 251 (1992). Here there is no doubt that Respondent gave the Union preimplementation notice of the changes concerning the schedule and pick/load system, and
25 the General Counsel does not contend otherwise. The General Counsel argues, however, that there was no meaningful opportunity to bargain because the Respondent had already made up its mind and presented the Union with a fait accompli. In support of this contention, the General Counsel relies in part on testimony of Atha and Warner which I have not credited. I examine the credible evidence as set forth above to resolve this issue. In support of the General
30 Counsel’s theory, the evidence shows that Respondent’s March 21 communication to the Union concerning the changes did not indicate that the decision was tentative or subject to negotiation. However, the totality of circumstances convinces me that the decision to make the changes was not a fait accompli. Instead, the changes were matters that Respondent felt strongly about but that they did not intend implement regardless of the Union’s position. I first
35 note that Respondent faxed and mailed the March 21 communication to the Union, a communication which invited the Union to call Respondent if it had questions. This written communication was followed by a telephone call specifically asking whether the Union wanted to meet and discuss the matters raised in the written communication. When the Union requested such a meeting, Respondent promptly agreed and meeting was held. This conduct
40 is inconsistent with that of an employer seeking to avoid its obligation to meet and bargain with the Union. Moreover, nothing occurred at the meeting that indicated that Respondent had a closed mind on the subject. Respondent there made a detailed documentary and verbal presentation of the planned changes and the reasons why Respondent felt they were needed. This supports the inference that Respondent was seeking to persuade the Union as opposed to
45 attempting to avoid engaging in a discussion of the matter with the Union. Importantly, there is no evidence that the Union was denied the opportunity at this meeting to make whatever arguments or proposals it desired in order to test Respondent’s willingness to alter the changes. Instead, during the meeting the Union conceded that Respondent had the authority to make the changes; it made no counter-proposals or suggestions, and merely protested that the scheduling change would certainly be unpopular among the warehouse employees and asserted that this change was being made to influence the drivers’ election. Even here Respondent attempted to allay the Union’s stated concern, albeit in an admittedly modest

fashion, by agreeing to delay the actual start of the bidding process until after the election among the drivers was completed. Moreover, after Sadler called Atha and indicated that Respondent was willing to delay the start of the bidding process, Atha expressed satisfaction with the resolution of that issue; the Union did not request further meetings. All this evidence tends to show that Respondent was engaged in a meaningful process designed to persuade and, to a certain degree, accommodate, the Union concerning the changes. The evidence also shows that the Union made no further efforts to pursue bargaining after the meeting.

The General Counsel also relies on the conversations Respondent had with employee Moore concerning the revised schedule; those conversations have been set forth above. However, when viewed in their entirety, those conversations show only that Respondent perceived the need to make the change for economic and efficiency reasons and was attempting to explain that to Moore. They do not show that Respondent was unwilling to negotiate with the Union concerning the changes.

Turning now to the matter of the freezer pay, to be sure the March 21 communication did not specifically indicate that as a result of the change to the pick/load system, freezer pay would be eliminated. However, as set forth above, freezer pay was given only to those employees who bid on and were selected for the freezer picker positions. In those jobs the employees spent virtually the entire day in the freezer area. From the information that Respondent provided to the Union, the Union should have realized that the freezer picker position, and thus the freezer premium, would be eliminated as a result of the conversion to the pick/load system. Specifically, the Union was advised that under the new system no employee would be spending the entire day in the freezer area any longer. Even more importantly, the Union was provided the actual new bids that Respondent intended to post for employees, and the freezer picker position was not included. I conclude that the elimination of the freezer picker position flowed logically from the change to the pick/load system, and the Respondent gave the Union sufficient information so that it should have realized this. Thus, the Union was provided with notice and an opportunity to bargain about the matter. Of course, the Union remained free to seek freezer pay for employees who perform freezer work even though they may not do that the entire day or occupy a specific freezer position, and Respondent would be obligated to bargain on those subjects. The record shows that in fact the parties bargained over the subject and reached a contract.

In sum, I conclude that Respondent provided the Union with preimplementation notice of the proposed changes and then engaged in bargaining on the matters to the extent it was required to do so considering the position taken by the Union on the changes. I shall therefore dismiss those allegations of the complaint.

The General Counsel also alleges that the schedule revisions for the warehouse employees violated Section 8(a)(1) of the Act because they were done in an effort to dissuade the drivers from voting for the Union in the election. The General Counsel's argument is that since the schedule change was unpopular among the warehouse employees who had recently selected the Union, implementation of the change prior to the election would demonstrate to the drivers the futility of their selection of the union. The difficulty with this argument is that there is no evidence to support the argument that Respondent engaged in this conduct to sway the drivers from supporting the Union. The General Counsel points only to Atha's subjective perception that Respondent was so motivated; this clearly is inadequate. In any event, I have credited the testimony set forth above that Respondent was motivated by various economic concerns in deciding to implement the scheduling change. Accordingly, I shall dismiss this

allegation of the complaint.¹³

D. *The Objections*

5 As indicated above, a mail ballot election was conducted among the employees in the drivers' unit for the period from March 24 through April 8. The petition was filed February 26. Thus, the critical period runs from February 26 through April 8. The Union filed timely objections to the election, three of which were referred to me by the Regional Director for disposition.

10 Objection 1 alleges that Respondent interfered with the election by its conduct concerning the removal of literature from the bulletin board. I have concluded above that Respondent's conduct in this regard was not unlawful. I shall thereafter recommend that this objection be overruled.

15 Objection 4 covers the allegation that Respondent revised the schedule of the warehouse employees in order to show how futile selecting a union would be to the drivers. I have concluded above that Respondent's conduct in this regard was not unlawful, nor does the record convince me that Respondent's motive in making this change had anything to do with the impending election among the drivers. I shall therefore recommend that this objection be overruled.

20 Objection 6 alleges that Respondent interfered with the election by interrogating employees concerning their union sentiments. I have found above that Respondent unlawfully interrogated employee Hile on a number of occasions. However, it was not established that these interrogations occurred during the critical period. The complaint alleged that the interrogations occurred during the months of January and February, at precise dates unknown to the General Counsel. Hile testified that these interrogations happened "Just about every day" during the time period "During February to -- towards the first of March."¹⁴ I conclude that this testimony is insufficient to establish with the requisite certainty that any of the interrogations occurred from February 26 through February 28. First, Hile's testimony was not that the interrogations occurred daily but that they happened "just about" everyday. Next, Hile's testimony was not that they occurred at the very end of February but only that they "towards" the first of March. The burden here is on the Union to supply evidence that prima facie would warrant setting the election aside. *Kalin Construction Co.*, 321 NLRB 649, 652, fn.11 (1996), citing *Bufkor-Pelzner Division*, 169 NLRB 998, 999 (1968). The vague testimony concerning the dates of the interrogations is inadequate to persuade me that any such conduct actually occurred during the critical period. Moreover, even if any such conduct did occur during the last three days in February, there is insufficient evidence to determine whether that conduct, separated from the pre-critical period conduct, would be sufficient to interfere with the free choice of the voters in the election. *Waste Management of Pennsylvania*, 314 NLRB 376 (1994); *Clark Equipment Co.*, 278 NLRB 498, 505 (1986). Accordingly, I recommend that this objection be overruled.

45 Although I have concluded that Respondent committed various unfair labor practices, it has not been established that those violations occurred during the critical period so as to effect

¹³ No evidence was presented to support allegation 5(d) of the complaint; I shall dismiss that allegation also.

¹⁴ Hile's later testimony that these conversations occurred "In late February, early March" only serves to establish the uncertain nature of his testimony concerning the precise dates.

the outcome of the election. I shall therefore recommend that the objections to the conduct of the election be overruled and that the results of the election be certified.

Conclusions of Law

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

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2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating employees concerning their union sympathies and the union sympathies of other employees, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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4. By interrogating an employee concerning why he had filed charges with the Board, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

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5. By threatening employees with discharge because they engaged in union activity, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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6. By impliedly promising a benefit to an employee in order to dissuade employees from supporting a union, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) of the Act.

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

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8. Respondent has not engage in conduct which warrants the setting aside of the election conducted in case 9-RC-16851.

Remedy

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

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁵

ORDER

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The Respondent, M & M Restaurant Supply, Springfield, Ohio, its officers, agents, successors, and assigns, shall

¹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Interrogating employees concerning their union sympathies or the union sympathies of other employees.

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(b) Interrogating employees concerning why they filed charges with the Board.

(c) Threatening employees with discharge because they have engaged in union activity.

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(d) Impliedly promising employees benefits in order to dissuade them from supporting a union.

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(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, post at its facility in Springfield, Ohio, copies of the attached notice marked "Appendix."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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 February 1, 1997.

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(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.

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

Dated, Washington, D.C. November 28, 1997

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William G. Kocol
Administrative Law Judge

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¹⁶ If this Order is enforced by a Judgment of the 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."

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees concerning their union sympathies of the union sympathies of other employees.

WE WILL NOT interrogate employees concerning why they filed charges with the Board.

WE WILL NOT threaten employees with discharge because they supported GENERAL TEAMSTERS, SALES & SERVICE AND INDUSTRIAL UNION, LOCAL NO. 654, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO, or any other labor organization.

WE WILL NOT impliedly promise employees a benefit in order to dissuade them from supporting a union.

5 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.

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M & M Restaurant Supply

(Employer)

Dated _____

By _____

(Representative)

(Title)

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This is an official notice and must not be defaced by anyone.

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This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 550 Main Street, Room 3003, Cincinnati, Ohio 45202-3271, Telephone 513-684-3663.

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