

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

VALMET, INC.

and

**Cases 15-CA-206655
15-RC-204708**

**UNITED STEEL, PAPER AND FORESTRY
RUBBER, MANUFACTURING, ENERGY,
ALLIED AND INDUSTRIAL SERVICE
WORKERS INTERNATIONAL UNION,
AFL-CIO, CLC**

*Andrew T. Miragliotta, Esq., for the General Counsel.
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(Fisher and Phillips, LLP, Atlanta, Georgia, for the Respondent.
Brad Manzolillo, Esq. (United Steel, Paper and Forestry Workers,
Pittsburgh, Pennsylvania,) for the Charging Party.*

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried in Columbus, Mississippi on February 26-27, 2018. It involves unfair labor practice allegations and objections to a representation election.

The Union filed objections to the September 14 and 15, 2017 representation election at Respondent's Columbus, Mississippi facility on September 20, 2017. The Region directed that a hearing be held on these objections on September 27, 2017. The Union filed the initial charge alleging unfair labor practices on September 21, 2017 and the General Counsel issued a complaint on December 27, 2017. The Region consolidated the objections case and unfair labor practice proceeding for trial on February 1, 2018. The General Counsel and Union seek a direction of a second election as well as posting of a notice regarding the alleged unfair labor practices.

The alleged unfair labor practices and objections overlap. The General Counsel alleges that Respondent violated Section 8(a)(1) and the Union alleges objectionable conduct on the part of Respondent, as follows:

1. by promising employees a benefit in the form of a cash raffle prize if employees participated in an anti-Union campaign on about September 1, 2017 and conducting such a raffle on September 13.¹(Union objections 3 and 4).

5 2. by Environmental, Health and Safety Manager Tiffany Wallace threatening employees with job loss and loss of benefits if they selected union representation in September 2017.

10 3. by General Manager Brian Hammerbacher, on about September 7, 2017, threatening employees with loss of benefits and frozen wages and loss of raises, if they selected union representation .

 4. by Supervisor Chris Cliett, threatening employees with frozen wages and loss of raises if they selected union representation.

15 5. by Human Resources Vice President Douglas Scheaffer, threatening employees with frozen wages and loss of raises if they selected union representation, promising increased benefits and improved terms and conditions of employment if employees rejected union representation, and informing employees that selecting union representation would be futile as a means of achieving better wages or benefits. (Union objections 1 and 2).

20 6. by Production Manager Larry Richardson, threatening employees with termination and unspecified reprisals if they selected union representation. (Union objections 5, 6 and 7).

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

FINDINGS OF FACT

30 I. JURISDICTION

35 The Respondent, Valmet, Inc., is a global corporation,² that rebuilds equipment that is used by customers in paper industry at its facility in Columbus, Mississippi. Respondent annually sells and ships goods valued in excess of \$50,000 from the Columbus facility directly to points outside of Mississippi. It also purchases and receives goods valued in excess of \$50,000 at the Columbus facility directly from points outside of Mississippi. 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, referred to herein as the United Steelworkers, is a labor organization within the meaning of Section 2(5) of the Act.

¹ Conducting the raffle is also alleged to be a violation of Section 8(a)(3) and (1).

² Valmet was “spun off” by the Metso Group several years ago. The company’s headquarters are located in Finland. Valmet has 9 production locations in North America and about 12,000 employees world-wide.

II. ALLEGED UNFAIR LABOR PRACTICES

On August 21, 2017, the Union filed a petition with the Board to represent a unit of all the full-time and regular part-time production and maintenance employees at Respondent's Columbus, Mississippi plant. There apparently was an earlier organizing campaign by the Steelworkers at this facility in 2015. The Board scheduled a representation election at the facility for the afternoon of September 14 and the morning of September 15, 2017. Thus, the critical period during which the conduct of the employer and the Union is more closely scrutinized runs from August 21, to September 15, 2017. 85 of 87 eligible voters cast ballots in the election that were counted. 43 votes were cast against union representation; 42 were cast in favor of representation by the United Steelworkers.

Respondent conducts a raffle/ contest during the critical period (complaint paragraphs 7 and 13; objections 3 and 4)

On August 30, 2017, during the critical period, Respondent announced a contest for employees via an informational poster that was either posted at the Valmet facility or mailed to employees' homes, or both. This flyer, Jt. Exh. 1, stated that:

...we keep hearing that a small group of union supporters keep telling co-workers to "ignore" the FACT SHEETS and examples that we are putting out to help you make intelligent decisions.

...

To make it more interesting-and to keep the union from keeping you from the FACTS-we are going to run a CONTEST to make sure you have plenty of incentive to learn all the REAL FACTS about the Union and what it actually can-and cannot do for you.

...

On September 11, you all will get the chance to test your knowledge by taking a 12-question quiz. The quiz will be based on the FACTS we are providing

...

1st Prize: \$900 (=1 year's Union Dues)
2nd Prize \$450 (=6 months' Union Dues)

Respondent posted a reminder about the contest on September 11, Jt. Exh. 2, which advised employees to see their supervisors for a quiz entry form starting at 5:30 a.m. on September 12.³

Valmet Supervisor Chris Cliett advised unit employee Roman "Casey" Nail that he could not hand him an entry form because it would look like a bribe. Supervisor Kevin Clark told unit

³ Joint Exhibits 1-4 are attachments to G.C. Exh. 2.

employee Rodriguez Bush that he could get an entry form from Clark's office. Clark either gave Travis Leonard an entry form or told him where he could get one.

The quiz consisted of 10 multiple choice questions.

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1. In the U.S. what percentage of non-government employees belong to unions?

2. After weeks of talking to Valmet Columbus employees, the USW has delivered written, signed Guarantees that they will deliver on the following promises?

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3. During contract negotiations, if the USW union cannot force Valmet Columbus to agree to deliver on promises it made to our employees, the union can do which of the following?

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4. Under U.S. labor laws, the USW can actually guarantee Columbus employees the following?

5. After the Omnova-USW strike ended, Omnova later shut down forever. How many former Omnova employees got jobs at other USW-represented companies?

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6. Based on the USW's 1.45% formula, Columbus employees could be required to pay monthly union dues of:

7. The USW union took in \$513,000,000.00 in 2018 in union dues and other income. How much of that was paid back out on behalf of individual members?

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8. Since 1968 the USW union has lost how many "dues paying" members?

9. How many unfair labor practice charges have been filed by "dues-paying" members against the USW since 2007?

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10. At the unionized Neenah, Wisconsin operation,⁴ Valmet contracted out how much more work in 2017 (so far) than it has at the Columbus operation?

35 Employees were encouraged to detach one part of a two-part raffle ticket, keep one part and drop the other in a contest quiz box in the employee break room. Entries had to be submitted by noon on September 13, the day before the representation election, which started at 2 p.m. on September 14. On September 18, 3 days after the representation election ballots were counted, Respondent randomly selected 2 winning tickets and announced the ticket numbers of the winners. Apparently there were multiple entries which had the most "correct" answers; thus the winning tickets were selected from this pool. On October 6 or October 9, employee Daniel Carter received \$900 via direct deposit and employee Charlie Horton received a \$450 direct deposit as the winners of the contest.

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⁴ Neenah is the only Valmet facility at which employees are represented by the Steelworkers. Two other plants are organized, one by the Teamsters; the other by the IAM.

Participation in the raffle/contest was voluntary. Respondent had never conducted a similar raffle/contest.

Respondent's mandatory meetings to encourage unit employees to vote against union representation

Respondent held a number of meetings at which attendance was mandatory in which it endeavored to convince employees to vote against union representation.

Company mandatory meetings on September 6 and 7, 2017 (complaint paragraph 9).

Brian Hammerbacher, the General Manager of the Columbus plant, held 2 sets of 5 or 6 mandatory meetings for employees at the facility. 5 or 6 sessions of one meeting for employees in different departments were conducted on August 30, and September 1, 2017. Another 5 or 6 sessions were conducted by department on September 6 and 7. Hammerbacher conducted a make-up session for one in which the company's video machine did not work and a separate meeting solely for the machine shop employees on September 12. Travis Leonard, a unit employee, recorded one of the meetings on September 7, 2017, at which 16-20 employees were present. Lori Kohl, Respondent's regional human resources manager, attended this meeting with Hammerbacher and addressed certain topics.

During this meeting, which was about 50 minutes long, Hammerbacher told employees that if they selected the Union, Respondent would maintain the status quo. He went on to elaborate that this meant that everything, including compensation would be "frozen" because everything would be subject to negotiation. Thus, there would be no wage increases, and no merit wage increases. In response to an inquiry from an unidentified speaker in the audience, Hammerbacher said that there would be no step progression increases as well, G.C. Exh. 3 (between minutes 7:04 and 7:53 of the September 7, 2017 recording). Hammerbacher did not indicate whether or not Respondent's annual cost of living increases would continue to be implemented during negotiations.

Respondent has a corporate severance plan for its employees that covers the Columbus facility, Tr. 225. During his meetings with employees, Hammerbacher referred to that plan as the "non-union" plan. This implied that if employees selected the Union they would necessarily lose some or all of the benefits of this plan. These statements were misleading and coercive. During contract negotiations, Respondent would have been obliged to continue the benefits of the company plan until it either negotiated a contract with the Union or implemented its final offer upon reaching impasse. To suggest, as did Hammerbacher, that employees would necessarily lose the benefits of the company severance plan if they chose union representation and in failing to assure employees that they would continue to receive its benefits during contract negotiations, Respondent violated Section 8(a)(1), *Lynn-Edwards Corp.*, 290 NLRB 202, 205 (1988); *Longview Fibre Paper & Packaging, Inc.*, 356 NLRB 796, 796n.3, 804 (2011).⁵

⁵ At page 21 of its brief, Respondent contends that Hammerbacher clarified his statement by telling employees that the severance plan was among the things that would be negotiated. His remarks at 32:30, five minutes after he discussed the severance plan, are not specific and would not have clarified his earlier statement.

Lori Kohl compared Respondent's non-union plan with the severance plan negotiated at Respondent's Neenah, Wisconsin facility at one captive audience meeting, Tr. 226. The severance plan at the Neenah facility, where employees are represented by the Steelworkers, only covers employees in the event of a plant closure. Respondent's plan also covers employees who are laid-off. Kohl and Hammerbacher's remarks together could only leave employees with the impression that selecting union representation would necessarily mean they would not get severance benefits in the event of a lay-off. Kohl herself conceded that the reason the Neenah plan was so limited was that the parties probably did not negotiate broader coverage. This is a far cry from the impression left with employees, i.e., there will be no severance for employees who are laid off if you select the Union.

Respondent is correct that an employer may lawfully compare union and nonunion benefits of historical fact. However, an employer violates the Act and engages in objectionable conduct when it makes statements from which employees could reasonably infer that they will lose an *existing* benefit if they select union representation, *Georgia-Pacific Corp.*, 325 NLRB 867 (1998); *Cooper Tire & Rubber Co.*, 340 NLRB 958, 959 (2003); *TCI Cablevision of Washington, Inc.*, 329 NLRB 700 (1999). Hammerbacher's remarks about the company severance plan did just that.

Meetings conducted by Human Resources Vice-President Douglas Scheaffer on September 12 and 13, 2017 (complaint paragraph 11; objections 1 and 2)

Douglas Scheaffer, a global vice-president of human resources for Valmet, conducted 6 meetings for unit employees over two days, September 12 and 13. Unit employee Travis Leonard recorded one of the September 13 meetings at which 15-20 unit employees were in attendance. Schaeffer spoke from prepared remarks at all 6 meetings and then entertained questions. I conclude that his talks, with the exception of his remarks in response to questions, were essentially the same at all 6 meetings as those recorded by Travis Leonard. Human Resources Regional Manager Lori Kohl was in attendance at this meeting as well and addressed certain topics.

The general tenor of the Scheaffer's prepared remarks was that unit employees were unlikely to benefit from selecting union representation.⁶ He told employees that everything would be up for negotiation if they selected union representation and that Respondent could not give any wage increases, G.C. 3, tape of September 13 meeting at 28:00-30:00. Scheaffer also told employees that negotiations for a first contract could go on for months, a year or even 15 months, *Ibid*. After about 38 minutes, Scheaffer entertained questions. An employee asked if the progressive step wage increases would be "frozen." Scheaffer responded that once employees selected the Union and the Union was certified, Respondent could not give any wage increases, G.C. 3 tape of September 13 at 38:45-40:00.

⁶ For example between 15:00 and 18:00 elapsed minutes on the recording, G.C. 3, September 13, Scheaffer talked about Respondent's need or desire to keep all its plants the same with regard to pay and benefits. He said he did not see how a 10% wage increase was going to happen if the employees selected the Union. Later he said if employees expected a big windfall from union representation that was not possible. Scheaffer then told employees that they were competing with other plants and that if Respondent raised wages, it would have to raise prices.

A little later an employee asked whether employees would still have their medical insurance during negotiations if employees selected union representation. Scheaffer responded by saying that would not change because Respondent would have to maintain the “status quo” during negotiations. However, he stated further that Valmet could not give any wage increases during this period and that wages would have to be frozen, G.C. 3, tape of September 13, 49:00-50:00.

Unless their performance is unsatisfactory, Respondent’s Columbus employees receive wage increases every 3 months for 4 years and every 6 months the fifth year until they reach the top of their pay grade (“max out”).

Shipping and Receiving Supervisor Chris Cliett testified that he had declined to give progressive wage increases on 10-15 occasions out of approximately 100 opportunities to grant them during his tenure. Progressive wage increases are denied to employees who have attendance issues, disciplinary write-ups or have caused Respondent to lose money (an in-plant loss).

Alleged violation by Supervisor Chris Cliett (complaint paragraph 10)

Scotty Lawrence, a unit employee in Valmet’s shipping department, testified that during the week prior to the representation election, supervisor Chris Cliett, came to talk to him about why employees at Valmet Columbus did not need a union. Lawrence testified that Cliett told him that if employees selected the Union that the company’s wage progression process would be frozen. Unit employee Roman Casey Nail, who was also present, testified that either Lawrence or Cliett used the word “frozen.” Nail recalled Cliett telling him and Lawrence that the progression wages would be “stuck in the status quo.” This led Nail to believe that he might not get the progression wage increase that he was due in about a week if the employees voted for union representation.

Cliett testified that Lawrence came to him after attending one of the meetings with Doug Scheaffer (either September 12 or 13). Lawrence was up for a wage increase pursuant to Respondent’s progressive wage increase process in October 2017. Cliett testified that he told Lawrence that whether he would get his October increase would depend on the status quo. Cliett was not sure whether or not employees would receive progressive wage increases pursuant to the status quo. Thus, at a minimum, he created uncertainty in the minds of Lawrence and Nail as to whether they would receive the progressive wage increases that they were otherwise expecting. Lawrence had received progressive wage increases in the past. There is no evidence that either he or Nail was ever denied a progressive increase. Lawrence received his increase in October 2107.⁷

⁷ I infer from this record that Nail also received the increase he was expecting.

Alleged violation by Tiffany Wallace (complaint paragraph 8)

On or about September 13, Tiffany Wallace, Valmet's Safety, Health and Environmental Manager, left a management training meeting regarding the union campaign. At least one of Respondent's attorneys was present at that meeting. Almost immediately thereafter, Wallace met with unit employees Rodriguez Bush and Michael Frierson in their work area. Wallace is an employee of Solutions Group, which has contracted with Valmet to provide it her services. However, there is no indication that unit employees are aware that Wallace is not an employee of Valmet. When Wallace tells an employee that, for example, they must wear personal protective equipment such as safety glasses, employees regard that as direction coming directly from Valmet.

Wallace was looking to speak with leadman William Jenkins, who had left work for the day. Leadmen are unit employees who voted in the representation election, but are paid 10% of their base salary extra for being leadmen. Rodriguez Bush and Michael Frierson, who are not leadmen, testified that Wallace told them that she had just left a meeting with Respondent's attorneys and that if employees selected union representation, either that the leadman position would be eliminated or that there would be no more leadman openings in the future.⁸ Bush relayed this conversation to Travis Leonard, who is a leadman, after work on September 13. He also told several other employees about the conversation the same day. Bush told William Jenkins what Wallace said on September 14. It is not clear whether he talked to Jenkins before or after the election started.

The subject of whether Respondent would continue to have leadmen and how they would be compensated was raised by an employee in the question and answer period of Douglas Scheaffer's September 13 meeting. It was an obvious concern to a number of unit employees. Scheaffer responded that whether Respondent continued to have leadmen, how many and how much extra they would be paid would be a subject of negotiation if employees selected the Union, G.C. 3, tape of September 13 meeting, 40:00-44:00.

⁸ I find Bush and Frierson's testimony to be more credible than that of Wallace. First of all, Bush would have had no way of knowing that Wallace had just come from a management meeting at which an attorney was present unless Wallace told him that. Thus, his testimony at Tr. 97-98 is far more credible than her denials at Tr. 154. In fact, Wallace did not deny that she told Bush that she had just left a meeting with the company attorney. She denied only that she told Bush that the company attorney or anyone else told her that Respondent was going to cut out leadmen.

Secondly, her explanation as to why she came to talk to Bush and Frierson is nonsensical. According to Wallace, she wanted them to talk to pro-union employee Larry Parker to put in a good word for her. She testified she didn't want to talk to Parker herself even though she considered him a friend. Wallace confirmed that she spoke to Bush and Frierson about negotiations if the employees selected the Union just after leaving a meeting in which a company attorney was present. She did not get any more specific than that. While Wallace had plenty of motivation to deny the comments attributed to her by Bush and Frierson, they had no motivation to fabricate their testimony. Moreover, other things being equal, the testimony of a current employee, which is made at the risk of alienating his or her employer, is likely to be particularly reliable, *Flexsteel Industries*, 316 NLRB 745 (1995).

*Alleged violative and objectionable conduct by Production Manager Larry Richardson
(complaint paragraph 12; objections 5, 6 and 7)*

At a mandatory company meeting most likely one conducted by Brian Hammerbacher on September 6 or 7, unit employee and leadman Justin Leonard (Travis' son) complained about Production Manager Larry Richardson. He intimated or said that Richardson's manner was one reason or the main reason some employees supported the Union. He also mentioned that Richardson had let a rebuilt part be shipped to a customer which Leonard believed should not have been shipped out.⁹

On September 14, about an hour or less before the representation election began, Richardson stopped at Leonard's work station. Richardson told Leonard that he wanted to discuss with Leonard what Leonard had said about him at the company meeting. Leonard asked Richardson who told him about his comments. Leonard had been led to believe that whatever he said at this meeting would be kept confidential. Richardson did not tell him.

Leonard does not have a clear recollection about everything Richardson said to him.¹⁰ He did recall that during that discussion, Richardson said something to the effect that if employees selected union representation, he would not be able to have one-on-one conversations with unit employees. Richardson also said, "just remember who hired you." Leonard's supervisor, Ken Hopper, in a November 8, 2017 affidavit, remembered that Leonard told him on September 14, that Richardson said he hired Leonard and could fire Leonard. I conclude that is exactly what Richardson said to Leonard.¹¹ Given the timing of this conversation, this was said to intimidate Leonard just before he went to vote in the representation election.

Leonard was very upset and immediately went to his supervisor, Ken Hopper, to complain about Richardson's conversation with him. Hopper then went to Lori Kohl, Valmet's regional human resources manager. Several employees questioned Leonard about his conversation with Richardson before Leonard went to cast his ballot in the representation election. No later than the evening after the September 14 voting, but before the September 15 voting, many employees were aware of the conversation/confrontation between Leonard and Richardson, Tr. 216-17.

⁹ Plant Manager Brian Hammerbacher may also have talked to Leonard about this part prior to September 5, R. Exh. 3.

¹⁰ Regardless of what Richardson said or didn't say about Leonard's complaints about him, Richardson communicated to Leonard that somebody had told Richardson about what Leonard said at the company meeting. Since Leonard knew he complained about Richardson, he reasonably would have inferred that somebody told Richardson about those complaints. Thus, Richardson, by letting Leonard know that he was aware of what Leonard said at the meeting and reminding Leonard that he hired him, was trying to and did intimidate Leonard just before the representation election.

¹¹ Hopper's affidavit constitutes substantive evidence of what transpired, *Conley Trucking*, 349 NLRB 308, 309-13 (2007). Hopper's affidavit is not hearsay evidence pursuant to Federal Rule of Evidence 801(d).

When Kohl arrived, Leonard said, “go ahead and fire me.” Kohl assured Leonard he was not going to be fired.

I credit Leonard’s testimony over that of Respondent’s witnesses.¹² Richardson testified that he only discussed the rebuilt part with Leonard. He testified further that the reason he went to talk to Leonard just before the election was that Brian Hammerbacher had mentioned the part to him that morning. This testimony is clearly inaccurate because Hammerbacher left the facility to go to Michigan on September 12 and did not return until after the election, Tr. 127-28. Moreover, an email chain introduced by Respondent establishes that Hammerbacher told Richardson about the issue with the rebuilt part on the morning of September 5, R. Exh. 3.

Richardson testified that Hopper told him that Leonard had come to him to report that Richardson had just threatened his job. Thus, Hopper’s testimony at Tr. 201 that Leonard did not tell him that Richardson threatened him is not credible and indeed is inconsistent with the affidavit he gave to Respondent’s counsel on November 9, 2017.¹³ I find that Leonard told Hopper that Richardson threatened his job immediately after Richardson did so.

Analysis

The Raffle/Contest

The lead Board case on raffles during the critical period before an election is *Atlantic Limousine*, 331 NLRB 1025, 1029 (2000). In that case, the Board set forth a bright-line test which prohibits unions or employers from conducting a raffle if (1) eligibility to participate or win prizes is in any way tied to voting in the election or being at the election site on election day, or (2) the raffle is conducted at any time within a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls. On page 1029 note 13, the Board discussed situations not falling within this bright line or per se rule, that might also be prohibited.

Raffles conducted more than 24 hours before the scheduled opening of the polls, not aimed at encouraging employees to come out to vote, do not raise the concerns that underlie the Board’s decision in *Sunrise*. Rather, such raffles held earlier in the election campaign primarily would raise issues of whether or not they involve promises or grants of benefits that would improperly affect employee free choice; or whether they allow the employer to identify employees who might or might not be sympathetic, and thus to learn where to direct additional pressure or campaign efforts. See *National Gypsum Co.*, 280 NLRB 1003 (1986). Accordingly, we shall not apply our new per se rule to such raffles, but shall analyze them based on whether or not they implicate those particular concerns.

Respondent goes to great lengths to argue that it conducted a contest, not a raffle on the day before the election. I find that it was close enough to a “raffle” that the standards in *Atlantic*

¹² See footnote 5 for an additional reasons I find Leonard credible.

¹³ Lori Kohl’s testified that Leonard did not tell her that Richardson said he could hire and fire Leonard. She did not recall Leonard saying anything about Richardson’s remark about hiring Leonard. This brings me to one of three conclusions: 1) Leonard did not repeat everything he said to Hopper to Kohl, or 2) Kohl’s recollections are faulty, or 3) Kohl’s testimony is not believable.

Limousine govern its legality. The winners of the contest or raffle were determined at least in part by a random drawing of the participants. Respondent in its brief states that the entries were graded after the election ended. However, there is no evidence to support this contention.¹⁴ The parties stipulated that Respondent randomly selected two winning tickets, G.C. Exh. 2. There is no evidence as to how Respondent determined which tickets were winners.

The raffle or contest in this case clearly falls outside of the bright line rule enunciated in *Atlantic Limousine*. However, the raffle/contest did run afoul of one of the considerations governing contest/raffles conducted more than 24 hours prior to the election. By requiring or suggesting that employees obtain a quiz from their supervisor the contest assisted Respondent in identifying which employees might or might not be sympathetic with the organizing drive. One would reasonably infer that employees who asked their supervisor for a quiz would be more likely to oppose the Union than those who did not request one. On this basis alone, I find that Respondent's raffle/contest violated the Act.

Progressive Wage Increases were part of the "status quo" which Respondent was required to continue if employees selected union representation.

Respondent's progressive wage increases occurred with such regularity and frequency that employees could reasonably expect them on a regular and consistent basis, *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353-354 (2003). These raises were awarded on a fixed schedule and apparently in fixed amounts. Based on Chris Cliett's testimony, I infer that progressive increases were denied only on the basis of fixed criteria, i.e., disciplinary write-ups, attendance issues or causing an in-plant loss.¹⁵ The only relevant factual question is whether the employer's action is similar in kind and degree to what the employer did in the past, *Raytheon Network Centric Systems*, 365 NLRB No. 161 (2017), slip opinion at page 13. *Daily News of Los Angeles*, 315 NLRB 1236 (1994) enfd. 73 F. 3d 406 (D.C. Cir. 1996); *United Rentals*, 349 NLRB 853 (2007); *Mission Foods*, 350 NLRB 336, 337 (2007). I conclude this is the case. Thus, Respondent's obligation in maintaining the status quo during negotiations, if employees selected the Union, included continuing granting these progressive increases as it had in the past.

Respondent, by Brian Hammerbacher, Douglas Scheaffer and Chris Cliett violated Section 8(a)(1) and engaged in objectionable conduct by telling employees that wage increases that were established past practices would be frozen if they selected union representation and/or indicating the employees would not receive such wage increases if they selected union representation

Respondent, by Brian Hammerbacher, Douglas Scheaffer and Chris Cliett violated Section 8(a)(1) and committed objectionable conduct by telling employees that wage increases that were established past practices would be frozen, and/or otherwise indicating that employees would not receive such increases during collective bargaining negotiations, *Alpha Cellulose Corporation*, 265 NLRB 177, 178 fn. 1 (1982) enfd. mem. 718 F. 2d 1088 (4th Cir. 1983); *ADIA*

¹⁴ If this were so, the grading could be a statutory violation in that it would indicate to Respondent how employees voted in the representation election, which must be a secret ballot election.

¹⁵ That an employee may be denied a progressive increase for unsatisfactory performance does not negate the fact that the increases are an established past practice, *Jensen Enterprises*, 339 NLRB 877 (2003).

Personnel Services, 322 NLRB (1992);¹⁶*W.F. Hall Printing Co.*, 239 NLRB 51, 52-53 (1978); *More Truck Lines*, 336 NLRB 772, 773 (2001) enfd. 324 F.3d 735 (D.C. Cir. 2003); *Illiana Transit Warehouse Corp.*, 323 NLRB 111, 115 (1997); *Jensen Enterprises*, 339 NLRB 877 (2003). The impact of Scheaffer's remarks was exacerbated by his emphasis on how long negotiations might take. This reasonably would suggest to employees that if they selected union representation they would not receive their progressive wage increases for an extended period.

Respondent suggests that it should not be held responsible for Scheaffer's remarks because he was "set-up" by pro-Union employees. It is clear from this record that Scheaffer was not very familiar with the step-progression system for wage increases at the Columbus facility, Tr. 140-144. He talked about Respondent not being able to give wages increases without distinguishing the step increase system to which employees were clearly entitled during negotiations. This would leave employees with the impression that they might not get these increases for some time, since Scheaffer indicated negotiations might drag on for some time. I conclude that Respondent bears full responsibility for this uncertainty. Had Scheaffer been adequately familiar with the wage system at Columbus, he would have able to correctly explain what would happen to wages during negotiations and after negotiations end.

Respondent, by Brian Hammerbacher violated the Act and engaged in objectionable conduct by suggesting that if employees selected union representation, they would lose the benefits of Respondent's severance plan

As stated earlier, to suggest, as did Hammerbacher, that employees would necessarily lose the benefits of the company severance plan if they chose union representation and in failing to assure employees that they would continue to receive its benefits during contract negotiations, Respondent violated Section 8(a)(1), *Lynn-Edwards Corp.*, 290 NLRB 202, 205 (1988); *Longview Fibre Paper & Packaging, Inc.*, 356 NLRB 796, 796n.3, 804 (2011); *Georgia-Pacific Corp.*, 325 NLRB 867 (1998); *Cooper Tire & Rubber Co.*, 340 NLRB 958, 959 (2003); *TCI Cablevision of Washington, Inc.*, 329 NLRB 700 (1999). This is so because the severance benefit was an existing benefit for Columbus employees.

Respondent, by Douglas Scheaffer, did not violate the Act by soliciting grievances.

As stated in the General Counsel's brief, towards the end of his speech on September 13, Douglas Scheaffer said "If you have a problem, put it out there, let's talk about it, and let's resolve it and let's agree." G.C. 3, 55:09-55:24. As I listened to the recording, Schaeffer continues to say something like "if we can't agree, we'll move on." I conclude that Scheaffer did not implicitly promise to remedy employee grievances. The speech in toto rebuts the presumption that Valmet would remedy all or even any employee grievances. Thus, I dismiss the allegation in complaint paragraph 11(b), *Maple Grove Health Care Center*, 330 NLRB 775 (2000).

¹⁶ This case is sometimes cited as *Siemens*.

Respondent, by Douglas Scheaffer did not violate the Act, by suggesting that employees would not benefit from union representation

5 While the general tenor of Scheaffer's remarks on September 13 were that employees would see little, if any, benefit from union representation, I conclude that his remarks did not rise to the level of a statutory violation. The cases cited by the General Counsel are all factually distinguishable. Respondent, did not for example, imply that it would insure its non-union status by unlawful means, *Winkle Bus Company*, 347 NLRB 1203, 1205 (2006); *Wellstream Corp.*, 313 NLRB 698, 706 (1994).

10 *Tiffany Wallace was an agent of Respondent*

15 The Board applies common law agency principles in determining who is an agent under the Act. When applied to labor relations, agency principles must also be broadly construed in light of the legislative policies embedded in the Act. A party may be bound by the conduct of those it holds out to speak and act for it, even though there is no proof that specific acts were actually authorized or subsequently ratified. *Atelier Condominium & Cooper Square Realty*, 361 NLRB No. 111 (November 26, 2014), slip op. p. 36. *Braun Electric Co.*, 324 NLRB 1, 2 (1997), *Dorothy Shamrock Coal Co.*, 279 NLRB 1298, 1299 (1986).¹⁷ Statements of a supervisor or agent may be imputed to an employer even if that employer was not aware that the statements were made, *Jays Foods, Inc. v. NLRB*, 573 F.2d 438 (7th Cir. 1978).

25 Common law principles incorporate the principles of implied and apparent authority. Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the agent to do the act in question, *Shen Automotive Dealership Group*, 321 NLRB 586, 593 (1996). Another way the Board has stated this principle is "whether under all the circumstances the employees would reasonably believe that [a person] was reflecting company policy and speaking and acting for management," *Community Cash Stores*, 238 NLRB 265 (1978); *Poly-America, Inc.*, 328 NLRB 667 (1999).

35 Unit employees Bush and Frierson would have reasonably believed that Wallace was speaking for management when she told them that leadmen positions *would* be eliminated or reduced in bargaining. This is so given her responsibilities in the plant and because she told them that she was imparting the information after attending a meeting with Respondent's management and attorneys.

¹⁷ The language of Section 2(13) defining "agent" states that actual authorization or subsequent ratification of specific acts is not controlling in determining whether a person is an "agent."

Respondent by Tiffany Wallace engaged in objectionable conduct and violated Section 8(a)(1)

Wallace's statements are objectionable and violative of Section 8(a)(1). Wallace was not telling employees that the status of leadmen was a subject of bargaining but rather that those who voted for union representation would lose that status or be foreclosed from becoming leadmen in the future. This is an obviously coercive statement the day before an election. It either implicitly threatened incumbent leadmen of a 10% loss in wages or threatened aspiring leadmen that selecting union representation would foreclose their opportunity in increasing their wages by becoming a leadman.

Respondent by Larry Richardson engaged in objectionable conduct and violated Section 8(a)(1)

Larry Richardson, either explicitly threatened Justin Leonard with loss of his job, or implicitly threatened him with unspecified reprisals. Even though Richardson did not mention the Union or the union campaign, Leonard was very likely to draw the connection between the threat and his comments at the captive audience meeting and the representation election. This is so because both he and Richardson understood that Richardson was talking to him about comments made at a captive audience meeting concerning the election. At that meeting Leonard had stated that Richardson's conduct was a reason for the union drive. Moreover, the timing of Richardson's conversation, just before Leonard was about to vote, was likely to coerce and interfere with Leonard's right to exercise his right to vote freely, *Jupiter Medical Center Pavilion*, 346 NLRB 650, 651 (2006). Additionally, assuming that Richardson did not specifically threaten Leonard with loss of employment, a threat of unspecified reprisal related to union or other protected activity violates the Act, *Aladdin Gaming, LLC*, 345 NLRB 585, 616-17 (2005).

Conclusions of Law

Respondent violated Section 8(a)(1) of the Act and engaged in objectionable conduct during the critical period between the filing of the representation petition as follows:

1. by Environmental, Health and Safety Manager Tiffany Wallace threatening employees with job loss or loss of promotion opportunities (to leadman) if they selected union representation on or about September 13, 2017.
2. by General Manager Brian Hammerbacher, on September 7, 2017, telling employees that during collective bargaining negotiations they would not receive progressive step wage increases, which were an established past practice of Respondent, if they selected union representation .
3. by General Manager Brian Hammerbacher, suggesting that unit employees would necessarily lose the benefits of Respondent's severance plan if they selected union representation.

4. by Supervisor Chris Cliett telling or suggesting to employees that they would not receive progressive step wage increases during collective bargaining negotiations if they selected union representation.

5. by Human Resources Vice President Douglas Scheaffer, on September 13, 2017, telling employees they would not receive progressive step wage increases during collective bargaining negotiations if they selected union representation.

6. by Production Manager Larry Richardson, threatening employees with termination and/or unspecified reprisals because of protected activities related to the representation election.

7. by conducting a raffle/contest during the critical period between the filing of a representation petition and a representation election in a manner which would aid it in identifying which employees were and which employees were not sympathetic to the Union.

Recommendations Regarding Objections

Generally, the Board will set an election and order a new election whenever an unfair labor practice occurs during the critical period between the filing of the representation petition and the election. The only exception to this policy is where the misconduct is de minimis, such that it is virtually impossible to conclude that the election outcome could be affected. In assessing whether the misconduct could have affected the result of the election, the Board has considered the number of violations, their severity, the extent of dissemination, the size of the unit, the proximity of the misconduct to the election and the closeness of the vote. It also considers the position of the managers who committed the violations, *Bon Appetit Management Co.*, 334 NLRB 1042 (2001); *Caterpillar Logistics*, 362 NLRB No. 49 (2015) enfd. 835 F. 3d 536 (6th Cir. 2016)¹⁸.

Respondent's statements, some of which were made by high-ranking company officials in captive audience meetings had more than a minimal impact on employees in an election that ended in an extremely close vote. Those statements include the statements by Hammerbacher, Scheaffer and Cliett, suggesting that employees would not receive their progressive wage increases, statements by Hammerbacher that employees would lose their severance plan benefit if they selected union representation, the statements by Wallace that either the leadman position would be eliminated or that there would be no more such positions and Richardson's coercive statements to Justin Leonard. Therefore, I recommend that the election be set aside and remanded to the Regional Director for the purpose of conducting a second election, *ADIA Personnel Services*, & *W.F. Hall Printing Company*, *supra*.

¹⁸ The Court of Appeals noted that the direction of a second election was unreviewable.

REMEDY

5 Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

10 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁹

ORDER

15 The Respondent, Valmet, Inc., Columbus, Mississippi, its officers, agents, successors, and assigns, shall

15 1. Cease and desist from

 (a) Threatening employees with job loss or loss of promotion opportunities if they select union representation..

20 (b) Telling or suggesting to employees that during collective bargaining negotiations they will not receive benefits, such as progressive wage increases, that are an established past practice of Respondent, if they selected union representation.

25 (c) Threatening employees with termination and/or unspecified reprisals because of protected activities related to the representation election.

 (d) Suggesting to employees that they would lose the benefits of Respondent's severance plan if they select union representation.

30 (e) Conducting a raffle/quiz during the critical period between the filing of a representation petition and a representation election in a manner that would assist it in determining which employees favored and which employees opposed unionization.

35 (f) In any like or related manner 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.

40 (a) Within 14 days after service by the Region, post at its Columbus, Mississippi facility copies of the attached notice marked "Appendix."²⁰ Copies of the notice, on forms provided by

¹⁹ 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.

²⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 September 7, 2017.

(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.

Dated, Washington, D.C., April 17, 2018



Arthur J. Amchan
Administrative Law Judge

20

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten employees with job loss or loss of promotion opportunities if they select union representation by the United Steelworkers or any other union.

WE WILL NOT tell employees that during collective bargaining negotiations they will not receive benefits that are an established past practice of Respondent, such as progressive wage step increases, if they select union representation by the United Steelworkers or any other union.

WE WILL NOT threaten employees with termination and/or unspecified reprisals because of protected activities related to a representation election or their support of the United Steelworkers or any other union.

WE WILL NOT suggest to employees that they will lose the benefits of our severance plant if they select union representation.

WE WILL NOT conduct a raffle/quiz during the critical period between the filing of a representation petition and a representation election in a manner that aids us in identifying which employees favor and which employees oppose unionization.

WE WILL NOT In any like or related manner restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

VALMET, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

600 South Maestri Place, 7th Floor, New Orleans, LA 70130-3413
(504) 589-6361, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/15-CA-206655 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (504) 589-6389.