Ace Heating and Air Conditioning Company, Inc. *and* Sheet Metal Workers International Association, Local Union No. 33, AFL–CIO. Cases 08–CA–133965, 08–CA–133967, 08–CA–133968, and 08–RC–127213

June 15, 2016

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On January 15, 2015, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision, Order, and Direction of Second Election.[2]

I. INTRODUCTION

The Respondent, Ace Heating and Air Conditioning Company, Inc., is an Ohio corporation that installs and services heating, ventilation, and air conditioning systems in the Cleveland, Ohio area. This case concerns events that took place in April and May 2014[3] in connection with a campaign by the Sheet Metal Workers International Association, Local Union No. 33, AFL–CIO (Union) to organize the Respondent's eight full-time field installers and service technicians, all of whom were working primarily at a jobsite called Shoreway Lofts.

Following the filing of a representation petition, an election was conducted pursuant to a Stipulated Election Agreement on May 21. Of the nine votes cast, the tally of ballots showed four for and four against the Union, with one challenged ballot belonging to Ed Dudek. On August 14, the Board adopted, in the absence of exceptions, a hearing officer's report recommending that Dudek's ballot not be counted based on a finding that he was a supervisor under Section 2(11) of the Act. Thus, the Union lost the election.

Subsequently, the Union filed objections to conduct affecting the results of the election in Case 08–RC–127213, which was consolidated with the Union's unfair labor practice charges filed in Cases 08–CA–133965, 08–CA–133967, and 08–CA–133968. On September 30, the General Counsel issued a consolidated complaint and notice of hearing alleging the Respondent committed several violations of Section 8(a)(1) of the Act and engaged in objectionable election conduct.

The complaint alleges these violations were committed by Supervisor Dudek and by the Respondent's owner and President, Mitchell Stephen. In particular, the complaint alleges that Dudek, upon direction from Stephen, threatened employees with business closure, and that Dudek conveyed to employees that the Respondent would pay them in exchange for voting against the Union.[4] Further, the complaint alleges that Stephen informed employees they were being denied a wage increase because of their support for the Union and that Stephen granted raises to some employees to influence employees against joining a union.

The judge found no merit to the allegations and recommended that the complaint be dismissed and the results of the election certified. Although we agree with the judge's decision to dismiss many of the allegations, we do not agree with his decision to dismiss the allegation that the Respondent unlawfully threatened employees with business closure. We find, moreover, that this threat requires setting aside the election.

II. UNFAIR LABOR PRACTICES

A. Alleged Violations of Section 8(a)(1) Premised on the Conduct of Supervisor Ed Dudek

1. At the time of the events in this case, Ed Dudek was a supervisor of the Respondent under Section 2(11) of the Act.[5] Dudek received his work instructions and or-

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In light of our decision today, we shall modify the judge's recommended Order, issue an appropriate notice to conform to our findings and remedy, and include a direction of second of election.

[3] All dates refer to 2014 unless otherwise indicated.

[4] The complaint also alleged that Dudek disseminated implicit threats of job loss to employees and interrogated them, but the judge discredited the relevant testimony supporting those allegations, and, as noted, we find no basis for overturning the judge's credibility determinations.

[5] The Respondent admitted in its answer "that Ed Dudek was a supervisor of the Respondent" and never sought to amend its answer to deny Dudek's supervisory status. See generally *Harco Trucking, LLC*, 344 NLRB 478, 479 (2005) ("admissions in an answer are binding on the respondent" (citing *Boydston Electric, Inc.*, 331 NLRB 1450, 1451 (2000))). In addition, the Respondent did not except to the judge's statement "that Ed Dudek was a supervisor within the meaning of Sec-

ders from owner Mitchell Stephen and he relayed those orders to eight installers and service technicians who worked under his supervision during the period in question. As is more fully explained in the judge's decision, Dudek signed a union authorization card on April 21, the date when Union Organizer David Coleman first met with employees at Shoreway Lofts and solicited and collected signed authorization cards from seven of the Respondent's employees. Dudek had some contact with Organizer Coleman and facilitated the initial meeting between Coleman and the employees.[6] Dudek also voted in the representation election on May 21, but his vote was challenged by a Board agent and, as indicated, a hearing officer determined he was ineligible to vote based on his status as a statutory supervisor.

The judge found that, about a week before the election, when Dudek was handing out paychecks to employees Henry (Joe) Huckoby, Noble Hall, Brian Orosz, and Chris Sikora, Dudek told them that Stephen had directed him to inform them that the Respondent would close its doors if they voted for the Union. The judge nevertheless found that the Respondent was not liable for this statement because Dudek was "actively involved on behalf of the Union" and therefore was not acting as an agent of the Respondent "in matters relating to the Union organizing drive." For that reason, the judge dismissed the complaint allegation that Dudek's threat violated Section 8(a)(1) and the Union's corresponding election objection.

The General Counsel excepts to the judge's dismissal on the grounds that Dudek is an admitted statutory supervisor and that, pursuant to well established Board precedent, any statements he made during the organizing campaign are imputable to the Respondent. The General Counsel additionally contends that even applying a traditional agency analysis, the Respondent clothed Dudek with apparent authority to speak on its behalf and is liable for Dudek's conduct as a result. We find merit in these exceptions.

Initially, there can be no dispute that the threat of business closure conveyed by Dudek would violate the Act, if the Respondent is liable for Dudek's conduct. It is well established that such threats by supervisors can be highly coercive, especially where, as here, the supervisor has a close working relationship with a higher-ranking official and invokes that official's name in making the threat. See, e.g., *C & T Mfg.*, 233 NLRB 1430, 1430 (1977); see also *Garvey Marine, Inc.*, 328 NLRB 991, 994 fn. 11 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001). The threat to cease operations, attributed to the Respondent's owner and president by a supervisor closely identified with him, would reasonably chill employees in the exercise of their Section 7 rights, and would be unlawful if attributable to the Respondent. Contrary to the judge, and our dissenting colleague, we find that it is, based either on Dudek's supervisory status or his apparent authority to speak for the Respondent on matters relating to the Union.

First, the Respondent is liable for Dudek's threat because he was its supervisor. The Board has long recognized that "Section 2(13) of the statute makes it clear that an employer is bound by the acts and statements of its supervisors whether specifically authorized or not." *Dorothy Shamrock Coal Co.*, 279 NLRB 1298, 1299 (1986), enfd. 833 F.2d 1263 (7th Cir. 1987); see also *Storer Communications,* 294 NLRB 1056, 1077 (1989); *Jays Foods, Inc.*, 228 NLRB 423 (1977), enfd. on this point 573 F.2d 438, 445 (7th Cir. 1978). This principle applies even where the supervisors who made allegedly unlawful statements had, on prior occasions, expressed sentiments or engaged in conduct that communicated to employees that the supervisors' sympathies were aligned with employees' organizing efforts or with the union. See *Daniel Construction Co.*, 241 NLRB 336, 340 (1979); see also *Maidsville Coal Co.*, 257 NLRB 1106, 1122–1123 (1981), enfd. 718 F.2d 658 (4th Cir. 1983) (en banc).

As the judge found, Dudek had some involvement, or even alignment, with the Union's representation effort, which was known to employees. Notwithstanding, he relayed the business closure threat on behalf of the Respondent's owner directly to four employees while he was functioning in his capacity as a supervisor of the Respondent. Therefore, applying our traditional principles pursuant to Sections 2(11) and 2(13) of the Act, we find that the Respondent is liable under the Act for Dudek's threat.[7]

tion 2(11)," and concedes in its opposition brief that "Mr. Dudek was a 'supervisor' within the meaning of Section 2(11)." Thus, in this proceeding, no party disputes that Ed Dudek was a statutory supervisor.

[6] As the judge found, Dudek "exchanged text messages with Organizer Coleman as late as May 7," but the record does not conclusively establish the quantity, nature, or contents of the text messages they exchanged, nor does the record show whether employees knew that the two communicated by text message or other means. Similarly, although Dudek appears to have told Coleman the time and place for meeting with the Respondent's employees, it is not clear from the record that employees had knowledge of the type or extent of communications between Dudek and Coleman.

[7] We find the judge's citation to, and apparent reliance on, *Indianapolis Newspapers, Inc.*, 103 NLRB 1750, 1751 (1953), and *Montgomery Ward & Co.*, 115 NLRB 645, 647 (1956), enfd. 242 F.2d 497 (2d Cir. 1957), misplaced, as those cases involved circumstances that are not present here. In both cases, the union and the employer entered into agreements to include statutory supervisors in the unit. With respect to

Even if Dudek were not a statutory supervisor, however, we would still find the Respondent liable for his coercive threat of business closure because Dudek was its agent; more specifically, he had apparent authority to speak for the Respondent. At the outset, we observe that the complaint alleged, and the Respondent did not specifically deny in its answer, that Dudek was an agent *of the Respondent* under Section 2(13).[8]

Moreover, the record evidence independently establishes that Dudek in fact was acting as an agent of the Respondent within the scope of his apparent authority when he made the business closure threat. Our standard is to apply "the common law principles of agency in determining whether an employee is acting with apparent authority on behalf of the employer when that employee makes a particular statement or takes a particular action." *Pan-Oston Co.*, 336 NLRB 305, 305 (2001) (citing *Cooper Industries*, 328 NLRB 145, 145–146 (1999)). The Board will find apparent authority where the principal has made a manifestation "to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question." Id. at 305–306 (citing *Southern Bag Corp.*, 315 NLRB 725, 725 (1994)). Thus, the question of Dudek's agency status is whether, under all the circumstances, employees would reasonably believe he was reflecting the Respondent's policy and speaking for management when he relayed Stephen's threat of closure. *Southern Bag Corp.*, supra at 725.

The circumstances here plainly establish that Dudek was an agent of the Respondent at the relevant time. As found by the judge, Dudek oversaw daily operations at the Shoreway Lofts jobsite, and Stephen routinely gave work orders to employees through Dudek. The employees, in turn, looked upon Dudek as Stephen's conduit on work-related matters. Significantly, Stephen himself generally did not appear at Shoreway Lofts on a daily basis, but typically did so only around two or three times per week, leaving Dudek to manage the work force in his stead. It is therefore not surprising that Stephen readily admitted that Dudek was in charge of the Shoreway job. Further, Stephen testified that he considered Dudek to be his "business partner" and "confidant," and that some employees perceived Dudek as his business partner. Lastly, it is undisputed that the relevant threat was conveyed while Dudek was handing employees their paychecks—a task he performed weekly on behalf of the Respondent. In these circumstances, we find, contrary to the judge, that the Respondent created a situation in which employees would reasonably conclude that Dudek was the primary conduit for transmitting Stephen's messages to employees and that Dudek was visibly and unambiguously functioning in this role when he relayed the threat of business closure to employees, purportedly on

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whether the employer was liable for the conduct of such supervisors, in *Montgomery Ward*, the Board opined:

> *When a supervisor is included in the unit by agreement of the Union and the Employer and is permitted to vote in the election, the employees obviously regard him as one of themselves.* Statements made by such a supervisor are not considered by employees to be the representations of management, but of a fellow employee. Thus they do not tend to intimidate employees. For that reason, the Board has generally refused to hold an employer responsible for the antiunion conduct *of a supervisor included in the unit*, in the absence of evidence that the employer encouraged, authorized, or ratified the supervisor's activities or acted in such manner as to lead employees reasonably to believe that the supervisor was acting for and on behalf of management.

Montgomery Ward, supra at 647 (citing *Indianapolis Newspapers*, supra at 1751) (emphasis added).

Here, the Respondent and the Union did not have an agreement to include Dudek in the unit, and thus the judge erred in relying on *Indianapolis Newspapers* and *Montgomery Ward*.

Our colleague points out that in *Indianapolis Newspapers*, the Board based its rejection of the notion that the particular supervisors in issue were acting for management not only on the fact that those supervisors "were in the unit bargained for," but also on evidence showing that they "were active on *its* behalf," i.e., the *union's* behalf. *Indianapolis Newspapers*, supra at 1751 (emphasis in original). In the present case, however, the question is not so much whether Dudek was acting for management when speaking in his own right, but whether employees would reasonably believe that Dudek was authorized to transmit statements from Stephen. The evidence demonstrates that Dudek did have at least the apparent authority in his position as a supervisor to relay a threat of business closure to employees as a message from Stephen. In *Indianapolis Newspapers* and *Montgomery Ward*, by contrast, no such evidence of the supervisor's apparent authority to communicate directives and messages to the work force from management existed. Relatedly, that Stephen actually may not have directed Dudek to convey that threat is immaterial.

Further, we disavow any suggestion by the judge that the "rebuttable presumption" framework set out in *National Apartment Leasing*, 272 NLRB 1097 (1984), is applicable here. In that case, pursuant to a remand from the Third Circuit in *NLRB v. Schroeder*, 726 F.2d 967 (3d Cir. 1984), the Board applied the law of the case to determine whether an employer was responsible for statements made by its supervisors. However, the Board continues to hold, as we have elsewhere stated, that an employer is bound by statements of its supervisors whether specifically authorized or not. Accord *Ideal Elevator Corp.*, 295 NLRB 347, 347 fn. 2 (1989).

[8] Sec. 102.20 of the Board's Rules and Regulations provides that "any allegation in the complaint not specifically denied or explained in an answer filed" shall be deemed admitted, unless good cause is shown.

The Respondent nevertheless asserted as an affirmative defense that it was not liable for Dudek's threat because Dudek actually was acting as an agent *of the Union* during the election campaign. Although the judge and our dissenting colleague accept this assertion, it has not been established. To the contrary, as the General Counsel argues, there simply is no record evidence that the Union either authorized Dudek to act on its behalf or made any outward manifestations such that employees would be reasonable in believing that Dudek was authorized to do so.

Stephen's instruction, notwithstanding that Dudek also had some involvement in the union campaign.[9]

In finding that employees did not believe Dudek was relaying a genuine threat from Stephen, the judge placed an unwarranted focus on Dudek's motive. Under well-established law, Dudek's motivation for making the statement is not relevant to whether the statement tended to chill employees in the exercise of their protected rights. See *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000) (citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946)). The judge also relied in part on the fact that none of the employees who heard the threat "made any comment to Dudek or Stephen about it," suggesting it was not taken seriously. Under the circumstances, the employees' silence is not probative of whether employees would reasonably believe Dudek was speaking for management. Rather, the fact that employees did not make comments to their employer about the threat may reflect that they took the threat seriously. Indeed, all four employees testified that they feared for their jobs because they believed that Dudek was speaking for Stephen and that their jobs were in jeopardy. One employee testified that, "before that threat, we were all voting yes."

Based on the foregoing, we reverse the judge's conclusion that Dudek was not acting as the Respondent's agent when it came to matters relating to the Union, and we find that the Respondent is liable for Dudek's unlawful threat.

2. Although the judge found that Dudek told employee Jimmy Mazzeo that Stephen would pay employees to vote against the Union in the election, he dismissed this allegation on the ground that Dudek was not an agent of the Respondent. We affirm the dismissal, but we rely only on the following reasons. The judge credited Mazzeo's testimony that, prior to the election, when Dudek and Mazzeo were working together at a jobsite, Dudek told Mazzeo that Stephen claimed he would "pay guys off for their vote." According to Mazzeo, Dudek was "rambling on and on" and once Dudek said, "Mitch claims that he's going to bribe guys," Dudek and Mazzeo "started laughing" because they "thought it was a joke[,] that there was no financial way he [Stephen] could do that . . . to pay guys for their votes."

"The Board's well-established test for interference, restraint, and coercion under Section 8(a)(1) is an objective one and depends on 'whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.'" *Dover Energy, Inc.*, 361 NLRB No. 48, slip op. at 2 (2014) (quoting *ITT Federal Services Corp.*, 335 NLRB 998, 1002 (2001)). Accordingly, the question is whether, given all the surrounding facts and circumstances, Dudek's statement to Mazzeo would reasonably have been understood by Mazzeo as coercive. We conclude that it would not.

During the course of a rambling, ad hoc conversation, Dudek jested with Mazzeo that Stephen was claiming he would "pay guys off." It is clear that this alleged "offer to bribe" was phrased in a humorous tone, and was immediately dismissed by both individuals as an obvious joke given the Respondent's financial condition. These circumstances contrast sharply with Dudek's threat of closure, which he conveyed while handing employees their paychecks as an express message from Stephen. Unlike that statement, we find that Dudek's joke regarding a possible bribe was not reasonably likely to be taken seriously and thus would not tend to coerce or influence an employee. Further, there is no credible evidence that Dudek's statement was disseminated to any other employees. For these reasons, we affirm the judge's dismissal of the allegation that the Respondent violated Section 8(a)(1) by offering to pay employees in exchange for their votes against the Union.

B. Other Alleged Violations of Section 8(a)(1)

1. The judge found that, soon after the election, Stephen and Mazzeo had a conversation in which Stephen stated that he was not changing employees' compensation or giving raises until the issue of union representation was resolved. The judge concluded that Stephen's statement did not violate the Act, reasoning that, "Respondent's decision to delay raises does not violate the Act unless these raises were of the nature that Respondent was required to give out raises despite the pending objections." Although we agree with the dismissal, we rely only on the following reasons.

An employer may lawfully tell employees that it is not providing raises in order to avoid creating the impression of trying to buy votes or otherwise interfere with an election proceeding. See *Village Thrift Store*, 272 NLRB 572, 572–573 (1983) (finding manager's statement that raises "would not then be provided because it would look like 'bribery' was a legitimate expression of the Respondent's concern that it not give the appearance of unlawful interference in the employee's exercise of their Section 7 rights"); see generally *Cutter Laboratories,*

[9] See *Mid-South Drywall Co.*, 339 NLRB 480, 480–481 (2003); *Cooper Industries*, supra at 145–146; *Southern Bag Corp.*, supra at 725; *Albertson's Inc.*, 307 NLRB 787, 787 (1992), enf. denied on other grounds 8 F.3d 20 (5th Cir. 1993). We also note the lack of evidence showing that Stephen ever gave any indication to employees that Dudek's authority was limited or that, in particular, he was not authorized to speak for Stephen or on his behalf concerning union-related matters.

Inc., 221 NLRB 161, 168–169 (1975). Here, Mazzeo summarized his conversation with Stephen as: "it came up that he [Stephen] wanted to operate the exact same way, he couldn't change nothing, so nothing would look out of place with – you know, in regards to the whole court hearing." Mazzeo further testified that Stephen said the reason for not wanting to give raises was because Stephen "didn't want it to look like there was any bribery going on, and he, you know, misplayed through this whole Union thing. So he said he's just going to keep operating the same way until this whole Union situation was cleared up." Stephen largely corroborated Mazzeo's version of their conversation. Thus, when Stephen was asked directly by an employee, Mazzeo, about the likelihood of receiving a raise just after the election, Stephen responded by explaining that a "court hearing" was needed to resolve outstanding matters related to the election and, until those matters were resolved, wages would remain unchanged because otherwise it might look like "misplay" or bribery. We find that Stephen's statement adequately conveyed that the Respondent's purpose in keeping wages unchanged was to avoid the appearance of attempting to interfere with the ongoing election proceeding. Stephen did not condition future raises on a lack of union representation, and he did not seek to capitalize on the postponed raises as a way to retaliate against employees or denigrate the Union.[10] Thus, nothing Stephen said would make it reasonable for Mazzeo or any other employee to think that raises would *not* be given if the Board certified the Union or if employees continued to support its organizational efforts. Accordingly, we do not find that the statement was unlawful.

2. The judge dismissed the allegation that the Respondent violated Section 8(a)(1) and engaged in objectionable conduct by granting pay raises to employees Fred Corbin and Steve Sarosy after the election while objections were pending. For the following reasons, we affirm.

The test for whether the Respondent's decision to grant pay increases violates the Act is whether the purpose is to impinge upon employee free choice in the event of a second election. See *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). Although raises conferred during an election campaign are not per se unlawful, the Board will draw an inference of improper motivation and interference with employee free choice, unless the respondent employer establishes a legitimate reason for the timing of the raises.[11] See *Stabilus, Inc.*, 355 NLRB 836, 836 fn. 5 (2010) (citing *Cardinal Home Products*, 338 NLRB 1004, 1016 (2003)); *Speco Corp.*, 298 NLRB 439, 439 fn. 2 (1990). The Respondent established such a legitimate reason. Specifically, Stephen testified that he provided the raises in order to retain Corbin and Sarosy after each presented him with offers to work at other jobs for higher pay. The General Counsel did not offer any contradictory evidence from which it could be inferred that the Respondent had an improper motive. Accordingly, we find that the Respondent did not violate the Act by granting the raises.

III. SETTING ASIDE THE ELECTION

It is well established that a violation of Section 8(a)(1) during the critical period of a representation election is conduct that interferes with the election, unless the violation is so de minimis that it is "virtually impossible" to conclude it affected the results. See *Mid-South Drywall Co.*, 339 NLRB at 481. The Board has consistently found threats of business closure to substantially interfere with employee free choice and destroy the laboratory conditions that the Board requires in order to guarantee a free and fair election. Id. (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 611 fn. 31 (1969)).

Here, we have found that the Respondent violated Section 8(a)(1) by threatening to shut down the company in the event that employees elected the Union to represent them. Although this unlawful threat was made only once, it was disseminated to half the eligible voters 1 week prior to the election. Therefore, we find that the business closure threat tainted the outcome of the election, necessitating that the election be set aside and a second election ordered. Accordingly, we shall direct a second election.

IV. PROPRIETY OF A *GISSEL* BARGAINING ORDER

The General Counsel additionally seeks a *Gissel* bargaining order, contending that the possibility of assuring a fair second election is slight given the Respondent's serious and substantial unfair labor practices. See *Gissel*, supra at 614–615. The Board has long considered plant closing threats to be "hallmark" violations because the coercive effect continues long after the threat was made,

[10] See and compare *Sacramento Recycling & Transfer Station*, 345 NLRB 564, 564–565 (2005); *Feldkamp Enterprises*, 323 NLRB 1193, 1198–1199 (1997); *Pacific Southwest Airlines*, 201 NLRB 647, 647 (1973), enfd. 550 F.2d 1148 (9th Cir. 1977); *Singer Co.*, 199 NLRB 1195, 1196 (1972).

[11] As the Supreme Court stated in *NLRB v. Exchange Parts Co.*, supra:

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

375 U.S. at 409.

thereby damaging election conditions more severely and for a longer period than other unfair labor practices. See *Evergreen America Corp.*, 348 NLRB 178, 180 (2006), enfd. 531 F.3d 321 (4th Cir. 2008) (citing, inter alia, *Cardinal Home Products*, supra at 1011; *Gissel*, supra at 611 fn. 31); *General Trailer, Inc.*, 330 NLRB 1088, 1097–1098 & fn. 7 (2000) (citing cases where threats alone were said to be sufficient to support a bargaining order). The business closure threat that Dudek relayed is a particularly serious violation because, in addition to being attributed to the Respondent's owner and president, it was disseminated to four employees in a small unit of eight employees who all worked at the same jobsite on a daily basis.

Nevertheless, we are unable to conclude that a bargaining order is necessary to mitigate the effects of the Respondent's unlawful threat. Significantly, although the threat of closure was attributed to Stephen, the speaker, Dudek, is no longer employed by the Respondent, and there is no evidence that any other member of the Respondent's management team acted unlawfully during the critical period. In these circumstances, we are persuaded that the Board's standard remedies will suffice to ensure that the Respondent will not engage in similar unlawful conduct in the future. Compare *Audubon Regional Medical Center*, 331 NLRB 374, 377–378, 378 and cited cases (2000) (no *Gissel* order warranted where the respondent no longer employed the supervisory or management personnel who perpetrated the unfair labor practices); with *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB 633, 637–638 (2011), enfd. sub nom. *Matthew Enterprise v. NLRB*, 498 Fed. Appx. 45 (D.C. Cir. 2012) (*Gissel* order warranted where the nature of the respondent's multiple hallmark violations, including discharge of a lead union supporter and plant closing threats, made the possibility of a fair election slight); and *Q-1 Motor Express*, 308 NLRB 1267, 1268 (1992), enfd. 25 F.3d 473 (7th Cir. 1994) (*Gissel* order warranted where the respondent's pervasive scheme of unlawful conduct, which included discharges, threats, and other unlawful acts of intimidation that were demonstrably visited upon each employee in a small unit, made it unlikely that traditional remedies and the passage of time could alone ensure a fair election).

CONCLUSIONS OF LAW

1. The Respondent, Ace Heating and Air Conditioning Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Sheet Metal Workers International Association, Local Union No. 33, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act and engaged in objectionable conduct by threatening to close the business if employees selected the Union to represent them.

REMEDY

Having found that the Respondent, Ace Heating and Air Conditioning Company, Inc., has unlawfully threatened employees with business closure, we shall order the Respondent to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Ace Heating and Air Conditioning Company, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to close the business if employees select the Sheet Metal Workers International Association, Local Union No. 33, AFL–CIO, or any other union, to represent them.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to 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 Cleveland, Ohio, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 any current em-

[12] 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."

ployees and former employees employed by the Respondent at any time since May 14, 2014.

(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.

IT IS FURTHER ORDERED that the election held on May 21, 2014, in Case 08–RC–127213 is set aside and that the case is severed and remanded to the Regional Director for Region 8 to conduct a second election as directed below.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the date of the first election and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by the Sheet Metal Workers International Association, Local Union No. 33, AFL–CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *Excelsior Underwear*, 156 NLRB 1236 (1966). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Respondent with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. June 15, 2016

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

I agree with my colleagues' disposition of the issues in all respects except one. Unlike my colleagues, I would affirm the judge's dismissal of *all* the allegations, including the judge's dismissal of the claim that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA or the Act) by threatening employees that it would close the business if the Union won the election. Thus, I would uphold the judge's dismissal of the complaint in its entirety and his resulting determination that the results of the election should stand.

This case involves a representation election in a unit of eight employees employed by a small Cleveland-area heating and air conditioning contractor. Nine employees cast ballots in the election, but it was determined that employee Ed Dudek's ballot should be excluded on the basis that Dudek is a statutory supervisor under Section 2(11). The election resulted in a 4-4 tie, which means the Union lacked the majority support needed to result in representative status.[1] However, my colleagues set aside the first election and direct a second election based solely on an alleged statement Dudek conveyed to four unit employees approximately a week before the election. Dudek told these four employees that, at the direction of the Respondent's owner and President, Mitchell Stephen, he (Dudek) was informing them the Respondent would close its doors if employees voted for the Union. There

[1] Sec. 9(a) of the Act states, in relevant part: "Representatives designated or selected for the purposes of collective bargaining by *the majority* of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . ." (emphasis added).

are two important facts regarding this alleged statement that are uncontroverted. First, Dudek (the supervisor) was openly and notoriously prounion, and he made the statement only to employees who appeared to support the Union. Second, there is no evidence that Stephen (the Employer's president and owner) campaigned against the Union. Indeed, there is no evidence that Stephen said *anything* to employees about the Union. Stephen denied telling Dudek to threaten employees with business closure, and the judge declined to find that Stephen did so.

Typically, any statement made by an employer's statutory supervisor is treated as a statement made by the employer itself. However, as the judge observed, when the supervisor in question is openly prounion, further inquiry is warranted to determine whether employees would reasonably view the supervisor as speaking for management. See *Indianapolis Newspapers, Inc.*, 103 NLRB 1750, 1751 (1953), enf. denied 210 F.2d 501 (7th Cir. 1954); *Montgomery Ward & Co.,* 115 NLRB 645, 646–648 (1956), enfd. 242 F.2d 497 (2d Cir. 1957), cert. denied 355 U.S. 829 (1957).[2] My colleagues acknowledge that Dudek "had some involvement, or even alignment, with the Union's representation effort." That is an understatement. Dudek was the leading supporter of and advocate for the Union. He arranged the union organizers' first on-site meeting with employees and introduced the union organizers to the employees. He signed an authorization card at that meeting in full view of other employees and watched approvingly as other employees signed cards. He was in frequent phone and text contact with a union organizer, he urged the employees to vote for the Union, and he himself voted in the election. Under these circumstances, absent actual ratification of Dudek's statement by owner Stephen himself, I do not believe the Board can reasonably find that employees would view Dudek as speaking for management when he claimed to be relaying a closure threat from Stephen.

The judge found the circumstances here "quite curious" and "extremely suspicious." I agree with the judge. The Respondent did not campaign against the Union. There is no evidence that its owner said anything at all to employees about the Union's organizing campaign. Then, a week before the election, the unquestioned driving force behind the organizing effort—Dudek—claims that the owner directed him to threaten employees with plant closure if they voted for the Union. I agree with the judge that it is not "far-fetched" to suspect that the threat was part of a back-up plan to secure a second election if the Union lost the first one. If so, based on my colleagues' decision in this case, the plan worked. Regardless whether there was such a plan, however, I believe that, under the circumstances presented here, employees would not have reasonably thought that Dudek was speaking for the Respondent when he claimed to be relaying a plant closure threat from the owner. I would dismiss the complaint in its entirety and uphold the election.

Accordingly, I respectfully dissent in relevant part.

Dated, Washington, D.C. June 15, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

[2] My colleagues distinguish *Indianapolis Newspapers* and *Montgomery Ward* on the basis that in those cases, the union and employer entered into an agreement to include statutory supervisors in the unit. It does not follow, however, that this is the *only* circumstance in which employees would reasonably reject the notion that the supervisor was speaking for management. Indeed, in *Indianapolis Newspapers*, the Board also relied on the fact that the supervisors in question "were active on [the union's] behalf." 103 NLRB at 1751. Here, Dudek was more than just "active" on the Union's behalf. He spearheaded the entire organizing drive. Moreover, he voted in the election, and it was not until *after* the election that Dudek was found to be ineligible to vote. In these circumstances, I would find *Indianapolis Newspapers* and *Montgomery Ward* applicable here.

My colleagues cite two cases for the proposition that an employer is bound by the statements of its supervisors even when their sympathies are aligned with the union: *Daniel Construction Co.*, 241 NLRB 336 (1979), and *Maidsville Coal Co.*, 257 NLRB 1106 (1981), enfd. en banc 718 F.2d 658 (4th Cir. 1983), cert. denied 465 U.S. 1079 (1984). Neither case warrants reversing the judge's decision. In *Maidsville Coal*, the judge distinguished *Montgomery Ward* based on the "limited extent" of the supervisor's "earlier" contacts with the union, 257 NLRB at 1122–1123, whereas Dudek's contacts with the Union and his other prounion activities were extensive and ongoing. As for *Daniel Construction*, the judge in that case altogether neglected to cite or discuss either *Indianapolis Newspapers* or *Montgomery Ward*, and it is impossible to determine whether the Respondent's exceptions drew the Board's attention to either of those cases. Moreover, in *Daniel Construction*, the employer interrogated and discharged supervisors known to sympathize with the union, sending a clear message that any union-related threats uttered by those supervisors reliably reflected the views of management regardless of the supervisors' own union sympathies. 241 NLRB at 340.

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 to close the business if you select the Sheet Metal Workers International Association, Local Union No. 33, AFL–CIO, or any other union, to represent you.

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

ACE HEATING AND AIR CONDITIONING COMPANY, INC.

The Board's decision can be found at http://www.nlrb.gov/case/08–CA–133965 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 SE, Washington, DC 20570, or by calling (202) 273–1940.

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DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Cleveland, Ohio on December 8 and 9, 2014. Sheet Metal Workers International Association Local Union No. 33 (the Union) filed the charges in this matter on August 4, 2014. The Regional Director issued the complaint on September 30, 2014, and consolidated the unfair labor practice cases with the Union's objections to conduct affecting the results of the May 21, 2014 representation election.

The results of that election were that 4 votes were cast in favor of the Charging Party Union and 4 were cast against. The vote of foreman Ed Dudek was challenged by the Board Agent, since Respondent did not include him on the list of employees eligible to vote, G.C. Exh. 2(f), page 3 of the hearing officer's report. A hearing was conducted on the challenge. The hearing officer found that Dudek was a statutory supervisor pursuant to Section 2(11) of the Act. No exceptions were filed to the hearing officer's report. Therefore, the Union did not win a majority of the votes cast and was not certified as the bargaining representative of Respondent's employees.

The essence of the complaint and the Union's objections are as follows:

1) Respondent, by Ed Dudek, at the direction of Respondent's Owner, Mitchell Stephen, threatened employees that Respondent would close if they voted for union representation.
2) Dudek, at Stephen's direction, told employees that Respondent would pay them in exchange for their voting against union representation.
3) Dudek interrogated employees about their union sympathies and how they would vote.

In addition to the unfair labor practices that mirror the Union's objections, the General Counsel also alleges that Respondent violated the Act in denying employees a scheduled pay increase about a week after the representation election.

Respondent's defense is essentially that Dudek was acting as an agent of the Charging Party Union, not as an agent of Respondent, during the relevant time period, April 18–May 21, 2014.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the brief filed by the General Counsel and the oral closing argument of the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, installs and services heating, ventilation and air conditioning systems in the Cleveland, Ohio area. It annually purchases and receives at its Cleveland, Ohio facility goods valued in excess of $50,000 directly from points outside 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.

II. ALLEGED UNFAIR LABOR PRACTICES

David Coleman, a union organizer, met with several employees of Respondent on Friday, April 18, 2014. The following Monday, April 21, he met a group of these employees at the beginning of their workday at the Shoreway Lofts project in Cleveland and distributed union authorization cards.[2] Six of the eight bargaining unit employees signed an authorization card. Another, Steve Sarosy, signed a card later that morning. Foreman/Supervisor Ed Dudek also signed an authorization card, Tr. 48, 293. The only unit member who did not sign an

[1] The transcript contains a number of errors. Two that I note are the following:
Tr. 465, line 5 should read, "saucy goose, saucy gander."
Tr. 472, line 2, should read, "April 21."

[2] The Shoreway Lofts project involved the conversion of a warehouse into apartments or condominiums.

authorization card was Charles Ashton, who normally did service work with owner Mitchell Stephen. The employees who signed authorization cards did almost exclusively installation work. The installation crew was supervised by Dudek.

Organizer Coleman went to Respondent's office on the afternoon of April 21 and presented a letter to Respondent's owner, Mitchell Stephen. Coleman asked for voluntary recognition of the Union as the representative of Respondent's full time installers and service technicians. Stephen told Coleman that he needed to consult with an attorney. On the evening of April 21, Dudek called Coleman. He reported that Mitchell Stephen had asked Dudek which employees had signed authorization cards. Dudek told Coleman that he reported to Stephen that all the employees (or all the installers) had signed a card.

On April 24, 2014, the Union filed a petition to represent Respondent's installers and service technicians. On that date, Organizer Coleman met with employees at the Shoreway jobsite. Stephen arrived and he and Coleman had a brief discussion. Stephen accused Coleman of trying to steal his employees. Coleman told him that was incorrect; that the Union wanted recognition and wanted Respondent to negotiate a collective-bargaining agreement with it. Stephen responded that his employees could choose to be union, but Ace Heating was not going to be a union company.

Stephen did not talk to employees directly about the union organization campaign. He did not, so far as this record shows, conduct a campaign to oppose the Union—except arguably through Dudek.

The election was scheduled for May 21. One week prior, on Wednesday, May 14, Dudek, at the Shoreway Lofts project, was handing out paychecks to installers Joe Huckoby, Noble Hall, Brian Orocz and Chris Sikora at the end of their workday. While doing so, Dudek said that at the direction of Mitch Stephen, he was informing these employees that Respondent would close its doors if they voted for union representation. There was no discussion about this alleged threat amongst the employees and none of them asked Stephen about it.[3]

Installers James Mazzeo and Steve Sirosy were apparently no longer working at Shoreway Lofts on this date. Stephen denies giving any such instructions to Dudek. Since I do not find Dudek any more credible than Stephen, I do not find that Stephen authorized Dudek to threaten employees with job loss if they voted for union representation.[4]

Dudek testified that Stephen told him to pass this message along to employees on at least 5 occasions, and that he did so. However, the record is quite clear that Dudek transmitted this message only once.[5]

Forman Dudek also testified that on May 21, he interrogated installer Fred Corbin as to how he was going to vote. There is no corroboration for this testimony and I do not credit it.[6] Moreover, if Dudek did interrogate Corbin, he did not necessarily do so as an agent of Respondent. Dudek may also have asked Jimmy Mazzeo how he intended to vote.

Dudek kept in contact with organizer Coleman throughout the critical period between the filing for representation on April 24 and the election on May 21. The record contains text messages between Dudek and Coleman on April 30 and May 7, 2014.

Foreman Dudek also testified that Stephen told him he would pay employees to vote No in the representation election. Stephen denies this. I do not find Dudek sufficiently more credible than Stephen to credit his testimony.

Dudek told installer Jimmy Mazzeo that Stephen would pay employees to vote against union representation. Dudek did not say this to any other employees.[7] Respondent gave raises to installers Fred Corbin and Steve Sirosy after the election. Sirosy at one time expressed support for the Union but publically changed his mind before the election. There is no evidence that Corbin and Sirosy were promised raises prior to May 21.

About a week after the May 21 election, apparently after the Union filed objections to conduct affecting the results of the election, Mitchell Stephen told Jimmy Mazzeo that he had planned to give employees raises but was going to hold off until the representation issues were completely resolved.

Analysis

Was Ed Dudek an agent of Respondent in making statements that violate Section 8(a)(1) of the National Labor Relations Act?

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

[3] Three years earlier, Brian Orocz went to Mitchell Stephen when he heard similar rumors.

[4] Dudek's motivation is quite curious. He made the statement in question only to those employees who appear to have supported the Union. Since he favored union representation, it is difficult to understand why he would pass such a statement along, even if Stephen did tell him to threaten employees. Respondent's suggestion in its closing argument that this was part of a back-up plan for filing objections if the Union lost the election, is not farfetched.

[5] Service Technician Charles Ashton did tell employees that they would lose their jobs if they voted for union representation. However, there is no allegation that Ashton was an agent of the Respondent. As of the December 8–9 hearing, only Chris Sikora, of the openly prounion employees, appears to have been still working for Respondent. Huckoby and Orocz were terminated and Hall was laid-off.

[6] I also decline to credit Dudek's testimony at Tr. 90 that in April he told employees that Mitch Stephen told him to tell them that if they wanted union jobs, to take union jobs, but leave Stephen "out of it." This testimony is not corroborated by any employee.

[7] Curiously, Dudek testified that he did not talk to any employees about Stephen's statement about bribing employees. However, I credit Mazzeo, a witness unsympathetic to the Union and the General Counsel, that Dudek did tell him this.

(1986).[8] 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).

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).

The hearing officer's report, to which exceptions were not taken, establishes that Ed Dudek was a supervisor within the meaning of Section 2(11) of the Act. As set forth in the General Counsel's brief, this normally forecloses further inquiry as to his agency status, specifically whether the statements he made can be imputed to the Respondent. However, when a supervisor, such as Dudek, is actively involved on behalf of the Union, further inquiry is warranted as to whether he was acting for and on behalf of management when making statements that would otherwise violate Section 8(a)(1), *Indianapolis Newspapers, Inc.,* 103 NLRB 1750, 1751 (1953). *Montgomery Ward & Co., Incorporated,* 115 NLRB 645, 647–648 (1956).[9]

There is no question that generally Ed Dudek was an "agent" of Respondent. When he told employees to do work on the jobsite, they would reasonably believe that he was speaking for management. Mitchell Stephen even referred to Dudek as his business partner, although there is no evidence that Dudek had an ownership interest in Ace Heating.

An individual may be an agent of the employer for one purpose and not another, *Pan-Osten Co.,* 336 NLRB 305, 306 (2001). Normally, it is the burden of the party who asserts that an individual has acted with apparent authority to establish the agency relationship, Id. However, this principle does not apply to an individual who is a statutory supervisor. Nevertheless, viewing the record as a whole, I conclude that in matters relating to the Union organizing drive, Ed Dudek was not acting as Respondent's agent.

Dudek signed a union authorization card in front of 6 of the unit employees who signed cards. Sarosy, the 7th unit member, was also aware of Dudek's support for the Union. Dudek facilitated the Union's contact with employees and exchanged text messages with Organizer Coleman as late as May 7.

None of the four employees, to whom the alleged threat was made on about May 14, made any comment to Dudek or Stephen about it. This is another consideration that leads me to conclude that they did not believe that Dudek was speaking on behalf of Stephen, or that Stephen had told Dudek to threaten them with job loss. Furthermore, assuming Dudek made such a statement, his motives are extremely suspicious. There is no reason why someone who wanted the Union to prevail would make such a statement to prounion employees 1 week before the election.

The Union considered Dudek to be operating on its behalf and not on Respondent's. In filing objections, it argued that Dudek was an "employee" whose vote should be counted. However, it also contended that if he was determined to be a statutory supervisor that his conduct should be considered objectionable. I conclude that the Union expected Dudek to vote for union representation by Local 33 and its desire to impute his statements to Respondent was a fall-back position in the event its effort to overturn the challenge was unsuccessful.

Dudek was not acting as Respondent's agent when making all the statements alleged to have violated Section 8(a)(1). Therefore I dismiss all the complaint items predicated on statements he made to unit employees.

The General Counsel failed to establish that Respondent violated the Act in not granting employees a scheduled pay increase because of their support for the Union.

The only evidence supporting the General Counsel's allegations in complaint paragraph 12 is the testimony of Jimmy Mazzeo. Mazzeo testified that a week after the election, Mitch Stephen told him that he was not changing employee's compensation or giving raises until the issue of union representation was resolved. Thus, there is no evidence that Stephen was retaliating against any employee because of their union support. In this regard, I infer that Stephen was aware that Mazzeo no longer supported the Union prior to the election on May 21.[10]

Respondent's decision to delay raises does not violate the Act unless these raises were of the nature that Respondent was required to give out raises despite the pending objections. That would be the case only if these raises were given with such regularity that employees were expecting raises, or if the employer had informed the employees that they were getting raises prior to the filing of the representation petition, *DMI Distribution of Delaware,* 334 NLRB 409, 411 (2001); *B & D Plastics,* 302 NLRB 245 fn. 2 (1991); *Philadelphia Coca-Cola Bottling Co.,* 340 NLRB 349, 353–354 (2003).

On the contrary, this record indicates the Respondent gave out wage increases in a "haphazard fashion." Thus, had it given raises during the critical period between the filing of the representation petition and the election, it would most likely have violated the Act and engaged in objectionable conduct warranting either a rerun of the election or a *Gissel* bargaining order. Once the election was over, with objections and challenges pending, Respondent granted raises at its peril. That is to say had the election been overturned and the Union certified,

[8] 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."

[9] Also see *National Apartment Leasing,* 272 NLRB 196, 197 (1984) in which the Board accepted as the law of the case the decision of the United States Court of Appeals for the Third Circuit in *NLRB v. Schroeder*, 726 F.2d 967 (3d Cir. 1984). The Court held that whether a statutory supervisor's violative statements could be imputed to the employer was a rebuttable presumption.

[10] Mazzeo called fellow employee Chris Sikora 4 days before the election and told Sikora to vote against union representation. Mazzeo also told Sikora that he would speak to Mitch Stephen about giving Sikora a raise, Tr. 289–290.

it would have been in violation of Sections 8(a)(5) and (1).[11]

Board law regarding an employer's unilateral changes during the period in which objections or ballot challenges are pending was summarized as follows in *Palm Beach Metro Transportation, LLC,* 357 NLRB No. 26 (July 26, 2011):

> Absent "compelling economic considerations," an employer "acts at its peril" by unilaterally changing working conditions during the pendency of election issues and where the final determination has not yet been made. And where the final determination on the objections results in the certification of representative the Board will find the employer to have violated Section 8(a)(5) and (1) of the Act for having made such unilateral changes, *Mike O'Connor Chevrolet,* 209 NLRB 701 (1974), *enf. denied on other grounds, NLRB v. Mike O'Connor,* 512 F.2d 684 (8th Cir. 1975).

Since the Union was not certified and will not be certified as a result of my decision, the *Mike O'Conner* principle has no relevance to this case. Thus, I find that Respondent did not violate the Act in delaying raises for unit employees or telling Jimmy Mazzeo that it was doing so.

The General Counsel's motion to amend alleging that Respondent violated the Act in giving two employees raises while objections were pending

The General Counsel also alleges, pursuant to a motion to amend the complaint, that Respondent violated the Act in granting raises to Sarosy and Corbin. Since I find that the General Counsel and the Union have not prevailed on proving objectionable conduct, such raises do not violate the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The complaint is dismissed.

I also recommend that the Board certify the results of the May 21, 2014 election.

Dated, Washington, D.C., January 15, 2015.

[11] An employer does not violate the Act it if tells employees that benefits previously provided in an indefinite manner will be deferred during the pendency of organizational efforts where they make clear that the purpose in doing so is to avoid the appearance of interference, *Village Thrift Store,* 272 NLRB 572 (1983).

[12] 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.