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# Memorandum on Bargaining-From-Scratch Statements, 1979

Warren C. Ogden

# Memorandum on Bargaining-From-Scratch Statements, 1979


## Abstract

Memo to all consultants regarding bargaining from scratch and techniques to prevent employers from violating the Labor Management Relations Act (LMRA), with relevant documentation. April 10, 1979.

file
2 union campaigns

TO: ALL CONSULTANTS

FROM: WARREN OGDEN

DATE: APRIL 10, 1979

RE: BARGAINING-FROM-SCRATCH STATEMENTS

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Bargaining-from-scratch statements are extremely effective. This case indicates that the employer can go too far but the Board generally defines the line. The difficulty is not only the potential overturning of the election or an 8 (a) (1) violation. The statement could be used to prove that the employer never intended to bargain in good faith. Wording of bargaining-from-scratch statements is therefore very important.

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who are represented by the Carpenters, but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

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**MADISON KIPP CO. —**

MADISON KIPP COMPANY, Johnson City, Tenn. and PATSY ELLIS, an Individual, Case No. 10-CA-12946, February 23, 1979, 240 NLRB No. 120

Judith M. Anderson and Paul K. Tamaroff, Atlanta, Ga., for General Counsel; James W. Bradford, Jr. and Walter C. Phillips (Hunter, Smith, Davis, Norris, Treadway & Hadden), Kingsport, Tenn., for employer; Larry G. Abel, Johnson City, Tenn., for union; Administrative Law Judge Robert C. Batson.

Before NLRB: Fanning, Chairman; Penello and Truesdale, Members.

**INTERFERENCE Sec. 8(a)(1)**

**—Threat ▶ 50.761**

Employer violated LMRA when it (1) told employees that it "would bargain long and hard" if union won representation election and (2) cited example of another employer that had bargained for eight years without reaching agreement. When viewed in context of employer's acts of unlawful interference, such statements clearly implied the threat that employer would not bargain in good faith but would instead adopt regressive bargaining posture to punish employees if they chose collective representation.

**—Interrogation — Promise of benefits ▶ 50.240 ▶ 50.778**

Employer did not violate LMRA when its official asked employee what he thought union could do for employees that employer could not do. There were no express or implied threats or promises designed to dissuade employee from union activities, and statement does not constitute unlawful promise of benefits.

[*Text*] In adopting the Administrative Law Judge's conclusion that Respondent did not violate Sec. 8(a)(1) when its employee relations manager, Ronald Houser, questioned employee Frank Cross, we do not rely upon the fact that Cross was openly pro-union and that Respondent knew of his support for the Union. * * *

The Administrative Law Judge found that Respondent did not violate Section 8(a)(1) of the Act when, during a speech to the employees on June 9, 1977, Plant Manager Jeff Mitchell stated that Respondent "would bargain from scratch" if the employees selected the Union to represent them. Although we agree with the Administrative Law Judge that the statements in this speech did not unlawfully imply that Respondent would unilaterally discontinue existing benefits prior to negotiations,[3] we believe, for the reasons set forth below, that Respondent's statements nevertheless violated Section 8(a)(1) of the Act.

In his speech to the employees, Mitchell indicated several times that any bargaining between Respondent and the Union would start from scratch and "all present wages and benefits are placed on the table." He further stated that "the Company would bargain long and hard and would only grant what is economically feasibly . . . . At Kingsport Press, the company and the unions bargained for eight years and never reached an agreement . . . bargaining that ended in lost jobs and no contract . . . ."

Although it is permissible to inform employees of the realities of the collective-bargaining process, which necessarily include the possibility that the union might trade away some existing benefits in order to obtain some other benefits and that reaching agreement may be difficult, an employer violates the Act when it makes a bargaining from scratch statement that can reasonably be interpreted as a threat either to unilaterally discontinue existing benefits prior to negotiations or to adopt a regressive bargaining posture to punish the employees for choosing collective representation.[4] In determining whether such a statement is unlawful, the totality of the surrounding circumstances must be considered, including the context of the statement itself and the presence of contemporaneous unfair labor practices.[5]

In its speech, Respondent asserted that it "*would* bargain long," not that there was a possibility negotiations might be long and difficult. This statement was followed by the graphic example of a company which bargained for 8 years without reaching agreement, thus illustrating for the employees what Respondent meant by "long" bargaining. Such statements, when viewed in the context of Respondent's interrogations of an employee, threats of plant closure, and withholding of benefits because of employees' union activity, clearly implied to the employees the threat that Respondent would not bargain in good faith, but would instead adopt a regressive bargaining posture in order to punish the employees if they chose collective representation. In so doing, Respondent violated Section 8(a)(1) of the Act.

**INTERFERENCE Sec. 8(a)(1)**

**—Threat ▶ 50.773**

Employer did not violate LMRA when supervisor told employee that plant would not close down if union won rep-

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[3] Compare Saunders Leasing System, Inc., 204 NLRB 448, 81 LRRM 1645 (1973).

[4] Tufts Brothers Incorporated, 235 NLRB No. 100, 98 LRRM 1204 (1978); Coach and Equipment Sales Corp., 228 NLRB 440, 94 LRRM 1391 (1977).

[5] Tufts Brothers Incorporated, supra at 3; Textron, Inc. (Talon Division), 199 NLRB 131, 81 LRRM 1645 (1972).

has indeed become a substitute for reasoned analysis." In Member Penello's opinion, the Board should abandon *Hollywood Ceramics* and adopt a standard under which "elections should be set aside only upon a showing of deliberate deception which renders the voters unable to recognize the campaign propaganda for what it is."

### B. Employer Speech: Threat or Prophecy

Employers seeking to inform employees of unfavorable consequences of unionization have developed certain campaign themes which have become familiar and which the Board seeks to evaluate, not in isolation, but in their "total context." Such evaluation occurs both in Section 8(a)(1) unfair labor practice proceedings and in representation proceedings to set aside elections. The following are the more significant case developments during the 1971-1975 period involving specific employer campaign statements.[103]

**1. The Union Will Bring "Serious Harm."** The Board continues to evaluate "serious harm" notices and statements in the "entire

[103] *See also* the following representative cases decided during the period of the Supplement involving employer preelection speech or conduct: (1) *Finding no coercion or interference:* Island Holidays Limited, 208 NLRB 966, 85 LRRM 1225 (1974) (working conditions at employer's hotel compared with those at union-represented hotel and statements made that house rules, including dress code, would be more strictly enforced if the union came in); Birdsall Constr. Co., 198 NLRB 163, 80 LRRM 1580 (1972) (preelection statement that if company had to operate under increased cost of union, it might make more economic sense to do so at different location where company would not have added cost of transporting goods); Garden City Fan & Blower Co., 196 NLRB 777, 80 LRRM 1113 (1972) (preelection statement that if union came in, employer could get union steward on anyone who is not doing his job and that employer would use union steward to get rid of undesirable employees); Rospatch Corp., 193 NLRB 772, 78 LRRM 1360 (1971) (no violation where employer in preelection statement told employees that if union won election, it would result in considerable legal expense that would reduce profits and employer's contributions to existing profit-sharing plan); Morristown Foam & Fiber Corp., 211 NLRB No. 6, 86 LRRM 1420 (1974) (no interference where employer distributed 12 letters and leaflets during critical period prior to election, making continued reference to violence, disaster, threats to kill, loss of jobs, plant closure and long costly strikes, Board finding that literature did not exceed permissible limits of election propaganda and that employees were capable of evaluating literature as such). (2) *Unlawful coercion or interference found:* May Dep't Stores Co., 211 NLRB No. 14, 86 LRRM 1423 (1974), *enforced,* 90 LRRM 2844 (CA DC, 1975) (employee told that if union won election, store would probably close and packing machines might be brought in to replace certain employees); Cotton Producers Ass'n, 188 NLRB 712, 76 LRRM 1411 (1971) (implying no wage increases would be given if union prevailed); Media Mailers, Inc., 191 NLRB 251, 77 LRRM 1393 (1971) (if union won election, employees would no longer be given work on certain machine since that work would not be covered by union contract); General Elec. Co., 215 NLRB No. 95, 87 LRRM 1613 (1974) (veiled threat to provide better job opportunities at nonunion plants than at organized plants).

context" in which they appear. Thus, in its 1975 *North American Phillips Co.*[104] decision, the Board found no violation of Section 8(a)(1) in the employer's letter to its unit employees during an organizational campaign, which stated: "If this union were to get in here, it would not work to your benefit but to your serious harm." The panel majority, quoting from the Board's decision in *Greensboro Hosiery Mills, Inc.*,[105] said:

> "We have not ordinarily found such notices to be illegal in and of themselves, for the bare words, in the absence of conduct or other circumstances supplying a particular connotation, can be given a non-coercive and non-threatening meaning."

In other earlier cases, the Board found "serious harm" notices in the context in which they were made to violate Section 8(a)(1).[106]

**2. "Bargaining Will Start From Scratch."** During this period, "bargaining will start from scratch" campaign messages have been held both not to have interfered, and to have interfered, with a representation election, the difference in result again depending upon the "totality of circumstances" in which the message was conveyed. Thus, in *Saunders Leasing System, Inc.*,[107] the Board set aside the election concluding that the "bargaining from scratch" statements by the employer were "meant to and did leave the impression that all existing benefits would unilaterally be eliminated if the union were successful in its campaign."

On the other hand, in *Computer Peripherals, Inc.*,[108] the panel majority, distinguishing *Saunders Leasing*, found the employer's "bargaining from scratch" statements "carried no implication that any benefits would be taken away unilaterally if the [union] were designated as the bargaining representative. . . ." Rather the em-

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[104] 217 NLRB No. 80, 89 LRRM 1530 (1975).

[105] 162 NLRB 1275, 64 LRRM 1164 (1967).

[106] Holly Farms Poultry Indus. Inc., 194 NLRB 952, 79 LRRM 1127 (1972); Serv-Air, Inc., 161 NLRB 382, 63 LRRM 1270 (1966). Board orders holding "serious harm" notices violative of Section 8(a)(1) have received various treatment in the courts of appeals. *Compare* NLRB v. Greensboro Hosiery Mills, Inc., 398 F 2d 414, 68 LRRM 2702 (CA 4, 1968) and Surprenant Mfg. Co. v. NLRB, 341 F 2d 756, 58 LRRM 2484 (CA 6, 1965) *with* J. P. Stevens & Co. v. NLRB, 380 F 2d 292, 65 LRRM 2829 (CA 2, 1967) and Serv-Air, Inc. v. NLRB, 395 F 2d 557, 67 LRRM 2337 (CA 10, 1968).

[107] 204 NLRB 448, 83 LRRM 1626 (1973), *enforced in relevant part*, 497 F 2d 453, 86 LRRM 2345 (CA 8, 1974).

[108] 215 NLRB No. 22, 88 LRRM 1027 (1974).

phasis was on the possible results of lawful bargaining with the union.[109]

The Board has also recently held lawful employer statements to the effect that a possible consequence of lawful collective bargaining is a loss of benefits. The Board pointed out that the employer's statements were in response to union claims to the employees that they could "only gain and . . . get better things from collective bargaining."[110]

**3. Signing Authorization Cards Can Be "Fatal."** In its 1975 *Mount Ida Footwear Co.*[111] decision, a Board majority concluded that the employer did not violate Section 8(a)(1) when its president told its assembled employees not to sign "any cards" because "they can be fatal to a business." In the majority's view, the employer's statements "merely expressed respondent's position that the employees would be better served . . . by rejecting the union." The use of the word "fatal" was not a threat of plant closure, the majority said, but rather "was a reference to the possibility that unionization could lead to difficulties if the union were to strike to obtain unreasonable demands."[112]

**4. Orders, Instructions or Directions vs. Views, Argument or Opinion.** The Board distinguishes between an employer's "instructions" or "directions" not to sign authorization cards and the expression of an employer's "views" or "opinions" advising against the signing of such cards. The former are unlawful; the latter lawful. In *Airporter Inn Hotel*,[113] the employer was held not to have violated the Act when in a letter it sent to employees during a union's organizational campaign it included the statement "refuse to sign any union authorization cards and avoid a lot of unnecessary turmoil." A Board majority held such statements, when read in context, were not "instructions or directions" but rather fell within the protection of Section 8(c) as "views, argument or

[109] *See also* Wagner Indus. Prods. Co., Inc., 170 NLRB 1413, 67 LRRM 1581 (1968).

[110] Ludwig Motor Corp., 222 NLRB No. 36, 91 LRRM 1199 (1976).

[111] 217 NLRB No. 165, 89 LRRM 1169 (1975).

[112] The majority supported this analysis of the employer's remarks by observing that in a later speech to the employees, the employer's president said "we are here to stay." Members Fanning and Jenkins dissented, viewing the employer's remarks "as a management directive to employees not to sign cards for the union unless they wished to subject themselves to dire consequences. . . ."

[113] 215 NLRB 156, 88 LRRM 1033 (1974).

opinions" of the employer. The Board's decision in *Trojan Battery Co.*[114] was overruled to the extent inconsistent.[115]

**5. "And Women Must Weep."** In *Litho Press,*[116] the Board held that the movie "And Women Must Weep" was not violative of the Act regardless of the circumstances of the campaign. All prior inconsistent decisions were expressly overruled.

## C. The Withholding or Granting of Benefits During an Election Campaign

**1. Withholding Benefits During an Election Campaign.** In two preelection campaign situations before different courts of appeals, employers during the 1971-1975 period were upheld in suspending wage increases during a union campaign and announcing to the employees that the suspension was because of the union organizational activity. The Second Circuit, in disagreement with the Board, held it was lawful for an employer to suspend its wage-review system during an organizational campaign, advising the employees that they deserved wage increases but that none could be granted until the union matter was settled.[117] The Fifth Circuit, also disagreeing with the Board, sanctioned an employer's posting of a letter stating that wages would be "frozen" for an indefinite period because the union had filed an election petition, where the employer's letter was in response to a union campaign propaganda notice which asked, "How much longer must we wait for a wage increase?"[118]

The Board continues to hold, however, that the employer's legal duty is to proceed as he would have done had the union not been on the scene. Thus, in *Otis Hospital,*[119] decided in early 1976, where prior to the advent of a union's organizational campaign

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[114] 207 NLRB No. 70, 84 LRRM 1690 (1973).

[115] In Trojan Battery Co.,*supra* note 114, a Board panel had held that the employer's statement "don't sign anything regardless of the reasons advanced by the union organizers" was an instruction or order, as opposed to a statement of opinion or argument.

[116] 211 NLRB No. 143, 86 LRRM 1471 (1975), *enforced,* 512 F 2d 73, 89 LRRM 2171 (CA 5, 1975).

[117] Newberry v. NLRB, 442 F. 2d 897, 77 LRRM 2097 (CA 2, 1971).

[118] NLRB v. Big Three Indus. Gas & Equip. Co., 441 F 2d 774, 77 LRRM 2120 (CA 5, 1971); *but cf.* Sargent-Welch Scientific Co., 208 NLRB 811, 85 LRRM 1563 (1974), where the withholding of accrued vacation and holiday benefits in an otherwise legal lockout was found to violate Sections 8(a)(1) and 8(a)(5).

[119] 222 NLRB No. 47 (1976).

spondent shall formulate rules on this subject in the same manner as provided in J. P. Stevens & Co., Inc., 239 NLRB No. 95, 100 LRRM 1052 (1978).

(j) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

**SUPERVISOR Sec. 2(11)**

**—Section leader ▶ 42.305 ▶ 42.306**

Section leader in mending department of cloth manufacturer's plant is supervisor within meaning of LMRA, since she (1) has authority responsibly to direct work of other section employees, (2) exercises judgment in independent manner affecting employee earnings, and (3) exercises judgment in granting employees time off for personal business.

**INTERFERENCE Sec. 8(a)(1)**

**—Interrogation — Threats ▶ 50.241 ▶ 50.761**

Employer violated LMRA by interrogating employees concerning their union activities and threatening tougher working conditions if employees selected union.

**—Promise of benefits ▶ 50.778**

Employer did not violate LMRA when supervisor told employee that employee could take more vacation than employer's vacation policy entitled him to, since statement was intended and understood to be argument for existing vacation policy, rather than promise of benefits dependent on rejection of union.

**INTERFERENCE Sec. 8(a)(1) EMPLOYER AGENT Sec. 2(2)**

**—Threat — Supervisor ▶ 50.773 ▶ 55.01**

Employer did not violate LMRA when supervisor failed to comment on employee's statement to co-worker that plant would be closed if union organized it, since employer is not responsible for statements made by third party who is not its agent. No merit is found in contention that supervisor adopted employee's statement by virtue of his silence.

**INTERFERENCE Sec. 8(a)(1)**

**—Threat ▶ 50.773**

Employer did not violate LMRA when supervisor told employee that supervisor had been with lawyers all evening [illegible] someone had said he had said that plant would be closed if employees selected union.

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Various Section 8(a)(1) allegations were dismissed on credibility grounds. The Board dismissed one 8(a)(1) allegation, rather than remand the case for credibility resolutions, noting that the remedy would not be affected in any event.

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**PRETERM, INC. —**

PRETERM, INC., Brookline, Mass. and DISTRICT 1199, HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU/AFL-CIO, Case Nos. 1-CA-12325 and -12326, February 9, 1979, 240 NLRB No. 81

Rosemary Pye, Boston, Mass., for General Counsel; Leon J. Kowal and Harold F. Kowal, Boston, Mass., for employer; Stephen R. Domesick, Boston, Mass., for union; Administrative Law Judge Herbert Silberman.

Before NLRB: Fanning, Chairman; Jenkins and Murphy, Members.

**REFUSAL TO BARGAIN Sec. 8(a)(5)**

**—Bad-faith bargaining ▶ 54.500**

Employer violated LMRA by participating in collective bargaining sessions without any intention of reaching agreement with union and by purposefully engaging in bargaining tactics that effectively precluded negotiation of a contract. (1) Employer persistently refused to negotiate concerning economic issues; (2) it attempted to exclude from bargaining unit certain categories of employees includable under terms of NLRB regional director's certification of union; (3) it adamantly refused to consider either any provision concerning union-security or any alteration of proposed "volunteers clause"; (4) it unreasonably delayed its response to union's repeated requests for employees' job descriptions; (5) it refused to meet with union negotiators on a number of occasions; (6) certain proposals submitted by employer either were more restrictive than agreements reached earlier or cut back substantially current benefits enjoyed by employees.

**—Delay in furnishing information ▶ 54.5230**

Employer violated LMRA when, during collective bargaining negotiations, it delayed furnishing union with requested information concerning job descriptions, since such information was relevant and reasonably necessary for proper performance of union's duties.

**—Management-rights clause proposal ▶ 54.452**

Employer's proposal of broad management-rights clause during contract negotiations with union does not constitute evidence of refusal to bargain in good faith, even though employer submitted proposal six months after start of negotiations, and proposed clause provided that employer's rights under clause were not to be reviewable in grievance or arbitration proceedings. (1) It is not illegal per se to propose and bargain concerning a broad management-rights clause; (2) employer did not adopt intransigent position with respect to proposal; (3) employer's submission of proposal did not impede negotiating process.

**—Negotiator's behavior ▶ 54.500 ▶ 54.25**

Bellicose behavior of employer's chief negotiator, who engaged in a number of arguments with union representatives during contract negotiations, was not sufficiently extreme or disruptive so as to constitute evidence of a refusal to bargain in good faith. Such behavior often accompanies attempts to hammer out an agreement and compromise differences.

**HEALTH CARE INSTITUTION Sec. 2(14) INTERFERENCE Sec. 8(a)(1)**

**—Interrogation ▶ 50.245 ▶ 80.202**

Health care institution did not violate LMRA when, after receiving 10-day strike notice, it distributed questionnaire to determine whether its employees would report for work during strike. (1) Once a health care institution receives 10-day notice and strike appears imminent, it properly may attempt to determine need for replacements by asking employees if they intended to strike; (2) safeguards that NLRB set forth in its Johnnie's Poultry (55 LRRM 1403) and Struksnes Construction Co. (65 LRRM 1385) decisions have been met, in view of fact that memorandum accompanying questionnaire explained purpose of questionnaire in clear manner, informed employees that they were free to make their own decision, and assured them that no reprisals would be taken.

**—Threat ▶ 50.769**

Health care institution violated LMRA when, after receiving 10-day strike notice, it questioned certain employees regarding their strike intentions without complying with safeguards that NLRB set forth in its Johnnie's Poultry (55 LRRM 1403) and Struksnes Construction Co. (65 LRRM 1385) decisions.

**ORDER Sec. 10(c)**

**—Back pay ▶ 56.4296**

Back pay due unfair labor practice strikers shall commence five days after strikers make unconditional offer to return to work, subject to caveat that back pay will commence as of date of such unconditional offer if employer already has rejected, or does reject, unduly delays, or ignores any unconditional offer to return to work, or if it attaches unlawful conditions to its offer of reinstatement.

**—Reimbursement of union negotiators — Computation of interest ▶ 56.501**

Employer that refused to bargain in good faith is ordered to reimburse employee-members of union's negotiating committee for any wages lost while attending past negotiating sessions. Interest on such wages shall be computed in same manner as interest on back pay.

[*Text*] The Respondent operates a reproductive health care clinic in Brookline, Massachusetts. After conducting a representation election in May 1975, the Regional Director for Region 1 certified the Charging Party as the exclusive representative of certain employees of the Respondent.[2] Negotiations for a collective-bargaining agreement commenced on December 1, 1975. Despite their attendance at 21 bargaining sessions over a 10-month period, the parties proved unable to reach an agreement, and the employees went out on strike on October 19, 1976. After the strike began and prior to the hearing in this case, the parties attended four additional collective-bargaining sessions, but once again were unable to reach an agreement.

After carefully examining all testimonial and documentary evidence in the record, we agree with the Administrative Law Judge's

[2] Essentially the bargaining unit * * * includes counselors, the abortion and pap clinic coordinators, nurses aides, and trainees, and excludes secretaries, bookkeeping employees, nurses, and physicians. In September 1976 the Regional Director clarified the unit and added the classifications of medical chart clerks, admitting officers, receptionists and maint-

conclusion that Respondent attended and nominally participated in numerous bargaining sessions without any intention of reaching an agreement and that it purposefully engaged in bargaining tactics which effectively precluded the negotiation of a contract. Thus, the Administrative Law Judge found, and we agree, that Respondent persistently refused to negotiate concerning economic issues despite the Union's repeated request for such discussion,[3] attempted to exclude from the bargaining unit certain categories of employees includable under the terms of the Regional Director's Certification of Representative,[4] adamantly refused to consider any provision concerning union security or any alteration of its proposed volunteers clause, unreasonably delayed in responding to the Union's repeated requests for the job descriptions of employees, and refused to meet with union negotiators on a number of occasions, including during a two-month period after charges were filed against the Union by Respondent and prior to the dismissal of the charges.

We further agree with the Administrative Law Judge's finding that Respondent's conduct during the bargaining session of October 18, 1976, the day before the strike was scheduled to commence, constitutes particularly strong evidence that Respondent failed to take seriously its duty to bargain in good faith. The proposals submitted by Respondent during the October 18 meeting were more restrictive than agreements reached earlier, or cut back substantially the current benefits of employees. By its demonstrated unwillingness to engage in meaningful negotiation, Respondent frustrated and undermined the collective-bargaining process. Accordingly, on the basis of the record as a whole and in light of the totality of Respondent's conduct during the negotiations, we hold that the Administrative Law Judge correctly concluded that Respondent violated Section 8(a)(5) and (1) of the Act.

We disagree, however, with the Administrative Law Judge's conclusion that Respondent's position on the question of management rights constituted evidence of a refusal to bargain in good faith. Respondent submitted its management-rights proposal during the June 8, 1976, negotiating session. It provided, inter alia, that except where such rights are specifically relinquished or limited by the contract, the Employer retains all prior rights, and, in addition, retains the unquestioned right to manage the affairs of the employer and to direct the work force. In addition, the June 8 proposal conferred on Respondent a number of specific rights with respect to the operation of the clinic and the utilization of employees, including, inter alia, the right to discontinue processes or operations or to discontinue their performance by employees; the right to relieve employees from duty for any legitimate reason in the best interests of employees; the right to prescribe, modify, and enforce reasonable rules regarding discipline and work performance; and the right to establish contracts or subcontracts for clinic operations. Finally, Respondent's proposal provided that such rights were unreviewable in any grievance or arbitration proceeding, but that the manner of the exercise of such rights might be subject to the grievance procedure.

Reasoning that Respondent's chief negotiator in all probability knew that the broad management-rights clause which he had proposed would be unacceptable to the Union and would result in fruitless discussion, the Administrative Law Judge concluded that the clause in issue constituted another indicium that Respondent's conduct was designed to prolong the negotiations. We disagree. It is not illegal per se for an employer to propose and bargain concerning a broad management-rights clause.[5] Hence, Respondent did not violate Section 8(a)(5) by the mere act of proposing the provision in question. And, while a rigid and inflexible insistence on the inclusion in a contract of a sweeping management-rights clause may under some circumstances constitute evidence of bad-faith bargaining,[6] the record reveals that Respondent did not adopt an intransigent position with respect to the provision in question. After a brief discussion of the management-rights proposal on June 8, the parties moved on to discuss other issues. On August 19, the Union submitted a counterproposal dealing with management rights. On August 25, Respondent submitted its own counterproposal, which the Union agreed to accept on that date. Hence, contrary to the Administrative Law Judge's conclusion, it appears that Respondent, though waiting six months to submit its initial proposal of broad management rights that were not to be reviewable in a grievance or arbitration proceeding, did not in fact impede the negotiating process in submitting its proposal.

We further disagree with the Administrative Law Judge's conclusion that the bellicose and argumentative behavior of Leon Kowal, Respondent's chief negotiator, constituted independent evidence of Respondent's refusal to bargain in good faith. While Kowal admittedly engaged in a number of arguments with union representatives during the negotiations, such behavior often accompanies attempts by the parties to hammer out an agreement and to compromise their differences. In our view, Kowal's bellicose manner, standing alone, was not sufficiently extreme or disruptive so as to constitute evidence of a refusal to bargain in good faith.

With respect to Respondent's questioning of its health care employees about their strike intentions, the Administrative Law Judge found that Respondent may lawfully engage in such questioning, but that Respondent violated Section 8(a)(1) by telling employees that their jobs would be in jeopardy if they did not respond to the questioning. For the reasons stated below, we agree with these findings.

After the Union sent Respondent a 10-day notice concerning its intention to institute a strike as required by Section 8(g) of the Act, Diane Richards, Respondent's director, instructed Preterm's supervisors to ask all employees whether they intended to work during the strike. Subsequently, Yvonne Sullivan, the coordinator of medical records and telephone counselors, individually questioned 11 employees, asking each whether she intended to report for work on the first day of the strike. Sullivan explained that she was asking for scheduling purposes. When two of the questioned employees, Ann Wax and Joan Levine, refused to respond to her inquiry, Sullivan told each woman that if she refused to answer, Sullivan would assume she was not coming to work and was therefore putting her job in jeopardy.

On October 5, 1976, five days later, Respondent circulated a questionnaire among its employees to determine whether or not they would report for work during the strike. The memorandum which accompanied the questionnaire explained:

"Mr. Small [a negotiator for the Union] also charged Preterm with having committed an unfair labor practice by making inquiries concerning your intentions of reporting to work on October 19, 1976. We are assured we can inquire of our employees as to their intentions of coming to work at the beginning of the strike. Our purpose in asking you is to make it possible to schedule incoming patients and have employees available to take care of them. We want to assure you that you are free to make your own decision. No reprisals will be taken against you whatever your decision may be.

"If you refuse to answer, we will not know whether you will be working and will therefore have to schedule a replacement."

The Administrative Law Judge concluded that a health care institution which has received a 10-day strike notice may properly attempt to determine whether or not employees intend to participate in the anticipated strike. We agree. In enacting Section 8(g), Congress was concerned about insuring the continuity of patient health care. Accordingly, the Administrative Law Judge correctly concluded that once an employer receives a 10-day notice and a strike therefore appears imminent, he may properly attempt to determine the need for replacements by asking employees if they intend to strike.

The Administrative Law Judge held, however, that Sullivan exceeded the bounds of permissible inquiry in warning employees Wax and Levine that if they refused to answer her inquiry she would assume they would not report for work during the strike and were therefore putting their jobs in jeopardy. Sullivan's remarks could reasonably have been interpreted by the employees as a threat to discharge them if they participated in the strike. Inasmuch as such threats violate Section 8(a)(1) of the Act,[7] we adopt the Administrative Law Judge's holding.

In reaching his conclusions, the Administrative Law Judge, in addition to analyzing Sullivan's conversation with Wax and Levine, also stated that he believed the strict safeguards of Johnnie's Poultry Co. and John Bishop Poultry Co.,[8] "should be relaxed" in cases involving the interrogation of prospective strikers by health care institutions. The General Counsel excepted, contending that the safeguards outlined in Johnnie's Poultry Co., supra, and Struksnes Construction Co., Inc.,[9] should regulate the manner in which such interrogation is conducted, citing the Board's decision in Commercial Management, Inc., 233 NLRB No. 104, sl. op., pp. 28 — 29, 97 LRRM 1247 (1977).

We agree with the General Counsel. In order to lessen the inherently coercive effect of the polling of its employees, Respondent had an obligation to explain fully the purpose of the questioning, to assure the employees that no reprisals would be taken against them as a result of their response, and to refrain from otherwise creating a coercive atmosphere. By the failure of its representative to comply with these requirements in questioning a number of employees, Respondent interfered with, restrained, and coerced its employees in the exercise of their right to engage in protected concerted activity.

In contrast, however, Respondent's memorandum of October 5 satisfied these requirements in full. That memorandum explained the purpose of the questionnaire in a clear manner, informed the employees that they were free to make their own decision, and assured them that no reprisals would be taken against them because of their decision whether or not to strike. Hence, in distributing its memorandum and questionnaire, Respondent did not exceed its right to determine the strike intentions of its employees.

*Remedy:* In adopting the Administrative Law Judge's recommended Order, we agree with him that backpay shall commence for each striking employee five days after he or she makes an unconditional offer to return to work. Drug Package Company, Inc., 228 NLRB 108, 94 LRRM 1570 (1977). This provision is, however, subject to the caveat that, if Respondent herein has already rejected, or hereafter rejects, unduly delays, or ignores any unconditional offer to return to work, or attaches unlawful conditions to its offer of reinstatement, the five-day period serves no useful purpose and backpay will commence as of the date of the unconditional offer to return. Newport News Shipbuilding & Dry Dock Company, 236 NLRB No. 218, 98 LRRM 1475 (1978). And while here bound by these cases as representing the Board major-

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[3] Initially, the Union suggested that noneconomic issues be discussed first, but later requested discussion of wages and other economic issues. Respondent then refused to discuss such issues for many months. In addition, we note, as found by the Administrative Law Judge, that in more than a year of negotiations Respondent at no time gave the Union a comprehensive contract draft, though it refused to use the Union's contract draft of December 5, 1975, as a working model from which to negotiate.

[4] Respondent did not agree to accept the Regional Director's description of the bargaining unit until November 19, 1976. Prior to that date, Respondent insisted on the exclusion from the unit of trainees and part-time employees who worked fewer than 16 hours per week, notwithstanding the fact that the Regional Director's Certification of Representative of May 1975 included in the unit both trainees and regular part-time employees.

[5] N.L.R.B. v. American National Insurance Company, 343 U.S. 395, 30 LRRM 2147 (1952); Texas Industries, Inc., 140 NLRB 527, 529, 52 LRRM 1054 (1963).

[6] E.g., San Isabel Electric Services, Inc., 225 NLRB 1073, 1078 — 80, 93 LRRM 1055, 1062 (1976); Gulf States Canners, Inc., 224 NLRB 1566, 1573 — 76, 93 LRRM 1425 (1976); Stuart Radiator Core Manufacturing Co., Inc., 173 NLRB 125, 69 LRRM 1243 (1968).

[7] Spriggs Distributing Company, 219 NLRB 1046, 1050, 90 LRRM 1332 (1975); Farmers' Cooperative Compress, 169 NLRB 290, 292, 67 LRRM 1266 (1968), enfd. in part 416 F.2d 1126, 70 LRRM 2489 (D.C. Cir. 1969); Cooks Markets, Inc., 159 NLRB 1182, 1186, 62 LRRM 1436 (1966).

[8] 146 NLRB 770, 55 LRRM 1403 (1964), enforcement denied 344 F.2d 617, 59 LRRM 2117 (8th Cir. 1965).

[9] 165 NLRB 1062, 65 LRRM 1385 (1967).

ity view, Chairman Fanning and Member Jenkins note that, in accordance with their dissent in Drug Package Company, Inc., they would make whole employees who apply for reinstatement without a five-day waiting period.

Respondent excepted to the Administrative Law Judge's recommendation that Respondent be ordered to reimburse the employee-members of the Union's negotiating committee for any wages lost while attending past negotiating sessions. We have decided to adopt the Administrative Law Judge's recommendation. See M.F.A. Milling Company, 170 NLRB 1079, 68 LRRM 1077 (1968), enfd. sub nom. Local 676, Laborers', 463 F.2d 953, 84 LRRM 2412 (D.C. Cir. 1972). However, interest on such wages should be computed in the same manner as the interest on backpay rather than at the specific rate of seven percent specified by the Administrative Law Judge.

**REFUSAL TO BARGAIN Sec. 8(a)(5)**

**—Failure to furnish information ▶ 54.5237**

Employer did not violate LMRA when, during contract negotiations, it failed to furnish union with information concerning contributions made by it and its employees under health plan, since union had not clearly asked for such information.

**—Failure to furnish information ▶ 54.5237**

Employer did not violate LMRA when, during contract negotiations, it failed to provide union with copies of its life and disability insurance policies, where union's request for policies was casually made and not renewed, and employer's failure to provide policies did not impede negotiations.

**—Failure to furnish information ▶ 54.5232**

Employer did not violate LMRA when, during contract negotiations, it delayed five or six weeks in furnishing union with requested information concerning job classifications, wages, and base salaries, since delay was not unreasonably long and did not impede negotiations.

**STRIKE Sec. 2(13)**

**—Unfair labor practice strike ▶ 52.3614**

Strike that in part was result of employees' frustration at lack of progress in contract negotiations was unfair labor practice strike, where lack of progress was due to employer's refusal to bargain in good faith.

**SUNRIZE MARKETS —**

SUNRIZE MARKETS, INC., Cucamonga, Calif. and RETAIL CLERKS, LOCAL 1428, AFL-CIO, CLC, Case No. 31-CA-8296, February 26, 1979

George A. Leet, Associate Executive Secretary, by direction of NLRB.

**PROCEDURE Sec. 10(b)**

**—Hearing ▶ 36.500**

Hearing is directed on complaint alleging that employer violated Section 8(a)(5) of LMRA.

[*Text*] On September 28, 1978, the Regional Director for Region 31 of the National Labor Relations Board issued a complaint and notice of hearing in the above-entitled proceeding, alleging that the Respondent has engaged in and is engaging in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Subsequently, Respondent filed an answer, admitting in part and denying in part the allegations of the complaint, submitting affirmative defenses, and requesting that the complaint be dismissed in its entirety.

Thereafter, on December 1, 1978, Respondent filed with the Board in Washington, D.C., a "Motion for Summary Judgment; Supporting Statement, and Affidavits in Support Thereof," with exhibits attached. Respondent moves to enter summary judgment on the ground that the pleadings, affidavits, and supporting papers attached thereto show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.

Thereafter, on December 11, 1978, the Board issued an Order Transferring Proceeding to the Board and Notice to Show Cause why Respondent's Motion for Summary Judgment should not be granted, and on December 13, 1978, an order correcting the order in certain respects. On December 26, 1978, the Charging Party filed an Opposition to Motion for Summary Judgment and a memorandum, in support thereof, and on December 27, 1978, the General Counsel filed a Motion in Opposition to Respondent's Motion for Summary Judgment.

The Board having duly considered the matter, is of the opinion that there are substantial and material issues of fact and law which may best be resolved at a hearing before an Administrative Law Judge. Accordingly,

It is hereby ordered that Respondent's Motion for Summary Judgment be, and it hereby is, denied.

IT IS FURTHER ORDERED that the proceeding be, and it hereby is, remanded to the Regional Director for Region 31 for the purpose of arranging such hearing and that said Regional Director be, and he hereby is, authorized to issue notice thereof.