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DEVELOPMENTS IN LABOR LAW: EXAMINING TRENDS AND TACTICS IN LABOR ORGANIZATION CAMPAIGNS

HEARING

BEFORE THE

SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS

OF THE

COMMITTEE ON EDUCATION AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

April 22, 2004

Serial No. 108-52

Printed for the use of the Committee on Education and the Workforce

Available via the World Wide Web: http://www.access.gpo.gov/congress/house
or
Committee address: http://edworkforce.house.gov

U.S. GOVERNMENT PRINTING OFFICE

93-255 PDF WASHINGTON : 2004

For sale by the Superintendent of Documents, U.S. Government Printing Office
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DEVELOPMENTS IN LABOR LAW: EXAMINING TRENDS AND TACTICS IN LABOR ORGANIZATION CAMPAIGNS

Thursday, April 22, 2004

U.S. House of Representatives

Subcommittee on Employer–Employee Relations

Committee on Education and the Workforce

Washington, DC

The Subcommittee met, pursuant to notice, at 10:58 a.m., in room 2181, Rayburn House Office Building, Hon. Sam Johnson [Chairman of the Subcommittee] presiding.

Present: Representatives Johnson, Ballenger, Kline, Andrews, Payne, McCarthy, Kildee, Tierney, Holt, and McCollum.

Staff present: Kevin Frank, Professional Staff Member; Ed Gilroy, Director of Workforce Policy; Don McIntosh, Staff Assistant; Jim Paretti, Professional Staff Member; Molly Salmi, Director of Workforce Policy; Deborah Samantar, Committee Clerk; Kevin Smith, Senior Communications Counselor; Loren Sweatt, Professional Staff Member; Jody Calemine, Minority Counsel Employer-Employee Relations; Margo Hennigan, Minority Legislative Assistant/Labor; Peter Rutledge, Minority Senior Legislative Associate/Labor; and Marsha Renwanz, Minority Legislative Associate/Labor.

Chairman JOHNSON. A quorum being present, the Subcommittee on Employer/Employee Relations of the Committee on the Education and the Workforce will come to order.

We're hearing today testimony on the developments in labor law, examining trends and tactics in labor organization campaigns. Under Committee rule 12B, opening statements are limited to the Chairman and ranking minority member of the Subcommittee, Mr. Rob Andrews.

Therefore, if other members have statements, they will be included in the hearing. With that, I ask unanimous consent for the hearing record to remain open for 14 days till our member statements and other extraneous material referenced during the hearing to be submitted in the official hearing record. Hearing no objection, so ordered.

STATEMENT OF HON. SAM JOHNSON, CHAIRMAN, SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Chairman JOHNSON. Good morning to you all. Thank you for being here. It's an honor to chair today's hearing, Developments in Labor Law: Examining Trends and Tactics in Labor Organization Campaigns. This is the first in a series of hearings that this Subcommittee will hold this year, both in Washington and in the country, in a comprehensive review of our nation's labor laws.

As we all know, the cornerstone of our nation's labor policy, the National Labor Relations Act, dates back to the Great Depression. Other laws, such as Labor Management Reporting and Disclosure Act, have now passed the half-century mark. The substance of most of these laws remains largely unchanged. Yet, the labor market reflects a vastly different and modern era.

It's our intent that these hearings examine what is working and what is not. Where Federal labor law is played out as Congress intended, where it has fallen short, and where and how these laws might be changed to better address the 21st Century workforce.

As we examine the trends in labor law, it's fitting that this morning's hearing focuses on a relatively new trend. More and more employers are being forced to recognize labor unions without first holding a secret ballot employee election. The election process that is guaranteed in law and administered by the National Labor Relations Board.

Since enactment of the law in 1939, most common means by which a union has sought to represent employees is through secret-ballot elections administered by the NLRB. If the interest is there, the union then petitions for an election, the employer and union deliver their arguments, and then the employees decide by way of secret ballot whether or not to unionize.

To ensure a free and fair process, the election is administered and supervised by the National Labor Relations Board. To prevent intimidation or harassment, the law establishes that neither the union nor an employer may coerce, harass, or restrain employees in exercising their right to choose whether or not to support the union.

Perhaps most important is that the employee's choice is made in the privacy of a voting booth with neither the employer nor the union knowing how any individual voted. You can call me old fashioned if you want to, but that sounds like a pretty good fair system to me.

In the last 10 years, however, we've seen an increased effort by labor to seek union recognition outside the secret-ballot process. Indeed, the use of so-called card-check agreements has become a critical component of labor organizing strategy. Under a card-check system, a union gathers authorization cards signed by workers, which supposedly express their desire to unionize.

Under current law, an employer may voluntarily recognize unions based on card checks but it's not required. An employer can always insist upon an election administered by NLRB. However, employers are often pressured into accepting card checks by union picketing, threats, or comprehensive corporate campaigns to discredit or smear the employer publicly.

It's no secret that corporate campaigns have become a key weapon in organized labor's arsenal of tactics. Unlike the traditional bargaining process, corporate campaigns center on making the employer look bad in the public eye. These campaigns often include intensely negative media campaigns, frivolous litigation, and picketing. Unions have even gone so far as to engage in other secondary activity on suppliers, distributors, and other businesses wholly unrelated to the election at hand.

Increased use of these card checks and pressures that result from these corporate campaigns raise red flags for a number of reasons. First, their very nature card checks leave the employers—employees vulnerable to harassment, intimidation, and union pressure.

Secret ballots are more accurate indicators than authorization cards. One court noted 18 percent of those who sign authorization cards do not want the union. It seems to me secret-ballot election taken with protections of law is something that works well, and that's what we should attempt to make sure occurs in the future.

With that said, our witnesses are three of the nation's finest minds in the area of labor law, who will give us their analysis of the legal matters raised in these questions. And I welcome my witnesses and their testimony.

I now yield to the distinguished minority member, Mr. Rob Andrews, for any comments he wishes to make.

[The prepared statement of Chairman Johnson follows:]

Statement of Hon. Sam Johnson, Chairman, Subcommittee on Employer–Employee Relations, Committee on Education and the Workforce

Good morning: It is an honor to chair today's hearing, "Developments in Labor Law: Examining Trends and Tactics in Labor Organization Campaigns."

This is the first in a series of hearings that this Subcommittee will hold this year, both in Washington and throughout the country, in a comprehensive review of our nation's labor laws.

As we all know, the cornerstone of our nation's labor policy, the National Labor Relations Act, dates back to The Great Depression.

Other laws, such as the Labor–Management Reporting and Disclosure Act, have now passed the half-century mark.

The substance of most of these laws remains largely unchanged. Yet, the labor market reflects a vastly different and modern era.

It is our intent that these hearings examine what is working and what is not: where federal labor law is played out as congress intended, where it has fallen short, and where and how these laws might be changed to better address a 21st century workforce.

As we examine trends in labor law, it is fitting that this morning's hearing focuses on a relatively new trend:

More and more, employers are being forced to recognize labor unions without first holding a secret-ballot employee election—the election process that is guaranteed in law and administered by the National Labor Relations Board.

Since enactment of the law in 1939, the most common means by which a union has sought to represent employees is through secret-ballot elections administered by the National Labor Relations Board.

If the interest is there, the union then petitions for an election, the employer and union deliver their arguments, and then the employees decide by way of a secret-ballot election whether or not to unionize.

To ensure a free and fair process, the election is administered and supervised by the National Labor Relations Board.

To prevent intimidation or harassment, the law establishes that neither the union nor an employer may coerce, harass or restrain employees in exercising their right to choose whether or not to support the union.

Perhaps most important is that the employee's choice is made in the privacy of a voting booth, with neither the employer nor the union knowing how any individual voted.

Now call me old-fashioned but that sounds like a good and fair system to me.

In the last ten years, however, we have seen an increased effort by labor to seek union recognition outside of the secret-ballot process.

Indeed, the use of so-called "card check agreements" has become a critical component of labor's organizing strategy.

Under a "card check" system, a union gathers "authorization cards" signed by workers which supposedly express their desire to unionize.

Under current law, an employer may voluntarily recognize unions based on card checks, but it is not required.

An employer can always insist upon an election administered by the NLRB. However, employers are often pressured into accepting "card checks" by union picketing, threats, or comprehensive "corporate campaigns" to discredit or smear the employer publicly.

It is no secret that corporate campaigns have become a key weapon in organized labor's arsenal of tactics. Unlike the traditional bargaining process, corporate campaigns center on making the employer look bad in the public eye.

These campaigns often include intensely negative media campaigns, frivolous litigation, and picketing.

Unions have even gone so far as to engage in other secondary activity on suppliers, distributors, and other businesses wholly unrelated to the election at hand.

The increased use of these card checks, and the pressures that result from these corporate campaigns raise red flags for a number of reasons.

First, by their very nature, card checks leave employees vulnerable to harassment, intimidation, and union pressure. Card checks strip workers of the right to choose, freely and anonymously.

Equally important, the evidence suggests that secret ballot elections are more accurate indicators than authorization cards of whether employees actually wish to be recognized by a union.

As one court noted, "18 percent of those who sign authorization cards do not want the union."

As we embark on these hearings, I am reminded of the old saying "if it ain't broke, don't fix it."

At least from where I'm sitting, it seems to me that the secret-ballot election, taken with the protections in law against harassment and retaliation, is something that works well.

It seems to me that a secret-ballot election is the only way, in fact, to protect the integrity of a worker's right to vote their conscience without fear of harassment, intimidation, retaliation, misinformation, or worse.

With that said, our witnesses today are three of the nation's finest minds in the area of labor law, who will give us their analysis of the legal issues raised on these important matters.

I welcome our witnesses and look forward to their testimony today.

STATEMENT OF HON. ROBERT E. ANDREWS, RANKING MEMBER, SUBCOMMITTEE ON EMPLOYER-EMPLOYEE RELATIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE

Mr. ANDREWS. Thank you, Mr. Chairman, and good morning. We start from a common principle that no person should be coerced into making a decision against his or her own will as to whether to join a union. I think that's the principle for which there is unanimity.

My concern is that this hearing is going to build an inadequate and incomplete record on the question of coercion of people when they choose to join or not join a union.

I fear that this record will be incomplete in three key respects. First, is that we heard the Chairman make a number of conclusory statements about widespread and rampant coercion by unions in the context of card check—card signings by union members. I look forward to hearing that record amplified during this hearing. I think if we're going to make such statements, it's the obligation of those who would support those statements to give evidence and factual statements that would back that up. It's rather easy to make

these conclusory statements. I'll be anxious to see the record that supports that conclusion.

Second, you know, coercion is a two-way street when it happens, and the focus should not simply be on the act that is the terminal act of deciding whether or not a union comes in, whether that's a vote cast or a card signed, but it ought to be the entire context of the employer/employee relationship leading up to that.

This record should also include discussions of one-on-one meetings, captive-audience meetings, examinations of in-house public relations and persuasion campaigns by employers. I do not submit that all employers engage in coercive tactics within an organizing drive context but some certainly do, and it's important that the record bear out those facts, as well as facts about alleged coercion on the union's side.

Finally, there's an important omission from the hearing as far as I can tell, and that is the question of what happens when there's been a fair election and the employees have opted to be collectively bargained represented by a union and the employer fails to negotiate in good faith for the first contract.

What remedies exist when an employer has fought and lost the election and just chooses not to recognize it, not by appealing the result of the election, but by interminably dragging out the bargaining process in bad faith.

What kind of economic sanctions militate against that result. It can lead us through a situation where winning an election really isn't winning at all, because the time that lapses from the victory in the election to the conclusion of the first contract is intolerably long and, in fact, costs the people in the union—the workers in the union—a significant amount, because there's no raise or no increase in benefits while that is going on.

So I do accept the notion that it's our responsibility to look at coercion from any side; from all sides when a worker is about to choose whether to join a union or not.

But any examination of coercion bears with it the responsibility of laying out on the record facts of coercive practices, carries with the responsibility of examining coercive practices by employers in the work place leading up to the decision, and I believe carries with it the responsibility of understanding what I believe is the course of practice of ignoring the result of a freely chosen union election in refusing to bargain in good faith with the duly elected representatives of the workers.

I don't see anything suggesting we're going to raise those questions. We certainly will take an opportunity to do so during the discussion with the panel. So I do look forward to hearing from the witnesses and thank the Chairman for his courtesies.

Chairman JOHNSON. Thank you, Mr. Andrews. I appreciate your confidence and, you know, I think you and I both look for open discussion in trying to find out the real facts. Despite the fact that you're a lawyer, you're a good guy.

Mr. ANDREWS. Flattery will get you everywhere.

Chairman JOHNSON. We have a very distinguished panel of witnesses before us today, and I thank you all for coming, and I'm going to introduce you each. I'm quite impressed by the backgrounds of all three of you.

Mr. Charles Cohen is a partner in the labor and employment practice of Morgan Lewis, one of the country's leading labor law firms. Mr. Cohen's practice focuses on representing senior management in complex labor and employment law matters in the private sector.

From '94 to '96, Mr. Cohen served as a member of the National Labor Relations Board. Prior to that, Presidential appointment. He had in-depth executive and staff labor law experience with the NLRB, as well as private practice.

He has a comprehensive background in collective bargaining issues and all facets of labor and employee relations. Mr. Cohen also serves as chair of the United States Chamber of Commerce, NLRB Subcommittee, and is a fellow of the College of Labor and Employment Lawyers.

Mr. Cohen is testifying today on behalf of the U.S. Chamber of Commerce.

Our second witness, Ms. Nancy Schiffer, has been an associate general counsel with the American Federation of Labor Congress of Industrial Organization since 2000. Her areas of responsibility involve NLRB and organizing-related projects.

Prior to coming to the AFL-CIO, Ms. Schiffer was deputy general counsel of the United Auto Workers in Detroit, Michigan. In addition to her administrative responsibilities there, her practice areas included NLRB, organizing, collective bargaining, and contract enforcement, arbitration, strikes, and lock outs, plant closings, relocations, and retiree health insurance litigation.

She practiced with a union-side labor firm from '79 till '82, and prior to that, with the National Labor Relations Board, Detroit Regional Offices, a field attorney. Ms. Schiffer is a member of the ABA Labor and Employment Law Section and its committee on practice and procedures under the NLRB.

Our third witness, Mr. Clyde Jacob, is a partner in the labor and employment section of Jones Walker, the leading national law firm. Mr. Jacob's experience spans over 25 years, exclusively in the field of labor and employment relations, representing management.

He has represented employers in responding to union organizing, boycotts, National Labor Relations Board, representation cases in corporate campaigns throughout the United States, Puerto Rico, Brazil, Norway, the United Kingdom, Singapore, and Nigeria.

Before the witnesses begin their testimony, I would like to remind members that we will be asking questions after the entire panel has testified. In addition, Committee rule two imposes a 5-minute limit on all questions.

And we also would like to adhere to a 5-minute rule on your testimony initially, if you don't mind. The lights down there that you saw them function for us they come on green when you first start, and then you'll see a yellow light with 1 minute remaining, and if you would conclude your remarks when the red light comes on.

I'd like to recognize the first witness now for your testimony. You may begin, sir.

STATEMENT OF CHARLES I. COHEN, ESQ., PARTNER, MORGAN LEWIS, COUNSELORS AT LAW, AND CHAIRMAN, U.S. CHAMBER OF COMMERCE, NATIONAL LABOR RELATIONS BOARD SUBCOMMITTEE, WASHINGTON, DC, ON BEHALF OF THE U.S. CHAMBER OF COMMERCE

Mr. COHEN. Chairman Johnson, Mr. Andrews, and members of the Subcommittee, I am pleased and honored to be here today. Thank you for your kind invitation.

At the head of the National Labor Relations Act is the secret-ballot election process, administered by the National Labor Relations Board. If a group of employees in an appropriate collective bargaining unit wishes to select a union to represent them, the board will hold a secret-ballot election, based on a petition supported by at least 30 percent of the employees in the unit.

The board administers the election by bringing portable voting booths, ballots, and a ballot box to the work place. The election process occurs outside the presence of any supervisors or managerial representatives of the employer.

No campaigning of any kind may occur in the voting area. The only people who are allowed in the voting area are the NLRB agent, the employees who are voting, and certain designated employee observers.

As the Supreme Court and numbers of Courts of Appeal have stated, a secret-ballot election is the preferred method of ascertaining whether a union has majority support. Although authorization cards may adequately reflect employee sentiment when the election process has been impeded, the Supreme Court recognized that cards are admittedly inferior to the election process.

Yet, one of the highest priorities of unions today is to obtain agreements from employers, which would allow the union to become the exclusive bargaining representative of a group of employees without ever seeking an NLRB supervised election.

These agreements, which are often referred to as neutrality or chard-check agreements, come in a variety of forms. In some cases the agreement calls for the employer to recognize the union if it produces signed authorization cards from a majority of employees. In many cases the agreement includes other provisions, which are designed to facilitate the union's organizing campaign, such as limitations or a gag order on employer communications to employees about the union.

An agreement to provide the union with a list of names and home addresses of employees in the unit. An agreement to allow the union access to the employer's facility to distribute literature and meet with employees. And an agreement to extend recognition based on card checks rather than a secret-ballot election.

Whatever form the agreement may take the basic goal is the same. To establish a procedure which allows the union to be recognized without the involvement or sanction of the NLRB. Neutrality agreements and card-check agreements, therefore, present a direct threat to the jurisdiction of the NLRB and its crown jewel the secret-ballot election process. There are many explanations for the precipitous decline of union density. The globalization of U.S. corporations, the increasing regulation of the work place through Fed-

eral legislation, rather than collective bargaining, and the changing culture of the American work place.

While unions may not disagree with these explanations to varying degrees, they claim that the NLRB's election process and the current law is to blame. They argue that the election process is slow and ineffective, and that this alternate procedure is needed.

I believe there are two basic problems with this argument. First, it is not supported by the facts. The NLRB's election process is efficient and fair, as demonstrated by hard statistics cited in my statement. Second, neutrality card-check agreements limit employee free choice, and are generally the product of damaging leverage exerted by the union against the employer.

To be sure, there are horror stories of employers who abuse the system and commit egregious unfair labor practices in order to prevail in an election. In such cases the law provides remedies for the employers' unlawful behavior, including even bargaining orders based on authorization card majorities. But these situations are the exception rather than the norm. In the overwhelming majority of cases where employees choose not to be represented by a union, they do so based on the information that is presented by both sides during the campaign process.

An important problem with neutrality card-check agreements is the method by which they are negotiated. They are typically a function of leverage rather than a groundswell from the employees to have the system determined by that.

There is no cause, I submit, for abandoning secret-ballot election process, which the board has administered for seven decades. The Act's system of industrial democracy has withstood the test of time, because its focus is on the true beneficiaries of the Act, the employees.

In my view the Miller-Kennedy Bill is not sound public policy, because it would deprive employees of the fundamental right to determine the important question of union representation by casting their vote in a board-supervised secret-ballot election. Indeed, it would be unwise public policy to abandon government-supervised secret-ballot elections in favor of mandatory card check. I would think that that would, in fact, be a self-evident proposition that a secret-ballot government election would be preferable.

I'm aware that the Committee has previously considered quite opposite legislation, which would require the union representation for currently unrepresented groups of employees be determined by a secret-ballot election. Without the increasing use of corporate campaigns and neutrality/card check agreements over the last decade—a trend which has eroded employee free choice and which reflects a shift in focus from organizing employees to organizing employers often as a result of corporate campaigns—such legislation would not be needed.

But in light of this trend, such legislation in my view is necessary to protect the interests of employees the Act is intended to benefit by ensuring that the right to vote is not compromised by agreements which are the product of external pressure on their employer.

This concludes my oral presentation.

[The prepared statement of Mr. Cohen follows:]

Statement of Charles I. Cohen, Esq., Partner, Morgan Lewis, Counselors at Law, and Chairman, U.S. Chamber of Commerce, National Labor Relations Board Subcommittee, Washington, DC

Chairman Johnson and Members of the Subcommittee, I am pleased and honored to be here today. Thank you for your kind invitation.

By way of introduction, I was appointed by President Clinton, confirmed by the Senate, and served as a Member of the National Labor Relations Board from March 1994 until my term expired in August 1996. Before becoming a Member of the Board, I worked for the NLRB in various capacities from 1971 to 1979 and as a labor lawyer representing management in private practice from 1979 to 1994. Since leaving the Board in 1996, I have returned to private practice and am a Senior Partner in the law firm of Morgan, Lewis & Bockius LLP. I am a member of the Labor Relations Committee of the U.S. Chamber of Commerce, and Chair of its NLRB subcommittee, and am testifying today on behalf of the U.S. Chamber of Commerce.

The National Labor Relations Act was enacted in 1935 and has been substantially amended only twice—once in 1947 and once in 1959. The Act establishes a system of industrial democracy which is similar in many respects to our system of political democracy. At the heart of the Act is the secret ballot election process administered by the National Labor Relations Board. In order to understand how recent trends in organizing are diluting this central feature of the Act, some background is necessary.

The NLRB's Secret Ballot Election Process

If a group of employees in an appropriate collective bargaining unit wishes to select a union to represent itself, the Board will hold a secret ballot election based on a petition supported by at least 30% of employees in the unit. The Board administers the election by bringing portable voting booths, ballots, and a ballot box to the workplace. The election process occurs outside the presence of any supervisors or managerial representatives of the employer. No campaigning of any kind may occur in the voting area. The only people who are allowed in the voting area are the NLRB agent, the employees who are voting, and certain designated employee observers.

The ultimate question of union representation is determined by majority rule, based on the number of valid votes cast rather than the number of employees in the unit. If a majority of votes are cast in favor of the union, the Board will certify the union as the exclusive bargaining representative of all employees in the collective bargaining unit. Once a union is certified by the Board, it becomes the exclusive representative of all of the unit employees, whether or not they voted for the union. The employer is obligated to bargain with the union in good faith with respect to all matters relating to wages, hours, and working conditions of the bargaining unit employees.

The Board is empowered to prosecute employers who engage in conduct that interferes with employee free choice in the election process, and may order a new election if such employer interference with the election process has occurred. The Board will also order the employer to remedy such unfair labor practices, for example by ordering the employer to reinstate and compensate an employee who was unlawfully discharged during the election campaign. In extreme cases, the Board may even order an employer to bargain with the union without a new election, if the Board finds that its traditional remedies would not be sufficient to ensure a fair rerun election and if there is a showing that a majority of employees at one point desired union representation. The Supreme Court affirmed the Board's power to issue this extraordinary remedy in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). When issuing a Gissel bargaining order, the Board will determine whether majority support for the union existed by checking authorization cards signed by employees during the organizing process.

As the Board and the Supreme Court have acknowledged, the use of authorization cards to determine majority support is the method of last resort. A secret ballot election is the "most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support." Gissel Packing, 395 U.S. at 602. Although authorization cards may adequately reflect employee sentiment when the election process has been impeded, the Board and the Court in Gissel recognized that cards are "admittedly inferior to the election process." Id. Other federal courts of appeal have expressed the same view:

- "[I]t is beyond dispute that secret election is a more accurate reflection of the employees' true desires than a check of authorization cards collected at the behest of a union organizer." NLRB v. Flomatic Corp., 347 F.2d 74, 78 (2d Cir. 1965).

- "It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a "card check," unless it were an employer's request for an open show of hands. The one is no more reliable than the other...Overwhelming majorities of cards may indicate the probable outcome of an election, but it is no more than an indication, and close card majorities prove nothing." NLRB v. S. S. Logan Packing Co., 386 F.2d 562, 565 (4th Cir. 1967).
- "The conflicting testimony in this case demonstrates that authorization cards are often a hazardous basis upon which to ground a union majority." J. P. Stevens & Co. v. NLRB, 441 F.2d 514, 522 (5th Cir. 1971).
- "An election is the preferred method of determining the choice by employees of a collective bargaining representative." United Services for the Handicapped v. NLRB, 678 F.2d 661, 664 (6th Cir. 1982).
- "Although the union in this case had a card majority, by itself this has little significance. Workers sometimes sign union authorization cards not because they intend to vote for the union in the election but to avoid offending the person who asks them to sign, often a fellow worker, or simply to get the person off their back, since signing commits the worker to nothing (except that if enough workers sign, the employer may decide to recognize the union without an election)." NLRB v. Village IX, Inc., 723 F.2d 1360, 1371 (7th Cir. 1983).
- "Freedom of choice is "a matter at the very center of our national labor relations policy,"...and a secret election is the preferred method of gauging choice." Avecor, Inc. v. NLRB, 931 F.2d 924, 934 (D.C. Cir. 1991) (citations omitted).

Having recognized in Gissel that a secret ballot election is the superior method for determining whether a union has majority support, the Supreme Court in Linden Lumber v. NLRB, 419 U.S. 301 (1974), held that an employer may lawfully refuse to recognize a union based on authorization cards and insist on a Board-supervised secret ballot election. The only exceptions to an employer's right to insist on an election are when the employer, as in the Gissel situation, has engaged in unfair labor practices that impair the electoral process or when the employer has agreed to recognize the union based on a check of authorization cards. Thus, an employer can agree to forgo a secret ballot election and abide by the less reliable card check method of determining union representation.

The Increasing Use of Neutrality/Card Check Agreements in Organizing Campaigns

One of the highest priorities of unions today is to obtain agreements from employers which would allow the union to become the exclusive bargaining representative of a group of employees without ever seeking an NLRB-supervised election. These agreements, which are often referred to as "neutrality" or "card check" agreements, come in a variety of forms. In so me cases, the agreement simply calls for the employer to recognize the union if it produces signed authorization cards from a majority of employees. In many cases, the agreement includes other provisions which are designed to facilitate the union's organizing campaign, such as:

- An agreement to provide the union with a list of the names and addresses of employees in the agreed-upon unit;
- An agreement to allow the union access to the employer's facilities to distribute literature and meet with employees;
- Limitations or a "gag order" on employer communications to employees about the union;
- An agreement to start contract negotiations for the newly-organized unit within a specified (and short) time frame, and to submit open issues to binding interest arbitration if no agreement is reached within that time frame; and
- An agreement to extend coverage of the neutrality/card check agreement to companies affiliated with the employer.

Whatever form the agreement may take, the basic goal is the same: to establish a procedure which allows the union to be recognized without the involvement or sanction of the National Labor Relations Board. Neutrality and card check agreements therefore present a direct threat to the jurisdiction of the Board and its crown jewel, the secret ballot election process. I have written two law review articles discussing this trend. See Charles I. Cohen, Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?, The Labor Lawyer (Fall, 2000); Charles I. Cohen and Jonathan C. Fritts, The Developing Law of Neutrality Agreements, Labor Law Journal (Winter, 2003).

The motivating force behind neutrality/card check agreements is the steady decline in union membership among the private sector workforce in the United States. Unions today represent only about eight percent of the private sector workforce, about half of the rate twenty years ago. See U.S. Department of Labor, Bureau of Labor Statistics, Union Members in 2003 (Jan. 21, 2004), available at http://www.bls.gov/news.release/pdf/union2.pdf. There are many explanations for this pre-

cipitous decline: the globalization of U.S. corporations, the increasing regulation of the workplace through federal legislation rather than collective bargaining, and the changing culture of the American workplace. While unions may not disagree with these explanations to varying degrees, they claim that the NLRB's election process is also to blame. Unions argue that the NLRB's election process is slow and ineffective, and therefore an alternative process is needed—namely, neutrality/card check agreements.

I believe there are two basic problems with this argument. First, it is not supported by the facts. The NLRB's election process is efficient and fair, as demonstrated by hard statistics. Second, neutrality/card check agreements limit employee free choice and are generally the product of damaging leverage exerted by the union against the employer.

The NLRB's Election Process Is Efficient and Fair

The standard union criticisms of the NLRB's election process are more rhetorical than factual. Unions argue that the NLRB's election process is slow and allows employers to exert undue influence over employees during the pre-election period. Both of these arguments are not supported by the facts.

The NLRB's election process is not slow. In fiscal year 2003, 92.5% of all initial representation elections were conducted within 56 days of the filing of the petition. Memorandum GC–04–01, Summary of Operations (Fiscal Year 2003), at p. 5 (December 5, 2003), available at http://www.nlrb.gov/nlrb/shared_files/gcmemo/gcmemo/gc04- 01.pdf?useShared=/nlrb/about/reports/gcmemo/default.asp. During that same time period, the median time to proceed to an election from the filing of a petition was 40 days. Id. Based on my experience over the past 30 years, these statistics demonstrate that the Board's election process has become even more efficient over time.

Unions are currently winning over 50% of NLRB secret ballot elections involving new organizing. This is the category of elections that unions are seeking to replace with neutrality/card check agreements, and it is also the same category of elections that would be replaced by the Miller–Kennedy bill. If anything, unions' win rate in representation elections is on the rise. The NLRB's most recent election report shows that unions won 58.9% of all elections involving new organizing. See NLRB Election Report; 6–Months Summary—April 2003 through September 2003 and Cases Closed September 2003, at p. 19 (March 26, 2004).

This figure is about the same as it was 40 years ago. In 1965, unions won 61.8% of elections in RC cases (cases which typically involve initial organizing efforts, as opposed to decertification elections or employer petitions). See Thirtieth Annual Report of the National Labor Relations Board, at p. 198 (1965). After 1965, unions' election win rate declined before rising back to the level where it is today:

- In 1975, unions won 50.4% of elections in RC cases. See Fortieth Annual Report of the National Labor Relations Board, at p. 233 (1975).
- In 1985, unions won 48% of elections in RC cases. See Fiftieth Annual Report of the National Labor Relations Board, at p. 176 (1985).
- In 1995, unions won 50.9% of elections in RC cases. See Sixtieth Annual Report of the National Labor Relations Board, at p. 153 (1995).

These statistics undermine any argument that the NLRB's election process unduly favors employers, or that the recent decline in union membership among the private sector workforce is attributable to inherent flaws in the NLRB's election process. Unions are winning NLRB elections at the same or higher rate now than they have in almost forty years. To be sure, there are "horror stories" of employers who abuse the system and commit egregious unfair labor practices in order to prevail in an election. In such cases, the law provides remedies for the employer's unlawful behavior, including Gissel bargaining orders. But these situations are the exception rather than the norm. In the overwhelming majority of cases where employees choose not to be represented by a union, they do so based on the information that is presented by both sides during the campaign process.

Problems with Neutrality/Card Check Agreements

The fundamental right protected by the National Labor Relations Act is the right of employees to choose freely whether to be represented by a union. 29 U.S.C. § 157. Neutrality/card check agreements limit employee free choice by restraining employer free speech. Section 8(c) of the Act protects the right of employers to engage in free speech concerning union representation, as long as the employer's speech does not contain a threat of reprisal or a promise of benefit. 29 U.S.C. § 158(c). Unions, through neutrality/card check agreements, seek to restrain lawful employer speech by prohibiting the employer from providing employees with any information that is unfavorable to the union during the organizing campaign. Such restrictions

or "gag orders" on lawful employer speech limit employee free choice by limiting the information upon which employees make their decision.

A second problem with neutrality/card check agreements is the method by which they are negotiated. In my experience, neutrality/card check agreements are almost always the product of external leverage by unions, rather than an internal groundswell from unrepresented employees. The leverage applied by the union can come from a variety of sources. In many cases, the union has leverage because it represents employees at some of the employer's locations. The union may be able to use leverage it has in negotiations for employees in an existing bargaining unit, in order to win a neutrality/card check agreement that will facilitate organizing at other locations. Bargaining over a neutrality/card check agreement, however, has little or nothing to do with the employees in the existing bargaining unit, and it detracts from the negotiation of the core issues at hand—wages, hours, and working conditions for the employees the union already represents.

In other cases, the union exerts pressure on the employer through political or regulatory channels. For example, if the employer needs regulatory approval in order to begin operating at a certain location, the union may use its political influence to force the employer to enter into a neutrality/card check agreement for employees who will be working at that location. Political or regulatory pressure may be coupled with other forms of public relations pressure in order to exert additional leverage on the employer. In general, this combination of political, regulatory, public relations and other forms of non-conventional pressure has become known as a "corporate campaign," and it is this type of conduct—rather than employee free choice—that has produced these agreements.

Thus, when a union succeeds in obtaining a neutrality/card check agreement, it generally does so by exerting pressure on the company through forces beyond the group of employees sought to be organized. The pressure comes from employees at other locations, and/or it comes from politicians, regulators, customers, investors, and the public at large. It is a strategy of "bargaining to organize," meaning that the target of the campaign is the employer rather than the employees the union is seeking to organize.

The strategy of "bargaining to organize" stands in stark contrast to the model of organizing under the National Labor Relations Act. Under the Act, the pressure to organize comes from within—it starts with the employees themselves. If a sufficient number of employees (30%) desire union representation, they may petition the NLRB to hold a secret ballot election. If a majority votes in favor of union representation, the NLRB certifies the union as the employees' exclusive representative and the collective bargaining process begins at that point.

At all times, the focus is on the employees, rather than on the employer or the union. There is no cause for abandoning the secret ballot election process that the Board has administered for seven decades. The Act's system of industrial democracy has withstood the test of time because its focus is on the true beneficiaries of the Act—the employees. In my view, the Miller–Kennedy bill is not sound public policy because it would deprive employees of the fundamental right to determine the important question of union representation by casting their vote in a Board-supervised secret ballot election. Indeed, that it would be unwise public policy to abandon government-supervised secret ballot elections in favor of mandatory card check appears to me to be a self-evident proposition.

I am aware that this Committee has previously considered quite opposite legislation which would require that union representation for currently unrepresented groups of employees be determined by a secret ballot election. Without the increasing use of corporate campaigns and neutrality/card check agreements over the last decade—a trend which has eroded employee free choice and which reflects a shift in focus from organizing employees to organizing employers—such legislation would not be needed. But, in light of this trend, such legislation, in my view, is necessary to protect the interests of the employees the Act is intended to benefit, by ensuring that their right to vote is not compromised by agreements which are the product of external pressure on their employer.

This concludes my prepared testimony. I look forward to discussing my comments in more detail during the question and answer period, but before that, I would again like to thank the Subcommittee for inviting me here today, and for its attention to these very important developments regarding labor law in the 21st century.

Chairman JOHNSON. Thank you, sir. We appreciate that. Ms. Schiffer, you may begin.

STATEMENT OF NANCY SCHIFFER, ASSOCIATE GENERAL COUNSEL, AFL-CIO

Ms. SCHIFFER. Thank you. Chairman Johnson, Mr. Andrews, members of the Subcommittee, thank you for inviting me here today, and good morning.

My name is Nancy Schiffer. I am associate general counsel at the AFL-CIO, but I'm also a union member. I'm a member of the National Writers Union, which is Local 1981 of the United Auto Workers. I've submitted written testimony. I will not recite that now.

What I'd like to do is give some context to this discussion by describing for you what an NLRB election representation process is like for workers. And I've selected a particular case that I was very much involved with, and I've—and, coincidentally, it involves a case that Mr. Clyde Jacob cited in his written testimony. And so it will be illustrative in that regard, as well.

This employer was a retail store called Hudsons. It was to Detroit what Macy's has been to New York City. It was the store with everything, including the real Santa. But it was sold and things changed, and the workers contacted the UAW about forming a union.

At the first meeting, which was advertised by word of mouth, there were over a hundred workers. An NLRB petition was filed, and the employer apparently, assuming that they would win handily, agreed to have an election. An election was held fairly promptly, and they were quite surprised when in May 1990 the workers chose to unionize by a vote margin of 95 votes out of 453.

This is where I'd like you now to recall Mr. Charles Cohen's statistics about how quickly elections are conducted and how unions are successful about 50 percent of the time, because, in fact, both are true in this scenario. There was a quick election and the union won, and, yet, this case, as you will see, remains a poster child for labor law reform.

The employer challenged the election, and while that case was pending about a year after the election, the employer claimed that it had evidence from one of the union's two initial supporters that the authorization cards used to support the NLRB petition had been forged. These cards had not been used to obtain recognition but only to initiate the NLRB representation process.

The board denied the employer hearing on this issue, but the 6th Circuit Court of Appeals was more receptive. It remanded the issue of possible forged cards back to the Board for a hearing. After the hearing, the judge said, "The whole basis of the company's motion to reopen the record, that is, that the union used forged authorization cards to portray a false picture of majority support is grounded on fabricated evidence."

There were no forged cards, and in the other two cases that Mr. Clyde Jacob cites in his written testimony, there were also no forged cards. The company appealed this decision to the board. They lost. They went back to the 6th Circuit Court of Appeals. They lost. They filed a petition for—with the Supreme Court of the United States. It was denied.

Now, we're in October 1996, and six and a half years after workers voted by an almost 100-vote margin to organize they finally get

to the bargaining table. And what do you suppose happens to workers' support for their union during six and a half years while the employer gains the NLRB process to deny them the benefits of why they voted for a union. They're denied their right to bargain. They become disillusioned. They give up on their supposedly federally protected right to form a union and engage in collective bargaining.

And in this particular case the woman who had been elected to serve as bargaining chair, died of a massive heart attack 2 weeks before we got to the bargaining table for the first meeting.

Meanwhile back on the campaign, a union election held at a nearby mall store was set aside because of employer misconduct in the election campaign. The remedy; the employer had to post a notice to employees that listed these violations and contained a promise not to commit the violations again. That was the remedy; the posted piece of paper on the bulletin board. While that notice was posted during the 60-day notice period, the employer violated almost every single provision of the notice that it had agreed it wouldn't violate again.

So how effective is this as a remedy for workers? How does this protect the worker's free choice? Do workers have a free choice when their employer has threatened to relocate the store if the union wins? This is what happened. The cook in the restaurant was told by her manager—called in to the office and said, "If the union gets in here, you could lose your job. People could be bumped off their jobs and the store can close."

Do workers have free choice when they see that the NLRB process just doesn't work. A sales employee in the deli department was told by her manager that look at what happened at the Hudsons' West Land store. They voted for a union years ago and nothing has happened there at all.

Do workers have free choice when they see that union supporters are being followed, spied on, harassed, and videotaped, and that's what happened in these stores. Employees' supporters were followed into the bathrooms, in and out of the stores, in and out of the parking lot. They were videotaped, sometimes in the store, sometimes in front of the store in the mall. Not all the employers' wrongdoing came to light.

I talked to workers in that campaign that were afraid to testify. They were afraid that they would lose their health insurance benefit for their children. So does the election process—the so-called secret-ballot process provide these workers with a free choice? No, it does not. And does it keep the focus on the workers? No, it doesn't. The only way it keeps the focus on workers is with video cameras and threats and promises and harassment, and this, to me, doesn't seem like the kind of focus the Act intended. Thank you.

[The prepared statement of Ms. Schiffer follows:]

Statement of Nancy Schiffer, Esq., Associate General Counsel, AFL–CIO, Washington, DC

Thank you for inviting me to testify before the Subcommittee today, my name is Nancy Schiffer, I am the AFL–CIO Associate General Counsel.

Although the notices of today's hearing do not specify a pending legislative initiative, it gives me an opportunity to speak to pending labor law reform legislation introduced in the 108th Congress by Representative George Miller and Senator Ed-

ward Kennedy, the Employee Free Choice Act H.R. 3619 and S. 1925, these members have been joined by over 200 of their colleagues as co-sponsors, 180 Representatives and 30 Senators.

The National Labor Relations Act's (NLRA) stated purpose and intent was not simply to permit, but explicitly to encourage worker self-organization for representation in collective bargaining with their employers. Even with the changes to the law that were effected by the Taft Hartley Amendment in 1947, this continued to be our nation's official, primary goal of its labor-relations policy, as reflected in the preamble of the Act. Unfortunately, in recent times the Act has been too often hijacked by employers and their agents who espouse a "union-free environment", to the detriment of working families.

Today U.S. workers have effectively lost their internationally recognized right to form a union for the purpose of self-organization to advance their common interests in the workplace. Yet, just as much as when the NLRA was passed, workers today need and try to form unions to gain an independent voice in the workplace, and to ensure they are rewarded and fairly compensated for their labor, that the gains of their productivity are shared equitably. Indeed, as U.S. workers today face wage depression, they need unions and collective bargaining more than every, as an ever-increasing number of them are uninsured and must rely on publicly financed health care services because they lack employer provided health care. Similarly, fewer and fewer workers have guaranteed pensions.

Meanwhile, union workers earn 27% more than non-union workers. Union workers are 53% more likely to have medical insurance through their job. Union workers are nearly four times as likely to have a guaranteed pension, according to the U.S. Department of Labor, Bureau of Labor Statistics. And recent surveys show that some 42 million non-union workers would like to have a union.

The bitter reality, however, is that U.S. workers typically face insurmountable employer opposition today when they seek to form a union. According to NLRB statistics, in 1969, the number of workers who suffered retaliation for union activities was just over 6,000. By the 1990s, more than 20,000 workers each year were victims of discrimination when they tried to organize a union. Sadly, it has too often become an acceptable business practice to threaten, intimidate and discharge workers who seek to join with their fellow workers for self-representation. And as employers and their union busting consultants know full well, the discharge of one worker has a chilling effect on an entire organizing campaign, when workers have no job protection or recourse.

Furthermore, even without firing workers who try to organize, the well-advised employer knows how to manipulate the NLRB election process in such a way as to turn the concept of democratic free choice on its head. To appreciate how easy this is to do, consider the differences between an NLRB election and an American civic election. First, imagine a regular civic election for political office where only the incumbent has the voter file, and with it, unfettered, unregulated access to the voters. The challenger, meanwhile, must rely on personal introductions outside the boundaries of the state or district involved, or must stand by the border to that district as voters drive by and try to flag them down. Imagine further the election being held the incumbent candidate's party offices, with voters escorted to the polls by the incumbent's staff. Imagine finally that during the entire course of the campaign, the incumbent has sole authority to electioneer among voters during at their place of employment and during their work time, and further has the right to have these voters deported (or fired) if they refuse to listen to this one-sided electioneering.

Needless to say, NLRB elections are conducted in an inherently coercive environment—the workplace. The employer, not the union, has ultimate power over employees. Only the employer has the ability to withhold wages or grant increases in salary, assign work and shifts, and ultimately discharge workers—the capital punishment of the workplace.

In the end, even when conducted by NLRB staff as professionally as possible, elections under the NLRA are not democratic, because the workplace is not democratic.

The Employee Free Choice Act is intended to remove these obstacles and at the same time improve cooperation between employees and employers by eliminating the requirement of mandatory voting when the majority of workers has already expressed its decision to self-organize. Under current laws, it is perfectly legal for a majority of employees to choose union representation without the need for an election; however, as it now stands, their employee has the right to veto their decision, absent an NLRB election. In civil society we regularly encourage participation and membership in other organizations: book and sporting clubs, religious organizations, and advocacy groups which further our collective and individual interests. In keeping with one long-declared federal policy of encouraging workers to organize and

bargain collectively, we should make it no more difficult for them to form labor unions.

The Employee Free Choice Act would restore the original intent of our nation's public policy under the National Labor Relations Act by doing three things.

First, the legislation would provide for majority verification of a union when employees express their desire by signing authorizations. When the NLRB finds that a majority of employees have signed authorizations, their employer would be required to recognize and bargain with the employees' union. This procedure, commonly known as "card check" has always been legal under the NLRA. However under current law, private sector employers can insist on an NLRB-supervised election process, even after a majority of workers have demonstrated their desire by signing authorizations. Majority verification through authorizations is more democratic than NLRB elections, because it requires a true majority of the eligible voters. In NLRB elections, like political elections, there is no guarantee that all who are eligible to vote will vote. Under majority verification the workers must show that a majority of workers have signed authorizations.

In an NLRB election, which can often take several months or more, the employer is free to wage a campaign where employees are intimidated, threatened, spied upon, harassed, and—in a quarter of all cases—fired, in order to suppress the formation of a union. No less an authority than Human Rights Watch finds that the fundamental human right of America's workers to form unions is seriously infringed upon as a result. The Employee Free Choice Act will enable workers to form unions without going through the meat-grinder of an NLRB election campaign, once a majority of workers sign authorizations demonstrating their desire to form a union.

Second, the Employee Free Choice Act would provide for first contract mediation and arbitration conducted by the Federal Mediation and Conciliation Service (FMCS). Employers who never wanted a union in the first instance too often deny workers the benefits of collective bargaining by refusing to bargain a contract, and current law provides no meaningful remedy. The legislation will give both parties access to mediation and after that, binding arbitration, if a first contract has not been negotiated voluntarily within a reasonable period.

Finally, the legislation would create meaningful penalties for violations of the Act. The bill would not restrict employer free speech, but would ensure the employer speech is not coercive or threatening, or intended to deter employee free choice. Under current law discipline or discharge of workers for union activity, threats to close or move the workplace, harassment and intimidation of workers at "captive audience" or one-on-one meetings with supervisors on work time, interrogation and surveillance of workers suspected of wanting to form a union are all technically illegal under the NLRA. However, there are no real penalties for these and other forms of illegal employer conduct to serve as a deterrent.

For example, the number of instances of illegal discipline or discharge of workers for union activity documented by the NLRB skyrocketed from 1,000 per year in the early 1950s to 15,000–25,000 annually in recent years. In the case of an employer who has been found to have discharged a worker in violation of the Act, the only penalty is back pay—less mitigation for earnings received while the case was pending. On average, for the employer, this means merely a $3,000 penalty and a cease-and-desist posting. Since employers know they face such an insignificant cost, if they are found to have violated workers rights, violations to thwart organizing campaigns have increasingly become seen as an acceptable cost of doing business.

The Employee Free Choice Act would provide for triple back pay awards to workers found to have been illegally fired. The legislation changes the penalty for threats and other illegal employer conduct from posting a cease-and-desist order in the workplace to fines of up to $20,000 per infraction. The bill provides for the same kind of timely injunctive relief against egregious illegal employer conduct that employers have enjoyed since 1947 against illegal union conduct.

The Employee Free Choice Act is needed to address a severe violation of human rights: the pervasive denial of America's workers' freedom to form unions and bargain collectively. The harm caused by this denial of fundamental rights is serious, not only for workers and their families but for the entire nation. It suppresses wages, health care and pension coverage, as well as justice and dignity on the job, for union and non-union workers alike. It widens race and gender pay gaps, worsens economic inequality, harms political participation, erodes the safety net, and coarsens our society.

Individual U.S. workers, now more than ever, should have the freedom to join with their fellow workers for self-representation to achieve better wages, pensions and benefits. Employers interference in their employees' decision whether to seek union representation should not be tolerated. In the past decade we have seen significant wage and earning erosion, job loss, and corporate scandals that have dev-

astated worker pensions and job security. It is time to restore the rights of workers to choose to self-organize and join a union for the purposes of collective bargaining.

The Employee Free Choice Act would reform the NLRA so that when a majority of workers demonstrate their choice to form a union their representative can be certified by the NLRB without the need for the NLRB election process. The legislation would also guarantee effective and efficient collective bargaining, and create real penalties as a determent to unlawful employer conduct. We urge your support of the Employee Free Choice Act, S. 1925/H.R. 3619. Thank you for this opportunity to address the committee.

Chairman JOHNSON. Thank you, ma'am. I appreciate your testimony.

Mr. Jacob, you may proceed. Thank you.

STATEMENT OF CLYDE H. JACOB, III, PARTNER, JONES WALKER, NEW ORLEANS, LOUISIANA

Mr. JACOB. Chairman Johnson and members of the Subcommittee, I am pleased and honored to be here today. Thank you for your kind invitation.

As you've heard this morning, union authorization cards begin the legal process under section nine of the National Labor Relations Act for a labor union to represent an appropriate unit of employees at an employer. While cards are an integral part of the legal representation process, they should not be final arbiter of employee representation. The circumstances surrounding the solicitation of cards does not insure a creditable process, free of pressure and intimidation, as do government-conducted secret-ballot elections.

Let me relate to you a case example that I believe shows why legislation to require secret-ballot elections is necessary to ensure a private, uncoerced, and creditable legal process for employees to choose whether or not they genuinely want to be represented by a particular labor union.

In May of 2000, a new union federation was formed and headquartered in Houma, Louisiana, and it was called the Offshore Mariners United or OMU. The OMU planned to organize the vessel personnel who work on the boats, which service the offshore oil and gas industry in the Gulf of Mexico and beyond.

The campaign lasted for over 3 years, ending this past summer when the OMU closed its offices. Union cards were solicited from the employees of various boat companies, and one company, Trico Marine Services, Inc., became the principle target of the organizing campaign.

Let me share with you some of the voluntary reports, which employees made about their experiences in the card solicitation process. Some employees when solicited at their homes by union representatives said no to signing a card. Yet, they reported repeated, frequent home visits by union representatives continuing to try to secure their signatures. After eight visits, one vessel officer had an arrest warrant issued against a union organizer.

Another employee reported that union representatives exited their vehicle, approached his home with a video camera, recorded him, which he believed made him a marked man. A vessel captain reported that while he was stationed in Brazil union representatives visited his home, knocked on his door, and when his wife, who

was at home did not answer, proceeded to circle the home for an extended time, looking into and knocking on the windows.

In an unfortunate incident, a fight broke out between a vessel officer and a union organizer at the officer's home. In another unusual event, union organizers in a recreation boat trolled next to company vessels with a six-foot blonde female passenger in a bikini who beckoned the mariners like a siren to invite her boat over, at which point union cards were solicited. Employees volunteered that they signed cards just to stop the pressure and harassment.

One has to ask whether cards solicited under such conditions can, with confidence, be considered reliable indicators of employees' sentiment on which to base union representation.

Misrepresentations were made by the union representatives to persuade Trico employees to sign cards. In an ironic twist, a representation was made to employees to go ahead and sign cards, and if they later changed their minds, they could vote differently in the election. Of course, the OMU had no intention of gaining representation through an election. Instead its plan was to gain representation through obtaining union cards from a majority of the employees and forcing the company with public pressure and harassment to recognize the OMU.

This plan came to light when the OMU offered the company a neutrality agreement, an agreement under which the company would facilitate the union's organizing effort and which insisted upon representation based solely on a card check. Trico Marine would not sign that agreement, and it faced all manner of attacks on the corporation, including disruption of its annual meeting, the meetings of its customers, veiled threats to customers and suppliers, attempts to hurt the company with the investment community, the disruption of trade shows and conventions at which the company attended or was featured, and threatened secondary boycotts of the company's subsidiaries in other parts of the world, including Norway, Nigeria, Brazil, and Southeast Asia.

If the National Labor Relations Act would have permitted Trico to file its own petition for a secret-ballot election to resolve the matter and end this protracted harassment, it would have. Unfortunately, the law provides very limited circumstances.

There are also problems with forgery with cards, and I've also given some case examples of that. Another factor that contributes to the high risk to employer rights of relying exclusively upon union cards is the refusal of labor unions to return the cards when employees want their cards. This problem is further compounded by the law, which does not require a union to return a requested authorization.

Attached as an exhibit to my testimony is a letter from the NLRB's 15th regional office to an offshore vessel employee, whose name has been redacted, acknowledging that it has no authority to require the return of his signed union card, or to rectify the misrepresentations that were made to him.

In my experience the risk of harassment, intimidation, and forgery in the card solicitation process is too substantial to permit union cards to be a method under the Act by which a union can establish legal representation. The quiet, sober, and private atmos-

phere of the voting booth should be the preferred method in all cases.

Union authorization cards play an integral role in our nation's labor laws on union organizing. They begin the representation process, but they should never be the end of that process. That should always belong to the democratic secret ballot. Legislation is definitely needed to insure this.

Thank you for the opportunity to address the Subcommittee.

[The prepared statement of Mr. Jacob follows:]

Statement of Clyde H. Jacob III, Esq., Partner (Labor & Employment) Jones Walker, New Orleans, LA

Mr. Chairman, members of the Subcommittee on Employer–Employee Relations, I am pleased and honored to be here today. Thank you for your kind invitation. My name is Clyde Jacob, and I am a partner with the Jones Walker law firm in New Orleans, Louisiana. For almost 25 years, my practice has been devoted to labor and employment law. My clients have included Fortune 500 companies and small, local businesses, and my work in the labor law field has taken me around the country as well as overseas.

Union authorization cards begin the legal process under section 9 of the National Labor Relations Act for a labor union to represent an appropriate unit of employees at an employer. Union representatives or employees of a company solicit employees to sign cards, and once 30% of the employees in an appropriate unit sign cards, a labor union has the right to invoke the legal machinery of the Act, petitioning for a secret ballot election conducted by the National Labor Relations Board (NLRB), usually within 50 days or less. While the cards are an integral part of the legal representation process, they should not be the final arbiter of employee representation. The circumstances surrounding the solicitation of cards does not ensure a credible process, free of pressure and intimidation, as do government conducted secret ballot elections.

Let me relate to you a case example that I believe shows why legislation to require secret ballot elections is necessary to ensure a private, uncoerced, and credible legal process for employees to choose whether or not they genuinely want to be represented by a particular labor union.

In May of 2000, a new union federation was formed and headquartered in Houma, Louisiana, and it was called Offshore Mariners United or OMU. With the help of the AFL–CIO's Department of Corporate Affairs, Center for Strategic Research, the OMU planned to organize the vessel personnel who work on the boats which service the offshore oil and gas industry in the Gulf of Mexico and beyond. The campaign lasted for over three years, ending this past summer when OMU closed its offices. Union cards were solicited from the employees of the various boat companies, and one company, Trico Marine Services, Inc., became the principal target of the organizing campaign. Employees of Trico Marine reported to the company of abusive, coercive, and intimidating tactics in the card solicitation process. Let me share with you some of the voluntary reports which employees made about their experience in the card solicitation process which occurred throughout the Gulf South in small towns and rural communities.

Some employees, when solicited at their homes by union representatives, said, "No," to signing a card; yet, they reported repeated, frequent home visits by union representatives continuing to try to secure their signatures, and they complained to the company of this harassment. After 8 visits, one vessel officer in southern Louisiana had an arrest warrant issued against a union organizer. One employee reported that the union representatives exited their vehicle and approached his home with a video camera recording him, which he believed made him a marked man. A vessel captain reported that while he was stationed in Brazil, union representatives visited his home, knocked on his door, and when his wife, who was home, did not answer, proceeded to circle the home for an extended time looking into and knocking on the windows. In an unfortunate incident, a fight broke out between a vessel officer and a union organizer at the officer's home. In another unusual event, union organizers in a recreation boat trolled next to company vessels with a 6 foot blonde female passenger in a bikini, beckoning mariners like a siren to invite her boat over, at which point union authorization cards were solicited. Employees volunteered that they signed cards just to stop the pressure and harassment. One has to ask whether cards solicited under such conditions can, with confidence, be consid-

ered reliable indicators of employee sentiment on which to base union representation.

Untrue statements were made by union representatives to persuade Trico employees to sign authorization cards. In an ironic twist, a representation was made to employees to go ahead and sign cards, and if they later changed their minds, they could vote differently in the election. Of course, the OMU had no intention of gaining representation through a NLRB conducted secret ballot election. Instead, its plan was to gain representation through obtaining union cards from a majority of the employees and forcing the company through public pressure and harassment to recognize the OMU. This plan came to light when the OMU offered the company a neutrality agreement, an agreement under which the company would facilitate the union's organizing effort. It was entitled, "Constructive Resolution Agreement," and it insisted upon representation based solely on union authorization cards from a majority of the employees.

Trico Marine would not sign the neutrality agreement, which relied only on authorization cards for legal recognition. As a consequence, it faced all manner of attacks on the corporation, including the disruption of its annual meetings and the meetings of its customers, veiled threats to customers and suppliers, attempts to hurt the company within the investment community, the disruption of trade shows and conventions at which the company attended or was featured, and threatened secondary boycotts of the company's subsidiaries in other parts of the world, including Norway, Nigeria, Brazil, and Southeast Asia. If the NLRA would have permitted, Trico would have filed its own petition for a secret ballot election to resolve the matter and end the protracted harassment. Unfortunately, the law provides a very limited circumstance for this to occur.

A serious problem with reliance upon union authorization cards as a method of gaining legal representation under the NLRA is the possibility of forged employee signatures on the cards. There was never any confirmation that this occurred during the OMU's campaign in the Gulf South; however, this has been an issue in other cases, and I have referenced reported decisions on this. Dayton Hudson v. NLRB et al., 79 F.3d 546; Krispy Kreme Doughnut Corp. v. NLRB, et al., 732 F.2d 1288, 1293 (6th Cir. 1984); Perdue Farms, Inc. v. NLRB, et al., 927 F. Supp. 897 (E.D. N.C. 1996), rev'd on other grounds, 108 F.3d 519 (4th cir. 1997).

While I have discussed the pressure, intimidation, and distortions that can accompany the card signing process, there is another factor that contributes to the high risk to employee rights of relying upon union cards as a method for determining legal representation—it is the refusal of labor unions to return cards when employees have sought their return. This problem is further compounded by the law under the Act which does not require a union to return a requested authorization card. Attached as Exhibit No. 1 to my testimony is a letter from the NLRB's 15th Regional Office to an offshore vessel employee, whose name has been redacted, acknowledging that it has no authority to require the return of his signed union card, nor to rectify misrepresentations.

In my experience, the risk of harassment, intimidation, and forgery in the card solicitation process is too substantial to permit union cards to be a method under the Act by which a union can establish legal representation. The quiet, sober, and private atmosphere of the voting booth should be the preferred method in all cases.

Union authorization cards play an integral role in our nation's labor laws on union organizing. They begin the representation process—but they should never be the end of that process—that should always belong to the democratic secret ballot. Legislation is definitely needed to ensure this.

Thank you for the opportunity to address the subcommittee. I would respectfully request that my written testimony be included in the record, and I would be glad to answer any questions.

[An attachment to Mr. Jacob's statement has been retained in the Committee's official files.]

Chairman JOHNSON. Thank you, sir. We appreciate you all's testimony. It sounds like there's some disagreement out there. My judge over here even shook his head.

Mr. Cohen, I have a question about the treatment of card checks under the law. I understand that under current law an employer may agree to recognize a union based on a card check, but it may also refuse to do so and insist on an election. I understand further that the Board holds that recognition of a union pursuant to a

card-check system is lawful, and that a union, which is recognized in such a way is a bona fide collective bargaining agent for the employees.

My question is this is the validity of unions recognized by a card check system a function of the NLRA? That is does the Act compel such recognition, or is it subject to differing interpretation by case law?

Mr. COHEN. Mr. Chairman, the Supreme Court called Lyndon-Lumber established that voluntary recognition based on authorization cards is a permissible, lawful means for the employer in the union to establish that agreement. So I think we find the law in that posture as we speak, and one would not expect the prosecutor of the National Labor Relations Board, the general counsel, to be attacking a principle such as that.

If there were to be a change, that would be the kind of change that one would expect would need to come from Congress; the change the law because of a disagreement with the Supreme Court law and as that law has been interpreted by the NLRB.

There are areas, however, where coercion, of course, is not permissible on either side. Under the law, today, an employer cannot coerce, a union cannot coerce, and if there are facts of coercion, one would expect those cases to be prosecuted, as well. But the basic notion of card check recognition is one which is established and embedded in the law as we speak.

Chairman JOHNSON. How would you suggest we change the law, if we change it?

Mr. COHEN. If we were to change it, I believe it would be based on the changed circumstances, and that is it is one thing for an employer to deal with the union and say to the union if a majority of the work force desires representation that the employer will forego its right to have an election and do it based on authorization cards. And that's where we were approximately 10 years ago.

The problem as I see it is that over the last 10 years there has been a vast increase in this kind of activity, but it hasn't just been that activity. It's been that activity coupled with corporate campaigns, neutrality agreements, access, et cetera, so that there is in my opinion an element of the union not getting these kinds of agreements, because it's something the employer wishes to do. But, rather, it's because there's been a corporate campaign. There's been a leveraging of the union's existing bargaining relationships, such that the employer knows it won't get the next collective bargaining agreement, something of important value to it, unless it gives this for an unrelated group of employees. It comes from a variety of sources, and I think if the legislation were to be enacted by Congress, it would be as a result of these changed facts over the last decade.

Chairman JOHNSON. Ms. Schiffer, you talked about a delay in getting an employer contract after the election or after the fact, and how do you think we can resolve that delay problem, because you know and I know that both sides are going to drag their feet if they can.

Ms. SCHIFFER. I think there's a good solution to that in the Employee Free Choice Act that's been introduced in both Houses, which provides for first contract arbitration. And that that would

be a way to ensure that workers really get the benefit of what they've—when they select employee—a union to represent them.

I'd like to, if I could, go back to one thing that Mr. Cohen just said in his response. Is that—

Chairman JOHNSON. Go ahead.

Ms. SCHIFFER. There has been research done on what we call card check neutrality agreements by two professors, one from Rutgers, one from West Virginia University, which I can provide you with the research. But they—their research shows that corporate campaigns are "not a frequently used strategy to secure these agreements."

They say that they're often secured the good old-fashioned way through a work stoppage, which, I think, is for the most part still lawful; parts of it. And that at least a third of such agreements are reached within the context of a broader labor management partnership, in which employers agree to an organizing process that will be less disruptive than the NLRA representation process.

And when these are agreed to, they are sometime card checked. They are sometimes neutrality. Some of them don't involve card checks. Some of them involve a privately conducted election. Some of them don't involve neutrality. Some of them involve a code of conduct where both parties agree as to how they will be bound, and they agree to an arbitration process that will immediately resolve any disputes. So they don't have to wait six and a half years to get to the bargaining table.

Chairman JOHNSON. Mr. Jacob, did you want to comment? You looked fidgety down there.

Mr. JACOB. Thank you for your observation.

Chairman JOHNSON. Punch the button again. Turn the microphone on.

Mr. JACOB. Thank you for your observation. I would say that when you find this delay after a union has been elected quite often there is a reason for it. It's because the union has made very over-the-top type of promises to the employees to get them to vote. And so quite often you will have a longer period.

And it's hard to have a one size fits all for contract negotiations. Look at this past summer with the very tough negotiations that went on out in California with the supermarkets that were out there. I mean, if you try to squeeze negotiations into a tight little pen, you're really going to upset the economic system that we have in play that is a very fair economic system.

Mr. COHEN. Mr. Chairman, could I make one—

Chairman JOHNSON. Go ahead, yes.

Mr. COHEN. Thank you. It has to do to the notion that Ms. Schiffer raised concerning first contract arbitration. We've had a principle in this country and it's been embedded in our labor laws since 1947. That doesn't require the employer to agree to a particular substantive term. The notion is it's the employer that has to meet payroll. It's the employer that has to compete with the competition and must ultimately have the say as to what the contract term that it will agree to.

To be sure, it can be as a result of economic warfare; the strike, the work stoppage. That's fine. The notion of turning that over to an arbitrator to have the arbitrator either split the baby or decide

in some fashion what the agreement would be. Just imagine if in the West Coast supermarket situation the arbitrator were to decide that these employees ought to be given full benefits for whatever. The employer, of course, has to compete with non-union competition up and down line.

So while it may sound nice and equitable to have an arbitrator—a neutral third person—decide a dispute, when you're talking about the terms of a labor contract it is truly an unacceptable kind of resolution in my judgment.

Chairman JOHNSON. Thank you. Mr. Andrews, do you care to question?

Mr. ANDREWS. Thank you. Mr. Jacob, in your testimony regarding the Trico organizing campaign, your testimony is limited to that campaign, correct?

Mr. JACOB. Yes, it is.

Mr. ANDREWS. You didn't study any other organizing campaigns or research any other ones in your testimony today?

Mr. JACOB. I have been involved in many, many campaigns in my career, but that focus was the Trico, yes.

Mr. ANDREWS. Your testimony is about Trico. On page—they're not numbered—where you tell the incident about eight visits from a union organizer to a vessel officer in Southern Louisiana, do you know if that organizer had access to the work place to visit the vessel officer in the work place?

Mr. JACOB. The work place for boats that are quite often out at sea, and so the union was able to get the home addresses and phone numbers.

Mr. ANDREWS. So was the union organizer permitted to board the ship when it was in port if the officer was working on the ship there?

Mr. JACOB. No, he was not.

Mr. ANDREWS. So where was the union organizer supposed to visit the vessel officer to make his pitch?

Mr. JACOB. At the vessel officers' homes. At meetings that were held in the community—

Mr. ANDREWS. So there were eight visits. And you indicate that an arrest warrant was issued against the organizer. What was the disposition of that case? Was the union organizer arrested?

Mr. JACOB. It just went away.

Mr. ANDREWS. Did it go away, because the complainant dropped charges? What happened?

Mr. JACOB. The complainant just eventually dropped charges, and the whole issue just dissolved.

Mr. ANDREWS. So there was a warrant issued but there was never a prosecution?

Mr. JACOB. That's correct.

Mr. ANDREWS. The other stories that are reported here about people visiting homes of vessel officers when they're in Brazil and so on and so forth were there any criminal charges filed as a result of any of those incidents?

Mr. JACOB. No.

Mr. ANDREWS. Were there any civil charges filed as a result of those incidents?

Mr. JACOB. No.

Mr. ANDREWS. Were there any charges filed with the National Labor Relations Board or any administrative agency as a result of these incidents?

Mr. JACOB. No.

Mr. ANDREWS. OK. Let me ask you a question about the exhibit that you've attached, the letter from Mr. Wells. And as I understand the facts, which I can imply from reading Mr. Wells' letter, an individual who is a part of the group that they're trying to organize signs a card and then decides that he doesn't want—he wants to revoke his signature of the card. He wants his card back, correct?

Mr. JACOB. He liked to get his card back.

Mr. ANDREWS. Right. So did the employee advise the union that he wanted his card back, because he wanted to revoke his consent to the union?

Mr. JACOB. Yes, that was my understanding.

Mr. ANDREWS. Now, if this had gone to a count—if we're going to count the number of cards, either for the purpose of certifying the election or under a voluntary agreement for certifying the union, would this individual's card have counted?

Mr. JACOB. I believe it would have.

Mr. ANDREWS. You think it would have?

Mr. JACOB. Yes.

Mr. ANDREWS. I would disagree with that conclusion, and I would point—I would ask unanimous consent to enter into the record three cases.

Chairman JOHNSON. Without objection.

Mr. ANDREWS. One is involving Emerald Industries. It is case number 9-CA-37493, in which the general counsel of the NLRB found that the employer lawfully refused to recognize a union in a card check when it was shown that the union had lost its majority because of revocation letters signed by employees. So whether it was revocation by the employees, the card didn't count, irrespective of who physically had the possession of the card.

Second, there's a case called King Supers, Inc., case 27CA12362, going back to 1993, where the general counsel found that six employee card rescissions negated the union's majority status before the card check occurred. Again, irrespective of the physical custody of the card.

And then, finally, a case from just last September under the heading of Le Marquis Hotel, 340 NLRB number 64, in which case there were two—as I understand it, two competing unions. Employees signed cards for both unions, and it was held that the card for the first union was invalid, because the act of signing the second one indicated revocation.

Now, I guess, my point to you is that it seems to me that irrespective of who had physical custody of the card that the fact that the employee had made evidence of his desire to revoke his consent to the card means his vote doesn't count or the card doesn't count. Isn't that right?

Mr. JACOB. I guess my experience has been is that employees do seek to get their cards back. The unions don't give it to them, and then election moves forward quite often when employees have cards that have not been given back.

Mr. ANDREWS. But if the employer contests the certification of the election on grounds that the card was revoked, these cases say the card was revoked, right? That means you fall below the threshold the statute requires there's no election or there's no certification?

Mr. JACOB. My experience is that elections have gone forward. That the Board regional offices will not accept an employer argument that we've got a number of employees who would like to get their cards back, and the Board tells us it's a showing of—

Mr. ANDREWS. Mr. Jacob, I would ask if you would supplement the record by giving us cases that cite that instance.

Mr. JACOB. I would be happy to supplement the record.

Mr. ANDREWS. Thank you, Mr. Chairman.

Chairman JOHNSON. Thank you, Mr. Andrews. Mr. Kline, do you wish to comment?

Mr. KLINE. Yes, thank you, Mr. Chairman, and thank you, lady and gentlemen, for being here today. It is clear, as the Chairman said, there is some disagreement. It seems to me that we are looking for a way to allow workers to decide to unionize in a fair way; fair to both employers and employees. And, clearly, there is disagreement as to what that would be.

Mr. Cohen, data from the National Labor Relations Board indicates that during a period spanning 1999 to 2003 of the roughly 14,000 elections held by the Board objections were only filed in 3 percent of them. And half of those objections came from the employer. What does that indicate to you the fact that unions filed objections in less than 2 percent of the elections?

Mr. COHEN. Mr. Kline, it would indicate to me that the system is working indeed.

Mr. KLINE. It would seem so. Thank you. Mr. Jacob, a question for you, and, of course, I welcome, Mr. Cohen, any comments that you would have on this.

In her testimony today Ms. Schiffer—and I thank her for her testimony. It was, in fact, quite enlightening -- Ms. Schiffer stated that 20,000 employees, I think is the number, allege that they were the victims of discrimination every year. And, Mr. Jacob, I'm curious in your experience how many of these allegations generally contain any real merit, and how many times are they filed simply to get back at an employer?

Mr. JACOB. My experience is that many are filed. Many are dismissed. Many are withdrawn by charging parties, and some moved forward. So I don't think that you can say that all 20,000 are valid, you know, legitimate charges.

Mr. KLINE. And do you have some case study that you could submit to the record—

Mr. JACOB. Really I'm basing it just on my experience. Of the number of charges that I handle, I see every type of result coming from it, including some that go to trial, some that get dismissed, some that are withdrawn.

Mr. KLINE. I see. And, Mr. Cohen, do you have anything to add to that?

Mr. COHEN. Yes. I would mention that historically—and I did start working for the NLRB myself back in 1971, so I've been there

on two different stints; one time for 8 years, one time for two and a half years.

There's something known as the merit factor, which has remained relatively constant over the decades, and that is of all the unfair labor practice charges, which are filed, 2/3 of them are typically either dismissed or withdrawn, and the remaining 1/3 are deemed to have merit. And of that 1/3, significantly 90 percent of the so-called meritorious cases settle before an NLRB hearing on the matter. So they're then resolved.

To be sure, certain ones are litigated. To be sure, certain ones go through the court system. And, obviously, to go through the court system, takes time. But that would be the basic yardstick, which, again, hasn't changed over the decades.

Ms. SCHIFFER. Mr. Kline, if I could.

Mr. KLINE. Yes, certainly.

Ms. SCHIFFER. In my testimony I believe that these figures are not charges filed but adjudicated cases. So that this merit factor in terms of going forward with the charge or the merit factor in terms of whether the case is won or lost is not in play. And I would be happy to supplement the record to make that more clear.

Mr. KLINE. Yes, I'd like to see that. It's 20,000 adjudicated cases you're talking about?

Ms. SCHIFFER. Not cases. Workers.

Mr. KLINE. Workers. I see. OK, thank you very much.

Ms. SCHIFFER. And I would like to go back, if I could, to one issue you raised with Mr. Cohen. These numbers in terms of number of objections filed. I'd like to go back to one thing I mentioned but very briefly in my testimony, and it's really illustrative and it's something that I've had to do over and over and over again in my practice, representing workers and unions. And that is talking to workers who say I know what happened to me was wrong. I want to testify about it, because I know the employer gets away with it if I don't but I can't.

And I will always have this memory vividly where I was standing in my house when I had this phone call with a woman who said I have a 10 year old son. He's asthmatic. If I lose my job, I can't afford his medications. I cannot testify. And this is a point the needs to be kept in mind when we say, oh, well, unions don't file anything so it must be OK. We can't file unless we have witnesses, and workers are out witnesses, and they have to be willing to put, not only their careers, but their families' welfare on the line.

Mr. KLINE. Thank you. And my guess—I have just one moment left. And my guess would be that there are some similar heart-wrenching stories of union workers who were asked to sign a card and had no choice, and I'd be interested in any comment from Mr. Jacob or Mr. Cohen to that effect.

Mr. JACOB. Well, I believe ultimately we all have—excuse me—we all have choices, but I do know that often times people sign cards who do not wish to sign cards. And that's why a secret ballot election is really the ultimate crown jewel, as Chuck Cohen has said, for resolving questions of representation.

Mr. KLINE. Thank you. Mr. Chairman, I yield back.

Chairman JOHNSON. The gentleman's time has expired. Mr. Kildee, do you care to question?

Mr. KILDEE. Yes, thank you, Mr. Chairman. First of all, according to such scholars as Kate Ruffenbrenner and John Logan, the National Labor Relations Board election process very often exposes workers to weeks and very often months of employer threats, surveillance, coercion, firings, and intimidation. As a matter of fact, when my dad sought to join the union back in 1935 in Flint, Michigan, the site of the sit-down strike, he had to face goon squads with blackjacks, and we've become more sophisticated in those years since then.

Now, it's lawyers and labor consultants with briefcases that generally stand in the way of organizing. And I certainly—I prefer that, the briefcases to the blackjack, but it can be very effectively also in blocking the right of workers to join a union.

The situation is so bad that the human rights watch finds the United States to be in serious violation of international human rights with respect to the protection of workers' freedom of association. And that should concern us, because the human rights watch is a very respected group.

But I do think that from the time of 1936 to now human nature being what it is very often employers want to run their business without any input from the workers or even input as to the wages and hours, and that they've changed maybe tactics and become a little more sophisticated, but their just as effective as they were back in 1936.

I can recall my good friend Walter Reuther being half beaten to death in the battle of the overpass with the goon squads and the blackjacks back in that time. So I think we have to be concerned to make sure that workers are not intimidated in seeking collective bargaining. Collective bargaining has changed. It's certainly changed the quality of life in Flint, Michigan, and changed the quality of life in the Kildee household.

Let me ask a question. I'll ask Ms. Schiffer. Mr. Cohen has characterized card check agreements on page six, arising from corporate campaigns, including a number of elements. And that employers are essentially forced into signing these agreements. Would you care to comment on that?

Ms. SCHIFFER. Yes. We use the term card check to cover a whole wide variety of agreements between—agreements about alternatives to the NLRB representation process. And they may include card check. They may not. They may include a private election. Some of them actually include an NLRB election but only that part. Some of them do include card check.

Typically, there are bilateral restrictions on both the union and the employer on conduct and speech, and the point is that the parties have a code of conduct. They know that they can this way avoid the divisive and the really confrontational process that is inherent—that's encouraged by the NLRB representation process.

And so these alternatives accord a workforce an alternative to that kind of polarization that the NLRB process encourages. It also, as a matter of fact, saves employers millions of dollars in anti-union consultant fees; a whole cottage industry blown up to take advantage of the NLRB process.

And with a much shortened process, the parties can get on to issues that they're both interested in. Work place issues, quality

issues, productivity issues, business success issues, instead of going through one of these years' long fight.

Mr. KILDEE. Let me ask you another part of this hearing today is corporate campaigns. How often are corporate campaigns used? Is this a frequent strategy to secure neutrality?

Ms. SCHIFFER. Research has been done by professors Adrienne Eaton, who is at Rutgers University, and Jill Kriesky, who's at West Virginia University. And they studied these types of agreements. And their research indicated that, in fact, corporate campaigns are not frequently used as a strategy to secure. That often it's traditional worker leverage in the form of a strike; a work stoppage. And that for many such agreements the part of an overall labor/management partnership where the parties can agree on a code of conduct to regulate the organizing process.

Mr. KILDEE. Thank you very much, Ms. Schiffer.

Chairman JOHNSON. Thank you, Mr. Kildee. Mr. Tierney, do you care to question?

Mr. TIERNEY. I do. Thank you, Mr. Chairman.

Chairman JOHNSON. You're recognized for five.

Mr. TIERNEY. I thank you. Ms. Schiffer, maybe you can help clarify something for me. We're all talking—at least all three of the witnesses have talked about their great concern for participation of the employee. On a card check process it's a majority of employees that have to sign the cards in order for the union to be acknowledged; am I correct?

Ms. SCHIFFER. That's right.

Mr. TIERNEY. But in an election it's just a majority of those voting?

Ms. SCHIFFER. That's correct. It doesn't have to be a majority of the workforce.

Mr. TIERNEY. Do we have any statistics as to—on elections generally how many times an actual majority of the employees vote or participate in the election?

Ms. SCHIFFER. I don't have those statistics.

Mr. TIERNEY. Let me go over some other statistics and ask you if you're familiar with those in terms of the elections versus the card. Are you aware that 25 percent of employers are found to have illegally fired or disciplined at least one worker for union activity during organizing campaigns?

Ms. SCHIFFER. Yeah, I've had a lot of experience with that, unfortunately.

Mr. TIERNEY. Are you aware that 75 percent of employers hired consultants or union busters to help them fight union organizing drives?

Ms. SCHIFFER. Employers spend millions of dollars on anti-union consultants.

Mr. TIERNEY. Are you aware that 78 percent of employers force employees to attend one-on-one meetings with their own supervisors against the union?

Ms. SCHIFFER. That's one of the most common techniques, because the employer has literally full-time access to workers.

Mr. TIERNEY. And are you aware that 92 percent of employers force employees to attend mandatory closed-door meetings against the union?

Ms. SCHIFFER. Right. Another extremely frequently used tactics where employees have to be there. They can be told that they cannot speak, they cannot ask questions, and they can, in fact, be fired if the employer says that and they still try to ask a question just trying to get information.

Mr. TIERNEY. Are you aware of the finding that 52 percent of employers threaten to call immigration officials during organizing drives that include undocumented employees?

Ms. SCHIFFER. When we have workforces trying to organize, who include undocumented workers, it's a threat over them that is just unequaled.

Mr. TIERNEY. And are you aware that there's findings that 51 percent of the companies threaten to close the plant if the union wins the election?

Ms. SCHIFFER. Yes. And, in fact, the percentage of plants that actually close when they're organized is almost negligible, and, yet, this many employers threaten that they will.

Mr. TIERNEY. In 1998, there were 24,000 cases won by workers who had illegally been discriminated against for engaging in legally protected union activities. Do you have anymore recent figures—knowledge of more recent figures than those from 1998?

Ms. SCHIFFER. I don't believe that I do, but if I do, we'll supplement the record.

Mr. TIERNEY. Now, one of the concerns in my district at least and in Massachusetts generally is the concern that even after unions have won an election they have an awful difficult time getting to their first contract, and I think the statistics show that in 32 percent of the times elections by workers to have a union occur but 2 years later they still don't have any contract.

Now, Mr. Cohen, you had discussed earlier the employee Free Choice Act. To get to the first contract, is what we're talking about and that provision of the law that indicates that after 90 days if no agreement can be reached either party may petition for a mediation or conciliation. Am I right? All right. And if that doesn't work or come to a resolve, then 30 days after that 90-day period it can go to arbitration for the first 2-year contract?

Ms. SCHIFFER. Yes, for the first contract.

Mr. TIERNEY. And then after that they're back on track, but I think it addresses the issue that seems to be almost too prevalent here. A third of the contracts still aren't done after 2 years when people elect to have a union. And I think that speaks volumes to the fact that, you know, this is a process that's not working right now. That the NLRB is not living up to its requirements on elections, and that in a country that has freedom of association we should encourage people to work agreements, freedom to contract. But if an employer wants to reach an agreement, then certainly should be able to reach an agreement and come to a peaceful resolution of this to move forward.

And, last, I think that what these companies are concerned about, you know, corporate activities or unions getting involved in their corporate board meetings and things of that nature. Most of these unions or many of them have investments in those companies, and they have a great interest that that company provide in a lawful way and avoid corporate scandals or whatever, and, hope-

fully, that's why they would get involved and try to make this thing work out under the law. And so I thank you for your testimony today and I yield back the balance of my time.

Chairman JOHNSON. Thank you. Mr. Cohen, did you want to make a comment? You acted like it.

Mr. COHEN. Just two brief things.

Mr. TIERNEY. Am I yielding my time to the chair or are you just giving me more time, Mr. Chair? Exercising a prerogative.

Chairman JOHNSON. I'll usurp a little. Is that OK?

Mr. TIERNEY. As long as it's reciprocal. We'd love the same opportunity.

Chairman JOHNSON. Thank you.

Mr. TIERNEY. Thank you.

Mr. COHEN. I believe the record ought to reflect that, again, one of the very strong points about the NLRB election process is that voter turnout is typically exceedingly high, and I am going to have to somewhat speculate here, but I believe it's up in the 80-percent range. And, obviously, when we compare that to the statistics for the political situation, it's a very healthy—

Chairman JOHNSON. Yeah. Can you get us some statistics on that, because I think his question was a good one.

Mr. COHEN. Would be happy to. And the NLRB in their annual reports would have those statistics I feel very confident.

Chairman JOHNSON. Please forward them to the Committee and both sides.

Mr. TIERNEY. Thank you. Then I'll just follow up with one on that. Do you at all have any information that would call into the question the statistic that 32 percent of the elections in which voters—workers vote and a union still has no contract after 2 years?

Mr. COHEN. I don't have anything specific, but I would mention—and I don't have the study in front of me, but I believe one of the studies that you were referring to was the Bronfenbrenner study, and it's my recollection that that study was done by interviewing union organizers alone. In other words, at the conclusion of an organizing campaign, the academic study goes and talks to union organizers to come up with these kinds of statistics. And I believe the unreliability of that type of a method speaks for itself.

Mr. TIERNEY. Well, I'm not sure it does. So why don't you tell me how—do you thing all those people are lying?

Mr. COHEN. Not necessarily lying. But there are perceptions. I think—

Mr. TIERNEY. A perception of whether or not you have a contract? That seems to be something you can determine without perception.

Mr. COHEN. Perception about employees who have been discriminated against.

Mr. TIERNEY. But my question here was whether or not a third of those contracts remain uncompleted after a 2-year period. That's no perception. It's either it has been done or it hasn't been done.

Mr. COHEN. I don't have an answer to that, Mr. Tierney.

Mr. TIERNEY. Thank you.

Chairman JOHNSON. Can you find that out for us too?

Mr. COHEN. I can attempt to, yes.

Chairman JOHNSON. OK, thank you. Thank you.

Ms. SCHIFFER. It may be helpful to Committee to have Dr. Bronfenbrenner testify here.

Chairman JOHNSON. Ms. McCollum, do you care to question?

Ms. MCCOLLUM. Thank you, Mr. Chair. Have any of the witnesses ever attempted to deliver union cards at the 30-percent level, which requests an election? Have any of you ever participated in doing that, or either not accepting the cards or taking the cards?

Mr. COHEN. It's my experience that unions don't petition with just 30 percent. They have typically greater than 50 percent. Often 60, 70 percent before they go to the NLRB to file.

Mr. JACOB. Likewise it's been my experience too.

Ms. MCCOLLUM. Well, Mr. Chair, I'm going to—I've been in Congress just a short while, and I haven't done this in a Committee before, but rather than ask a question now, I'm just going to—not state opinion—but state first-hand witnessing.

I have been with unions when they have tried to deliver cards and management has been present to receive them and management has refused to come out and meet with the unions to receive the cards. Then I have been present over an hour when there is someone that says that they will meet with the union organizers. They are not management from the store. When I ask them where they're from, they've been flown in from another area, and they use intimidation. They use intimidation so that the cards are not delivered, and as we heard the gentleman speak, well over 30 percent of the employees have asked.

Now, about these cards. Employees know that the employer is going to know who signs a union card. It takes a tremendous amount of courage in many instances to put your name on a card. And then the meetings start. And I'm not speaking from anything by personal experience in management. Then the meetings start one on one.

Well, do you know if we do this we're going to have to lay people off or your hours are going to have be cut. Are you sure you want to do this? Is this in your best interest? You know, we were thinking of maybe having you go into a more supervisory position. Maybe you want to think about this, and you need to decide if it's in your family's best interest.

Managers are brought in. Your expectation here is not to be neutral. Your expectation in management is to support the company and the company does not want a union. And that's what you're to do. You're to speak against unions.

Then there are the union organizers who come in. I sold film to them, thousand-speed film. Why do you need thousand-speed film, I said. Well, we're going to photograph the workers while they're working to find out who's saying what to who. I was in meetings when people spoke very openly about filming people when they came out to the VFWs after the union meetings, because we want to find out who the agitators are.

Then there's election day. Yeah. Everybody shows up. Thank heavens it's a secret ballot, because the employer knows whether or not you've shown up, as well as the union organizer. And the people do show up to vote. And that's a good thing. First contract. Took the union quite a while. Cards were contested. Peoples' job

classifications were even changed so that they could throw out cards.

Then first contract came and it was the last management meeting I attended, because, quite frankly, we had had enough of each other. The attorneys came in. Here is how it works. If we don't get a first contract, the union loses confidence with its members and it's all over. And other people won't be tempted to look at organizing, so we're going to make this difficult, and we have the resources, the time, and the energy and the money to do it.

I just think we need to be straight here. There are some employers out here who follow the letter in the spirit of the law. And many times people choose not to organize. There are employers that follow the letter in the spirit of the law and they work with their unions, not always in harmony. Not always it's a wonderful life, but they work together. And then there are employers that use fear and intimidation time and time and time again.

And that's why when employees show up to vote their vote counts, but that's why also we have to use a secret ballot, because people are afraid at times to put their name on the line on a card, because the employer is going to be calling them into their office.

Chairman JOHNSON. Thank you, Ms. McCollum. Mr. Ballenger, do you care to question?

Mr. BALLENGER. Yes, sir. And I'd like to apologize to the panel. I happen to be Chairman of the Western Hemisphere, and I had to meet with the OAS for just a second.

I am, as some people know, a manufacturer myself, and I'd like to ask Mr. Cohen if he'd like to comment on Ms. McCollum—what are the reasons an employer—and I understand most of them—would not accept cards. Would you explain that.

Mr. COHEN. Sure. I believe that as a general rule employers would be well advised to refuse to look at cards, and the reason for that is there is a process—the employer has a right that's guaranteed under the law to have a secret-ballot election. But the employer can agree to look at the cards and then be bound by the determination if, in fact, there's a majority.

So if I were an employer, I would personally say I don't want to see the cards. You've got a process. I don't want to compromise anybody's integrity. I want to protect their secrecy. Let it be. So, therefore, just file your petition, if that's what you want. You will have a secret-ballot election, and I believe we're in agreement on that if I might presume that. The importance of that secret-ballot election to the employee. I don't think the employee is entitled to anything less than that.

Mr. BALLENGER. Just following up on—Ms. Schiffer, if I may, what is the AFL-CIO's position with respect to the decertification proceedings? Put another way when employees are trying to vote out the union does the AFL-CIO maintain that a secret ballot is and I quote, "not comparable to the privacy and independence of the voting booth and that the secret-ballot election system provides the surest means of avoiding decisions, which are the result of group pressures and not individual decisions." And I'm quoting from a brief of the AFL-CIO filed in 1998. And I think Ms. McCollum kind of made a similar statement. Can I throw that at you.

Ms. SCHIFFER. I'm familiar with the brief, even though it was filed a couple of years before I was associated with the AFL-CIO. In that particular case the AFL-CIO and other unions were trying to make the point that if as is now the law an employer can require the NLRB representation process in order for workers to become organized then it ought to be the same procedure when workers want to no longer be part of a union.

And so what they AFL-CIO was urging in that case was that there be a similar process for the—if you will—for the marriage as for the divorce. And that was the point.

I would like to go back to one thing that Mr. Cohen said in response to your question. And point out that the process as it is now when workers want to form a union is that the employer chooses whether to force the NLRB representation process. The employer has that right to refuse to recognize a union, even if 100 percent of the workforce—there's not even a union there—a 100 percent of the workforce go into the office and say we want to have a union. The employer can say I don't care. We have to go through this other process.

Mr. BALLENGER. Well, then, obviously, the employer has no idea whether that's 100 percent is there or not there. You can give me a stack of cards this high or this high and say, well, we need it and the first thing I would say—and I agree with Mr. Cohen—the first thing I would say is I don't look at the cards. Why should I commit myself by law by accepting the cards when all of a sudden there is no contest after that.

Ms. SCHIFFER. Even if all of the workers say that they want to be represented—and I would just like to make the point, and I think I did in my oral testimony. That the NLRB's election process is a—it's just that, a process. And in order to get to that secret-ballot election, the employees have to go through this—and very confrontational, very difficult process.

And so the point of my testimony really was to suggest that is there really a free choice that's exercised in that ballot box. Is it really inherently valid that after employees have been threatened, spied on, harassed, that their choice in the poling booth is going to be more legitimate than when they sign a card.

Mr. BALLENGER. Let me just say having seen occurrences many times where the brutalization of management by unions in the news media it's not a one-way street you're speaking about. Unions are not milk toast in a situation like this. It's not—I'd just like to say that you can get beat up pretty badly by dragging your feet a little bit on an election.

Ms. SCHIFFER. But we're talking here about workers and their employer holds that sort of life or death, you have a job or you don't have a job.

Mr. BALLENGER. No, I agree with you. Anybody that's—people deserve a union if they—I mean, management deserves a union if they don't treat their employees properly.

Ms. SCHIFFER. What I'm saying is that they're inherently, because of the employer's power over its workers, a difference in the kind of coercion that can be exercised the employer to employee.

Mr. BALLENGER. Well, is there something like a critical period involved in this timing of the cards being presented and so forth and

so on? Is there not—I mean, there are—the law regulates—Mr. Cohen, you are leaning forward like you had an answer to what I was going to ask.

Mr. COHEN. Well, if I'm anticipating it correctly. The NLRB once a petition is filed approximately 90 percent of the cases go to an election by agreement.

Mr. BALLENGER. Right.

Mr. COHEN. In other words, without legal—further legal proceedings. And in those cases I believe the median time is either 40 or 42 days to the conduct of an election, which I submit is a quite short period of time, particularly, for the employees to have an opportunity to come to realize what the benefits might well be of unionization and what the downside of it might be, as well.

As to those cases that go to hearing, I believe if one were to lump it all together, that the—90 percent of the cases still go to an election within 60 days from the filing of a petition. So I think it's a situation where the NLRB very much holds employers' feet to the fire and performs very admirably.

Mr. BALLENGER. I think the NLRB—the appointment to the NLRB is a very vital thing to the strength of the unions in this country and they pretty well call the shots. I don't know whether—maybe I come from a conservative area of the United States that sees that. But your 42 days I think we're debating on the floor the idea of if Congress were to lose 100 members in some disaster that to have 45 days to have a nationwide election. I think 42 days is pretty sharp. Excuse me, Sam. I didn't mean to go so long.

Ms. MCCOLLUM. Mr. Chair, my name has been mentioned twice, and people are deciding what I've said. So if I could clarify something, Mr. Chair.

Chairman JOHNSON. What did you really say?

Ms. MCCOLLUM. I really said what I meant. And that is when unions do try to deliver cards they are met with the first taste of what the intimidation is going to be like forward—in going forward with the union organizing campaign. And that by changing the rules to accept cards will give employees another option in which to have their voices heard and to have management know that they want to go forward with having a union.

And that if the coercion and the intimidation continues, yes. Then let's have a secret ballot. Thank you, Mr. Chairman.

Chairman JOHNSON. Thank you, Ms. McCollum. Mr. Payne, do you care to question?

Mr. PAYNE. Well, I'm sorry that I missed most of the testimony, but I just want to maybe ask Mr. Cohen a question. A lot of times when we hear about organizing of labor unions it tends to be characterized that the organizers are the ones that have the strongest hand, intimidation, the strong arming, the power over the employee. And I wonder if in your opinion is that what you also contend? That the union organizers have a stronger hand, because I've heard sort of just the reverse, and maybe Ms. Schiffer might want to just mention that it's just the reverse.

I usually hear these horror stories about how intimidating the organizers are and hear very little about the power of the employer who can tell you you got a job, don't have a job, don't want you to do the wrong thing, we might have to lay off if the union comes

in. So what is the general perception that you have as to, say, a normal organizing campaign.

Mr. COHEN. Mr. Payne, I would say that there can certainly and have been horror stories on both sides of this, but in my experience the decision as to whether employees choose to unionize or not does not turn on characterizations of power, intimidation, things of that. We are operating today in a global economy. What the employer is trying to do is produce its product, deal with the competition, make a profit to be sure, and that's where job security in my experience comes from.

I think there was a time when it would have been much more frequent to characterize the union organizers as intimidators, et cetera. It's been my experience over the last couple of decades that that argument doesn't resonant particularly well.

Mr. PAYNE. Well, that's good. Another reason I raise the question because there is still some of the, you know, policymakers like us that still have that Draconian 1920 image. And I wish more of them were here to hear you. But thank you very much. I have no other question.

Chairman JOHNSON. Thank you, Mr. Payne. I appreciate that. Mr. Holt, do you care to question?

Mr. HOLT. Yes, thank you, Mr. Chairman. Mr. Cohen, I believe you said that bargaining over a neutrality card check agreement has—I believe your words were—little or nothing to do with employees in the bargaining unit, and that it would detract from core issues like wages and working conditions. That strikes me as missing the point. It seems to me it has everything to do with the bargaining—with the employees in the bargaining unit.

Wouldn't—were you saying that it makes little or not difference to the employees in the bargaining unit whether they have the power to represent 10 percent of the workforce or 100 percent of the workforce? Doesn't that have everything to do with whether they are in a position to bargain?

Mr. COHEN. Mr. Holt, it can be an important piece of it, but our laws are structured on the basis of bargaining in a collective bargaining unit of the recognized or certified bargaining unit. The employer is under an obligation to recognize and bargain with the union as the representative as to all the wages, hours, and terms and conditions of employment of that precise group.

If the union is trying to establish a separate collective bargaining unit and wants to use its leverage in unit "A" in order to get unit "B" easier to it, I would submit—and the law is not perfectly clear in this area—that that ought to be a so-called non-mandatory subjective bargaining and something about which the union should not be permitted to bargain to impasse or to strike over.

And, in fact, Ms. Schiffer I believe twice mentioned a study that unions go about getting these agreements by good old fashioned work stoppages. Frankly, that troubles me a good deal, because we are typically dealing with out-of-unit personnel. But in an aggregate sense, of course, if a union has a 100 percent representation it will have—

Mr. HOLT. So you are really asking for a fundamental change in the NLRB. And so I guess that leads to the question what has changed? A couple of you have mentioned that we now live in a

global economy. Does that mean the workers have the employer over a barrel as opposed to the other way around? I'm not sure that the fundamental relationship between employers and workers has changed since 1938.

Yes, we have a world economy, but the reason for the NLRB was to protect those workers' rights. Am I right that you're looking for a fundamental change, and if so, why? And I suppose maybe the other witnesses have a comment on this.

Mr. COHEN. I don't believe that I am advocating a fundamental change. What we have right now is a system where the norm has historically been secret-ballot elections. I believe it is most imperative to preserve and to not overturn it to instead have card-check recognition be mandated as the Miller-Kennedy would do. I think that would be very bad public policy.

In terms of the increased use of neutrality agreement card check recognition, I believe that there has been a change in the way voluntary—so-called voluntary recognition has been—had this increased use of it. And that's where the legislative change might well be called for.

I believe that the Miller-Kennedy Bill would be radical legislative change.

Mr. HOLT. Ms. Schiffer or Mr. Jacob, in the few seconds remaining, would either of you care to comment?

Ms. SCHIFFER. I think that the change has been that the NLRB representation process has become really a confrontational mechanism that forces workers through this sort of endurance process in order to be able to form union. And unless the employer chooses—it's the employer's choice to enter into an alternative process. That this is the only way workers can form a union, and the process has become so gamed by employers as to create delay. It has such weak remedies that it does not anymore protect the right of workers to organize. And that's what has changed.

Mr. JACOB. The one observation I would make with respect to secret-ballot elections is that if you go to the numbers you will find that the labor unions in the U.S. win on average 50 percent or more per year going back many, many years. Batting .500 would be remarkable in the major leagues.

Mr. HOLT. That's in those situations where the union has chosen to try to organize?

Mr. JACOB. That's in those situations where the union has chosen to go to secret-ballot elections conducted by the National Labor Relations Board they prevailed—I think currently it's over 50 percent of the time.

Chairman JOHNSON. Thank you, Mr. Holt.

Mr. HOLT. OK, thank you, Mr. Chairman.

Chairman JOHNSON. Thank you. You know today is bring your children to work day across the country, and there are a few of them in the audience. Would all of the children who are here as part of their parents' bring your children to work day please stand up. Mr. Andrews, do you care to comment?

Mr. ANDREWS. I do. I want to welcome all of the participants and introduce two of my friends from Marlton, New Jersey, Ms. Nicole Gerbreen. Nicole, can you raise your hand. And her sister Amira Gerbreen and my daughter Jacqueline Andrews and my daughter

Josie Andrews. And maybe this young man can introduce himself too. It's nice to have you with us today. Thank you very much.

Chairman JOHNSON. We're glad to have you all here. I want to thank the witnesses for your time and testimony and for the members' participation. And I want to tell you you've been a good panel and the discussion and cross talk has been good for all of us. If there's no further business, the Subcommittee stands adjourned.

[Whereupon, at 12:28 p.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows:]

National Labor Relations Board Cases, Submitted for the Record by Ranking Member Robert Andrews: (1) #9-CA-37493 (2) #27CA12362 (3) #340NLRB64

NATIONAL LABOR RELATIONS BOARD
OFFICE OF GENERAL COUNSEL

Case No. 9-CA-37493

2000 NLRB GCM LEXIS 28

June 7, 2000

SUBJECT: [*1] Emerald Industries

REQUESTBY: Richard L. Ahearn, Regional Director, Region 9

OPINION:

This case was submitted for advice as to whether the Employer is obligated to recognize the Union pursuant to an agreed upon card check.

We agree with the Region that the charge should be dismissed, absent withdrawal, but we do so only for the following reasons. There are 140 employees in the bargaining unit. The Union obtained 87 signed authorization cards. However, at the time of the card count, 19 employees had signed revocation letters; the Union possessed 15 of those revocation letters and the Employer had an additional 4. Thus, at the time of the card count, the Union only possessed 48.5% of valid authorization cards. In these circumstances, and notwithstanding the fact that a third party certified the Union, the Employer lawfully refused to recognize the Union. n1 Thus, we need not decide whether the Employer could lawfully deny recognition in circumstances where the Union possessed a majority of valid authorization cards, but not the 60% that the parties had agreed would be necessary to trigger a bargaining obligation. n2

n1 The relevant date for determining majority status is the date of the card count, not the date the Union requested the card count, since the Employer agreed to recognize the Union only after a card count. [*2]

n2 Compare Snow & Sons, 134 NLRB 709, enfd. 308 F.2d 687 (9th Cir. 1962) (once an employer agrees to a card check, and the union demonstrates that it represents a majority of employees, the employer can not then insist on a Board-conducted election, and must recognize the union.)

Barry J. Kearney, Associate General Counsel, Division of Advice

TO: Arthur DePalma, Regional Director Region 27

*1 SUBJECT: King Soopers, Inc.
Case 27-CA-12362
February 26, 1993

DIGEST NO.S:
324-8025-7500, 518-4040-5000, 518-4040-7567-6700, 530-2025, 530-2050, 530-2075
This case was submitted for advice as to whether authorization cards rescinded after the demand for recognition, but before recognition based on a card check is extended, can be used in determining majority status.

FACTS

The Employer and the Union have a long bargaining history and are signatory to a series of collective-bargaining agreements covering a number of grocery stores in Colorado. In May 1990, the parties signed a Letter of Agreement establishing, inter alia, that at certain unrepresented stores, including the one at Greeley, the Employer would recognize the Union through a card check procedure. [FN1]
In January, 1992, [FN2] the Union began an organizational drive at the Employer's Greeley store. Pursuant to the Letter of Agreement, the organizing campaign continued through two 120-day periods. The second 120-day period was scheduled to expire on August 31.
By letter of August 29, the Union advised the Employer that it had achieved majority status as of August 28 and requested a card check on September 4. This letter apparently listed the wrong zip code, and therefore was not received by the Employer until September 8.
Meanwhile, on August 31, a Union organizer left a telephone message with the Employer's Labor Relations Manager's secretary stating that the Union had a card majority and wanted to set a date for a card check. On September 1, the organizer by phone informed the Labor Relations Manager of the August 29 letter. On the same day, the organizer also spoke to an assistant store manager at the Greeley store and told him of the efforts to set a date for a card check. On September 2, the organizer informed the Greeley store manager of the Union's efforts to set up a card check. On September 3, the organizer spoke to the Employer's Assistant Labor Relations Manager and again requested a card check. The Assistant Labor Relations Manager said he would set the date for a card check upon receipt of the August 29 letter. On September 4, the Union President repeated the request for a card check and offered to provide the Employer a copy of the August 29 letter. The Employer declined, stating that if the letter had been sent, the Employer would receive it in the mail in the near future.
On September 10, the Employer acknowledged receipt of the Union's letter and, on that same date, faxed to the Union an Excelsior list marked with designations of nine employees who had rescinded their authorization cards. [FN3] It did not appear that the actual rescissions were provided to the Union, and there was no evidence that the Union had independently received or learned of any rescissions.
On September 11, the parties met to conduct the Greeley store card check. The Union submitted 74

cards, three of which were challenged because of alleged signature irregularities, [FN4] leaving the Union with 71 authorization cards. [FN5] The Employer and the Union agreed that the written card rescissions, which were all dated August 30 and 31, would not be subtracted from the Union's total because they were not dated prior to August 28, the date on which the Union claimed to have reached majority. If the six rescissions from unit employees had been subtracted from the total number of authorization cards, the Union would have had 65 cards, less than a majority.

***2** After verifying the Union's apparent majority, the Employer orally recognized the Union and agreed to the effective dates for the application of the area agreement to the Greeley store employees. The Union agreed to send to the Employer a written memorandum incorporating the agreement.

Thereafter, the Employer received statements from employees complaining about the Union and alleging improprieties in the method that the Union had used to obtain authorization cards. On September 23, the Employer received a petition signed by 105 employees stating that the Union had engaged in misrepresentation and asking to meet with the Employer. The Employer arranged a joint Employer- Union meeting on September 29, at which employees complained about alleged misrepresentations by the Union as to both the purpose of the cards and the benefits under the contract. The Union refused the request made by a number of employees at this meeting to have a secret ballot election.

By letter of October 6, the Employer advised the Union that it was refusing to grant recognition at the Greeley store based on employee statements concerning the Union's conduct. [FN6] On October 19, the Union filed a charge alleging that the Employer violated Section 8(a)(5) of the Act by withdrawing recognition of the Union which had been granted pursuant to a card check showing majority status, and by refusing to apply to the Greeley store the collective-bargaining agreement reached on September 11.

ACTION

We conclude that the instant charge should be dismissed, absent withdrawal, because the Employer has shown by affirmative evidence that the Union did not represent a majority of the employees in the unit at the time that recognition was granted.

Where an employer has extended voluntary recognition to a union, it may thereafter challenge the union's majority status in a Section 8(a)(5) proceeding by introducing affirmative evidence which proves a lack of majority at the time of recognition. [FN7] In this case the Employer has effectively borne the burden of showing that, at the time recognition was granted, the Union did not in fact represent a majority of the employees. The six rescissions signed by unit employees were clear and unambiguous. Thus, on September 11, when the Union and the Employer met to conduct the card check, both the Union and the Employer knew that the Union had lost the card majority it had attained on August 28. In such circumstances, the Union and the Employer could not agree to disregard the rescissions and apply the collective- bargaining agreement to the Greeley unit based on the Union's earlier majority status, for such an agreement would have the effect of negating the sentiments concerning representation of a majority of the unit. [FN8]

We recognize that after the Union had made its initial assertion of majority status and demand for a card check and recognition, it learned of the rescissions from a faxed Excelsior list from the Employer,

because the employees had sent their rescissions to the Employer, not to the Union. We further recognize that, in Alpha Beta Co., 294 NLRB 228, 230 (1989), the Board stated, "It is well established that an **authorization card** cannot be effectively **revoked** in the absence of notification to the union prior to the demand for recognition." (footnote omitted) However, Alpha Beta is distinguishable from the instant case. The employer in Alpha Beta had refused to participate in a card check with the union, even though the Kroger clause in its collective-bargaining agreement called for such a card check. The Board found "it was not at all clear," ibid., whether employees who signed a petition were repudiating support for the union or simply saying that they wanted an election on the question of representation. It also was not clear whether the employer had received the petition at the time when the employer refused to participate in the card check. Indeed, the employer refused to participate in the card check because it asserted that authorization cards were unacceptable and unreliable evidence of employee wishes concerning representation, not because of the petition.

***3** Moreover, the cases that the Board cited in Alpha Beta, at 230 fn. 9, for the proposition that a revocation is not valid in the absence of notice to the union before it demands recognition are also distinguishable. In James H. Matthews & Co. v. NLRB, 354 F.2d 432, 438 (8th Cir.1965), cert. denied 384 U.S. 1002 (1966), the issue was whether the union had majority status on January 11, 1964, when it made its demand for recognition. The court found that a letter of revocation postmarked January 22 could not be relevant to the union's status on January 11. In reaching this conclusion, the court cited the Restatement (2d) of Agency, Sec. 119(c), for the proposition that "a principal's revocation of his agent's authority is ineffective until communicated to his agent." Thus, the union had majority status when it made its bargaining demand and when the employer rejected that demand. In NLRB v. Southbridge Sheet Metal Works, 380 F.2d 851, 856 (1st Cir.1967), the Board had set aside an election and issued a bargaining order. The issue before the court was whether a majority of employees supported the union at the time of a pre- election petition. Holding that there was a sufficient basis for the Board's finding that the employer did not have a good faith doubt of the union's majority status, the court found no significance in the testimony of five employees that they had changed their minds about the union since they never communicated their views to any union official. In both of these cases, as in other cases, [FN9] the question of the timing and communication of a revocation of union authorization is relevant to show that the union at one time possessed majority status, which had then been destroyed by employer unfair labor practices, thus justifying the imposition of a bargaining order.

In sum, the Alpha Beta line of cases is relevant to the question of whether an employer has a good faith doubt of the union's majority status at the time that the employer rejects the union's bargaining demand. Neither Alpha Beta nor the cases it cites deal with the question posed by the instant case: whether the Union and the Employer can agree to disregard employee rescissions that destroy the Union's earlier majority status when the Union and the Employer learn of the recissions after the Union makes its bargaining demand but before the Union and the Employer meet to determine the Union's representational status. In the absence of any contemporaneous unfair labor practices that destroyed the Union's majority status, we conclude that the instant case resembles Oroweat Baking Company, supra, in that the Employer and the Union procedure for ascertaining the Union's majority status had the effect of negating employee sentiment concerning union representation. If the employer in Oroweat violated

Section 8(a)(2) by extending recognition to a union in such circumstances, it follows that the Employer's withdrawal of such unlawfully granted recognition in the instant case does not violate Section 8(a)(5).
***4** For the foregoing reasons, the instant charge should be dismissed, absent withdrawal. [FN10]

Robert E. Allen
Associate General Counsel
Division of Advice

FN1 See, e.g., Houston Division of the Kroger Company, 219 NLRB 388 (1975).

FN2 All dates are in 1992 unless otherwise indicated.

FN3 Six of the rescissions were from bargaining unit employees. The remaining three rescissions were from delicatessen employees, whom the parties determined should not be in the unit. The rescissions stated, in relevant part,
I [name] wish to rescind my (vote) card for Union representation for bargaining purposes.
I no longer want to be represented by Local 7, UFCW, AFL--CLO, effective immediately.
I demand that my name not be used on any Union list and/or roll.

FN4 The Union did not concede that there were irregularities with regard to the three cards but found it unnecessary to establish their validity because the Employer granted recognition to the Union.

FN5 There were 138 employees in the unit as of August 28.

FN6 The Region has determined that the Employer's allegations concerning misrepresentations and use of a backdated card are without merit and seeks advice only on the issue of the counting of revoked cards.

FN7 Royal Coach Lines, Inc., 282 NLRB 1037 (1987), enf. denied on factual grounds 838 F.2d 47 (2d Cir.1988); Moisi & Son Trucking, Inc., 197 NLRB 198 fn. 2 (1972).

FN8 See, e.g., Oroweat Baking Company, Case 16-CA-7181, Advice Memorandum dated September 30, 1977, and Oroweat Baking Company, JD (SF) 106-78, adopted by the Board in the absence of exceptions (employer violated Section 8(a)(2) and (1) by recognizing union based on card check where, prior to card check, employer was given petition signed by majority of employees stating they did not want to be represented by the union).

FN9 See, e.g., American Fleet Maintenance Co., 289 NLRB 764 (1988); Photo Drive-Up, 267 NLRB 329, 364 fn. 224 (1983); Struthers Dunn, 228 NLRB 49 (1977), enf. denied 594 F.2d 796 (3d Cir.1978); Payless, 157 NLRB 1143, 1150 (1965).

FN10 In light of our conclusion that the Employer could rely on the six unit employees' rescissions to reject the Union's claim of majority status, it is unnecessary to reach the question of whether the Employer could also rely on the employees' petition when it withdrew recognition from the Union.

OFFICE OF GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)
1993 WL 142627 (N.L.R.B.G.C.)

Le Marquis Hotel, LLC and Local 758, Hotel and Allied Services Union, SEIU, AFL-CIO and District 6, International Union of Industrial Service, Transport and Health Employees, Party-in-Interest

Case 2-CA-34440

NATIONAL LABOR RELATIONS BOARD

2003 NLRB LEXIS 628; 174 L.R.R.M. 1270; 340 NLRB No. 64

September 30, 2003

PRIOR-HISTORY: [*1] Original ALJ-Decision can be found at 2003 NLRB LEXIS 19.

DECISION AND ORDER

By Robert J. Battista, Chairman; Wilma B. Liebman, Member; Peter C. Schaumber, Member

COUNSEL:
Allen M. Rose, Esq. & Leah Z. Jaffe, Esq., for the General Counsel.

Gregory R. Begg, Esq. (Peckar & Abramson), of River Edge, New Jersey, for the Respondent.

Kent Y. Hirozawa, Esq. (Gladstein, Reif & Meginness, LLP), of New York, New York, for the Charging Party.

Johnathon Walters, Esq. (Markowitz & Richman), of Philadelphia, Pennsylvania, for Party-In-Interest.

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

OPINION:

On January 22, 2003, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief. n1 The General Counsel filed an answering brief.

n1 The Respondent excepts only to the judge's application of the Board's dual card doctrine, which it contends is no longer valid precedent, in finding that the Respondent violated the Act.

[*2]

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, and conclusions and to adopt the recommended Order. n2

n2 Member Liebman has already expressed her view that the dual card rule should be abandoned on the ground that an employee, by signing authorization cards for each of two rival unions, indicates a willingness (absent an explicit revocation of one card by the other) to be represented by either union, and that both cards should therefore be counted toward, respectively, a majority showing of support for each union. See *Alliant Foodservice*, 335 NLRB 695, 698-699 (2001) (Member Liebman dissenting). In this case, the cards signed for the Charging Party explicitly revoked the cards previously signed for the union the Respondent recognized, and the judge correctly found that a majority showing was not made.

[*3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Le Marquis Hotel, LLC, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

ALJ:

STEVEN FISH

ALJ-DECISION:

DECISION

Statement of the Case

STEVEN FISH, Administrative Law Judge. Pursuant to charges filed by Local 758, Hotel and Allied Services Union, SEIU, AFL-CIO, herein called Local 758 or the Union, the Director for Region 2 issued a Complaint and Notice of Hearing on May 9, 2002, n1 alleging that Le Marquis Hotel, LLC herein called Respondent, violated Sections 8(a((1) (2) and (3) of the Act by recognizing and signing a contract containing a Union security clause, with District 6, International Union of Industrial Service, Transport and Health Employees, herein called District 6, even though District 6 did not represent a majority of employees in the unit.

n1 All dates herein are in 2002, unless otherwise indicated.

The trial with [*4] respect to the Complaint allegation, was held before me in New York, NY, on August 15 and 16, 2002. Briefs havae been filed by all parties and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a corporation with an office and place of business at 12 East 31st Street, New York, N.Y., where it is engaged in the business of operating a hotel.

Annually, Respondent derives gross revenues in excess of $ 500,000 and purchases and receives at its New York, N.Y. facility, goods and supplies valued in excess of $ 5,000 directly from points located outside the State of New York.

It is admitted, and I so find that Respondent is an employer engaged in commerce within the meaning of Section 2(2) (6) and (7) of the Act.

It is also admitted and I so find that Local 758 and District 6 are labor organizations within the meaning of Section 2(5) of the Act.

II. FACTS

A. THE RECOGNITION OF DISTRICT 6

Respondent is a hotel located at 12 East 31st, New York, NY. District 6's office is located next door to the hotel at 18 East 31st [*5] Street.

During January and February, a number of employees of Respondent executed authorization cards on behalf of District 6. Subsequently, Respondent and District 6 agreed on a card count, which was conducted on February 15, by Arbitrator Roger E. Maher.

On that date, arbitrator Maher reviewed 24 authorization cards submitted by District 6, and verified the authenticity of 17 of these cards, by comparing signatures to 28 signed W-4 forms, which is the number of Respondent's employees in the bargaining unit which the parties agreed upon. n2

n2 The unit which was essentially the same as set forth in the collective-bargaining agreement, subsequently entered into by Respondent and District 6, was as follows:

All full time and regular part-time porters, housekeepers, maids, bell persons and food beverage personnel; excluding guards supervisors, office clericals, managers and desk clerks.

The arbitrator certified that 17 cards n3 out of a unit of 28 employees, represented a majority of employees in the unit. Based [*6] on that determination, Respondent recognized District 6 as the collective-bargaining representative of Respondent's employees in the unit. On February 19, the parties executed a collective-bargaining agreement, running from February 19, 2002 through February 18, 2005. Although the contract contained a Union security clause, the parties stipulated that no dues were deducted pursuant to the Union security clause in the agreement.

n3 The arbitrator excluded seven cards submitted by District 6, because they were from employees not in the unit or were not employed on the date of the count. The 17 cards that the arbitrator counted were all dated between January 10 and February 12.

B. LOCAL 758's ORGANIZATIONAL CAMPAIGN

Local 758 began organizing Respondent's employees in early February. Between February 4 and February 14, Local 758 obtained a number of authorization cards from employees, including nine cards from employees who also signed cards for District 6, which were part of the 17 cards examined and authenticated [*7] by the Arbitrator at the card count.

The Local 758 authorization cards which were obtained from Respondent's employees reads as follows:

APPLICATION FOR MEMBERSHIP SERVICE EMPLOYEES INTERNATIONAL UNION

Local Union No. 758

I hereby request and accept membership in the SEIU Union, Local 758, AFL-CIO, and authorize said union to represent me and, in my behalf, to negotiate and conclude any and all agreements as to wages, hours and other conditions of employment. This full power and authority to act for the undersigned supersedes and cancels any power and authority heretofore given to any person or organization to represent me. I agree to be bound by the Constitution and Bylaws, and the rules and regulation of the International and the Local, and by any contracts that may be in existence at the time of this application or that may be negotiated by the Union.

However, the cards as printed, contained blanks after Local Union No. ___, and again in the main paragraph between the and Union and after the word Local. Thus, where underlining appears in the above language, the cards contains blanks to be filled in by handwriting. On the bottom of the card on the same [*8] side, there is a space for date and signature. On the other side of the card, there are printed spaces for name, residence, phone number, social security number, date of birth, occupation and "employed by".

Neil Diaz, an organizer for Local 758 solicited all of the cards executed on behalf of Local 758. Sometime prior to February 1, the Union received a phone call from employee William Campo concerning organizing by the Union. On

February 1, Diaz met with Campo and introduced himself as a representative from Local 758, and indicated that Campo had called the Union. Campo informed Diaz at that time that another Union (District 6) was coming around, but that the employees want Local 758 only. Campo and Diaz discussed the organizing process, and Diaz informed Campo that the Union would need to obtain signed authorization cards from employees, and that the Union "might probably get an election in the future." Diaz also discussed the benefits that employees would get if the Union wins the election. Diaz added that if after the Union wins the election, it will negotiate a contract with Respondent and these benefits will be part of the benefits that the employees will receive. However, Diaz [*9] did not give Campo any cards on February 1.

On February 4, Diaz approached Campo outside the hotel, and informed him that it was time to start signing cards. Diaz asked Campo if he had signed a card for District 6. Campo replied that he had signed a card for that Union, but the employees didn't want District 6. Diaz informed Campo that Local 758 needed to get a majority of employees to sign Local 758 cards. Diaz gave Campo a card to sign himself, as well as 10 other cards to distribute to other employees. Campo said "yes", and proceeded to read and fill out the card. He returned the card to Diaz, but the card was not signed on the back.

Later on that same morning, Campo informed employee Miguel Velez, that Diaz, a representative from Local 758, which is the real Union for hotels was around and would be distributing cards for Local 758. Campo told Velez to sign a card for Local 758, because it was a better Union, it was a hotel Union, and the employees would get more benefits with a hotel Union. Velez told Campo that he had already signed a card for District 6, thinking that it was Local 6 of the Hotel Union. Campo informed Velez that District 6 is not a hotel Union. Velez answered [*10] that he would sign a card for Local 758.

Shortly thereafter, Diaz saw Campo and Velez outside the hotel. Campo introduced Velez to Diaz, and Velez smiled, shook Diaz' hand and said, "I heard a lot about you." Diaz told Velez that he was from Local 758, the hotel Union, not District 6. Diaz said that "We have to start signing cards", and gave a blank card to Velez. He asked Velez to fill it out. Velez put it in his pocket and said that he would fill it out later.

At about 3:00 p.m. on the same day, Diaz saw Velez standing outside. Diaz asked Velez if he had signed the card? Velez said "no, but I will do it right now." Velez then took out the blank card from his pocket, read it, filled out all sections of the front except for the name of the employer, turned the card over, signed it, dated it and returned the card to Diaz. Diaz asked where Campo was, and Velez replied that Campo was inside but would be coming out soon. A few minutes later, Campo came out, and he and Diaz walked along 31st Street. Diaz pulled out the card that Campo had previously given him, without a signature. Diaz said, "You forgot to sign the card this morning." Campo replied "no problem. I'll do it right now." Diaz [*11] handed the card to Campo, who signed it, and dated it, in Diaz's presence and returned it to Diaz.

The following day, at Diaz's office, Diaz took the cards of both Velez and Campo out of his pocket. On each card, Diaz filled in portions of the card that had not bee filled in by Velez and Campo. Diaz filled in the name of the Employer on the front, and on the back, (the signature portion) 758 next to the printed Local Union No., and SEIU and 758 in the authorization paragraph. Diaz then put the cards in his file cabinet. n4

n4 The cards of Campo and Velez were both dated February 4. Velez's card for District 6 was dated January 10, and Campo's District 6 card was dated January 17.

During the first week of February, Diaz met unit employees Carrina Marrero and Tiffany Branigan at different times outside the hotel. He introduced himself to these employees as a representative from Lo al 758, the hotel Union, and informed them that he was not from District 6. Branigan replied that she had heard about Diaz and Local 758. In [*12] that regard, Branigan previously had a conversation with fellow employee Domingo Castro, who had informed her that Diaz was gathering cards for Local 758, and Castro had shown her a copy of a contract that Local 758 had with another employer. Castro told Branigan that if employees signed cards for Local 758, the benefits included in the contract would be offered to the employees. However, in early February, Diaz did not give any cards to Branigan or Marrero.

However, on February 13, Diaz met Branigan and Marrero as they were going to lunch at Taco Bell. He asked if he could accompany them to lunch, and they agreed. As they were walking to lunch, and when they got to Taco Bell, Diaz explained to them some of the benefits available to employees under the Union's contract. In fact, he showed them a copy of a Master Local 758 contract, which is a "pattern agreement", that Local 758 signs with most employers. Diaz

told Marrero and Branigan that if the employees signed cards for Local 758, the Union try to get these benefits for the employees, and it would be better for the employees. Both Branigan and Marrero responded that they need medical benefits because they have kids, and both agreed [*13] to sign cards.

Diaz handed them cards. Then both read the cards, filled out the entire front of the card, including name of the Employer, and signed and dated the back of the card. As was the case with the cards of Velez and Campo, on the back, of the card, the number of the Local (758) was not filled in at the time, nor was the designation "SEIU" in the authorization paragraph. Upon returning to his office, Diaz filled in these missing portions on these cards. n5

n5 Both Local 758 cards were dated February 13. Marrero had signed a card for District 6 on January 14, and Branigan's card for District 6 was undated. However, Branigan testified that she signed her District 6 card, before she signed the Local 758 card, and that Cruz the District 6 representative never showed her a contract, as did Diaz. Therefore, she felt that Local 758 would be better for the employees.

During the first week of February, Diaz approached employee Mario Ferreira while Ferreira was cleaning the glass doors in front of the hotel. Diaz introduced [*14] himself to Ferreira in Spanish, as from Local 758, SEIU, and that he was "not from next door, District 6." Ferreira replied that he had heard about Diaz. Diaz then proceeded to tell Ferreira about signing a card for Local 758, and discussing some of the benefits of the Local 758 contract. Diaz told Ferreira that if he signed a card, he would get better benefits, and added that the employees might have to choose which Union they want. Diaz gave Ferreira a card, which Ferreira put in his pocket. Diaz instructed Ferreira to make sure management doesn't see the card, and to give it to Diaz later.

On February 13, Diaz saw Ferreira on the street coming to work. Diaz asked if he had signed his card. Ferreira replied no and added that he didn't have it on him. Diaz gave Ferreira another card and told him to fill it out. Ferreira filled out the front side of the card, including personal information as well as the name of the Employer. When Ferreira turned the card over to the other side, Diaz offered to translate this side for Ferreira if he had a problem understanding it. Ferreira said that, "I understand a little bit." Diaz replied "no problem", and proceeded to translate into Spanish the [*15] entire of the back of the card. After Diaz completed his translation, Ferreira signed and dated the card, February 13. n6 Later, in Diaz's office, Diaz wrote the Local's number and "SEIU" in the appropriate blanks within the authorization paragraph. He then placed the card in the file cabinet.

n6 Ferreira signed a card for District 6 on February 7.

Diaz first encountered employee Nativdad Caba in the morning of February 4 in the elevator. Diaz introduced himself as "Neil Diaz from SEIU, Local 758. I'm from the hotel Union. I'm not from next door, District 6." Caba replied "Oh yes, I heard from William (Campo), I heard about you." The elevator then reached the 10th floor, and since the assistant manager was on that floor, Diaz did not get a chance to discuss cards or the Local 758 contract. He told her that he would see her later.

Diaz also met employee Lizette Tellez outside the hotel, during the first week of February. He introduced himself as Neal Diaz "from Local 758. I'm from the hotel Unions." Tellez said "good", [*16] but she was in a hurry to get to work. Diaz replied that he would see her another day.

On February 14, in the afternoon, Diaz saw Tellez and Caba as they were leaving the hotel, and going to the subway to go home. He asked if he could walk with them. They replied, "no problem." As they were waking towards Fifth Avenue, Diaz explained to the employees the benefits of the Local 758 contract, including sick days, holidays, and a medical plan. Tellez replied that she needed benefits because she has a little son, and Caba mentioned that she would like to have more sick days. Diaz pulled out two blank cards, and gave one to Tellez, and held the other in his hand. Diaz said that if they have any problem understanding the language on the card, he would be glad to translate into Spanish. Tellez declined the offer, stating that she understands English "pretty good." Caba however said that she understands "a little bit", so Diaz proceeded to translate into Spanish the back portion of the card, starting with the words "application for membership." He also translated the words 'SEIU' and "Local 758", even though these words were not filled in at the time. After Diaz completed the translation, [*17] both employees filled out the cards, signed and dated the cards February 14, n7 and returned the cards to Diaz.

n7 Both Caba and Tellez signed cards for District 6, dated February 12.

In his office the next morning, Diaz filled in the Local's number and "SEIU" on both cards, and the name of the Employer on Caba's card on the appropriate blank line. He then placed the cards in the file cabinet.

Diaz first met employee Lia Restrepo in early February as she was leaving the hotel. Diaz introduced himself as Neil Diaz from "Local 758, SEIU, from the hotel Unions. I'm not from the Union next door, which is District 6. I'm the real Union for the hotels." Restrepo replied, "yes, yes, I heard about you. The girls had spoken to me about you." They briefly discussed benefits, and Restropo stated that she needed a better medical plan. However, Diaz did not give her a card at that time, because she was in a hurry to leave and didn't have time.

On February 14, after obtaining the cards from Caba and Tellez, Diaz returned to the hotel. [*18] He saw Restrepo leaving the hotel, and walking towards the train. Diaz walked with her to the train, and showed her an authorization card. He explained that the card was to show that the Union can represent her, protect her in her work, and added that the Union has good benefits. Diaz told Restropo that if she signed the card she would get better benefits than the employees currently have. Diaz translated the back portion of the card into Spanish for Restrepo then filled in the information on the front of the card, as well as the date on the back of February 14, n8 and signed the card in Diaz's presence. Diaz examined the card, and put it in his pocket. The next day, in Diaz's office he wrote in the Local's number and "SEIU" on the appropriate blanks, and placed the card in the file cabinet.

n8 Restrepo signed a card for District 6 on February 12.

On or about February 4, Diaz spoke with a group of four employees including an engineer, and employee Shaowen Ku inside the hotel on one of the floors. He introduced himself [*19] as Neil Diaz from SEIU Local 758, a hotel Union. He added that he was not from District 6. The engineer asked if the Union was part of Hotel Trades Council. Diaz replied yes. The engineer smiled, shook Diaz's hand, and said to the other employees present, "this is the real Union." At that point, the other employees left to go back to work, and Diaz spoke with Ku. Diaz explained to Ku the benefits of Local 758's Master Contract, including holidays, sick days, full medical plan for him and his family. Ku replied that it "sounds good." Diaz took out a card and gave it to Ku. He instructed Ku to read it, fill it out, sign it, and return it to Diaz. Ku took the card and put it in his pocket.

On February 13, outside the hotel, employee William Campo gave Ku's signed card to Diaz. Diaz examined it and put it in his pocket. At his office, the next day, Diaz wrote in the Local's number and "SEIU" in the appropriate blanks in the authorization paragraph. He then placed the card in his file cabinet. Ku's card was dated February 13. Ku's District 6 card was dated February 7. I have examined the signatures that appear on the District 6 card and the Local 758 card. The signatures appear to me to [*20] be identical, and to have been signed by the same person. n9

n9 My findings above are based on a compilation of the credible portions of the testimony of Diaz and employees Branigan, Velez, Ferreira and Restrepo. I place no reliance on the vague, unsubstantiated, clearly hearsay testimony of District 6 representative Nephty Cruz, that he was told by many employees that they were shown a copy of a contract that Local 758 has with another hotel, and that the employees were "guaranteed" that if they sign and elect Local 758 they would be given all benefits included in the contract. However, as I have noted above, employees were shown a copy of a Local 758 contract with another employer, and were told by Diaz or other employees that they either would or might receive the benefits in that contract, if they signed a card for Local 758.

On March 4, Local 758 filed a petition for certification with the Region. District 6 had filed a similar petition on January 31, but this petition was withdrawn on February 7, in light of [*21] the fact that Respondent had agreed to the card count, which as noted above was conducted on February 15.

II. ANALYSIS

> When an employee has signed authorization cards for two unions, the card of neither Union will be regarded as a valid designation which can be counted toward a majority, unless the record is sufficiently probative to "clearly dissipate the ambivalence as to intent that is inherent in dual card situations, and to leave no doubt that at the time material to the determination of majority status, the dual card signer intended only one of his card cards, and which of them to evidence his designation of a bargaining agent." *Katz's Deli*, 316 NLRB 318, 329-330 (1995), enfd. 80 F.3d 775 (2d Cir. 1996), quoting *Crest Containers Corp.* 223 NLRB 739, 741 (1976).

This statement of law has been consistently applied by the Board, and supported by the Courts. *Alliant Food Service*, Inc. 335 NLRB No. 57 (2001); *Human Development Assn*, 293 NLRB 1228 (1989) enfd. 937 F.2d 657 (D.C. Cir. 1991); *Flatbush Manor Center*, 287 NLRB 457, 458, 471-472 (1987); [*22] *Caro Bags, Inc.* 285 NLRB 656, 669-670 (1987); *Windsor Place Corp.*, 276 NLRB 445 448-449 (1985); *Unit Train Coal Sales*, 234 NLRB 1265, 1271-2 (1978).

In applying the principles of these cases to the instant facts, Respondent recognized District 6 on the basis of its submission of 17 authorization cards, which did represent a majority of Respondent's employees in a unit of 28 employees. However, the evidence discloses that Local 758 obtained cards from nine of the employees, who also signed cards for District 6. These Local 758 cards were all dated subsequent to the dates that the employees signed District 6 cards, and were dated prior to the recognition of District 6 by Respondent.

Thus the dual card analysis must be made. However, it is first necessary to determine the validity of Local 758's cards, and whether General Counsel adduced sufficient evidence to authenticate these cards. In that regard, while both Respondent and District 6 made a number of objections to the receipt into evidence of these cards, it is interesting to note that in their briefs, neither party made any reference to [*23] the validity of the cards. While I do not construe such failure as a waiver of their objections to the cards, it does suggest that both parties realize that the record firmly establishes the validity of all of the Local 758 cards.

In any event, I do deem it appropriate to consider the issue, and I conclude that General Counsel has established that all of the cards were executed by employees of Respondent, and that none of the evidence cited by Respondent or District 6, establishes the invalidity of these cards.

Thus Diaz credibly testified that he solicited cards from employees Campo, Velez, Branigan, Marrero, Ferreira, Caba, Tellez, and Restrepo, and that he personally witnessed each of these employees sign his or her card on the date appearing on their card. Four of these employees, Velez, Ferreira, Branigan and Restrepo, testified and identified their signature, and testified that they signed cards on the dates appearing therein. There can be little doubt that the testimony of Diaz, (the solicitor) who observed employees sign cards and who returned the cards to him, is sufficient to authenticate these cards. I so find. *McEwen MFG. Co.*, 172 NLRB 990, 992 (1968); [*24] *Airtex Air Conditioning*, 308 NLRB 1135, 1139 (1992).

The card of Ku is more problematical, since although Diaz gave him a card, it was not returned to Diaz by Ku, but by Campo, who did not testify. However, I have compared the signatures of Ku on his District 6 card and on the Local 758 card that Diaz was given by Campo, and have concluded that the signatures were identical. I am satisfied that the same individual signed both cards, and in such circumstances the Local 758 card had been sufficiently authenticated. *Traction Wholesale Center Co*, 328 NLRB 1058, 1059-1060 (1999); *Lott's Electric Co.*, 293 NLRB 297, 312 (1989).

I now turn to the various objections made to the validity of these cards, as expressed by Respondent and District 6 during the trial. Respondent objected to the admission of some of the cards, because Diaz could not identify the signer's handwriting. Thus contention is totally without merit, as it is not required that Diaz be able to identify the handwriting in order to authenticate the card. *Pedro's Restaurant, 246 NLRB 567, 579 (1979).* Respondent [*25] also raised chain of custody issues, asserting that the fact that Diaz placed the cards in a file cabinet, and the Union president had a key to the cabinet, somehow raises the possibility of tampering and therefore invalidates the cards. I disagree. No evidence was presented that any of the cards were tampered with, and my examination of the cards in question do not suggest in any way, that such tampering has taken place. It is not essential that the General Counsel establish a chain of custody of cards, that might be necessary in a criminal case involving certain evidence. Absent any evidence of tampering, the inquiry ends when the Union receives the card. *The Rowland Co., Inc.*, 210 NLRB 95, 111 (1974); *All Tronics*, 175 NLRB 644, 652 (1969). *McEwen* supra. See also *Alexander Dawson Inc. v. N.L.R.B.*, 586 F.2d 130 (9th Cir. 1978). (under 901(a) of the Federal Rules of Evidence, once prima facie evidence of authenticity is adduced, it is not necessary to establish chain of custody. Burden the shifts to Respondent to rebut the authenticity of documents).

Respondent [*26] also raised the issue with respect to some of the cards, that the number Local 758, the abbreviation "SEIU", and the name of the Employer was not filled out by the employees, and these items were filled in by Diaz, after they were signed by these employees. However, it is well settled that a card which is properly authenticated is not rendered invalid simply because the signer had not filled in all of the banks when he turned it in to the Union. *McEwen Mfg.* supra at 992; *Capital Varsity Cleaning Co.*, 163 NLRB 1057, 1060 (card of Marjorie Maynor) enfd. in pertinent part 395 F.2d 870 (6th Cir. 1968).

However, this precedent does not dispose of the issue, raised by Respondent, that when employees signed the cards, absent the name of the Local Union, and the abbreviation "S.E.I.U., they did not know what they were signing, and the cards were therefore invalid. In that regard, while it is obviously preferable practice to list the full name of the labor organization being designated on the card, before it is signed, the absence of such designation is not fatal to the validity of an authorization card, [*27] as long as the circumstances of its execution show that the signer knew the identity of the Union being designated as the bargaining representative. *World Wide Press, Inc.*, 242 NLRB 345, 365 (1979); *Cam Industries*, 251 NLRB 11 (1980); *W.C. Richards Co.*, 199 NLRB 1069, 1077 (1972); *Southbridge Sheet Metal Works, Inc.* 158 NLRB 819, 827 (1966), enfd. 380 F.2d 851 (1st Cir. 1967).

Here the circumstances reveal that the authorization cards contained the name of the parent organization, Service Employees International Union in Capital letters. Thus the failure to include the abbreviation "S.E.I.U.", before the card was signed, has no significance. The failure to include Local 758 is more troublesome, but the solicitation of the cards makes it clear that the employees knew that they were designating Local 758 when they signed their cards. Thus, Diaz made it clear when he solicited all of the cards that he was from Local 758, and not District 6. Indeed the four employees who testified, Branigan, Velez, Ferreira and Restrepo all confirmed [*28] that they knew when they signed their cards that Diaz was from Local 758, and that their cards were for Local 758. Therefore, I conclude that the employees were not mislead by the absence of the Local Union's number on the card, when they signed the cards, and that the cards were valid. *World Wide* supra; *Cam Industries* supra; *W.C. Richards* supra; *Southbridge Sheet* supra.

Finally, both Respondent and District 6 asserted at the trial, that the cards should be invalidated because Diaz promised employees that they would receive benefits, as under Local 758's contract with other employers, if they signed their cards. It is argued that this constitutes an unlawful promise of benefits sufficient to invalidate the cards. I do not agree. The evidence did establish that Diaz in the course of his solicitation of cards, did discuss Local 758's contract with other employers, showed this contract to some employees, and informed some employees that they might or in some cases would obtain these benefits, if they signed cards for Local 758. However, such statements by Diaz were [*29] not a promise of benefit to be granted by the Union but merely an explanation of what benefits Diaz believed would occur if the Union were successful in the election and a contract was signed with Respondent. The Union was merely engaging in commonplace election propaganda and the cards solicited by Diaz are not invalidated by such comments. *Windsor Industries, Inc.*, 265 NLRB 1009, 1020 (1982); *Federal Alarm, 230 NLRB 518, 521 (1977); Diamond Motors Inc.*, 212 NLRB 820, 830 (1974); *Jimmy Richard Co.* 216 NLRB 802, 807 (1974); *Essex Wire Corp.*, 188 NLRB 397, 416-417 (1971).

The underlying basis for these cases is that the Union has no power to grant wage increases or other benefits, unlike the employer, so that when a Union promises that employees will obtain increased benefits if they signed for or support the Union, employees understand that such benefits can be expected only after a contract is signed. Indeed the Court's have long recognized that while it may be unlawful for an employer to promise employees increased benefits if they [*30] reject the Union, it is not unlawful or objectionable for a Union to promise employees increases in benefits to support the Union, in recognition of the fact that the Employer has control over such matters, but not the Union. *NLRB v. Kinter Brothers*, 419 F.2d 329, 335 (D.C. Cir. (1969) (Union advised employee that Union would obtain higher wages and better working hours. Cards held valid); *NLRB v. Golden Age Beverage Co.*; 715 F.2d. 26, 28 (5th Cir. 1969) (Union's promises of benefit did not interfere with election) *NLRB v. Gilmore Industries*, 341 F.2d., 240, 242 (6th Cir. 1965). (It is not unlawful for a Union to promise to obtain a wage increase or other benefits if it is elected.) *Olson Rug Co. v. NLRB*, 260 F.2d 255, 256 (7th Cir. 1958). (Promise of benefit by Union not objectionable, since benefit was not within the power of Union to confer upon the employees).

These cases must be contrasted with cases such as *NLRB v. Savair Mfg.*, 414 U.S. 270 (1973) (Union's waiver of initiation fee for card signers unlawful), and *Wagner Electric Co.*, 167 NLRB 532, 533 (1967) [*31] (Union's promises to employees of life insurance upon signing cards, objectionable, where the promises involve a benefit that the Union was in a position to confer upon card signers.)

Accordingly, I find that the statements made by Diaz about benefits that employees would or could receive if they signed cards, do not invalidate the Local 758 cards that they signed. I therefore find that all nine cards submitted were valid designations for Local 758 to represent the employees.

The next question to be answered is the effect of these cards on the prior cards that these employees signed for District 6. As the above cited precedent discloses, the issue is whether the record establishes that ambivalence in intent that is inherent in dual card situations has been dissipated by evidence that leaves no doubt that the dual card signers intended only his other District 6 card to evidence his or her designation of a bargaining agent. *Katz's Deli* supra, *Crest Container* supra, *Alliant Food Service* supra.

It is clear that under no conceivable interpretation of the facts here, can such a finding be made. [*32] Indeed, if anything the evidence could conceivably establish that the employees by signing their Local 758 cards intended to clearly repudiate their District 6 membership, and to support Local 758 as their bargaining representative. *Wave Crest Home for Adults*, 211 NLRB 217, 230 (1975); Alliant Food Service supra at 2, see also *Harry Stein*, 43 NLRB 124, 131 (1942) (Employee who signed duplicate cards, testified she preferred Union whose card she signed last, because it was a "sample card Union.") Cf. *Caro Bag* supra, and *Windsor Place* supra, where dual cards signed by recognized Union, held invalid even though these cards were signed after they signed cards for different Union.

However, I need not and do not decide, whether Local 758's cards would be deemed a sufficient repudiation of their District 6 cards, to warrant a finding that the Local 758 cards could form the basis for lawful voluntary recognition of Local 758. I need only find, which I do that the Local 758 cards created sufficient ambivalence about the District 6 cards signed by these employees, that [*33] their District 6 cards cannot be counted in establishing District 6's majority status at the time of recognition.

Neither Respondent nor District 6 quarrel with this factual finding. Instead they find fault with current law, and argue consistent with the dissenting opinion of Judge Harry Edwards in *Human Development v. NLRB* supra, 937 F.2d at 670-675, that the Board should overrule its longstanding precedent with respect to dual cards, in light of its decision in *Bruckner Nursing Home*, 262 NLRB 955 (1982). Since I as an administrative law judge, am bound to apply existing Board precedent, I need not go any further in my analysis, and could simply relegate Respondent and District 6 to make their appeal to the Board to change the law. However, I nevertheless deem it appropriate to express my views on the subject, and I shall do so.

I am of the opinion that current Board law on dual cards is not inconsistent with or overruled by *Bruckner*, as asserted by Respondent, District 6, and Judge Edwards, and should not be changed. The essence of the argument made by Respondent as well as by District 6 and Judge Edwards, is that [*34] since *Bruckner* has overruled *Midwest Piping & Supply*, 63 NLRB 1060 (1945), and found an employer does not violate the Act by recognizing a majority Union in a dual organizational situation, unless a valid petition has been filed at the time of recognition, the dual card doctrine. "no longer makes sense", *Human* Development supra at 673. Indeed it is noted by both Judge Edwards and Respondent that the Board in Bruckner made specific reference to dual cards, as follows:

> Our new approach provides a satisfactory answer to problems created by execution of dual authorization cards. It is our experience that employees confronted by solicitations from rival unions will frequently sign authorization cards for more than one union. Dual cards reflect the competing organizational campaigns. They may indicate shifting employee sentiments or employee desire to be represented by either of two rival unions. In this situation, authorization cards are less reliable as indications of employee preference. When a petition supported by a 30-percent showing of interest has been filed by one union, the reliability of a rival's expression [*35] of a card majority is sufficiently doubtful to require resolution of the competing claims through the Board's election process. . . .
> . . . . The phenomenon of dual cards in a rival union organizational setting must be taken into account, but can no longer solely justify our absolute refusal to rely on cards in *Midwest Piping* situations, particularly since we regard them as a reliable means of ascertaining the wishes of a majority of employees in other organizational contexts. 262 NLRB at 958.

Also, Judge Edwards and Respondent argue that the Board in a number of cases subsequent to *Bruckner*, have appeared to back away from, if not abandon the dual card doctrine. n10

n10 *Great Southern Construction Inc.*, 266 NLRB 364, 365 (1983); *Film Constortium*, 268 NLRB 436 (1983); *Rollins Transportation*, 296 NLRB 793 (1989).

However, in my view all of these contentions are adequately and persuasively [*36] disposed of by the majority opinion in *Human Development* supra. As the opinion points out, both before and after *Bruckner*, the Board has "clearly distinguished between a challenge based on dual cards, to an employer recognized Union's majority support, and a challenge to an employer's strict neutrality under *Midwest Piping." 937 F.2d at 666.* Thus as *Crest Container supra and Flatbush Manor* supra makes clear, the theories underlying violations in *Midwest Piping* and now *Bruckner*, and violations based on lack of majority status are distinctly different. Under a *Bruckner* theory, "lack of majority status is not a necessary element of proof of a violation, and proof that the recognized union possesses majority support is not a defense to the alleged violation." *Film Constortium* supra at fn. 4. Recognition of a Union that does not have majority status is a separate theory of a violation, and this is where the dual card doctrine becomes relevant. The existence of dual cards becomes relevant in assessing majority status, and where, as here, the dual cards preclude a finding that [*37] the District 6's cards represent the unambiguous choice of that employee of District 6 as its representative, the card cannot be counted toward establishing District 6's majority status.

To be sure, there can be some overlap in these theories, in that evidence tending to show the existence of a real question concerning representation and the existence of dual cards can be similar. Indeed in some cases violations are found based on both theories. *Yankee Department Stores*, 211 NLRB 306, 309 (1974) (violation based on both *Midwest Piping* and lack of majority, due to dual cards). Nonetheless, the theories are distinct, and evolve from different considerations. The *Midwest Piping/Bruckner* theories evolve from the Board's desire to have real questions concerning representation, decided by Board elections, rather than voluntary recognition in rival organization campaigns, whether or not majority status is present. The dual card theory is simply a recognition of long standing precedent that a Union must be designated by a majority, in order to obtain lawful recognition, and that where employees sign dual cards, the cards, "do not reliably reflect the [*38] employees' choice of bargaining agent and cannot properly be counted to support the claim of majority status." *Yankee Department* supra at 309.

While *Bruckner* supra, does make reference to dual cards, as pointed out by Respondent and Judge Edwards, a careful reading of the context of the reference, makes clear that the Board did not intend to change existing law with respect to dual cards. Thus *Bruckner* was issued to reevaluate *Midwest Piping*, in light of the many Court of Appeals decisions, which disagreed with the Board's *Midwest Piping* analysis, n11 and concluded that where a union represents a majority of employees, an employer does not violate the law by recognition of that Union, and no question concerning representation thereby existed. The Board in *Bruckner* attempted to avoid the difficult issues of deciding whether a "real question concerning representation" exists, by returning to the bright line rule of requiring the filing of a petition to preclude recognition. n12 Thus, the discussion of dual cards in *Bruckner* supra, related to the Board's assessment of dual cards [*39] or any cards for that matter, in a "*Midwest Piping*" situation. Thus, the Board observed that the phenomenon of dual cards must be taken into account, "but can no longer justify our absolute refusal to rely on cards in *Midwest Piping* situations." Therefore, the Board concludes that in finding the proper balance between statutory purposes, it will require a properly filed petition by one of the competing labor organizations in order to preclude recognition, under a *Midwest Piping* theory. It is significant to note that the Board does recognize the validity of dual cards as valid for showing of interest purposes, since it reasons that employees could desire to join more than one Union, and "the election will determine which labor organization, if any, the employees wish to represent them for the purposes of collective bargaining." *Brooklyn Borough Gas*, 110 NLRB 18, 20 (1954).

n11 *Plyskool v NLRB*, 477 F.2d 66 (7th Cir. 1973); *NLRB v. Peter Paul Inc.* 467 F.2d 700 (9th Cir. (1972); *American Bread Co. v. NLRB*, 411 F.2d 147 (6th Cir. 1969). [*40]

n12 I note that this is actually a return to *Midwest Piping* itself, which had required a filing of a petition to establish the existence of a real question concerning representation, but that position was subsequently changed by removing that requirement, and assessing each case on its own facts to determined if the other Union presented a "colorable claim", a claim that was "not naked" or a claim that was "not unsupportable." *Bruckner* supra at 956.

However that is not the case, where as here, the dual card is used to establish majority status, and to preclude the employees from choosing their representative by the preferred Board conducted election. It is clear that Buckner did not intend to change the law with respect to the reliability of dual cards to establish majority status. Thus in footnote 13 of *Bruckner*, as pointed out by the majority in *Human Development*, supra the Board stated:

> Although an employer will no longer automatically violate Sec. 8(a)(2) by recognizing one of several rival unions before an election petition has been filed, we emphasize [*41] that an employer will still be found liable under Sec. 8(a)(2) for recognizing a labor organization which does not actually have majority employee support. *International Ladies' Garment Workers' Union, AFL-CIO [Bernhard-Altman Texas Corporation] v. N.L.R.B.* 366 U.S. 731 (1961). This longstanding principle applies in either a single or rival Union organizational context and is unaffected by the revised *Midwest Piping* doctrine announced in this case. For instance, if an occasion arises where an employer is faced with recognition demands by two Unions, both of which claim to posses valid authorization card majority support, the employer must beware the risk of violating Sec. 8(a)(2) by recognizing either Union even though no petition has been filed. In such a situation, there is a possibility that the claimed majority support of the recognized Union could in fact be nonexistent. Consequently, the safe course would be simply to refuse recognition, as clearly authorized under *Linden Lumber Division, Summer & Co. v. N.L.R.B.*, 419 U.S. 301 (1974). Either of the Unions or the employer could then file a representation position. [*42] 262 NLRB at 957.

This footnote demonstrates, confirmed by subsequent Board cases such as *Flatbush Manor* supra that majority status is clearly distinct from *Midwest Piping* issues, and that dual cards generally cannot be used to reliably establish that the employee has chosen either labor organization as its representative. Therefore, where an employer, as Respondent did here, recognizes a Union based on an alleged majority, which cannot be found absent the dual cards, the recognition is unlawful, even though the employer is unaware of the existence of the dual cards. Therefore the arguments asserted by Respondent and District 6, that the employer should not have to "guess" whether a QCR exists is answered. *Bruckner* gives the employer a bright line rule to follow with respect to the existence of a question concerning representation, but does not disturb long standing precedent that the Union must still represent a majority of employees, and that an employer's lack of knowledge of a Union's non-majority status is no defense to an Sec. 8(a)(2) violation. Indeed, there are numerous situations where employers might be [*43] unaware of a Union's lack of majority, even where as here, a card count is conducted. The cards could be coerced, induced by an unlawful promise of a waiver of initiation fee, by statements that the card is to be used only for an election, solicited by supervisors, or in the most closely related situation, where the cards have been revoked by the signer prior to the recognition. *TMT Trailer Ferry, Inc.*, 152 NLRB 1495, 1496 (1965); *Martin Theatres*, 126 NLRB 1057, 1058-1059 (1960). In each of these situations, the employer might not know that the cards that it relied upon were invalid for the above reasons, including the subsequent revocation by the signer, but it is not exonerated from its conduct in recognizing a minority Union, regardless of its knowledge of that fact. *Bernard Altman* supra. "When an employer recognizes a Union without the confirmation of a representation election, it assumes the risk of mistaking the extent of the Union's support, and of committing the unfair labor practices associated with recognition of a minority Union." *Human Development* supra, 937 F.2d at 665.

In [*44] my view dual cards are simply another way of invalidating a card as a reliable indication of Union support, most akin to a subsequent revocation by the card signer.

As related above, I disagree with Respondent that cases subsequent to Bruckner, suggest that the dual card doctrine is no longer the law. In *Great Southern Construction. Inc.*, 266 NLRB 364, 365 (1983), the Board dismissed a complaint which had been litigated under a *Midwest Piping* theory, based on its recently issued *Bruckner* decision. It is true as Respondent notes, that the evidence therein revealed that a majority of employees had signed cards for the charging party Union, which suggests that dual cards would have negated the majority of the recognized Union. However, the Board specifically stated that it was not analyzing the case in the "context of dual authorization cards", since the cards of neither Union were introduced into evidence, and the case was litigated solely under a *Midwest Piping* theory. Therefore, this case cannot be construed as an abandment or even a retreat from prior dual card precedent. Indeed if the Board wished to conclude that *Bruckner* overruled [*45] *Crest Container* and its progeny, it could have done so, but it carefully declined to take such a position.

Similarly, in *Film Consortium*, 268 NLRB 436, 437 (1983), another case litigated under a *Midwest Piping* theory, the Board again dismissed the complaint, under *Bruckner*, since no petition was filed at the time of the recognition.

Respondent cites this case as authority for the Board not considering the dual card doctrine. I disagree. Although the case did reveal evidence of a dual organization campaign, dual card issues were neither litigated, nor discussed. To the contrary, the Board dismissed the contention of General Counsel and Charging Party that under *Bruckner*, Respondent is not relieved of liability, since the evidence did not prove that the recognized Union represented a majority. The Board made clear the difference between a *Midwest Piping* theory and lack of majority status, and noted that in the latter case, it is the General Counsel's burden to establish lack of majority status. Thus since majority status was not litigated, the Complaint must be dismissed. Therefore, this case not only does not support Respondent's [*46] assertion that *Bruckner* changes dual card precedent, but in fact supports a contrary conclusion. It make the distinction between majority status and *Midwest Piping-Bruckner* violations, which are not dependent on majority status.

Respondent also relies on *Rollins Transportation*, 296 NLRB 743 1989), as modified by *Smith Food & Drug Centers*, 320 NLRB 844 (1996) in support of its assertion that *Bruckner* has changed Board law with respect to dual cards. Once more, I cannot agree. *Rollins* was a representation case, dealing with the issue of representation bar in the context of a rival organizational campaign. The only reference to dual cards in the decision, was the Board's statement that the evidence suggested that dual cards existed, and it implies "that at the time of recognition some employees were uncertain which union they actually supported." Thus this language, if anything reinforces the Board's view of dual cards. The Board found no recognition bar, in view of the simultaneous organizational campaigns, despite the fact that the employer was not aware of both campaigns. However, Respondent relies on Footnote [*47] 5 which states as follows:

> Nothing in our holding that no recognition bar exists in the conduct of an election should be construed to cast doubt on the legitimacy of the Employer's granting recognition to the Intervenor. Likewise this holding should not lead employers in other factually similar situations to be reluctant, for fear of violating the Act, to grant recognition to union's that have demonstrated majority support. Indeed, we agree with our dissenting colleague that the grant of recognition here would be lawful under *Bruckner* because the intervenor was recognized before the Employer had knowledge is a critical element for determining the lawfulness of an employer's granting recognition in the rival union, initial organizing unfair labor practices setting. Id at 795.

Thus Respondent argues that this footnote establishes that under *Bruckner*, in an unfair labor practice setting, knowledge of rival organizing is the crucial factor, and that therefore the dual card doctrine as obsolete. However, Respondent misses the point that *Bruckner* decides whether an unfair practice has been committed, based on a theory of whether a question concerning representation exists. [*48] As related above, and made clear by the Board in *Flatbush Manor* supra and *Film Consortium* supra, this is a different theory than lack of majority status. Indeed *Rollins* itself mentions in the footnote, cited by Respondent, that in order to have lawful recognition, the Union must have demonstrated majority support." 296 NLRB at 795. Dual cards, as I have detailed above, is simply one of the ways that assesses the validity of the dual card as a reliable designation of either of the unions as the unambiguous representative of the signer for majority purposes.

Smith's Food supra, modified *Rollins*, and attempted to harmonize *Bruckner* to recognition bar law. Thus, it applied a modified analysis of *Bruckner* to recognition bar cases, and held that in rival organizing situations, a voluntary recognition of a Union by the "employer based on an unassisted uncoerced showing of interest from a majority of unit employees will bar a petition from a competing Union, unless the petitioner demonstrates a 30-percent showing of interest that predates the recognition." [*49]

The Respondent cites the portion of the opinion in *Smith Foods* that emphasizes that the Board has "an obligation to provide clear guidance wherever possibe so that parties can understand the legal requirements imposed on them and reasonably predict the consequences of their actions." Id at 846. Therefore Respondent argues that the dual card doctrine is inconsistent with this requirement, and requires employers to "guess whether they may lawfully recognize a Union supported by a majority of their employees, or whether they risk committing an unfair labor practice by doing so." Id. Once more, Respondent has confused the *Bruckner* theory of a violation which does require employer knowledge, and concludes that such knowledge is supplied when a petition is filed with a violation based on lack of majority status. Indeed, the very quote cited by Respondent, which discusses employer knowledge, also states that the Union must be supported by a majority of employees, in order for recognition to be valid. Therefore, the dual card doctrine, which is utilized in calculating majority status is still valid and consistent with *Bruckner*. While as I have observed [*50] above, it may be true that an employer may not know about the dual cards, but "when an employer recognizes a Union without the confirmation of a representation election, it assumes the risk of mistaking the extent of

the Union's support, and of committing the unfair labor practices associated with the recognition of a minority Union." *Human Development* supra at 665 citing *Bernhard Altman* supra at 738-39.

Accordingly, based on the foregoing analysis, I agree with the majority Court opinion in *Human Development* supra that the dual card doctrine is neither impacted nor changed by *Bruckner* and is still valid precedent. Cases subsequent to *Human Development* only serve to confirm this view. *Katz's Deli* supra, *Alliant Food Service* supra. n13

n13 Respondent also relies on member Liebman's dissenting opinion in *Alliant Food Services* supra which seeks to overrule the dual card doctrine, because in her view, a dual card can be construed as a valid card for either union, since it infers that the signer desires union representation and would be prepared to accept either union. However, this dissenting opinion is of no help to Respondent. Aside from the fact that is a dissenting opinion only, and is not based on *Bruckner* as Respondent argues, it is any event inapplicable to the instant case. Member Liebman concedes that her theory would not apply where the second card, specifically revokes any prior cards. Id at p.5. Here the Local 758 cards signed by dual card signers does state that the card "supersedes and cancels any power and authority heretofore given to any person or labor organization to represent me."

[*51]

Therefore, I conclude that Respondent has violated Sections 8(a)(1) (2) and (3) of the Act, by recognizing *District* 6 and signing a contract with District 6 containing a Union security clause, at a time when District 6 did not represent a majority of its employees. *Alliant Food Service* supra; *Katz's Deli* supra; *Human Development* supra; *Flatbush Manor* supra; *Crest Containers* supra.

CONCLUSIONS OF LAW

(1) The Respondent, Le Marquis Hotel, LLC, is an Employer engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act.

(2) Local 758 Hotel & Allied Services Union, SEIU, AFL-CIO and District 6 International Union of Industrial, Service Transport and Health Employees, are labor organizations within the meaning of Section 2(5) of the Act.

(3) Respondent has violated Section 8(a)(1) (2) and (3) of the Act by recognizing and signing a contract with District 6, containing a Union security clause.

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

THE REMEDY

Having found that [*52] Respondent has violated Section 8(a)(1), (2) and (3) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent cease and desist from giving effect to or enforcing its contract with District 6, but with the proviso that the Order shall not require the withdrawal or elimination of any benefit of any wage increase or other benefit under the contract. *Alliant Food Service* supra at p. 3.

I also agree with General Counsel, that although the parties stipulated that no dues were deducted pursuant to the Union Security Clause, the stipulation did not include initiation fees or other assessments. Therefore, the record is silent as to whether any fees were exacted pursuant to the contract. In view of the above, it is appropriate to order reimbursement for such fees, if exacted. n14

n14 Of course if at the compliance stage, the evidence discloses that no initiation or other fees were exacted, no reimbursement will be necessary.

[*53]

In that connection however, reimbursement is appropriate only for employees who paid such fees, and who did not join District 6 voluntarily before the contract became effective. *Alliant Food Service* supra at p.3; *Human Development Assn.*, 293 NLRB at 1229, *Katz's Deli* supra. While I have found that the dual card signers who signed for Local 758, invalidated their District 6 cards for the purposes of determining majority support, such action does not vitiate the

voluntary nature of their signing District 6 cards. *Katz's Deli* supra at 1229. Therefore, the dual card signers would not be eligible for any reimbursement of initiation fees. Interest on any refunded initiation or other fees shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Based on these findings of fact and conclusions of law and on the entire record, I issue the following recommended. n15

n15 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.

[*54]

ORDER

The Respondent, Le Marquis Hotel, LLC, New York, NY its officers agents, successors and assigns, shall

1. Cease and desist from

(a) Recognizing or dealing with District 6, International Union of Industrial Service Transport and Health Employees, as the exclusive bargaining representative of its employees at a time when that labor organization does not represent a majority of such employees in an appropriate bargaining unit.

(b) Giving effect to or enforcing the collective-bargaining agreement executed with District 6 or to any extension, renewal, or modification of it; provided, however, that nothing in this Order shall require the withdrawal or elimination of any wage increase or other benefits or terms and conditions of employment that may have been established pursuant to the performance of the contract.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Withdraw and withhold all recognition from District 6 as the collective-bargaining representative of its employees unless [*55] and until District 6 has been certified by the National Labor Relations Board as the exclusive representative of such employees.

(b) Reimburse its employees for any money required to be paid pursuant to the collective-bargaining agreement between Respondent and District 6, including money paid for initiation fees, or other obligations of membership in District 6 plus interest.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amounts owed to employees under the terms of this Order.

(d) Within 14 days after service by the Region, post at its New York, New York facility copies of the attached notice marked "Appendix." n16 Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and [*56] maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 15, 2002.

n16 If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED

PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible [*57] official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT recognize or deal with District 6 International Union of Industrial Services Transport and Health Employees, as the exclusive collective-bargaining representative of our employees at a time when it is not the representative of a majority of such employees in an appropriate bargaining unit.

WE WILL NOT give effect to or enforce our collective-bargaining agreement with District 6 or to any extension, renewal, modification of it; provided, however, that nothing in the Board's Order requires the withdrawal or elimination of [*58] any wage increase or other benefits or terms and conditions of employment that may have been established pursuant to the performance of the contract.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL withdraw and withhold all recognition from District 6 as the collective-bargaining representative of our employees unless and until it has been certified by the National Labor Relations Board as the exclusive representative of such employees.

WE WILL reimburse our employees for any money required to be paid pursuant to our collective-bargaining agreement with District 6, including money paid for initiation fees, or other obligations of membership in District 6 plus interest.

LE MARQUIS HOTEL, LLC (Employer)

Dated ___ By ___ (Representative) (Title)

Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially [*59] to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614, New York, NY 10278-0104

(212) 264-0300, Hours: 8:45 a.m. to 5:15 p.m.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (212) 264-0346.

Letter from Nancy Schiffer with Attachments, Submitted for the Record

American Federation of Labor and Congress of Industrial Organizations

815 Sixteenth Street, N.W.
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R. Thomas Buffenbarger
John W. Wilhelm
Capt. Duane Woerth
Joseph J. Hunt
Cecil Roberts
Melissa Gilbert
John J. Flynn
William H. Young

Gene Upshaw
Gloria T. Johnson
Michael Goodwin
Leon Lynch
Martin J. Maddaloni
Boyd D. Young
Elizabeth Bunn
Terence O'Sullivan
Cheryl Johnson, R.N.
Edward C. Sullivan
Edward J. McElroy Jr.
Baxter M. Atkinson

Frank Hanley
Clayola Brown
Sonny Hall
Arturo S. Rodriguez
John M. Bowers
Dennis Rivera
Michael J. Sullivan
Harold Schaitberger
Bruce Raynor
William Burrus
Ron Gettelfinger
John Gage

May 5, 2004

Chairman Sam Johnson, Subcommittee on
Employer-Employee Relations
Representative Robert Andrews, Ranking Member,
House Subcommittee on Employer-Employee Relations
Committee on Education and the Workforce
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Johnson and Ranking Member Andrews:

Thank you for allowing me to testify before the Subcommittee on April 22, 2004, and provide supplemental documentation in support of my testimony, as requested by Subcommittee members.

In my testimony, I was questioned regarding the use of corporate campaigns as a means to achieve card-check agreements. In making my response, I quoted an article entitled, "*No More Stacked Deck: Evaluating the Case Against Card-check Union Recognition,*" by Adrienne Eaton and Jill Kriesky.[1] That article is attached, and I ask that it be made a part of the hearing record. Eaton and Kriesky have done extensive research on card-check and neutrality agreements and are widely regarded as leading academic experts on this topic.

In addition, I was questioned by Representative Kline regarding my written statement which says: "According to NLRB statistics, in 1969, the number of workers who suffered retaliation for union activities was just over 6,000. By the 1990s, more than 20,000 workers each year were victims of discrimination" when they tried to exercise their fundamental human right to freedom of association in the workplace.

These statistics can be found in the Annual Reports of the National Labor Relations Board. I also direct your attention the 2000 report by Human Rights Watch entitled, "Unfair

[1] Adrienne Eaton and Jill Kriesky, "No More Stacked Deck: Evaluating the Case Against Card-Check Union Recognition," Industrial Relations Research Association, 2003, *Perspectives on Work*, v. 7, no.1, pp. 19-21.

Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards, (2000)," which is an examination of union organizing campaigns in the United States. I have attached a copy of this report, which I ask to be made a part of the hearing record. The numbers I cited can be found in the report at page 8, which states:

> *"The cases studied in this report are not isolated exceptions in an otherwise benign environment for workers' freedom of association. They reflect a broader pattern confirmed by other researchers and borne out in nationwide information and statistics. In the 1950s, for example, workers who suffered reprisals for exercising the right to freedom of association numbered in the hundreds each year. In the 1960s, the number climbed into the thousands, reaching slightly over 6,000 in 1969. By the 1990s more than 20,000 workers each year were victims of discrimination leading to a back-pay order by the NLRB-23,580 in 1998. The frequency and growing incidence of workers' rights violations should cause grave concern among Americans who care about human rights and social justice."*

I was also asked if there are more recent numbers. NLRB Annual Reports for 2001 and 2002 report the number of workers receiving back pay from employers in unfair labor practice cases which have been resolved through adjudication or settlement, as summarized below:

Fiscal Year	Total	Agreement by the Parties (informal)	Agreement by the Parties (formal)	Recommendation of Administrative Law Judge	Board Order	Court Order
2002	15,722	10,361	174	1,449	1,179	2,559
2001	27,582	24,245	184	827	1,380	946

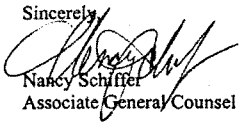
Source: NLRB Annual Reports, 2001 and 2002, Table 4

As these numbers demonstrate, an average of approximately 20,000 workers each year is maintained during 2001 and 2002.

Finally, I wish to submit the full text of *Dayton Hudson v. NLRB*, 79 F.3d 546 (6th Cir. 1996); cert. denied, 519 U.S. 819 (1996), which I referred to in my testimony and which was also cited in the written testimony of Clyde H. Jacob III, Esq. I believe this case is important in order to clarify the record as Mr. Jacob's representations regarding alleged falsification of authorization cards, in my opinion, do not accurately reflect the facts of this case or its final disposition. I ask that this case, as well as related cases involving this same organizing campaign and which formed the basis for my remarks, also be made a part of the official hearing record. These case citations and case texts are included in the attachments.

Thank you again for allowing me the opportunity to present testimony and supplement the hearing record. If you have any questions or concerns please feel free to contact me at the AFL-CIO, at (202) 637-5336.

Sincerely,



Nancy Schiffer
Associate General Counsel

Attachments:

1. *No More Stacked Deck: Evaluating the Case Against Card-check Union Recognition*, by Adrienne Eaton and Jill Kriesky.
2. *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards*, (2000), Human Rights Watch.
3. *Dayton Hudson Department Store Company, a Division of Dayton Hudson Corporation v. NLRB*, 79 F.3d 546 (6th Cir. 1996); cert. denied, 519 U.S. 819 (1996);
   Dayton Hudson Department Store Company, a Division of Dayton Hudson Corporation v. NLRB, 987 F.2d 359 (6th Cir. 1993);
   Dayton Hudson Department Store Company, a Division of Dayton Hudson Corporation, 316 NLRB 477 (1995);
   Dayton Hudson Department Store Company, a Division of Dayton Hudson Corporation, 316 NLRB 85 (1995);
   Dayton Hudson Department Store Company, a Division of Dayton Hudson Corporation, 314 NLRB 795 (1994);
   Dayton Hudson Department Store Company, a Division of Dayton Hudson Corporation, 302 NLRB 982 (1991).

No More Stacked Deck: *Evaluating the Case Against* Card-Check Union Recognition

ADRIENNE E. EATON AND JILL KRIESKY

Much of the management community has long argued against union recognition via "card check," the presentation to an employer of signed cards authorizing union representation for a majority of employees in a unit. Their core argument, that workers deserve the right to a secret-ballot election, has remained unchanged. But the campaign to oppose these arrangements has recently intensified, perhaps due to the increased forcefulness and success of union efforts to secure card-check and neutrality agreements (whereby an employer agrees to remain neutral during an organizing drive).

The Labor Policy Association (LPA), which published *Employee Free Choice: It's Not in the Cards* in 1998, has been a leader in this effort.[1] This past summer, a House subcommittee held hearings on a bill that would prohibit card-check recognition. Among those testifying in favor of the prohibition were LPA senior vice president Daniel Yager, coauthor of *Employee Free Choice*, and Jarol Manheim, a George Washington University professor.

As scholars who have conducted research for several years on neutrality and card-check agreements (N/CC), we offer an empirical evaluation of the arguments against card check. Whether free choice is "in the cards" is a decision for policy makers. But if policy makers are to deal workers a fair hand on this issue—and many workers would argue that the current situation is far from fair—then they have an obligation to draw from a deck that isn't stacked. The goal of our research is to bring some empirically grounded, clear thinking to the discussion.[2]

Neutrality, Card Check, and Corporate Campaigns

Manheim's written testimony before the House Subcommittee on Workforce Protections emphasizes the link between "corporate campaigns" and N/CC. Manheim identifies himself as an expert on this union tactic, and his testimony argues that "unions decided to marry their campaigns to a tandem of organizing demands—card check and neutrality. . . ."[3] In contrast, our interviews with both union and management representatives indicate that corporate campaigns are not a frequently used strategy to secure neutrality and/or card check.[4]

> During organizing, the union leverage most often cited by employers is quite old-fashioned—the threat of a work stoppage.

No more than a handful of the agreements we have studied involved cor-

porate campaigns. The union leverage most often cited by employers is quite old-fashioned—the threat of a work stoppage. About one-third of the agreements studied were negotiated within the context of a broader labor–management partnership. In response to union and employee willingness to assist the company in meeting its performance goals, employers agree to an organizing process that is clearly less disruptive of workplace activities than the traditional National Labor Relations Board (NLRB) election process.

When deciding whether or not to agree to N/CC, employers assess the "business case" via the same cost–benefit analysis they use for any union demand. Many employers have refused N/CC demands, and others have successfully bargained "neutrality only" language instead of the card-check arrangements sought by unions.

Employee Rights, Oversight, and Union Abuses

Manheim raises the concern that in deciding whether to enter such agreements employers may be bargaining away employee rights granted by the National Labor Relations Act (NLRA). While employers are bargaining away their *own* rights, there is no evidence of lost workers' rights. Note also that unions and employers are both waiving their statutory rights with these agreements: three-fourths of the written agreements we analyzed incorporated limitations on union organizing behavior as well as on management. These include union speech limitations, notice requirements, and time limits.

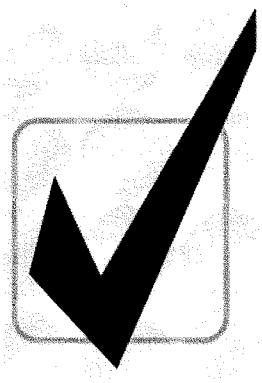
N/CC opponents argue there is a lack of oversight of card-check campaigns as compared with the carefully regulated NLRB election process; Yager, for example, told the House subcommittee that card-check campaigns generally have no neutral oversight.[5] Our data refutes his assertion. A strong majority of the card-check agreements we studied provided for certification by a neutral third party, typically an arbitrator.

> A majority of the card-check agreements we studied provided for certification by a neutral third party, typically an arbitrator.

In *Employee Free Choice* and elsewhere, Yager and his co-authors identify union abuses of the card-check recognition process, which, in their view, the NLRB has failed to address.[6] One is deliberate union misrepresentation of what the card means. We asked our employer interviewees about this. A majority believed that there had been misrepresentation, but most also reported that misrepresentation is rare, in part because the parties often work together to design the card and/or the material given to employees about the card. Employers combat misrepresentations through workforce education, meetings with union leaders and organizers, grievance arbitration, and NLRB charges.

In its publications, LPA paints a picture of employers so hamstrung by union pressure that they cease to protect their employees.[7] The NLRB is portrayed as a regulator unwilling to intervene. Our interviews uncovered a different scene. We found only two employers that never respond to allegations of union wrongdoing in the organizing process. In both cases, they had concluded that unionization was desirable in the particular markets in which they operate.

Our research finds that other types of union misconduct involving cards—such as forgery and the use of threats to get employees to sign cards—are extremely rare. As in the case of misrepresentation, employers reported using informal and/or formal means, including arbitration and NLRB complaints, to correct such violations. Employers told us unequivocally that they do not stand by and allow unions to violate N/CC agreements and the law.



> Employers combat card-check misrepresentation through workforce education, meetings with union leaders and organizers, grievance arbitration, and NLRB charges.

Card Check as an Organizing Strategy

Manheim refers to card-check campaigns as "wholesale" organizing, in which "the union needs to convince the company itself, in a sense, to turn over its workers—which is to say, to withdraw from the contest."[8] As indicated, though, our research indicates the vast majority of employers agreeing to N/CC are continuing to monitor the process by which employees are making their decision. This process *does* have more favorable outcomes for unions than NLRB elections: card-check campaigns are more likely to result in union recognition, and a subsequent contract, than NLRB elections. However, the fact that unions win only about 80 percent of the time with these ar-

rangements indicates that employees can and do reject unionization in card-check campaigns.

When asked about the impact of the N/CC on organizing tactics, many union respondents indicated that less time was spent on countering management's anti-union message and attacking the employer, and more emphasis was placed on the positive contributions of the union. Beyond that, campaigns were often similar to traditional organizing campaigns. Although N/CC agreements make the hard work of organizing easier, unionists recognize the agreements cannot be viewed as substitutes for that work.

Neutrality and card-check agreements can pave the way for business improvements.

Employer Advantages through Card Check and Neutrality

Finally, our research finds that N/CC organizing has advantages for employers as well as for workers and unions. N/CC lets an employer shape the organizing campaign by bargaining limitations on the union. If house calls are viewed as an intrusion on employee privacy, for instance, then an employer may be able to limit them by negotiating over the organizing process.

N/CC can also improve union–management relations, which may enable management to achieve other bargaining or business goals. After successfully organizing through N/CC, some unions have been willing to accept flexible agreements to help companies in highly competitive or low union density environments.

In addition, N/CC can reduce the impact of an organizing campaign on production. Where unions already add to a business—via partnership, supply of skilled labor, and improved relations with customers, among other things—the negotiation of a N/CC agreement may pave the way for business improvements to continue without the disruption of a traditional campaign. Indeed, organizing processes negotiated by unions and management currently offer the best chance for employees in any setting to determine whether to form a union without disrupting productive workplace activities.

Notes

1. Yager, D. V., T. J. Bartl, and J. J. LoBue. 1998. *Employee Free Choice: It's Not in the Cards*. Washington, DC: Labor Policy Association.
2. The assessment in this article is based on two phases of research. The first, which led to an article published in 2001, included an analysis of interviews with union representatives about their experiences negotiating and organizing under N/CC. It also incorporated a review of the language of over one hundred agreements provided by the interviewees. In the second phase—which produced results presented at the Michigan State University/AFL-CIO Workers' Rights Conference in October 2002—we interviewed employers involved in thirty-four of the aforementioned agreements. See Eaton, A. E., and J. Kriesky. 2001. "Union Organizing Under Neutrality and Card Check Agreements," *Industrial and Labor Relations Review*, Vol. 55, no. 1, pp. 42–59.
3. Manheim, J. Testimony before the House Education and the Workforce Committee, Subcommittee on Workforce Protections, July 23, 2002.
4. We do not share Mannheim's concerns about corporate campaigns. However, the point here is that those concerns are not particularly relevant to the debate on card-check agreements.
5. Johnson, Fawn H. 2002. "Rep. Norwood Calls for Prohibition of Card-Check Union Certification." *Bureau of National Affairs Daily Labor Report*, July 24, AA1–2.
6. See Yager, D. V., and J. J. LoBue, "Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-first Century," *Employee Relations Law Journal*, Vol. 24, no. 4 (1999), pp. 21–56.
7. Of course, most trade unionists and many industrial relations scholars will scoff at the idea of employers as protectors of worker rights in the organizing context given the well-known data on unfair labor practices, particularly illegal discharges, by employers. Indeed, these abuses are what motivate use of N/CC agreements in the first place.
8. Manheim, 2002.

Adrienne E. Eaton

Adrienne E. Eaton is professor of labor studies and employment relations at Rutgers University where she teaches credit and non-credit courses in collective bargaining and industrial relations. She is also editor-in-chief of the IRRA.

Jill Kriesky

Jill Kriesky is extension professor with the Institute for Labor Studies and Research at West Virginia University. She is also director of that university's Office of Service Learning Programs and West Virginia Campus Compact. She serves on the editorial board of the Labor Studies Journal.

I. SUMMARY

Everyone shall have the right to freedom of association with others, including the right to form and join trade unions.

-International Covenant on Civil and Political Rights (ratified by the United States in 1992)

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other mutual aid or protection.

-National Labor Relations Act (passed by Congress in 1935)

I know the law gives us rights on paper, but where's the reality?

-Ernest Duval, a worker fired in 1994 for forming and joining a union (speaking in 1999)
Every day about 135 million people in the United States get up and go to their jobs in service, industry, agriculture, non-profit, government and other sectors of the enormous and complex American economy. The rate of new job creation in the United States-almost twenty million in the 1990s-is the envy of many other countries.

Under a wide-angle lens the American economy appears strong. Unemployment is low, and wages are inching up after years of stagnation. In focus, though, there are alarming signals for Americans concerned about social justice and human rights. A two-tier economy and society are taking shape. Income inequality is at historically high proportions.10 Worker self-organization and collective bargaining, engines of middle-class growth and social solidarity in the century just ended, have reached historically low proportions. Although trade unions halted adeclining membership trend in 1999, slightly increasing the absolute number of workers who bargain collectively, the percentage of the workforce represented by unions did not increase.11

10 See Center on Budget and Policy Priorities; Economic Policy Institute, "Pulling Apart: A State-by-State Analysis of Income Trends" (January 2000), showing that the average income of families in the top 20 percent of the income distribution was $137,500, or more than ten times as large as the poorest 20 percent of families, which had an average income of $13,000, and that throughout the 1990s the average real income of high-income families grew by 15 percent, while average income remained the same for the lowest-income families and grew by less than two percent for middle-income families - not enough to make up for the decline in income in the 1980s. See also Richard W. Stevenson, "In a Time of Plenty, The Poor Are Still Poor," *New York Times*, January 23, 2000, Week in Review, p.3; James Lardner, "The Rich Get Richer" What happens to American society when the gap in wealth and income grows larger?", *U.S. News & World Report*, February 21, 2000, p.38.

11 In 1999 more than sixteen million workers in the United States belonged to trade unions. For the workforce as a whole, 13.9 percent of all workers and 9.4 percent of private sector workers were union members. While more workers gained union representation by forming new unions than lost it through workplace layoffs and closures in 1999 for the first time in many years, the proportion of the total workforce represented by unions remained unchanged because of employment growth in firms and sectors with less union presence. In the 1950s such union "density" reached more than 30 percent of the total workforce and nearly 40 percent in the private sector. See Frank Swoboda, "Labor Unions See Membership Gains," *Washington Post*, January 20, 2000, p. E2.

12 Union-represented workers generally have higher wages and benefits than non-represented employees. In 1999, union members had median weekly earnings of $672, compared with a median of $516 for workers who did not belong to a union. They are also protected against arbitrary discharge or other forms of discrimination under a "just cause" standard contained in nearly every union contract. For most non-represented workers in the private sector, an employment-at-will doctrine prevails. An employer can dismiss a worker for "a good reason, a bad reason, or no reason at all," in the classic formulation, except where laws specifically prohibit discrimination. On comparative weekly earnings, see U.S. Department of Labor, Bureau of Labor Statistics, "Union Membership in 1999" (January 19, 2000). For extensive discussion of the at-will doctrine, see Pauline T. Kim, "Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will world," 83 Cornell Law Review 105 (1997); Richard A. Epstein, "In Defense of the Contract at Will," 51 University of Chicago Law Review 947 (1984).

13 At the same time, Human Rights Watch did find instances in various case studies of interference with workers' rights by government authorities. They included biased intervention by police and local government authorities and government subsidization of workers' rights violators. While these cases do not rise to a level of systemic abuse, they are no less troubling and, if they are not addressed and stopped, such abuses could spread.

14 See NLRB Annual Reports 1950-1998; 1998 Table 4, p. 137

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15 The Norris-LaGuardia Act outlawed "yellow-dog" contracts (requiring a worker to renounce union membership as a condition of employment) and *ex parte* labor injunctions (by which judges enjoined strikes and jailed strike leaders after hearing only the employer's argument in a case). The Wagner Act created Section 7 rights, defined unfair labor practices, and set up the NLRB for enforcement. Senator Norris and Congressman LaGuardia were both Republicans; Senator Wagner was a Democrat, reflecting a tradition of support for workers' rights from both major political parties.

16 29 U.S.C. §§ 151-169, Section 7.

17 Under the NLRA, back pay awards are "mitigated" by earnings from other employment. Employers who illegally fire workers for organizing need only pay the difference, if any, between what workers would have earned had they not been fired, and what they earned on other jobs during the period of unlawful discharge. Since workers cannot remain without income during years of litigation, they must seek other jobs and income, leaving the employers who violated their rights with an often negligible back pay liability.

18 See *PVM I Associates, Inc. D/b/a King David Center and U.S. Management, Inc. and 1115 Nursing Home Hospital and Service Employees Union-Florida*, 328 NLRB No. 159, August 6, 1999. In Duval's case, the judge found that management discharged him on fabricated misconduct charges because it was "determined to rid itself of the most vocal union supporter."

19 Human Rights Watch telephone interview, North Miami, Florida, March 8, 2000.

20 Human Rights Watch interview, near Mount Olive, North Carolina, July 15, 1999.

21 Human Rights Watch interview, Sunnyside, Washington, November 6, 1999. See Chapter IV., *Washington State Apple Industry* below.

22 A videotape of the workers' picketing activity, reviewed by Human Rights Watch, shows the consultant making this statement. For more details, see Chapter IV., *Washington State Apple Industry* below.

23 Human Rights Watch interview, Chicago, Illinois, July 8, 1999. For more details, see Chapter IV., *Northbrook, Illinois Telecommunications Castings* below.

24 Human Rights Watch interview, Pueblo, Colorado, May 20, 1999. For details on the legal underpinnings of an assertion of unlawful conduct, see the discussion and footnotes in Chapter V., *Colorado Steelworkers, the Right to Strike and Permanent Replacements in U.S. Labor Law* below.

25 Human Rights Watch interview, Seattle, Washington, November 4, 1999. For details, see Chapter IV., *Contingent Workers* below.

26 See, for example, Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, 96th Cong., 2d Sess., "Report on Pressures in Today's Workplace" (1980); Subcommittee on Labor Management Relations of the House Committee on Education and Labor, 98th Congress, "The Failure of Labor Law: A Betrayal of American Workers" (1984); U.S. Department of Labor, Bureau of Labor-Management Relations, Report No. 134, "U.S. Labor Law and the Future of Labor-Management Cooperation"(1989); U.S. Department of Labor, U.S. Department of Commerce, Commission on the Future of Worker-Management Relations, *Fact Finding Report* (May 1994).

27 See Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Strasbourg, N.P. Engel, 1993), p. 387 (noting that "the US was unsuccessful with its motion in the HRComm to protect freedom of association only against `governmental interference.'").

28 ICESCR, Article 8 (d).

29 ILO member countries are "bound to respect a certain number of general rules . . . among these principles, freedom of association has become a customary rule above the conventions." See Fact Finding and Conciliation Commission on Chile, (ILO, 1975), para. 466.

30 See ILO *Declaration on Fundamental Principles and Rights at Work and Its Follow-Up*, adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998, p. 7.

Many Americans think of workers' organizing, collective bargaining, and strikes solely as union-versus-management disputes that do not raise human rights concerns. This report approaches workers' use of these tools as an exercise of basic rights where workers are autonomous actors, not objects of unions' or employers' institutional interests. Both historical experience and a review of current conditions around the world indicate that strong, independent, democratic trade unions are vital for societies where human rights are respected. Human rights cannot flourish where workers' rights are not enforced. Researching workers' exercise of these rights in different industries, occupations, and regions of the United States to prepare this report, Human Rights Watch found that freedom of association is a right under severe, often buckling pressure when workers in the United States try to exercise it.

Labor rights violations in the United States are especially troubling when the U.S. administration is pressing other countries to ensure respect for internationally recognized workers' rights as part of the global trade and investment system. For example, many developing countries charge that U.S. proposals for a working group on labor rights at the World Trade Organization (WTO) are motivated by protectionism, not by a concern for workers' rights. U.S. insistence on a rights-based linkage to trade is undercut when core labor rights are systematically violated in the United States.

This report occasionally touches on rights of association outside the context of trade unionism. One example is the right of workers to seek legal assistance for work-related problems. Most of Human Rights Watch's investigation, however, deals with workers' attempts to form unions and bargain with their employers. Forming and joining a union is a natural response of workers seeking to improve their working conditions. It is also a natural expression of the human right, indeedthe human need, of association in a common purpose where the only alternative offered by an impersonal market is quitting a job.12

Without diminishing the seriousness of the obstacles and violations confronted by workers in the United States, a balanced perspective must be maintained. U.S. workers generally do not confront gross human rights violations where death squads assassinate trade union organizers or collective bargaining and strikes are outlawed.13 But the absence of systematic government repression does not mean that workers in the United States have effective exercise of the right to freedom of association. On the contrary, workers' freedom of association is under sustained attack in the United States, and the government is often failing its responsibility under international human rights standards to deter such attacks and protect workers' rights.

The cases studied in this report are not isolated exceptions in an otherwise benign environment for workers' freedom of association. They reflect a broader pattern confirmed by other researchers and borne out in nationwide information and statistics. In the 1950s, for example, workers who suffered reprisals for exercising the right to freedom of association numbered in the hundreds each year. In the 1960s, the number climbed into the thousands, reaching slightly over 6,000 in 1969. By the 1990s more than

20,000 workers each year were victims of discrimination leading to a back-pay order by the NLRB-23,580 in 1998.14 The frequency andgrowing incidence of workers' rights violations should cause grave concern among Americans who care about human rights and social justice.

Policy and Reality

Workers in the United States secured a measure of legal protection for the right to organize, to bargain collectively, and to strike with passage of the Norris-LaGuardia Act of 1932 and the Wagner Act of 1935, the original National Labor Relations Act (NLRA).15 These advances came after decades of struggle and sacrifice from the time, a century before, when trade unions were treated as a criminal conspiracy. The NLRA declares a national policy of "full freedom of association" and protects workers' "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."16 The NLRA makes it unlawful for employers to "interfere with, restrain, or coerce" workers in the exercise of these rights. It creates the National Labor Relations Board (NLRB) to enforce the law by investigating and remedying violations. All these measures comport with international human rights norms regarding workers' freedom of association.

The reality of NLRA enforcement falls far short of its goals. Many workers who try to form and join trade unions to bargain with their employers are spied on, harassed, pressured, threatened, suspended, fired, deported or otherwise victimized in reprisal for their exercise of the right to freedom of association.

Private employers are the main agents of abuse. But international human rights law makes governments responsible for protecting vulnerable persons and groups from patterns of abuse by private actors. In the United States, labor law enforcement efforts often fail to deter unlawful conduct. When the law is applied, enervating delays and weak remedies invite continued violations.

Any employer intent on resisting workers' self-organization can drag out legal proceedings for years, fearing little more than an order to post a written notice in the workplace promising not to repeat unlawful conduct and grant back pay to a worker fired for organizing. In one case cited here, a worker fired for five yearsreceived $1,305 back pay and $493 interest.17 Many employers have come to view remedies like back pay for workers fired because of union activity as a routine cost of doing business, well worth it to get rid of organizing leaders and derail workers' organizing efforts. As a result, a culture of near-impunity has taken shape in much of U.S. labor law and practice.

Moreover, some provisions of U.S. law openly conflict with international norms and create formidable legal obstacles to the exercise of freedom of association. Millions of

workers are expressly barred from the law's protection of the right to organize. U.S. legal doctrine allowing employers to permanently replace workers who exercise the right to strike effectively nullifies the right. Mutual support among workers and unions recognized in most of the world as legitimate expressions of solidarity is harshly proscribed under U.S. law as illegal secondary boycotts. Labor laws have failed to keep pace with changes in the economy and new forms of employment relationships creating millions of part-time, temporary, subcontracted, and otherwise "atypical" or "contingent" workers whose exercise of the right to freedom of association is frustrated by the law's inadequacy.

Workers' Voices

"I know the law gives us rights on paper, but where's the reality?" asks Ernest Duval, a certified nurse assistant at a Florida nursing home. Duval and several coworkers were unlawfully fired in 1994 for activities like wearing buttons, passing out flyers, signing petitions, and talking with coworkers about banding together in a union at their workplace in West Palm Beach. In 1996 a judge found their employer guilty of unlawful discrimination and ordered Duval and his coworkers reinstated to their jobs. In 1999 they were still out of work despite an NLRB order upholding the judge's ruling.18 The employer continued to appeal these decisions, now to federal courts where years' more delay is likely. Meanwhile, the firedworkers remain off the job, and their coworkers are frightened into retreat from the organizing and bargaining effort.

"We know our job, we love our job, we love our patients, but management doesn't respect us," Marie Pierre, another nursing home assistant, told Human Rights Watch.19 Pierre served as a union observer at two representation elections in 1998 and 1999 at a nursing home in Lake Worth, Florida. The union won both elections, but Pierre was fired in December 1999 for speaking Creole with coworkers. The company has refused to accept election results, appealing them to the NLRB and raising the prospect of years more of appeals before the courts.

"They don't let us talk to Legal Services or the union. They would fire us if we called them or talked to them," said a farmworker in North Carolina to an Human Rights Watch researcher examining freedom of association among H-2A migrant laborers.20 The H-2A program grants migrant workers a temporary visa for agricultural work in the United States. They labor at the sufferance of growers who can fire them and have them deported if they try to form or join a union.

A continent's breadth away, an apple picker in Washington State told Human Rights Watch of threats from "the consultant that was telling [the company] how to beat the union."21 Part of a growing industry that specializes in telling employers how to defeat workers' self-organization, the consultant told striking apple workers, "You have thirty minutes to get back to work or you're all fired."22 A convoy of police cars escorted trucks and vans full of workers sent by other apple growers to break the strike.

Farmworkers in the United States are excluded from coverage by laws to protect the right to organize, to bargain, and to strike, and can be fired for exercising these rights.

Nico Valenzuela is another kind of victim. He and his coworkers at a Chicago-area telecommunications castings company voted by a large majority in 1987 to form and join a union. Valenzuela is still working, but collective bargaining proved futile in the face of a management campaign to punish workers for their vote. Despite repeated findings by the NLRB that the company acted unlawfully, legal remedies took years to obtain. The workers abandoned bargaining in 1999, twelve years after they formed a union, never having achieved a contract. The delays "took away our spirit," said Nico Valenzuela of the bargaining process. "I don't know how the law in this country can allow these maneuvers."23

Lloyd Montiel, a twenty-seven-year veteran employee at a steel mill in Pueblo, Colorado, exercised the right to strike along with 1,000 coworkers in response to management's threats during bargaining. The company permanently replaced them with newly hired strikebreakers, many coming from other states. "How can the government and Congress allow companies to do this?" he asks. "They [the employer] can plan a strike, cause a strike, and then get rid of people who gave them a lifetime of work and bring in young guys who never saw the inside of a steel mill."24

At a world of work far removed from steel mills and nursing homes, Barbara Judd, a high-tech contract worker in Redmond, Washington, found herself and coworkers who formed a union caught between the firm where they worked and their temporary employment agencies when they sought to bargain collectively. As "permatemps"-long-term workers at a single firm, but nominally employed by outside agencies-Judd's group had no one to bargain with. Denying their employment status, the firm refused to bargain with the group. Meanwhile, the temporary agencies refused to bargain with workers placed at the firm.25

The stories of these and other workers who have tried to exercise the right to freedom of association promised by international human rights instruments and by the U.S. labor law principles are the focus of this report. The cases reported here are not exceptional, and the findings are not novel for those familiar with domestic U.S. discourse on workers' rights to organize and bargain collectively. Congressional committees and presidential commissions have reached the same conclusions, and Human Rights Watch has consulted these sources among others in preparing this report.26

International Human Rights and Workers

Human Rights Watch brings to the discussion an analysis of workers' freedom of association in the United States in light of international human rights standards. An international human rights perspective provides new ways of understanding U.S. labor

law and practice and of advocating changes to bring them in line with international standards.

Freedom of association is the bedrock workers' right under international law on which all other labor rights rest. In the workplace, freedom of association takes shape in the right of workers to organize to defend their interests in employment. Most often, workers organize by forming and joining trade unions. Protection of their right to organize is an affirmative responsibility of governments to ensure workers' freedom of association. As one scholar notes, "States are . . . obligated [under the International Covenant on Civil and Political Rights, ratified by the United States] to protect the formation or activities of association against interference by private parties."27

But the right to organize does not exist in a vacuum. Workers organize for a purpose: to give unified voice to their need for just and favorable terms and conditions of employment when they have freely decided that collective representation is preferable to individual bargaining or management's unilateral power.

The right to bargain collectively stems unbroken from the principle of freedom of association and the right to organize. Protecting the right to bargain collectively guarantees that workers can engage their employer in exchange of information, proposals and dialogue to establish terms and conditions of employment. It is the means by which fundamental rights of association move into the real and enduring life of workers and employers. The right to bargain collectively is "real" implementation in the economic and social setting of the "ideal" civil and political rights of association and organizing.

At the same time, the right to bargain collectively is susceptible to a higher level of regulation than the right to organize. Bargaining is more than an exercise of the pure right of association by workers, since it implicates another party-the employer-and can carry social effects outside the workplace. Collective bargaining takes a wide variety of forms in different countries reflecting theirnational histories and traditions. For example, some countries protect bargaining by workers whose unions represents only a minority of employees in workplaces. Others, like the United States, require majority support. Some countries allow multiple union representation among workers in the same jobs. The United States and others require exclusive representation by a single union for workers in a defined "bargaining unit." But regardless of differences in models of collective bargaining, the underlying basic right must be given effect.

The right to bargain collectively is compromised without the right to strike. This right, too, must be protected because without it there cannot be genuine collective bargaining. There can only be collective entreaty. Here, too, a greater level of regulation is contemplated under international norms since strikes can affect not just the parties to a dispute, but others as well. The International Covenant on Economic, Social and Cultural Rights proclaims "[t]he right to strike, provided that it is exercised in conformity with the laws of the particular country."28 The International Labor Organization (ILO) has long

maintained that the right to strike is an essential element of the right to freedom of association, but recognizes that strikes may be restricted by law where public safety is concerned, as long as adequate alternatives such as mediation, conciliation, and arbitration provide a solution for workers who are affected.

The right to organize, the right to bargain collectively, and the right to strike unfold seamlessly from the basic right to freedom of association. But they should not be equated with outcomes for the exercise of these rights. Workers do not have a right to win an NLRB election. They do not have a right to win their collective bargaining demands. They do not have a right to win a strike on their terms. Nothing in this report should be seen to argue for any specific outcome in an organizing, bargaining, or strike dispute. However, employers must respect and the state must protect workers' fundamental rights.

In recent months, the U.S. government has amplified calls for integrating human rights and labor rights into the global trade and investment system in such venues as the World Trade Organization and the Free Trade Agreement of the Americas. Freedom of association is the first such right cited in calls for labor rights in trade agreements. But to give effective leadership to this cause that is not undercut by hypocrisy, the United States must confront and begin to solve its own failings when it comes to workers' rights. Moving swiftly to strengthen labor rights enforcement and deter labor rights violations in the United States will reinforce the sincerity of U.S. concern for ensuring worldwide respect for core labor standards.

International Labor Rights Norms

A widely accepted body of international norms has set forth standards for workers' freedom of association. They can be found in the Universal Declaration of Human Rights and other United Nations instruments, in conventions of the ILO, in workers' rights clauses in regional trade agreements, and in other international compacts. They are also grounded in the near-universality of national laws protecting workers' freedom of association in all countries' labor law systems.

Workers' freedom of association in human rights instruments has been complemented by legal guidelines on international labor norms developed in detail by the ILO. These norms set forth the right to organize, the right to bargain collectively, and the right to strike as fundamental rights. They are inextricably tied to the exercise of the right to freedom of association and must be protected by national governments. Nearly every country is a member of the ILO. Each is bound by ILO Conventions 87 and 98 dealing with freedom of association whether or not they have ratified those conventions, since freedom of association is taken to be a constitutional norm binding on countries by virtue of their membership in the organization.29

The United States has not ratified Conventions 87 and 98 but has long acknowledged its obligations under them. In 1998, the United States championed adoption at the ILO of a landmark Declaration on Fundamental Principles and Rights at Work stating that

> all Members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution [of the ILO], the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; . . .30

International human rights law prohibits the use of state power to repress workers' exercise of their right to freedom of association. Forming and joiningunions, bargaining collectively, or exercising the right to strike may not be banned or rendered impotent by force of law. Officially or unofficially, authorities may not harass workers, arrest them, imprison them, or physically abuse or kill them for such activities.

Moreover, governments must take affirmative measures to protect workers' freedom of association. Governments have a responsibility under international law to provide effective recourse and remedies for workers whose rights have been violated by employers. Strong enforcement is required to deter employers from violating workers' rights.

In the United States, millions of workers are excluded from coverage by laws to protect rights of organizing, bargaining, and striking. For workers who are covered by such laws, recourse for labor rights violations is often delayed to a point where it ceases to provide redress. When they are applied, remedies are weak and often ineffective. In a system replete with all the appearance of legality and due process, workers' exercise of rights to organize, to bargain, and to strike in the United States has been frustrated by many employers who realize they have little to fear from labor law enforcement through a ponderous, delay-ridden legal system with meager remedial powers.

LEXSEE 79 F.3D 546

DAYTON HUDSON DEPARTMENT STORE COMPANY, a Division of Dayton Hudson Corporation, Petitioner/Cross-Respondent, v. NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), Intervenor.

Nos. 94-6092/94-6281

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

79 F.3d 546; 1996 U.S. App. LEXIS 5684; 1996 FED App. 0105P (6th Cir.); 151 L.R.R.M. 2865; 131 Lab. Cas. (CCH) P11,542

March 29, 1996, Decided
March 29, 1996, Filed

PRIOR HISTORY: [**1] ON PETITION to Review and Cross-Application to Enforce an Order of the National Labor Relations Board. 7-CA-31476.

DISPOSITION: AFFIRMED

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner chain store sought review of the decision of respondent, the National Labor Relations Board, which affirmed the findings of an administrative law judge that petitioner's allegations of forgery, in authorization cards used to generate support for the union, was a fabrication. Respondent's motion to expedite enforcement of its order had previously been denied.

OVERVIEW: A majority of the employees of a local store of petitioner chain store voted to establish a local union. Petitioner filed an objection with respondent, the National Labor Relations Board, contending that the election's outcome was tainted by a letter sent by the organization committee to all employees prior to the election, making false statements about petitioner's profits. Respondent ordered petitioner to bargain with the union. Petitioner filed a motion to reopen the record on allegations of newly discovered evidence that forged authorization cards were used in the election to generate support for the union. Respondent denied the motion, but the court remanded with instructions to reopen. The administrative law judge (ALJ) found that petitioner's forgery allegations were a total fabrication. The court affirmed the findings, holding that the ALJ did not err in concluding that the letter was insufficient to warrant a new election, in light of the large margin of victory enjoyed by the union and the fact that, prior to receiving letter, voters were aware that the organization committee was allied with the union. The ALJ's findings were supported by substantial evidence.

OUTCOME: The court affirmed respondent National Labor Relations Board's determination that petitioner chain store's allegation of forgery in a union election was fabricated. A letter misstating petitioner's profits was insufficient to warrant a new election, in light of the margin of victory enjoyed by the union and the fact that the voters knew that the organization committee that sent the letter was allied with the union.

LexisNexis (TM) HEADNOTES - Core Concepts:

Labor & Employment Law > Collective Bargaining & Labor Relations > Right to Organize
[HN1] A party seeking to overturn the results of a representation election has the burden to show that the election was not fairly conducted.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence Review

[HN2] If the National Labor Relations Board's findings are supported by substantial evidence, they will be upheld.

COUNSEL: For DAYTON HUDSON DEPARTMENT STORE COMPANY, a Division of Dayton Hudson Corporation, Petitioner Cross-Respondent: Timothy K. Carroll, ARGUED, BRIEFED, [COR LD NTC ret], John F. Birmingham, Jr., [COR ret], Dykema & Gossett, Detroit, MI.

For NATIONAL LABOR RELATIONS BOARD, Respondent Cross-Petitioner: Joan Hoyte-Hayes, BRIEFED, [COR gvt], National Labor Relations Board, Office of the General Counsel, Washington, DC. Aileen A. Armstrong, Dep. Asso. Gen. Counsel, [COR LD NTC gvt], National Labor Relations Board, Washington, DC. Margaret Gaines Neigus, ARGUED, [COR gvt], National Labor Relations Board, Washington, DC.

For INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), Intervenor: Jordan Rossen, [COR ret], Nancy Schiffer, ARGUED, BRIEFED, [COR LD NTC ret], Associate General Counsel, International Union, UAW, Detroit, MI.

JUDGES: Before: MERRITT, Chief Judge; WELLFORD and BATCHELDER, Circuit Judges.

OPINIONBY: HARRY W. WELLFORD

OPINION:

[*548] HARRY W. WELLFORD, Circuit Judge. Petitioner Dayton Hudson Department Store Company ("Hudson") operates a chain of retail department stores in the Midwest. In 1990, some of the employees of Hudson's store at the Westland Mall in Westland, Michigan, began an effort to organize and bring in the UAW. On May 11, 1990, an authorized ballot of eligible workers took place; 274 votes were cast for the union and 179 against. Thereafter, Hudson filed timely objections with the NLRB, contending that the outcome of the election was tainted by a letter sent to all employees on May 8, 1990. n1

n1 Hudson also contended that the election process was tainted by other incidents involving the UAW, including: 1) a leaflet, handed out only hours before the election, containing inaccuracies; 2) the presence of two UAW officials and a pro-union employee in an area of the store ruled off-limits during the election; and 3) an alleged attempt by a UAW representative to intimidate anti-union employees with a pipe wrench.

[**2]

The letter at issue, mailed just three days before the election, began with the greeting "Dear Fellow Hudson's Employee," contained a number of references to "we" and "us," and addressed anti-union arguments and tactics employed by Hudson. The letter falsely represented, among its other statements, that Hudson "claimed profits of OVER 60 MILLION DOLLARS in our Westland Hudson's store alone last year . . . ." n2 In closing, the letter stated:

n2 Both sides agree that this statement was grossly inaccurate. The sales of the Westland Hudson's store in 1989--the year referenced in the letter--totalled $ 52.5 million and the profits only $ 1.4 million.

With the UAW on the ballot, we have the opportunity to choose to balance the power between [Hudson headquarters] and us. [***3]

By our joining the UAW, we guarantee ourselves a voice in our future. On May 11 vote to give yourself a meaningful voice in decisions that impact your life--VOTE YES FOR THE UAW.

The letter purported to be authored [**3] by "Your Fellow Workers/The Westland Employees Organizing Committee," but the UAW concedes that it was actually prepared by a paid UAW representative.

In December 1990, the NLRB overruled Hudson's objections, holding that the letter did not warrant a new election under the standard set forth in *Midland National Life Insurance Co., 263 N.L.R.B. 127 (1982).* n3 Accordingly, the Board certified the UAW as the exclusive representative of the Westland bargaining unit. Hudson, nevertheless, refused to negotiate with the UAW based on the company's belief that the union's certification was inappropriate. As a result of this recalcitrance, the UAW filed an unfair labor practice charge against Hudson.

n3 In *Midland National Life*, the NLRB held:

We will no longer probe into the truth or falsity of the parties'

> campaign statements, and . . . we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is. Thus, we will set an election aside not because of the substance of the representation, but because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is.

Midland Nat'l Life Ins. Co., 263 N.L.R.B. at 133 (footnotes omitted).

[**4]

On May 15, 1991, the NLRB ordered Hudson to bargain with the UAW. Two weeks later, Hudson moved to reopen the record on allegations of newly discovered [***4] evidence that forged authorization cards were used prior to [*549] the election to generate additional support for the union. n4 The NLRB denied Hudson's motion, holding that the allegations, even if true, were insufficient to warrant a new election under *Midland National Life*, because Hudson had not claimed that the cards were actually shown to any employees.

n4 This new evidence was provided primarily by John Madgwick, an employee of and one-time union promoter at Hudson's Westland Mall store. Madgwick alleged, in a statement given on May 10, 1991, that he had personally forged a number of authorization cards.

In October 1991, Hudson petitioned this court for review of the Board's refusal to reopen the record. In *Dayton Hudson Department Store v. NLRB, 987 F.2d 359 (6th Cir. 1993),* we remanded the case to the NLRB with instructions to reopen the [**5] record and conduct a "full inquiry into such questions as how many authorization cards were forged, the actual use to which those cards were put, when these incidents occurred, and whether and in what context any misrepresentations concerning the cards occurred." *Id. at 367.* This court also instructed the NLRB to re-evaluate the May 8, 1990 letter under the standard posited in *Van Dorn Plastic Machinery Co. v. NLRB, 736 F.2d 343 (6th Cir. 1984), cert. denied, 469 U.S. 1208, 84 L. Ed. 2d 323, 105 S. Ct. 1173 (1985).* [***5] n5

n5 In *Van Dorn*, this court indicated a "reluctance to be bound by the *Midland National Life* rule in every case." *Van Dorn, 736 F.2d at 348.* The *Van Dorn* panel went on to state that

> there may be cases where no forgery can be proved, but where the *misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected.* We agree with the Board that it should not set aside an election on the basis of the substance of representations alone, but only on the deceptive manner in which representations are made.

Id. (emphasis added).

[**6]

A hearing pursuant to remand was held before Administrative Law Judge Ladwig from January 18 to 21, 1994. At this hearing, Hudson attempted to establish its forged cards allegations chiefly through the testimony of John Madgwick, cochairman of the Westland Employees Organization Committee. n6 Madgwick testified that the organization committee had been told that the UAW would not file an election petition until sixty-five percent of the bargaining unit had signed authorization cards. Madgwick further testified that, after an initial period of high interest, card signing slowed down. Fearing that the sixty-five percent mark would not be reached, Madgwick allegedly decided to attempt to revitalize the union's campaign by forging authorization cards. Madgwick testified that the main impetus for this plan was a telephone call from the organization committee's other cochairman, Mary Grab, in which Grab stated that she was going to forge cards to help reach the goal. n7

n6 The proof also included a statement and affidavit given by Madgwick in 1991.

n7 Grab later testified that this was a "flippant, stupid remark" on her part, and she denied having forged any cards.

[**7]

Madgwick allegedly forged between ten and twenty cards and gave them to union representative Ray Westfall in a mall restaurant frequented by Hudson employees. According to Madgwick, the plan was to make show of handing the cards to Westfall in order to indicate additional union support in hopes of inducing undecided employees who might be present to "jump on the bandwagon." Madgwick testified that approximately fifty employees signed cards as a result of his activities, and he indicated that union representatives were fully aware that he had forged authorization cards. [***6]

At the conclusion of the hearing, ALJ Ladwig reaffirmed the NLRB's order to bargain. ALJ Ladwig found Hudson's forgery allegations to be a "total fabrication" and concluded that the May 8, 1990 letter had not affected the outcome of the election. The NLRB subsequently affirmed Ladwig's findings of fact and conclusions of law. This petition ensued, n8 raising the following issues: 1) whether the NLRB erred in holding that the May 8, 1990 letter did not meet the *Van Dorn* standard for a new election; and 2) whether the NLRB's ruling on the unauthorized cards issue should be overturned due to [*550] circumstances [**8] surrounding the remand hearing and certain errors made therein by ALJ Ladwig.

n8 The NLRB's motion for expedited enforcement of the Board's order, filed roughly one month later, was denied by this court.

I. *STANDARD OF REVIEW*

We do not "'lightly set aside the results of a NLRB-supervised representation election.'" *NLRB v. Superior Coatings, Inc., 839 F.2d 1178, 1180 (6th Cir. 1988)* (quoting *NLRB v. First Union Management, Inc., 777 F.2d 330, 336 (6th Cir. 1985))*. [HN1] A party seeking to overturn the results of a representation election "'has the burden to show that the election was not fairly conducted.'" *Dayton Hudson Dep't Store v. NLRB, 987 F.2d at 363* (quoting *NLRB v. Bostik Div., 517 F.2d 971, 975 (6th Cir. 1975))*. [HN2] If the Board's findings are supported by substantial evidence, they will be upheld. *Id.*

II. *THE MAY 8, 1990 LETTER*

The National Labor Relations Act contemplates "unhampered freedom of choice" in selecting a bargaining representative. *International* [**9] *Ass'n of Machinists, Tool & Die Makers Lodge No. 35 v. NLRB, 311 U.S. 72, 80, 85 L. Ed. 50, 61 S. Ct. 83 (1940)*. In attempting to safeguard employees' freedom of choice in the context of campaign statements, the NLRB has stated that it will not set aside an election on the basis [***7] of misleading representations alone. *Midland National Life Ins. Co., 263 N.L.R.B. at 133*. The Board will, however, intervene in "cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is." *Id.*

Although this court has followed Midland National Life, it has expressed a reluctance to do so in every case. *See Van Dorn Plastic Mach. Co., 736 F.2d at 348*. In *Van Dorn*, we held that "there may be cases where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected." *Id.* n9 On remand, ALJ Ladwig and the NLRB concluded that the May 8, 1990 letter was not sufficient to warrant a new election under the *Van Dorn* standard. Hudson argues that this conclusion was erroneous. [***8] [**10]

n9 This court recently elaborated on the *Van Dorn* standard in a case noted by the petitioner after briefs were filed. *See NLRB v. Hub Plastics, Inc., 52 F.3d 608, 613 (6th Cir. 1995)*. In *Hub Plastics*, Judge Brown stated

> *Van Dorn* and *Dayton Hudson* stand for the proposition that although employees naturally treat campaign propaganda with skepticism, on occasion a misrepresentation may be, though not a forgery, so artful that this skepticism is overcome, resulting in employees believing that the campaign propaganda must absolutely be true. Such a misrepresentation may also be so pervasive that it is likely to influence a large enough group of employees to have a material effect on the election. While the source of the misrepresentation is certainly one factor in determining a misrepresentation's "artfulness," it is not dispositive. The ways in which a party supports the misrepresentation . . . may also be relevant in determining whether the misrepresentation was so artful as to overcome the employees' natural skepticism.

Id.

[**11]

Hudson maintains that the letter, issued only a few days before the election, impermissibly tainted its outcome. Hudson points out that the UAW's letter was not only untrue, but also deceptive in that it appeared to have been authored by "fellow workers." Hudson argues that this "deception" increased the persuasive force of the misrepresentation to such an extent as to negate voters' freedom of choice on the issue of whether or not to join the UAW.

ALJ Ladwig and the NLRB found no merit in Hudson's position, holding that, although the misrepresentation was gross, it was not sufficiently pervasive or artfully made as to warrant a new election. n10 ALJ Ladwig reached this conclusion because no evidence was offered which showed: 1) that the contents [*551] of the letter did not mirror the sentiments espoused by the committee while campaigning on behalf of the union; 2) that employees were misled into believing that the pro-union statements in the letter were not obviously campaign propaganda; or 3) that the employees would have any reason to believe that the organization committee members would have any special knowledge of company profits. Ladwig also noted that "among all the campaign propaganda, [**12] this was [only] one false statement in one long letter."

n10 The ALJ found that the letter was not within the scope of *Midland National Life* either. In this regard, Ladwig stated that

> an employee could reasonably be expected to recognize the letter as propaganda. It was received from the UAW Region 1, it bore the printed signature of the Union's organizing committee, it was critical of the Company and its antiunion "scare tactics," it was received shortly before the election, and it concluded: VOTE YES FOR THE UAW."

Upon reviewing the record, we hold that the ALJ did not err in concluding that the May 8, 1990 letter was insufficient to warrant a new election. It is difficult to assess how many employees may have been affected by the [***9] letter's extreme exaggeration of Hudson's profitability. Additionally, we acknowledge that some employees may have been deceived as to the real source of the letter. Nevertheless, in light of the large margin of victory enjoyed by the UAW and the fact [**13] that, prior to receiving the May 8, 1990 letter, voters were undoubtedly aware, in general, that the organization committee was allied with the UAW, we are not prepared to reverse the determination of the Board and the ALJ. We note, however, that we are discomforted by the fact that the letter was mailed at such a time as to afford Hudson little opportunity to respond to the gross misrepresentation contained therein. We stress that we will continue to review cases arising under *Midland National Life* and *Van Dorn* very carefully.

III. *THE FORGERY ALLEGATIONS*

On remand, ALJ Ladwig ruled against Hudson on the company's assertion that forged cards had tainted the outcome of the representation election at its Westland store. According to the ALJ, Hudson's allegations in this regard were a "total fabrication." The NLRB subsequently affirmed on this issue. On appeal, Hudson argues that ALJ Ladwig erred in concluding that the forged card incident did not occur. Upon reviewing the ALJ's extensive findings, however, we are disposed to conclude that they are supported by substantial evidence. Although the ALJ found witness Madgwick's testimony to be a "total fabrication," we hold [**14] only that there are sufficient bases to find for the union on the question of whether alleged forged authorization cards influenced the outcome of the election. [***10] n11

n11 We cannot agree that Madgwick's testimony was a "total fabrication," because of Grab's "flippant" remark to Madgwick that she and her family members might also forge names, if needed, to bring in the union. Additionally, Madgwick's reporting of his forgeries to his employer and the union might have been contrary to his interests.

IV. *WAS THERE "FULL INQUIRY" INTO THE FORGERY ISSUE ON REMAND?*

Hudson finally contends, for a number of reasons, that it was denied the "full inquiry" ordered by this court into its allegations of forged authorization cards. First, Hudson contends that the nearly four year delay between the occurrence of the relevant events in this case and the remand hearing created a perceived lack of credibility on the part of its witnesses due to the fact that their memories had faded. While we regret the [**15] length of the disposition in this case and acknowledge that this delay may have had a bearing on the some of the ALJ's credibility rulings, we hold that Hudson suffered no undue prejudice. Hudson had the opportunity to preserve the testimony of its witnesses in affidavits for subsequent use in refreshing their memories, but failed to do so. *See*

Kusan Mfg. Co. v. NLRB, 749 F.2d 362, 366 (6th Cir. 1984).

Next, Hudson contends that it was deprived of a "full inquiry" into its forgery allegations by an administrative error on the part of the NLRB. On the second day of the remand hearing, the Board admitted that it had inadvertently returned the authorization cards from the Westland Mall store, originally submitted to the Board in March 1990 along with the UAW's election petition, to the UAW in November 1992. Apparently, the Board was supposed to have returned authorization cards from another Hudson store in connection with a withdrawn election petition filed by the UAW. In any event, the [*552] UAW returned 268 Westland cards to the Board approximately two weeks after receiving them.

According to Hudson, this administrative mix-up explains why the alleged forgeries cannot now be located. [**16] Hudson theorizes that more than 268 cards were originally filed with the Board and that the UAW, knowing that a hearing was in the offing, culled out the forgeries and returned the remaining cards to the Board. This tampering argument was rejected by the Board as unsupported by any evidence. In fact, the Board noted that counsel for Hudson admitted [***11] that there was "no evidence or suggestion that what had been represented by the General Counsel or by [counsel for the UAW] is not entirely true." While Hudson acknowledges this statement, it contends that no "representation was made that all of the cards [originally filed] were returned to the Board. No representations were made regarding the handling of the cards by the UAW while they were in its possession."

Contrary to Hudson's assertions, we do not believe that the Board's mishandling of the authorization cards denied the company sufficient inquiry into the forgery issue. n12 There is simply no credible evidence that more than 268 cards were originally filed with the Board, or that the UAW engaged in any impropriety while in possession of the cards. We do not agree, however, with the Board's assertion that Hudson's [**17] argument is merely a feeble "attempt . . . to resurrect its forged-cards allegation."

n12 Furthermore, we conclude that Hudson's argument in this regard is untimely because Hudson failed to raise this issue when the mistake came to light at the remand hearing.

Finally, Hudson contends that it was unduly prejudiced by ALJ Ladwig's exclusion of certain testimony on the issue of whether Madgwick had a motive to undermine the election results. We generally review an ALJ's exclusion of evidence in this context for an abuse of discretion. *Manna Pro Partners, L.P. v. NLRB, 986 F.2d 1346, 1353 (10th Cir. 1993); see Walter N. Yoder & Sons v. NLRB, 754 F.2d 531, 534 (4th Cir. 1985); Marathon LeTourneau Co. v. NLRB, 699 F.2d 248, 254 (5th Cir. 1983).*

In 1991, Hudson erased an $ 8,055.79 deficit in Madgwick's account. n13 At the remand hearing, the UAW asserted that this deficit write-off provided a motive for [***12] Madgwick to attempt to undermine the election results by concocting allegations of forgery. [**18] Hudson attempted to undercut this assertion by eliciting testimony from both Madgwick and Tom Rector, a UAW organizer at the Hudson's in Pontiac, Michigan, that Madgwick had told Rector of his forging activities at Westland and advised Rector to do likewise in connection with an October 1990 representation election at Pontiac. Counsel for the union took the position that whether cards were forged in the Pontiac election, which occurred five months after the Westland election, was irrelevant to the issue of whether cards were forged at the Westland store. ALJ Ladwig agreed, excluding the testimony on grounds that it exceeded the scope of the remand.

n13 The ALJ found that Hudson had also eliminated deficits in the accounts of other commissioned sales consultants during the same time period.

We conclude that any error in the exclusion of this testimony was harmless. Even if Madgwick's testimony had been admitted, neither the ALJ nor the Board would have accepted it in light of the fact that they found him to be [**19] a "most untrustworthy witness." Similarly, even if Rector's testimony had been admitted, we would still find supported by substantial evidence the ALJ's conclusion that Madgwick had motivation to undermine the representation election. n14

n14 In addition to concluding that the deficit write-off motivated Madgwick, the ALJ found that Madgwick was motivated to fabricate the forged cards incident because Madgwick had repeatedly expressed resentment at having to share bargaining responsibility with local UAW president Mary Grab.

V. *CONCLUSION*

Despite some reservations, we AFFIRM the decision of the NLRB in this case based on the analysis above.

LEXSEE 987 F.2D 359

DAYTON HUDSON DEPARTMENT STORE COMPANY, a Division of Dayton Hudson Corporation, Petitioner/Cross-Respondent, v. NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Applicant, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, Intervenor.

Nos. 91-6197, 91-6314

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

987 F.2d 359; 1993 U.S. App. LEXIS 3208; 142 L.R.R.M. 2585; 124 Lab. Cas. (CCH) P10,600

August 11, 1992, Argued
March 1, 1993, Decided
March 1, 1993, Filed

SUBSEQUENT HISTORY: [**1] As Corrected June 7, 1993.

PRIOR HISTORY: On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board. No. 7-CA-31476.

DISPOSITION: Remanded

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner employer sought review of an order of respondent National Labor Relations Board (NLRB), which refused to set aside the results of the union election and ordered the employer to bargain with intervenor union. The NLRB sought enforcement of the order.

OVERVIEW: An employer challenged an order of the NLRB refusing to set aside a union election. On appeal, the court remanded and held that the NLRB misapplied its own standard regarding setting elections aside where forgery was involved. The court found that a letter mailed to eligible voters was addressed to "fellow employees" and purported to be authored by "your fellow workers." The court also found that the union conceded that the letter, which contained facts and arguments critical of the employer and supportive of union representation, was actually prepared by a paid union representative. The court further found that the use of forged authorization cards to create a false picture of the extent of union support, independent of whether the cards actually were shown to any employees, may have constituted precisely the sort of pervasive misrepresentation and artful deception that under the proper circumstances could be the basis for setting aside an election. Finally, the court ruled that the NLRB abused its discretion in failing to grant the employer's motion to reopen the record for additional evidence on the use of the forged authorization cards.

OUTCOME: The court reversed the finding of the NLRB and remanded with instructions that the NLRB reevaluate the letter and that the NLRB hold a new hearing on the forged authorization cards issue.

LexisNexis (TM) HEADNOTES - Core Concepts:

Labor & Employment Law > Collective Bargaining & Labor Relations > Judicial ReviewLabor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices
[HN1] A party seeking to set aside the results of a representation election has the burden to show that the election was not fairly conducted. If the National Labor Relations Board's findings are supported by substantial evidence, they will be upheld. Moreover, proof of physical threats, without more, will not suffice; rather,

specific evidence is required, showing not only that the unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election.

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices
[HN2] Sustained conversation with prospective voters waiting to cast their ballots in a union election, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election. This per se rule, however, does not extend to any conversation, no matter how slight.

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices
[HN3] Where the conversation with voters at the polls of a union election is not prolonged, and where it does not involve party representatives' conversing with voters waiting in line to vote or in the actual polling area, the per se rule that sustained conversation with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election, is inapplicable. Instead, under these circumstances, the National Labor Relations Board makes a judgment, based on all the facts and circumstances, whether the electioneering substantially impaired the exercise of free choice so as to require the holding of a new election.

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices
[HN4] A single chance comment, even if made in a designated no-electioneering area, to a single employee outside the immediate polling area during an election won by a margin of almost 100 votes falls far short of impairing the exercise of employee free choice.

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices
[HN5] Where the pervasiveness of misrepresentation or the artfulness of deception during an election campaign renders employees so unable to separate truth from untruth that their free and fair choice is affected, an election must be set aside even in the absence of proof that forgery has occurred.

Labor & Employment Law > Collective Bargaining & Labor Relations > Judicial ReviewAdministrative Law > Agency Adjudication > Review of Initial Decisions
[HN6] A party to a proceeding before the National Labor Relations Board (NLRB) may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing de novo and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

Labor & Employment Law > Collective Bargaining & Labor Relations > Judicial ReviewAdministrative Law > Agency Adjudication > Review of Initial Decisions
[HN7] The decision to grant or deny a new hearing under *20 C.F.R. § 102.48(d)(1)* is within the sound discretion of the National Labor Relations Board, and will only be disturbed by a reviewing court if the challenging party establishes an abuse of discretion.

COUNSEL:

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For INTERNATIONAL UNTION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), 91-6197, 91-6314, Intervenor: Jordan Rosen, 313 926-5216, Nancy Schiffer, BRIEFED, 313-926-5216, Associate General Counsel, International Union, UAW, 8000 E. Jefferson Avenue, Detroit, MI 48214.

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JUDGES: Before: KEITH and BATCHELDER, Circuit Judges; and WELLFORD, Senior Circuit Judge. BATCHELDER, Circuit Judge, delivered the opinion of the court, in which WELLFORD, Senior Circuit Judge, joined. KEITH, Circuit Judge, delivered a separate dissenting opinion.

OPINIONBY: ALICE M. BATCHELDER

OPINION:

[*361] ALICE M. BATCHELDER, Circuit Judge.

Petitioner/Cross-Respondent, the Dayton Hudson Department Store Company ("Company"), owns and operates department stores, including Hudson's Department Stores. This action involves one such Hudson's Department Store, located at the Westland Mall in Westland, Michigan.

On May 11, 1990, pursuant to agreement of Intervenor, the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("Union"), and the Company, the National Labor Relations Board ("Board") conducted a secret-ballot representation election at the Westland Mall Company store. Of the approximately 537 eligible voters, 274 cast votes for the Union and 179 against. n1

n1 Eight votes were cast for an intervening union. There were also seven challenged ballots. Neither of these facts is of further relevance here.

[**2]

On May 18, 1990, the Company filed timely objections to the election. On June 6, 1990, a hearing was held on the Company's objections. On June 21, 1990, the hearing officer issued a Report and Recommendations in which she recommended that the Company's objections be overruled and the Union be certified as the employee bargaining representative.

The Company then filed with the Board objections to the Report. On December 26, 1990, the Board issued a decision adopting the hearing officer's findings and certifying the Union as the exclusive bargaining representative. n2 The Union subsequently requested the Company to bargain collectively. The Company, however, refused to bargain.

n2 This decision was vacated by the Board on February 7, 1991 because of certain errors, and a new decision was substituted. However, the February 7, 1991 decision made no substantive changes in the earlier decision.

On February 1, 1991, the Union filed an unfair labor practice charge with the Board. Following the issuance of a complaint, on May [**3] 15, 1991, the Board ordered the Company to bargain with the Union. However, on or about May 30, 1991, the Company filed a Motion to Reopen Record. The Company alleged in its motion that immediately prior to receipt of the Board's May 15, 1991 Order, it had obtained newly discovered evidence that, prior to the election, the Union used forged authorization cards to generate additional support for the Union. The Company contended that because this newly discovered evidence, if accredited, would necessitate a new election, the Board was required to order the record reopened and a new hearing held.

On September 30, 1991, the Board denied the Motion on the ground that even if the allegation that the Union had used forged cards to misrepresent Union strength were accepted as true, under Board precedent, the use of forged authorization cards, unaccompanied by any allegation that the cards were actually shown to any employees, was an insufficient basis for reopening the record. On October 15, 1991, the Company petitioned this court for review. On November 12, 1991, the Board filed a cross-application for enforcement. On July 21, 1992, this court granted the Union's Motion to Intervene.

For [**4] the reasons that follow, we remand this case with instructions to reopen the record and take additional evidence and to reevaluate this case in light of the analysis set forth herein.

I.

The Company points to four incidents as the basis for its objections to the representation election. n3 The first of these involves the distribution of a letter by the Union to eligible voters. On or about May 8, 1990, three days before the election, the Union mailed to all eligible voters a letter that began with the greeting "Dear Fellow Hudson's Employee." The letter contains a number of references to "we" and "us" and purports to be authored by "Your Fellow Workers/The Westland Employees Organizing Committee." However, the Union concedes that the letter, which contains [*362] facts and arguments critical of the Company and supportive of Union representation, was actually prepared by a paid Union representative. The letter alleges, among other things, that the Company "claimed a profit of OVER 60

MILLION DOLLARS in our Westland Hudson's store alone last year . . ." (emphasis in original). The Board acknowledges that the hearing officer was correct in finding that the total sales of this store for the [**5] previous year, 1989, were $ 52.5 million and the profits only $ 1.4 million, not $ 60 million, as claimed in the letter.

n3 One of the Company objections, Objection No. 1, was withdrawn by the Company after the hearing but before the hearing officer's report was issued.

The second incident involves a leaflet that was handed out by the Union on the morning of the election. The leaflet contains the following passage:

Come Monday, [the Company] hopes to return to business as usual:

* * *

Business as usual, where employees can retire with 17 years of service and must pay $ 43/mo. to maintain their health insurance and take home only $ 40/mo., while [Company executives] Mackey, Gibson and Watson will retire with huge pensions and no health insurance premiums.

The Company contends that this statement grossly misrepresents that Company executives receive preferential treatment as to health benefits. The Company also alleges that the timing of this leaflet, which was handed out within hours of the time the polls opened, [**6] and of the letter, which apparently was received by eligible voters shortly before the election, made it impossible for the Company to respond meaningfully to the alleged inaccuracies.

The third alleged election impropriety involves the presence of two Union representatives, Ray Westfall and Bob King, and a pro-Union employee, John Madgwick, for approximately eight to ten minutes during the morning election period, n4 in the restaurant cashier counter and candy counter areas, n5 a part of the Company premises that a Board agent had ruled off-limits for Company and Union representatives during the election. As found by the hearing officer, these three individuals were present in an area near which voters logically would travel to reach the polling area. However, the hearing officer also found that the only encounter between any of these individuals and an eligible voter occurred when Westfall, while outside a restroom that is across the corridor from the candy counter and adjacent to the buffeteria polling area, said "Hello" to one employee. There was no evidence that any other voters observed the three individuals, that they engaged in any electioneering while in this area, or that [**7] they engaged in any electioneering whatsoever in the buffeteria room itself.

n4 The polls were open on the day of the election from 10:00 a.m. to 2:00 p.m. and from 4:00 p.m. to 7:00 p.m.

n5 The buffeteria room, in which the voting took place, is approximately thirty to forty feet from the areas in which Westfall, King, and Madgwick were located.

The final incident to which the Company objected at the June 6, 1990 hearing involved allegedly coercive conduct by Union representative Westfall. On the morning of the election, in the presence of three employees who were handing out anti-Union literature, as well as a number of pro-Union employees, Westfall carried onto the Company premises a two-foot pipe wrench that the Union contended was to be used in opening a helium tank so that the Union could inflate balloons. However, according to the Union, because it was too windy for balloons, the wrench was not needed, and so Westfall "pitched" the wrench onto a nearby ledge approximately seven to fifteen feet away from the [**8] anti-Union employees. The Company contends that the Union had no need for the wrench because it knew the wind was too strong for balloons and, therefore, that Westfall's act of tossing the pipe wrench must have been intended to intimidate anti-Union employees. There was no evidence that Westfall or any other Union supporters uttered any threats or engaged in any other threatening conduct.

II.

We address two issues on appeal. First, we must determine whether the Board [*363] erred in refusing to set aside the election on the basis of the alleged election improprieties. Second, we must determine whether the Board erred in denying the Company's motion to reopen the record and hold a new hearing on the issue of forged authorization cards.

We first consider the pipe wrench incident. We find that the Board did not err in refusing to set aside the election on the basis of this incident. [HN1] A party seeking to set aside the results of a representation election "has the burden to show that the election was not fairly conducted." *Tony Scott Trucking, Inc. v. NLRB, 821 F.2d 312, 316* (6th Cir.) (per curiam) (quoting ***NLRB v. Bostik Div.**, 517 F.2d 971, 975 (6th Cir. 1975),* [**9] **cert. denied**, *484 U.S. 896, 98 L. Ed. 2d 188, 108*

S. Ct. 230 (1987)). If the Board's findings are supported by substantial evidence, they will be upheld. ***Hickman Harbor Serv., a Div. of Flowers Transp. Co. v. NLRB**, 739 F.2d 214, 218 (6th Cir. 1984)*. Moreover, proof of physical threats, without more, will not suffice; "rather, specific evidence is required, showing not only that the unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." ***Tony Scott Trucking**, 821 F.2d at 316* (quoting ***NLRB v. Golden Age Beverage Co.**, 415 F.2d 26, 30 (5th Cir. 1969))*.

The Union provided a reasonable explanation for the presence of the pipe wrench on the Company premises, namely, to assist in opening a helium tank. When that became unnecessary, Westfall tossed the pipe wrench onto a ledge approximately three feet from where he was standing and seven to fifteen feet from where the anti-Union employees were standing. There is no evidence that any employees besides the pro-Union employees and the three [**10] anti-Union employees who were present ever saw the wrench. There is also no evidence that Westfall made any threatening gestures with the wrench or otherwise implied that he would use it against those anti-Union employees who were present. The Board's decision that this incident did not reasonably tend to interfere with the free and uncoerced choice of employees is supported by substantial evidence and, therefore, will be upheld. n6

n6 The cases cited by the Company are distinguishable as involving more egregious facts. **See, e.g.,** ***NLRB v. Connecticut Foundry Co.**, 688 F.2d 871, 880-81 (2d Cir. 1982)* (Where a drawing of skull and crossbones was displayed to several voters waiting in line to vote, one voter described the drawing to other voters immediately after leaving polling area, a pattern of threats and violence characterized the campaign for six months prior to the election, and the election was decided by a vote of 100-95, the court denied enforcement of the Board's order); ***Exeter 1-A Ltd. Partnership v. NLRB**, 596 F.2d 1280, 1281-84 (5th Cir. 1979)* (Where there occurred three separate incidents involving threats, swearing, and police involvement, and where the "highly belligerent and abusive" actions of union representatives were directed toward both management and employees, the combined effect of these "disruptive acts" necessitated denial of enforcement and setting aside of the election).

[**11]

The Company also alleges that the presence for approximately eight to ten minutes during the election of Union representatives Westfall and King and pro-Union employee Madgwick in an area designated as off-limits by the Board agent warrants setting aside the election. The Company contends that voters going to or from the polling area would have had to pass by these individuals. The Company also points to the fact that Westfall admitted having spoken to one eligible voter during this time in the corridor adjacent to the buffeteria. The Company alleges that both Board precedent and court decisions, including a decision by this court, ***Kitchen Fresh, Inc. v. NLRB**, 716 F.2d 351 (6th Cir. 1983)*, require that a new election be held.

The Board has established a **per se** rule that certain types of election misconduct will, by themselves, warrant setting aside an election:

We believe that the [HN2] sustained conversation with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election.

[*364] ***Milchem, Inc.**, 170 N.L.R.B. 362, 362 (1968)*. [**12] This **per se** rule, however, does not extend to **any** conversation, no matter how slight:

This does not mean that any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election. We will be guided by the maxim that "the law does not concern itself with trifles."

***Id.** at 363*. [HN3] Where the conversation is not prolonged, and where it does not involve party representatives' conversing with voters waiting in line to vote or in the actual polling area, **Milchem** is inapplicable. Instead, under these circumstances, "the Board makes a judgment, based on all the facts and circumstances, whether the electioneering substantially impaired the exercise of free choice so as to require the holding of a new election." ***Glacier Packing Co.**, 210 N.L.R.B. 571, 573 (1974)*. **See also** ***NLRB v. Duriron Co.**, 978 F.2d 254 (6th Cir. 1992); **Colquest Energy, Inc. v. NLRB**, 965 F.2d 116, 120 (6th Cir. 1992); **Certainteed Corp. v. NLRB**, 714 F.2d 1042, 1063 (11th Cir. 1983); **Boston Insulated Wire & Cable Sys. v. NLRB**, 703 F.2d 876, 881 (5th Cir. 1983)*. [**13]

The Company apparently contends that **Milchem** applies here. However, even were **Milchem** applicable at all where an encounter occurs outside the immediate polling area and does not involve an employee voting or waiting in line to vote, the isolated, innocuous comment by Westfall plainly would fall within the **de minimis** exception set forth in **Milchem**. **See, e.g.,** ***NLRB v.***

Michigan Rubber Prods., Inc., *738 F.2d 111, 115-16 (6th Cir. 1984);* ***NLRB v. Oesterlen Servs. for Youth Inc.***, *649 F.2d 399, 400-01* (6th Cir.), **cert. denied**, *454 U.S. 1031, 70 L. Ed. 2d 474, 102 S. Ct. 567 (1981).* Furthermore, [HN4] a single chance comment, even if made in a designated no-electioneering area, to a single employee outside the immediate polling area during an election won by a margin of almost 100 votes falls far short of impairing the exercise of employee free choice within the meaning of **Glacier Packing. See** ***NLRB v. Del Rey Tortilleria, Inc.***, *823 F.2d 1135, 1140-41 (7th Cir. 1987).* Thus, this electioneering incident cannot be the basis for setting aside the election. n7

n7 The post-**Milchem** cases and Board decisions cited by the Company involve more extreme facts than the present case. **See, e.g.,** ***Kitchen Fresh***, *716 F.2d at 359* (remanding for a hearing and stating that, under **Milchem**, if union representatives engaged in "any conversation with employees who were waiting to vote," a new election would be required); ***Bio-Medical Applications of Puerto Rico, Inc.***, *269 N.L.R.B. 827, 829 (1984)* (where union representative, in violation of Board agent's instructions, remained for almost the entire election period in a waiting room adjacent to the polling area and spoke to four employees during this time, the **Milchem** rule was violated and the election was set aside).

[**14]

The Company also alleges that both the letter that was mailed to eligible voters three days before the election and the leaflet that was handed out by the Union on election day are sufficiently egregious to require that this election be set aside. In evaluating the propriety of this campaign literature, we are guided by the Board's decision in ***Midland Nat'l Life Ins. Co.***, *263 N.L.R.B. 127 (1982)* and our decision in ***Van Dorn Plastic Mach. Co. v. NLRB***, *736 F.2d 343 (6th Cir. 1984),* **cert. denied,** *469 U.S. 1208, 84 L. Ed. 2d 323, 105 S. Ct. 1173 (1985).*

In **Midland National Life**, which represents the Board's current position on election campaign statements, n8 the Board enunciated the following rule:

n8 The Board has vacillated in this area of the law, having reversed itself three times between 1962 and 1982. **See** ***NLRB v. Chicago Marine Containers***, *745 F.2d 493, 497-98 (7th Cir. 1984)* (discussing the chronology of Board decisions in this area).

[**15]

We rule today that we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is. Thus, we will set an election aside [*365] not because of the substance of the representation, but because of the deceptive manner in which it was made, a manner which renders employees unable to evaluate the forgery for what it is. As was the case in **Shopping Kart** [***Food Market, Inc.***, *228 N.L.R.B. 1311 (1977)],* we will continue to protect against other campaign conduct, such as threats, promises, or the like, which interferes with employee free choice.

Id. at 133. **Midland National Life** emphasizes the situations where voters are unable to recognize or evaluate union propaganda utilized in a deceptive manner so as to interfere with their free choice. Two years after the Board announced its **Midland National Life** rule, we decided **Van Dorn**, a case in which we applied a portion of a Board order addressing election [**16] misrepresentations. In dicta that mirrored certain concerns expressed in ***NLRB v. New Columbus Nursing Home, Inc.***, *720 F.2d 726, 730 (1st Cir. 1983),* however, we also indicated our "reluctance to be bound by the **Midland National Life** rule in every case." ***Van Dorn,*** *736 F.2d at 348.* We cautioned that

there may be cases where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected. We agree with the Board that it should not set aside an election on the basis of the substance of representations alone, but only on the deceptive manner in which representations are made.

Id. See also ***NLRB v. Superior Coatings, Inc.***, *839 F.2d 1178, 1181-82 (6th Cir. 1988);* ***Hickman Harbor,*** *739 F.2d at 217;* ***Chicago Marine Containers,*** *745 F.2d at 498 n.4.* We continue to adhere to **Van Dorn** as representing a narrow but appropriate limitation on the expansive rule announced in **Midland** [**17] **National Life** -- namely, that [HN5] where the pervasiveness of misrepresentation or the artfulness of deception during an election campaign renders employees so unable to separate truth from untruth that their free and fair choice is affected, an election must be set aside even in the absence of proof that forgery has occurred.

While the leaflet distributed by the Union on the day of the election, standing alone, does not constitute either a forged document under **Midland National Life** or a "pervasive" and "artful" misrepresentation under **Van Dorn**, nevertheless we think the leaflet bears upon the "free and fair choice" inquiry we must address. Unlike the May 8 letter, the leaflet was not addressed to "Fellow . . . Employee," nor did it purport to be authored by "Your Fellow Workers." This document was in leaflet rather than letter form, which reinforced the impression that it was campaign propaganda rather than a personal message from fellow workers. Additionally, the leaflet concluded with a portion of a mock ballot stating, in large letters, "UAW YES," accompanied by a check mark. This characteristic of the leaflet may have indicated to a reasonable employee that the leaflet [**18] was not a personal message from co-workers, but partisan propaganda. Thus, although the leaflet, like the May 8 letter, did contain references to "we" and "us," we believe the leaflet was probably recognizable as propaganda (under **Midland National Life**). If this were the only basis for challenge, we would hold that the leaflet was not (under **Van Dorn**) so deceptive or artful that employees' free and fair choice was affected. But this was not the only basis for challenge, and the leaflet's timing, coupled with the deceptive letter of May 8, leads us to a closer examination of the implications of the letter.

The May 8, 1990 letter is more troublesome. In its February 7, 1991 Decision and Certification of Representative, which adopted **in toto** the findings and recommendations of the hearing officer, n9 the [*366] Board concluded that the May 8 letter did not run afoul of **Midland National Life** because employees reasonably would have recognized this letter to be campaign propaganda, and the fact that the letter was actually prepared by the Union and not by the Dayton employees did not render it a forgery because other "employees would not reasonably be inclined to assume that the [**19] material in [it] originated exclusively from fellow employees and had no input from the UAW." n10 However the three-member panel of the Board that rendered this Decision apparently considered the election only under the **Midland National Life** standard and did not examine the election in light of **Van Dorn**. n11 We, therefore, remand this case to enable the Board to reevaluate, in light of our reaffirmation here of **Van Dorn**, whether the May 8, 1990 letter, even if not a proven forgery, nonetheless contained misrepresentation and deception pervasive and artful enough to interfere with employees' fair and free choice to such an extent as to require a new election.

n9 In its December 26, 1990 Decision, the Board adopted the hearing officer's findings and recommendations, including its finding that the May 8, 1990 letter was not a forgery within the meaning of **Midland National Life**. Although this Decision was later vacated and an amended Decision substituted therefor, the parties agree that the Board, in the amended Decision, again adopted the findings and recommendations of the hearing officer. [**20]

n10 Hearing Officer's Report and Recommendations, p. 5 n.3.

n11 In a footnote in the February 7, 1991 Decision, the Board noted Member Oviatt's view that, in more extreme circumstances than were present here, even where there was no evidence of forgery, "the Board may sometimes be obliged to inquire . . . whether the 'alleged misrepresentation is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and . . . their right to a free and fair choice will be affected.'" February 7, 1991 Decision at 2 n.3 (quoting ***Van Dorn**, 736 F.2d at 348)*. Thus, there was at least some recognition among the Board members of the potential applicability of our **Van Dorn** decision under the proper circumstances.

Finally, we remand this case for an inquiry into the allegations surrounding the authorization cards. In its May 15, 1991 Order Denying Motion to Reopen Record, the Board concluded that, because the Company did not allege that the authorization cards actually had been shown to any employees, the forged-documents exception under [**21] **Midland National Life** was inapplicable and, therefore, reopening of the record was not required. The Board, although not citing in its Order to Section 102.48(d)(1) of the Board's rules and regulations, relied on this section which provides as follows:

[HN6] A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing **de novo** and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional

evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing. [**22]

29 C.F.R. § 102.48(d)(1) (1991). **See also** ***NLRB v. Lane Aviation Corp.***, *615 F.2d 399, 400-01 (6th Cir. 1980).* [HN7] "The decision to grant or deny a new hearing under [Section 102.48(d)(1)] is within the sound discretion of the Board, and will only be disturbed by a reviewing court if the challenging party establishes an abuse of discretion." ***May Dep't Stores Co. v. NLRB***, *897 F.2d 221, 230* (7th Cir.) (and cases cited therein), **cert. denied**, *498 U.S. 895, 112 L. Ed. 2d 204, 111 S. Ct. 245 (1990).*

The Board's position as to the forged authorization cards is that, because the Company did not allege that the Union actually showed these cards to any employees, the "forged-documents exception" under **Midland National Life** does not apply. However, as developed both in the briefs and during oral argument, at the time the [*367] motion to reopen the record was filed, n12 the Company only possessed evidence that forged cards had been used to generate additional Union support, not that the cards actually had been shown to employees. n13 The Board, relying on **Midland National Life**, determined that, even if true as alleged, this use of forged [**23] cards, because it was tantamount to misrepresentation rather than forgery, would not require setting aside the election and, therefore, Section 102.48(d)(1) did not apply.

n12 Board regulations require that a motion to reopen the record to adduce additional evidence "shall be filed promptly on discovery of such evidence." *29 C.F.R. § 102.48(d)(2)* (1991). The Company alleges that it learned of the forged cards immediately before receiving the Board's May 15, 1991 Decision and Order requiring the Company to bargain with the Union. On or about May 30, 1991, the Company filed its Motion to Reopen Record on the basis of newly discovered evidence. Given that further information concerning the allegedly forged cards is uniquely within the knowledge and control of the Union, the inability of the Company, in its Motion, to provide further details concerning the use of forged cards without benefit of a hearing is hardly surprising.

n13 The Company also contends that the Board's application of **Midland National Life** to forged authorization cards conflicts with the Supreme Court's decision in ***NLRB v. Savair Mfg. Co.***, *414 U.S. 270, 38 L. Ed. 2d 495, 94 S. Ct. 495 (1973).* In that case, the Court held that where a union promised to waive the initiation fee for employees who signed union recognition slips before the election, the election had to be set aside because it did not provide employees with a fair and free choice of bargaining representatives. ***Id.*** *at 277.* The present case involves, not union recognition slips procured through economic inducement, but the use of forged authorization cards. However, although **Savair** thus is not directly applicable to the present case, the rationale of **Savair** -- that the Board ought not to appear to sanction actions that favor one party over the other, **id.** -- may have application where, as here, a party resorts to the use of forged authorization cards during an election campaign.

[**24]

We disagree and find that the use of forged authorization cards to create a false picture of the extent of Union support, independent of whether the cards actually were shown to any employees, might constitute precisely the sort of pervasive misrepresentation and artful deception that we indicated in **Van Dorn** could, under the proper circumstances, be the basis for setting aside an election. In contrast to the use of a leaflet or even a letter that is distributed, and thus may at least be examined by employees to determine whether the representations made therein are true or untrue, the use of forged cards that are merely alluded to or otherwise utilized without being shown to employees deprives employees of the opportunity to evaluate the cards and determine that they are, or are not, propaganda. Arguably, therefore, such use of forged cards presents an even greater danger of misrepresentation and deception.

Because the use of forged cards to generate Union support, if this use prevented employees from separating truth from untruth and affected their right to a free and fair choice, would require a different result in the proceedings before the Board, the failure of the Board [**25] to grant the motion to reopen the record was an abuse of discretion. A hearing on this issue will ensure full inquiry into such questions as how many authorization cards were forged, the actual use to which those cards were put, when these incidents occurred, and whether and in what context any misrepresentations concerning the cards occurred. n14

n14 We note that although this election was not decided by a handful of votes, a swing of approximately fifty votes from pro-Union to anti-

Union would have changed the outcome of the election. On remand, in determining whether employee fair and free choice of a bargaining representative was affected, the Board, of course, may take into account this factor.

III.

This case is remanded to the Board with the instruction that the Board reevaluate the May 8, 1990 letter in accordance with the principles set forth herein, and with the further instruction that the record be reopened and a new hearing held on the issue of forged authorization cards.

DISSENTBY: DAMON J. KEITH

DISSENT:

DAMON J. KEITH, [**26] Circuit Judge, dissenting. Because I disagree with the majority's position that *Van Dorn Plastic Mach. Co.* [*368] *v. NLRB, 736 F.2d 343 (6th Cir. 1984),* **cert. denied,** *469 U.S. 1208, 84 L. Ed. 2d 323, 105 S. Ct. 1173 (1985),* limits the applicability of the National Labor Relations Board's election campaign statements rule announced in ***Midland National Life Ins. Co. v. NLRB,*** *263 NLRB 127 (1982),* I must respectfully dissent.

The majority correctly states the Board's rule regarding election campaign statements as articulated in **Midland National Life** and acknowledges that this is the "current position" of the Board. However, the majority attempts to sidestep the rule by relying on what it concedes to be "dicta" from **Van Dorn**, where the majority opinion stated a "reluctance to be bound by the **Midland National Life** rule in every case." ***Van Dorn,*** *736 F.2d at 348.* This Court did not hold in **Van Dorn** that the rule established in **Midland National Life** should be limited. Chief Judge Lively, the author of the majority opinion in **Van Dorn**, merely stated that there may be reasons to limit the applicability [**27] of **Midland National Life** where there is misrepresentation or deception surrounding elections, but no proof of forgery. **See id.** I cannot concur with the majority's reliance on dicta as binding authority. Thus, I would strictly adhere to the **Midland National Life** rule requiring proof of forgery to set aside elections.

In the instant case, the Board found that there was insufficient evidence that forged documents were used to influence the election. The rule in this Circuit is that Board decisions should not be lightly set aside, but upheld if supported by substantial evidence. **See** ***NLRB v. First Union Management, Inc.,*** *777 F.2d 330, 336 (6th Cir. 1985).* I would affirm the Board's decision as supported by substantial evidence.

LEXSEE 316 NLRB 477

Department Store Division of the Dayton Hudson Corporation and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO.

Cases 7-CA-32279, 7-CA-32433, and 7-CA-33871

NATIONAL LABOR RELATIONS BOARD

316 N.L.R.B. 477; 1995 NLRB LEXIS 164; 149 L.R.R.M. 1173; 1995-96 NLRB Dec. (CCH) P15,650; 316 NLRB No. 89

February 24, 1995

[**1]

DECISION AND ORDER

By Margaret A. Browning, Member; Charles I. Cohen, Member; John C. Truesdale, Member

COUNSEL:
John Ciaramitaro, Esq. and Cindy L. Beauchamp, Esq., for the General Counsel.

Timothy K. Carroll, Esq. and John F. Birmingham, Esq., of Detroit, Michigan, for the Respondent.

Nancy Schiffer, Esq., of Detroit, Michigan, for the Charging Party.

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OPINION:

[*477] On August 3, 1994, Administrative Law Judge Irwin H. Socoloff issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief to the Respondent's exceptions and cross-exceptions and a supporting brief. The Charging Party filed an answer to the Respondent's exceptions and a supporting brief and cross-exceptions and a supporting brief. The Respondent filed an answering brief to the Charging Party's cross-exceptions and to both the Charging Party's and [**2] the General Counsel's answers to the Respondent's exceptions.

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, n1 and conclusions n2 and to adopt the recommended Order as modified.

n1 The Respondent 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 the findings.

The Respondent has also excepted to the judge's finding that it engaged in unlawful surveillance. The Respondent argues that it merely recorded the activity of employees who were in the company of professional union organizers when the organizers were inside the Respondent's store, thereby engaging in incidental surveillance of employees during lawful surveillance of nonemployees. The Respondent's argument is devoid of merit. The judge found that the Respondent engaged in unlawful surveillance by videotaping employee movements and actions, watching and following employees, and interrupting their conversations and monitoring their telephone calls. The judge cites credited testimony supporting this finding involving multiple employees on multiple occasions. Moreover, among these numerous incidents, there are only two which hint at the conjunction of professional union organizers with employees and activity inside the Respondent's store. Thus, Ray Lichy credibly testified that, during the last week in July 1991, the Respondent videotaped employees and professional union organizers leafletting at the employee entrance to the store. When a small group entered the store, they were filmed by Brenda McNamara, the store's security manager. Lichy did not specify whether the group which entered the store was the same as the group leafletting at the employee entrance. Similarily, Lindel Salow credibly testified that, shortly before the second election, the Respondent videotaped him at his work station in the men's fragrance department. Then within an hour, the Respondent videotaped Salow again as he waited on two customers who were wearing jackets with union insignia embroidered on them. Salow specifically testified that he did not know who the two customers were. Accordingly, the record does not reveal whether the Respondent's surveillance of Lichy when he entered the store or Sallow when he waited on the two customers was merely incidental to lawful surveillance of nonemployees. We find it unnecessary to reach the issue of whether Respondent was privileged to engage in surveillance during the two instances described above. Assuming arguendo that it could, and that those instances can be divorced from the many instances in which union agents were not present (and the surveillance was therefore clearly unlawful), those latter instances are more than enough to warrant the remedial order entered here in.

n2 We note that the judge inadvertently failed to conform his conclusions of law, order, and notice with the violations found. We hereby correct this error.

Members Cohen and Truesdale do not reach or pass on the alleged unlawful interrogaiton of employee Harry Gersell and the alleged unlawful oral reprimand of employee Eric Gawura. These violations are cumulative and do not substantially affect the remedy.

Member Browning would affirm the judge's finding, for the reasons he stated, that the reprimand of employee Gawura violated Sec. 8(a)(3) of the Act. In Member Browning's view, that finding is not "cumulative," despite the fact that the Respondent also unlawfully reprimanded other employees. In addition, the absence of the finding does affect the order and notice, because the Respondent will no longer be required to remove any reference to Gawura's reprimand from its records and to notify him that it will not be used against him in any way. [**3]

CONCLUSIONS OF LAW

1. Department Store Division of the Dayton Hudson Corporation is an employer engaged in commerce, and in operations affecting Commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By issuing reprimands to Leonard Militello Jr. on July 18 and 26, 1991, and to Vivian Armstrong on July 31, 1991, because of their union activities, the Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(3) of the Act.

4. By threatening employees with store closure, store relocation, loss of jobs, bumping from jobs, and more onerous working conditions if they select the Union to represent them, and by informing employees that it would be futile for them to select union representation, the Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

5. By denouncing and humiliating an employee in the presence of other employees, by harassing an employee and threatening his physical safety, and [**4] by screaming vulgarities at a union organizer and threatening violence against

her in the presence of employees, because of employee support for the Union, the [*478] Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

6. By coercively interrogating employees regarding their union activities and sympathies, the Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

7. By impliedly promising employees improvements in their wages, hours, and working conditions to disuade them from supporting the Union, the Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

8. By asking an employee to remove his ration button, the Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

9. By altering the manner of distributhlg work schedules to employees, restricting employee conversations, and changing other work rules and practices because of employee activities on behalf of the Union, the Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(l.) of the Act. [**5]

10. By desparately enforcing its written rules regarding solicitation and distribution against employees engaged in such activities on behalf of the Union, and by requiring employees to remove union literature from stockrooms, drawers, and other locations available to them for keeping nonwork related items, the Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

11. By coercively surveilling employees, in response to employee activities on behalf of the Union, including videotaping employee movements and actions, watching and following employees, interrupting their conversations, and monitoring their telephone calls, the Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

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

13. In light of the Respondent's failure to comply with the terms of the June 23, 1992 settlement agreement, in Cases 7-CA-32279 and 7-CA-32433, as shown by its continued pattern of unfair labor practice conduct in the summer and fall of 1992, the Regional Director properly set aside the agreement. [**6]

14. The Respondent has not otherwise violated the Act as alleged in the consolidated complaint.

ORDER

The National Labor Relations Board orders that the Respondent, Department Store Division of the Dayton Hudson Corporation, Dearborn, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing reprimands to employees because of their union activities.

(b) Threatening employees with store closure, store relocation, loss of jobs, bumping from jobs, and more onerous working conditions if they select the Union to represent them, and informing employees that it would be futile for them to opt for union representation.

(c) Denouncing and humiliating an employee in the presence of other employees, harassing an employee and threatening his physical safety, screaming vulgarities at a union organizer and threatening violence against her in the presence of employees, because of employee support for the Union.

(d) Coercively interrogating employees regarding their union activities and sympathies.

(e) Impliedly promising employees improvements in their wages, hours, and working conditions to dissuade them from supporting the Union.

(f) Asking [**7] employees to remove their union buttons.

(g) Altering the manner of distributing work schedules to employees, restricting employee conversations, and changing other work rules and practices because of employees, restricting employee conversations, and changing other work rules and practices because of employee activities on behalf of the Union.

(h) Disparately enforcing rules regarding solicitation and distribution against employees engaged in such activities on behalf of the Union, and requiring employees to remove union literature from stockrooms, drawers, and other locations available to them for keeping nonwork related items.

(i) Coercively surveilling employees, in response to employee activities on behalf of the Union, including videotaping employee movements and actions, watching and following employees, interrupting their conversations, and monitoring their telephone calls.

(j) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Remove from its files any reference to the unlawful reprimands [**8] issued to Leonard Militello Jr. on July 18 and 26, 1991, and to Vivian Armstrong on July 31, 1991, and notify them in writing that this has been done and that the reprimands will not be used against them in any way.

(b) Post at its Fairland Mall store, copies of the attached notice marked "Appendix." n3 Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for [*479] 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

n3 If this Order is enforced by a judgment of a United Sttaes court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" and shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the [**9] Respondent has taken to comply.

ALJ: IRWIN H. SOCOLOFF

ALJ-DECISION:

[*479] DECISION

STATEMENT OF THE CASE

IRWIN H. SOCOLOFF, Administrative Law Judge. On charges filed on September 3 and October 10, 1991, and amendments thereto, and further charges filed on October 27 and December 28, 1992, n1 by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO (the Union) against Department Store Division of the Dayton Hudson Corporation (the Respondent), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a consolidated complaint dated February 26, 1993, n2 alleging violations by Respondent of Section 8(a)(1) and (3) and Section 2(6) and (7) of the National Labor Relations Act (the Act). Respondent, by its answer, denied the commission of any unfair labor practices.

n1 The matters raised by the charge filed on December 28, 1992, in Case 7-CA-3406, were settled at trial and, accordingly, Case 7-CA-34069 was served from this proceeding.

n2 Simultaneously, the Regional Director set aside, for noncompliance, the June 23, 1992 settlement agreement, between the Regional Director and the Respondent, in Cases 7-CA-32279 and 7-CA-32433, dealing with alleged unlawful conduct by Respondent during 1991. [**10]

Pursuant to notice, trial was held before me in Detroit, Michigan, on April 19-22 and June 7-9, 1993, at which all parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the General Counsel, the Charging Party, and the Respondent filed briefs which have been duly considered.

On the entire record in these cases, and from my observations of the witnesses, I make the following

[*480] FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the operation of retail department stores, and runs such stores in the State of Michigan, including a store located in Dearborn, Michigan, called the Fairlane Mall store. During the year ending December 31, 1992, a representative period, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $ 500,000, and purchased and received goods and materials, valued in excess of $ 50,000, at its Michigan locations, which were sent directly by suppliers located outside the State of Michigan. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the [**11] Act.

II. LABOR ORGANIZATION

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

III. THE UNFAIR LABOR PRACTICES

A. *Background*

Beginning late in 1989, and early in 1990, the Union made efforts to organize the employees working at certain of Respondent's metropolitan Detroit area stores. In this connection, the UAW, on May 11, 1990, won a Board-conducted election among employees of Hudson's Westland Mall store and, thereafter, was certified. Subsequently, the Board issued an order requiring Hudson to bargain, and it petitioned the Sixth Circuit Court of Appeals for enforcement. On March 1, 1993, the court remanded the case to the Board for reconsideration and further hearing. n3 Also in 1990, on October 12, the Union lost an election conducted at the Summit Place Mall store, in Pontiac. That election was, thereafter, set aside, and a second election was scheduled and, later, canceled, when the Union withdrew its petition.

n3 *302 NLRB 982 (1991),* remanded *987 F.2d 359* (6th Cir.).

At Fairland, the store involved in this proceeding, the Union won an election held on April 12, 1991, among the full-time and regular part-time selling and nonselling [**12] employees at the store, some 500 in number. That election was, thereafter, set aside by the Board, and a second election was conducted on August 9, 1991, which the Union lost. The results of the second election were set aside by stipulation of the parties, and the conduct of a third election was scheduled for October 30, 1992. However, immediately prior to the date of the scheduled third election, the Union withdrew its representation petition and the election was canceled.

In the instant case, the General Counsel contends that, during the periods preceding the 1991 elections, and, again, in the months before the scheduled 1992 election, at the Fairlane Mall store, Respondent embarked on a widespread, extensive, and continuing campaign of unfair labor practice conduct, including, issuing reprimands to employees because of their union activities; threatening employees with store closure, store relocation, loss of jobs, and more onerous working conditions if they select the Union to represent them; warning employees that it would be futile for them to opt for union representation; coercively interrogating employees regarding their union activities and sympathies; impliedly promising [**13] employees improvements in their wages, hours, and working conditions to dissuade them from supporting the Union; asking an employee to remove his union button; changing work rules, policies, and practices because of employee activities on behalf of the Union; disparately enforcing its written rules regarding solicitation and distribution against employees engaged in such activities on behalf of the Union; coercively surveilling employees, in response to their union activities, including videotaping their movements and actions, watching and following them, interrupting their conversations, and monitoring their telephone calls. Respondent urges that, viewed in context, all of its actions should be seen as lawful.

B. *Facts* n4 *and Conclusions* n5

n4 The fact findings contained here are based on a composite of the documentary and testimonial evidence introduced at trial. Where necessary to do so, in order to resolve significant testimonial conflict, credibility resolutions have been set forth, infra. In general, I have relied on the testimonial accounts of events offered by employee Leonard Militello and former employee Raymond Lichy, as both of them impressed me as honest,

forthright, and in possession of a relatively full recollection of significant events. On the other hand, based on demeanor considerations, and because I found certain of their testimonial statements implausible, I have viewed with suspicion the testimony of statutory Supervisors Reggie Sneed, Lance Petross, and Cedric Jackson. To the extent that the testimony of Sneed, Petross, or Jackson conflicts irreconcilably with the credited testimony of Militello and/or Lichy, it is discredited.

n5 In support of certain complaint allegations, witnesses called by the General Counsel identified the claimed perpetrators of unfair labor practice conduct by first name, only. The individuals so described were, apparently, regularly employed at other Hudson Detroit area stores and were assigned, temporarily, to the Fairland store at the time of the alleged unlawful conduct. In light of the lack of adequate record identification of these individuals, and, particularly, the lack of evidence of their supervisory status, I have made no findings of unfair labor practice conduct by Respondent based on the alleged actions of the individuals. [**14]

1. Alleged threats, interrogations, promises of benefit, and requests to remove union insignia

Former Fairlane Mall store employee Karl Colston, who worked in the restaurant as a dishwasher and a cook, testified that, in late July 1991, about a week before the second election, he was called into the office of his department manager, statutory Supervisor Aruna Bazaz. She asked Colston how he felt about the Union coming in and, in reply, the employee stated that he would not mind getting more hours, money, and benefits. Bazaz told Colston that, if the Union got in, all his "absences and tardies" would have to be written up, and he would be required to report to work on time. n6 The employee's testimony in these regards is uncontradicted. Based on Colston's credited, uncontradicted testimony, I find that Respondent, through Bazaz, violated Section 8(a)(1) of the Act by the foregoing threat, an outright statement that union representation would result in stricter work rules and more rigid enforcement of existing rules. n7

n6 Prior to this conversation, Colston had been absent or tardy, from time-to-time, but had not received any written warnings.

n7 *Jennie-O Foods, 301 NLRB 305 (1991).* [**15]

Some 2 weeks before the second election at Fairlane, the "Vote No" committee, an organization of Fairlane store employees [*481] who oppose unionization, distributed, in front of the store, leaflets entitled "Red Alert." Copies of this document also appeared on all three selling floors, at employee work stations, or wrap stands, where the cash registers were located and packages could be wrapped. The leaflet stated, in part:

Hudson's Employees: Did you know that if Dayton Hudson's wanted to, it could *close* a store, *open a new store elsewhere,* and hire all *new* employees? Hudson's could do this legally *with* or *without* a union!

Further, according to the leaflet, regarding the Westland store, where the Union had won an election, Hudson's chose not to renew its lease with the Westland Mall, and might move the store to a new mall. n8

n8 Store Manager Christopher Wozniak testified that, by letter dated August 8, 1991, 1 day prior to the second election, Respondent informed the Fairlane employees that decisions concerning store closures would not be based on union considerations.

According to the testimony of employee Harry Gersell, and that of former employee Eric [**16] Gawura, salesmen in the men's active wear department, they were approached, later that day, by Manager Diana Grandy who asked them if they had seen the Red Alert flyer and if they had any questions about it. Gersell asked about the possibility, indicated in the flyer, that the Westland store might close. Grandy stated that the store would close, and move into another mall, "because of the union activity."

Based on the credited, uncontradicted testimony of Gersell and Gawura, I find that Respondent, through statutory Supervisor Grandy, violated Section 8(a)(1) of the Act by informing employees that Respondent would close the Westland store where the employees had voted for representation by the Union, because of employee union activities. This statement constituted a thinly veiled threat to close the Fairlane store, too, if the employees there also voted in the Union.

Janetta Harrison, a Fairlane store sales employee in the children's department, testified that, in April 1991, before the first election, she and fellow employee Clarice Barrow were informed by their manager, statutory Supervisor

Kristen Hickock, that Hudson would not bargain with the Union, which would leave the [**17] employees, should they choose the Union, with a strike as their only option. Harrison's testimony is uncontradicted and is credited. I find that, by so advising employees that it would be futile for them to opt for union representation, Respondent, through Hickock, violated Section 8(a)(1) of the Act.

In late July or early August 1991, preceding the second election, a document referred to as the "Westland contract" appeared on many employee counters and wrap stands at the Fairlane store. Store Manager Wozniak testified that he first saw this document when it was given to him by certain of the Westland store employees. Wozniak discussed it with Henry Bechard, Respondent's labor relations manager for the Detroit area stores, and they decided to give copies of the Westland contract to the Fairlane store supervisors and to instruct them to talk to the employees about it, particularly, about the section of the "contract" dealing with bumping. Wozniak testified that, at the time, he knew that there had not been negotiations at the Westland store; that there was not a Westland contract; that there had been no contract proposals to the Company made by the Union; and that what they referred [**18] to as the Westland contract was not a Westland contract.

Employee Gwyn McKinney, a sales employee in the men's furnishings department, testified that, shortly before the second election, Greg Gibson, a corporate regional manager, came up to her work area and began to speak. Gibson told McKinney that, if the Union were voted in McKinney might be bumped and/or laid off, because of her lack of seniority. McKinney's testimony is uncontradicted. I find, based on the employee's credited and uncontradicted testimony, that Respondent, through Gibson, violated Section 8(a)(1) of the Act by threatening employees with bumping and/or job loss if they selected the Union to represent them. Gibson's warning, without reference to the collective-bargaining process, conveyed the message that bumping and/or layoffs would come about as a consequence of organization.

Bobbie Murph, a cook in the Fairlane store restaurant, testified that she met with her manager, Aruna Bazaz, in the manager's office, some 7 days before the second election. Bazaz had with her a document which she made reference to, apparently, the Westland contract. According to Murph's credited and uncontradicted testimony, Bazaz [**19] told her that, "if the Union gets in, you could lose your job, the store could close, Westland would close, and people could . . . be bumped off of their jobs." Based on Murph's testimony, I find that Respondent, through Bazaz, violated Section 8(a)(1) of the Act by threatening employees with store closure, job loss, and bumping if they voted in the Union.

According to the uncontradicted and credited testimony of Pamela Jaros, a sales employee in the Fairlane store deli department, she was approached, about a week before the second election, by Assistant Manager Lisa Nathanson, a statutory supervisor. Nathanson asked Jaros, who, apparently, wore neither UAW insignia nor a "Vote No" pin, how she felt about the Union coming in at Hudson's. Later in the conversation, the supervisor told the employee that, if a union were there, it would be harder for employees to know their schedules in advance and, with a third party involved, it would be more difficult for employees to request time off. Nathanson further told Jaros that, even if the store employees voted for the Union, this would not, necessarily, obligate Hudson to negotiate with the Union. In this connection, Nathanson pointed [**20] out that the Westland store employees had voted for the Union and, a year later, there still had not been any negotiations.

Nathanson's questioning of Jaros concerning her union sympathies was without legitimate purpose, occurred without assurances against reprisals and was coercive in nature and violative of Section 8(a)(1) of the Act. Also unlawful were the warnings to Jaros about the inevitable, undesirable changes in working conditions which would occur if the Union became the employees' representative. In the same conversation, Respondent, through Nathanson, violated Section 8(a)(1) of the Act by informing Jaros, in effect, that it would be utterly futile for the employees to opt for representation because Hudson would not engage in negotiations, anyway. Based on Jaros' testimony, I find that Respondent violated the Act by its coercive interrogation, threats of undesirable changes in working conditions, and warnings of futility.

[*482] Willola Gray, a sales employee in the Fairlane store infant's department, testified, credibly and without contradiction, that, during the weeks preceding the second election, Manager Kristen Hickock approached her, on several occasions, and read [**21] to Gray sections of the Westland contract. Hickock told Gray that Respondent would close the Westland store and that Gray, a part-time worker, "could be bumped." Based on Gray's testimony, I find that Respondent, through Hickock, violated Section 8(a)(1) of the Act by informing Gray, in effect, that store closure or bumping were the inevitable results of organization.

According to the credited and uncontradicted testimony of Michael Renfroe, a Fairlane store dockworker, in August 1991, preceding the second election, he was instructed to report to the office of his manager, Mike Zantini, a statutory supervisor. Zantini showed to Renfroe a copy of the Westland contract, and pointed to the bumping provisions,

stating that, if the contract were to take effect at Fairlane, employees who lacked seniority could be bumped or laid off. Zantini also told Renfroe that, in the event of organization Renfroe would no longer get "the favors" he had gotten in the past, an apparent reference to the shift changes accorded to Renfroe in order to allow him to meet family obligations. Based on Renfroe's testimony, I find that Respondent, through Zantini, violated Section 8(a)(1) of the Act by informing [**22] an employee that undesirable changes in working conditions would inevitably accompany employee organization.

Gloria Kovich, a sales employee in the men's accessory department at Fairlane, testified that, before the August 1991 election, she was 1 of 18 to 24 Fairlane employees to attend a meeting conducted by Respondent's president, Dennis Toffolo. At the meeting, Kovich testified, Toffolo stated that, if the Union were selected, the Company would not agree with its demands and, so, the employees, probably, would go on strike and would not be able to survive. Further, Kovich testified, Toffolo stated that the store might close.

Kovich's testimony, concerning statements made to her as part of a large gathering, is uncorroborated. In addition, her testimonial description of occurrences at the event in question is not entirely consistent with the statements contained in her pretrial affidavit concerning the matter. For these reasons, I am unwilling to base an unfair labor practice finding on her testimony in these regards and I find, contrary to the complaint, that the evidence is insufficient to show that Respondent, through Toffolo, violated the Act, before the second election, [**23] by telling a large group of employees that, in the event of organization, a strike was inevitable and the store might close.

UAW Organizer Maureen Fitzsimmons testified that, on August 7 or 8, 1991, immediately before the second election, she and Respondent's consultant and agent, Jim Strong, exchanged unpleasant comments while Fitzsimmons was outside the store, at the main level entrance, coordinating leafleting activities. Later that day, outside, at a lower level public entrance to the store which was nearby to the employee entrance, Strong passed by, and Fitzsimmons and a cohort called him a "union buster." Strong walked over to Fitzsimmons, stood very close to her, and screamed at her: "Fuck you, fuck you, fuck you." He then said, loudly, "What is you name? You're Moe . . . I can find out where you live." Strong, before leaving, made an obscene gesture with his finger. This incident occurred at midday, during an employee shift change, and was observed by employees coming into work and by employees inside the store, near the public entrance, who were looking out and watching.

Fitzsimmon's testimony concerning the foregoing incident is uncontradicted and is credited. I find, [**24] based on her testimony, that Respondent, by Strong, violated Section 8(a)(1) of the Act by screaming vulgarities at a union organizer, and threatening physical violence against her, in the presence of store employees.

Raymond Lichy worked at the Fairlane store, as a sales employee in the men's accessories department, from October 1987 until December 23, 1992. Lichy, who wore UAW buttons and insignia to work every day, and who frequently distributed UAW literature to employees outside the employee entrance into the store, was, indisputably, an employee leader of the organizing effort and was known to Respondent as such.

Lichy testified that, in October 1992, preceding the scheduled third election, he was at his work station speaking to his coworker, Devon Washington. The manager in the men's suits department, Lance Petross, approached and told Lichy that there was no soliciting on the floor. Lichy said that he was not soliciting and he pulled out a copy of the National Labor Relations Board notice, posted by Respondent pursuant to the June 23, 1992 settlement agreement, and, he testified, pointed to the line stating that the Company would not interfere with employees' talking [**25] amongst themselves. Petross, according to Lichy, stated that that did not mean a thing. Petross then turned to Washington and asked him if he knew that Lichy had called a manager, Cedric Jackson, a "nigger" and a "monkey," and if he, Washington, knew that Lichy was afraid to walk around the store, by himself, and without the presence of his son. Lichy denied that he had ever said these things.

Petross, Lichy further testified, turned back to him and told him to put his employee badge on, and to take his foot off the counter. Lichy complied with these instructions. Then, Petross told Lichy to go home, but the employee refused. Petross told Lichy that "I am going to knock the shit out of you in the parking lot." The manager then called for the substitute executive store manager, Rose Spencer, and he told her that Lichy had been soliciting on the floor and had refused to wait on a customer. Accordingly, Petross told Spencer, he wanted her to send Lichy home. When Spencer said that Lichy did not have to go home, Petross claimed that Lichy had threatened him with violence in the parking lot. Petross stated that he would call the police and, then, both he and Spencer left the area. [**26] While Petross did not, in fact, call the police, Lichy did do so and he was advised to leave the store for the day. The employee so informed Spencer, and he left, accompanied by a security guard. Lichy filed a police report on October 9, 1992.

Petross, in his testimony, claimed that, after he told Lichy to put his badge on, and to remove his foot from the ledge of the wrap stand, he instructed the employee to service a nearby customer. As the conversation continued, the customer started to walk away and, Petross further testified, Lichy then called to him, loudly, asking if he needed help. The customer said, "[N]o." According to Petross, during the conversation, when Lichy pointed to the Board's notice Lichy stated that, "according to this, I don't have to do anything. [*483] I can do anything I want." Furthermore, Petross testified, it was Lichy who said that they could talk about, or take care of, the matter outside. At that point, Petross called for the executive on duty, Spencer. Petross did not deny telling Washington that Lichy had called Jackson a "nigger" and a "monkey" and that Lichy was afraid to walk around the store by himself.

For the reasons stated at footnote 4, [**27] I credit Lichy's testimony and find that the confrontation between Lichy and Petross, in the presence of Washington, in October 1992, occurred as described by Lichy. To the extent that Petross' version of the event, as set forth in his testimony, differs from Lichy's account, it is discredited.

In light of Lichy's leading role in the union campaign, Respondent's knowledge of same, the timing of the confrontation (immediately before the scheduled third election), Respondent's contemporaneous unfair labor practice conduct and its failure to advance any credible explanation for the confrontation, I find that Petross initiated the confrontation with Lichy in response to the employee's union activities. By denouncing and humiliating Lichy in the presence of another employee, and by harassing him and threatening his physical safety, and because of his support for the Union, Respondent, by Petross, violated Section 8(a)(1) of the Act.

Delores McMinn, a sales support employee in the men's sportswear department of the Fairlane store, testified, credibly and without contradiction, that, prior to the first election, she was approached, at a party, by Vince Giacobbe, the store manager of Respondent's [**28] Eastland Mall store. McMinn, who normally wore a union badge to work, was not wearing it on that occasion. Giacobbe asked McMinn if she was "with us," and she replied, "[N]o."

During the week preceding the second election, Giacobbe visited the Fairlane store and, passing by, he stopped to ask McMinn, "[A]re you for us, yet?" She replied, stating that she was not. Giacobbe told her that, nonetheless, he was telling people that she was. McMinn protested, stating that that was a lie. Giacobbe stated, "[W]ell, nobody else knows it is."

While the first instance of interrogation of McMinn by Giacobbe was, arguably, casual in nature, the second instance, clearly, may not be so described, even according due weight to the fact that the employee was a known union supporter. McMinn, before the second election, was asked by a high ranking company official, for the second time, where she stood on the question of the Union. The official, Giacobbe, had no valid purpose for asking the question, gave no assurances against reprisals, and refused to accept the employee's answer to his question. The interrogation occurred in the context of an employer campaign replete with unfair labor practice [**29] conduct. Based on McMinn's testimony, I find that Respondent, by Giacobbe, violated Section 8(a)(1) of the Act by its coercive interrogation of McMinn.

Karen King, a sales employee in the Fairlane store's women's shoes department, testified that she was on an approved leave of absence, for educational purposes, from February 11 until July 22, 1991. Immediately on her return, and while wearing her union pin, she was approached by Manager DeEtta Whigham, a statutory supervisor. Whigham pointed to the pin and asked King why she had come back to work if she had an attitude like that. Whigham further stated that King did not have to come back and that she could not understand why King was acting that way. Based on King's uncontradicted and credited testimony, I find that Respondent, through Whigham, violated Section 8(a)(1) of the Act by its coercive interrogation of King concerning her union sympathies.

Employee Harry Gersell, although a union supporter, did not wear union insignia at work. He testified that, about 2 or 3 weeks before the second election, in the employee lounge, a manager, statutory Supervisor Bill Thome, approached him. Thome asked the employee why he wanted [**30] the Union, and what significance it had. When Gersell complained about employee benefits, Thome asked him if he participated in the retirement plan, and if he liked the medical and dental plan. Based on Gersell's credited and uncontradicted testimony, I find that, by the foregoing coercive interrogation of Gersell by Thome, Respondent violated Section 8(a)(1) of the Act.

Former employee Eric Gawura testified, credibly and without contradiction, that, a few days before the second election, he was approached at his work station by Regional Manager Greg Gibson. Gibson said that he had noticed that Gawura was wearing a union pin, and he asked Gawura how long he had been working for the Company. When the employee said that it had been for a period of 9 or 10 months, Gibson asked him why an employee who had been there for such a short time would want a union in the store. Gawura started to enumerate his reasons, and Gibson

became upset and raised his voice. In light of the foregoing uncontradicted testimony, I find that Respondent, through Gibson, violated Section 8(a)(1) of the Act by its coercive interrogation of Gawura.

According to the testimony of Scott McCliment, a sales employee [**31] in the Fairlane store's men's department, at his request, met with his manager, DeEtta Whigham, in her office, about a month before the second election. McCliment said that he needed 2 days off from work and Whigham replied, saying, "[S]ure, no problem." Then she told McCliment that he could do something for her, namely, he could take his union pin off. The employee refused. The supervisor then told him to write down, for his own benefit, the pros and cons of having a union. Finally, Whigham asked him to tell her "what's going on with the UAW."

Based on McCliment's credited, uncontradicted testimony, I find that Respondent, by Whigham, violated Section 8(a)(1) of the Act by asking McCliment to remove his union pin. Employees have a protected right to wear union insignia at work and, absent a showing of special circumstances, it is unlawful for an employer to infringe on that right. n9 In the same conversation, Respondent, through Whigham, engaged in coercive interrogation, in violation of the Act, by asking the employee to tell her what was going on with the Union.

Employee Willola Gray testified that, in September 1992, on her return to work after a lengthy illness, she was [**32] wearing both union buttons and "Vote No" insignia. Gray was approached at her work station by Manager Grandy, who, according to Gray's credited, uncontradicted testimony, stated:

[Y]ou have so much going on in your chest . . . I don't know what you are going to do. Why don't you [*484] decide what way you are going to vote. I don't know if you are for the union or against it.

n9 *Control Services, 303 NLRB 481 (1991).*

Grandy's remarks called on Gray to reveal her union sympathies, and her intentions with respect to voting in the then impending third election, and was, thus, a coercive interrogation. Based on Gray's testimony, I find that Respondent, through Grandy, further violated Section 8(a)(1) of the Act.

Gray also testified that, a year earlier, a month or more before the second election, while working in her department, she encountered Human Resources Manager Sherry Brenner. Gray complained about the work assigned to her that day, and Brenner stated that "it was all because of the union that had brought these problems into the store." Gray complained about low wages, an insufficient number of work hours and racism in work assignments. Brenner promised to get matters [**33] cleared up. She told Gray that things would be taken care of and that Gray would get proper compensation and more hours.

Gray was given additional hours, going from 24 to 30 per week. Some 2 weeks later, Respondent's president, Toffolo, appeared at her work station and asked Gray if she had gotten the additional hours. She said, "[Y]es, and also stated that she was still unhappy. Toffolo said that they would become a family again, and they would get things together. He further stated that the employees did not need a union, and that things were going to get better.

Promises of specific benefits, and promises that things will get better, made during the course of a campaign and designed to dissuade employees from supporting a union, are violative of Section 8(a)(1) of the Act. In this case, the record evidence offers no explanation, except unlawful motivation, for the timing of the promises. Based on Gray's credited and uncontradicted testimony, I find that Respondent, by Brenner and Toffolo, so violated the Act.

2. Enforcement of the no-solicitation and no-distribution rules

Respondent maintains written no-solicitation and no-distribution rules which are posted at the [**34] timeclocks, in the employees' lounge, and in the employees' locker room. The rules state:

No solicitation, except for the annual United Way Drive, is permitted during working time and no solicitation is permitted on a selling floor at any time during store hours. Should an employee desire to engage in such activity, it must be confined to non-working time, such as breaks and meal periods and in non-selling areas of the store if during store hours.

No distribution of literature, pamphlets, documents or any other materials, except for the annual United Way Drive, is permitted during working time and no distribution of any sort is permitted in any working area, at any time.

The General Counsel concedes that the rules, as written, are valid, but urges that they were disparately enforced against employees engaged in solicitations and distributions on behalf of the Union, in violation of the Act.

There is uncontradicted, credible record evidence, in the form of testimony by employees Delores McMinn and Leonard Militello, that, prior to the advent of the Union, the above-referenced rules were not enforced. Thus, McMinn and Militello testified, employees have, traditionally, engaged [**35] in solicitations of each other, during working time and on the selling floor, with regard to the sale of girl scout cookies, raffle tickets, candies, and cans of Slim-Fast diet products. Solicitations have also occurred with regard to football pools and church-sponsored charity drives. In connection with solicitations to purchase Avon and Tupperware products, catalogue books have been passed about. These activities have been carried on openly and in the presence of the department managers, including John Karl, Elizabeth Richardson, and Lance Petross.

Fairlane Store Manager Wozniak testified that there are no exceptions to the rules, except for the United Way campaign. He further testified that he has personally stopped a solicitation for the sale of girl scout cookies, and another solicitation to sell raffle tickets. In each case, the store manager told the individual involved that such activities were not permitted on company time and in selling areas. Wozniak conceded that he is aware of the fact that solicitations in violation of the written rules occur, but stated that he takes no action to stop such activities unless he personally observes the occurrence.

Employee Harry [**36] Gersell testified, credibly and without contradiction, that, preceding both the first and second elections, he would observe Manager Grandy remove UAW literature from the wrap stands and deposit it in the garbage. On the other hand, "Vote No" committee literature was not so removed and, often, it would remain on the counters all day long. There were occasions when Grandy would remove UAW literature while, at the same time, allowing vote no literature to stay.

According to the credited and uncontradicted testimony of employee Lindel Salow, a sales employee in the Fairlane store's men's fragrances department, he arrived at work, several weeks before the second election, for the start of his 9:45 a.m. shift, at 9:40 a.m. Salow found vote no literature on the two register counters in his department. In response, the employee placed UAW literature on one of the counters, alongside the vote no literature. Later in the morning, his manager, Nancy Miller, a statutory supervisor, instructed him to remove the UAW literature, as it was not allowed on the selling floor. Salow told Miller that vote no literature was also on the counters, and he pointed it out. Miller merely re peated her [**37] instruction to remove the UAW literature, saying, again, that it was not allowed on the floor. Salow complied with Miller's directive and removed the UAW literature. The vote no literature was allowed to remain on the counters.

Employee Willola Gray testified, credibly and without contradiction, that, in September 1992, when she returned to work following her illness, Manager Grandy told her that she knew that Gray was a union supporter. Grandy told Gray that she could not talk to anyone, or leave her department, or take personal phone calls or communicate with anyone about the Union. Grandy told Gray that these restrictions were being imposed, contrary to normal store practices, because of the Union and that she, Grandy, did not want telephone calls in which the Union was discussed.

According to the credited, corroborated, and uncontradicted testimony of former employee Raymond Lichy, in the period preceding the second election, often, he would report [*485] to work in the morning to find vote no literature on the sales counters throughout the store. In his department, such literature would remain on the counters. On the other hand, when UAW literature would appear on the same counters, [**38] it was quickly picked up, and thrown away, by Managers Wozniak, Grandy, Petross, Richardson, David Conn, and Tony Larkins. Lichy further testified that, before the second election, Manager Bill Thome, a statutory supervisor, entered the employee lounge, a nonworking area, and observed that UAW literature was sitting on some of the tables. Thome said, "I see the UAW paper fairy has been here," and he proceeded to pick up the literature, rip it up, and throw it away. By contrast, Lichy testified, in September 1992, preceding the scheduled third election, he observed Manager Marc Pilibosian, a statutory supervisor, assist an employee in the distribution of vote no literature on the selling floor. In this connection, employee Militello credibly testified that, in July 1991, preceding the second election, he observed such activity on the part of Manager Sneed on the selling floor and Manager Thome in the lunchroom. n10

n10 For the reasons stated at fn. 4, Sneed's denial is not credited.

Store Manager Woziniak testified that each employee is provided with a locker in which they are expected to store their personal items. However, he testified, that rule has not been rigidly enforced. [**39] Lichy, in his testimony,

stated that, as the lockerroom is located at the employee entrance to the store, and away from the work areas, items stored there are not easily accessible, for example, newspapers and other reading material to be used by employees while on break. Accordingly, many, if not most, employees, store personal items in areas in the department storerooms. Indeed, some of the storerooms contain televisions, radios, and hot plates. In the storeroom connected to his department, Lichy would place a manilla folder, on top of shirt boxes, into which he put various items, including, occasionally, UAW literature, and he placed a rubber band around it.

According to Lichy's credited and uncontradicted testimony, on May 30, 1991, Manager Tony Larkins, a statutory supervisor, told him that he could not bring union literature into the storeroom, and that his personal items were to be stored in his locker. Lichy responded to Larkins, stating:

I mentioned that, well, people bring all sorts of items into the storeroom, school books, briefcases, purses, bags and I mentioned that Brice Rudder (a member of the Vote No committee) brings a briefcase in every day and nobody seems [**40] to mind that. I said, am I the only one that is not allowed to bring any items into the store and put it into the storeroom like everybody else does? He said, no, you can't do that, everything has to stay in your locker.

On the next day, May 31, Lichy again brought his folder into the storeroom. He was approached by Managers Larkins and Conn who told him that he was not allowed to bring union literature into the store, and that he was to put his things in his locker. Later in the day, Lichy was summoned to appear in Conn's office where Conn and Larkins discussed the same subject. Lichy asked if the new rule was meant only for him. The employee requested the presence of the store manager. When Store Manager Wozniak joined the meeting, Conn stressed to him that it was "union literature" that was in Lichy's folder. Wozniak told the employee to leave the folder, and his belongings, in his locker.

Prior to the advent of the Union, employees in Leonard Militello's department, men's tailoring, kept their personal items in a file cabinet located within the department, but off the selling floor. The cabinet contains five drawers, one for use by each of the five full-time departmental [**41] employees, and Respondent placed no limitation on the types of materials stored there. Indeed, one employee stored "Slim Fast" products there, for sale to other workers, and a blender.

According to Militello's uncontracdicted and credited testimony, in July 1991, Manager Petross told him that he, Petross, had noticed that the employee had "union paraphernalia" in his cabinet drawer. Petross told Militello that he had exactly one-half hour to get rid of it, and that the drawer was to be used for business-related matters, only.

As shown, above, the record evidence establishes that, prior to the onset of employee activities on behalf of the Union, Respondent did not enforce its rules restricting solicitation and distribution. When the union campaign began, Respondent instituted a sudden and selective effort at enforcement. It confiscated union literature found on the selling floor, and/or instructed employees to remove it, while it allowed vote no literature to remain; it banned all union literature from selling floor areas, other work areas, and, even, nonwork areas, while it not only permitted, but, also, assisted in the distribution of, vote no literature on the selling floor, [**42] it told prounion employees that, contrary to normal practices, and because of the Union, they could not talk to anyone, or leave their departments, or take personal phone calls or communicate with anyone about the Union. Based on this evidence, I find that Respondent began to enforce its rules with respect to solicitation and distribution in response to employees' union activities, and when it did so, it enforced the rules, often in an overly broad manner, against union solicitations and distributions, only, in violation of Section 8(a)(1) of the Act.

3. Changes in policies

Employee Vivian Armstrong, who worked as a lead cook in the Fairlane store's market foods deli department, testified, credibly and without contradiction, that, in her department, the work schedules of the 24 employees were, each week, posted on a board located at the kitchen entrance. However, before the second election, the department manager, statutory Supervisor Suzanne Bicknese, ceased to follow this practice. Instead, and without explanation, she gave each department employee, weekly, a piece of paper containing his or her own work schedule, only. Following the election, Bicknese returned to the former [**43] practice.

In the men's suit department, employee Leonard Militello testified, the practice had been to place the schedules, for all employees in the department, some 2 to 3 weeks in advance, in a notebook. The notebook was kept in the department and was available to employees who could check each other's schedules. However, according to Militello's further credited and uncontradicted testimony, some 4 weeks before the second election, this practice ceased and the schedules were removed from the selling floor. At that time, the department employees were advised by Manager Petross that, thereafter, they would receive, each week, a copy of an individual [*486] schedule, only, for the following week. For the men's suit department, this change in policy was short-lived. Several days after it was instituted, a

department employee pointed out to Petross that, in that particular department, there was a business need, because of customer inquiry, for the employees to know each other's schedules. Petross obtained the consent of the store manager, Wozniak, to rescind the policy change as applied to that department.

Patricia McKay, an employee in the Fairlane store china department, testified, [**44] credibly and without contradiction, that, in mid-October 1992, before the scheduled third election, she discussed with a fellow employee certain details of Respondent's vacation policy, as contained in its employee handbook which is distributed to all employees. The department manager, Derinda Olszewski, a statutory supervisor, interrupted the conversation, and ended it. She then called McKay aside, for a private talk, and told her, in a loud tone of voice, that she was not to quote store policies to anyone. Prior to this incident, employee discussion of such matters had not been prohibited.

As shown, above, Respondent engaged in changes in store policies, affecting terms and conditions of employment, during preelection periods. The changes occurred without explanation and in the midst of other, massive, violations of the Act. The record evidence does not even suggest the possibility that there were reasons for the changes which were unrelated to the employees' union activities. I therefore find and conclude that the policy changes were violative of Section 8(a)(1) of the Act.

4. Alleged surveillance, interrupted conversations, following, and monitoring of employees

According [**45] to the credited and uncontradicted testimony of employee Militello, a few days prior to the second election, he and fellow employees Renfrow, Rowe, and Peters engaged in leafleting activities, by the employee entrance into the Fairlane store, an outside entrance, distributing UAW leaflets to entering workers. The employees' activities in these regards were videotaped by agents of Huffmaster, Inc., a security service engaged by Respondent in late July 1991. Supervisor Petross and other managers stood at the door and observed this.

Militello also testified that, in the weeks preceding the second election, managers from others of Respondent's stores were brought into the Fairlane store and assigned to the different departments. In this time period, a Huffmaster agent, Brian Cleary, began to follow Militello through the store, holding a cam corder pointed at the employee. Thus, Militello testified, wherever he went, inside or outside the store, Cleary would follow, whether the employee was working or on break. Sometimes Cleary walked two steps behind Militello; at other times he stood shoulder to shoulder with the employee. At one point, Cleary told him that "I am personally assigned [**46] to you, I go everywhere you go." Indeed, he did, even following Militello to the restroom twice each day.

According to Militello's further testimony, starting some 3 weeks before the second election, other managers, including Sneed and Petross, followed him, everywhere he went in the store, trailing behind him by some 10 or 15 feet. He observed that other employees who, concededly, had been identified by Respondent as employee leaders in the Union's campaign, were also followed by managers, throughout the store, namely, Raymond Lichy, Glenna Gildersleeve, and Vera Hawkins.

In the weeks before the second election, Militello testified, Sneed, Petross, and other managers would step in so as to overhear the employee's conversations with customers, and would get close enough to overhear Militello's telephone conversations when he used one of the phones at the wrap stand. Also, they would interrupt his conversations with fellow employees. After the second election, management returned to the policies that existed prior to the advent of the Union, and the above-described occurrences ceased. n11

n11 There is a conflict in the record evidence concerning whether management officials, before the second election, also monitored and interrupted the conversations of known vote no supporters. [**47]

According to the credited and uncontradicted testimony of employee Lichy, the employees, prior to the start of the UAW campaign, were allowed to converse with each other, on worktime, if they had neither customers to wait on nor a special task to perform. Also, an employee on break was permitted to visit another department, spend breaktime there and converse with an employee working in that department. Such conversations were not interrupted.

Lichy testified that, on May 24, 1991, on his way out of the store to have lunch, he stopped to speak to employee Agnes Walsh, at her work station. Manager Grandy approached, asked, "[W]hat's up" and, then, stood there and listened. There were no customers in the area. In July, Lichy further testified, he, during his break period, walked into the men's suit department, as he had done in the past, and sat down on a chair. Manager Petross approached and asked

Lichy if he was on break. When Lichy said, yes, Petross told him that "I don't want to see you taking your break in my department ever again." Lichy left.

During the last week in July 1991, Lichy, along with Walsh, Militello, Hudson's employees who worked at other stores, and one [**48] or more people employed as organizers by the UAW, passed out leaflets at the employee entrance to the store. Their activities were recorded by two of the Huffmaster agents, using cam corders. Later, when they walked into the store, they were filmed by the store security manager, statutory Supervisor Brenda McNamara.

Lichy also testified that, within a few weeks of the second election, the number of managers in the Fairlane store doubled, as individuals were brought in from other Hudson stores. Thereafter, there were two to four managers, each day, assigned to stand in Lichy's department and to watch him all day long. Similarly, before the scheduled third election, there was a large increase in the number of managers at Fairlane. At that time, an individual named Paul LaBlanc was assigned by Hudson's to station himself in the corner of Lichy's work area and, for 4 to 6 hours each day, to stand there and watch him. When Lichy moved out of his work area, LaBlanc would follow right behind him. Manager Kevin Debri, a statutory supervisor, told Lichy that managers were, indeed, watching him.

Between the time of the second election in August 1991, and the time of the scheduled third [**49] election in October 1992, Lichy testified, statutory Supervisor Cedric Jackson, a group manager, "would come down and stand on the aisle way looking at me and he would grunt and snort." Jackson would [*487] make noises, for long periods of time, as he looked at Lichy, at work, and, then, he pretended to laugh. At other times, when Jackson saw Lichy, he would come very close, sometimes brushing Lichy, and make noises. On occasions, Jackson would stick his elbow out and poke Lichy, or he would bump into him. Such incidents, Lichy testified, occurred at least once each day. Jackson, in his testimony, denied that any of the foregoing had ever occurred. For the reasons stated at footnote 4, the denial is not credited.

Fairlane store employee Janetta Harrison, who regularly wore union insignia at work, testified that, shortly before the second election, on her break, she entered the mall and stopped at the pit area, a recessed rest area by Hudson's first floor mall entrance. While seated in the pit talking to fellow employee Tania Collins, and to a UAW organizer, Harrison looked up and saw that they were being videotaped.

Employee Willola Gray testified that, before the second election, [**50] each time she went to lunch, took a break, or went to the bathroom, she was followed by one or more of the managers. Indeed, one manager would follow her into the bathroom. Gray was followed, closely and in lock-step, to and from her department. Prior to the advent of the Union, employees were not followed, and they freely conversed with each other, and made personal phone calls at the wrap stands, in front of managers.

Fairlane store employee Scott McCliment, who wore a union pin to work every day, testified that, prior to the union campaign, there was no limitation on where employees could take their breaks, and worktime conversations between employees were not interrupted. However, prior to the second election, and again, before the scheduled third election, managers interrupted and/or monitored his conversations with coworkers.

Employee Lindel Salow, who wore union insignia to work each day, testified that, shortly before the second election, while he, Salow, was at his work station in the men's fragrances department, a Huffmaster agent pointed a cam corder at him, and videotaped Salow for 15 or 20 seconds, and, then, left. Within the hour, Salow waited on two individuals [**51] who were wearing jackets that had the UAW insignia embroidered on them. The Huffmaster agent returned and videotaped Salaw and the customers, until the customers left.

Employee Patricia McKay, who wore union buttons to work, testified that, before the second election, managers would monitor her conversations with fellow employees by approaching and standing next to them. Further, she testified, on one occasion, she was videotaped while seated alone in the pit area, reading a UAW leaflet which had just been handed to her by a leafleter. The camera then returned its focus to the leafleters. McKay was also videotaped on the frequent occasions when she, outside the employee entrance, engaged in leafleting for the Union, along with other employees, and, at times, UAW organizers.

According to the testimony of employee Caroline Lakoff, who worked as a sales person in the Fairlane store's lamp department, prior to the scheduled third election, managers monitored her conversations with coworkers, by approaching and listening, and, also, similarly, monitored her telephone conversations. Prior to the advent of the Union, she testified, the employees used the wrap stand phones for business [**52] and for personal calls.

Cathran Vickroy, a Fairlane store gift wrap department employee who wore UAW pins to work each day, testified that, in September 1992, before the scheduled third election, she, on her lunch hour, shopped at the store with her brother. As they went from department to department, Vickroy and her brother were followed by statutory Supervisor Elizabeth Richardson, and two other individuals who were with her.

Employee, Louise Lasiter, who worked in the Fairlane store's men's sportswear department as a salesperson, wore union insignia at work. She testified that, on or about August 5, 1991, while seated alone in the pit area, she was videotaped by a Huffmaster agent. Later that day, while talking to Irene Kowal, an organizer employed by the UAW, in the pit area, Lasiter was videotaped, again, for a 10-minute period.

Glenna Gildersleeve, a Fairlane store cosmetics department sales employee, was, the parties stipulated, an "open and notorious" supporter of the UAW. She testified that, prior to the scheduled third election, her manager, statutory Supervisor Nancy Miller, would follow her, within 4 to 5 feet, everywhere in the store that she went, including into [**53] the lavatory. Rossalyn Fuhr, a sales employee in the Fairlane store's men's updated sportswear department, testified that, during the week preceding the second election, she observed statutory Supervisors Wozniak, Conn, and Petross follow employee Militello, from close behind him, and also, she saw Supervisor Whigham follow employee McCliment about the store. During September 1992, Fuhr testified, preceding the scheduled third election, she, herself, was followed from the store to the parking lot, back into the store, and back out to the parking lot by Supervisors Conn, Brenner, and Petross.

The foregoing testimony of employees Harrison, Gray, McCliment, Salow, McKay, Lakoff, Vickroy, Lasiter, Gildersleeve, and Fuhr is uncontradicted and is credited. In addition, I note the testimony, by Militello and others, that Respondent's security personnel, in the period before the second election, enforced more rigidly against union supporters than vote no committee members, the policy of random inspection of employee packages going into, or out of, the store. As such testimony was based on impressions, only, I have not relied on it.

Henry Bechard, Respondent's labor relations manager [**54] for the Detroit department stores, testified that the impetus for Respondent's retention of Huffmaster, and the utilization of video cameras at the Fairlane store, was the activities of the UAW at their rally at Respondent's Detroit area, Oakland store, on July 20, 1991. According to Bechard, at 10 a.m. on that day, pursuant to previous announcement, some 700 people arrived, in vans, cars, and on foot, into the Oakland mall, parking facility, and grouped together. That assemblage included UAW and Teamsters union officials, and:

They all gathered together. There were bull horns, there were speeches made, they all clasped their hands together and were singing Solidarity Forever, cheering, shouting. It was pretty impressive.

Following the speeches and the singing, which lasted less than an hour, Union Official Bob King directed everyone to enter the store. At that point, Bechard testified:

[T]hey all came charging through the front entrances and first surrounded the piano player who was on the [*488] lower level by the escalator. . . . We had some employees and managers passing out balloons at the front entrance and we were giving balloons to those folks as they came through the door. [**55] Some of the customers were pushed out of the way . . . and all of a sudden you started hearing balloons popping and kids screaming and pretty general mayhem . . . [they stayed for] about three to four hours . . . did a lot of things. Rode in groups up and down the escalators, roamed from department-to-department on every floor. Went into the restaurant and they were making purchases and paying them with pennies, nickels and dimes. Backing up our lines, generally wising off to some of the sales consultants and they had a difficult time determining who was the managers or not, but just pretty much causing a lot of mayhem. In the restaurant, a group of them went in there, I would say twenty or thirty, paid with pennies and dimes, got up and sang Solidarity Forever. A lot of the customers left that area. Went into our electronics department and turned up all the amplifiers, turned the sound up on all the electronic equipment so when the power did kick on, it was really loud. Just generally a lot of mayhem . . . just four hours of just generally mayhem, people wandering around up and down the escalators, a group of them singing Solidarity Forever, marching through departments, [**56] making purchases. They also came back, they returned some of those goods and demanded payment, as well. They weren't long-lasting purchases. I think what I could see was designed to jam up our lines and upset customers.

According to Bechard's further testimony, in anticipation of the Oakland store rally, he, prior to the event, engaged Huffmaster so as to "beef up our security." As a result, on the day of the rally, there were 16 Huffmaster agents present, using 12 video cameras, and they videotaped people moving about the store. The resultant films were reviewed by Bechard and others of Respondent's officials. Yet, despite the increased number of security agents present at Oakland,

the filming of the movements of the "visitors" as they went about the store and the general conditions of "mayhem" which they allegedly created, there was not a single arrest made that day and Respondent did not file any police reports, even after its review and study of the films.

Bechard also testified that there was media coverage of the rally and that, on a newscast, Union Officiai King announced that there would be further rallies. In addition, according to Bechard, a newscaster, quoting a [**57] UAW source, said there would be further activity until Hudson learned their lesson. In response, Bechard decided to increase security at Fairlane, and Huffmaster was retained to supply two to four people at that store, to stop "mischief."

There were no UAW rallies at the Fairlane store after the July 20, rally, at the Oakland store. n12 Nor were any such rallies ever planned or announced. No police reports were filed, and no arrests were made, as a result of the extensive filming at Fairlane, and the study and review of such films by Respondent. Bechard, in his testimony, pointed to three incidents of "mischief" at the Fairlane store, namely, a threat by an individual who was walking in the store with King, directed at Supervisor David Conn, to "kick your fucking ass"; the appearance of UAW stickers on mannequins and display counters; the action of a leafleter, standing in the mall, who, on one occasion, yelled "vote UAW" into the store.

n12 On July 28, 1991, 1 week after the Oakland store rally, the vote no committee staged a brief rally outside the Fairlane store. This was met by a UAW-sponsored counterdemonstration, and the two groups exchanged heated words.

Paul Strickland, [**58] Respondent's corporate director of employee relations, testified that, preceding the second election, additional managers were brought into the store in response to increased UAW activity, in particular, an escalating number of UAW officials and members who were entering the store. Also, in response, "we tightened up on our rules in the store, particularly in regard to people wandering out of their areas," so that employees would stay at their assigned posts and serve customers. In an effort to prevent campaigning on paid time, Strickland testified, employees were followed, even to the restrooms, and were told not to use the phones for personal calls. Security personnel were reminded to check all employee parcels coming into the store and, in general, there was a "tightening up" on those rules.

Store Manager Wozniak, on the other hand, testified that the instructions to security personnel with respect to checking employee parcels was not changed after the onset of union activities and that random inspections continued, as before. Wozniak also testified that, while, prior to the advent of the Union, it was the "understood policy" that the store phones were to be used for business [**59] purposes, only, he knew that employees used the phones for personal calls and they were not disciplined for doing so.

It is well established that, absent legitimate justification, an employer's videotaping or photographing of its employees, while they are engaged in protected concerted activities, constitutes unlawful surveillance, in violation of Section 8(a)(1) of the Act. In particular, the videotaping, during an election campaign, of employees lawfully and peacefully engaged in handbilling at a gate or store entrance, where such videotaping reveals whether profferred campaign literature is accepted or rejected, reasonably tends to intimidate. When an employer's monitoring of such open, public union activities goes beyond "mere observation," as in the case of surveillance by photographing or videotaping, and the employer seeks to justify its actions on the ground that it reasonably anticipated misconduct, it must provide "solid justification" for its resort to the anticipatory photographing. The belief that "something might happen" is not sufficient to justify the conduct in view of its tendency to create fear among employees of future reprisals. n13

n13 *Brunswick Hospital Center, 265 NLRB 803 (1982); Sunbelt Mfg., 308 NLRB 780 (1992); F.W. Woolworth Co., 310 NLRB 1197 (1993).* [**60]

Here, Respondent videotaped employees while they were peacefully and lawfully engaged in leafleting activities, outside the employee entrance to the store, during the election campaigns. It did so when the employees were accompanied by agents of the Union, and it also videotaped employees when they leafleted without the presence of union agents. Such videotaping revealed which employees accepted, and which rejected, profferred literature. Respondent also videotaped employees who supported the Union when they sat alone in the mall, when they conversed in the mall with [*489] union agents and, even, when they serviced customers inside the store.

In addition to the videotaping, Respondent, as shown above, engaged in other serious acts of surveillance and intimidation. It followed the leading union activists, into and out of the store; into and out of the bathrooms; into and out of the parking lot. It engaged in sudden and close supervision of supporters of the Union, staring at them, and making intimidating noises directed at them, for long periods. At the same time, during preelection periods, Respondent abandoned previous policies and began a practice of monitoring and interrupting [**61] employee conversations and telephone calls.

Respondent engaged in the foregoing inhibiting and stifling conduct in an atmosphere, so far as this record shows, devoid of mischief on the part of the employees, and, or, the Union, at the Fairlane store. Indeed, Respondent seeks to justify its actions at Fairlane by reference to the union-sponsored rally at the Oakland store, and the claim that that rally resulted in "mayhem." In rejecting this defense, I note, again, that the Union did not sponsor a rally at Fairlane, nor did it ever announce or plan such an event. Moreover, in light of the fact that no arrests were made at Oakland, and that Respondent, after reviewing its extensive Films of that rally, decided not to file a police report, I am of the view that the term "mayhem," as contained again and again in Bechard's uncorroborated testimony, perhaps, does not accurately describe what happened there. In any event, whatever occurred at the Oakland rally did not provide justification for the daily, constant acts of intimidation at Fairlane, on the theory that "something might happen" there. In this connection, for example, I am not persuaded that Respondent had a legitimate need [**62] to follow Fairlane employees into the restrooms in order to head off mischief at some future rally that was not planned, not announced, and which never occurred. Nor is there any evidence that campaigning ever occurred in the restrooms, on paid time, justifying action by Respondent. I conclude that Respondent, by its acts of surveillance, including videotaping, interrupting employee conversations, and monitoring and following employees, as detailed above, violated Section 8(a)(1) of the Act.

5. Issuance of reprimands

a. *Vivian Armstrong*

Armstrong testified that she worked on Sunday, July 28, 1991, performing her duties as a lead cook. Specifically, she spent the day frying 60 pounds of chicken, and preparing 10 to 15-pound bowls of salad, as assigned. The next 2 days, Monday and Tuesday, July 29 and 30, were her days off, and Armstrong visisted the store on Tuesday, July 30, to exchange some merchandise. She wore a jogging suit, and a shirt reading "Vote Yes UAW." The employee was approached by her manager, Suzanne Bicknese, who told her that she, Bicknese, did not like Armstrong's shirt. Thereafter, Bicknese, and, later, Store Manager Wozniak, followed the employee [**63] about the store.

On the next day, Wednesday, July 31, Armstrong returned to work and she asked Bicknese why she had followed her. Bicknese said that she could follow Armstrong, and she threatened to write up the employee for questioning it. Armstrong told her to do what she had to do. A short time later, Bicknese called Armstrong into her office and showed her a writeup for failure to make 60 sandwiches on Sunday, July 28. Armstrong told Bicknese that she had not been assigned to make sandwiches, and she would not sign the writeup. At trial, Armstrong again insisted that, on the day in question, she had not been asked to make sandwiches.

In light of Armstrong's credited, uncontradicted testimony, it is clear that it was the employee's UAW shirt worn on July 30, and not her work performance on July 28, that was of concern to Bicknese. One day after telling Armstrong that she, Bicknese, did not like her shirt, and then, following the employee about the store in concert with the store manager, Bicknese gave Armstrong a writeup for failure to perform duties that were never assigned. The discipline was in obvious retaliation for the demonstrated union sympathies of this employee, [**64] and would not have occurred absent the protected conduct. I find that Respondent, by Bicknese, violated Section 8(a)(3) of the Act when, on July 31, 1991, it issued a written reprimand to Armstrong.

b. *Eric Gawura*

Gawura wore union pins to work. For a long period of time, he had been in the habit of working crossword puzzles, at his wrap stand, in the absence of customers. This was known to the managers and, on previous occasions, Managers Grandy and Petross had told him to stop. He was not, however, reprimanded.

A few days before the August 9, 1991 election, at a time when there were no customers in the area, Gawura, at his work station, was doing a puzzle. He was approached by the Eastland store manager, Vince Giacobbe, who asked Gawura if he were working a crossword puzzle. The employee said, yes, and he put it away. Giacobbe looked at Onwura's union pin and then said, in a very loud tone of voice, "[Y]ou are doing a crossword puzzle on my time? Do you think if the union were here, you would be able to do a crossword puzzle?" Grocobbe told Gawura not to let him catch the employee doing it again.

The foregoing is based on the credited and uncontradicted testimony [**65] of Gawura. That testimony shows that, by Giacobbe's choice of words, he made clear that the verbal reprimand was the result of Gawura's union sympathies and that, absent such sympathies, the employee's conduct, as in the past, would not have resulted in a reprimand. Accordingly, I find that, in orally reprimanding Gawura, before the second election, Respondent, by Giacobbe, violated Section 8(a)(3) of the Act.

c. *Leonard Militello*

Militello testified that, on July 18, 1991, on the selling floor, he and Manager Sneed discussed certain statements contained in a UAW leaflet. There were no customers in the area. Manager Petross joined the conversation and, at that point, Militello testified, the discussion charged from pleasant, to loud and heated, and the subject matter broadened, to include, generally, the veracity of the commentary contained in both union and employer publications. When the two supervisors laughed at an argument made by Militello, the employee looked at Petross, said, "[Y]ou are full of shit," and walked away. It is undisputed, as Militello testified, that other employees, in the presence of managers, use this and similar language. Employees have not [**66] been told that such [*490] speech is not permissible. Indeed, Petross has used such words in conversations with employees. Nonetheless, on July 19, Petross showed Militello a writeup for his conduct on the previous day, namely, yelling in front of customers, challenging Petross' ability and commitment as a manager, and telling Petross that "you're full of shit."

Sneed, in his testimony, claimed that there were customers present when the conversation occurred, and that it was Militello's voice, and only his, that got louder during the course of the discussion. However, Sneed further testified that he could not remember what the conversation was about. Petross testified that the discussion took place in the presence of customers; that Militello was the only one to raise his voice; that the employee ignored Petross' requests that he keep his voice down; and that Militello told Petross that he was "full of shit" in a loud tone of voice. Petross claimed that he gave Milltello the warning because he had been loud, within earshot of customers, and had directed his curse words at the supervisor, personally.

For the reasons stated at footnote 4, I credit Militello's testimony concerning the [**67] July 18 event, and find that his discussion with Sneed and Petross occurred outside the presence of customers, and became loud and heated only after Petross joined the conversation. I also note that the discussion, held shortly before the second election, occurred in the midst of massive violations of the Act by Respondent, and that much of the unlawful conduct was directed, individually, at Militello. For example, it was in this time period that Respondent began to videotape Militello's activities and, by Sneed and Petross, followed the employee wherever he went in the store. The conversation between Militello and the supervisors dealt with the inherently emotional subject of leaflet veracity, and the epithet used by the employee was a mild one, and not at all out of line with the language commonly spoken in the store by employees and supervisors. To say, as claimed by Petross, that, in context, Militello's language challenged the supervisor's commitment and ability, and was directed at him personally, is to strain and drain the words beyond all logic.

On the state of this record, I can find no explanation for the discipline meted out to an employee for language and actions [**68] well within the range of what was normally tolerated, except this: Militello was known to Respondent as one of the leading union activists, and this Respondent was in the midst of a massive campaign of unlawful conduct designed to defeat the Union. In light of General Counsel's strong prima facie case, and Respondent's failure credibly to show that it would have disciplined Militello even absent his protected activities, I find and conclude that Respondent, by Petross, violated Section 8(a)(3) of the Act by issuing a written warning to Militello because of his July 18, 1991 conduct.

Militello also testified that, late in July, he was advised by employees Lucy Ene and Paulian Cvetanovski, women from eastern European countries who worked in the alterations department, that they had been required by Manager Sneed to wear antiunion buttons on their clothing, Militello told them that they did not have to wear the buttons and, 2 days later, he left a "just say yes" button for Cvetanovski, at her machine. Later that day, Militello was called into Sneed's office and told by the supervisor that he, Sneed, had learned that Militello had been harassing and threatening the women. Militello [**69] stood up and said, "Reggie . . . I am not going to let you do this to me," and he walked out. Sneed followed Militello back to his work station and told him to stay out of the alterations room unless he had business to conduct in there. Later that day, or the next day, by memorandum dated July 26, 1991, Militello received from Petross a written warning for insubordination to Sneed, by walking out on him; harassment of fellow employee Cvetanovski; solicitation in violation of the no-solicitation rule.

Sneed, in his testimony, stated that Ene and Cvetanovski had told him that they were afraid of Militello because he was upset that they were wearing pro-company pins, and he had entered their room to lay down a "vote yes" pin. When

he, Sneed, attempted to discuss the matter with Militello, the employee refused, and walked out. Sneed reported the matter to Petross, Militello's manager. Petross testified that, in addition to the report he received from Sneed, he, Petross, had gotten a complaint directly from Cvetanovski, that Militello had solicited her to wear a UAW button. Petross decided to give Militello a written warning for soliciting Cvetanovski and Ene to wear UAW buttons [**70] while he and they were on working time, harassing the women, and refusing to meet with Sneed about the matter.

In resolving this issue, it is sufficient to note that the warning, on its face, shows that it was imposed, in substantial part, for violation of the no-solicitation rule. I have previously found that Respondent violated the Act by its disparate enforcement of the no-solicitation and no-distribution rules. Accordingly, the rules, as enforced, were invalid, and the discipline of Militello, for violation of an invalid rule, was unlawful. I conclude that, on July 26, 1991, Respondent, by Petross, violated Section 8(a)(3) of the Act by the written warning issued to Militello.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practice conduct [**71] in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

1. Department Store Division of the Dayton Hudson Corporation is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By issuing reprimands to Leonard Militello Jr. on July 18 and 26, 1991, to Vivian Armstrong on July 31, 1991, and [*491] to Eric Gawura in early August 1991 because of their union activities, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(3) of the Act.

4. By threatening employees with store closure, store relocation, loss of jobs, and more onerous working conditions if they select the Union to represent them, and by informing employees that it would be futile for them to opt for union representation, Respondent has engaged in unfair labor [**72] practice conduct within the meaning of Section 8(a)(1) of the Act.

5. By coercively interrogating employees regarding their union activities and sympathies, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

6. By impliedly promising employees improvements in their wages, hours, and working conditions to dissuade them from supporting the Union, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

7. By asking an employee to remove his union button, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

8. By altering the manner of distributing work schedules to employees, restricting employee conversations, and changing other work rules and practices because of employee activities on behalf of the Union, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

9. By disparately enforcing its written rules regarding solicitation and distribution against employees engaged in such activities on behalf of the Union, and by requiring employees to remove union literature from [**73] stockrooms, drawers, and other locations available to them for keeping nonwork-related items, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

10. By coercively surveiling employees, in response to employee activities on behalf of the Union, including videotaping employee movements and actions, watching and following employees, interrupting their conversations, and

monitoring their telephone calls, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(1) of the Act.

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

12. In light of Respondent's failure to comply with the terms of the June 23, 1992 settlement agreement, in Cases 7-CA-32279 and 7-CA-32433, as shown by its continued pattern of unfair labor practice conduct in the summer and fall of 1992, the Regional Director properly set aside that agreement.

13. Respondent has not otherwise violated the Act, as alleged in the consolidated complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended n14

ORDER

The [**74] Respondent, Department Store Division of the Dayton Hudson Corporation, Dearborn, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing reprimands to employees because of their union activities.

n14 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.

(b) Threatening employees with store closure, store relocation, loss of jobs and more onerous working conditions if they select the Union to represent them, and informing employees that it would be futile for them to opt for union representation.

(c) Coercively interrogating employees regarding their union activities and sympathies.

(d) Impliedly promising employees improvements in their wages, hours, and working conditions to dissuade them from supporting the Union.

(e) Asking employees to remove their union buttons.

(f) Altering the manner of distributing work schedules to employees, restricting employee conversations, and changing other work rules and [**75] practices because of employee activities on behalf of the Union.

(g) Disparately enforcing rules regarding solicitation and distribution against employees engaged in such activities on behalf of the Union, and requiring employees to remove union literature from stockrooms, drawers, and other locations available to them for keeping nonwork-related items.

(h) Coercively surveilling employees, in response to employee activities on behalf of the Union, including videotaping employee movements and actions, watching and following employees, interrupting their conversations, and monitoring their telephone calls.

(i) In any other manner discriminating against employees with respect to tenure or terms or conditions of employment because of their union activities, or interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the act.

(a) Rescind and remove from its files any reference to the reprimands issued to Leonard Militello Jr. on July 18 and 26, 1991, to Vivian Armstrong on July 31, 1991, and to Eric Gawun in early August 1991 and notify [**76] the affected employees, in writing, that this has been done.

(b) Post at its Fairlane Mall store, copies of the attached notice marked "Appendix." n15 Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

n15 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."

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. August 3, 1994

[*479contd]
[EDITOR'S NOTE: THE PAGE NUMBERS OF THIS DOCUMENT MAY APPEAR TO BE OUT OF SEQUENCE; HOWEVER, THIS PAGINATION ACCURATELY REFLECTS THE PAGINATION OF THE ORIGINAL PUBLISHED DOCUMENTS.]

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD [**77]
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT issue reprimands to employees because of their union activities.

WE WILL NOT threaten employees with store closure, store relocation, loss of jobs, bumping from jobs, and more onerous working conditions if they select the Union to represent them, or inform employees that it will be futile for them to opt for union representation.

WE WILL NOT denounce and humilate any employee in the presence of other employees, harass any employees and threaten their physical safety, scream vulgarities at union organizers and threaten violence against them in the presence of employees, because of your support for the Union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL [**78] NOT impliedly promise employees improvements in their wages, hours, and working conditions to dissuade them from supporting the Union.

WE WILL NOT ask employees to remove their union buttons.

WE WILL NOT alter the manner of distributing work schedules to employees, restrict employee conversations, or change other work rules and practices because of employee activities on behalf of the Union.

WE WILL NOT disparately enforce rules regarding solicitation and distribution against employees engageed in those activities on behalf of the Union, and wE WILL NOT require employees to remove union literature from stockrooms, drawers, and other locations available to them for keeping nonwork-related items.

WE WILL NOT coercively surveill employees, in response to employee activities on behalf of the Union, including videotaping employee movements and actions, watching and following employees, interrupting their conversations, and monitoring their telephone calls.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify Leonard Militello Jr. and Vivian Armstrong that we have removed from our [**79] files any reference to their unlawful reprimands and that the reprimands will not be used against them in any way.

DEPARTMENT STORE DIVISION OF THE

DAYTON HUDSON CORPORATION

LEXSEE 316 NLRB 85

Department Store, Division of Dayton Hudson Corporation and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO

Case 7-CA-34182

NATIONAL LABOR RELATIONS BOARD

316 N.L.R.B. 85; 1995 NLRB LEXIS 40; 148 L.R.R.M. 1257; 316 NLRB No. 14

January 23, 1995

[**1]

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

OPINION:

[*85] On December 23, 1993, Administrative Law Judge Marvin Roth issued the attached decision. The Respondent and the Charging Party filed exceptions and supporting briefs, the General Counsel and the Charging Party filed answers to the Respondent's exceptions, and the Respondent replied to the General Counsel and the Charging Party's answers and replied to the Charging Party's exceptions.

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, and conclusions only to the extent consistent with this Decision and Order.

We agree, for the reasons cited by the judge, that the Respondent violated Section 8(a)(1) of the Act by engaging in surveillance of employees and by forbidding employees: to wear certain union buttons; to have guests in the employee lunchroom; and to talk to other employees. We also agree, for the reasons cited by the judge, that the Respondent discriminated against employee Nancy Kluska in violation of Section [**2] 8(a)(3) and (1) of the Act by issuing a written warning to her for allegedly violating the Respondent's solicitation and distribution policies. However, we disagree with the judge's finding that the Respondent did not violate Section 8(a)(1) by surveillance of employees and union organizers on November 24, 1992, both in the Respondent's Westland Mall store and in the nearby Coney Island restaurant. n1

n1 In the absence of exceptions, we adopt pro foram the judge's dismissal of the 8(a)(1) complaint allegations in other respects.

The facts as to the surveillance are as follows: On November 24, 1992, three employees and two nonemployee union organizers met in the Respondent's Westland store. Mary Schultz, a Fairlane store employee and union supporter who was on her day off, went with union organizer, Vernida Stanton, to the Westland store. The pair planned a lunch meeting with Mary Grab, the president of the Union's local. Grab was at work in the Westland store. Schultz and Stanton encountered Joel Nelson inside the store. Nelson, a union supporter, was on his day off from the Respondent's Briarwood store and also planned to meet Grab for lunch. Irene Kowal, another union [**3] organizer, by prearrangement with Stanton, met Stanton and Schultz. In a loose group, the four individuals headed for the furniture

department where Grabe was working and then toured that department while waiting for Grab to take her lunchbreak. Approximately five or six of the Respondent's managers followed the group. n2 At the outset, one manager greeted Schultz with a hug and friendly words as three or four other managers observed this encounter. Another manager hailed Nelson as he went down the escalator and then spoke to him at the bottom of the escalator, inquiring about why he did not visit with her. When the group toured the furniture department, another manager asked them what they were doing. On being told that they were waiting for Grab for lunch, the manager said since the group had no packages, they were not shopping. Accordingly, he said, they should leave and the manager would arrange for Grab to meet them. One manager accused Kowal of organizing and told her to stop harassing the Westland employees. The manager also engaged Kowal in a discussion about a Westland employee who had been very active on behalf of the Union but was now promoted to a management position. [**4] When Grab was ready for lunch, the group left for the nearby Coney Island restaurant. n3 The managers followed Grab and her party from the store to the restaurant where both groups ate lunch. Although the managers were too far away for them to be able to hear the employees' conversation during lunch, the managers could clearly see where Grab and her party were seated. Not all the managers remained for the approximately 45-minute lunch. Some left early. However, two or three of the Respondent's managers followed the group when it returned to the store after lunch. A manager asked Schultz if she needed help. When she declined, he indicated that this was no problem. Another manager engaged in some bantering with Kowal about "old ladies [having] nothing better to do . . . than walk around the store." There was no further incident on November 24, 1992.

n2 Frank Kuse, the manager of the men's tailored department testified that it was the Respondent's policy to give nonemployee union organizers "the utmost customer service . . . and stick right with them and make sure that they do not harass any . . . employees."

n3 It was common practice for both employees and managers from the Westland store to eat lunch at this restaurant. [**5]

The judge discussed the Respondent's conduct both inside and outside the store. Concerning the former, he found that "the Union engaged in a show of strength and effort to enlist the support of employees at work, by parading through the store during store hours." He discredited the alleged happenstance that brought together union organizers and employee union supporters inside the store. He noted that the Respondent's managers [*86] addressed most of their remarks to the organizers and not the employees; that the Respondent was privileged to engage in surveillance of nonemployee union organizers inside the store; and that the Respondent's observance of employees who joined the organizers was merely incidental to this legitimate conduct. The judge therefore found no violation of Section 8(a)(1) of the Act.

The judge noted that the legitimacy of the Respondent's survelliance no longer prevailed once the group of employees and organizers left the store. However, the judge reasoned that the Respondent's managers did not intend to monitor the union activity of the employees. He noted that the Respondent's managers followed the union group into the nearby restaurant pursuant to the Respondent's [**6] policy to "stick with" union organizers; that the Respondent's managers and employees frequented this restaurant regularly and were often there together, and that the managers seated themselves at some distance from Grab and her party who were aware that the managers could not hear them. The judge therefore found no violation of Section 8(a)(1) of the Act.

We disagree. There was no legitimacy to the Respondent's surveillance once Mary Schultz, Vernida Stanton, Joel Nelson, Irene Kowal, and Mary Grab left the Respondent's Westland store and proceeded to the Coney Island restaurant. The group of employees and union organizers were no longer on the Respondent's premises nor were the employees on working time. Grab was on her lunchbreak and Schultz and Nelson were on their days off. Yet approximately five or six of the Respondent's managers followed the group to the restaurant, watched them throughout their meal, and then followed them back to the Respondent's Westland store. It matters not that the restaurant was commonly frequented by managers and employees simultaneously, or that the Respondent's managers could not hear the union group in the restaurant, or that fewer managers [**7] followed the group out of the restaurant than into it. What is critical is that the Respondent had a group of managers follow and watch employees who chose to associate with union organizers on their free time away from the Respondent's premises. This conduct revealed the Respondent's intention to observe at close range the Section 7 activities of Grab, Schultz, and Nelson. This intrusion on their statutory rights constitutes unlawful surveillance and violates Section 8(a)(1) of the Act.

We also find unlawful the Respondent's preceding conduct inside its Westland store. n4 Schultz was greeted by a manager as soon as she entered the store and a group of three or four other managers observed this encounter.

Similarly, a manager hailed Nelson as he went down the escalator and then engaged him in conversation at the bottom of the escalator. A group of managers immediately formed and pursued the union group as they toured the furniture department and waited for Grab to commence her lunchbreak. The managers told the union group to leave because they had no packages and were not shopping. When the union group did leave for lunch, the group of managers followed them through the store [**8] and to the nearby Coney Island restaurant.

n4 Member Cohen agrees with the judge that the Respondent's conduct inside the store did not constitute unlawful surveillance.

The Respondent's action made it graphically plain to employees that the Respondent was as concerned with monitoring the activity of the employees as the nonemployees in the union group. Concededly, the managers addressed most of their remarks to the nonemployee union organizers in the group. They did not, however, ignore the employees. Off duty employees Schultz and Nelson were promptly told, once on the Respondent's premises, that the Respondent was watching them. The Respondent also told them, as well as the nonemployee union agents, that they should leave the Respondent's premises. The Respondent did not restrict its surveillance to its own premises. The surveillance which had begun in the Respondent's Westland store continued into the nearby Coney Island restaurant and then continued further as the managers followed the employees back to the store. There was nothing incidental about the Respondent's obtrusive surveillance of its employees inside its Westland store by a group of five or six managers. [**9] The Respondent watched and followed Schultz, Nelson, and Grab in one discrete and continuous episode which incorporated the store, the restaurant, and the return to the store. Accordingly, we find that the Respondent violated Section 8(a)(1) of the Act by monitoring the union activity of its employees on November 24, 1992, both inside its Westland store and inside the nearby Coney Island restaurant. n5

n5Contrary to the judge, we find that *CVN Companies, 301 NLRB 789 fn. 1 (1991),* supports finding a violation here. In that case, a manager sat next to an employee who was seated with other employees discussing the Union during their lunchbreak. The manager said: "This ought to be interesting because the Union lady is going to talk." The Board found that the manager, by his words and actions, was actually monitoring the union activities of the employee. Similarly, in this case, the Respondent's managers engaged in a course of conduct that demonstrated their intent to monitor the union activities of employees Mary Schultz, Joel Nelson, and Mary Grab. The management group did not simply follow the employees while they were in the company of union organizers, Vernida Stanton and Irene Kowal, on the Respondent's premises. The managers' conduct commenced when they let the employees know that they were aware of their presence and that their associating with the organizers was unwelcome. Next, the group of five or six managers closely followed the employee group as it moved though the store prior to the rendezvous with Grab and afterwards as it moved from the store to the nearby Coney Island restaurant. At the restaurant, the managers seated themselves where they could observe the employees. Then the monitoring persisted as some of the managers followed the employee group back to the store after lunch. This was no mere incidental observance of Schultz, Nelson, and Grab coincidental with lawful observatin of Stanton and Kowal on the Respondent's premises. Rather, the group of managers, by their actions and words from the beginning inside the Respondent's store to the end back at the Respondent's premises, made it plain that they intended to monitor the union activity of the Respondent's employees. This conduct violates Sec. 8(a)(1) of the Act.

[*87] [**10] ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Department Store, Division of Dayton Hudson Corporation, Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(e).

"(e) Engaging in surveillance of employees because of their union activities both inside the Respondent's Westland Mall store and inside the nearby Coney Island restaurant."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. January 23, 1995

Margaret A. Browning, Member

Charles I. Cohen, Member

John C. Truesdale, Member

NATIONAL LABOR RELATIONS BOARD

ALJ-DECISION:

[*87] DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. This case was heard at Detroit, Michigan, on September 27 and 28, 1993. The charge was filed on January 21, 1993, by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO (the Union). The complaint, which issued on March 30, 1993, alleges that Department Store, [**11] Division of Dayton Hudson Corporation (Respondent or the Company) n1 violated Section 8(a)(1) of the National Labor Relations Act (the Act). The gravamen of the complaint is that the Company allegedly engaged in various acts of unlawful interference, restraint, and coercion, includint threates of reprisal, surveillance of union supporters, and overly broad or discriminatory enforcement of no-soliciatation and no-access rules

n1 The caption has been amended to reflect Respondent's correct name.

The Company's answer denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. The General Counsel, the Union, and the Company each filed a brief.

All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. On the entire record in this case, n2 and from my observation of the demeanor of the witnesses, and having considered the briefs submitted by the parties, I make the following

n2 Certain errors in the official transcript of proceedings are noted and corrected.

FINDINGS OF FACT

I. [**12] THE BUSINESS OF RESPONDENT

The Company, a corporation, with its headquarters in Southfield, Michigan, is engaged in the operation of retail department stores. The Company's Westland Mall store in Westland, Michigan, and Eastland Mall store in Harper Woods, Michigan, are the only facilities involved in this proceeding. In the operation of its business, the Company annually derives gross revenues in excess of $ 500,000, and annually [*88] purchases and receives at its Michigan stores goods valued in excess of $ 50,000 directly from points outside of Michigan. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

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

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

In late 1989 the Union commenced an organizational campaign among the employees of the Company's stores in the Detroit Metropolitan area. On May 11, 1990, pursuant to the Union's petition (Case 7-RC-19227), the Board

conducted a representation election at the Westland store. Among approximately 537 eligible voters, 274 voted [**13] for the Union and 179 against. The Company filed timely objections to the conduct of the election. Following a hearing, the hearing officer recommended that the objections be overruled. The Company filed exceptions to the hearing officer's report and recommendation. On December 26, 1990, the Board issued its decision, adopting the hearing officer's findings and certifying the Union as bargaining representative.

The Union requested bargaining, but the Company refused. The Union filed an unfair labor practice charge, the General Counsel issued a complaint, and on May 15, 1991, the Board issued a Decision and Order directing the Company to bargain *(302 NLRB 982)*. Subsequently the Company filed a motion to reopen the record based on newly discovered evidence. The Board denied the motion. The Company petitioned for review to the Sixth Circuit Court of Appeals, and the Board filed a cross-petition for enforcement.

On March 1, 1993, the court of appeals remanded the case to the Board to reconsider part of the Company's arguments in light of a previous holding by the court, and for further hearing with respect to another allegation. The Board accepted the remand, but to my knowledge [**14] has not yet otherwise acted in the matter.

Meanwhile, following the Board certification, the Union established its Local 3500 for the Westland unit, and in early 1991 conducted elections for union offices. Employee Mary Grab is the Local's president. For its part the Company seeks and anticipates a new election. Store Manager Mike Gilligan has periodically mailed antiunion literature to the store employees.

The Board also conducted representation elections at the Company's Pontiac and Fairlane Mall stores. The Pontiac election conducted on October 12, 1990, resulted in 157 votes for the Union and 187 against. The Union filed timely objections to the election. Following a hearing, the Board's hearing officer issued a report and recommendations, finding merit in two objections, specifically, that the Company granted raises to 10 employees in order to influence the election, and threatened loss of retirement benefits if the Union won the election. The Regional Director scheduled a second election, but the Union subsequently withdrew its election petition. Unfair labor practice charges filed by the Union resulted in a settlement agreement.

At Fairlane Mall, the Union won an [**15] election conducted on April 12, 1991. However the election was set aside on the basis of an objection filed by the Company. The Regional Director scheduled a second election. The Union lost the second election. The Union filed objections and unfair labor practice charges. The parties agreed to a third election, but the Union subsequently withdrew its election petition, opting to proceed instead on its unfair labor practice charges. The General Counsel issued a consolidated complaint, and the allegations were heard by Administrative Law Judge Irwin Socoloff in a 7-day hearing in April and June 1993. Briefs were submitted in September 1993, and the matter is pending decision by Judge Socoloff.

The present allegations before me must be decided on the basis of the evidence adduced in the present hearing. The findings of a hearing officer in a (nonadversarial) proceeding on objections to an election do not constitute Board precedent. That is particularly true where, as in the Pontiac representation proceeding, the Union withdrew its election petition, thereby precluding Board review of the matter. Therefore, the hearing officer's findings cannot be considered as evidence in [**16] this proceeding. It would also be inappropriate for me to consider any or all the evidence adduced in the Fairlane Mall matter. Indeed, it would not be possible for me to make findings on those allegations, as unlike Judge Socoloff, I did not hear the witnesses. If the Union wanted the present case to be considered together with the Fairlane Mall allegations, then the Union could have filed a timely motion with the Board's Regional Director to consolidate the cases for hearing. (As indicated, the present complaint issued prior to commencement of the hearing before Judge Socoloff.) However, the Union chose not to do so.

B. *The Present Allegations*

1. Alleged order to remove union buttons

The complaint alleges that about January 16, 1993, the Company, by its agent, Bob Ivan, ordered employees to remove buttons denoting support for the Union. n3 This is the only allegation involving the Eastland Mall store.

n3 All dates herein pertain to the period from July 1, 1992, through June 30, 1993, unless otherwise indicated.

Mary Kay Freeman is clerical assistant in the design studio at the Eastland Mall store. On January 16 she was at work at the front reception desk. Freeman [**17] was wearing a button which proclaimed: "Just say yes to peace." The Union provided these buttons to its supporters in response to "just say no" buttons worn by company managers as an expression of opposition to unionization. Freeman testified in sum as follows: Store Manager Vince Giacobbe told her it was a union button, and made a clucking sound. Freeman acknowledged that it was a union button. About 4 days later Freeman's supervisor, Design Studio Manager Bob Ivan, came by and, seeing the button, told her to take it off. Freeman refused. Some 20 minutes later Ivan came by again and said: "I told you to take this button off." Freeman again refused. About this time an employee walked by wearing a "just say no" button. Freeman remarked that when "Carl from display" took his button off, "then we'll talk about taking my button off." Ivan replied: "Point taken."

[*89] Freeman was the only witness to testify concerning the above incidents. As a general rule, employees have a statutorily protected right to wear union insignia at work. An employer rule prohibiting employees from wearing union emblems while at work violates Section 8(a)(1), absent evidence that special circumstances make [**18] the rule necessary to maintain production and discipline. *Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945)*: The employer has the burden of presenting evidence which demonstrates such circumstances. *Mack's Supermarkets, 288 NLRB 1082, 1098 (1988)*. Moreover, an employer violates the Act by enforcing even a facially valid rule in a discriminatory manner. *Uniontown Hospital Assn., 277 NLRB 1298 (1985)*.

In the present case, the Company failed to allege even the existence of a rule prohibiting the wearing of buttons or other insignia at work, let alone circumstances which would justify such a rule if it existed. Former employee Irene Kowal testified without contradiction that managers wore "just say no" buttons at work.

I credit the uncontradicted testimony of Freeman concerning her encounters with Managers Giacobbe and Ivan. I do not agree with the Company's argument (Br. 18) that Freeman was engaged in a voluntary discussion or debate with her supervisors concerning the merits of unionization. Manager Ivan twice ordered Freeman to remove her button. Freeman risked disciplinary action by invoking her statutory right and refusing his order. Freeman escaped such [**19] action only because she was fortuitously able to demonstrate the blatantly discriminatory nature of Ivan's action, i.e., that the Company permitted its personnel to wear antiunion buttons at work. Other union adherents might not have been so bold, or lucky. The Company interfered with Freeman's statutory right, and did so in a discriminatory manner. The Company thereby violated Section 8(a)(1) of the Act. See *NLRB v. Schwan's Sales Enterprises, 687 F.2d 163 (6th Cir. 1982)*. I further find that the incident may be considered as evidence of company discriminatory motivation in connection with other alleged unfair labor practices in this case.

2. Written warning to Nancy Kluska

The complaint alleges that about October 28, 1992, the Company by its agent, Linda Greene, engaged in overly broad enforcement of its no-distribution rule by issuing a written warning to employee Nancy Kluska because of her distribution activities on behalf of the Union.

The Company has a written no-distribution policy which states that: "No distribution of literature, pamphlets, documents or other materials, except for the annual United Way Drive, is permitted during working time and no distribution [**20] of any sort is permitted in any working area, at any time." Copies of the rule (and the Company's no-solicitation policy) are posted throughout the Westland Mall store: two in the locker room, two in the employee lounge, one in the store's public restaurant, one in the human resource office, and one on the lower level.

Nancy Kluska has been a company employee at the Westland Mall store for 15 years. Kluska testified in sum as follows: At about 9 a.m. on October 28 she was distributing union fliers in the employee locker room. She overheard security personnel talking about shortages in registers. Kluska was curious, and stepped into the adjacent aisleway to join their conversation. The aisleway is located at the north end of the store. The store does not open to the public until 10 a.m., and consequently only company personnel would be coming through the aisleway at that time. Company personnel from other stores were coming in, apparently for a meeting (unlike store employees, they signed in as they entered). The aisleway is adjacent to the security office and package pickup area. The only employees at work in those areas were employees engaged in "loss prevention."

Kluska [**21] further testified in sum as follows: Company President Dennis Toffolo entered the store through the aisleway. Kluska handed him a union flier, which he dropped to the floor. At the time Kluska was about three steps into the aisleway from the locker room. Some 3 to 4 minutes later, Company Personnel Manager Linda Greene approached Kluska. Green told Kluska: "You have to pass those out in the locker room. You can't pass them out in the hallway." Kluska returned to the locker room. In the interim between the arrivals of Toffolo and Greene, Kluska did not distribute

any fliers. No store employees entered during that time, and Kluska did not distribute the fliers to nonstore personnel other than Toffolo. It is undisputed that about noon on October 28 Green summoned Kluska to the personnel office, where she issued Kluska a written warning for violating the Company's "solicitation policy" by "standing in our Package Pickup area distributing a union handout." Kluska did not testify as to what if anything she said to Greene.

Employee and Local Union President Mary Grab testified in sum as follows: The Union understood that literature could be distributed in the locker room, but not [**22] in the aisleway described by Kluska, as that was considered a work area. About 2 weeks after the Kluska incident, Grab was leaving work at about 5:15 p.m. She saw employee Mary Alice Simpson distributing antiunion literature by the wall opposite the package pickup window. Simpson was about four steps from the locker room door. The store was open and the area was open to the public. Security personnel and managers (who Grab could not identify) were present. Grab told Simpson that she could not stand there and leaflet. Simpson answered that she was not on the clock. Grab referred to the Kluska writeup, and told Simpson she should go outside or into the locker room. Simpson initially ignored Grab's admonition, but moved to the locker room when Grab began writing on a notepad.

Personnel Manager Greene testified in sum as follows: At about 9:30 a.m. on October 28, pursuant to her usual practice, she headed for the employee entrance to greet employees as they arrived. The security office, and later Toffolo, told her that Kluska was in the aisleway. Greene observed Kluska with fliers in her hand. Greene told her: "Nancy, you know the rules. You need to be inside the locker [**23] room." Kluska answered that she knew, and went into the locker room. Later Greene summoned Kluska to the personnel office to discuss the Company's solicitation policy. Kluska said she knew the policy. Greene gave Kluska the written warning because Kluska knew the policy, and because the aisleway, although not a work area, was part of the selling floor. (The Company's "solicitation policy" expressly prohibits solicitation "on a selling floor at any time during store hours.") There could have been customers in the area, because beauty parlor customers come through that area at 9 a.m. for their appointments. However, Greene was not aware of any customers in the area at that time.

[*90] Greene further testified in sum as follows: Some time after the Kluska incident, employee Simpson came to see Greene. Simpson was upset because Grab told her to go to the locker room. Simpson, a known "vote no person" was distributing procompany fliers in the package pickup area at about 5 p.m. Greene told Simpson that Grab was correct. Greene instructed Simpson to be careful and to tell the rest of the "vote no" committee to remain in the locker room or employee lounge, or Greene would issue them a [**24] written warning. Greene testified at one point that she did not give Simpson a written warning because she did not know the policy, and at another point that Simpson did not understand about "non-working area." However, Greene conceded in her testimony that the "vote no" employees: "knew the policy. That they had a clear understanding of where the employee areas were. It's the locker room and the lounge or outside the building." Greene also conceded that Simpson worked at the Westland Mall store for over 25 years, and probably saw the posted notice.

As a general rule, an employer may, in a nondiscriminatory manner, promulgate or enforce a rule prohibiting distribution of literature in working areas. An employer engaged in operation of a retail store, may, in a nondiscriminatory manner, also promulgate or enforce a rule prohibiting solicitation on its selling floors. *Stoddard-Quirk Mfg. Co., 138 NLRB 615 fn. 4 (1962).* However, an employer violates the Act by maintaining, enforcing, or applying such rules in a discriminatory manner, e.g., in such a manner as to favor antiunion employees over union adherents. *Blue Bird Body Co., 251 NLRB 1481, 1485 (1980),* enfd. *677 F.2d* [**25] *112*(T) (5th Cir. 1982); *Federated Dept. Stores, 241 NLRB 240, 246 (1979).*

I find for two reasons that the Company violated Section 8(a)(1) and (3) by issuing a written warning to Kluska. First, the Company's posted solicitation and distribution policy, on its face, did not prohibit distribution of literature in the aisleway area prior to 10 a.m. As indicated, the "distribution policy" prohibited "distribution of any sort . . . in any working area." However, Personnel Manager Greene testified that the aisleway was not a working area. Therefore, by Greene's own definition, the policy did not prohibit distribution in that area. Indeed, when Greene issued a written warning to Kluska, she invoked the "solicitation" rather than the "distribution" policy. The "solicitation" policy prohibited solicitation "on a selling floor at any time during store hours." Greene testified that the aisleway was part of the selling floor in that it was adjacent to the young men's department. However, the store generally, including the young men's department, was not open to the public until 10 a.m. Therefore, the posted policies purported to permit employees to engage in distribution in the aisleway [**26] prior to 10 a.m. Nevertheless, the Company disciplined Kluska for engaging in what, in the absence of valid restriction, constituted a protected statutory right.

Second, the Company enforced its rule, as interpreted by Greene, in a discriminatory manner, by issuing a written warning to Kluska for engaging in union distribution, but refusing to discipline Simpson for engaging in antiunion distribution in the same area. Greene's assertion that Simpson was not familiar with the Company's policy, or interpretation of that policy, is incredible. As indicated, Greene testified, that the "vote no" committee, which included Simpson, knew perfectly well that distribution was permitted only in the locker room, employee lounge or outside the building. Nevertheless, Greene gave Kluska a written warning for giving Company President Toffolo a handbill before store hours, but did not discipline Simpson, who distributed antiunion literature in the aisleway when the store was open. I have also taken into consideration the Company's conduct toward Mary Freeman, indicating a predisposition to discriminate in favor of union opponents and against union adherents. In sum, the Company "disparately [**27] and discriminatorily applied (its rule) against union-advocating employees in violation of the Act." *Federated Dept. Stores, 241 NLRB at 246.*

3. Alleged disparate enforcement of no-solicitation rule

The complaint alleges that in late September, the Company, by manager of Petites and Updates, Jackie Borman, disparately enforced the Company's no-solicitation rule by ordering employee union supporters on break not to talk to other employees on break, and to leave a public area of the store.

Jacqueline Garner was employed at the Westland Mall store for 16 years, until October 3, 1992, when she opted to take severance rather than transfer to sales, when her job as design assistant clerical was eliminated. Garner was a known union supporter and member of the Union's bargaining committee. She participated in demonstrations, distributed union literature, and her name appeared on such literature. Garner testified in sum as follows: One day in late September, she met employee Joyce Speen in the lunchroom, located on the second floor of the store. Speen worked in the dress department, also located on the second floor. Both employees were on their break. They left together to return [**28] to work, walking to the elevator, as Garner was taking inventory in the furniture department on the lower level. They were standing and conversing in an aisleway by the elevator, when Manager Borman came "charging" up to them. Borman was neither employee's supervisor. Borman told Garner: "I want you off this floor and I want you to leave these employees alone." Speen protested that they were not talking about the Union, but "this is a personal matter." Borman replied: "I don't care what you are talking about; I want you [Garner] off this floor." At the time, Garner and Speen were both still on their break.

Manager Borman was not presented as a witness in this proceeding. Freeman was the only witness to testify concerning the incident. However Garner and present or former employees Joel Nelson, Nancy Kluska, and Irene Kowal testified in sum, without contradiction, that the Company had no policy prohibiting employees from talking to each other when on break, or at work when they were not busy, or restricting them to their assigned areas when they were on break.

In light of this unexplained deviation from company policy, company knowledge of Garner as a leading union adherent, [**29] and evidence herein discussed, demonstrating a company tendency to discriminate against union adherents, I find that the General Counsel presented a prima facie case that Manager Borman ordered Garner off the second floor, and to refrain from talking to employees on that floor, because of her union activity. I would not characterize Borman's action as enforcement of a no-solicitation rule. Garner was not engaged in union solicitation, Speen so informed Borman, and [*91] Borman asserted that she did not care what they were talking about. However, it is an unfair labor practice for an employer to discriminatorily impose restrictions at work upon the movements and talking of known union adherents, regardless of whether such movements or talking involves union activity. *Southwire Co., 277 NLRB 377, 389-390 (1985),* enfd. *820 F.2d 453, 464 (D.C. Cir. 1987); Jennie-O Foods, 301 NLRB 305, 316 (1991).* By imposing such restrictions on Garner, the Company violated Section 8(a)(1) of the Act.

4. Alleged disparate enforcement of no-access rule

The complaint alleges that about October 20, the Company, by its agent Bill Valentino, disparately enforced the Company's no-access rule by ordering [**30] a former employee who was a guest of current employee union supporters to leave the employee lunchroom.

The Company maintains an employee "lunchroom" on the second floor of the Westland Mall store. The lunchroom does not provide cafeteria service, but contains vending machines, and employees may bring food into the lunchroom. Other Company stores have similar lunchrooms. An "Employees Only" sign is posted at the entrance to the Westland Mall lunchroom. The lunchroom, like those at other company stores, is not open to the general public. However, present and former employees Garner, Kluska, Grab, and Kowal, and also Nelson with respect to the Company's

Northwood and Briarwood stores, testified in sum that the Company has always permitted friends and relatives of employees in the lunchroom. In particular, Mary Grab testified that after the incident which is the subject of this allegation, she saw former (retired) employee Jane Powell in the Westland Mall employee lunchroom. Although Store Manager Gilligan, Company Official Mike Hyter, and security personnel were present, Powell was permitted to remain in the lunchroom. The employee witnesses testified in sum that (except with [**31] respect to the incident which is the subject of this allegation), they never saw anyone escorted from the lunchroom because they did not belong there. William Valentino, who was manager for men's tailored, shoes, and luggage at the Westland Mall store from June 1992 to March 1993, and the Company's only witness concerning this matter, testified that he never (other than the incident in question) saw nonemployees in the employee lunchroom. However he also testified that he seldom ate in the lunchroom, and he did not deny the testimony of the General Counsel's witnesses to the effect that friends and relatives of employees used the lunchroom.

Jacqueline Garner, who left her employment on October 3, went to the Westland Mall store on October 20 to pick up her last paycheck and make a credit union deposit. She saw Joyce Speen, who invited her to join Speen in the employee lunchroom. They sat down at a table with other employees, including Mary Grab. Garner and Grab testified in sum as follows: Manager Valentino and two company security guards came into the lunchroom. Valentino told Garner that she had to leave, Garner asked why. Valentino answered: "You no longer work here." Garner [**32] asked: "Aren't friends and relatives allowed in the lunchroom?" Valentino answered: "No." Garner asked: "Since when?" Valentino replied: "Since you walked in 10 minutes ago." Garner got up and left.

Manager Valentino testified in sum as follows: He knew Garner, and knew her to be a union supporter. He saw Garner enter the employee lounge (lunchroom) with Grab and other employees. Valentino called the Company's executive office and asked the secretary who answered the phone whether a nonemployee could use the employee lounge. The secretary answered: "No." Valentino explained that Garner was in the lounge having lunch with Mary Grab. The secretary told Valentino to tell Garner that she could not stay there. Valentino went into the lounge. A security officer joined him. Valentino told Garner that the lounge was for employees only, and she had to leave. Garner asked: "Oh, I do?", Valentino answered: "Yeah, that's our policy to my knowledge." Grab remarked that she did not know that Garner could not stay. Valentino did not answer her, and Garner left. Valentino did not make any remark to the effect that this was the policy since Garner walked in.

I credit the substantially [**33] uncontroverted testimony of the General Counsel's witnesses to the effect that the Company normally permitted friends and relatives, including former employees, to join employees in the employee lounge-lunchroom. Therefore, it is unnecessary to decide whether Valentino impliedly admitted to such a policy. I find that the Company evicted Jacqueline Garner from the employee lunchroom because she was a known union activist. I agree with the Company's assertion (Br. 17) that as of October 20, Garner was no longer an "employee," and consequently not directly entitled to the protection of the Act with respect to this matter. However, the Company's practice of permitting guests of employees to use the lunchroom-lounge was a privilege which inured to the benefit of the store employees, i.e., a benefit of their employment. Here, the Company discriminated against store employees by excluding their guest from the lunchroom because that guest happened to be a union activist. The Company thereby discriminatorily denied its employees a benefit of their employment in order to discourage union activity, and violated Section 8(a)(1) of the Act.

5. Alleged surveillance and related allegations [**34] involving only store employees

The complaint alleges that about November 15, the Company by then Market Place Department Manager Belinda Rholader, engaged in coercive surveillance of employee union supporters by following them and monitoring their conversations.

Employee Mary Ann Flowers worked as a sales consultant in the Market Place (kitchenware department) at the Westland Mall store. Flowers, a known union supporter who always wore a prounion button at work, was chairman of the Union's local bargaining committee. Flowers testified in sum as follows: One day in November the Union was holding a "demonstration" outside the store. Flowers was at work, but employee Carmen Schrader, who was off that day, participated in the demonstration. Flowers went to a restroom located on the third floor (where both Flowers and Schrader worked). There she met Schrader, who came into the restroom to warm her hands. They conversed. Meanwhile Rholader, Flowers' supervisor, followed Flowers to the restroom and stood in the middle of the floor while Flowers and Schrader talked for about 2 or 3 minutes. The employees did not discuss the Union, and Rholader said nothing.

Flowers was the only [**35] witness to testify concerning the alleged incident. Personnel Manager Greene testified that [*92] Rholader left the Company's employ about 6 months before the present hearing, and Greene did not know her whereabouts.

The complaint further alleges that about November 28, the Company, by Women's Shoe Department Manager Jay Clothier, engaged in coercive surveillance of employee union supporters by interrupting their conversations, asking what they were talking about and monitoring their conversations.

Nancy Kluska is union recording secretary, wears a union button at work, and, as indicated, distributes union literature. Kluska testified in sum as follows: About November 29 she was on her way to work in the men's fragrances department, located on the first floor. She stopped in the shoe department (also on the first floor), to give her friend Joyce Zelleck a check. Zelleck was at work, and customers were in the area, but Zelleck was not busy. They talked briefly. Department Manager Clothier came up to them and said to Kluska: "I'm going to have to put a badge on you and let you work in my department." Kluska responded: "That's all right. At least I'd show up every day." Clothier remained [**36] with the employees until Kluska left to report to her department. Clothier walked with her almost until she reached the men's fragrances department.

Kluska was the only witness to testify concerning the alleged incident. Manager Clothier was not presented as a witness in this proceeding. However, Manager Valentino testified that he was under instructions, both with respect to employee union adherents and "vote no" committee members, that if they were on break he should do "absolutely nothing as long as they're not bothering anybody who is on company time," but "if they are out of their area on company time, you ask them to go back to their area." Manager Frank Kruse testified to the same effect.

As a general rule, an employer may lawfully engage in surveillance of its employees at their work stations. Working time is for work, and the employer has the right to observe their work or to determine whether they are performing that work. However, the employer cannot engage in such surveillance for unlawful reasons, e.g., in reprisal for the employee's union activities, or for the purpose of obtaining pretextural grounds for disciplining the employee in reprisal for such union activities. [**37] See *Brown & Root-Northrop, 174 NLRB 1048, 1058 (1969).*

In the present case, as indicated, the General Counsel's witnesses credibly testified that the Company had no policy prohibiting employees from talking to each other when on break, or at work when they were not busy, or restricting them to their assigned areas when they were on break. With regard to the Flowers incident, employee Schrader was not at work, and Flowers was taking her break, when Manager Rholader followed Flowers into the restroom. The Company offered no explanation as to why Rholader would follow Flowers into the restroom, and then stand conspicuously in the middle of the restroom throughout the conversation between the two employees. As to the Kluska incident, Zelleck was at work, although Kluska had not yet reported to work. However, Zelleck was not busy. Therefore, under usual company practice, Clothier would not have objected to their conversation. It is also significant that Clothier said nothing to Zelleck. Instead, he addressed his remark to Kluska, and proceeded to follow her to her department. As indicated by the Garner-Borman incident. The Company sought to restrict and impede contact between [**38] leading union adherents and other employees. Flowers and Kluska, like Garner, were leading union activists. I find that the Company engaged in surveillance of Flowers' and Kluska's movements and conversations because of their role as leading union activists, and to intimidate them from contacts with other employees. The Company thereby violated Section 8(a)(1) of the Act.

6. Alleged urveillance involving employees and nonemployee union representatives

The complaint alleges that about October 5, the Company, by Department Managers Frank Kruse, Tony Seymour, Peggy Horn, and Jackie Borman, followed and engaged in coercive surveillance of employee union supporters who were on their breaktime in the Westland Mall.

The operative facts concerning this occurrence are undisputed. Jacqueline Garner and Mary Grab testified in sum as follows: On Monday, October 5, Garner (by then a former employee), employees Grab and Flowers, and union official, Bob King, and retiring union official, Ray Westphal (both nonemployees) walked together through the Westland Mall store during store hours. Grab and Flowers were on their breaktime. Westphal had been honored with a plaque upon his retirement. [**39] The purpose of this procession was to show the plaque to employees who had not previously seen it. The procession lasted for 30 to 40 minutes. The group approached employees who were at work, but not busy. They did not approach any employee with a customer. This procession was closely followed by another procession consisting of six or seven managerial personnel, including Kruse, Seymour, Horn, and Borman. During their walk, the managers made nonthreatening remarks to the nonemployees, but did not attempt to prohibit the union group

from engaging in their activity. The union people sometimes responded with their own remarks. Seymour told Westphal: "You're a nothing little man and people just tolerate you." Kruse asked Garner if she was working for the Union. Garner asked Seymour why the managers were following them. Seymour answered: "We are not going to let happen this time what happened the first time. We were not prepared for the first election. This time we will be prepared."

The Company's witnesses did not testify concerning this incident. However, Managers Kruse and Valentino testified in sum that they were under instructions, with respect to nonemployee union [**40] people, to give them excellent customer service, but walk with them to make sure they did not harass employees.

The Company by its action did not violate the Act. First, three of the five union people who walked through the store were nonemployees, including two union officials. The Company was privileged to engage in surveillance of these persons while they were on store premises. The Company cannot be faulted if two employees chose to join this group, as observance of the employees was "merely incidental" to "lawful surveillance" of the union officials. *Crowley, Milner & Co., 216 NLRB 443 (1975).* Second, the procession of union people through the store during business hours constituted in reality a "demonstration," no less than a picket line or handbill distribution. This was not an instance of a conversation between a union organizer and employee adherent. Rather, a group of five union officials and adherents paraded through the store, displaying a plaque, and seeking to [*93] enlist the support or sympathy of employees who were on their worktime and at their work stations. The Company had a right to observe such open union activity, and as it did in substance, stage its [**41] own counterdemonstration. Remarks were directed only at the nonemployees. The managers did not threaten, question, or even initiate conversations with the two employees. "Union representatives and employees who choose to engage in their union activities at the employer's premises should have no cause to complain that management observes them." *Adams Super Markets, 274 NLRB 1334 (1985).* Therefore, I am recommending that this allegation be dismissed.

The complaint further alleges that about November 20, the Company, by Managers Bill Valentino and Janice Heffernan, engaged in coercive surveillance of employee union supporters by following them in the Westland Mall and monitoring their activities while they were in the Mall Coney Island restaurant.

The General Counsel presented four witnesses concerning this alleged incident: Mary Schultz was employed at the Company's Fairlane store; Joel Nelson worked at the Briarwood store; Mary Grab, as indicated, worked at Westland Mall. Irene Kowal previously worked at the Westland Mall store for 25 years, retired, and since 1991 has worked for the Union as an organizer. Vernida Stanton, who was not called as a witness, is also a former [**42] company employee who as of November 1992 was working as an organizer for the Union.

Mary Schultz testified in sum as follows: November 24 was her day off. She went with Stanton to visit Mary Grab and other friends at the Westland Mall store. Schultz was wearing a union button. They went first to the cosmetics department to see employee Barb Adams, who was at work. Adams and the department manager, who both previously worked at Fairlane, greeted Schultz. Three or four managers stood nearby, watching as the four exchanged greetings and briefly conversed. Schultz and Stanton then went to see Grab. Joel Nelson came by, as did a manager. All four walked in the same direction. The manager called Nelson by name, but he did not answer. Schultz, Stanton, and Nelson went down the escalator, and Schultz and Stanton met Irene Kowal. Schultz, Stanton, and Kowal went through the furniture department, and Nelson went elsewhere. Three or four managers, including Greene, Kruse, and Heffernan, followed them. When Schultz, Stanton, and Kowal reached the carpeting department, Mary Grab was on the telephone. Manager Greene asked Schultz what they were doing there. Schultz answered that [**43] they were waiting to go to lunch with Grab. Greene replied that since they were not shopping, she would have Grab meet them, and suggested that they leave. Schultz and her companions chose to remain. There was a conversation between the managers, Kowal and Stanton. When Grab appeared ready to leave for lunch, Schultz, Kowal, and Stanton left the store.

Joel Nelson testified in sum as follows: On November 24 he went to the Westland Mall store to meet Mary Grab for lunch. Nelson had participated in leafleting and other union activities, and was wearing a union "peace" button that day. At the main store entrance he met Kowal, Schultz, and Stanton, and invited them to join him and Grab for lunch. They entered the store. About halfway down the main aisle, Manager Valentino, walking in front of Nelson, spoke into a portable telephone: "Get hold of Janice Heffernan. Joel Nelson is in the store." Nelson remarked: "Say hi to Janice for me." Nelson went down the escalator, and his companions followed. Meanwhile, Manager Heffernan, who was Nelson's former manager at the Briarwood store, repeatedly yelled his name. On the floor below, Heffernan asked why he didn't stop, what he was [**44] doing in the store, and suggested he visit her. Nelson replied that he was on the escalator, and that he was in the store to meet Grab for lunch. When Nelson reached the carpeting department, Grab was

busy with a customer. Nelson walked around the furniture department. Meanwhile, four managers, including Valentino, followed Nelson's companions, who were following Nelson. There was "verbiage going on" and "it was a chaotic scene." When Grab finished her transaction, the others left the store to go to lunch.

Mary Grab testified in sum as follows: She arranged to meet Nelson for lunch. When he arrived at the carpeting department, she was on the telephone, handling a customer is problem. When she got off the phone she went to the office to fax pertinent information to the customer. She returned to the department. Manager Kruse asked her some questions, which she answered. Grab told Kruse that she was going to lunch, and then went to join the others.

Irene Kowal testified in sum as follows: On the day in question she went to the Westland Mall store to attend an informal luncheon of retired employees in the store's public cafeteria. She met Stanton and Schultz, and agreed to [**45] join them for coffee after the retirees luncheon. They waited in the store, but Kowal got separated from the others, and walked toward the carpeting department, where she saw Nelson, Stanton, Schultz, and two retirees who were to attend the retirees luncheon, Shirley Giles and Jackie Del Greco (Del Greco was a retired employee, and Giles was a "retirement plus" employee who could work part time). Kowal, Giles and Del Greco took Schultz on a tour of the furniture department. A group of five or six managers stood nearby. Manager Greene asked Kowal if she was going to buy anything. Kowal answered that she was just looking. Greene told her she had to leave. Kowal refused, and the four continued looking. Corporate Human Resource Official Hank Bechard told Kowal: "You better leave right now. I know what you're doing," explaining "you're organizing." Kowal responded that the store was organized, and refused Bechard's order to leave. Eventually everyone moved to the main aisle of the lower level -- the union group and the management group. By this time there were six managers in the latter group. Manager Valentino accused Kowal of harassing employees, and Kowal denied the accusation. [**46] The managers continued to make remarks to Kowal, e.g., that there would be no bargaining order, and how the Company dealt a blow to the Union by promoting a leading union adherent to a management position. The union group then proceeded out the store.

The foregoing is the substance of what might be described as phase 1 of the sequence of events which occurred on November 24. With regard to phase 2, the General Counsel's witnesses testified in sum as follows: The union group proceeded out the store, followed by the management group. The union group headed for lunch at the Coney Island restaurant, which is located within Westland Mall. The management group continued to follow them. It was now about 2:30 [*94] p.m. The union group sat down at a booth in the Coney Island. The managers took a booth across the aisle and a few booths down from them. Both groups remained for about 40 minutes, but Heffernan and at least one other manager left earlier. The managers were eating and drinking. They were not close enough to the union group to hear their conversation. When the union group left, the remaining managers, including Valentino, followed them. (Nelson testified that Valentino was [**47] talking on his portable phone.) When the union group reached the store, they dispersed.

Mary Schultz further testified in sum as follows: She went back into the store, accompanied by Stanton, in order to visit a friend in the women's clothing department on the first floor. A manager wearing a "No" button asked them if they needed help. They said they were just looking. The manager said, "Fine," and they left shortly thereafter. Irene Kowal further testified in sum as follows: She went back into the store with Giles and Del Greco, and headed for the decorating department on the third floor. Managers Kruse and Valentino followed them. The managers made insulting comments, like referring to old ladies who had nothing to do but walk around the store. The managers said they could follow them all day, because they were paid to do this. Kowal did not make any comment about Valentino's bald head.

Managers Kruse and Valentino testified concerning the events of November 24, although not in the same detail as the General Counsel's witnesses. Kruse and Valentino testified in sum as follows: They followed Kluska through the store, pursuant to company policy to stick with union organizers [**48] to make sure they did not harass employees. There was bantering going back and forth, and "a lot of laughing and kidding." Most of the comments were between Valentino and Kowal. Valentino asked Kowal why she called Laura Daly at home and harassed her (Daly was the union activist who was promoted to a management position). Kowal remarked that Valentino was funny because his hair must have grown on the inside of his head and tickled his brain. Valentino retorted with a remark that "nice retired old ladies like you have nothing better to do than to come in here and bother our consultants." Valentino further testified in sum as follows: He saw Joel Nelson enter the store, and subsequently saw Manager Heffernan talking to him. Heffernan asked him how he was doing. (Heffernan subsequently left the Company's employ and presently lives in Florida.) Valentino carries a cordless phone because he has no office, but its range does not carry beyond the store. He was in the Coney Island restaurant that day, possibly with other managers, and possibly at the same time as the union group. However, he usually goes to the Coney Island for his break or lunch. (Valentino and Manager Greene testified [**49] in sum that although there are four restaurants outside the store in the Mall, most company personnel, including

employees and managers, prefer the Coney Island.) None of the Company's witnesses, in their testimony, denied intentionally following the union group to the Coney Island.

I find that the testimony of the General Counsel and company witnesses together reflects the substance of what transpired on November 24. Corporate official, Bechard, was correct in what he told organizer Kowal. It is evident that as on October 5, the Union engaged in a show of strength and effort to enlist the support of employees at work, by parading through the store during store hours. The General Counsel witnesses' testimony concerning the remarkable set of coincidences which allegedly brought union organizers and supporters together in the store, strains credulity. As indicated Nelson testified that he met Kowal, Schultz, and Stanton at the main store entrance. Nelson thereby contradicted Schultz' assertion that she and Stanton happened to meet Kowal in the store. I find incredible Kowal's assertion that she, Giles, and Del Greco took Schultz on a tour of the furniture department. Schultz [**50] testified that she visited the Westland Mall store six to eight times during the preceding year, and sometimes shopped there. It is evident that she did not need an escort to show her around. Kowal, in her testimony, never indicated that she actually attended the alleged luncheon of retirees.

I find, for the reasons discussed in connection with the events of October 5, that the Company was lawfully entitled to and did in fact engage in surveillance of nonemployee union organizers who engaged in a union demonstration in the store. As on October 5, the managers addressed their remarks to the nonstore employees (principally Kowal). Therefore the present allegation is without merit, insofar as the complaint alleges that the Company engaged in coercive surveillance of employee union adherents in the store.

The managers' actions outside the store present a closer question. As indicated, the managers, in their testimony, did not deny that they followed the union group to the Coney Island restaurant. The inference is warranted, and I so find, that the managers continued to follow the union group pursuant to their instructions to stick with the union organizers. When the union group [**51] left the store, the organizers were no longer engaged in open union activity. However, I am not persuaded that the managers thereby either engaged in or created the impression of coercive surveillance. The managers did not seat themselves close to the union group, and it was obvious to the union group that the managers could not overhear their conversation. The testimony of company witnesses indicates that it was not unusual for managers and employees to be present at the same time in the Coney Island. In these circumstances, the managers did not by their "actions and words" indicate their "intention to observe at close range" the employees' "union activity i.e., to actually monitor" their "union activity." Compare, *CVN Companies, 301 NLRB 789 fn. 2 (1991),* enfd. *957 F.2d 911 (D.C. Cir. 1992).*

7. Alleged threats to Mary Grab

The complaint alleges that about October 1 and 10, the Company, by Manager Kruse, threatened employees with written warnings because of their support for or activities on behalf of the Union.

As indicated, Mary Grab worked in the carpeting department. Grab's husband Paul worked at Ford Motor Company, where he was a member of the Union. Paul Grab [**52] often came back to the store to pick up Mary after work. During the period in question he often wore a union jacket. The furniture department is near carpeting. The union campaign at Westland Mall began among the furniture department employees, but those employees eventually changed sides and became openly antiunion.

Mary Grab testified in sum as follows: In early October Manager Kruse, who was then her supervisor, summoned her to his office. Kruse told Grab it was reported to him that her [*95] husband was giving looks to people in the furniture department, and making noises at them. Kruse said it had to stop, that Mary Grab was responsible for her husband's actions during working hours, and if it continued, she would be written up. Grab told Kruse that she was not responsible for her husband's actions, and Kruse should discuss the matter with him. Several days later, Paul Grab was waiting in the store for his wife to finish work. Mary Grab introduced her husband to Kruse, "The handshake got tighter and tighter." (Paul Grab is bigger, although older than Kruse.) Paul asked Kruse if his smile was good enough. He told Kruse that if he did not like something that Paul did, he should [**53] discuss it with Paul, and not bring Mary into it. Kruse walked away and Paul Grab left. But 2 minutes later Kruse came back yelling, "He did it again!" Kruse told Mary Grab he would see her Monday morning. She responded that Kruse could talk to her lawyer.

Manager Kruse, the only other witness to testify concerning this matter, testified in sum as follows: Shortly after he was given managerial responsibilities, which included carpeting, a group of employees from the furniture department complained to him that they felt Paul Grab was harassing them. They said he snorted, grunted, coughed and would come up behind them and make rude noises. Kruse initially did nothing, but a few days later he received similar

complaints, e.g., that Paul Grab was making spitting sounds, and glaring and whistling at employees. Kruse also received a report that Paul Grab was in the office complex area, which is off the selling floor. Kruse summoned Mary Grab to his office, and expressed his concern about Paul's alleged behavior. Kruse told Mary that she was responsible for her husband's conduct when he was in the building. Mary said, "Fine," and that she was not aware of any problem. Kruse also [**54] told Mary she could not bring her husband into the office complex without a manager's approval (Mary Grab testified that Kruse raised this matter prior to the incidents in question). Kruse did not at any time threaten to give Mary Grab a verbal or written warning.

Kruse further testified in sum as follows: About a week later, as the store was closing, Paul Grab came and introduced himself. They shook hands. Grab asked Kruse whether his smile was good enough, and proceeded to squeeze Kruse's hand increasingly tightly. He told Kruse that it was not right for Kruse to talk to Mary about him, and warned him not to do it. Kruse pulled away and left for his office. Shortly thereafter, as Kruse returned to the selling floor, an employee told him, "He just did it again." (Paul Grab had just left.) Kruse told Mary Grab, who answered that she could not help that, and Kruse should deal with Paul. Kruse said they would talk about the matter. Mary Grab refused, saying that Kruse would talk to her attorney.

I find it unnecessary to resolve whether Kruse threatened to give Mary Grab a written warning. Assuming that he did so, his conduct would not, in the circumstances, constitute an [**55] unfair labor practice. Paul Grab was present in the store as a guest of employee, Mary Grab for the purpose of taking her home from work. Therefore Kruse could reasonably assert, as he did, that Mary Grab was responsible for her husband's behavior while he was in the store. At least, Kruse's decision to take this position did not rise to the level of an unfair labor practice. The evidence fails to indicate that Kruse would have acted differently if Mary Grab was not a leading union adherent. The General Counsel failed to present evidence that company policy or practices differed in any comparable situations. Therefore, I am recommending that this allegation of the complaint be dismissed.

8. Alleged threats of loss of benefits or other adverse consequences in the event of unionization

The complaint alleges that the Company, by Personnel Manager Greene: (1) about late summer, threatened employees with loss of benefits if the Company was required to negotiate with the Union, (2) about late August, threatened employees with loss of benefits and that everything would have to be renegotiated if the Company was required to bargain with the Union; and (3) about February 8, threatened [**56] employees with more onerous working conditions and that she would be less flexible if the Company and the Union reached agreement on a contract.

The Company has, in addition to a pension plan, a supplemental retirement and savings plan (SRSP) The Company's store employees (who as indicated are not covered by any collective-bargaining contract) are covered by the pension plan and are eligible to participate in SRSP.

Gloria Cooke works in the fashion jewelry department at the Westland Mall store. Cooke testified in sum as follows: In late summer Personnel Manager Greene came by her department and asked how she liked working at the Company. Greene said something about a contract. Cooke responded that "we have nothing to lose when we go bargain." Greene replied: "Yes, we can either have SRSP or a pension but we cannot have both."

Cooke further testified that in February she asked Greene for an advance on her vacation pay. Green agreed. On her direct examination Cooke testified that Greene said that "once the Union comes in she won't be able to do favors or be as liberal about things as she is now." On cross-examination Cooke testified that Greene said she would not be as flexible, [**57] or that she won't be able to be as flexible as she is now. Cooke did not recall whether Greene explained what she meant.

Earl Cook, who also works at the Westland Mall store, has worked for the company for 43 years. In July or August he attended a company seminar on retirement benefits, conducted by Greene and Bernie Schlepper, the Company's corporate director of SRSP benefits. Some 25 to 30 employees were present. Cook testified in sum as follows: Greene and Schlepper, using a projector, visually compared the Company's employee benefits with those of its competitors. Greene, next using a flip chart, mentioned that company warehouse employees represented by the Teamsters union did not have SRSP in their contract. Cook regarded SRSP, under which the Company makes matching contributions, as critical to his retirement plans. Greene, referring to the flip chart, listed benefits which the employees enjoyed (Cook did not recall whether the list included SRSP). Cook initially testified that Greene said "we would probably lose them and they would have to be renegotiated in the union contract if the UAW came in." Cook subsequently testified that she said "they would all be gone and [**58] would have to be renegotiated with the Union."

Personnel Manager Greene testified in sum as follows: She and Schlepper conducted a series of retirement benefit meetings for employees during the summer of 1992. Gloria Cook [*96] attended one of the meetings. Greene asked Cooke what she thought of the meeting, and what she felt she would be able to gain from a union contract. Cooke answered, "[W]e have nothing to lose," explaining that "we keep SRSP and we get a better pension." Greene responded that both were negotiable. She did not say that they could not have both.

With regard to the second alleged conversation with Gloria Cooke, Greene testified in sum as follows: In early February Cooke requested a vacation payout. This was the third time she did this. Greene agreed to give her 2 weeks' vacation pay. Greene told Cooke that she might not be as flexible if there were a union contract.

With regard to the retirement benefits meetings, Greene testified that she used the flip chart as a script. The text was introduced in evidence. The 14th (final) page of the flip chart is the only one containing reference to unions or unionization (entitled "comparison to union plans"). That [**59] page states in pertinent part that pension benefits and SRSP are negotiable issues, that all department store division employees are on the company retirement plan, except for one unit who is on a Teamsters plan, and that Detroit Teamsters Local 299 is not on SRSP "despite numerous bargaining demands for the plan." Greene testified that she did not say that employees would lose, or probably would lose any benefits, but said only that all benefits were negotiable. She further testified that Earl Cook was present at one of the meetings, and asked some questions.

As indicated, both Gloria Cooke and Earl Cook tended to shift or equivocate in describing what Greene allegedly said. I have no comparable reservations with respect to Greene's testimony concerning these matters. I credit Greene, and do not credit the testimony of the employees insofar as it conflicts with Greene's testimony.

I find that Greene, by her statements did not violate the Act as alleged in the complaint. n4 Greene could lawfully state, as she did, that both pension and SRSP were negotiable. She also did not violate the Act by truthfully telling the employees that the Teamsters unit employees did not have SRSP, [**60] despite numerous bargaining demands for the plan. Greene did not thereby either expressly or impliedly threaten the employees that the Company would unilaterally withdraw SRSP, or fail to bargain in good faith with the Union concerning SRSP. An employer may "stress to employees those benefits they have received without a union's assistance, and contrast wages and working conditions in his plant with those in unionized plants." *John W. Galbreath & Co., 266 NLRB 96 (1983);* see also *Clark Equipment Co., 278 NLRB 498, 499-500 (1986); Sheraton Plaza La Reina Hotel, 269 NLRB 716, 717-718 (1984).* n5 Greene also did not act unlawfully by telling Gloria Cooke that she might not be as flexible under a union contract. Greene simply lawfully informed Cooke of the possibility that under a negotiated union contract, management might have less or no discretion to grant early payout of vacation pay, i.e., that contract terms might be adverse to her interests. See *Walter Garson Jr. & Associates, 276 NLRB 1226, 1230 (1985); Montgomery Ward & Co., 288 NLRB 126 fn. 3 (1988).* Therefore, I am recommending that these allegations of the complaint be dismissed.

n4 Greene apparently engaged in unlawful interrogation when (as she admitted) she asked Gloria Cooke what Cooke felt she would be able to gain from a union contract. Greene raised the subject, she had no legitimate reason to question Cooke, and she gave Cooke no assurance against reprisal, although the Company engaged in discriminatory actions against union adherents. However, the General Counsel has made no allegation in this regard, and the Company was not on notice that this aspect was in litigation. Therefore, I am making no findings concerning interrogation.

n5 The Union's reliance (Br. 20) on *International Harvester Co., 258 NLRB 1162 fn. 3 (1981),* is misplaced. In that case, the Board found that the employer, on several occasions, "stated outright" that the employees would lose the benefit in question if they voted for union representation. The Board held that the employer did not remedy these threats by "belatedly "telling the employees that the benefit would be subject to negotiations, but reminding them that no union-represented unit had been able to negotiate a retention of the benefit in their contracts. In the present case, the credited testimony indicates that the Company never told employees they would lose SRSP under a union contract. [**61]

CONCLUSIONS OF LAW

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

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

3. By discriminatorily issuing a written warning to Nancy Kluska because of her union and concerted activities, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act, the Company has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that the Company be ordered to rescind the written warning issued to Nancy [**62] Kluska in October 1992, to remove from its records any reference to the warning, to give Kluska written notice of such expunction, and to inform her that this unlawful conduct will not be used as a basis for future personnel actions against her.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended. n6

n6 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."

ORDER

The Respondent, Department Store, Division of Dayton Hudson Corporation, Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[*97] (a) Discouraging membership in the Union or any other labor organization, by issuing warnings to employees or otherwise discriminating against them because of their union activities.

(b) Discriminatorily prohibiting employees from distributing union literature or prohibiting them from distributing union literature during nonwork time and in nonwork [**63] areas.

(c) Discriminatorily prohibiting employees from wearing union buttons or other insignia.

(d) Discriminatorily imposing restrictions upon the movements and talking of employees because of their union activities.

(e) Engaging in surveillance of employees because of their union activities.

(f) Discriminatorily excluding guests of employees from its employee lunchrooms because of the union activities of the employees of their guests.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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

(a) Rescind the written warning issued to Nancy Kluska in October 1992, remove from its records any reference to the warning, and notify her in writing that this has been done and that evidence of the warning will not be used as a basis for future personnel actions against her.

(b) Post at its Westland Mall and Eastland Mall stores, copies of the attached notice marked "Appendix. n7 Copies of said notice on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's authorized [**64] representative, shall be posted by Respondent immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other materiai.

n7 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."

(c) Notify the Regional Director in writing within 20 days from the receipt of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. December 23, 1993

[*87contd]
[EDITOR'S NOTE: THE PAGE NUMBERS OF THIS DOCUMENT MAY APPEAR TO BE OUT OF SEQUENCE; HOWEVER, THIS PAGINATION ACCURATELY REFLECTS THE PAGINATION OF THE ORIGINAL PUBLISHED DOCUMENTS.]

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government
The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage membership in International Union, United [**65] Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL -CIO, or any other labor organization, by issuing warnings to employees or otherwise discriminating against them because of their union activities.

WE WILL NOT discriminatorily prohibit employees from distributing union literature, or prohibit them from distributing union literature during nonwork time and in nonwork areas.

WE WILL NOT discriminatorily prohibit employees from wearing union buttons or other insignia.

WE WILL NOT discriminatorily impose restrictions on the movement and talking of employees because of their union activities.

WE WILL NOT engage in surveillance of employees because of their union activities, both inside our Westland Mall store and inside the nearby Coney Island restaurant.

WE WILL NOT discriminatorily exclude guests of employees from our employee lunchrooms because of the union activities of the employees or their guests.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right to engage in union or concerted activities, or to refrain therefrom.

WE WILL rescind the written warning issued to Nancy Kluska in October [**66] 1992, remove from our records any reference to the warning, and notify her in writing that this has been done.

DEPARTMENT STORE, DIVISION OF DAYTON HUDSON CORPORATION

Richard F. Czubaj, Esq., for the General Counsel.

Timothy K. Carroll, Esq., of Detroit, Michigan, for the Respondent.

Nancy Schiffer, Esq., of Detroit, Michigan, for the Charging Party.

LEXSEE 314 NLRB 795

Dayton Hudson Department Store Company, a Division of Dayton Hudson Corporation and International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO.

Case 7-CA-31476

NATIONAL LABOR RELATIONS BOARD

314 N.L.R.B. 795; 1994 NLRB LEXIS 633; 147 L.R.R.M. 1164; 1993-94 NLRB Dec. (CCH) P15,437; 314 NLRB No. 129

August, 18, 1994

[**1]

SUPPLEMENTAL DECISION AND ORDER

By James M. Stephens, Member, Dennis M. Devaney, Member, Charles I. Cohen, Member.

OPINION:

[*795] On May 15, 1991, the National Labor Relations Board issued a Decision and Order in this proceeding granting the General Counsel's Motion for Summary Judgment and finding that the Respondent had violated Section 8(a)(5) and (1) by refusing to bargain with the Union. n1 The Respondent was ordered to cease and desist and to take certain affirmative action to remedy the unfair labor practices.

n1 *302 NLRB 982.*

Thereafter, the Respondent filed a petition for review with the United States Court of Appeals for the Sixth Circuit, and the Board filed a cross-petition for enforcement of its Order. On March 1, 1993, the court granted the Respondent's petition for review and denied the Board's cross-petition for enforcement. n2 The court held that: (1) the Board must reevaluate one of the two union campaign documents at issue in the Respondent's Objection 2 in the representation proceeding in Case 7-RC-19227; n3 (2) the Respondent was entitled to a hearing on the allegation that the Union had forged authorization cards, which was the subject of the Respondent's motion to reopen [**2] the record filed on June 7, 1991. n4 The court remanded the proceeding to the Board for the limited purposes set forth in its opinion.

n2 *Dayton Hudson Department Store v. NLRB, 987 F.2d 359 (6th Cir. 1993).*

n3 In its Objection 2, the Respondent alleged that the Union's May 8, 1990 letter intentionally contained gross misrepresentations of material facts about the Respondent's profits and that its distribution was timed to preclude any effective response. The court upheld the Board's decision to overrule Objection 2 insofar as the Respondent alleged that the Union's campaign flyer distributed on the day of the election, May 11, 1990, constituted a forged document. The court also upheld the Board's decision to overrule Objections 3 and 4.

n4 In its motion to reopen the record, the Respondent alleged that the Union had forged authorization cards and had used these to claim widespread support for the Union during the campaign.

On November 22, 1993, the Board remanded the proceeding to the Regional Director for Region 7 for the purpose of arranging a hearing before an administrative law judge limited to the allegation concerning the false authorization

cards. [**3] The Board also ordered that the administrative law judge's decision should include both the forged cards allegation and a reevaluation of the Union's May 8, 1990 letter to employees.

On March 25, 1994, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Union answered the Respondent's exceptions, and the Respondent replied to the Union's answering 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, n5 and conclusions n6 and to adopt the recommended Order.

n5 The Respondent 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 the findings.

Here the judge based his findings not only on the demeanor of the witnesses, but also on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. In particular, we agree with the judge's finding that John Madgwick's claim that he forged authorization cards is a "total fabrication." The Respondent errs in claiming that the delay of almost 4 years from the events at issue and the hearing about them impaired the judge's credibility findings. To the extent that delay may have adversely affected any testimony, it would have equally affected all witnesses, not just those of the Respondent. See *Bell Foundry Co. v. NLRB, 827 F.2d 1340, 1343 (9th Cir. 1987).* Moreover, the judge did not rely on imprecision and vagueness alone in making his credibility findings. He specifically cited demeanor as well as the panoply of considerations outlined above. We refer especially to the judge's analysis of the testimony of John Madgwick, Rosemary Minni, and Suzann Roberts. We find no error in the judge's credibility findings. [**4]

n6 In its exceptions, the Respondent asserts that Region 7's mishandling of authorization cards deprived the Respondent of the "full inquiry" mandated by the court on remand. The Respondent refers to the fact, which was revealed at the hearing, that on November 9, 1992, the Region inadvertently returned cards to the Union from the Respondent's Westland store rather than from the Respondent's Fairlane store. (The Fairlane store was the subject of a withdrawn election petition also involving the Union.) The Union returned the Westland cards on November 23, 1992, when the Union discovered the mistake. With reference to this incident, the Respondent's counsel acknowledged on the record that there was "no evidence or suggestion that what has been represented by the General Counsel or by [counsel for the Union] is not entirely true." The parties also stipulated that there were 268 Westland cards stamped with the Region's March 12, 1990 date, the day the Union filed its petition, bearing the names of employees in the bargaining unit at that time.

In its brief to the judge, the Respondent referred to this incident and asserted that it had been deprived of an opportunity to investigate the 2-week period that the Union had possession of the cards. The judge correctly dismissed the Respondent's arguments by noting that at no time had the Respondent sought a continuance; that the 268 cards bore the Region's March 12, 1990 stamp; and that the Respondent made no suggestion of any motive for tampering with the stamped cards or how such tampering could have affected the outcome of this case.

The Respondent now states in its exception that the Union had the opportunity to sanitize the time-stamped cards by removing those that allegedly had been fraudulently signed. The Respondent refers to no evidence to support this allegation we find no merit in this attempt by the Respondent to resurrect its forged-cards allegation. Judge Ladwig has rendered the "full inquiry" mandated by the court and found that John Madgwick's tale of forged cards is a "total fabrication." We agree with this finding. The Respondent's innuendo in no way contravenes it.

[*796] [**5] ORDER

The Board's Order reported in *302 NLRB 982 (1991),* is reaffirmed.

Dated, Washington, D.C. August 18, 1994

James M. Stephens, Member

Dennis M. Devaney, Member

Charles I. Cohen, Member

LEXSEE 302 NLRB 982

DAYTON HUDSON DEPARTMENT STORE COMPANY, A DIVISION OF DAYTON HUDSON CORPORATION and INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AFL--CIO

Case 7-CA-31476

NATIONAL LABOR RELATIONS BOARD

302 N.L.R.B. 982; 1991 NLRB LEXIS 339; 137 L.R.R.M. 1357; 1991-92 NLRB Dec. (CCH) P16,662; 302 NLRB No. 165

May 15, 1991

[**1]

DECISION AND ORDER

By Dennis M. Devaney, Member; Clifford R. Oviatt, Jr., Member; John N. Raudabaugh, Member

OPINION:

[*982] On March 6, 1991, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 7--RC--19227. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel, 265 NLRB 343 (1982).)* The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On April 15, 1991, the General Counsel filed a motion to strike portions of the Respondent's answer and for summary judgment. On April 18, 1991, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On May 1, 1991, the Respondent filed a Response.

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

Ruling on Motion for Summary Judgment

In its answer and response [**2] to the Notice to Show Cause the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of its objections to the election in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 162 (1941).* Accordingly, we grant the Motion for Summary Judgment. n1

n1 We, however, deny the General Counsel's motion to strike portions of the Respondent's answer. Given that this is the initial test-of-certification proceeding, the Respondent's denials that the Union's certification was

proper and that the Respondent violated the Act by refusing to bargain, while erroneous, are not frivolous or a sham. See Mattie *C. Hall Health Care Center, 280 NLRB 1114 fn. 1 (1986).* [**3]

On the entire record, the Board makes the following

Findings of Fact

I. Jurisdiction

The Respondent, a Minnesota corporation with its principal office and place of business in Southfield, Michigan, is engaged in the operation of retail stores. The Respondent maintains various stores in the State of Michigan, including a store located at 35000 West Warren, in the city of Westland, Michigan. During calendar year 1990, a representative period, the Respondent, in the course and conduct of its business operations, had gross revenues in excess of $ 1 million, and purchased and caused to be delivered at its Michigan facilities, clothing, furniture, household electronics, and other goods and materials valued in excess of $ 55,000, of which goods and materials valued in excess of $ 50,000 were transported and delivered to its facilities in the State of Michigan, directly from points located outside the State of Michigan. We find that the Respondent is an employer engaged in commerce within the meaning of Section 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

A. The Certification

Following [**4] the election held May 11, 1990, the Union was certified on December 26, 1990, as the collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time selling and non-selling employees, including employees of leased departments, except employees of Glemby International Michigan, Inc., employed at the Employer's facility located at 35000 West Warren, Westland, Michigan; but excluding confidential employees, employees of Glemby International Michigan, Inc., guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since on or about January 24, 1991, the Union has requested the Respondent to bargain and, since on or about January 31, 1991, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

[*983] Conclusions of Law

By refusing on and after January 31, 1991, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting [**5] commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co., 136 NLRB 785 (1962); Lamar Hotel, 140 NLRB 226, 229 (1962),* enfd. *328 F.2d 600 (5th Cir. 1964),* cert. denied *379 U.S. 817 (1964); Burnett Construction Co., 149 NLRB 1419, 1421 (1964),* enfd. *350 F.2d 57 (10th Cir. 1965).*

ORDER

The National Labor Relations Board orders that the Respondent, Dayton Hudson Department Store Company, A Division of Dayton Hudson Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers [**6] of America, UAW, AFL--CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time selling and non-selling employees, including employees of leased departments, except employees of Glemby International Michigan, Inc., employed at the Employer's facility located at 35000 West Warren, Westland, Michigan; but excluding confidential employees, employees of Glemby International Michigan, Inc., guards and supervisors as defined in the Act.

(b) Post at its facility in Westland, Michigan, copies of the attached notice marked "Appendix." n2 Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the [**7] Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

n2 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."

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Union, United Automobile, Aerospace and Agricultural Implement [**8] Workers of America, UAW, AFL--CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time selling and non-selling employees, including employees of leased departments, except employees of Glemby International Michigan, Inc., employed at the Employer's facility located at 35000 West

Warren, Westland, Michigan; but excluding confidential employees, employees of Glemby International Michigan, Inc., guards and supervisors as defined in the Act.

DAYTON HUDSON DEPARTMENT
STORE COMPANY, A DIVISION
OF DAYTON HUDSON
CORPORATION
(Employer)

Dated By
(Representative) (Title)

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

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning [**9] this notice or compliance with its provisions may be directed to the Board's Office, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226-2569, Telephone 313--226--3219.

Statement of Glenn M. Taubman, Staff Attorney, National Right to Work Legal Defense Foundation, Inc., Springfield, VA, Submitted for the Record

STATEMENT OF GLENN M. TAUBMAN, STAFF ATTORNEY,
NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.,
TO THE
UNITED STATES HOUSE OF REPRESENTATIVES'
COMMITTEE ON EDUCATION AND THE WORKFORCE,
EMPLOYER-EMPLOYEE RELATIONS SUBCOMMITTEE
HEARING: APRIL 22, 2004

Chairman Johnson and Distinguished Members:

Thank you for the opportunity to comment on the issues raised in these important hearings.

My name is Glenn Matthew Taubman. I am a Staff Attorney with the National Right to Work Legal Defense Foundation, in Springfield, Virginia. Since the Foundation was founded in 1968, it has provided free legal aid to workers who choose to stand apart from a labor union, to exercise the "right to refrain" that Congress granted them under § 7 of the National Labor Relations Act, 29 U.S.C. § 157, and that, more fundamentally, is guaranteed by the First Amendment freedom of association.

I have worked as a Foundation staff attorney for almost twenty years. In that time, I have provided free legal representation to thousands of individual employees nationwide, seeking through litigation to vindicate their fundamental constitutional and civil rights against compulsory unionism abuses perpetrated by both unions and employers. In addition to representing public sector employees in a wide variety of federal civil rights cases dealing with the abuses of compulsory unionism,[1] I have spent

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[1] *Tierney v. City of Toledo*, 116 LRRM 3475 (N.D. Ohio 1984), *aff'd.*, 785 F.2d 310 (6th Cir. 1986), *vacated and remanded*, 106 S. Ct. 1628 (1986), *reversed on* (continued...)

a large part of my professional life litigating cases under the National Labor Relations Act.[2] In recent years, I have been representing individual employees facing a new challenge to their right to refrain from compulsory unionism: so-called "neutrality and card check" programs hatched by unions to help force union "representation" on unwilling employees. I am counsel or co-counsel in numerous currently pending cases challenging some form of "neutrality and card check" scheme.[3]

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[1] (...continued)
reconsideration, 824 F. 2d 1497 (6th Cir. 1987), *further proceedings*, 917 F.2d 927 (1990); *Lowary v. Lexington Local Board of Education*, 124 LRRM 2516 (N.D. Oh. 1986), *reversed*, 854 F.2d 131 (6th Cir. 1988); *further proceedings*, 704 F. Supp. 1430 (N.D. Ohio 1987), *further proceedings*, 704 F. Supp. 1456 (N. D. Ohio 1988), *further proceedings*, 704 F. Supp. 1476 (N. D. Ohio 1988), *affirmed in part and reversed and remanded in part*, 903 F.2d 422 (6th Cir. 1990); *Jordan v, City of Bucyrus*, 739 F. Supp. 1124 (N.D. Ohio 1990), *further proceedings*, 754 F. Supp. 554 (N.D. Ohio 1991).

[2] *E.g., UFCW Local 951 v. Mulder*, 812 F. Supp. 754 (W.D. Mich. 1993), *aff'd*, 31 F.3d 365 (6th Cir. 1994); *NLRB v. Office and Professional Employees Intern. Union, Local 2, AFL-CIO*, 292 NLRB No. 22 (1988), *enforced*, 902 F.2d 1164 (4th Cir. 1990); *California Saw and Knife Works*, 320 NLRB 224 (1995); *Schreier v. Beverly California Corp.*, 892 F. Supp. 225 (D. Minn. 1995); *Bloom v. NLRB*, 153 F.3d 844 (8th Cir. 1998), *vacated*, 209 F.3d 1060 (2000); *Production Workers of Chicago (Mavo Leasing)*, 161 F.3d 1047 (7th Cir. 1998); *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir 2000).

[3] *UAW and Freightliner/Daimler-Chrysler*, Case Nos. 11-CA-20070-1, 11-CA-20071-1, 11-CB-3386-1, 11-CB-3387-1; *UAW and Dana Corp. (Elizabethtown, KY)*, Case Nos. 9-CA-40444-1 and 9-CB-10981-1, Case Nos. 9-CA-40521-1 and 9-CB-10996-1; *UAW and Dana Corp. (Bristol, Va)*, Case Nos. 11-CB-3397, 11-CB-3398, 11-CB-3399, 11-CA-20134, 11-CA-20135, 11-CA-20136 (Region 11, Winston-Salem); *Heartland Industrial Partners and United Steelworkers of America (USWA)*, Case No. 8-CE-84-1 (Region 8, Cleveland Oh.); *Patterson v. Heartland Industrial Partners, et. al*, No. 5:03 CV 1596 (U.S. District Court, N.D. Ohio); *UAW and Dana Corp. (St. Johns, MI)*, Case Nos. 7-CA-46965-1 and 7-CB-14083-1, 7-CA-47078-1 and 7-CB-14119, and 7-CA-47079-1 and 7-CB-14120; *UAW and Dana Corp. (Upper Sandusky, OH)*, Case No. 8-RD-1976; *Metaldyne Precision Forming/UAW (St. Marys, PA)*., Case Nos. 6-RD-1518 and 6-RD-1519; *United Steelworkers of America and Cequent Towing Products (Goshen, IN)*., NLRB Case No. 25-RD-1447.

WHAT IS "NEUTRALITY AND CARD CHECK?"

Frustrated that workers are not voluntarily choosing to join or be represented by unions, labor union officials have turned to organizing employers and imposing unionization on employees from the top down. The National Labor Relations Board reports that unions win less than 50% of secret ballot elections, and that figure does not even include the many occasions where unions withdraw election petitions and walk away because they lack employee support. Of necessity, union officials do not want to publicize these election losses, preferring to act secretly. A case in point recently occurred at the Magna Donnelly plant in Lowell, Michigan. There, the United Auto Workers union (UAW) secured an agreement for strict employer neutrality, but with the stipulation that there be a secret-ballot election. Even with strict employer neutrality, the UAW lost badly, with one employee publicly commenting to the local newspapers, "Unions are not needed in America anymore."[4] Unions obviously would rather operate in secrecy.

So what exactly is a "neutrality agreement?" It is an enforceable contract between a union and an employer – usually kept secret from the very employees it targets[5] – under

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[4] *'Neutral' Union Bid Fails First Local Test,* Grand Rapids Press, September 27, 2003, p. A-1.

[5] Attached as Exhibit 1 is the Declaration of Clarice Atherholt, the petitioner in *UAW and Dana Corp. (Upper Sandusky, OH),* Case No. 8-RD-1976. Ms. Atherholt describes her inability to even see the secret agreement that her employer, Dana Corporation, entered into with the UAW. Attached as Exhibit 2 is the "confidential" agreement between Heartland Industrial Partners and the United Steelworkers Union (USWA) at issue in *Patterson v. Heartland Industrial Partners, et. al,* No. 5:03 CV 1596 (U.S. District Court, N.D. Ohio).

which the employer agrees to support a union's attempt to organize its workforce. Although these agreements come in several different forms, common provisions include:

- **Gag Rule:** While most neutrality agreements purport merely to require an employer to remain "neutral," in reality they impose a gag order on speech not favorable to the union. A company, including its managers and supervisors, is prohibited from saying anything negative about the union or unionization during an organizing drive. Employees are only permitted to hear one side of the story: the version the union officials want employees to hear. In a recent speech to the ABA, NLRB Chairman Battista criticized the growing use of neutrality agreements and stated that the "purpose of using neutrality agreements is not to expedite [employee free choice], but to silence one of the parties." Daily Labor Reporter, Five Members Discuss Decisionmaking, Wide Variety of Issues at ABA Meeting, August 15, 2003, Page B-1.

For example, the UAW's model "neutrality clause" states that an employer may not "communicate in a negative, derogatory or demeaning nature about the other party (including the other party's motives, integrity, character or performance), or about labor unions generally."[6] In practice this requires employers to refrain from providing even truthful information in response to direct employee questions. In contrast to this employer silence, the UAW's model neutrality agreement *requires* the signatory employer to affirmatively "advise its employees in writing and orally that it is not opposed to the UAW being selected as their bargaining agent." Such limits on free

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[6] *See* http://www.nrtw.org/d/uawna.pdf

speech, and requirements of forced pro-union speech, are purposefully designed to squelch debate and keep employees in the dark about the union that covets them.

- **No Secret Ballot Election:** Most neutrality agreements include a "card check" agreement. Under such an agreement, employees are not permitted to vote on union representation in a secret ballot election monitored by the National Labor Relations Board. Instead, the employer pledges to recognize the union automatically if it can produce a certain number of signed union authorization cards. Experience shows that employees are often coerced or misled into signing these authorization cards. For example, employees report being falsely told that these union authorization cards are merely health insurance enrollment forms, non-binding "statements of interest," requests for an election, or even tax forms.[7]

Indeed, the United States Supreme Court has recognized this as well: "We would be closing our eyes to obvious difficulties, of course, if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee

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[7] Attached as Exhibit 3 is a sworn Declaration of Faith Jetter in Support of her Motion to Intervene or, Alternatively, to File a Brief Amicus Curiae in the case of *Sage Hospitality Resources, LLC v. HERE Local 57*, Case No. 03-4168, U.S. Court of Appeals (3d Cir.). In her Declaration, Ms. Jetter describes her own harassment at the hands of the union, and in addition states: "I also saw the union representatives try to coerce another employee to sign a card, even though they never explained to the employee what this card meant, or told her that the union could be able to be automatically recognized as the representative of the employees without a secret ballot election. It was clear to me that this employee had no idea what this card meant when the union tried to get her signature."

for collective bargaining purposes or merely to authorize it to seek an election to determine that issue."[8]

Moreover, when an employee signs (or refuses to sign) a union authorization card, he or she is not likely to be alone. Indeed, it is likely that this decision is made in the presence of one or more union organizers pressuring the employee to sign a card. This solicitation could occur during or immediately after a union mass meeting or a company-paid captive audience speech, or it could occur in the employee's own home during an unsolicited union "home visit." In all cases the employee's decision is not secret, as in an election, since the union clearly has a list of who has signed a card and who has not. Thus, a choice against signing a union authorization card does not end the decision-making process for an employee in the maw of "card check drive," but often represents only the beginning of harassment and intimidation for that employee.

In sharp contrast, each employee participating in an NLRB-conducted election makes his or her choice one time, in private. There is no one with the employee at the time of decision. The ultimate choice of the employee is secret from both the union and the employer. Once the employee has made the decision "yea or nay" by casting a ballot, the process is at an end. Thus, only with an Orwellian world-view can unions claim that "we save industrial democracy and employee free choice by doing away with the secret ballot election."

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[8] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 604 (1969).

- **Access to Premises:** Neutrality agreements commonly give the union permission to come on company property during work hours for the purpose of collecting union authorization cards. This differs from the guidelines set by the NLRB and the courts, under which an employer has no obligation to, and may actually be prohibited from, providing the union with such sweeping access to its employees.

- **Access to Personal Information:** Neutrality agreements frequently require that the company provide personal information about employees to the union, including where employees and their families live. Armed with a company-provided list of the names and addresses of each employee, union officials can conduct "home visits" to pressure employees to sign union authorization cards.

Employee Faith Jetter attested to what happened after her employer provided the HERE union with her personal information:

> I was called at home and also contacted in person by HERE union representatives and urged to sign a union authorization card. These union representatives already had my name and home address and telephone number. I was asked if the union representatives could come to my home and make a presentation about the union. I allowed them to come, as I was willing to listen.
>
> Two union representatives came to my home and made a presentation about the union. They tried to pressure me into signing the union authorization card, and even offered to take me to out dinner. I refused to sign this card as I had not yet made a decision at that time.
>
> Shortly thereafter, the union representatives called again at my home, and also visited my home again to try to get me to sign the union authorization card. I finally told them that my decision was that I did not want to be represented by this union, and that I would not sign the card.
>
> Despite the fact that I had told the union representatives of my decision to refrain from signing the card, I felt like there was continuing pressure on me to sign. These union representatives and others were sometimes in and around the hotel, and would speak to me or approach me when I did not want to speak with

> them. I also heard from other employees that the union representatives were making inquiries about me, such as asking questions about my work performance. I found this to be an invasion of my personal privacy. Once when I was on medical leave and went into the hospital, I found that when I returned to work the union representatives knew about my hospitalization and my illness. I felt like their knowledge about me and my illness was also an invasion of my personal privacy.[9]

- **Captive Audience Speeches:** Employees may be forced to attend company-paid "captive audience" speeches pursuant to neutrality agreements. In these mandatory forums, the union and management work together to pressure employees to sign up for the union. Sometimes it is announced that the union and company have already formed a "strategic partnership," making union representation seem a foregone conclusion. In one facility owned by Johnson Controls Inc., it was strongly implied that if workers did not support the union's organizing effort, they risked losing potential job opportunities. Can it be said that employees freely signed cards after such coercion?

HOW DO UNIONS SECURE NEUTRALITY AGREEMENTS?

Employers are often pressured into neutrality agreements by union picketing, threats, or comprehensive "corporate campaigns." Some employers are pressured into neutrality agreements by other companies who are acting at the behest of union officials. A neutrality agreement itself may require an employer to impose the neutrality agreement

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[9] See Exhibit 3 attached hereto.

on other companies with whom it affiliates.[10] But do employees who are targets of these agreements approve? Are they ever asked? Many do not even know that such a deal covering their unionization exists. As employee Faith Jetter noted in her sworn Declaration (Exhibit 3), "I heard that the Hotel and the HERE union signed an agreement covering the union's attempt to organize the employees of the Hotel. I also learned that this agreement required my employer to give the HERE union a list of employees' names and addresses, and access to the employees inside of the Hotel. No one asked me if I approved of this, and I do not. I am opposed to the Hotel giving the HERE union a list of with my name and personal information, and allowing them access to me in the workplace."

Even more ominous, there is a growing trend in which state and local politicians pass laws mandating that employers who wish to do business with the state or locality must sign neutrality agreements. In one notorious case, the San Francisco Airport Authority mandated that any concessionaires who wished to lease space at the airport had to first sign a neutrality agreement. That governmental interference in private labor relations was held to be federally preempted, and was enjoined.[11] Unfortunately, many

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[10] See Exhibit 2, the "confidential" agreement between Heartland Industrial Partners and the United Steelworkers Union (USWA). This agreement contains a "virus clause," in which any "covered business enterprise" must force its affiliates to also sign "neutrality and card check agreements."

[11] *Aeroground, Inc. v. City & County of San Francisco*, 170 F. Supp. 2d 950 (N.D. Cal. 2001) (municipal ordinance which regulated private-sector labor relations and mandated the waiver of rights and interests protected by the NLRA is unconstitutional as preempted); *see also Chamber of Commerce v. Lockyer*, 225 F. Supp. 2d 1199 (C.D. Cal. 2002) (similar

(continued...)

state and local politicians are still attempting to require neutrality agreements as a condition of contracting with the government or of obtaining grants, even though most, if not all, such requirements are federally preempted.

The bottom line is this: employees' rights of free choice are sacrificed and lost under so-called "neutrality agreements." Instead of being able to freely choose for themselves whether they desire union representation through a secret ballot election, management and union officials work together to impose unionization on workers from the top down.

AN EXAMPLE OF WORKER ABUSE UNDER"NEUTRALITY AGREEMENTS"

There are many pending legal cases challenging neutrality agreements and card checks as abuses of workers' rights, some of which are cited in footnote 3 above. One that particularly highlights these abuses is *Dana Corp. and UAW*, Case Nos. 7-CA-46965-1 and 7-CB-14083-1and 7-CA-47078-1 and 7-CB-14119.

In this case, the UAW has been trying to unionize the Dana Corporation plant in St. Johns, Michigan ("Dana St. Johns") for several years, without success. In August, 2003, the UAW reached a "partnership" agreement with Dana that covers the employees of Dana St. Johns (and others), even though the UAW does not represent any of the targeted employees. The terms of this "partnership" agreement have been kept secret.

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[11] (...continued)
state statute preempted); *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, 325 F.3d 879 (7th Cir. 2003) (employer association has standing to challenge county ordinance requiring employers to enter into "labor peace agreements").

This "partnership" agreement is undisputably a "labor contract" enforceable under § 301 of the NLRA, 29 U.S.C. § 185. *See UAW v. Dana Corp.*, 278 F.3d 548 (6th Cir. 2002). The provisions of this enforceable contract: 1) establish a "card check" and dispense with NLRB-supervised secret ballot elections, 2) establish joint UAW-Dana captive audience speeches; 3) gag all supervisors from even truthfully answering employees' questions; 4) give union organizers wide access to employees in the plant; and 5) give union organizers personal information about the employees including home addresses – all with the joint goal of prodding these employees into accepting the UAW as their representative. In practice, the UAW has also used this "partnership" to limit employees' ability to revoke their authorization cards, by informing them that in order to do so, one or more union officials must personally come to their homes!

The UAW and Dana entered into their "partnership" agreement out of fear that the union would continue to fail in its quest to unionize the employees at Dana St. Johns and elsewhere. This "partnership agreement" is a classic example of a "bargaining to organize" scheme, wherein union officials commit to act in a manner favorable to management interests in exchange for employer assistance with gaining and maintaining control over employees.[12] Despite public fanfare about the existence of this "partnership," the specific terms of the agreement are secret from the very employees it targets, and whose interests it compromises.

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[12] Even the union oriented press has reported that the UAW trades employee wages and benefits for "neutrality," see "UAW Trades Pay Cuts for Neutrality" at http//www.labornotes.org/archives/2003/07/c.html and http//www.labornotes.org/archives/2003/10/b.html

As noted, the employees of Dana St. Johns have long rejected the UAW as their collective bargaining agent. It is for this reason that in the fall of 2003, a **majority** of the Dana St. Johns employees signed a petition which stated unequivocally:

PETITION AGAINST UAW "REPRESENTATION"

The undersigned employees of Dana Corporation-St. Johns, MI., do **NOT** want to be "represented" by the UAW union, do **NOT** want to join the UAW union, and do **NOT** wish to support the UAW union in any manner.

To the extent that any of the undersigned employees have ever previously signed a UAW membership card or UAW "authorization card", the undersigned hereby **REVOKES** that card. More specifically, that Dana Corporation, the UAW union, and all third parties or arbitrators take **NOTICE** that any such card signed by an undersigned employee prior to the signing of this petition is **NULL AND VOID.**

The undersigned employees of Dana Corporation **DO NOT** wish to be subjected in any way to the "partnership agreement" sign by corporate Dana officials and corporate UAW officials, and request that Dana Corporation and the UAW union **CEASE** giving any affect to the "partnership agreement" at this Dana plant in St. Johns, MI.

The undersigned employees of Dana Corporation hereby request that Dana Corporation **NOT** disclose or otherwise reveal to the UAW union, or its agents, any personal information about them; including, but not limited to: their name, social security number, home address, telephone number, job title, or work history.

The undersigned employees of Dana Corporation hereby request that Dana Corporation expressly recognize that the UAW union does **NOT** represent a majority of the employees at this facility, at which we work, for an irrevocable period of one-year.

This petition states in part that the undersigned employees recognize the destructive and self-serving behavior of the UAW, and its documented role in union violence, union corruption, and plant closures caused by featherbedding and other uneconomic union work rules.

Finally, I **DO NOT** want any UAW officials, organizers, or agents calling or visiting me at my home. I hereby deny access to my property to any UAW official, organizer, or agent.

Respectfully Submitted,

Dana Corporation, St. Johns employees

[Signatures]

Copies of this petition – signed by a majority of employees – were delivered to both Dana management officials and UAW officers. However, the petition was not acted upon by Dana or the UAW. Although the petition recites that the signatures are irrevocable for one year, Dana and the UAW nevertheless conducted their captive audience speeches, Dana gave out lists of employees' names and home addresses, gagged its supervisors and the UAW conducted home visits. In response to employee inquiries about revoking previously signed authorization cards, UAW officials told employees that the *only* way to revoke their cards was for union organizers to personally visit them at their homes. In short, these employees have not been respected in their congressionally-granted "right to refrain." To the contrary, they have been subject to a concerted campaign to force them to sign union cards, whether they wish to or not.

CONCLUSION: None of the abusive situations outlined herein, which are just the tip of the iceberg, would be happening if the National Labor Relations Act prohibited secret ballot elections, and outlawed union "recognition" via coercive "card checks." I trust these hearings will shed further light on the abuses inherent in "neutrality and card check" processes.

NATIONAL LABOR RELATIONS BOARD
REGION 8

Clarice K. Atherholt,
(Petitioner)

Dana Corp.,
(Employer) Case No. 8-RD-1976

and

International Union, United Automobile Aerospace
and Agricultural Implement Workers of
America, AFL-CIO ("UAW")
(Union)

DECLARATION OF CLARICE K. ATHERHOLT IN SUPPORT OF HER DECERTIFICATION PETITION

I, Clarice K. Atherholt, pursuant to Section 1746 of the Judicial Code, 28 U.S.C. § 1746, declare as follows:

1. My name is Clarice K. Atherholt. I have first hand knowledge of all of the facts set forth herein, and if called to testify could do so competently. I live at 302 S. Fifth Street, Upper Sandusky, OH. 43351. I am employed by Dana Corporation ("Dana") at its facility in Upper Sandusky, OH. ("Dana Upper Sandusky").

2. I am the Petitioner in this case, and circulated on non-work time the showing of interest against the UAW union that accompanied the filing of the Petition. I am part of a bargaining unit of approximately 180 employees at Dana Upper Sandusky.

3. Several months ago Dana and the UAW announced that they had become parties to some sort of "neutrality agreement." Although the employees at Dana Upper Sandusky (among others) are the targets of the agreement, the agreement was initially kept secret from us, although some of the union's organizers had their own copies. Only after I and many other employees complained, and only after the UAW was recognized by Dana at Upper Sandusky, was I told that I could go to Human Resources and read a copy of this agreement, but could not make any copies and could not take a copy away in

order to consult with an independent legal advisor. (Attached as Exhibits 1 and 2 are true and correct copies of letters exchanged between me and Dana related to this subject). As a result of the secrecy, employees at Dana Upper Sandusky know very little of what is contained in the "neutrality agreements" the UAW signed with Dana.

4. Our local management was not allowed to inform any of us about the specific details of the neutrality agreement. We were told that employees would not be permitted to vote in a secret ballot election and that the union organizers would have access to employees' personal information (like home addresses), and access to employees in the plant. Also, we were strongly encouraged "for our own benefit" to attend one of several "captive audience" speeches while on paid company time. At these meetings, officials from Dana Corporation in Toledo and UAW officials from Detroit told us that the UAW and Dana had entered into a "partnership," and that this partnership would be beneficial to us in getting new business from the Big Three into the plant. The implication was that our plant would lose work opportunities or jobs if we did not sign cards and bring in the UAW. I was an outspoken critic of the UAW at this time, and I tried to attend several of the scheduled meetings. The UAW apparently told Dana Human Resources that they did not want me to attend all of these meetings, that my presence was a threat and a distraction, and that the UAW would turn out more supporters if I attended other sessions. I attended two sessions in total, one on my own time and one while on paid company time.

5. Apparently pursuant to the neutrality agreement, UAW organizers came into our plant and stayed there until the "voluntary recognition" was achieved. But the UAW's "card check" drive was nothing like a secret ballot election. UAW organizers did everything they could to make people sign union cards. The UAW put constant pressure on some employees to sign cards by having union organizers bother them while on break time at work, and visit them at home. I believe that the UAW organizers also misled many employees as to the purpose and the finality of the cards. Overall, many employees signed the cards just to get the UAW organizers off their back, not because they really wanted the UAW to represent them.

6. On or about December 4, 2003, Dana suddenly announced that the UAW was our union representative. There was no vote. Many of my co-workers and I were very upset that this union could be thrust upon us without a chance to vote in a secret ballot election. I don't understand how Dana and the UAW can sign away my rights to an election and bring in a union without giving employees the right to vote.

7. I am not aware, as of the date of this Declaration, of Dana and the UAW engaging in any negotiations or bargaining sessions for a collective bargaining agreement since the

UAW was recognized on or about December 4, 2003. I understand that the UAW is just now beginning to form a temporary bargaining committee, but nothing else has happened as of this time in terms of negotiating.

8. I strongly believe that it is wrong that Dana management declared that the UAW was our representative without a secret ballot vote. Judging by the fact that over 35% of employees in the bargaining unit signed a decertification petition within just a few days after I began circulating it, I am not alone.

9. I fail to see how the UAW union can properly be considered our representative without a secret ballot vote. If the UAW really believes that it has the support of over 50% of employees, then it has nothing to fear by giving employees a chance to vote. If employees vote and the union wins, then by all means it is our representatives as stated and we move forward. But if the UAW loses, then it and Dana must concede to the fact and the UAW must leave, as per our request.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 13, 2004

Clarice K. Atherholt

Clarice K. Atherholt

Mr. Dave Warders
1480 Ford St.
Maumee, Oh. 43537-1718

302 S. Fifth Street
Upper Sandusky, Oh. 43351
November 20, 2003

Mr. Bob King
8000 E. Jefferson St.
Detroit, Mi. 48214

Dear Mr. Warders & Mr. King,

Have you ever been on "my" side of a neutrality agreement? If not, you should try it. I don't think you would like it.

The UAW has been campaigning in my area for nearly 6 months now. We sat through a captive audience speech and now we are blessed with having UAW organizers at break and lunch times. And still you don't have enough cards signed to be representative of employees. Now, you bring in other organizers(or whatever you call them) from the Lima, Ohio plant. What gives?

I should think that by now the UAW would get the hint. Just because of a few disgruntled employees doesn't mean our whole plant should be subjected to what some are considering harassment. The anti-union people do not appreciate being disturbed during "their" time.

When I applied for my job(at then Continental Hose), I went there specifically because there was NO union. And like many of us continue to enjoy working in a non-union environment. Admittedly, we are not a perfect plant, there are some problems, but none that joining a union will solve.

Mr. Warders, you made an excellent point about quality Friday and that actually turned a couple people to be AGAINST the union. THANK YOU for that.

Mr. King, I'm not sure that you gained any momentum from your comments.

I believe that you both were in agreement that the neutrality agreement was not to have been shown by the UAW reps and that you would be discussing that this week. I am requesting that you BOTH please send me a copy so that I can read it myself. I am asking both, that way I will hopefully be assured of getting at least one.

Thank you for your time.

Clarice K. Atherholt

Exhibit 1

INDUSTRIAL RELATIONS

CHRIS BUETER
MANAGER, INDUSTRIAL RELATIONS

December 9, 2003

Ms. Clarice K. Atherholt
302 S. Fifth Street
Upper Sandusky, Ohio 43351

Ms. Atherholt:

Your letter addressed to both Dave Warders and Bob King and dated November 20, 2003 has been forwarded to my attention for response by Mr. Warders.

As you know, the matter of union representation in Upper Sandusky was resolved on Thursday December 4, 2003 when the employees of Upper Sandusky, by a majority of signed employee representation forms, selected the UAW as its bargaining representative in conformance with the Dana – UAW Partnership Agreement representation process that was explained to all of you in plant meetings on November 14, 2003.

Notwithstanding this plant decision, we have forwarded to Allison Miller under separate cover a single copy of the Dana – UAW Partnership Agreement. This single copy will remain in Human Resources where you may review it at your leisure at any time other than your scheduled work time. You must schedule in advance with Ms. Miller if you wish to review this document and you will not be afforded the opportunity to copy this document.

It is sincerely hoped that any questions you may have regarding this Agreement will be answered once you review this document in its entirety, however should you have further questions after your review, you should forward those questions to Allison Miller and she can address those matters for you. I hope that with this correspondence Dana has adequately addressed your request dated November 20, 2003.

Sincerely,

Chris Bueter
Manager, Labor Relations

c: Dave Warders
Bob King
Allison Miller
Dan Schueren
Mark Roseman

Exhibit 2

HEARTLAND INDUSTRIAL PARTNERS

November 27, 2000

Mr. George Becker
International President
United Steelworkers of America
Five Gateway Center
Pittsburgh, PA 15222

Dear Mr. Becker:

The following will confirm our understanding regarding certain matters concerning the United Steelworkers of America ("USWA" or the "Union") and Heartland Industrial Partners ("Heartland").

1. Over the years, a number of Heartland's key principals, both directly and through companies with which they have been involved, have developed a constructive and harmonious relationship with the USWA, built on trust, integrity and mutual respect. Heartland places a high value on the continuation and improvement of that relationship.

2. To underscore Heartland's commitment in this matter, we agree that in the event Heartland, after the date of this letter, directly or indirectly becomes an investor in a Covered Business Enterprise ("CBE") (as defined below), Heartland will:

   A. Within 30 days of the consummation of the transaction that results in Heartland becoming an investor in said CBE (a "Transaction"), provide the USWA with a detailed description of the CBE including:

      (i) a list of each of the CBE's plants, and for each of those plants, the products, markets, number of employees eligible for union representation and the classifications, union status and affiliation (if any) of those employees; and

      (ii) the business and financial due diligence, plans and forecasts which Heartland in the ordinary course of business would provide to its limited partners.

      (iii) In addition, Heartland will, upon request, informally discuss with the Union, from time to time, its present plans (as such plan may exist) for the utilization, expansion, contraction, or other major changes in the role or size of the production facilities of the CBE.

39400 North Woodward Avenue, Suite 130
Bloomfield Hills, Michigan 48304
Telephone: 248.593.8814
Fax: 248.203.6882

320 Park Avenue, 33rd Floor
New York, New York 10022
Telephone: 212.981.5613
Fax: 212.981.3535

55 Railroad Avenue
Greenwich, Connecticut 06830
Telephone: 203.861.2622
Fax: 203.861.2722

www.heartlandpartners

EXHIBIT 2

The Union shall keep all such information strictly confidential within its senior officials and elected leadership and/or organizing department. Finally, the Union explicitly recognizes that any plans discussed may be speculative, contingent, or subject to change at any time.

B. If, at any time after six months following a Transaction, the Union notifies Heartland in writing of its actual intent to organize any of the facilities of the CBE, then within ten (10) days of such notification, Heartland will cause the CBE to immediately execute an agreement (hereafter known as the "Framework for a Constructive Collective Bargaining Relationship" or "Framework Agreement") between said CBE and the USWA in form and substance identical to Exhibit I hereto, as well as this Side Letter, both of which shall also at that time be executed by the Union.

3. A Covered Business Enterprise or CBE shall be defined as any business enterprise in which Heartland, directly or indirectly: (i) owns more than 50 percent of the common stock; (ii) controls more than 50 percent of the voting power; or (iii) has the power, based on contracts, constituent documents or other means, to direct the management and policies of the enterprise; with only the following limited exceptions:

A. companies engaged principally in the pulp and paper, clothing and textile, oil refining or coal mining businesses; provided, however, that the Framework Agreement shall apply to the non-United States operations of entities principally engaged in either oil refining and/or coal mining and to Canadian domiciled companies principally engaged in coal mining and/or oil refining;

B. in the case of companies where a single Union affiliated with the AFL-CIO (other than the USWA) both: (i) represents more than 33 percent of all employees of that CBE eligible for unionization; and (ii) represents more than twice as many employees of the CBE as does the USWA (an "Other Union"), then the Neutrality provisions of the Framework Agreement will take effect at particular Covered Workplaces of the CBE, but only upon the earlier of:

(i) an unsuccessful attempt by the Other Union to organize the employees at said Covered Workplaces; and

(ii) three years from the date on which the Covered Workplace becomes part of a CBE.

4. Notwithstanding the provisions of # 3A above, the Framework Agreement will, in no respect apply to any facility located outside of the United States and its territories or Canada.

5. Notwithstanding the provisions of # 3B above, once a business enterprise has met the definition of a CBE, then the Framework Agreement shall thenceforth, without exception, be binding upon said enterprise.

6. Notwithstanding the Framework Agreement or any provision of this Side Letter, the Neutrality Agreement (Section I of the Framework Agreement) shall apply to all non-represented employees at a Covered Workplace with only the following limited exceptions: professional, managerial, sales, confidential, office clerical employees, security guards and supervisors. Office clerical employees are clerical employees who are not "plant clericals" and who report directly to a senior management employee and/or work within the Company's executive, legal, financial, human resources, accounting, sales, marketing, estimating, advertising, purchasing, computer and information services, planning, or similar departments.

7. Rules Regarding Existing Ventures.

   A. If at the time of a Transaction a CBE has an existing Venture, then said Venture shall not be covered by the Framework Agreement provided, however, that in the event the CBE: (i) increases its ownership or influence in the existing Venture such that the Venture becomes an Affiliate; or (ii) the CBE makes a voluntary new investment in the existing Venture, then the Framework Agreement shall immediately apply to said Venture.

   B. In the event the existing Venture materially changes or expands its operations in a manner that could reasonably be expected to impact negatively the employees at one or more of the CBE's organized operations, then the CBE shall make every effort to have the Venture adopt the Framework Agreement.

8. Limitations on Organizing Campaigns.

   A. There shall be no more than one Organizing Campaign in any 12-month period.

B. If, over a five (5) year period, the Union conducts three (3) unsuccessful organizing campaigns at a particular Covered Workplace then, provided that the CBE was not found to have violated the Neutrality provisions of the Framework Agreement during the course of any of those campaigns, the Union will not seek to organize the employees at that Covered Workplace for at least three (3) years from the date of the conclusion of the third unsuccessful campaign.

9. The following will provide guidance and amplification as to the intentions and mutual understandings of the parties regarding Sections I.D., I.F., I.G. and Section II of the Framework Agreement.

A. The parties recognize that in determining the comparability of a newly-organized facility ("NOF") to an existing operation of the CBE ("EO") for the purpose of determining the appropriate level of wages and benefits for that NOF, that to the degree that the NOF has a substantially lower level of valued-added products and fixed investment per employee and the NOF's competitors provide their employees with a compensation package materially less costly than that provided at EOs, then the CBE may not be in a position to provide employees with a compensation package as costly as that provided at EOs.

B. The parties recognize that in determining the comparability of an NOF to an EO and to unionized competitors of the facility ("UCs") for the purpose of determining the appropriate level of wages and benefits for that NOF, that in cases where the NOF has substantially older and less efficient production equipment than EOs and UCs, that the immediate application of a substantial rise in wages and benefits to reach levels at EOs and UCs must be balanced by a reasonable consideration of:

- implementation of new work systems and modern operating practices;
- assuring the competitive viability of the NOF;
- a period of up to five years for wage increases to reach indicated wage and benefit levels;
- limitation of annual increases in hourly compensation to levels no greater than 2X the current rate of annual increases in average

hourly compensation in the United States as published by the Bureau of Labor Statistics.

C. The above considerations shall in no way limit, and in fact the parties explicitly acknowledge the appropriateness of placing in the first collective bargaining agreement strong protections of seniority and union security with "union security" defined broadly to include provisions such as those which: (i) recognize the value of a strong institutional presence of the Union in the plant; (ii) provide for an effective grievance procedure with binding arbitration; and (iii) require that new employees join the Union, maintain membership and pay dues through payroll deduction.

D. Hiring Preference.

1. The provisions of Sections I. D.1. and I. D.2. of the Framework Agreement will become effective upon the USWA becoming the collective bargaining agent representing 50 percent or more of the employees eligible for union representation at a CBE. At that point the Hiring Preference shall apply to hiring at all non-represented Covered Workplaces at the CBE.

2. After such threshold is met, this obligation shall continue, irrespective of any later addition to or reduction from the percentage of USWA-represented employees at the Covered Business Entity.

3. This Hiring Preference shall give preference to employees covered by a Labor Agreement with the USWA only against other applicants who are not then employed at the workplace at which the employee is seeking employment.

E. All arbitrators selected under Section I. G. of the "Framework Agreement" (i.e., for issues arising under the Framework Agreement and this Side Letter other than interest arbitration as part of collective bargaining) shall be selected as follows: Within ninety (90) days of the date of this agreement, the parties will mutually agree to a list of seven (7) arbitrators to serve on a "permanent panel." These arbitrators shall be members of the American Academy of Arbitrators, and shall have experience arbitrating claims within the industries in which Heartland is or expects to be involved. In the event that one of the members of the

panel becomes unable or unwilling to serve, the parties shall immediately replace him in a manner to be agreed by the parties.

F. In the event of a challenge by the Union or a CBE under the Arbitration provisions of Section I. G. regarding the conduct of the CBE or the Union, during the course of an organizing campaign, any count of cards or recognition of the results of the count shall be delayed until the Arbitrator has issued his decision, and his remedy, if any, implemented.

G. The parties will select an arbitrator from the permanent panel within two (2) business days of the receipt of a grievance by the CBE or the Union and any arbitration hearing required under Section G of the Agreement shall be held within five (5) business days of the selection of an Arbitrator. The Arbitrator shall render his decision within two (2) business days of the conclusion of the hearing.

H. Interest arbitration under I. F. (3) of the Framework Agreement will be conducted as follows:

(i) The parties will attempt to mutually agree upon an acceptable Arbitrator who is a member of the Academy of Arbitrators and has arbitral experience as an arbitrator in the industry in question. If such an agreement takes place, a hearing will take place where both parties will present their final offers along with any arguments in support thereof. The parties will also present all language agreed upon by the parties, which shall be accepted in total by the Arbitrator. The Arbitrator shall select one of the final proposals to resolve the remaining disputes. If the parties cannot agree on a single arbitrator, then arbitration shall be by the following system:

(ii) Each party will appoint an arbitrator of its own choosing. Following said appointment, the parties will select a third neutral arbitrator by the alternate strike off of names from the pool of approved arbitrators described at F. above, with the order of striking determined by a coin toss. The last arbitrator remaining on the list will be selected as the third (neutral) arbitrator. A hearing will take place in which both parties will present their final offers along with any arguments in support thereof. The parties will also present all language agreed upon by the parties, which shall be accepted in total by the arbitrators. The three

arbitrators, after due consideration and by majority vote, will select one of the two final proposals presented by the parties to resolve the remaining disputes between the parties.

I. The provisions of Section II of the Framework Agreement will become effective at a CBE upon the USWA becoming the collective bargaining agent representing 50 percent or more of the employees eligible for union representation at that Covered Business Entity or a distinct operational division thereof. After such a threshold is met, the CBE shall continue to be covered by Section II, irrespective of any later addition to or reduction from the percentage of USWA-represented employees at the CBE or division thereof.

10. Notwithstanding anything to the contrary herein, Section III of the Framework Agreement, Work Stoppages, will apply at any CBE where the USWA represents employees of that CBE.

11. In the event that Heartland becomes the owner of an interest in a business enterprise, but such enterprise does not qualify as a CBE as that term is defined in #3 above, then Heartland shall inform the USWA of its investment and use its reasonable best efforts to cause the enterprise to adopt the Framework Agreement and this Side Letter. Whether Heartland has used its reasonable best efforts in such a case shall be subject to the grievance and arbitration procedure described in the Framework Agreement at Section G and this Side Letter.

12. In the event the USWA merges with another union, and as a result of this merger(s), the USWA, immediately following the merger, provides less than 40 percent of the voting members of the executive committee or equivalent governing body of the new union (in the case of a three-way merger, the percentage referred to above shall be 25 percent), then this Side Letter and the Framework Agreement shall be null and void.

13. It is explicitly agreed that the provisions of this Side Letter definitively interpret and override any contrary or ambiguous provision of the Framework Agreement. It is further agreed and acknowledged that the execution of the Framework Agreement and Side Letter by Heartland and/or any Covered Business Entity is conditioned explicitly upon execution and the acceptance of the terms and conditions of this Side Letter by the Union.

14. In the event that any provision of this Agreement is determined to be illegal by a decision of a court of competent jurisdiction or by the National Labor

Relations Board, that court or Board is authorized to reform the illegal section(s) of the Agreement to the extent necessary to make it (them) legal but to reform it in a manner as closely as possible to reflect the intent of the parties evidenced herein.

15. This Side Letter and Framework Agreement will be treated as non-public by all parties except as otherwise required by the terms of either document, agreed to by mutual written consent of the parties, or by law. Neither of the parties nor their agents will issue any press release regarding this Side Letter or the Framework Agreement, or otherwise publish or publicize these agreements, except that if the Union is successful in organizing a Covered Workplace, it can publicize the organizing of such workplace and, to the extent it desires, the impact of the Neutrality provisions on said success.

16. This Side Letter and Framework Agreement are a total expression of the parties' intent and can be modified only in writing. Any prior writings, communications, statements, or proposals on the subjects covered by this Agreement are deemed merged herein.

Sincerely yours,

David A. Stockman
Heartland Industrial Partners

Confirmed:

George Becker
International President
United Steelworkers of America

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192551:

Exhibit I

Framework for a Constructive Collective Bargaining Relationship

Agreement by and between

Heartland Industrial Partners

and the

United Steelworkers of America

I. NEUTRALITY

A. INTRODUCTION

Heartland Industrial Partners, for a Covered Business Enterprise of Heartland (as defined as a "CBE" under 2(A), 2(B) and 3, 4, 5, 6 and 7 in the Side Letter attached hereto) ("The Company') and the United Steelworkers of America ("USWA" or "the Union") place a high value on having a constructive and harmonious relationship built on trust, integrity and mutual respect.

B. NEUTRALITY

To underscore the Company's commitment in this matter, it agrees to adopt a position of neutrality in the event that the Union seeks to represent any non-represented employees of the Company.

Neutrality means that, except as explicitly provided herein, the Company will not in any way, directly or indirectly, involve itself in efforts by the Union to represent the Company's employees, or efforts by its employees to investigate or pursue unionization.

The Company's commitments to remain neutral as outlined above shall cease if the Company demonstrates to an Arbitrator under Section G herein that during the course of an Organizing Campaign (as defined in C below), the Union is intentionally or repeatedly (after having the matter called to the Union's attention) materially misrepresenting to the employees

the facts surrounding their employment or is conducting a campaign demeaning the integrity or character of the Company or its representatives.

C. ORGANIZING PROCEDURES

Prior to the Union distributing authorization cards to non-represented employees at a Covered Workplace (meaning any workplace which is: (i) controlled by the Company, as the Company is defined in Section E herein; and (ii) employs or intends to employ employees who are eligible to be represented by a labor organization in any unit(s) appropriate for bargaining), the Union shall provide the Company with written notification (the "Written Notification") that an organizing campaign (the "Organizing Campaign") will begin. The Written Notification will include a description of the proposed bargaining unit.

The Organizing Campaign shall begin immediately upon provision of Written Notification and continue until the earliest of: (i) the Union gaining recognition under C-5 and C-6 below; (ii) written notification by the Union that it wishes to discontinue the Organizing Campaign; or (iii) 90 days from provision of Written Notification to the Company.

There shall be no more than one Organizing Campaign in any 12-month period.

Upon Written Notification the following shall occur:

1. Notice Posting

The Company shall post a notice on all bulletin boards at all Covered Workplaces where employees eligible to be represented within the proposed bargaining unit work and where notices are customarily posted. This notice shall read as follows:

"NOTICE TO EMPLOYEES

We have been formally advised that the United Steelworkers of America is conducting an organizing campaign among certain of our employees. This is to advise you that:

1. The Company does not oppose collective bargaining or the unionization of our employees.

2. The choice of whether or not to be represented by a union is yours alone to make.

3. We will not interfere in any way with your exercise of that choice.

4. The Union will conduct its organizing effort over the next 90 days.

5. In their conduct of the organizing effort, the Union and its representatives are prohibited from misrepresenting the facts surrounding your employment. Nor may they demean the integrity or character of the Company or its representatives.

6. If the Union secures a simple majority of authorization cards, subject to verification, of the employees in [insert description of bargaining unit provided by the Union] the Company shall recognize the Union as the exclusive representative of such employees without a secret ballot election conducted by the National Labor Relations Board (NLRB).

7. The authorization cards must unambiguously state that the signing employees desire to designate the Union as their exclusive representative.

8. Employee signatures on the authorization cards will be verified by a third party neutral chosen by the Company and the Union."

The amended version of this notice as described above will be posted as soon as the Unit Determination procedure in C-3 below is completed.

In addition, following receipt of Written Notification, the Company may issue one written communication to its employees concerning the Campaign. Such communication shall be restricted to the issues covered in the Notice referred to in C-1 above or raised by other terms of this Neutrality Agreement.

The communication shall be fair and factual, shall not demean the Union as an organization nor its representatives as individuals and no

reference shall be made to any occurrence, fact or event relating to the Union or its representatives that reflects adversely upon the Union, its representatives or unionization.

The communication shall be provided to the Union at least two business days prior to its intended distribution. If the Union believes that the communication violates the strictures of this provision it shall so notify the Company. Thereupon the parties shall immediately bring the matter to an Arbitrator, which shall issue a bench decision resolving any dispute.

2. Employee Lists

Within five days following Written Notification, the Company shall provide the Union with a complete list of all of its employees in the proposed bargaining unit who are eligible for union representation. Such list shall include each employee's full name, home address, job title and work location. Upon the completion of the Unit Determination procedure as described in C-3 below, an amended list will be provided if the proposed unit is changed as a result of such Unit Determination procedure. Thereafter during the Organizing Campaign, the Company will provide the Union with updated lists monthly.

3. Determination of Appropriate Unit

As soon as practicable following Written Notification, the parties will meet to attempt to reach an agreement on the unit appropriate for bargaining. In the event that the parties are unable to agree on an appropriate unit, either party may refer the matter to the Dispute Resolution Procedure contained in Section G below. In resolving any dispute over the scope of the unit, an Arbitrator shall apply the principles used by the NLRB.

4. Access to Company Facilities

During the Organizing Campaign the Company, upon written request, shall grant reasonable access to its facilities to the Union for the purpose of distributing literature and meeting with unrepresented Company employees. Distribution of Union literature shall not compromise safety or production,

disrupt ingress or egress, or disrupt the normal business of the facility. Distribution of Union literature inside Company facilities and meetings with unrepresented Company employees inside Company facilities shall be limited to non-work areas during non-work time.

5. Card Check

If, at any time during an Organizing Campaign which follows the existence at a Covered Workplace of a substantial and representative complement of employees in any unit appropriate for collective bargaining, the Union demands recognition, the parties will request that a mutually acceptable neutral (or the American Arbitration Association if no agreement on a mutually acceptable neutral can be reached) conduct a card check within five days of the making of the request. The neutral shall compare the authorization cards submitted by the Union against original handwriting exemplars of the entire bargaining unit furnished by the Company and shall determine if a simple majority of eligible employees has signed cards. The list of eligible employees shall be jointly prepared by the Union and the Company.

6. Union Recognition

If at any time during an Organizing Campaign, the Union secures a simple majority of authorization cards of the employees in an appropriate bargaining unit, the Company shall recognize the Union as the exclusive representative of such employees without a secret ballot election conducted by the National Labor Relations Board. The authorization cards must unambiguously state that the signing employees desire to designate the Union as their exclusive representative for collective bargaining purposes. Each card must be signed and dated during the Organizing Campaign.

D. HIRING

1. The Company shall, at any Covered Workplace which it builds or acquires after [the effective date of this Neutrality Agreement], give preference in hiring to qualified employees of the Company then accruing continuous service in bargaining units covered by a Labor Agreement. In choosing between

qualified applicants from such bargaining units, the Company shall apply standards established by provisions of said Labor Agreement(s).

This Section D-1 shall only apply where the employer for the purposes of collective bargaining is or will be the Company, a Parent or an Affiliate (and not a Venture) provided, however, that in a case where a Venture will likely have an adverse impact on employment opportunities for then current bargaining unit employees covered by a Labor Agreement, then this Section D-1 shall apply to such Venture as well.

2. Before implementing this provision the Company and the Union will decide how this preference will be applied.

3. In determining whether to hire any applicant at a Covered Workplace (whether or not such applicant is an employee covered by a Labor Agreement), the Company shall refrain from using any selection procedure, which, directly or indirectly, evaluates applicants based on their attitudes or behavior toward unions or collective bargaining.

E. DEFINITIONS AND SCOPE OF THIS AGREEMENT

1. Rules with Respect to Affiliates, Parents and Ventures

For purposes of this Framework Agreement only, the Company includes (in addition to the Company) any entity which is either a Parent, Affiliate or a Venture of the Company.

For purposes of this Framework Agreement, a Parent is any entity which directly or indirectly owns or controls more than 50% of the voting power of the Company; an Affiliate is any entity in which the Company directly or indirectly: (a) owns more than 50% of the voting power or (b) has the power based on contracts or constituent documents to direct the management and policies of the entity; and a Venture is an entity in which the Company owns a material interest.

2. Rules with Respect to Existing Parents, Affiliates and Ventures

The Company agrees to cause all of its existing Parents, Affiliates and/or Ventures that are covered by the provisions of

Section E-1 above, to become a party/parties to this Framework Agreement and to achieve compliance with its provisions.

3. Rules with Respect to New Parents, Affiliates and Ventures

The Company agrees that it will not consummate a transaction, the result of which would result in the Company having or creating: (i) a Parent, (ii) an Affiliate or (iii) a Venture; without ensuring that the New Parent, New Affiliate and/or New Venture, if covered by the provisions of Section E-1 above, agrees to and becomes bound by this Framework Agreement.

F. BARGAINING IN NEWLY-ORGANIZED UNITS

Where the Union is recognized pursuant to the above procedures, the first collective bargaining agreement applicable to the new bargaining unit will be determined as follows:

1. The employer and the Union shall meet within 14 days following recognition to begin negotiations for a first collective bargaining agreement covering the new unit bearing in mind the wages, benefits, and working conditions in the most comparable operations of the Company (if any comparable operations exist), and those of unionized competitors to the facility in which the newly recognized unit is located.

2. If after 90 days following the commencement of negotiations the parties are unable to reach agreement for such a collective bargaining agreement, they shall submit those matters that remain in dispute to the Chairman of the Union Negotiating Committee and the Company's Vice President-Employee Relations who shall use their best efforts to assist the parties in reaching a collective bargaining agreement.

3. If after 90 days following such submission of outstanding matters, the parties remain unable to reach a collective bargaining agreement, the matter may be submitted to final offer interest arbitration in accordance with procedures to be developed by the parties.

4. If interest arbitration is invoked, it shall be a final offer package interest arbitration proceeding. The interest arbitrator shall have no authority to add to, detract from, or modify the final offers submitted by the parties, and the arbitrator shall not be authorized to engage in mediation of the dispute. The arbitrator's decision shall select one or the other of the final offer packages submitted by the parties on the unresolved issues presented to him in arbitration. The interest arbitrator shall select the final offer package found to be the more reasonable when considering (a) the negotiating guideline described in F-1 above, (b) any other matters agreed to by the parties and therefore not submitted to interest arbitration, and (c) the fact that the collective bargaining agreement will be a first contract between the parties. The decision shall be in writing and shall be rendered within thirty (30) days after the close of the interest arbitration hearing record.

5. Throughout the proceedings described above concerning the negotiation of a first collective bargaining agreement and any interest arbitration that may be engaged in relative thereto, the Union agrees that there shall be no strikes, slowdowns, sympathy strikes, work stoppages or concerted refusals to work in support of any of its bargaining demands. The Company, for its part, likewise agrees, not to resort to the lockout of employees to support its bargaining position.

G. DISPUTE RESOLUTION

Any alleged violation or dispute involving the terms of this Framework Agreement may be brought to a joint committee of one representative of each of the Company (or Heartland Industrial Partners) and the Union. If the alleged violation or dispute cannot be satisfactorily resolved by the parties, either party may submit such dispute to an Arbitrator. A hearing shall be held within ten (10) days following such submission and the Arbitrator shall issue a decision within five (5) days thereafter. Such decision shall be in writing but need only succinctly explain the basis for the findings. All decisions by the Arbitrator pursuant to this Framework Agreement shall be based on the terms of this Framework Agreement and the applicable provisions of the law. The Arbitrator's remedial authority shall include the power to issue an order requiring the Company to recognize the Union where, in all the circumstances, such an order would be appropriate.

The Arbitrator's award shall be final and binding on the parties and all employees covered by this Framework Agreement. Each party expressly waives the right to seek judicial review of said award; however, each party retains the right to seek judicial enforcement of said award.

II. BARGAINING STRUCTURE

The Company agrees that:

(i) all current and future USWA bargaining units shall be merged in a single bargaining unit; and

(ii) all current and future labor agreements between itself and the USWA shall be merged into one Master Agreement with a single expiration date and with differences between individual agreements dealt with through local supplements.

III. WORK STOPPAGES

The Company agrees that:

(i) in the event of a lawful work stoppage at any USWA represented unit, that it shall not permanently replace striking employees;

(ii) said obligation shall survive the expiration of the applicable labor agreement;

(iii) breaches of this agreement on Work Stoppages shall be subject to the grievance and arbitration provisions of the applicable labor agreement, notwithstanding any other provisions of said agreement; and

(iv) the Arbitrator provided for in (iii) above shall have the authority to fashion a suitable remedy, including but not limited to a cease and desist order.

November 27, 2000

UNITED STEELWORKERS OF AMERICA

George Becker
International President

HEARTLAND INDUSTRIAL PARTNERS

David A. Stockman
Senior Managing Director

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SAGE HOSPITALITY RESOURCES, LLC, Appellant, *v.* H.E.R.E. LOCAL 57, Appellee.	CASE NO. 03-4168

DECLARATION OF FAITH JETTER IN SUPPORT OF MOTION TO INTERVENE OR, ALTERNATIVELY, TO FILE A BRIEF AMICUS CURIAE

Faith Jetter, pursuant to Section 1746 of the Judicial Code, 28 U.S.C. §1746, declares as follows:

1) I am an employee of Sage, employed at the Renaissance Hotel ("Hotel") in Pittsburgh. I became employed at the Hotel in February, 2001, as part of the initial employee orientation. The Hotel opened for business shortly after I was hired. At the Hotel, I work as a housekeeping inspectress.

2) I know that Local 57 of the Hotel Employees and Restaurant Employees Union ("HERE") has been trying to unionize myself and other employees of the Hotel.

EXHIBIT 3

3) I heard that the Hotel and the HERE union signed an agreement covering the union's attempt to organize the employees of the Hotel. I also learned that this agreement required my employer to give the HERE union a list of employees' names and addresses, and access to the employees inside of the Hotel. No one asked me if I approved of this, and I do not. I am opposed to the Hotel giving the HERE union a list with my name and personal information, and allowing them access to me in the workplace.

4) I was called at home and also contacted in person by HERE union representatives and urged to sign a union authorization card. These union representatives already had my name and home address and telephone number. I was asked if the union representatives could come to my home and make a presentation about the union. I allowed them to come, as I was willing to listen.

5) Two union representatives came to my home and made a presentation about the union. They tried to pressure me into signing the union authorization card, and even offered to take me to out dinner. I refused to sign this card as I had not yet made a decision at that time.

6) Shortly thereafter, the union representatives called again at my home, and also visited my home again to try to get me to sign the union authorization card. I finally told them that my decision was that I did not want to be represented by this

union, and that I would not sign the card.

7) Despite the fact that I had told the union representatives of my decision to refrain from signing the card, I felt like there was continuing pressure on me to sign. These union representatives and others were sometimes in and around the hotel, and would speak to me or approach me when I did not want to speak with them. I also heard from other employees that the union representatives were making inquiries about me, such as asking questions about my work performance. I found this to be an invasion of my personal privacy. Once when I was on medical leave and went into the hospital, I found that when I returned to work the union representatives knew about my hospitalization and my illness. I felt like their knowledge about me and my illness was also an invasion of my personal privacy.

8) I also saw the union representatives try to coerce another employee to sign a card, even though they never explained to the employee what this card meant, or told her that the union could be able to be automatically recognized as the representative of the employees without a secret ballot election. It was clear to me that this employee had no idea what this card meant when the union tried to get her signature.

9) I do not care what decision any employee makes regarding whether or not to

be represented by the HERE union, but I think it is each employee's individual choice, to be made with full knowledge of what that choice means. I also believe that an employee's decision to say "no" should be respected, without pressure or coercion by the union.

10) If this union was going to come into the workplace, I would absolutely want to have a secret ballot election so that me and my fellow employees could vote our consciences in private, without being pressured by the union representatives. I would also want to hear all sides of the story, not just the union's side.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 19, 2003.

Faith Jetter

Letter from Charles I. Cohen, Morgan, Lewis & Bockius, LLP, Washington, DC, Submitted for the Record

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COUNSELORS AT LAW

Charles I. Cohen
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May 18, 2004

Chairman Sam Johnson
Subcommittee on Employer-Employee Relations
Committee on Education and the Workforce
U.S. House of Representatives
1211 Longworth House Office Building
Washington, D.C. 20515

Re: NLRB Election Data

Dear Chairman Johnson:

This shall supplement the testimony I provided on April 22, 2004, before the Subcommittee on Employer-Employer Relations, regarding "Developments in labor law: Examining trends and tactics in labor organization campaigns." As you requested, please find below a table listing the number of total employees eligible to vote in National Labor Relations Board (NLRB) Elections involving new organizing campaigns, and the number of total votes cast in those elections from October 2000 through September 2003. These numbers confirm that approximately eighty-five percent (85%) of eligible employees show up and cast their vote in NLRB-conducted secret ballot elections to determine whether they wish to be represented by a union. This exceedingly high turnout is yet another indicator that the NLRB's secret ballot elections are indeed working.

Morgan Lewis
COUNSELORS AT LAW

Chairman Sam Johnson
Subcommittee on Employer-Employee Relations
May 18, 2004
Page 2

TIME PERIOD	TOTAL EMPLOYEES ELIGIBLE TO VOTE	TOTAL VOTES CAST	PERCENTAGE OF ELIGIBLE VOTERS THAT CAST VOTES
April 2003-Sept 2003	68,045	57,465	84%
Oct 2002-March 2003	71,449	62,182	87%
April 2002-Sept 2002	74,240	62,165	84%
Oct 2001-March 2002	75,873	64,801	85%
April 2001-Sept 2001	95,152	77,324	81%
Oct 2000-March 2001	89,663	76,684	86%

The above data was taken from the NLRB Election Reports, Fiscal Years 2001-2003, which are located at *http://www.nlrb.gov/nlrb/shared_files/brochures/election_reports.asp*. For your convenience, please find enclosed the underlying documents which contain the data used in the table above.

If you have any questions or if I can be of further assistance, please let me know.

Sincerely,

Charles I. Cohen

Enclosures

cc: James A. Paretti, Jr., Esq.

NATIONAL LABOR RELATIONS BOARD

SUMMARY TABLE 7: OUTCOME OF COLLECTIVE-BARGAINING ELECTIONS 1/
INVOLVING NEW ORGANIZING*, AND NUMBER OF EMPLOYER ELIGIBLE TO VOTE
(CASES CLOSED OCTOBER 2000 - MARCH 2001)

PARTICIPATING UNIONS	TOTAL ELEC-TIONS	PERCENT WON BY UNIONS 3/	ELECTIONS WON BY			NO REPRE SENTATIVE CHOSEN	TOTAL EMPLOYEES ELIGIBLE TO VOTE	EMPLOYEES ELIGIBLE TO VOTE IN UNITS WON BY			NO REPRE SENTATIVE CHOSEN
			TOTAL WON	AFL-CIO	UNAFF.			TOTAL WON	AFL-CIO	UNAFF.	
AFL-CIO	1,076	50.9	548	548		528	79,615	30,315	30,315		49,300
Unaffiliated	91	58.2	53		53	38	7,549	2,869		2,869	4,680
1-union elections	1,167	51.5	601	548	53	566	87,164	33,184	30,315	2,869	53,980
AFL-CIO v. AFL-CIO	12	66.7	8	8		4	674	400	400		274
AFL-CIO v. Unaffiliated	10	80.0	8	6	2	2	1,467	1,246	484	762	221
Unaffiliated v. Unaffiliated	5	80.0	4		4	1	263	100		100	163
2-union elections 2/	27	74.1	20	14	6	7	2,404	1,746	884	862	658
AFL-CIO v. AFL-CIO v. AFL-CIO	2	100.0	2	2		0	95	95	95		0
3 (or more)-union elections 2/	2	100.0	2	2	0	0	95	95	95	0	0
Total Representation Elections	1,196	52.1	623	564	59	573	89,663	35,025	31,294	3,731	54,638

* New organizing represents the difference between total collective-bargaining elections and those in which an incumbent union was on the ballot.

1/ Does not include decertification elections.

2/ This summary indicates the affiliation or nonaffiliation of the unions involved. It does not indicate which union was the petitioner. Such information can be obtained by an analysis of the two union (or more) elections held.

3/ Shows percentage of elections won to total elections within each category.

NATIONAL LABOR RELATIONS BOARD

SUMMARY TABLE 8: VALID VOTES CAST IN COLLECTIVE-BARGAINING ELECTIONS 1/
INVOLVING NEW ORGANIZING*, BY RESULTS OF ELECTIONS
(CASES CLOSED OCTOBER 2000 - MARCH 2001)

		VOTES CAST IN ELECTIONS WON				VOTES CAST IN ELECTIONS LOST			
		VOTES FOR UNION			TOTAL VOTES	VOTES FOR UNIONS			TOTAL VOTES
PARTICIPATING UNIONS	VOTES CAST	TOTAL	FOR AFL-CIO	FOR UNAFF.	FOR NO UNION	TOTAL	FOR AFL-CIO	FOR UNAFF.	FOR NO UNION
AFL-CIO	68,448	17,228	17,228		7,903	14,716	14,716		28,601
Unaffiliated	6,527	1,633		1,633	681	1,323		1,323	2,890
1-union elections	74,975	18,861	17,228	1,633	8,584	16,039	14,716	1,323	31,491
AFL-CIO v. AFL-CIO	613	251	251		55	228	228		79
AFL-CIO v. Unaffiliated	865	581	339	242	89	102	28	74	93
Unaffiliated v. Unaffiliated	175	69		69	2	101		101	3
2-union elections 2/	1,653	901	590	311	146	431	256	175	175
AFL-CIO v. AFL-CIO v. AFL-CIO	56	56	56	0	0	0	0		0
3 (or more)-union elections 2/	56	56	56	0	0	0	0	0	0
Total Representation Elections	76,684	19,818	17,874	1,944	8,730	16,470	14,972	1,498	31,666

* New organizing represents the difference between total collective-bargaining elections and those in which an incumbent union was on the ballot.

1/ Does not include decertification elections.

2/ This summary indicates the affiliation or nonaffiliation of the unions involved. It does not indicate which union was the petitioner. Such information can be obtained by an analysis of the two union (or more) elections held.

NATIONAL LABOR RELATIONS BOARD

SUMMARY TABLE 7: OUTCOME OF COLLECTIVE-BARGAINING ELECTIONS 1/
INVOLVING NEW ORGANIZING*, AND NUMBER OF EMPLOYER ELIGIBLE TO VOTE
(CASES CLOSED APRIL 2001–SEPTEMBER 2001)

PARTICIPATING UNIONS	TOTAL ELEC-TIONS	PERCENT WON BY UNIONS 3/	ELECTIONS WON BY			NO REPRE SENTATIVE CHOSEN	TOTAL EMPLOYEES ELIGIBLE TO VOTE	EMPLOYEES ELIGIBLE TO VOTE IN UNITS WON BY			NO REPRE SENTATIVE CHOSEN
			TOTAL WON	AFL-CIO	UNAFF.			TOTAL WON	AFL-CIO	UNAFF.	
AFL-CIO	1,000	52.3	523	523		477	84,981	25,938	25,938		59,043
Unaffiliated	99	67.7	67		67	32	6,441	3,930		3,930	2,511
1-union elections	1,099	53.7	590	523	67	509	91,422	29,868	25,938	3,930	61,554
AFL-CIO v. AFL-CIO	23	60.9	14	14		9	2,029	501	501		1,528
AFL-CIO v. Unaffiliated	14	78.6	11	7	4	3	1,605	1,570	508	1,062	35
Unaffiliated v. Unaffiliated	2	50.0	1		1	1	96	90		90	6
2-union elections 2/	39	66.7	26	21	5	13	3,730	2,161	1,009	1,152	1,569
Total Representation Elections	1,138	54.1	616	544	72	522	95,152	32,029	26,947	5,082	63,123

* New organizing represents the difference between total collective-bargaining elections and those in which an incumbent union was on the ballot.
1/ Does not include decertification elections.
2/ This summary indicates the affiliation or nonaffiliation of the unions involved. It does not indicate which union was the petitioner. Such information can be obtained by an analysis of the two union (or more) elections held.
3/ Shows percentage of elections won to total elections within each category.

NATIONAL LABOR RELATIONS BOARD

SUMMARY TABLE 8: VALID VOTES CAST IN COLLECTIVE-BARGAINING ELECTIONS 1/
INVOLVING NEW ORGANIZING,* BY RESULTS OF ELECTIONS
(CASES CLOSED APRIL 2001–SEPTEMBER 2001)

		VOTES CAST IN ELECTIONS WON				VOTES CAST IN ELECTIONS LOST			
		VOTES FOR UNION			TOTAL VOTES	VOTES FOR UNIONS			TOTAL VOTES
PARTICIPATING UNIONS	VOTES CAST	TOTAL	FOR AFL-CIO	FOR UNAFF.	FOR NO UNION	TOTAL	FOR AFL-CIO	FOR UNAFF.	FOR NO UNION
AFL-CIO	69,300	14,254	14,254		6,679	14,721	14,721		33,646
Unaffiliated	5,127	2,358		2,358	698	699		699	1,372
1-union elections	74,427	16,612	14,254	2,358	7,377	15,420	14,721	699	35,018
AFL-CIO v. AFL-CIO	1,603	386	386		11	461	461		745
AFL-CIO v. Unaffiliated	1,223	984	478	506	212	20	6	14	7
Unaffiliated v. Unaffiliated	71	42		42	23	2		2	4
2-union elections 2/	2,897	1,412	864	548	246	483	467	16	756
Total Representation Elections	77,324	18,024	15,118	2,906	7,623	15,903	15,188	715	35,774

* New organizing represents the difference between total collective-bargaining elections and those in which an incumbent union was on the ballot.

1/ Does not include decertification elections.

2/ This summary indicates the affiliation or nonaffiliation of the unions involved. It does not indicate which union was the petitioner. Such information can be obtained by an analysis of the two union (or more) elections held.

NATIONAL LABOR RELATIONS BOARD

SUMMARY TABLE 7: OUTCOME OF COLLECTIVE-BARGAINING ELECTIONS 1/
INVOLVING NEW ORGANIZING*, AND NUMBER OF EMPLOYER ELIGIBLE TO VOTE
(CASES CLOSED OCTOBER 2001 - MARCH 2002)

PARTICIPATING UNIONS	TOTAL ELEC-TIONS	PERCENT WON BY UNIONS 3/	ELECTIONS WON BY			NO REPRE-SENTATIVE CHOSEN	TOTAL EMPLOYEES ELIGIBLE TO VOTE	EMPLOYEES ELIGIBLE TO VOTE IN UNITS WON BY			NO REPRE-SENTATIVE CHOSEN
			TOTAL WON	AFL-CIO	UNAFF.			TOTAL WON	AFL-CIO	UNAFF.	
AFL-CIO	867	49.7	431	431		436	63,146	23,632	23,632		39,514
Unaffiliated	81	66.7	54		54	27	8,783	3,419		3,419	5,364
1-union elections	948	51.2	485	431	54	463	71,929	27,051	23,632	3,419	44,878
AFL-CIO v. AFL-CIO	28	82.1	23	23		5	2,336	906	906		1,430
AFL-CIO v. Unaffiliated	8	75.0	6	3	3	2	1,163	588	129	459	575
Unaffiliated v. Unaffiliated	3	33.3	1		1	2	445	415		415	30
2-union elections 2/	39	76.9	30	26	4	9	3,944	1,909	1,035	874	2,035
Total Representation Elections	987	52.2	515	457	58	472	75,873	28,960	24,667	4,293	46,913

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3/ Shows percentage of elections won to total elections within each category.

NATIONAL LABOR RELATIONS BOARD

SUMMARY TABLE 8: VALID VOTES CAST IN COLLECTIVE-BARGAINING ELECTIONS 1/
INVOLVING NEW ORGANIZING*, BY RESULTS OF ELECTIONS
(CASES CLOSED OCTOBER 2001 - MARCH 2002)

		VOTES CAST IN ELECTIONS WON				VOTES CAST IN ELECTIONS LOST			
		VOTES FOR UNION			TOTAL VOTES	VOTES FOR UNIONS			TOTAL VOTES
PARTICIPATING UNIONS	VOTES CAST	TOTAL	FOR AFL-CIO	FOR UNAFF.	FOR NO UNION	TOTAL	FOR AFL-CIO	FOR UNAFF.	FOR NO UNION
AFL-CIO	54,556	13,358	13,358		5,716	11,676	11,676		23,806
Unaffiliated	7,190	1,802		1,802	877	1,390		1,390	3,121
1-union elections	61,746	15,160	13,358	1,802	6,593	13,066	11,676	1,390	26,927
AFL-CIO v. AFL-CIO	1,981	751	751		9	472	472		749
AFL-CIO v. Unaffiliated	725	454	174	280	11	150	78	72	110
Unaffiliated v. Unaffiliated	349	317		317	10	22		22	0
2-union elections 2/	3,055	1,522	925	597	30	644	550	94	859
Total Representation Elections	64,801	16,682	14,283	2,399	6,623	13,710	12,226	1,484	27,786

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NATIONAL LABOR RELATIONS BOARD

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(CASES CLOSED APRIL 2002 - SEPTEMBER 2002)

PARTICIPATING UNIONS	TOTAL ELEC-TIONS	PERCENT WON BY UNIONS 3/	ELECTIONS WON BY			NO REPRE-SENTATIVE CHOSEN	TOTAL EMPLOYEES ELIGIBLE TO VOTE	EMPLOYEES ELIGIBLE TO VOTE IN UNITS WON BY			NO REPRE-SENTATIVE CHOSEN
			TOTAL WON	AFL-CIO	UNAFF.			TOTAL WON	AFL-CIO	UNAFF.	
AFL-CIO	1,032	55.2	570	570		462	64,267	27,094	27,094		37,173
Unaffiliated	101	73.3	74		74	27	4,406	3,410		3,410	996
1-union elections	1,133	56.8	644	570	74	489	68,673	30,504	27,094	3,410	38,169
AFL-CIO v. AFL-CIO	36	100.0	36	36		0	3,423	3,423	3,423		0
AFL-CIO v. Unaffiliated	4	75.0	3	1	2	1	301	125	50	75	176
Unaffiliated v. Unaffiliated	7	100.0	7		7	0	1,843	1,843		1,843	0
2-union elections 2/	47	97.9	46	37	9	1	5,567	5,391	3,473	1,918	176
Total Representation Elections	1,180	58.5	690	607	83	490	74,240	35,895	30,567	5,328	38,345

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3/ Shows percentage of elections won to total elections within each category.

NATIONAL LABOR RELATIONS BOARD

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		VOTES FOR UNION			TOTAL VOTES	VOTES FOR UNIONS			TOTAL VOTES
PARTICIPATING UNIONS	VOTES CAST	TOTAL	FOR AFL-CIO	FOR UNAFF.	FOR NO UNION	TOTAL	FOR AFL-CIO	FOR UNAFF.	FOR NO UNION
AFL-CIO	55,477	15,671	15,671		6,771	10,532	10,532		22,503
Unaffiliated	3,333	1,895		1,895	592	300		300	546
1-union elections	58,810	17,566	15,671	1,895	7,363	10,832	10,532	300	23,049
AFL-CIO v. AFL-CIO	1,977	1,952	1,952	0	25	0	0		0
AFL-CIO v. Unaffiliated	243	94	67	27	0	43	22	21	106
Unaffiliated v. Unaffiliated	1,135	1,063	0	1,063	72	0		0	0
2-union elections 2/	3,355	3,109	2,019	1,090	97	43	22	21	106
Total Representation Elections	62,165	20,675	17,690	2,985	7,460	10,875	10,554	321	23,155

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			TOTAL WON	AFL-CIO	UNAFF.			TOTAL WON	AFL-CIO	UNAFF.	
AFL-CIO	897	51.5	462	462		435	62,980	21,777	21,777		41,203
Unaffiliated	86	60.5	52		52	34	6,427	2,708		2,708	3,719
1-union elections	983	52.3	514	462	52	469	69,407	24,485	21,777	2,708	44,922
AFL-CIO v. AFL-CIO	14	92.9	13	13		1	495	487	487		8
AFL-CIO v. Unaffiliated	14	85.7	12	7	5	2	1,190	1,008	433	575	182
Unaffiliated v. Unaffiliated	6	100.0	6		6	0	227	227		227	0
2-union elections 2/	34	91.2	31	20	11	3	1,912	1,722	920	802	190
AFL-CIO v. AFL-CIO v. AFL-CIO v. AFL-CIO	1	100.0	1	1		0	14	14	14		0
AFL-CIO v. AFL-CIO v. Unaffiliated	1	100.0	1	1	0	0	116	116	116	0	0
3 (or more)-union elections 2/	2	100.0	2	2	0	0	130	130	130	0	0
Total Representation Elections	1,019	53.7	547	484	63	472	71,449	26,337	22,827	3,510	45,112

* New organizing represents the difference between total collective bargaining elections and those in which an incumbent union was on the ballot.

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NATIONAL LABOR RELATIONS BOARD

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		VOTES CAST IN ELECTIONS WON				VOTES CAST IN ELECTIONS LOST			
		VOTES FOR UNION			TOTAL VOTES	VOTES FOR UNIONS			TOTAL VOTES
PARTICIPATING UNIONS	VOTES CAST	TOTAL	FOR AFL-CIO	FOR UNAFF.	FOR NO UNION	TOTAL	FOR AFL-CIO	FOR UNAFF.	FOR NO UNION
AFL-CIO	55,236	12,650	12,650		5,608	12,888	12,888		24,090
Unaffiliated	5,423	1,688		1,688	472	1,004		1,004	2,259
1-union elections	60,659	14,338	12,650	1,688	6,080	13,892	12,888	1,004	26,349
AFL-CIO v. AFL-CIO	277	221	221		46	4	4		6
AFL-CIO v. Unaffiliated	949	741	395	346	66	67	61	6	75
Unaffiliated v. Unaffiliated	184	174	0	174	10	0		0	0
2-union elections 2/	1,410	1,136	616	520	122	71	65	6	81
AFL-CIO v. AFL-CIO v. AFL-CIO v. AFL-CIO	20	20	20	0	0	0	0		0
AFL-CIO v. AFL-CIO v. Unaffiliated	93	64	62	2	29	0	0	0	0
3 (or more)-union elections 2/	113	84	82	2	29	0	0	0	0
Total Representation Elections	62,182	15,558	13,348	2,210	6,231	13,963	12,953	1,010	26,430

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			TOTAL WON	AFL-CIO	UNAFF.			TOTAL WON	AFL-CIO	UNAFF.	
AFL-CIO	985	57.3	564	564		421	54,776	25,484	25,484		29,292
Unaffiliated	96	66.7	64		64	32	6,374	2,655		2,655	3,719
1-union elections	1,081	58.1	628	564	64	453	61,150	28,139	25,484	2,655	33,011
AFL-CIO v. AFL-CIO	13	76.9	10	10		3	1,120	976	976		144
AFL-CIO v. Unaffiliated	10	80.0	8	5	3	2	3,863	3,513	551	2,962	350
Unaffiliated v. Unaffiliated	9	100.0	9		9	0	1,886	1,886		1,886	0
2-union elections 2/	32	84.4	27	15	12	5	6,869	6,375	1,527	4,848	494
Unaffiliated v. Unaffiliated v. Unaffiliated	1	100.0	1		1	0	26	26		26	0
3 (or more)-union elections 2/	1	100.0	1	0	1	0	26	26	0	26	0
Total Representation Elections	1,114	58.9	656	579	77	458	68,045	34,540	27,011	7,529	33,505

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		VOTES FOR UNION			TOTAL VOTES	VOTES FOR UNIONS			TOTAL VOTES
PARTICIPATING UNIONS	VOTES CAST	TOTAL	FOR AFL-CIO	FOR UNAFF.	FOR NO UNION	TOTAL	FOR AFL-CIO	FOR UNAFF.	FOR NO UNION
AFL-CIO	47,758	15,010	15,010		6,353	9,559	9,559		16,836
Unaffiliated	5,261	1,482		1,482	511	1,136		1,136	2,132
1-union elections	53,019	16,492	15,010	1,482	6,864	10,695	9,559	1,136	18,968
AFL-CIO v. AFL-CIO	836	686	686		28	67	67		55
AFL-CIO v. Unaffiliated	2,265	1,947	888	1,059	47	198	72	126	73
Unaffiliated v. Unaffiliated	1,334	1,304	0	1,304	30	0		0	0
2-union elections 2/	4,435	3,937	1,574	2,363	105	265	139	126	128
Unaffiliated v. Unaffiliated v. Unaffiliated	11	11	0	11	0	0		0	0
3 (or more)-union elections 2/	11	11	0	11	0	0	0	0	0
Total Representation Elections	57,465	20,440	16,584	3,856	6,969	10,960	9,698	1,262	19,096

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Letter from Clyde H. Jacob III, Jones, Walker, Waechter, Poitevent, Carrere & Degnegre LLP, New Orleans, LA, Submitted for the Record

JONES WALKER

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May 26, 2004

The Honorable Sam Johnson
Chairman
Subcommittee on Employer-Employee Relations
Committee on Education and the Workforce
U.S. House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515-6100

Re: Subcommittee Hearing, April 22, 2004
Developments in Labor Law: Examining Trends and Tactics in Labor Organization Campaigns

Dear Representative Johnson:

It was a privilege to be asked to provide testimony at your subcommittee hearing on trends and tactics in labor organization campaigns. The subcommittee's interest in this subject is important to the continued growth and welfare of our nation's economy and also to the employees who are the engine of our economy.

One aspect of my testimony about the inherent risks of basing union representation on union authorization cards was that from my experience when employees have sought to have their cards returned from a labor union, the union has ignored the request. Employees who have filed unfair labor practice charges with the National Labor Relations Board (NLRB) seeking the return of their cards have discovered that there are no provisions under the National Labor Relations Act (NLRA) that would permit the NLRB to order the return of the cards. Please see exhibit no. 1 attached to my testimony.

Following my testimony, The Honorable Robert Andrews questioned me about this. Representative Andrews entered into evidence three NLRB cases and stated that irrespective of who had physical custody of the card, the fact that the employee had made evidence of his desire to revoke his consent to the card means his vote does not count or the card does not count. Further, that if the employer contests the certification of the election on the grounds that the card was revoked, the card is revoked, and there is no election or no certification.

In response, I began to explain that in my experience, NLRB elections have still gone forward with the Board's regional office processing a union election pention. Mr. Andrews asked if I would supplement the record with cases on this, and I said I would be happy to do so.

I would refer the Subcommittee to the National Labor Relations Board's Case Handling Manual, the portion dealing with the preliminary investigation of representation case proceedings. Within that area are sections focused upon the NLRB administratively checking the required showing of interest to determine whether to move the union petition forward to a secret ballot election. This confidential, administrative process is accomplished by the regional office checking the authorization cards or petition signed by employees to ascertain whether the requisite showing of interest of at least 30% in an appropriate unit has been attained.

Section 11027.1, dealing with card validity, states, "W-4 forms or other documents should not be accepted routinely for checking against signatures on the authorizations, absent objective evidence that provides a reasonable basis for challenging the showing of interest." The *only* grounds set forth for challenging are allegations of fraud, misconduct, supervisory taint, or forgery -- not an employee's request to have his card revoked or returned.

Section 11028.3 states, "A challenge to the validity or authenticity of the showing of interest may not be litigated at a hearing." Section 11028.4 states, in pertinent part, "After an election has been held, the adequacy of the showing of interest is irrelevant. *Gaylord Bay Co.*, 313 NLRB 306 (1993). Accordingly, challenges to the adequacy of the showing of interest may not be raised after an election has been held." After a labor union has filed a petition for an election, from my experience, there is no provision under the law for an employee or an employer to challenge the sufficiency of a union's election petition or election victory based upon employees who have changed their minds and sought to revoke or to have their cards returned.

A difficulty in relying solely upon solicited cards to establish legal union representation was recognized by Representative Andrews at the hearing in one of the cases he offered into evidence. In *Le Marquis Hotel, LLC*, 340 NLRB No. 64 (2003), a representation case involving an employer and two unions, the NLRB stated:

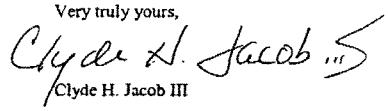
> The *Midwest Piping/Bruckner* theories evolved from the Board's desire to have real questions concerning representation, decided by Board elections, rather than voluntary recognition in rival organizational campaigns, whether or not majority status is present.

In my view, government-conducted secret ballot elections are the hallmark of our nation's labor law and should always remain so.

Let me again thank you for the opportunity to provide testimony on this important subject, and if I can be of further service, I would be pleased to do so.

With very best regards, I am

Very truly yours,



Clyde H. Jacob III

CHJ/rbm