

Katz's Delicatessen of Houston Street d/b/a Katz's Deli and Hotel Employees & Restaurant Employees International Union, Local 100 of New York & Vicinity, AFL-CIO and Local 131, International Brotherhood of Trade Unions, Party in Interest

Local 131, International Brotherhood of Trade Unions and Hotel Employees & Restaurant Employees International Union, Local 100 of New York, New York & Vicinity, AFL-CIO and Katz's Delicatessen of Houston Street d/b/a Katz's Deli, Party in Interest. Cases 2-CA-25065, 2-CA-25079, 2-CA-25124, 2-CA-25266, and 2-CB-13722

February 16, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND BROWNING

On September 2, 1994, Administrative Law Judge Steven B. Fish issued the attached decision. Katz's Deli (the Employer) and Local 131, International Brotherhood of Trade Unions filed exceptions and supporting briefs, and the General Counsel filed an answering brief and filed cross-exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

¹ The Employer and Local 131 have 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 Employer and Local 131, in taking exception to the judge's reliance on the two petitions signed by employees for Local 100, specifically question his failure to rely on the testimony of four employees who testified that the petitions presented to them for signature were blank. The Employer and Local 131 also contend that the judge erred in failing to find that the employees, as they further testified, were coerced or deceived into signing the blank petitions. We find no merit in these contentions. In finding the petitions to be valid, the judge by necessity implicitly discredited the employees' testimony (described in subsec. A of sec. II of his decision) that the petitions they signed were blank. He also specifically rejected the argument that coercion and deceit were used to obtain the employees' signatures to the petitions. In this regard, he found that the statements of Lynch, the Local 100 representative who solicited the employees to sign the petitions, to the effect that the employees could or would lose their benefits if they changed from representation by Local 100 to Local 131, were "not necessarily untrue, and [are] in fact likely" in such a situation. He also discredited testimony that Lynch threatened employees with a loss of jobs if they did not sign

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Katz's Delicatessen of Houston Street d/b/a Katz's Deli, New York, New York, its officers, agents, successors, and assigns, and the Respondent, Local 131, International Brotherhood of Trade Unions, New York, New York, its officers, agents, and representatives, shall take the action set forth in the Order.

the petitions. In light of our agreement with these findings, we adopt the judge's findings with respect to the petitions.

We find it unnecessary to speculate about the Employer's motive for recognizing Local 131 and we do not rely on the judge's statement that the Employer's conduct demonstrates that it wished to rid itself of expensive pension and welfare obligations under its contract with Local 100.

Mindy E. Landow, Esq., for the General Counsel.
Joel E. Cohen, Esq. (Mudge, Rose, Guthrie, Alexander & Ferdon), of New York, New York, for the Respondent Employer.

J. Warren Mangan, Esq. (O'Connor & Mangan, P.C.), of Mineola, New York, for the Respondent Union.

Steven O'Beirne, Esq., of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN B. FISH, Administrative Law Judge. Pursuant to charges filed by Hotel Employees & Restaurant Employees International Union, Local 100 of New York, New York & Vicinity, AFL-CIO (Local 100 or the Charging Party), the Regional Director for Region 2 on May 22, 1992, issued an order consolidating cases, consolidated complaint and notice of hearing, alleging that Katz's Delicatessen of Houston Street d/b/a Katz's Deli (Respondent Employer, Katz's, Respondent, or Katz) and Local 131, International Brotherhood of Trade Unions (Respondent Union or Local 131) violated Section 8(a)(1), (2), (3), and (5) and Section 8(b)(1)(A) and (2) of the Act, respectively.

The trial with respect to the allegations raised by the complaint was held before me in New York, New York, on November 17, 18, and 24, 1993. Briefs have been filed by the General Counsel, Respondent Employer, and Respondent Union and have been carefully considered. Based on the entire record,¹ including my observation of the demeanor of the witnesses, I make the following

¹ While every apparent or nonapparent conflict in the evidence may not have been specifically resolved here, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying, and my evaluation of the reliability of their testimony. Accordingly, any testimony which is inconsistent with or contrary to my findings is discredited.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent Employer is a corporation with a place of business in New York, New York, where it is engaged in the operation of a public restaurant selling food and beverages. Annually, Katz's derives gross revenues in excess of \$500,000 and purchases and receives at its facility products, goods, and materials valued in excess of \$5000 directly from points outside the State of New York.

It is admitted and I so find that Katz's has been and 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 100 and Local 131 are labor organizations within the meaning of Section 2(5) of the Act.

II. FACTS

A. *The Alleged Refusal of Katz's to sign a Contract and the Recognition of Local 131*

Katz's and Local 100 have maintained a collective-bargaining relationship for many years and have been parties to a number of collective-bargaining agreements.² Alan Dell and Fred Austin purchased the restaurant in 1988, and subsequently entered into a collective-bargaining agreement with Local 100, which by its terms was effective from April 1, 1988, to March 30, 1991.³

The agreement provides in article 19, entitled visitation, that "a duly authorized union representative shall be admitted to the Employer's place of business at all reasonable times." The contract also provides for welfare contributions to be made by Katz's into Local 100's welfare fund of \$31.25 per week for each full-time and regular part-time employee and \$6.25 per day for each other employee as of November 1, 1989, and for pension contributions, effective October 1, 1988, of \$16 per week for each full- and regular part-time employee to the Local 100 pension fund.

Timothy Lynch, a business representative for Local 100, was assigned to service Katz's sometime in 1989.

In January 1991, Local 131 began an organizing campaign at Katz's facility. Sam Sali, Local 131's president, enlisted the support of Luigi Gjokaj, an employee of Katz's in distributing and soliciting employees of Katz's to sign authorization cards on behalf of Local 131. Gjokaj in turn enlisted the support of fellow employees Johnny and Rafael in this effort. Between January 24 and 29, they obtained signed authorization cards from seven Katz's employees. On January 30, 14 additional cards were executed by Katz's employees, which brought Local 131's total to 21.⁴ On that date, Thomas Lee, a business representative for Local 131 brought these 21 cards to the Brooklyn Regional Office. He was given a receipt for the cards, dated January 30, but was told that the proper Region to file the petition was at Region 2 in Manhattan. Lee for some reason, unexplained in the record, waited until February 1 to file the petition at Region 2. While Re-

spondent Employer contends that the petition would have been timely had it been filed on January 30, it is not correct in that assertion. The insulated period of 60 days includes the expiration date of the existing contract. Therefore, a petition to be timely must be filed 61 days before the termination of the contract. *DeLuxe Metal Furniture Co.*, 121 NLRB 995, 1000, 1001 (1958). Thus, the petition filed by Local 131 was untimely whether or not it was considered filed on January 30 or February 1.

Thereafter, Local 131 argued that the existing contract was not a bar because of an allegedly unlawful union-security clause. This contention was rejected by the Regional Director for Region 2 in an order dismissing petition on February 26.

Thereafter, representatives of Local 100 and Katz's met to negotiate over terms of a successor collective-bargaining agreement. At the first meeting on February 28, Kenneth Kirschner, attorney for Katz's, and Austin were present representing Respondent Employer. Lynch, several unit employees, and Darwin Lanyi, Local 100's vice president, represented Local 100. Each party presented a list of proposals, which were discussed extensively at that meeting. At the outset of the meeting, Lynch, in view of his knowledge of Local 131's interest in the shop, informed Katz's that by March 30, the expiration date of the agreement, Local 100 would present Katz's last offer to the employees, and if it was rejected, he intended to call a strike. According to Austin, Lynch added that Katz's would "be shut down." Additionally, Kirschner stated at this meeting that there would be no final agreement unless there was an agreement on all terms of a contract.

The parties then had three other bargaining sessions, March 1, 22, and 25. Dell rather than Austin represented Respondent Employer along with Kirschner at these meetings. The same representatives for Local 100 were present, except that Lynch was not present at one of the first two meetings in March.

The final negotiation session between the parties occurred on March 25. Although all parties agree that not all issues had been resolved by the close of that meeting, the witnesses, principally Lynch and Dell, differed sharply as to what items remained open when the March 25 meeting concluded. According to Lynch, the only issues which had not been either agreed on or withdrawn by the end of March 25 were wages, a pending arbitration,⁵ and contributions to the welfare fund. Local 100 had presented a list of 11 proposals for a renewal agreement. Lynch and Dell agreed that wages and welfare contributions were still outstanding issues by the end of the meeting. According to Lynch, and not disputed by Dell, the parties had agreed on the duration of the agreement (April 1, 1991, to March 31, 1994), and Local 100 had withdrawn its proposals for increases in vacations, paid holidays, paid sick days, jury duty, bereavement, and superseniority for its shop steward. Lynch also testified that Local 100 withdrew its proposal for increases in pension contributions, but Dell contends that this issue was still open as of the close of the March 25 meeting.

Katz's also submitted a list of 11 proposals which were discussed during the course of the parties' bargaining. Ac-

²Local 100 represented Katz's waiters, waitresses, counterpersons, buspersons, chefs, kitchen personnel, and porters.

³All subsequent dates hereinafter referred to are in 1991, unless otherwise indicated.

⁴At that time Katz's employed 34 employees in the unit.

⁵Although not part of Local 100's written proposals, there was discussion concerning a pending arbitration filed by Local 100 concerning minimum salaries.

ording to Lynch, and again not disputed by Dell, the parties reached agreement on several of Katz's proposals, with some modification, such as forfeiture of 2 days' accrued benefits if an employee resigns without giving more than 2 days' notice, a proposal concerning consecutive days off and Employer discretion, an agreement to increase the probationary period from 30 to 60 days on request of the Employer, elimination of the requirement in the expired contract that Katz's must pay an employee pending arbitration, that the contract would contain base salary levels as reflected in prior correspondence between the parties, and the elimination of a differential for former Local 1 employees.

Lynch also testified that Katz's had withdrawn its proposals to reduce the guarantee for showing up from a full day to a half a day. This testimony is not disputed by Dell, but Dell does contend that other proposals that Lynch also testified were withdrawn, such as an open shop, elimination of the hiring clause, a requirement that employees contribute to welfare fund increases, and a proposal that business representatives must give advance notice to management before coming onto the premises, had not been withdrawn and were still open items as of the end of March 25. In this connection, bargaining notes taken by Lynch which appear to reflect the March 25 session corroborate Lynch that the open shop, elimination of hiring clause, and requirement for employees to contribute to the welfare fund were withdrawn by Katz's. However, with respect to the proposal for advance notice to management by the business representative, Lynch's notes state, "the Union rejects advance notice to management visitation proposal."

There was also a conflict in the testimony of Dell and Lynch with respect to two other proposals of Katz's. The expiring contract provided that with respect to arbitration, any and all disputes, at the option of the party seeking arbitration, shall be submitted either to the New York State Mediation Board, to the American Arbitration Association (AAA), or to Arbitrators Robert Gosseen, Henry Berger, Ira Drogin, George Sabatella, Charles Chuisano, Ronald Straci, Lou Tempera, or Gerald Schillian. Katz's proposal 10 reads, "provide for arbitration with American Arbitration Association or Ralph Berger, Jonathan Liebowitz, Martin Scheinman, Robert Light, and Bonnie Siber Weinstock in rotation." According to Dell, there was no agreement on this proposal of Katz's, although Lynch stated at the negotiations that they would think about it and "maybe would come to an agreement on this one, but he had to get back to the people." Lynch, on the other hand, testified that an agreement was reached on this proposal. Lynch's testimony, however, was not very specific as to what precisely was agreed on. He testified that the parties agreed to add some names, delete other names, and add the AAA. His testimony reflected that Ralph Berger was added, Robert Light was deleted, but he could not recall the other names of the arbitrators that were either included in the alleged agreement or deleted from the prior contract. Lynch's bargaining notes also do not reflect an agreement on this clause, and indicates that the union counterproposes arbitration clause with "American Arbitration Association, New York State Mediation Board, Ralph Berger or Elliot Schriffman in rotation."

Katz's also proposed a management-rights clause. According to Dell, Kirschner had written up a clause and submitted language to Local 100, and at the close of the March 25

meeting, Local 100 was going to get back to Katz's on whether it would be agreed on. Lynch, on the other hand, contends that an agreement was reached on the management-rights clause proposed by Katz's, plus two minor additions which were made by Local 100 representatives. A copy of this typed clause, with the two written additions, was introduced into the record. Lynch could not recall at which negotiation session this clause as revised was agreed to, but he was certain that agreement had been reached. Lynch's bargaining notes contained no reference to either an agreement or even a discussion of this clause. Katz's proposals list management rights as proposal 11. Lynch's notes of the last session makes reference to #11, but is blank next to that number. Darwin Lanyi's bargaining notes next to #11 contain the words "revised language," which according to Lynch reflects that an agreement was reached on Katz's management-rights clause with the revised language.

The parties agree that at the close of the March 25 session, Katz's representatives indicated that because of vacations and other commitments, they could not meet again until April 9 or 10. The witnesses also agree that the subject of an extension agreement came up at that time. Dell contends that Lynch on behalf of Local 100 suggested signing an extension agreement, in view of the unavailability of Katz's officials, but that Katz's refused to agree to sign such an extension, because it felt that it could get more concessions from Local 100. Lynch, however, asserts that Kirschner on behalf of Katz's suggested signing an extension agreement, and that Local 100 refused to agree because it wanted to keep the pressure on Katz's. Both Dell and Lynch agree that Lynch did inform Katz's on March 25, as he had stated at earlier sessions, that he intended to present Katz's last offer to the employees prior to March 30, and if it is rejected, he would call a strike.

There were no further formal negotiation sessions between the parties. However, Austin testified that on March 26, Lynch stopped by the restaurant and they had a discussion concerning negotiations, concerning which Austin immediately wrote down on a one-page summary. According to Austin, corroborated by his notes, Lynch informed Austin that he (Lynch) had spoken to Local 100's attorney and to Chuck Amadeo, Local 100's president, and that Local 100 wanted to work out the contract. Lynch referred to the issue of the arbitration and in writing acceptance of current salary levels without retroactivity. There was also a reference to welfare payments and retroactivity for these payments. Local 100's original proposal provided for increases to \$47 per employee per week for the first year, \$55.40 the second, and that the contract shall be reopened to establish insurance rates for the third year, effective April 1, 1993. Austin's notes indicate that Lynch suggested that if Katz's agreed to pay last year's rate, Local 100's proposal would be \$41, \$47, and \$55.40 over a 3-year period, with retroactivity to sometime in 1990.

Austin also asserts that Lynch mentioned something to him about a 2-week extension of the contract, and his notes also contain a reference to a 2-week extension, as well as the fact that the contract expires on March 30. However, neither Austin's testimony nor his notes reflect what specifically Lynch said about a 2-week extension during the conversation. Austin contends that he reported his conversation with Lynch to Kirschner. Curiously, Lynch denies having any

conversation with Austin about negotiations prior to March 30.

Lynch testified that on the morning of March 30, he received a phone call at home from Austin. According to Lynch, Austin informed him that Katz's wished to reach a conclusion on the contract, and that Kirschner wanted to speak to him about the matter. Lynch claims that he told Austin that he would be at the restaurant in the afternoon. Austin denies this conversation in its entirety, and adds that he does not have and never had Lynch's home telephone number.

Lynch further testified that a few minutes later, he received a phone call directly from Kirschner, who told Lynch that he wanted to reach a conclusion on all open issues. Lynch asserts that Kirschner made an offer on wage increases, which Lynch wrote down on top of his bargaining notes, of no raise for an employee in the first year of the contract, a raise of \$2 and \$5 per week for tipped employees, and \$5 and \$10 per week for nontipped employees, in the second and third year of the agreement. Lynch asserts further that he tried to persuade Kirschner to raise that offer, but was not successful, and finally agreed to recommend it to the employees. According to Lynch, he and Kirschner also discussed and reached agreement on the welfare payments' issue. Lynch asserts that the agreement was for Katz's to pay \$41 per week, per employee, retroactive to December 1990, \$47 effective April 1992, and \$55.40 effective April 1993. Finally, Lynch also testified that he informed Kirschner that if the agreement was ratified by the employees, that Local 100 would withdraw the arbitration over Katz's failure to adhere to contract minimum rates. Lynch further claims that he informed Kirschner that he intended to recommend that the employees ratify the package later that day. The General Counsel contends that Lynch also testified that Kirschner agreed during this conversation to prepare a typed agreement for execution. Lynch furnished no such testimony, although he did testify that at the outset of negotiations, Kirschner stated that it was his intention to type up any agreement that may be reached, and that Local 100 agreed with that procedure.

Lynch arrived at the restaurant at about 2 p.m. While Lynch claims that he discussed with Dell the fact that he and Kirschner had reached agreement on the telephone, and they went over the terms that had been agreed on, Dell emphatically denies any such discussion with Lynch, or that Kirschner informed him of any agreement being reached between Kirschner and Lynch. In that connection, Austin corroborates Dell in not being informed that there was any agreement reached or even communications between Kirschner and Lynch on March 30.

Lynch then met with the unit employees in small groups, using fellow employees who spoke English to translate, and according to Lynch told them the details of the agreement that had been reached. Lynch asserts that he went over with them each and every change from the prior contract, as well as the fact that there would be no raise in the first year of the contract for any employees. He told them that he was recommending that they ratify the agreement and, if they did not, he would be recommending that they strike. Lynch adds that he told them specifically that there would be no raise in the first year, and that employees asked about the possibility of moving up the first raise from April 1992 to December

1991, to match the date of increased welfare contributions. Lynch claims that he didn't think that was possible, but he would check with Kirschner.

Lynch asserts that he then contacted Kirschner and asked about the employees' request, but was not successful in persuading Kirschner to change Respondent's offer. Lynch then allegedly reported back to the employees, and that they accepted Respondent's offer. According to Lynch, he prepared a document entitled, "Katz's Deli Contract Ratification vote. Are you in agreement with the boss's last offer?" On this document, there were two columns, headed, "yes" and "no." Lynch obtained signatures from 22 employees under the yes column.

Local 131 presented employee witness Genero Adames, Mario Adames, Bernardo Martinez, and Jose Martinez, who furnished testimony concerning their execution of the above-described document. These witnesses, although not totally consistent, were essentially mutually corroborative in most respects. They assert that Lynch told them that by signing the paper they would be agreeing to a contract with Local 100 that would provide the employees with better benefits. According to the employees, however, Lynch provided no specifics as to what terms were being agreed to or what better benefits they would be receiving. The employees also assert that Lynch criticized Local 131 as a "ghost union," and told them that if Local 131 got in, or if they did not sign the paper for Local 100, the employees would lose their benefits.⁶ The employees also insist that the top of the paper was blank when they all signed their names. Finally, the employees also testified that Lynch told them that if they did not sign the paper, they would have to go on strike.

A fifth employee witness, Luigi Gjokaj, who was Local 131's main card solicitor, also testified concerning the events of March 30. He confirmed as noted that Lynch had spoken to employees in groups on that day, but he, Gjokaj, refused to speak to Lynch on that day as he was a Local 131 supporter. After Lynch left, however, Gjokaj testified that he was told by a number of employees that they signed a paper for Local 100. The employees also told him that there was an agreement between Local 100 and Katz that wasn't good for the employees, and that there would be no raise for the employees.

Lynch testified that after the employees ratified the Respondent's final offer, he so notified Dell, and discussed with him the signing of an extension agreement. According to Lynch, he presented to Dell a document which had been prepared on March 26 at the suggestion of his superior at the Union, Darwin Lanyi. Lynch asserts that the document was a standard union form for extension agreements, which Lanyi told him was to be signed only in the event that an agreement was reached, in order to give the parties 2 weeks to prepare and execute a formal agreement. Lynch further asserts that Lanyi and he were both of the opinion that the execution of this document would be sufficient to bar a petition from another union. Lynch asserts that he was unfamiliar with these forms, and that he had never used them before.

The document as prepared by the Union states that the agreement was made as of March 26, 1991, between Katz's

⁶One of the employees recalled that Lynch made specific mention of the possible loss of pension benefits if employees went into a different union.

and the Union, and that all the terms of the contract between the parties dated as of April 1, 1988, "shall be continued in full force and effect for a period of 2 weeks, or until the parties enter into a new collective-bargaining agreement, or until the parties reach a good-faith impasse with respect to negotiations, whichever occurs first." The second paragraph of the agreement provides that all terms of any new collective-bargaining agreement shall be retroactive to April __ the date the collective-bargaining agreement described above terminated or expired prior to being extended. The date that the Union placed next to April on the agreement is in dispute. Lynch was not sure initially in his testimony, but after reviewing another copy of the agreement, his memory was refreshed that the document listed April 13 as the date of retroactivity. The document does not indicate specifically on what date the extension agreement expires. According to Lynch, although it was typed and dated March 26, he believed that it meant that the expiration of the extension agreement was 2 weeks from the expiration date of the contract or April 13. Lynch further testified that although there was no bargaining session scheduled on March 30, he intended to present Respondent's last offer to the employees, recommend against it, and call a strike if the employees rejected the offer. He was hopeful he claims, that the threat of an imminent strike would induce Respondent to change their offer sufficiently so that agreement could be reached, and to enable the extension agreement to be signed.

Lynch alleges that he showed the extension agreement to Dell, and told him that the agreement was for the purpose of giving Dell's attorney time to prepare the agreement. Dell, then according to Lynch, telephoned Kirschner, and reported to Lynch that Kirschner wanted to cross out the lines of the agreement that stated that the agreement will be in effect "or until the parties enter into a new collective bargaining agreement, or until the parties reach a good faith impasse with respect to negotiations, whichever occurs first." Dell also stated that Kirschner wanted the date of retroactivity changed from April 13 to April 1. Lynch did not recall whether Dell informed him why Kirschner wanted these changes to be made. However, Lynch claims that he had no problems with eliminating the language requested by Respondent, since they had already reached agreement, and no further bargaining was contemplated.

Lynch and Dell then crossed out and initialed the changes, and both signed the agreement. Dell admits to signing the extension agreement, but presents a significantly different version of events, leading up to the signing. According to Dell, Lynch arrived at the restaurant, and before speaking to any employees presented him with the extension agreement and said that unless Dell signed it, there would be pickets in front of the store and the Union would close down the restaurant. He also told Dell that the agreement would last until April 9 or 10. Dell also claims that the date on the original document presented to him for the retroactivity date was April 10, not April 13 as testified to by Lynch. Dell then asserts that he called his attorney at home and notified him of the above developments. Kirschner allegedly told Dell that if the Union was willing to sign the extension agreement, it means that it was buckling a little, and that Respondent might be able to obtain some concessions. Therefore, Kirschner instructed Dell that he could sign the extension agree-

ment, but he should obtain some concessions from the Union first.

According to Dell, Lynch agreed to no raises and for no pension increases the first 2 years, with the third year left open for further discussion on both issues. Dell also asserts that there was some agreements reached on increases for welfare payments, retroactive to December, for the first 2 years of the contract, again with the third year to be discussed later. Dell further claims that there were no discussions about several other items which were still unresolved, including some management proposals which had not been withdrawn.

After obtaining these concessions, Dell testified that he called Kirschner, informed him about what these agreements were, and they discussed signing the extension agreement. At that time, Dell read Kirschner the agreement as proposed by the Union. Kirschner informed Dell that he wanted certain lines out of the agreement, because they would permit the negotiations to go on indefinitely, and he did not want negotiations to go on past April 10. Indeed, Lynch, when he presented the agreement to Dell, allegedly informed Dell that the agreement would last until April 9 or 10. At that point, Dell claims that Kirschner and Lynch spoke on the phone and discussed the removal of this language. After the phone conversation, Dell asserts that Lynch told him that he agrees to remove the language (the same three lines that Lynch testified were eliminated) that Kirschner objected to being included. Dell further claims that it was Lynch's idea to change the retroactively date from April 10 to April 1, and that Kirschner agreed to that as well. Dell agrees, as noted, that the changes were made, both of them initialed the crossouts and signed the document. Dell adds that Lynch told him that he would get back to Dell to set up a meeting, for either April 9 or 10.

Dell denies emphatically that an agreement was reached on all terms of a new contract, or that Lynch informed him that employees had ratified an alleged agreement. Dell did recall that Lynch spoke to employees in groups on March 30, but only after the signing of the extension agreement. Dell denies that he knew what Lynch was speaking about with employees, or that he was ever shown a copy of the paper wherein Lynch had obtained signatures from employees.⁷

Lynch testified further that later on that same evening, while at home, he prepared a document entitled agreement between Katz's and Local 100. The document reflects the terms of the agreement essentially as he had testified, plus a statement that the "2 week extension signed for the purpose of employer to execute the new agreement." The document also reflects the statement, "ratified by a majority of the workers." Additionally, the document indicates with respect to the arbitration clause, "change arbitration clause to read . . . before AAA or Ralph Berger, Martin Scheinman and Bonnie Silver Weinstock in rotation."

Lynch testified further that he subsequently informed his superior, Lanyi, that he had reached agreement with Katz's and had gotten an extension agreement signed. Lynch did not recall when he so informed Lanyi of these facts. According to Lynch, he had no discussions with Lanyi about whether a memorandum of agreement had been signed. Lanyi was not

⁷Lynch had asserted that he showed Dell a copy of the document signed by employees reflecting ratification of the alleged agreement.

called as a witness to corroborate Lynch with respect to the above conversation.

Austin testified that Dell discussed with him the events of March 30 on that evening. Austin states that Dell informed him that Lynch had come into the restaurant and threatened to picket unless Respondent signed an extension. Dell informed Austin that the extension was supposed to last for 2 weeks. Dell did not inform Austin that any concessions were made on March 30 or that any agreements were reached on that day.

On April 2, Local 131 filed a petition with the Board in Case 2-RC-21018. On April 4, Thomas Lee, on behalf of Local 131, sent a telegram to Respondent asserting that Local 131 has been designated by Respondent's employees to be their collective-bargaining representative, and requested an opportunity to demonstrate its majority status.

Also on April 4, the Union received from Kirschner a copy of a collective-bargaining agreement that Kirschner had prepared, reflecting an agreement that had been reached between the Union and the Second Avenue Deli.⁸ According to Lynch, he was expecting to receive a copy of the contract agreed on with Katz's from Kirschner at the same time. Therefore, Lynch claims that he called Kirschner and asked him about the Katz's contract. Lynch asserts that Kirschner replied that Lynch would have it in a few days.

Shortly thereafter, Local 100 became aware of Local 131's petition and, according to Lynch, was also informed that the extension agreement was not sufficient to block Local 131's petition. A conference with respect to Local 131's petition was scheduled for April 10. Therefore, on April 9, Lynch visited the restaurant along with several other union representatives. At that time, Lynch and the other union representatives obtained signatures from 19 employees on a petition stating that they had approved and ratified a contract between Katz's and Local 100 and that they were not interested in representation by any other labor organization.

According to Lynch, he asked the employees to read the document and to sign it if they were in agreement. The employees involved were almost all Spanish speaking and could not read English. There were Spanish-speaking union representatives present who assisted Lynch in translating for the employees.

Employee Genaro Adames testified that Lynch and the union representatives told the employees that the Union was going to try to get the employees a better contract with better benefits. Bernado Martinez testified that he was told by the lady from the Union in Spanish that the employees should sign or else they would lose their benefits or rights, and that the other Union (Local 131) was a "ghost union." Gjokaj testified that on the date that this petition was signed, he was spoken to by two representatives from Local 100, Lee ___ and Rocky ___ and they told him that Local 100 was going to be the representative at the shop, and if the employees got rid of Local 100, they would lose their

pensions. Gjokaj also testified that similar statements were made to employees by Local 100 representatives, in order to persuade them to sign the petition. Additionally, Gjokaj asserts that Lynch came over to him at the counter and said that he (Gjokaj) should use his head and watch his steps and watch what he was doing.

David Kindler who was the General Counsel's witness, and an alleged discriminatee here, also signed this petition on April 9, and furnished some testimony as to his discussions with Lynch when he signed the document. According to Kindler, Lynch asked him to sign the petition in support of Local 100. Although, as noted, the petition states that a contract was agreed on and ratified by employees, Kindler concedes that he was not present nor was he ever told by Lynch or other employees that the contract had been agreed on or ratified by the employees. Kindler did, however, recall a discussion with Lynch on that date, concerning a contract with Katz's, during which Lynch told him that they were "fighting for a raise," and that they were "working on" a contract.

The next day, April 10, the parties met at the Regional Office for a conference regarding the petition filed by Local 131. Present were Lynch, Kirschner, Dell, Local 100's attorney Christopher Berman, Local 131's attorney Warren Mangan, and Board Agent Polly Chill. Lynch testified that he stated at the conference that there had been an agreement reached between Local 100 and Katz's, and that both Kirschner and Dell confirmed that fact. According to Lynch, they say that an oral agreement was reached, but that they were "very specific" on all the terms and conditions of the contract. Lynch at that point asserts that he presented the petition signed on April 9, which confirmed that agreement had been reached to Mangan. Lynch testified further that he and the Union had learned prior to April 10 that the extension agreement that had been signed would not bar Local 131's petition, so he felt that if he presented Local 131 with a petition showing that agreement had been reached and that a majority of employees supported Local 100, that Local 131 would withdraw and walk away. Lynch testified further that a discussion ensued concerning the possibility of Local 131 withdrawing its petition, and that Mangan after reviewing the petition stated that his client would consider whether to withdraw its petition.

Dell's version of the conference differs in several significant respects from Lynch's account. According to Dell, when Board Agent Chill asked if the parties had an agreement, Kirschner replied, "yes." At that point, Dell whispered to Kirschner and asked what was he talking about. Kirschner whispered back that he was referring to the extension agreement. Dell further testified that either Lynch or Local 100's lawyer then showed the extension agreement to Chill. Chill after reviewing this document stated that the extension agreement was not a contract and did not bar another union from coming in. She then asked if the parties had anything else in writing reflecting a contract. Nothing else was presented, and neither Lynch nor Local 100 stated that the parties had reached an oral agreement on all terms of an agreement. In fact, according to Dell, he told the Board agent in response to her question that the parties had reached agreement on some items, but not all, and that there was no contract. Dell did recall that Lynch gave a copy of a petition to Mangan, but his recollection was that Lynch stated that the

⁸ Respondent at the hearing adduced evidence concerning the collective-bargaining negotiations between the Second Avenue Deli and the Union, in an attempt to somehow establish a connection between the two sets of negotiations. Respondent made no reference in its brief to this evidence, which I have assumed to be an abandonment of such contentions. I have therefore not included any findings with respect to those matters, which I deem to be irrelevant to any issues before me.

document proved that Local 100 represented a majority of the workers. Dell did not recall, but did not deny that there was some discussion about Local 131 withdrawing its petition at the conference.

After the conference ended, Lynch and Dell had a conversation outside the Regional Office. Once again, the accounts of Lynch and Dell differ substantially. Lynch claims that Dell told him at that time that he knew that there was a deal with Local 100, and he didn't want any problems. Lynch added that he did not ask Dell whether they were going to sign an agreement or whether Kirschner was preparing one, because Kirschner had told him previously that he would have it prepared in a few days. Lynch also admits that he made no further efforts to contact Kirschner to see if he had prepared the contract as allegedly promised.

Dell, on the other hand, asserts that Lynch said to him, "what the fuck are you trying to pull"? Dell then asked what did Lynch mean, and Lynch did not explain, but threatened to close down the store. At that point according to Dell, he got nervous and left.

As noted above, Respondent had received a mailgram from Local 131 demanding recognition. Thereafter, Austin made arrangements for a card check of Local 131's authorization cards with George Sabatella, a commissioner with New York State Mediation Board, who was also on the panel of arbitrators under the Local 100 contract. According to both Dell and Austin, the date of April 11 was chosen for the card check, because that was the day after the extension agreement with Local 100 was to have expired.

On April 11, Sabatella examined Local 131's authorization cards, as well as payroll records and W-2 forms supplied by Respondent. Sabatella issued a certification, dated April 11, indicating that based on his examination of authorization cards submitted by Local 131, he determined that 20 out of 21 signed cards were "valid authorization cards" and that "it is my opinion that the union does in fact represent a majority of employees." Immediately thereafter, also on April 11, a stipulation was executed by Austin and Sam Sali, president of Local 131. The stipulation reflects that based on the card check conducted by Sabatella, "Respondent is satisfied that Local 131 is the collective-bargaining representative of Respondent's unit employees, and that Respondent agrees to recognize Local 131 as the collective bargaining representative without the certification of the Union's status pursuant to a representation election by the National Labor Relations Board." Austin testified that on April 11, Sali had informed him that the representation petition filed by Local 131 was in "the process of or had been withdrawn." Sali did not furnish any corroboration of Austin's testimony with respect to the withdrawal of the petition, and in fact Local 131 had not even requested withdrawal of the petition by April 11. Dell testified that he was aware that Austin signed a recognition agreement with Local 131 on April 11, but claims that at the time he was unaware of any rule that he couldn't sign a recognition agreement where a petition was still pending. Dell further testified that he believed that Kirschner, his attorney, had told him that it was legal to sign a recognition agreement, because the petition was going to be withdrawn. Dell also asserts that his sister-in-law is an attorney, and she also advised him that as long as the petition was going to be withdrawn, and was in fact eventually withdrawn, the signing of a recognition agreement would be legal.

Subsequently, negotiations were conducted between Local 131 and Respondent, resulting in an agreement being reached, which was ratified by the employees on April 18 by a vote of 20 to 1 with 3 employees not voting. On that same date, April 18, Local 131 sent a letter to the Region, requesting withdrawal of the petition in Case 2-RC-21018, as well as withdrawing any objections to the Region's order dismissing petitions in Case 2-RC-21001. The Regional Director approved the withdrawal of the petition in Case 2-RC-21018 by letter dated April 22.

There is no dispute that a collective-bargaining agreement was executed by Respondent and Local 131 which by its terms runs for 3 years, effective April 22. The record is not clear as to precisely what date the agreement was signed. The consolidated amended complaint alleges that Respondent and Local 131 entered into and has maintained a collective-bargaining agreement on April 18, and this allegation was admitted by both Respondents in their answers. Sali, testified that the contract was not signed until April 22, the same day that it was effective. Although Sali's affidavit states that the contract was signed on April 18, Sali asserts that this was a "mistake," and that he meant to say that agreement was reached and the contract was ratified on April 18, but Local 131 needed a few days to prepare the typed agreement, which was not accomplished until April 22.

The contract contains a union-security clause and checkoff clause, and provided for wage increases of either \$6 or \$12 per week for employees depending on the classification as of April 15, 1991, and between \$6 and \$10 on April 15, 1992, and April 15, 1993. The contract provides for payments into the Local 131 welfare fund of \$110, \$120, and \$130 per month per employee, and for payments into an annuity fund of \$25 per month, per employee.

Respondent began to deduct dues from the salaries of employees at some point undisclosed by the record. With the exception of employee David Kindler who testified that he never signed an authorization for dues to be deducted from his salary, and who had dues deducted from his check for the pay date of May 9, 1991, the record does not reflect whether or not any other employees executed checkoff authorizations on behalf of Local 131.

B. The Alleged Removal of Local 100 Representatives

According to Lynch, subsequent to the April 10 conference at the Region, he began hearing reports that Local 131 representatives were visiting Katz's facility. In fact, Sali had been permitted to speak to workers at the restaurant pertaining to the negotiation of the agreement.

Therefore, Lynch claims that on April 18, he and two other union representatives, Leroy Hodge and David Segarra, visited the restaurant. Lynch testified that Dell appeared agitated that he was there, and said that Lynch had no business talking to the workers. Lynch replied that he had every business talking to the workers and he intended to do so. At that point, Dell went into his office and returned with a tape recorder. Dell again objected to Lynch speaking to the workers. Lynch waited a half hour, and not seeing anyone from Local 131, informed some employees to beep him if Local 131 representatives appeared at the restaurant. He and the other representatives then left.

At around 10 a.m., Lynch received a call on his beeper from an employee who informed him that a Local 131 rep-

representative was on the premises. Lynch immediately went to the restaurant and observed Sali speaking to employees at a table. Lynch approached the table, introduced himself, and asked to join the conversation. Sali got up and walked away. Lynch then began speaking to employees and told them that his purpose was to have open debate if there was going to be a discussion between the unions.

At that point, Dell came over and again instructed Lynch that he had no business talking to the workers. Lynch protested and pointed out that Dell was allowing Sali, who had gone over to speak to other employees, to talk to workers, and asked why he wouldn't allow Lynch to do so as well? Dell ignored Lynch's inquiry. Lynch went over to the area where Sali was talking to workers and attempted to participate in the conversation. Dell intervened and angrily told Lynch that he had no business being there and to get off the premises. Lynch once again pointed out that Dell was allowing Sali, a representative of another Union to speak to workers, but not permitting Lynch to do so, even though Local 100 had an agreement including visitation privileges. Dell responded that if Lynch did not leave, he would call the police.

Lynch refused to leave and Dell as promised called the police. When the police came, Lynch explained to the officers that there was another union official (Sali) who was allowed to remain. The police replied that it was the Employer's store, and if he says Lynch had to leave, Lynch must leave. The police escorted Lynch off the premises, while Sali was permitted to remain and continue speaking to employees. Lynch then waited for Segarra and Hodge whom he had previously summoned on their beepers. When they arrived, Lynch instructed them to go back inside and participate in any conversations between Sali and employees. After they went in, the police were again called and escorted Segarra and Hodge off the premises, while Sali remained inside talking to the workers.

Dell's version of the incident is not surprisingly somewhat different. Dell contends that the incident took place on April 9, the day before the NLRB conference, when Lynch was obtaining signatures from employees. According to Dell, Lynch came in with Segarra and Hodge, and Lynch was yelling and pulling men off the counter and telling them there was a meeting. Dell asserts further that Lynch was creating a disturbance in the restaurant, and when Dell complained that the employees were working, Lynch replied that he "was the representative of the Union and I could take whoever I want, whenever I want off the counter. There is nothing you can do about it." At that point, Dell claims that he called the police who escorted Lynch from the restaurant, but that Segarra and Hodge were not asked to leave because they weren't causing any trouble. Dell furnished no testimony as to whether or not Sali was on the premises on that day or whether he was allowed to remain while Lynch was removed.

Sali, although testifying about other matters, did not testify about this incident. Hodge and Segarra, who are no longer employed by Local 100, were not called as witnesses in this proceeding.

Lynch also testified that the next day April 19, he was told by the Board agent that Local 131 was withdrawing its petition, and he went to the restaurant to inform the workers of this fact. As he was discussing a problem of a dental bill with an employee, the father of one of the owners came over

and said, "Aren't you the Union guy that we threw out of here yesterday"? Lynch replied yes, but he thought the problem was resolved, the other Union was finished, and "we have a contract." At that moment, Austin came out of his office, and told Lynch that he had 30 seconds to get off the premises or he was calling the police. Lynch responded that he had a right to be there, and he thought that their problems had been resolved. Austin called the police, and once again Lynch was escorted off the premises.

Austin could not recall the date, but remembered one occasion, where he asserts Lynch came into the restaurant in the morning, and was "disrupting" the staff while they were attempting to set up for the day. Austin⁹ asserts that he asked Lynch to stop and allow the employees to set up. Lynch replied, according to Austin, that he "could do whatever he wants, whenever he wants." Austin further claims that Lynch invited Dell to call the police and have him thrown out, and he did so.

Local 100 filed a charge on April 25, in Case 2-CA-25065 alleging that Respondent violated Section 8(a)(1) of the Act by having the police escort Lynch from the Respondent's premises. Between April 25 and May 1, Lynch testified to a phone conversation with Kirschner. Lynch had instructed Hodge and Segarra to visit the shop and post a copy of the unfair labor practice charge on the bulletin board. Lynch asked Kirschner for assurances that Segarra and Hodge would not be thrown off the premises, as Lynch had been on April 18 or 19. Kirschner replied that he knew nothing about Lynch's being thrown out, and had no idea why the Employer had done so. According to Lynch, Kirschner added that he could understand why Respondent would give an audience to the other Union, but not to Lynch.

C. The Alleged Discharge of David Kindler

David Kindler was employed by Respondent as a counterman for approximately 1 year, on the evening shift, from 3 p.m. to closing. Kindler had been a member of Local 100 and its predecessor unions since 1971 while employed at various other employers. At Katz's, Kindler's dues for Local 100 were deducted from the first paycheck of every month in the amount of \$27.

On January 30, Kudler signed a membership card for Local 131, which was given to him by Gjokaj. According to Kindler, Gjokaj told him that by signing the card, it wouldn't obligate him to join Local 131, and was just for information purposes only, in case he eventually decided to join and Local 131 would then have his name, address, and social security number. Gjokaj attempted to give Kindler some other papers for Local 131, but Kindler refused to accept them from Gjokaj. Kindler did not work on March 30, because it was the Passover Holiday. As noted above, Kindler signed the petition for Lynch on April 9 to show support for Local 100.

Kindler's paycheck for the first week of May showed a deduction of \$20 for union dues. Kindler asked Austin what the \$20 deduction was for, and Austin replied that the deduction was for Local 131. Kindler replied that he had not joined Local 131 and asked for his \$20 back. Kindler did not recall Austin's response at that time. Kindler continued to work for the rest of that week, but he did not receive his

⁹Austin did not further explain what he meant by "disrupting."

schedule for the following week, which he customarily received either on Saturday or Sunday.

On Sunday, May 12, Dell asked to speak to Kindler in Dell's office. According to Kindler, Dell told him that he had to join Local 131, and that Local 100 doesn't exist any more in the store. Dell then asked Kindler to sign a piece of paper stating that he quit. Kindler asked if he had been fired. Dell said no, and asked again if Kindler quit. Kindler replied no and asked if he was working that day. Dell replied yes, so Kindler went to work that day. However, he still did not receive his schedule for the next week.

Monday, May 13, was Kindler's regular day off, so on Tuesday he went to Local 100 to speak to Lynch and Local 100's attorney. They advised Kindler to report to work as usual on that afternoon. Kindler reported to work and noticed that there was no timecard for him. Kindler approached Dell and said he was there to work. Dell allegedly replied that if Kindler didn't sign the paper for Local 131, he couldn't work for Respondent. Kindler answered that he was for Local 100.

Kindler left but returned after 5 p.m. to speak to Austin. Kindler asked Austin about his working, and where was his pay envelope. Austin replied that Kindler had taken too many sick days,¹⁰ so Respondent was going to deduct this week's check. Kindler informed Austin that he couldn't do that and advised Austin to check with his lawyer. Kindler asked Austin for the \$20 taken out of his prior check for Local 131. Austin added that he likes Kindler and considered him a good worker, but he was sorry to see Kindler go.

The next day Austin called Kindler and told him to come down and get his money. On Sunday, May 19, Kindler went to the restaurant as requested. Austin gave Kindler an envelope with his pay. He also told Kindler that the \$20 dues for Local 131 was included in the money that he received. Kindler asked Austin if he could work, and Austin replied no.

Subsequently, Austin called Kindler and arranged for him to come to the restaurant on June 3. According to Kindler, he met with both Dell and Austin in the office, and Dell asked him to sign a paper stating that he had quit. Kindler refused. Dell told Kindler that he was a troublemaker and he had cost Dell a lot of money because he had to hire lawyers.¹¹ Kindler responded that if Respondent hadn't fired him, it wouldn't have cost them anything, because he worked there over a year without a problem, and that Respondent was nice to him. At that point, Dell left the office and returned accompanied by three countermen. Kindler stood up and said if Respondent was going to have three witnesses, he wanted to get his own witnesses. Dell grabbed Kindler's arm and Kindler told him to let go of his arm and not to touch him.

Kindler walked outside and Dell followed him. Dell told Kindler "off the record," that "if I could, I would break your face." Kindler contends that he dropped his hands and said, "Go ahead, be my guest, I'll own you for the rest of my life." Kindler then walked away.

¹⁰A few months before Kindler was out for 7 to 8 days for an injury on the job. Austin told Kindler that time not to file for compensation, and Respondent would pay him anyway.

¹¹The Union had filed a charge with the Region on May 28 in Case 2-CA-25124 which alleged among other items that Respondent discharged Kindler unlawfully on May 14.

According to both Dell and Austin, they did ask Kindler to sign a paper stating that he had quit. Austin asserts that Kindler had said that he was quitting, because he didn't want to pay union dues to Local 131 and that he was a Local 100 employee. Both Austin and Dell contend that at that point, Kindler jumped up and started yelling, "stop hitting me," "stop hitting me," and walked out of the restaurant. Dell adds that he followed Kindler outside and asked, "What is this nonsense." Dell denied that he threatened to break Kindler's face.

Respondent sent a letter later that day, dated June 3, to Kindler. The letter indicates that Respondent was sorry about the misunderstanding about Kindler's resignation, and states that it was hoping that he chose to return to work with Katz's. The letter also refers to a discussion that revolved around Kindler's return to work, and an assertion that Kindler was willing to return the next week. The only testimony offered concerning this statement was Dell's testimony that when Respondent offered Kindler his job back, Kindler asked for some time off to spend time with a newly arrived grandchild before he is able to start. Kindler furnished no testimony concerning this alleged statement by him to Dell.

The letter also makes reference to Kindler's "mouth and temper," and states that while Respondent respects his opinions, it hopes he will express himself "within the bounds of good taste and out of earshot of customers." The letter concludes by stating, "looking forward to seeing you next week."

Kindler responded by letter dated June 7, after consulting with Lynch. The letter insists that Kindler did not resign, but was fired for not signing a dues authorization card for Local 131. It adds that both Austin and Dell told him on a number of occasions that he had to sign for Local 131 or could not work at Katz's. Kindler asserted that at the June 3 meeting, he had no intentions of ever signing for Local 131. Kindler concluded by stating, "if you are willing to put me back to work without further harassment, physical or otherwise, as to my refusing to join Local 131, I would be glad to have my job back."

Austin wrote Kindler a letter, dated June 11, stating, "following our cordial conversation of last week, I had anticipated your return to work, today as we had discussed." No testimony was furnished by Dell or Austin concerning the alleged "cordial telephone conversation," wherein Kindler allegedly agreed to return to work on June 11. Austin's letter adds that since Kindler did not show up for work or call, "I can only assume that you wish your resignation to stand."

This letter was followed up by another dated June 14, also from Austin to Kindler. This letter refers to an alleged conversation between Kindler and Respondent wherein Respondent allegedly made "an unconditional offer to return to work, at your same position, same job title and same pay. Although I assure you that there would be no retaliation or other conduct against you, you failed to appear for work on June 11 as you said you would." Once again, however, no testimony was offered by Respondent concerning this alleged "unconditional offer" to Kindler by Respondent. The June 14 letter continues by reiterating that the "unconditional offer to return to work under the same terms and conditions of employment you previously enjoyed will remain open until after the end of this month. If you fail to exercise that right, we will assume you have resigned from Katz's."

Kindler responded by letter dated June 17. He took issue with Austin's description of their last conversation as "cordial." Kindler's letter repeated that he had not resigned, but was fired because of his refusal to join Local 131 and his support for Local 100. The letter continues, "yes, you did offer me my job back but because of the verbal and physical abuse shown by your partner, Alan Dell, I cannot see ever returning to work at Katz's while such a hostile and uncertain environment exists." The letter concludes by requesting his back wages, as well as the \$20 dues money that was illegally deducted from his check.

Dell testified that he was aware that Kindler was in favor of the "old union," rather than the new Union. Dell asserts further that around the end of May, at a private party, Kindler although working was dancing with customers. According to Dell, when he reprimanded Kindler for dancing rather than working, Kindler replied, "I am quitting anyway." Kindler recalled the party, and admitted dancing, and being criticized by Dell for such actions. However, Kindler denies that he told Dell at that or any other time that he was quitting. Kindler adds that he had danced with customers on prior occasions, in order to liven up the party, and that Austin had given him permission to dance with customers at these prior parties.

Dell testified further that he thereafter continued to put Kindler on the schedule for "a little while," and that at one point he heard that Kindler would not work if Local 131 was in the shop because he wanted Local 100. Therefore, according to Dell, Respondent did not put Kindler on the schedule for that week.

Austin asserts that he and Dell had heard stories from other employees that Kindler was unhappy with the new Union coming in. Austin made no reference to, nor did he corroborate, Dell's testimony that Kindler allegedly told Dell personally that he was quitting.

Austin testified further that based solely on the alleged stories from other employees that Kindler was unhappy with the new Union, Respondent assumed that Kindler was quitting, and therefore did not schedule Kindler "for the first week following the contract signing with Local 131." According to Austin, Kindler did not report to work or complain to Respondent about why he wasn't on the schedule. Austin further testified that the following week, after not hearing from Kindler, he and Dell "compared notes," realized that neither of them had spoken with Kindler about the matter and sent him a letter. Later on in his testimony, Austin, after seeing that the first letter was not sent to Kindler until June 3, recalled that he had some telephone conversations with Kindler about returning to work, but he was still unclear as to the dates of these conversations, and still asserted that he believed that Kindler was not working at any time after Local 131's contract became effective. Austin denied telling Kindler that he had to sign a card for Local 131 in order to keep his job, but he did recall discussions with Kindler about dues for Local 131. Austin did recall Kindler complaining that he would not work in a position where dues were taken out for Local 131, but Austin did not recall if in fact dues had been deducted from Kindler's salary at the

time.¹² In fact, Austin believed, although he was not certain, that the conversation was after Respondent had taken him off the schedule and was "a more theoretical conversation," because "it is my recollection now that he wasn't working when 131 was in the store."

III. CREDIBILITY RESOLUTIONS AND ANALYSIS

A. *The Alleged Refusal to Sign an Agreed-on Contract*

The issue of whether or not Respondent has violated the Act by refusing to execute an agreed-on contract with Local 100 is largely dependent on a credibility resolution between Dell and Lynch, as to whether in fact the parties had reached full agreement on all terms of a new collective-bargaining agreement, as testified to by Lynch.

Bearing in mind particularly the fact that the burden of proof rests with the General Counsel to adduce sufficiently probative evidence to establish by a preponderance of the evidence, that full agreement has been reached, I conclude that the General Counsel has failed to meet his burden in this regard.

Lynch's testimony, uncorroborated by the testimony of any other employees or by any probative documentary evidence, and indeed contradicted by the testimony of other witnesses, as well by the only pertinent document signed by all parties, cannot be relied on to establish that agreement that all terms of a contract has been reached.

Accordingly, for the reasons described below, I do not credit the testimony of Lynch that a contract was agreed to and credit except where otherwise indicated the versions of the disputed conversations and events given by Dell or Austin, as opposed to Lynch, with regard to this issue. I note initially the lack of corroboration for Lynch's testimony by any bargaining unit employee or even any other official of Local 100. While it is true that a number of bargaining unit employees admitted to signing petitions on March 30 and April 9, which, on their face, support Lynch's testimony, not a single employee was presented by the General Counsel that supported Lynch's version of the circumstances in which these signatures were obtained. To the contrary, a number of employee witnesses testified directly contrary to Lynch on a number of significant areas concerning these petitions. While I agree with the General Counsel that these witnesses were not fluent in English and may not have fully understood what Lynch was saying, I find their essentially mutually corroborative testimony to be for the most part credible. I therefore conclude that Lynch did not, as he insisted, provide the employees with all the details of the alleged agreement with Respondent. I find, however, that he did tell the employees that agreement with Respondent was reached, and that there would be no raise, but gave no other details. I conclude that he also told employees that if they did not agree and sign the petitions, there would be a strike called. In agreement with a compilation of the testimony of the employees, I further find that Lynch told employees that a new contract with Local 100 would give them better benefits, but if they chose to go with Local 131 (which Lynch characterized as a "ghost union"), they would or might lose benefits, including

¹² Austin conceded that if Kindler had been employed after the start of the Local 131 contract, dues would have been deducted from his salary.

a specific reference to pension benefits. In this regard, I do not credit the testimony of one or two employees that Lynch also mentioned that employees would lose their jobs unless they signed. I find it unlikely that Lynch would make such an assertion, while I do find it probable that he would refer to a possible loss of pension or other benefits. Thus, should the employees not sign the petition in support of Local 100, and then transfer their support to Local 131, it is certainly conceivable that employees could lose some benefits that they had been receiving under Local 100's contract, including a possible loss of pension benefits or credits.¹³ Therefore, I find it likely that Lynch would point this out to employees in attempting to persuade them that it was in their best interest to stick with Local 100 and reject Local 131. However, I do not believe that Lynch would refer to a loss of jobs should employees reject the contract and reject Local 100. In my view, the employees, who so testified, recalled Lynch's assertion that there would be a strike if the employees did not sign, and believed in their own mind that a strike could result in a possible loss of jobs.

While the credited testimony of the employees that Lynch did not provide any details of the alleged agreement does not necessarily refute Lynch's testimony that an agreement had, in fact, been reached, such credited testimony does reflect poorly on the veracity of Lynch's version of events, since Lynch testified unequivocally that he did furnish such details. Moreover, I also find it likely that had full agreement been reached, as testified to by Lynch, that he would have supplied such details to the employees, since according to Lynch the alleged agreement provided for substantial increases in payments to Local 100's welfare fund, as well as wage increases in the second and third year of the contract.

Not only did, as noted, no employee witness testify in support of Lynch's account of events, and witnesses called by Local 131 significantly contradicted Lynch in important areas, but the only employee witness called by the General Counsel provided not only no supporting testimony, but also testimony extremely damaging to Lynch's assertion that full agreement had been reached. Thus, David Kindler, an alleged discriminatee, and an admitted outspoken supporter of Local 100, did not sign the March 30 petition (because he was not present on that day), but did sign the April 9 petition given him by Lynch. While the April 9 petition provides that the employees ratified an agreement with Respondent, Kindler admits having no knowledge of such an agreement, and testified credibly that when he signed the petition, Lynch asked him to sign the petition in support of Local 100. More significantly, Kindler did recall that Lynch did discuss a possible contract with him on that day, and informed Kindler that Local 100 was "fighting for a raise," and that they were "working" on a contract. These comments by Lynch to its chief supporter are certainly not reflective of having reached an agreement with Respondent, but are supportive of Dell's testimony that further negotiations would be necessary before an agreement would be reached.

The General Counsel relies on other testimony from Kindler, to the effect that prior to Passover, Austin and Dell al-

legedly informed him that a contract was "initialed," and that there would be a contract signed after Dell comes back from vacation. I cannot rely on this vague and unclear testimony, particularly since Kindler was admittedly not present on March 30, the day before Passover, when agreement was allegedly reached. Thus, whatever Dell or Austin may have said to Kindler prior to March 30 cannot be construed as supportive of Lynch's testimony. If anything, it shows only that Dell and Austin were hopeful that an agreement could be reached after Dell returned from vacation.

The General Counsel also relies on the fact that Kirschner was not called as a witness by Respondent, and that therefore Lynch's testimony concerning his alleged conversations with Kirschner are not denied. However, I note that Kirschner is no longer Respondent's attorney, apparently having been terminated as Respondent's attorney, shortly after the events in question. In such circumstances, it is improper to draw an adverse inference against Respondent for the failure to call Kirschner as a witness. *Lancaster Fairfield Community Hospital*, 303 NLRB 238 (1991). Inasmuch as Dell and Austin were essentially consistent in their denials and refutations of Lynch's testimony, and the General Counsel was unable to produce a single corroborating witness to Lynch's version of events,¹⁴ I place little significance on Respondent's failure to call Kirschner as a witness.

I do place much significance, however, on the only document signed by all the parties, the extension agreement executed on March 30, although it was dated March 26. This agreement which extends the existing contract for a period of 2 weeks does not make any reference to an agreement being reached by the parties, nor to the fact that Respondent was going to prepare a copy of the contract allegedly agreed to, as Lynch testified was the intent of the document. I find Lynch's explanation for the failure of this document to reflect that an agreement had been reached to be unconvincing. Lynch asserts that he was a relatively new business agent, and that he was unfamiliar with the standard form extension agreement, which was suggested to him Lanyi, his superior at the Union. According to Lynch, Lanyi told him that the document was to be signed only if an agreement was reached, in order to give the parties time to prepare and execute a formal agreement. Thus, Lynch's testimony that his inexperience as a business agent was responsible for his not having obtained a written confirmation of an agreement being reached is clearly undermined. The extension agreement given to Lynch by his experienced superior, Lanyi, clearly contemplates a 2-week extension of the contract, while the parties continue to bargain on terms of a new agreement, rather than an extension only until Respondent prepares a new agreed-on contract. It is noteworthy in this connection that Lanyi was not called as a witness by the General Counsel or Local 100 to corroborate Lynch's testimony concerning the preparation of the extension agreement and Local 100's alleged intention in submitting the document to Respondent for its signature.

Therefore, I conclude that Dell's testimony concerning the circumstances and intention of the parties in signing the extension agreement is more persuasive than Lynch's version.

¹³It is of course true that there are certain vesting requirements under ERISA, but it is not inconceivable that some employees, depending on their length of service, might lose pension credits if they were no longer represented by Local 100.

¹⁴Indeed, the General Counsel or Local 100 could have called Lynch's superior, Darwin Lanyi, to corroborate that Lynch told him that agreement had been reached with Katz's.

I note additionally, that Respondent waited until April 11 to conduct the card count with Local 131. This fact supports Dell's testimony that the parties contemplated that the agreement would expire on April 10, since it would have been easy for Respondent to schedule the card count for several days later, if the extension agreement was still in force, as testified to by Lynch. Moreover, since Local 100 was responsible for and in fact did prepare the extension agreement, any ambiguity or uncertainty in the interpretation of the document should be construed as adverse to the Union.

The General Counsel also places significant reliance on the document allegedly executed by Lynch on the evening of March 30, which reflected that an agreement had been reached, and that the "2 week extension was signed for the purpose of employer to execute the new agreement." However, I cannot place significant weight on this self-serving document, which was not shown to nor signed by any representatives of Respondent and was not prepared contemporaneously with the events it purports to describe. It is also pertinent in this regard that neither the General Counsel nor Local 100 introduced any internal memos from Local 100, which could have supported Lynch's testimony or his own self-serving document, that agreement with Katz was reached.

Although as noted, I have for the most part credited the mutually corroborative testimony of Dell and Austin that no final agreement was reached between the parties, I do find Lynch's testimony to be more credible in certain respects, more particularly as to what had been agreed on at the close of the March 25 bargaining session. Thus, Dell testified that several proposals made by Katz's, such as open shop, elimination of the hiring clause, and requirement for employees to contribute to welfare fund increases, had not been withdrawn by that time, as Lynch had so testified. I credit Lynch that these proposals had been withdrawn, since Lynch's contemporaneous bargaining notes reflect that these items were withdrawn by Katz's on March 25. However, I credit Dell's testimony that Respondent's proposal for advance notice to management by a business had not been withdrawn, as Lynch so testified, particularly since Lynch's bargaining notes state with respect to that clause, "the Union rejects advance notice to management proposal," without an indication of Respondent's withdrawal of this proposal as his notes had indicated with respect to the other items referred to above.

Dell also testified that no agreement was reached on a management-rights clause proposal made by Respondent. I find Lynch's testimony concerning this issue to be more believable, however, and conclude that agreement was reached on the Union's version of the clause proposed by Respondent, which is corroborated by Lanyi's bargaining notes.

Finally, there was also disagreement as to whether there was agreement on revisions in the existing arbitration clause, concerning the selection of arbitrators. Dell contends that no final agreement was reached on this proposal, although he concedes that Lynch indicated an agreement on this item was likely, but he had "to get back to the people." Lynch insists that a full agreement was reached on this proposal, but his testimony on this clause was vague and uncertain. He asserted that the parties agreed to add some names, delete other names, and add the AAA. Lynch's testimony recalled only one additional name (Ralph Berger) and one deletion (Robert Light), and provided no further indication of who the other

names agreed to or deleted were or when such agreement was reached. Moreover, Lynch's bargaining notes do not reflect an agreement on this issue and indicates a union counterproposal of AAA, NYS Mediation Board, Ralph Berger, or Elliot Schriffman in rotation. In fact, the only specific indication of the details of an agreement on this proposal is found in the document that Lynch alleges that he prepared on the evening of March 30. In that document, an agreement on the arbitration is specified, "change arbitration clause to read . . . before AAA or Ralph Berger, Martin Scheinman and Bonnie Silber Weinstock in rotation." It is noteworthy that Lynch gave no testimony as to when the parties reached final agreement as to this clause, or as to the specific names included in his March 30 document.¹⁵ In these circumstances, I cannot conclude that the General Counsel has established that an agreement was reached on all the details of the arbitration clause and credit Dell that no such agreement was reached.

Accordingly, based on the foregoing analysis and credibility resolutions, I am unable to conclude that the General Counsel has met its burden of establishing that Respondent and Local 100 had reached full agreement on all terms of a collective-bargaining agreement. Therefore, I shall recommend dismissal of this paragraph in the complaint.

B. *The Alleged 8(a)(2) and 8(b)(1)(A) and (2) Violations*

The complaint alleges and the General Counsel contends that Respondent Katz violated Section 8(a)(1) and (2) of the Act, and Respondent Local 131 Section 8(b)(1)(A) and (2) of the Act, by entering into a recognition agreement on April 11 and a collective-bargaining agreement on April 18.

The General Counsel advances several different theories in support of its contention that these actions of Respondents were unlawful. Its initial contention is that the recognition and signing of a contract were unlawful because Local 100 as of March 30 enjoyed an irrebutable presumption of majority status, by virtue of having reached full agreement with Respondent on all terms on new contract. This theory is of course without merit, since I have found above that no such agreement was reached between the parties. Similarly, the General Counsel's contention that the actions of Respondents were unlawful because they occurred during the term of the extension agreement signed by the parties must meet a similar fate, since the recognition agreement was signed on April 11, 1 day after I have concluded that the extension agreement expired.

The General Counsel also submits, however, that the recognition and contract were unlawful based on two other theories, which I conclude have been substantiated by the evidence in this proceeding. Where an employee signs an authorization card 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 "clearly to 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 dual cards and which of them to evidence his designation of a bargaining

¹⁵ Except as noted above, Lynch did testify at one point that the parties had agreed to add the name of Ralph Berger.

agent.” *Crest Container Corp.*, 223 NLRB 739, 741 (1976). See also *Human Development Assn.*, 293 NLRB 1228 (1989), *enfd.* 937 F.2d 657 (D.C. Cir. 1991); *Windsor Place Corp.*, 276 NLRB 445 (1985).

The General Counsel argues and I agree that the actions of the employees¹⁶ of Respondent of signing the petitions on March 30 and April 9, in support of Local 100, are akin to signing authorization cards on behalf of Local 100 and creates a dual-card situation, which under the above precedent precludes reliance on the Local 131 cards to grant recognition.

Respondent argues, however, that the petitions signed by the employees on behalf of Local 100 were “signed through coercion and deceit and are a nullity, as a matter of Law.” I do not agree. In this connection, I have found that Lynch did inform the employees when they signed the petitions that if they did not sign and/or if they supported Local 131 (the alleged “ghost union”), there would be a strike called, and they would or could lose benefits, including a specific reference to pension benefits. However, I do not view these statements of Lynch to constitute coercion or deceit sufficient to characterize the employees’ actions in signing the petitions as a nullity. Indeed, if the employees had not signed the petition and ratified the agreement, Lynch was authorized to call a strike, and I find no improper conduct on Lynch’s part in bringing this possibility to the attention of the employees. As for the alleged threats of loss of benefits, including pensions, I note that it is certainly conceivable that should employees reject Local 100, and shift their allegiance to Local 131, that their benefits, including pensions would be reduced or even lost. Indeed, the contract that Respondent eventually executed with Local 131 provided for substantially smaller payments into Local 131’s welfare fund than would have been required under the Local 100 contract, and provided for no pension contributions whatsoever, unlike the Local 100 contract.

It is of course true that under ERISA, there may be some vesting requirements that would enable some employees to retain some pension benefits for prior service under Local 100’s pension plan. It is also true that Lynch did not point this factor out and might have given the wrong impression to some employees that they would lose all prior credits should they switch unions. However, I do not believe that the failure on Lynch’s part to disclose this information to the employees is a sufficient misrepresentation to establish that the signing of the petitions were a nullity. I note again that the basic thrust of Lynch’s statements, that employees could or would lose benefits by changing unions, is not necessarily untrue, and is in fact likely in the instant situation. These are certainly facts that employees are entitled to know, and might very well have been a factor in the decision of the employees to sign the petitions for Local 100, which includes a statement on the April 9 petition that they were not interested in representation by any other labor organization other than Local 100.

Accordingly, I conclude that in view of the signing of the subsequent petitions on behalf of Local 100, the record does not clearly indicate that the employees intended only that their Local 131 cards evidenced their designation of a bar-

¹⁶Eighteen of the employees who signed cards for Local 131 also signed petitions on behalf of Local 100.

gaining agent.¹⁷ In these circumstances, most of the Local 131 cards cannot be counted toward majority support for that labor organization. *Crest*, supra; *Human Development*, supra; and *Windsor Place*, supra.

Therefore, I conclude that Local 131 was not the majority representative of Respondent’s employees at the time of the recognition or the execution of the contract, and that Respondent Katz violated Section 8(a)(1), (2), and (3)¹⁸ of the Act and Respondent Local 131 violated Section 8(b)(1)(A) and (2) of the Act by such conduct.

The final theory advanced by the General Counsel, attacking the recognition and subsequent execution of a contract by Respondents, relies on the fact that these events took place when Local 131’s representation petition was still on file. Therefore, the General Counsel contends and I agree that Respondents were not free to agree to recognition or to sign a collective-bargaining agreement, in the face of a continuing claim by Local 100 to represent the employees and the pendency of a representation petition that would have resolved this question concerning representation. *Louisiana Dock Co.*, 297 NLRB 439, 440 (1989); *S.M.S. Automotive Products*, 282 NLRB 36 (1986); *Signal Transformer Co.*, 265 NLRB 272, 274 (1982). See also *Bruckner Nursing Home*, 262 NLRB 955 (1982).

I note that this theory for establishing a violation is applicable, even if Respondent Local 131 represented a majority of employees (which, as noted I have found above that it did not) or, if Respondent Katz’s had a good-faith doubt of Local 100’s majority status, which would justify its decision to withdraw recognition from Local 100 (which as will be discussed below, I also conclude was not the case). *Louisiana Dock*, supra at 440; *Signal Transformer*, supra at 274.

Respondents argue that this theory should not be applied here, since the parties were aware at the time of the recognition that the petition was going to be withdrawn by Local 131 and it was in fact withdrawn a few days later. Therefore, they assert that this would be a hypertechnical and unfair extension of *Bruckner*, supra, and should not be countenanced. I disagree.

Bruckner, supra, was issued modifying the Board’s prior doctrine of *Midwest Piping & Supply Co.*, 63 NLRB 1060 (1945), in order to avoid the difficult problem of identifying a “colorable claim” and defining when a “real” question concerning representation existed. Thus, the Board recognized that these difficulties resulted in an inability to provide the parties with clear standards that would enable them to discern the fine line between a colorable claim and a naked one. *Bruckner*, supra at 956. Thus, the Board set forth a clearly defined rule of conduct, which prohibits an employer from recognizing any competing labor organization “for the limited period during which a representation petition is in process even though one or more of the Unions may present a valid-card majority.” *Id.* at 958. Such a rule is not merely “technical,” but carefully considered balancing of various factors, which in my view is not affected by the fact that the parties may have contemplated withdrawal of the petition at the time of the recognition, or the fact that the petition was

¹⁷It is noteworthy in this connection that the Local 131 cards were signed in late January, some 2-1/2 months before the petitions were executed by the employees on behalf of Local 100.

¹⁸The contract contained a union-security clause.

eventually withdrawn. Indeed, the essence of the rationale is the preference for a Board-conducted election in the face of competing claims. Clearly, Local 100's claim for recognition, as an incumbent union no less, was still viable at the time of the recognition, as well as the signing of the contract.¹⁹ Furthermore, I note that the Regional Director did not approve the withdrawal request until April 22, well after the date of recognition, and I agree with the General Counsel that it is questionable whether the Regional Director would have approved the withdrawal request, if all the facts were known at the time. It is noteworthy in this connection that the possible withdrawal of the petition was discussed at the NLRB conference on April 10, on the basis that Local 131 would disclaim any interest in representing employees of Respondent Katz in view of the petition signed by employees on behalf of Local 100. Yet notwithstanding the above, and Local 100's known interest in representing the employees, Local 131 and Katz signed a recognition agreement the very next day, April 11, without notifying Local 100 or the Board of their actions. This conduct by Respondent can hardly be construed as acting in good faith and makes their reference to an alleged "technical" violation to be disingenuous at best.

Respondent Katz also argues that "Local 100's egregious unfair labor practices directed against the employees mandate that it lose any advantage of incumbency." Respondent Katz in this regard asserts that Local 100 violated its duty of fair representation toward the employees, *Vaca v. Sipes*, 386 U.S. 171 (1967), by virtue of Lynch's "misrepresentations and threatening statements" to employees, which would mandate revocation of an incumbent Union's certification. *Abilene Area Sheet Metal Contractors Assn.*, 218 NLRB 1652 (1978); *Community Service Publishing*, 216 NLRB 997, 1000 (1975); *Teamsters Local 671 (Airborne Freight)*, 199 NLRB 994 (1972).

However, I have already discussed above my view of Lynch's statements to employees in connection with the effect of his remarks on the validity of the petitions signed on behalf of Local 100. As I detailed there, Lynch's comments were far from "egregious unfair labor practices," but essentially arguments to Respondent's employees, not without some basis, as to why they should continue to support Local 100 rather than switch to another labor organization. While as noted Lynch may not have been entirely candid with employees as to the possibility of their losing prior pension credits, the thrust of his argument, that the change from one labor organization to another could cause a loss of benefits to employees, was essentially accurate.

Accordingly, I do not find that Lynch's conduct amounted to any unfair labor practices, much less "egregious" unfair labor practices as argued by Respondent, nor does it amount to a violation of Local 100's duty of fair representation, nor conduct which would warrant a revocation of Local 100's certification.

Therefore, I conclude that whether or not Respondent Local 131 represented a majority of Respondent Katz's employees Respondents violated Section 8(a)(1), (2), and (3)

¹⁹ Although not determinative of any of my conclusions here, I find in agreement with the General Counsel, particularly in view of the admissions in Respondent's answers, that the collective-bargaining agreement was signed on April 18.

and Section 8(b)(1)(A) and (2) of the Act by executing a recognition agreement and a contract.

The complaint also alleges that in May, Respondent Katz assisted and supported Local 131 by deducting money from employees' wages and remitting such money to Local 131, notwithstanding the absence of employee authorizations for the deductions and remittance of dues, and that Local 131 received such assistance and support in violation of Section 8(a)(1) and (2) and Section 8(b)(1)(A) of the Act, respectively.

The evidence adduced by the General Counsel in this regard consisted of the testimony of employee David Kindler that dues were deducted from his salary for Local 131, notwithstanding the fact that he had not signed any document authorizing such a deduction. Additionally, the General Counsel argues that Respondent Katz by its agent, Austin, admitted that it was deducting dues after the effective date of the contract from employees' paychecks for Local 131, and that "Respondents failed to introduce into evidence any documents signed by employees authorizing the employer to deduct and remit union dues to Respondent Local 131." However, the General Counsel has misperceived the burden of proof in this instance. Respondents need not introduce any evidence that they obtained checkoff authorizations from employees. It is the General Counsel's burden to establish by a preponderance of the evidence that the employees did not execute such authorizations.

The General Counsel has met that burden with respect to employee Kindler, and I find that Respondent Katz violated Section 8(a)(1) and (2) of the Act by deducting dues from his salary without authorization, and Respondent Local 131 violated Section 8(b)(1)(A) of the Act by accepting such payments from Respondent Katz. However, I cannot conclude that because no such authorization was obtained from Kindler, Respondents acted similarly with respect to any other employees. Therefore, I shall not find, as contended by the General Counsel that Respondents deducted or accepted dues from the salaries of any other employee, without the employee having signed a checkoff authorization.

C. The Withdrawal of Recognition

While I have found above that Respondent Katz violated Section 8(a)(1), (2), and (3) of the Act by recognizing and signing a collective-bargaining agreement with Local 131, it does not necessarily follow that the contemporaneous withdrawal of recognition from Local 100 is violative of the Act. Thus, even where, as here Respondent may not lawfully recognize Local 131, it could lawfully withdraw recognition from Local 100, if Respondent could demonstrate that Local 100 lost its majority status or that Respondent had a good-faith and reasonably grounded doubt of Local 100's majority status. This doubt must be based on objective considerations and raised in a context free of any employer unfair labor practices aimed at causing employee disaffection with Local 100. *Louisiana Dock*, supra at 440-441; *Signal Transformer*, supra. See also *RCA Del Caribe, Inc.*, 262 NLRB 963, 965 (1982).

I conclude, however, that Respondent Katz has not demonstrated either that at the time of the withdrawal of recognition from Local 100 (April 11, when it recognized Local 131), that Local 100 lost its majority status or that Respondent had a good-faith doubt of Local 100's majority status.

As noted above, I have concluded that Local 131's cards, signed in January, could not be used to demonstrate its majority status in April, in view of the subsequently signed petitions by Respondent Katz's employees in support of Local 100. It therefore follows that Local 100 did not lose its majority status.

With respect to the question of good-faith doubt of Local 100's majority status, while this is a lesser standard of proof than actual loss of majority, I nonetheless do not believe that Respondent has met its burden of proof in this area, as well. I again emphasize the petitions signed by its employees on March 30 and April 9 in support of Local 100. It is significant that Respondent was clearly aware of at least the April 9 petition, as it was presented by Lynch to Mangan at the NLRB conference, in Dell's presence, and Dell conceded that Lynch stated that the document proved that Local 100 represented a majority of the workers. In this connection, although I credit Dell's version of the NLRB conference for the most part, I do credit Lynch that the parties discussed Local 131 withdrawing its petition and "walking away," in view of this petition.²⁰

Therefore, I conclude that in view of Respondent's knowledge of Local 100's petition, it did not have a good-faith doubt of Local 100's majority status. It is significant in this regard that Local 131's cards were signed in January, and Local 100's petition was executed on April 9, just 2 days before the recognition of Local 131 and withdrawal of recognition from Local 100. Additionally, I do not believe that Respondent Katz acted in good faith in these circumstances. Indeed if Respondent truly had a good-faith doubt of Local 100's majority status, as a result of the card check, the proper and appropriate procedure for Respondent to have followed was to simply withdraw recognition from Local 100, and let the Board's election procedures determine which union, if any, the employees desired to represent them. However, it did not adopt this course, but on the contrary misled both Local 100 and the NLRB by failing to disclose at the April 10 conference that a meeting was already scheduled for the next day to conduct a card count for Local 131. It is significant that at the same time the parties were discussing whether Local 131 would withdraw its petition and "walk away," in view of the petition signed on April 9 by employees supporting Local 100 and rejecting representation by any other organization.

Such conduct can hardly be characterized as acting "in good faith," but rather demonstrates that Respondent Katz was simply anxious to rid itself of the expensive pension and welfare obligations which it had under the Local 100 contract, and was not interested in having its employees choose which labor organization they desired as their collective-bargaining representative.

I recognize that in both *Signal Transformer and Louisiana Dock*, supra, a good-faith doubt was found to exist, notwithstanding the fact that the employers there allegedly recognized another labor organization. However, in both of those cases, the recognition of the outside union was unlawful, solely because of the existence of outstanding NLRB petitions, and there was no evidence there to doubt the majority

²⁰I note that Dell did not recall but did not deny that there was some discussion about Local 131 withdrawing its petition at the conference.

status of the outside union and the loss of majority by the incumbent. Indeed, unlike the instant case, the demonstration of majority status by the outside union consisted of picketing, which compelled the employers to recognize the respective unions in order to stop the picketing. There was no evidence there, as here, that the incumbent union had any support amongst the employees. Moreover, there was no evidence there of deceitful conduct, as in the instant case, where Respondent misled Local 100 and the Board by failing to disclose its intentions to conduct a card count, in the midst of a representation proceeding, where Local 100 had asserted a continuing interest in representing employees, supported by a recently signed petition.

Accordingly, based on the foregoing, I conclude that Respondent Katz has violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from Local 100 on and after April 11.²¹

D. *The Alleged Unlawful Eviction of Lynch*

In this instance, I find the testimony of Lynch to be much more credible than that of Dell or Austin, and credit Lynch's versions of events on April 18 and 19, as detailed above, concerning Lynch's eviction from the restaurant.

I found Lynch to be forthright, detailed, and precise as to his testimony concerning these days, while Dell and Austin were vague, uncertain, and unconvincing in their attempts to recount the incidents. Indeed, Dell initially placed the first incident as having occurred on April 9, and then was not sure when it happened. Neither Dell nor Austin furnished sufficient particularity to their assertions that Lynch was being "disruptive," when Respondent admittedly asked him to leave. I also note that Sali, who was an official of Local 131, and clearly identified with Respondent Katz's interests in this proceeding, testified on other matters, but did not corroborate Dell as to the events of April 18. Indeed, it is significant that Dell did not even testify as to whether Sali was present at the restaurant speaking to employees when Dell demanded that Lynch leave.

I note further that April 18 was the day that Sali was at the restaurant to speak to employees about ratifying the contract between Local 131 and Katz, and that the agreement was signed on that day. It is therefore understandable why Respondent Katz would not want Lynch or any other representative from Local 100 being present on that day. Thus, in my view, the mere presence of Local 100 representatives was deemed "disruptive" by Respondent.

I conclude, therefore, that as testified to by Lynch, on April 18, Dell ordered him to leave when he tried to speak to employees and to Sali, and that when Lynch refused to leave, Dell called the police to remove him, as well as other Union Representatives Hodge and Segarra.

Similarly, on April 19, Austin also ordered Lynch to leave, and called the police and had Lynch evicted once again.

²¹While the complaint does not contain a specific allegation of a withdrawal of recognition, such action was part and parcel of the illegal recognition of Local 131, which was alleged. The matter was fully litigated, and indeed Respondents both made reference in their briefs to Katz's right to withdraw recognition from Local 100 based on Local 100's alleged loss of majority status, by virtue of the card check for Local 131.

The expired collective-bargaining agreement provided for access to the premises by union business agents during working hours. Such a contractual right survives the expiration of the agreement. *T.L.C. St. Petersburg*, 307 NLRB 605, 610 (1992); *Fabric Warehouse*, 294 NLRB 189, 192 (1989). Therefore, Respondent has violated Section 8(a)(1) and (5) of the Act by evicting Lynch from the premises and calling the police to have him removed.

Moreover, even apart from Local 100's contractual right of access, which survived the contract, Respondent Katz's may not deny access to its premises and employees to Local 100, while at the same time permitting such access to Local 131. Such conduct is violative of Section 8(a)(1) and I so find. *Kosher Plaza Supermarket*, 313 NLRB 74 (1993), and cases cited there.

E. *The Alleged Termination of David Kindler*

With respect to the disputed versions of events, as between Kindler and Respondent's witnesses, Austin and Dell, I credit Kindler entirely. I found his testimony more detailed, precise, logical, and believable, as well as consistent with documentary evidence, such as his paycheck. On the other hand, the testimony of both Dell and Austin with regard to Kindler's discharge was vague, disjointed, unpersuasive, and often contradictory of each other. Thus, for example, Dell asserted that Kindler personally told him at a private party the end of May, after allegedly being criticized by Dell for dancing with customers, that he (Kindler) was "quitting anyway." Significantly, Austin made no mention of this alleged statement made to Dell by Kindler.

Moreover, both Dell and Austin were thoroughly confused about the dates that Respondent did not place Kindler on the schedule. Finally, I find the testimony of both Dell and Austin that Respondent decided not to schedule Kindler, because they had heard from other employees that Kindler would not work or was unhappy with the new Union, and was therefore "quitting," to be unconvincing and not credible.

Accordingly for the above reasons, I credit Kindler's testimony and conclude that as he testified, Kindler complained to Respondent about the fact that dues had been deducted from his salary for Local 131 in early May. Moreover, on Sunday, May 12, Dell told Kindler that he had to sign a paper for Local 131 and asked him to sign a paper saying that he quit. Kindler refused to sign any such paper, and this was his last day of work for Respondent. He was not scheduled for work for the next week, and when he reported for work on Tuesday, May 14, his next normal day of work, his timecard was missing, and Dell told him that if Kindler did not sign the paper for Local 131, he couldn't work for Respondent. This comment by Dell is an unlawful threat to discharge Kindler in violation of Section 8(a)(1) and (2) of the Act, and I so find.

Kindler replied to Dell that he was for Local 100, on that same day and later on that evening, spoke to Austin. After discussing Kindler's paycheck, Austin told Kindler that he likes Kindler and considered him a good worker, but was sorry to see him go.

Based on the above circumstances, it is clear and I find that Respondent discharged Kindler on May 14, because of

his refusal to join Local 131, as well as his support for Local 100,²² in violation of Section 8(a)(1), (2), and (3) of the Act.

CONCLUSIONS OF LAW

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

2. Respondent 131 and Local 100 are labor organizations within the meaning Section 2(5) of the Act.

3. At all times material Local 100 has been and continues to be the exclusive collective-bargaining representative for Respondent Katz's employees in an appropriate unit as follows:

All full-time and regular part-time waiters, waitresses, counterpersons, buspersons, chefs, kitchen personnel and porters employed by Respondent Katz at its Houston Street facility.

4. Respondent Katz has violated Section 8(a)(1), (2), and (3) of the Act by recognizing Local 131 and signing a collective-bargaining agreement with Local 131, containing a union-security clause.

5. Respondent Katz has violated Section 8(a)(1) and (2) of the Act by deducting dues for Local 131 from the salary of employee David Kindler, without receiving a signed checkoff authorization from Kindler for such deduction.

6. Respondent Katz violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from Local 100 as the collective-bargaining representative of its employees.

7. Respondent Katz violated Section 8(a)(1), (2), and (3) of the Act by discharging David Kindler.

8. Respondent Katz violated Section 8(a)(1) and (5) of the Act by evicting representatives of Local 100 from its premises.

9. Respondent Katz violated Section 8(a)(1) and (2) of the Act by evicting representatives of Local 100 from its premises, while at the same time permitting representatives of Local 131 to remain on its premises and speak to its employees.

10. Respondent Local 131 has violated Section 8(b)(1)(A) and (2) of the Act by accepting recognition from, and signing a contract with, Respondent Katz, which contained a union-security clause, and by accepting dues which had been deducted from the salary of employee David Kindler, without Kindler having signed a written authorization for such a deduction.

11. Respondent Katz has not violated the Act in any other manner as alleged in the complaint.

THE REMEDY

Having found that Respondents have violated Section 8(a)(1), (2), (3), and (5) and Section 8(b)(1)(A) and (2) of the Act, I shall order that they cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

²² In this connection, Respondent admitted knowledge of Kindler's support for Local 100, as well as its unlawful recognition of Local 131, makes it quite likely that Respondent wished to rid itself of one of the remaining supporters of the former incumbent union, Local 100.

While I have found above that Respondent Katz discriminatorily discharged David Kindler on May 14, 1991, the General Counsel does not seek an order requiring Kindler's reinstatement, as it concedes that at some point in June, Respondent made a valid offer of reinstatement to Kindler. However, the General Counsel has not stated, nor does the record sufficiently establish, precisely when Respondent Katz made a valid offer and/or consequently when Kindler's backpay terminates. While the record does reflect various letters sent by Respondent Katz to Kindler in June, as well as Kindler's replies to some of them, the record does not contain testimony concerning various alleged conversations between Kindler and Katz officials, which are referred to in some of the letters. Therefore, I conclude that the record has not been sufficiently developed to determine at what point between June 3 and 14, Respondent's backpay obligation terminates. I shall therefore leave that issue to be resolved in the compliance portion of this proceeding. I shall recommend that Kindler's backpay be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 389 (1950), with interest in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Since I have also found above that Respondent Katz violated Section 8(a)(1) and (2) of the Act by deducting dues from Kindler's salary, and Respondent Local 131 by accepting such dues, I shall order Respondents to jointly and severally reimburse Kindler for such moneys improperly deducted from his salary, plus interest.

I have also found that Respondents violated Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2) of the Act, by agreeing to recognition, and by executing and enforcing a collective-bargaining agreement containing a union-security clause with respect to Respondent Katz's employees. In that connection, the General Counsel requests a remedy of disestablishing the collective-bargaining relationship and agreement with Local 131 and the refund of Local 131 dues and fees to employees.

A disestablishment order is clearly appropriate, with the caveat that nothing here shall authorize or 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 collective-bargaining agreement between Local 131 and Katz. *Jayar Metal Corp.*, 297 NLRB 603 (1990); *Alpha Beta Co.*, 294 NLRB 228, 231 (1989).

However, with respect to the General Counsel's request for reimbursement of dues and fees for all employees, the Board orders such a remedy only for those employees who have been coerced to join a union by operation of the union-security clause. *Louisiana Dock*, supra at 440; *Alpha Beta*, supra at 231. Thus, employees who have voluntarily signed cards authorizing Local 131 to represent them, prior to the execution of the unlawful contract, are not deemed to have been so covered. *Alpha Beta*, supra; *Unit Train Coal Sales*, 234 NLRB 1265 (1978). Moreover, while I have found above that a number of employees of Respondent Katz who signed cards for Local 131 subsequently signed petitions in support of Local 100, which invalidated their Local 131 cards for purposes of determining majority support, such action does not vitiate the voluntary nature of their signing Local 131's cards. *Human Development*, supra at 1229; *Unit Train*, supra at 1265 fn. 3. Therefore, it is appropriate to

order reimbursement for all unit employees, except those who signed authorization cards for Local 131 prior to the execution of the collective-bargaining agreement on April 18, 1991, plus interest. *Human Development*, supra; *Louisiana Dock*, supra.

I have also found that Respondent Katz violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from Local 100. With respect to this finding, the General Counsel requests that Respondent Katz be required to reinstate the terms of the expired collective-bargaining agreement with Local 100 as well as to reconvene bargaining with Local 100. I agree.

In addition to ordering Respondent Katz to resume bargaining with Local 100 over terms for a new agreement, which remedy is clearly appropriate, I also believe that in the circumstances here, that an order requiring the restoration of the employees prior terms and conditions of employment, which were encompassed in the Local 100 contract, is appropriate as well.

Such a remedy is routine where an employer has been found to have violated the Act by unilaterally changing terms and conditions of employment of employees as encompassed by an expired collective-bargaining agreement. *Tampa Sheet Metal Co.*, 288 NLRB 322, 326-327 (1988).²³

However, here the complaint does not allege that Respondent Katz violated Section 8(a)(5) by making unilateral changes and indeed, as noted above, does not even contain an allegation of withdrawal of recognition. The General Counsel does not seek a finding that Respondent Katz violated Section 8(a)(1) and (5) by making unilateral changes, but requests as a remedy for the unlawful recognition, the restoration of the status quo, by placing the employees in the same position that they would have been in, had Respondent not unlawfully withdrawn recognition. I had no difficulty in finding a violation in Respondent Katz's withdrawal of recognition, notwithstanding the absence of a complaint allegation, since that issue was fully litigated, and was in fact raised as a defense by both Respondents to their unlawful recognition and execution of a contract.

I have more difficulty in finding Respondent Katz liable for the remedying of unilateral changes, which were not alleged in the complaint as violative of the Act. While I believe that the more appropriate procedure would have been to include specific allegations in the complaint concerning these unilateral changes, I am persuaded that the absence of such allegations does not preclude the remedying of Respondent's withdrawal of recognition by ordering the restoration of the prior terms and conditions of employment. I note in this connection, *Lee Lumber*, supra, where the administrative law judge, affirmed by the Board without comment, concluded that in light of the complaint allegation of an unlawful withdrawal of recognition from the union, "the Respondent is charged with derivative 8(a)(5) violations based upon subsequent changes in employment terms." 306 NLRB at 412.

More significantly, the Board in *U.S. Marine Corp.*, 293 NLRB 669, 672 (1989), affd. 916 F.2d 1183 (7th Cir. 1990),

²³ Such a remedy does not include checkoff or union-security provisions which are extinguished by the expiration of the contract. *Lee Lumber & Building Co.*, 306 NLRB 408, 410 (1992); *Tampa Sheet*, supra at 326 fn. 15; *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962).

ordered an employer to restore prior terms and conditions of employment of employees, notwithstanding the absence of a complaint allegation that it had made unlawful unilateral changes. Here, as in *U.S. Marine*, supra, an order requiring the institution of prior terms and conditions of employment would be "simply restoring as nearly as possible the situation that would have prevailed but for Respondent's unfair labor practice. We rely on the established principle that . . . the restoration of the status quo ante is a necessary remedy as it is the Board's policy that the wrongdoer, rather than the victim should bear the hardships of the unlawful action." *Id.* at 672.

Moreover, here as was also the case in *U.S. Marine*, supra, no prejudice has been shown, nor can such prejudice be readily discerned, from the General Counsel's failure to allege specifically that unlawful unilateral changes were made. There is nothing indicating that Respondent Katz would have litigated the case any differently or would have presented any different evidence had such specific allegations been made. On the contrary, it is clear that Respondent would have relied on its same and sole defenses, i.e., that it was justified in withdrawing recognition from Local 100 and in signing a contract with Local 131. *Id.* at 672.

Therefore, I shall recommend that Respondent Katz be ordered to restore its employees' terms and conditions of employment to its prior status, which is set forth in the expired collective-bargaining agreement with Local 100, including but not limited to payments into the Local 100 funds, and granting visitation privileges to its business agents.²⁴

In that connection, any amounts due to employees shall be computed as in *Ogle Protection Service*, 182 NLRB (1970), plus interest as prescribed in *New Horizons for the Retarded*, supra. Respondent Katz shall remit all payments owed to Local 100's benefit funds and reimburse their employees in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), *enfd.* 661 F.2d 940 (9th Cir. 1981), for any expenses resulting from the failure to make these payments. Any amounts that Respondent must pay into the benefit funds shall be determined in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

Based on these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁵

ORDER

A. Respondent Katz's Delicatessen of Houston Street, d/b/a Katz's Deli, New York, New York, its officers, agents, representatives, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge if they refuse to join or support Local 131, International Brotherhood of Trade Unions.

(b) Discharging or otherwise discriminating against its employees, because of its employees' support for Hotel Employees & Restaurant Employees International Union, Local

100 of New York, New York & Vicinity, AFL-CIO or because the employees refuse to join or support Local 131.

(c) Deducting moneys from the salaries of its employees and forwarding the moneys to Local 131 without the employees having executed a written authorization for such a deduction.

(d) Withdrawing recognition from or refusing to recognize and bargain with Local 100 as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time waiters, waitresses, counterpersons, buspersons, chefs, kitchen personnel and porters employed by Respondent Employer at its Houston Street facility.

(e) Discontinuing its prior practice of permitting visitation at its facility by Local 100 representatives, calling the police to have such representatives removed from its facility, or permitting representatives of Local 131 to speak to its employees at its premises, while denying such an opportunity to representatives from Local 100.

(f) Recognizing or bargaining with Local 131 as the exclusive collective-bargaining representative of its employees in the aforesaid collective-bargaining unit, unless and until that labor organization has been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of such employees.

(g) Giving effect to or enforcing the collective-bargaining agreement executed with Local 131 or to any extension, renewal, or modification of it; provided, however, that nothing in this Order shall authorize or 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 above contract.

(h) 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) Make whole its employee David Kindler for the discrimination against him and the unlawful deduction from his salary, plus interest, in the manner set forth in the remedy section of this decision.

(b) On request, recognize and bargain with Local 100 as the exclusive collective-bargaining representative of its employees in the aforesaid appropriate unit and, if an agreement is reached, embody it in a signed document.

(c) On request of Local 100, rescind any departures from terms and conditions of employment that existed prior to April 11, 1991, retroactively restoring preexisting terms and conditions of employment of employees as set forth in the remedy section of this decision.

(d) Withdraw and withhold all recognition from Local 131 as the collective-bargaining representative of its employees unless and until that labor organization has been certified by the National Labor Relations Board as the exclusive representative of such employees.

(e) Jointly and severally with Local 131, reimburse all unit employees, except those who joined or signed authorization cards for Local 131 prior to the execution of the collective-bargaining agreement between Katz and Local 131 on April

²⁴ As noted above, the union-security clause and checkoff provisions are not included in this Order.

²⁵ 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.

18, 1991, for initiation fees, dues, or other obligations of membership in Local 131, plus interest.

(f) Preserve and, on request, make available to the Board and its agents for examination or copying, all records or documents necessary to determine the amounts owed to the employees.

(g) Post at its facility in New York, New York, copies of the attached notice marked "Appendix A."²⁶ Copies of the notice, on forms provided by the Regional Director for Region 29, 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.

(h) Post at the same places and under the same conditions copies of Appendix B as soon as it is forwarded by the Regional Director.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. Respondent Local 131, International Brotherhood of Trade Unions, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Acting as the exclusive collective-bargaining representative of Respondent Katz's employees unless and until the labor organization is certified by the National Labor Relations Board as the exclusive collective-bargaining representative of such employees.

(b) Giving effect or attempting to enforce the collective-bargaining agreement between Respondent Katz and Local 131 or to any extension renewal or modification thereof.

(c) Accepting dues or fees which have been deducted from the salaries of employees by Respondent Katz, without the employees having executed a written authorization for such deduction.

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

(a) Jointly and severally with Respondent Katz, reimburse David Kindler and all unit employees, except those who joined or signed authorization cards for Local 131 prior to the execution of the collective-bargaining agreement between Katz and Local 131 on April 18, 1991, for initiation fees, dues, or other obligations of membership in Local 131, plus interest.

(b) Post at conspicuous places in Respondent Local 131's business office, meeting halls, and places where notices to its members are customarily posted copies of the attached notice marked Appendix "B."²⁷ Copies of such notice shall be posted 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 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.

(c) Furnish to the Regional Director signed copies of the aforesaid notice for posting by Respondent Katz. Copies of the notice to be furnished by the Regional Director shall, after being signed by Respondent 131, be forthwith returned to the Regional Director.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed, as to all allegations not specifically found here.

APPENDIX A

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 threaten our employees with discharge if they refuse to join or support Local 131, International Brotherhood of Trade Unions.

WE WILL NOT discharge or otherwise discriminate against our employees, because of our employees' support for Hotel Employees & Restaurant Employees International Union, Local 100 of New York, New York & Vicinity, AFL-CIO or because the employees refuse to join or support Local 131.

WE WILL NOT deduct moneys from the salaries of our employees and forward the moneys to Local 131, without the employees having executed a written authorization for such a deduction.

WE WILL NOT withdraw recognition from or refuse to recognize and bargain with Local 100 as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All full-time and regular part-time waiters, waitresses, counterpersons, buspersons, chefs, kitchen personnel and porters employed by us at our Houston Street facility.

WE WILL NOT discontinue our prior practice of permitting visitation at our facility by Local 100 representatives, or call the police to have such representatives removed from our facility, or permit representatives of Local 131 to speak to our employees at our premises, while denying such an opportunity to representatives from Local 100.

WE WILL NOT recognize or bargain with Local 131 as the exclusive collective-bargaining representative of our employees in the aforesaid collective-bargaining unit, unless and until that labor organization has been certified by the National Labor Relations Board as the exclusive collective-bargaining representative of such employees.

WE WILL NOT give effect to or enforce the collective-bargaining agreement that we executed with Local 131 or to any extension, renewal, or modification of it; provided, however, that nothing in this Order shall authorize or require the with-

²⁶If 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."

²⁷See fn. 26, above.

drawal 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 above 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 make whole employee David Kindler for our discrimination against him and our unlawful deduction from his salary, plus interest.

WE WILL, on request, recognize and bargain with Local 100 as the exclusive collective-bargaining representative of our employees in the aforesaid appropriate unit and, if an agreement is reached, embody it in a signed document.

WE WILL, on request, of Local 100 rescind any departures from terms and conditions of employment that existed prior to April 11, 1991, retroactively restoring preexisting terms and conditions of employment of our employees.

WE WILL withdraw and withhold all recognition from Local 131 as the collective-bargaining representative of employees unless and until that labor organization has been certified by the National Labor Relations Board as the exclusive representative of such employees.

WE WILL, jointly and severally with Local 131, reimburse all unit employees, except those who joined or signed authorization cards for Local 131 prior to the execution of the collective-bargaining agreement between us and Local 131, on April 18, 1991, for initiation fees, dues, or other obligations of membership in Local 131, plus interest.

KATZ'S DELICATESSEN OF HOUSTON STREET
D/B/A KATZ'S DELI

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
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 act as the exclusive collective-bargaining representative of the employees of Katz's Delicatessen of Houston Street, Inc., d/b/a Katz's Deli, unless and until we are certified by the National Labor Relations Board as the exclusive representative of such employees.

WE WILL NOT give effect to or attempt to enforce the collective-bargaining agreement between Katz's and us or to any extension, renewal, or modification thereof.

WE WILL NOT accept dues or fees which have been deducted from the salaries of employees by Katz's Deli, without the employees having executed a written authorization for such deduction.

WE WILL, jointly and severally with Katz's Deli, reimburse David Kindler, and all unit employees, except those who joined or signed authorization cards for us prior to the execution of the collective-bargaining agreement between Katz's Deli and us on April 18, 1991, for initiation fees, dues, or other obligations of membership in our organization, plus interest.

LOCAL 131, INTERNATIONAL BROTHERHOOD
OF TRADE UNIONS