

**Gerig's Dump Trucking, Inc. and Chauffeurs, Teamsters and Helpers Local Union No. 414, a/w International Brotherhood of Teamsters, AFL-CIO.** Cases 25-CA-23392, 25-CA-23459, and 25-CA-23571 (Amended)

March 25, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND COHEN

On August 30, 1995, Administrative Law Judge Richard A. Scully issued the attached decision. The Respondent filed exceptions with a brief in support and an answering brief. The General Counsel filed limited cross-exceptions with a brief in support and an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

For the following reasons, we agree with the judge that a bargaining order to remedy the Respondent's misconduct is warranted under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The parties stipulated at the hearing that there were 21 employees in the bargaining unit on July 25, 1994, the date the Union requested recognition. The Respondent has not excepted to the judge's finding that the Union had in its possession valid authorization cards from 15 of these employees when it requested recognition. The Respondent now contends, however, that a bargaining order is not warranted because of employee turnover in the bargaining unit after July 25. In this regard, the Respondent relies on the General Counsel's Exhibit 32 which indicates

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Additionally, the Respondent asserts that the judge's findings are a result of bias and prejudice and requests that the case be remanded for hearing before an "impartial" administrative law judge. After a careful examination of the entire record, we are satisfied that this allegation is without merit. The Respondent's motion for rehearing is denied.

At sec. III,E,2, par. 2, and seventh sentence of the judge's decision, the words "that it could provide such benefits" should read "that it could not provide such benefits." This inadvertent error does not change the results of our decision.

<sup>2</sup> We conclude that the serious nature of the Respondent's unlawful conduct warrants the imposition of a broad cease-and-desist order. *Hicknott Foods*, 242 NLRB 1357 (1979). We shall modify the judge's recommended Order accordingly.

that 8 employees who were in the bargaining unit on July 25 are no longer employed by the Respondent and that 12 employees hired after July 25 are now included in the unit. We find the Respondent's argument without merit. Initially, we emphasize that turnover in the bargaining unit is irrelevant in assessing the propriety of a bargaining order because the "validity of a bargaining order depends on an evaluation of the situation as of the time the unfair labor practices were committed." *Be-Lo Stores*, 318 NLRB 1, 15 (1995). Even assuming that turnover were a relevant consideration, we would find the Respondent's argument without merit. The General Counsel's Exhibit 32 establishes that a majority of the employees who were in the bargaining unit on July 25 are still in the bargaining unit and that they now comprise more than half of the present bargaining unit. The Board has found that a *Gissel* bargaining order was warranted in cases of higher turnover where the seriousness of the respondents' unfair labor practices rendered the holding of a fair election unlikely. See *Be-Lo Stores*, supra at 15 fn. 41.<sup>3</sup>

We also reject the Respondent's argument that there are relatively few violations and that they do not justify a *Gissel* bargaining order. We agree with the judge that the seriousness of the Respondent's unfair labor practices fully warrants the issuance of a bargaining order. In this regard, we emphasize not only the serious nature of Craig Yoder's, the Respondent's president and co-owner, threats of business closure and job loss, which are "hallmark" violations whose effect on the unit employees cannot be underestimated, but also the effect of the Respondent's promise of increased benefits on the unit employees after they renounced the Union. The effect of these unlawful threats and promises was swift and immediate. Thus, only 2 days after the unit employees voted to strike in support of the Union's request for recognition, and only 1 day after Yoder's unlawful threats were disseminated to the unit employees, the employees abandoned the strike and returned to work. Further, the day after the August 2 meeting at which the Respondent unlawfully promised the employees increased benefits, 12 employees signed a petition which stated that they resigned from the Union. In these circumstances, the fact that the Respondent had to commit only a few unfair labor practices to achieve its unlawful purpose does not mitigate against the imposition of a bargaining order.

Finally, we agree with the judge that the Respondent's unlawful grant of benefits on August 31, 1994, further renders the possibility of a fair election unlikely. Unlawfully granted benefits have a particularly

<sup>3</sup> Member Cohen does not pass on the issue of whether employee turnover is a relevant factor in deciding on the propriety of a *Gissel* bargaining order. Assuming arguendo that it is, Member Cohen agrees that the turnover in this case is insufficient to warrant the denial of the bargaining order.

longlasting effect on employees and are difficult to remedy by traditional means not only because of their significance to the employees, but also because the Board's traditional remedies do not require a respondent to withdraw the benefits from the employees. *Color Tech Corp.*, 286 NLRB 476, 477 (1987). Further, the benefits unlawfully granted will serve as a reminder to the employees that the Respondent, not the Union, is the source of such benefits and that they may continue as long as the employees do not support the Union. In this regard, we observe that Yoder, the individual who committed the most serious violations, remains the Respondent's president and co-owner and is therefore a visible reminder to the employees of what is likely to happen if they again choose to support the Union.

### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Gerig's Dump Trucking, Inc., Yoder, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(f).

“(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.”

2. Substitute the attached notice for that of the administrative law judge.

### APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with business closure and loss of employment in order to discourage support for the Union or any other labor organization.

WE WILL NOT tell you that you may not return to work unless all the employees abandon a strike and return to work.

WE WILL NOT promise you additional benefits in order to discourage support for the Union.

WE WILL NOT tell you that support for the Union is futile.

WE WILL NOT grant you increased benefits in order to discourage support for the Union.

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

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of our employees in the appropriate unit concerning rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody that understanding in a signed agreement.

### GERIG'S DUMP TRUCKING, INC.

*Walter Steele, Esq.*, for the General Counsel.

*James H. Hanson, Esq.*, of Indianapolis, Indiana, for the Respondent.

*Ken Henry* of Fort Wayne, Indiana, for the Charging Party.

### DECISION

#### STATEMENT OF THE CASE

RICHARD A. SCULLY, Administrative Law Judge. On charges filed on August 15, September 12, and November 8, 1994,<sup>1</sup> and an amended charge filed on February 8, 1995, by Chauffeurs, Teamsters and Helpers Local Union No. 414, a/w International Brotherhood of Teamsters, AFL-CIO (the Union), the Regional Director for Region 25 of the National Labor Relations Board (the Board) issued a consolidated complaint on February 13, 1995, alleging that Gerig's Dump Trucking, Inc. (the Respondent) had committed certain violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The Respondent filed a timely answer denying that it has committed any violation of the Act.

A hearing was held in Fort Wayne, Indiana, on April 24, 25, and 26, 1995, at which all parties were given a full opportunity to participate, to examine and cross-examine witnesses, and to present other evidence and argument. Briefs submitted on behalf of the General Counsel and the Respondent have been given due consideration. On the entire record and from my observation of the demeanor of the witnesses, I make the following

#### FINDINGS OF FACT

##### I. THE BUSINESS OF THE RESPONDENT

At all times material, the Respondent was a corporation with an office and place of business in Yoder, Indiana, engaged in the transportation of bulk commodities.

During the 12-month period preceding February 1995, the Respondent, in the course and conduct of its business operations, sold and shipped from its Yoder, Indiana facility goods valued in excess of \$50,000 directly to Fiddler, Inc., an enterprise located within the State of Indiana and directly

<sup>1</sup> All dates are in 1994, unless otherwise indicated.

engaged in interstate commerce. The Respondent admits, and I find, that at all times material it has been an employer engaged in interstate commerce within the meaning Section 2(2), (6), and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that at all times material the Union was a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### A. *The Respondent's Motion to Dismiss*

At the beginning of the hearing, the Respondent moved to strike certain allegations in the complaint on the grounds that they were not related to any of the allegations in the underlying charges filed by the Union. That motion was denied without prejudice and has been renewed by the Respondent in its posthearing brief. Specifically, the motion, relying on the United States Circuit Court of Appeal's decision in *Embassy Suites Resort v. NLRB*, 32 F.3d 588 (D.C. Cir. 1992), contends that complaint paragraphs 5(b), (c), and (f) and 6(a) are not supported by the charges and must be dismissed. I find that the motion has no merit and it is denied. Section 10(b) of the Act does not require that the charge be specific nor that the charge and the subsequent complaint be identical. There need only be a sufficient factual connection between the general terms of the charge and the specific allegations of the complaint. The violation alleged in paragraph 5(b) of the complaint, involving employee Munson, arises from the same incident referenced in the charge in Case 25-CA-23571, filed on November 8. The violations alleged in paragraph 5(f) involve conduct by Yoder that was virtually identical to that alleged to have occurred on July 27 in the charge in Case 25-CA-23392, filed on August 15. The Board has the responsibility to protect public rights and it is not precluded from dealing adequately with unfair labor practices that are related to and grow out of those alleged in a charge. *NLRB v. Fant Milling Co.*, 360 U.S. 301, 308-309 (1959). The allegation in paragraph 6(a) is also directly related to the actions of the Respondent referenced in the charge filed on August 15. I find that the Respondent's motion to dismiss these complaint paragraphs should be denied.<sup>2</sup>

### B. *Background Facts*

The Respondent began business in May 1994 when a group of investors bought the dump truck division from an entity known as Gerig Trucking and Leasing (GT&L). It purchased the equipment and existing contracts and hired most, if not all, of the drivers who had been working for GT&L. The drivers were paid a percentage of the revenue generated by their trucks. Benefits available to them included life insurance, group health, and disability insurance paid for by the employees, a 401(k) plan, and a "cafeteria plan" which apparently provided certain tax benefits. At a meeting with the drivers at the time of the purchase, the Respondent's president and part owner, Craig Yoder, informed them that they would continue to be paid in the same manner and that the

Respondent would provide at least the same benefit package they had been receiving.

About a month after the Respondent began operating, the drivers began talking about seeking union representation and eventually contacted the Union. A meeting was held at the Union's hall on July 15 at which several drivers signed union authorization cards. There were meetings on July 20 and 25 at which additional cards were submitted. On the morning of July 25, Union Business Agent Ken Henry hand-delivered a letter to the Respondent demanding that it recognize the Union as the drivers' collective-bargaining representative and that it respond to the demand by 6 p.m. that day. When the meeting at the union hall began that evening, there had been no response to the demand for recognition and the drivers decided to go on strike the next morning and to set up a picket line at the Respondent's facilities. Sometime that evening the Respondent transmitted a faxed letter to the Union stating that it would not recognize the Union without an election. It does not appear that the drivers were aware of this response before their meeting ended. The majority of the drivers began a strike to obtain recognition on the morning of July 26.<sup>3</sup> On the afternoon of July 27, most of the striking drivers decided to return to work as of July 28. The Union maintained the picket line until August 26.

### C. *Alleged Violations of Section 8(a)(1)*

#### 1. The meeting near the picket line on July 26

On the afternoon of the first day of the strike, Yoder and the Respondent's general manager, Rick Meyers, came out to the picket line. Union Representative Henry attempted to introduce himself but Yoder said that he did not recognize the Union and that he wanted to speak to his employees. He asked them to select three representatives to speak with him. The drivers selected Richard Kempf, Norman Munson, and Eugene Hunnicutt and they, Yoder, and Meyers met up by the shop for about a half hour. The complaint alleges that Yoder's remarks during this discussion violated Section 8(a)(1) of the Act.

Kempf testified that Yoder did the talking on behalf of the Respondent and began by telling them that he did not realize that they had such serious problems. They told Yoder that they had asked for a meeting with Meyers to discuss problems, but it never occurred. They said that their problems included the Respondent's failure to provide health insurance. Yoder said that he knew that they wanted the Union's highway contract and that he could not afford to pay the highway contract and the \$4 benefit package it involved. The drivers responded that, at that point, they did not know exactly what they wanted except that the Respondent recognize the Union as their bargaining representative. Yoder said that they had until the next afternoon to decide if they were coming back to work or staying out. If they did not return, the Respondent would either sell the trucks and take its losses or lease them out to somebody. He said if they did not come back to work the trucks would be gone and they would have no jobs to come back to. If that occurred, the drivers could go over and apply for jobs at Bunsold Trucking, a competitor that had a contract with the Union. The drivers returned to the picket line and told the others what had been discussed.

<sup>2</sup>Given my findings on the merits, the motion concerning the allegation in par. 5(c) is moot.

<sup>3</sup>Only two drivers worked during the strike.

Hunnicuttt testified that Yoder told them that when the Company was started they did not plan to be Union and that they could either come back to work by the following evening or the Company would be closed down. There was a discussion about the fact that if it closed they could apply at Bunsold and be new hires who would not be working as much. He could not recall anything being said about benefits at first, but after being shown an affidavit he gave the Board, dated August 30, he recalled Yoder saying that union benefits would cost \$4 an hour, that it wouldn't be feasible to do so and that, if he had to, he might as well close up and take his losses.

Munson testified that Yoder said that he was not going to recognize the Union, that he knew the kind of hourly wages that it would be seeking, plus a \$4-an-hour benefit package, and that because they had just purchased the Company and were bound by its contracts they could not afford to pay that kind of money. He said that if the drivers did not return to work by 4 p.m. the next day, the trucks would be out of there and they could seek employment wherever they went. He did not say where the trucks were going just that they would be gone and that, if he had to take "a bath," he would do so and go on to something else. He mentioned Bunsold Trucking in the context of telling them they could apply for work someplace else.

Yoder testified that he began the discussion by apologizing for being unaware that the drivers had issues that needed to be addressed. He told the three drivers that he could not negotiate with them or offer them anything. All he could do was offer them an invitation to return to work. He also said that there needed to be a deadline for their return and thereafter he would have to pursue other options because the trucks could not sit idle. Kempf asked him what those options were and he responded that he did not know. He said the only thing he could offer was that they return to work under the old conditions. He said that the drivers asked if he was going to sell the trucks to Bunsold or if he was going to lease them out. He responded that those were options but that no decision had been made. The drivers asked him why he would not accept the Union's "stockpiling agreement" and he said he was not familiar with it and could not discuss it. He testified that there was no mention of a highway contract, that he did not say anything about being unable to afford \$4 an hour in benefits, and that he did not say he would close the Company or sell or lease the trucks. The conversation ended with him saying that he would take no action until after there was a response from the drivers by 4 p.m. the following day.

#### Analysis and conclusions

Based on their demeanor while testifying and the content of that testimony, I credit the testimony of the three drivers over that of Yoder. I find their generally consistent and mutually corroborative testimony establishes that Yoder told them that if the striking drivers did not agree to return to work by the afternoon of July 27, the Respondent would sell or lease its trucks and cease doing business. The result of this would be that they would no longer have jobs with the Respondent and they could go to its union-organized competitor, Bunsold Trucking, and seek jobs as new hires. Numerous other drivers who were at the picket line testified that this is what the three reported to them when they returned

from the meeting with Yoder. I find that the minor differences in their descriptions of the meeting appear to result from their different perspectives and that they enhance rather than detract from their credibility. All the three drivers were still employed by the Respondent at the time of the hearing. I find it unlikely they would falsify their testimony under these circumstances. See *Stanford Realty Associates*, 306 NLRB 1061, 1064 (1992); *K-Mart Corp.*, 268 NLRB 246, 250 (1983); and *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1961). Hunnicutt, in particular, struck me as a reluctant but honest witness. He admitted that he had no real commitment to the Union but signed an authorization card and joined the strike in order to go along with the majority of the drivers. I believed his testimony.

On the other hand, I found Yoder's version of what transpired to be incredible and an effort to put his own spin on the conversation and various subjects he could not deny having been discussed. According to Yoder, at the time of this conversation he had formulated no plan of action and did not even know what his various options were, but he did know that he could not negotiate or offer the drivers anything. Yet, he went out to the picket line and asked for a private meeting with three driver representatives for the sole purpose of inviting them to come back to work under the same conditions they had left. If that was the extent of his message, there is no reason why he could not have delivered it quickly and directly to all the drivers at the picket line. Although he says he was simply extending an invitation to return to work, he added a deadline of approximately 24 hours. This was purportedly done so that he would know if he had to pursue his other options. I find this much more indicative of an intention to take specific action once the deadline passed than as a starting point for considering what he was going to do. According to Yoder, once he had given them the deadline, the drivers proceeded to ask him a series of questions which laid out his various options, including, selling the trucks, or leasing them out and he simply acknowledged that these were possibilities, while at the same time assuring them that he had not decided on a specific course of action. It was the drivers, not him, who introduced Bunsold Trucking into the discussion by raising the possibility of a sale of the trucks to it. He simply commented that Bunsold involved a union "scenario" and the drivers concluded that they would end up at the bottom of Bunsold's drivers list if they went to work there. It was the drivers, not him, who raised the issues of union wages and a \$4-an-hour benefits cost, and he made no comment about them.

Although Meyers was along to serve as a witness, his testimony does little to support Yoder's credibility. He testified that he was walking around during the conversation and did not hear all of it. After first saying that the conversation was mostly questions from the drivers, primarily Kempf, and that Yoder told them he didn't know what his options were, he said that Yoder told the drivers he had to get the trucks rolling and if that meant hiring replacement drivers, leasing or selling the trucks he would do so.<sup>4</sup> Yoder testified that, at the time of this conversation, he did not even know what his options were. When asked on cross-examination if Yoder told the drivers they could come back to work without the

<sup>4</sup>None of the other participants, including Yoder, testified that hiring replacement drivers was discussed as an option.

Union or not at all, Meyers' answer was that Yoder did not say that "in so many words." Meyers also testified, in contradiction of Yoder, that Yoder told the drivers that if the Company was Union it would operate under a "stockpile agreement" and that under such an agreement they might not be as well off as they were. Yoder testified that, when the subject of a "stockpile agreement" was raised, he was unfamiliar with it and did not discuss it.

I find that Yoder told the drivers that if they did not abandon the strike and return to work on the following afternoon, the Respondent would sell or lease its trucks and cease doing business.<sup>5</sup> The coercive effect of these threats of business closure and loss of jobs is obvious and such interference with the employees' rights to engage in activities protected by Section 7 of the Act violated Section 8(a)(1). E.g., *C.J.R. Transfer*, 298 NLRB 579, 591 (1990); *Sedloff Publications*, 265 NLRB 962, 969 (1982); and *Pittsburgh & New England Trucking*, 238 NLRB 1706, 1707 (1978).

## 2. Statements by Rick Meyers

Norman Munson testified that on the evening of the first day of the strike he telephoned Meyers and asked if he could go back to work because he could not afford to be out of work. Meyers responded that he had no control over that and for Munson to return to work all the drivers had to return. He said that they went out as a group and they had to return as a group. Meyers testified that when Munson telephoned him and asked if he could return to work he told him that he would love to have him come back to work but he did not know if he could let one guy come back and that he would have to talk to Yoder and the attorneys, get an answer, and let him know.

Former employee Dana Cuney testified that on the afternoon of July 27, most of the drivers left the picket line and went over to tell the Respondent that they were returning to work. When they approached Meyers, he said that he was glad they were coming back and the ones that were still out there were going to be "blackballed." Meyers testified that when the drivers left the picket line to return to work he was sitting in his van with the door open. A group of drivers, including Cuney, came up and were standing by his van. He spoke to them as a group and told them that he was glad to see that they were back. He told them to return at 7 a.m. the next day to be dispatched. He denied that he said that the ones who were still out there would be blackballed. He said that he never used the word "blackballed" or anything that was even vaguely similar during that conversation.

The complaint alleges that Meyers' comments to Munson during their telephone conversation on July 26 and the "blackball" comment testified to by Cuney violated Section 8(a)(1)

### Analysis and conclusions

I credit the testimony of Munson as to what was said in his July 26 telephone conversation with Meyers. After observing his demeanor while testifying, I found Munson to be an impressive and believable witness and, as noted above, he is still an employee of the Respondent and unlikely to misstate what occurred in this conversation. Munson's version of

the conversation is much more in keeping with the ultimatum that Yoder had given the drivers a few hours earlier than is Meyers' version. Yoder made it clear that unless the drivers agreed to return to work by the following afternoon the business would be closed down. Having one driver come back to work on July 27 would have been meaningless if all or most did not agree to return and thereby keep the Respondent's business open and the trucks running. Meyers was aware that at least two drivers had not gone on strike and had driven their trucks on July 26 and would be driving them again on July 27. Yet, according to his version, he did not know if Munson could return to work and had to consult with Yoder and his attorneys to be sure "that we did not create any problems." However, he was unable to testify as to any specific problem Munson's returning to work might have caused. Although he testified that he told Munson he would inquire and get back to him, there is no evidence that he did so prior to the deadline Yoder had imposed. I find that Meyers' statement that Munson could not come back to work unless all the employees abandoned the strike and returned was coercive and violated Section 8(a)(1).

After observing his demeanor while testifying, I believed Meyers' emphatic denial that he did not tell the group of employees who returned to work on July 27 that those who had not returned would be blackballed. Although there were several other employees present at the time of the alleged statement, no one else testified to hearing it. While he appeared to be a credible witness and there was no reason for Cuney, who is no longer employed by the Respondent, to fabricate such an incident, I find it likely he overheard someone's speculation as to what might happen to those who did not return and erroneously attributed it to Meyers. I find the evidence fails to establish that Meyers made the statement and shall recommend that this allegation be dismissed.

## 3. The July 28 letter to employees

Most of the drivers left the picket line and abandoned the strike on the afternoon of July 27. While they were discussing their return to work with Yoder and Meyers, someone suggested that there should be a meeting between the drivers and management to discuss the drivers' concerns. It was agreed that a meeting would be held on August 2. On July 28 the drivers were given a letter from Yoder reminding them to attend this meeting "to discuss various benefit programs being considered by the company." The letter states that the Company is ready to implement a 401(k) retirement plan, a section 125 cafeteria plan, and \$15,000 of life insurance coverage. It also states that at the meeting there will be a discussion of "additional benefits being considered for you which include long-term disability benefits and medical insurance." The complaint alleges that through this letter the Respondent unlawfully promised the employees additional benefits if they abandoned their support for the Union. The Respondent contends that the letter, "on its face" does not condition any benefits on abandoning support for the Union and no employee could have interpreted it as doing so.

### Analysis and conclusions

In determining whether an employer's conduct is unlawfully coercive, it must be looked at "in the total context of all the circumstances." *Rossmore House*, 269 NLRB 1176,

<sup>5</sup>As is discussed below, Yoder made similar comments to Hunnicutt on August 31.

1177 (1984). This letter was presented to the drivers right after they returned to work following Yoder's telling the drivers that the Respondent could not afford to pay wages and benefits under a union contract and his unlawful threats to close the business and terminate their jobs unless they abandoned their strike and returned to work. It appears that after using the stick to get the drivers back to work the Respondent switched to the carrot to undermine their support for the Union. In the discussion Yoder had near the picket line with the three driver representatives on July 26, they told him that one of their principal reasons for seeking representation by the Union was the Respondent's failure to provide health insurance benefits. Two days later, the drivers received this letter in which the Respondent announced that it would, as previously promised, finally provide certain benefits they had when employed by GT & L and said that it would be announcing "additional benefits" including medical insurance and long-term disability benefits. I find the promise of improved insurance benefits within 2 days of the date the Respondent learned that its employees were seeking representation by the Union was clearly intended to convey the message that union representation was unnecessary. Any doubts the drivers may have had that these promises of improved benefits were conditioned on their abandoning support for the Union were dispelled at the meeting on August 2, discussed below. These promises of improved benefits interfered with protected rights and violated Section 8(a)(1). *Pennsy Supply*, 295 NLRB 324, 325 (1989); and *Highland Foods*, 255 NLRB 1118, 1120 (1981).<sup>6</sup>

#### 4. The August 2 meeting

The meeting that had been agreed on on July 27 was held on the evening of August 2 in a meeting room at the Orchard Inn, a restaurant near the Respondent's facility. The Respondent was represented by Yoder and Meyers and there was an insurance agent present. The agent made a presentation explaining the benefits that were being implemented, the 401(k) plan, the "cafeteria" plan and the life insurance program. He did not say anything concerning medical insurance or disability insurance.

Hunnicuttt testified that he met and spoke with Yoder downstairs before the meeting with the drivers began. Yoder told him that he could not tell him what he wanted to because it was still too early, as "the Union was still out there." Yoder said that he had it all set up to announce company paid health insurance that night but "he was not able to do it because of the Union." Hunnicutt also testified that at the meeting Yoder told the drivers he could not talk about what he wanted to that night "because the Union was still present." Kempf testified that at this meeting Yoder said that he knew that the drivers had problems but that they had to take care of one problem before he could do anything. Munson testified that Yoder said that he could not do anything for them at that time and that they had to get rid of this other problem before he could do anything.

Yoder testified that he began the meeting by introducing the insurance agent and telling the drivers that while the agent was to present five different items as indicated in the

<sup>6</sup>As is discussed below, I do not credit the Respondent's claim that it had decided to provide improved insurance benefits before the employees sought representation by the Union.

memo they had received, "unfortunately, because of the current situation, we will not be able to address two of those items, which are medical insurance and the disability." He also told them the agent would not respond to any questions concerning those two subjects "because of the current situation." Yoder denied that he had made any reference to or used the word "problem" during the meeting or that he had said that he could not talk about what he wanted to because of the Union or because the Union was still present.

#### Analysis and conclusions

I credit the testimony of Hunnicutt that Yoder told him before the meeting started that he was going to announce that the Company would provide the drivers with medical and disability insurance but that he could not do so because the Union was still there. I also credit the consistent testimony of Munson and Kempf that during the meeting Yoder told the drivers that there would be no announcement or discussion of these items and that they had to do something about the "problem" before there would be. I find that these statements constituted coercive and unlawful attempts to induce the employees to abandon their support for the Union in return for increased benefits.

The Respondent contends that because Yoder did not specifically say that he was promising to provide these benefits if the drivers withdrew their support for the Union, there can be no violation of the Act. I do not agree. A lawful purpose is not established by the fact that the employer who promises increased benefits did not expressly relate those promises to the organizational campaign. See *Honolulu Sporting Goods Co.*, 239 NLRB 1277, 1280 (1979), citing the Supreme Court's decision in *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 410 (1964). Moreover, the Respondent's action must be looked at in the context of the surrounding circumstances. In its July 28 letter to the drivers, the Respondent informed them that one of the purposes of the August 2 meeting was to discuss the "additional benefits" of medical and disability insurance. At the meeting, Yoder informed them that these subjects could not be discussed because the Union was still present. Even under Yoder's version, that he said only that this was "because of the current situation," it was an obvious reference to the Union and indicated that these additional benefits would not be forthcoming so long as it was in the picture.<sup>7</sup>

<sup>7</sup>The testimony of Meyers confirms this:

Q. [By Mr. Steele] So what did Mr. Yoder say about medical and disability insurance at this August 2nd meeting?

A. Uh, basically that he couldn't talk about it.

Q. He said he couldn't talk about it?

A. He could not tell them anything about it.

Q. Did he say why?

A. Just because of the the legal end of the Union as far as I understood it.

Q. What . . . how did the Union get involved in this? I mean why . . . what did the Union have to do with him being able to say anything about medical and disability?

A. Well, I assume that was one of the things that the Union wanted to get . . . I mean, the drivers wanted to get from joining the Union, was a medical insurance policy.

Q. And Mr. Yoder said, "I can't talk about that because of the Union?"

A. Because of the Union picketing going on right now.

In its brief, the Respondent also contends that at the meeting Yoder “informed the drivers that there were certain questions about benefits that he could not respond to and that Gerig was not in a position to work out any insurance program until a resolution was reached, favorably or unfavorably, with regard to the union’s organizational efforts” and that this simply summarized the Respondent’s rights and obligations under the law regarding providing benefits during an organizing campaign. (Emphasis added.) The problem with this contention is that there is no evidence that Yoder ever said the italicized part of the sentence the brief attributes to him. He didn’t say it when he introduced the insurance agent at the start of the meeting and he didn’t say it before he left the premises even though he was admittedly aware by that time that the drivers were already talking about what they had to do in order to get rid of the Union. There can be little doubt but that was exactly what the Respondent had hoped to accomplish. I find Yoder’s telling the employees at the August 2 meeting that the additional medical and disability insurance benefits mentioned in its July 28 letter would not be implemented because the Union was still present did not serve to rebut the promise of increased benefits contained in that letter. Yoder’s statement at the meeting, concerning these benefits, was an additional implied promise of increased benefits if they abandoned their support for the Union and violated Section 8(a)(1). *Western Health Clinics*, 305 NLRB 400, 406–407 (1991).

#### 5. The Autumn Ridge incident

Hunnicuttt testified that on the afternoon of August 31, prior to an employees’ meeting at which the Respondent announced it would provide paid insurance benefits, he encountered Yoder at the Autumn Ridge jobsite. Yoder told him that the drivers would be happy because the Company was going to carry insurance for them. He also told Hunnicutt that the Company “would never be union” and that they were a lot better off that the Union was out of there and that he hoped they realized it. Yoder also said that if they went union he “would just close it up and put it under Bunsold Trucking and lease it to them or whatever.”

Yoder testified that when he met Hunnicutt at the Autumn Ridge jobsite he was there in his capacity as an officer of Colonial Development and not as an officer of the Respondent. He admitted discussing with Hunnicutt the fact that there was a meeting for the Respondent scheduled for that evening at which insurance benefits would be announced, but said that the subject of the Union never came up. He denied saying that the Company would never be union, that they were better off without the Union, or that he would close down the Company if it went union.

#### Analysis and conclusions

This is strictly a matter of credibility. As discussed above, I found Hunnicutt, a current employee who was clearly reluctant and uncomfortable testifying adversely to the Respondent’s interests about this and other incidents, to be an honest and convincing witness. There was absolutely no reason for him to fabricate such an incident after he had at-

Q. Okay. “I can’t talk about either the, uh, long-term disability or the medical insurance because of the Union?”

A. Yeah, I . . . as I remember, yeah, that is right.

tempted to resign from the Union and the Respondent had provided the drivers with the medical insurance benefits Hunnicutt was so concerned about. I did not believe Yoder’s testimony that he did not discuss the Union with Hunnicutt. Although the Respondent apparently contends that Yoder’s remarks are not attributable to it because he was not representing it at this jobsite, the contention has no merit. Yoder was clearly talking to Hunnicutt as a representative of the Respondent when he told him about the insurance benefits that were to be announced at the meeting that evening and when he directed Hunnicutt to be at the meeting and authorized him to quit working at 5 p.m. in order to attend the meeting although the contractor he was hauling for wanted him to work past 6 p.m. Like his statements to the driver representatives on July 26, Yoder’s remarks here threatened business closure and made an implied promise of unspecified benefits if the employees rejected the Union, in violation of Section 8(a)(1). His statement to Hunnicutt that the Respondent would never be Union, implied that support for the Union was futile, and also violated Section 8(a)(1). *Rood Industries*, 278 NLRB 160, 164 (1986); and *El Rancho Market*, 235 NLRB 468, 471–472 (1978).

#### D. Alleged Violations of Section 8(a)(3) and (1)

##### 1. Conditioning employment on employees’ abandoning support for the Union

The complaint alleges that, since July 26, the Respondent has violated Section 8(a)(3) and (1) of the Act by conditioning further employment of its employees on abandoning their support for the Union. I find that the evidence fails to establish such a violation. It is clear that the Respondent did not want the Union to represent its employees and that it took several unlawful actions to undermine their support for the Union, including threats of business closure, implied promises of benefits if they did not opt for such representation and the granting of additional benefits. However, there is no evidence that it actually conditioned any employee’s return to work or continued employment on his abandoning support for or membership in the Union.<sup>8</sup> When confronted by the Union’s demand for recognition based on authorization cards signed by a purported majority of its employees, the Respondent had the right to refuse and to insist on a representation election. *Summer & Co. v. NLRB*, 419 U.S. 301 (1974). That is what it indicated it would do in its July 25 letter in response to the Union’s recognition demand. I shall recommend that this allegation be dismissed.

##### 2. Constructive discharges of employees Cramer and Underwood

Lewis Cramer and Leonard Underwood were employed by the Respondent as drivers when the Union’s organizing campaign began. They attended union meetings, signed authorization cards, and participated in the strike. They had agreed with one another after the first day of picketing that they would not go back to work if the Respondent did not recognize the Union. When most of the drivers left the picket line

<sup>8</sup> Although Meyers did unlawfully tell Munson, during the strike, that he could not come back to work unless all the drivers returned, there is no evidence that any other driver was told the same thing. It became a moot point once the drivers decided to return to work.

and agreed to return to work on the afternoon of July 27, Underwood who was present did not join them. That evening he telephoned Cramer and told him about the other drivers abandoning the strike and agreeing to return to work. Neither has returned to work for the Respondent. The complaint alleges that Cramer and Underwood were constructively discharged in violation of Section 8(a)(3).

#### Analysis and conclusions

This is not a case in which the employer unlawfully unilaterally abrogated an existing collective-bargaining relationship with its employees' chosen representative. Consequently, *Superior Sprinkler*, 227 NLRB 204 (1976), and similar cases cited by the General Counsel are inapposite. Here, the employer declined to recognize the Union without an election. I have found that there is no evidence that the Respondent actually conditioned the strikers' ability to return or continue to work on their abandoning support for or membership in the Union. Accordingly, I also find that they were not faced with the choice of quitting or continuing their employment on condition that they relinquish rights guaranteed by Section 7 of the Act when the Respondent refused to recognize the Union. Given the unlawful threats made by Yoder on July 26, Cramer and Underwood may have believed they would face that choice. But as is stated in *White-Evans Service Co.*:<sup>9</sup> "Although resigning in the face of such a choice is one thing, 'quitting in anticipation that such may take place later on is an entirely different matter.' *Marquis Elevator Co.*, 217 NLRB 461 (1975)." I find that Cramer and Underwood were not constructively discharged and that this allegation should be dismissed.

#### 3. Granting increased benefits

At a meeting for all employees held at the shop on the evening of August 31, the Respondent announced that it would provide company paid medical and long-term disability insurance for its employees, effective September 1. When they were employed by GT&L, the drivers had the option of purchasing medical and disability insurance without any employer contribution to the cost. Following its purchase of the business from GT&L, in a letter to employees, dated June 9, the Respondent had informed them that it would provide them with "the same group medical insurance coverage" they had with GT&L.<sup>10</sup> The complaint alleges that the Respondent violated Section 8(a)(3) and (1) by implementing improved insurance benefits in order to discourage the employees' support for the Union. The Respondent contends that it had been considering providing such benefits before it learned of the employees' union activity and had nothing to do with the Union.

#### Analysis and conclusions

Granting employees increased benefits in order to dissuade them from choosing a labor organization as their collective-bargaining representative is discriminatory and violates the Act. E.g., *Ideal Elevator Corp.*, 295 NLRB 347, 351 (1989);

<sup>9</sup>285 NLRB 81, 82 (1987).

<sup>10</sup>During the period between the purchase of the business by the Respondent and September 1, the drivers who had opted for coverage under GT&L's medical insurance program had been purchasing such insurance under a program known as COBRA.

*Dentech Corp.*, 294 NLRB 924, 965 (1989); and *Clements Wire & Mfg. Co.*, 257 NLRB 206, 208 (1981). If, however, the employer can establish that the grant of benefits was governed by factors unrelated to the advent of union activity, such as being part of a preexisting company policy from which it has not deviated, it will not be found to have acted unlawfully. *American Sunroof Corp.*, 248 NLRB 748 (1980); *Honolulu Sporting Goods Co.*, supra at 1280. I find that the Respondent has not established that it had already decided to provide its employees with company paid medical and disability insurance benefits before it learned that they were seeking representation by the Union or that its decision was not intended to undermine their support for the Union.

The Respondent relies primarily on the self-serving testimony of Yoder in trying to establish that it had made a decision to provide these benefits before the Union appeared on the scene. I did not believe his testimony about several other issues and I found his testimony about how, when, and why this decision was made to be incredible. To begin with, he admitted that he was not primarily responsible or directly involved in arranging for these insurance programs and he seemed to know little about them.<sup>11</sup> The programs were arranged by an insurance agent, Pat Sullivan, and Rex Harris, a co-owner of the Company. Harris was not called as a witness to corroborate Yoder's testimony or to expand on his admittedly incomplete knowledge. There was no evidence that Harris was unavailable or unfavorably disposed to the Respondent. This warrants the inference, which I draw, that his testimony would not have supported the Respondent's position on this issue. *International Automated Machines*, 285 NLRB 1122, 1123 (1987).

Yoder testified that when he first met with the drivers after the purchase of the business, he told them that the Respondent would provide at least the same benefit package as they had under GT&L. This was confirmed in the June 9 letter which informed the employees that the Respondent was "currently in the process of providing to you the same group medical insurance coverage under which you have previously been covered with Gerig's Trucking & Leasing, Inc." and asked them to fill out an enclosed enrollment form indicating whether they wished to participate in the program. There is no dispute but that the insurance available to the employees of GT&L was not paid for by the Employer and Yoder admits that he had never told the employees that the Respondent would provide company paid medical and disability insurance benefits prior to the demand for recognition by the Union.<sup>12</sup>

Yoder claimed that the Respondent was considering providing these benefits but a final decision could not be made until the insurance agent researched the medical history of the employees and determined what the cost would be. He said that this was delayed due to the failure of its first insurance agent to get the programs together and that Sullivan, its

<sup>11</sup>For example, he testified that he did not know whether the disability insurance program GT&L provided was paid for by the Employer or the employees.

<sup>12</sup>Although there was evidence that Yoder had told Hunnicutt at some time that they would have paid insurance, Yoder testified that he told him that he "was not going to go public with it" and would deny ever saying it. I find this is insufficient to establish that the Respondent had a policy whereby it was committed to providing these benefits which predated the advent of the Union.

new agent, provided the cost and other information it needed to make that decision on the Monday before the strike began. I did not believe him. First, until the Union came into the picture, there was no incentive or any apparent reason for the Respondent to provide improved insurance benefits after announcing that it would provide the same benefits. All the drivers who had worked for GT&L came to work for the Respondent after Yoder had told them they would receive the same benefits that they had. Within a few weeks of taking over the business, the Respondent had actually increased the drivers' benefits by giving them paid holidays and extra pay for working on Saturdays. There was no evidence that the employees demanded or even asked for additional or improved benefits.<sup>13</sup> On the contrary, on July 26, Yoder expressed surprise when he learned that the drivers were so upset that they had gone to the Union.

There is no documentary evidence to support the claim that insurance agent Sullivan was asked to or provided the Respondent with information concerning the company paid insurance programs it implemented, as of September 1, before its employees sought representation by the Union. The only document in the record concerning either of these programs is one summarizing the medical insurance benefits which was handed out to employees by Sullivan on August 31. It appears to have been first sent to the Respondent by a fax transmission on August 30. Although Yoder claimed one purpose of this document was to inform the partners of what they were providing, it contains no information concerning the cost of the program to the Respondent. When asked on cross-examination what correspondence there had been between the Respondent and the insurance agent concerning these programs, Yoder's answer was that he did not know because Harris handled it. When asked about the information on which the Respondent had based its decision to pay for the insurance, he again said he did not know what it was because Harris handled it. When asked if there were documents which would reflect that information, he said that he assumed there were. Finally, when asked when such documents became available to the Respondent, he said that he did not know, but Harris might. As indicated, I did not find Yoder to be a credible witness and I find the Respondent's failure to call Harris as a witness or to provide any documentation as to when it asked for and/or received the information it claims its decision to provide these benefits was based supports an inference that it was not until after the employees sought representation by the Union. Accordingly, I find that the evidence fails to establish that the Respondent had a preexisting policy pursuant to which these insurance benefits were provided. I conclude that they were implemented because the employees sought such representation and in order to dissuade them from doing so, in violation of Section 8(a)(3) and (1).

#### E. Alleged 8(a)(5) Violation

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) by rejecting the Union's demand for recognition and thereafter committing unfair labor practices so seri-

<sup>13</sup> There was evidence that some employees, who no longer had medical insurance because the Respondent had not provided any despite its statement that it would do so, expressed some concerns over their coverage under the COBRA program.

ous and substantial that the possibility of erasing their effects and assuring the conduct of a fair representation election by use of traditional remedies is slight and that the entry of a remedial order requiring it to recognize and bargain with the Union as the exclusive collective-bargaining representative of its drivers is warranted. There is no dispute but that on July 25 the Union made a demand for recognition which the Respondent rejected.

#### 1. The Union's majority status

The evidence establishes that there were 21 drivers employed by the Respondent on the date that the Union made its demand for recognition. The Respondent contends that the evidence does not establish that the Union had valid authorization cards from a majority of the drivers on that date. It argues that certain of the cards should not be counted in determining whether the Union had majority status because they were not properly authenticated at the hearing. There is no dispute as to the cards of eight drivers who appeared as witnesses and authenticated their cards.<sup>14</sup>

The Respondent objects to counting several cards that were introduced through the testimony of Union Representative Ken Henry on the grounds that they have not been properly authenticated. I find that each of these cards has been properly authenticated and should be counted. The Board does not require that the signer of an authorization card appear as a witness to authenticate it or that his absence be accounted for. It has long held that "a card may be authenticated by a witness who testifies that he observed its execution," and it "will also accept as authentic any authorization cards which were returned by the signatory to the person soliciting them even though the solicitor did not witness the actual act of signing." *McEwen Mfg. Co.*, 172 NLRB 990, 992 (1968). Accord: *Stride Rite Corp.*, 228 NLRB 224, 234-235 (1977).

Henry testified concerning the organizational meetings for the Respondent's employees held at the union hall on July 15, 20, and 25 and he identified the attendance sheets for those meetings. He testified that at the meetings on July 15 and 20 he received a number of authorization cards from employees in attendance and stamped the date of receipt on the back of each card. He testified that the cards were on the table during the meeting but that he did not actually witness them being filled out or signed. Henry identified the cards of Kevin Krumma, John Isamoyer, George Marlow, Roy Guzman, and Lynn Cocks as having been handed to him at one or the other of the meetings by those employees. The attendance sheet for the July 15 meetings shows that Isamoyer, Marlow, and Guzman were at the meeting and their cards bear stamps showing they were received by Henry on that date. The attendance sheet for the July 20 meeting shows that Cocks attended the meeting and his card is stamped as having been received on that date. Although Krumma did not sign the attendance sheet for the July 20 meeting, the date his card was stamped as received, I do not find this casts any doubt on Henry's credible testimony that he received the card from Krumma, as signing in at the meetings was not

<sup>14</sup> They are Richard Kempf, Eugene Hunnicutt, Dana Cuney, Norman Munson, Leonard Underwood, Lewis Cramer, Cecil Claybaugh, and Kenneth Behny.

mandatory.<sup>15</sup> I find that all of these cards should be counted in determining the Union's majority status. Certain of Henry's testimony concerning the card of Lynn Dager, as reflected in the hearing transcript, is unclear.<sup>16</sup> After careful consideration, however, I find that he did not state that he was given Dager's card by another driver, as the Respondent contends. His card is stamped as having been received by the Union on July 20. The attendance sheet for the meeting shows that Dager was present. Henry indicated that he did not see Dager sign his card but he did not say that Dager was not present or that someone else gave him Dager's card. I find that this card should be counted.

The card of Donald Harris was received by the Union at the July 15 meeting but it is unsigned. Harris testified that he attended the meeting, filled out the card, and returned it to Henry, but he failed to sign it due to "just my carelessness." He said that he did not realize that he had neglected to sign the card until it was shown to him at the hearing. The Respondent contends that because the card is unsigned it does not constitute a designation of the Union, but demonstrates his lack of interest in such representation and that his subsequent testimony concerning his intent cannot be considered. I do not agree. If Harris was not interested in representation by the Union, he had no reason to fill out the card and even less to return it to the solicitor. There is an obvious ambiguity about Harris' card which can be resolved by his testimony. *I. Tatel & Son*, 119 NLRB 910, 911 fn. 3 (1957). Nothing in that testimony was inconsistent with or sought to repudiate his actions on July 15. The evidence shows that Harris attended all three meetings at the union hall and that he joined the strike at the outset and served on the picket line both days. I find that by filling out the card and delivering it to Henry on July 15, Harris made a valid designation and that his card should be counted.

Henry identified the undated card of Norman Meredith as having been received at the meeting on July 20, the date stamped on the card. However, Henry did not see Meredith sign the card and was not sure if he was present at the meeting. His name is not on the attendance sheet. Because Henry's testimony does not establish that Meredith signed the card or that he received the card from Meredith, I find that this card does not meet the standards for authentication discussed above and should not be counted. The same is true with respect to the card of Larry McHenry which Henry did not receive directly from the signatory but from another unidentified driver who brought it to him at the July 20 meeting, which McHenry did not attend. That card should not be counted. Henry testified that Richard McHenry came to the

picket line on July 26, represented himself as being an employee of the Company, offered to participate in the strike, and filled out an authorization card. There is no evidence to establish that Richard McHenry was ever an employee of the Respondent. He is not on the list in the record that the parties have stipulated includes the names of all drivers employed by the Respondent on July 25, the date of the Union's demand for recognition. Consequently, I find that his card should not be counted. See *Dadco Fashions*, 243 NLRB 1193 (1979). The card of Kirk Sipe was not signed or received by the Union until July 26 and cannot be counted in determining whether the Union represented a majority of the employees on July 25.

I find that the evidence establishes that there were 21 drivers employed by the Respondent on July 25, the date the Union made its demand for recognition.<sup>17</sup> I also find that as of that date the Union had been designated as the bargaining representative of 15 of the unit employees, which was more than a majority.<sup>18</sup>

## 2. The propriety of a bargaining order remedy

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court held that in exceptional cases involving outrageous and pervasive unfair labor practices, a bargaining order is justified because traditional remedies cannot eliminate the coercive effects of the employer's misconduct and a fair election cannot be held. The Respondent's conduct in this case does not fall into the exceptional case category. I find, however, that it does fall into the second category discussed in *Gissel*, involving, "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process." *Id.* at 614. In such cases a bargaining order should issue when the possibility of erasing the effects of past misconduct and ensuring a fair election through the use of traditional remedies is slight and employee sentiment once expressed through authorization cards would, on balance, be better protected through a bargaining order.

I have found that the Respondent has committed several violations of Section 8(a)(1) and (3) of the Act, the most significant of which involved threats of business closure and loss of employment, promising additional benefits, and the granting of substantial benefits in order to undermine the employees' support for the Union. Within a day of learning that the drivers were seeking union representation, the Respondent committed what the Board considers to be among the most pernicious of "hallmark violations" of the Act when Yoder threatened that if they did not abandon the strike and return to work within 24 hours the business would close and they would be without jobs. As it stated in *A.P.R.A. Fuel Oil*, 309 NLRB 480, 481 (1992), such threats are among the most

<sup>15</sup>It is noted that Krumma's name is printed on the attendance sheet for the July 25 meeting and the printing is similar to that on his authorization card.

<sup>16</sup>The transcript reports part of Henry's testimony concerning this card, as being:

Q. [By Mr. Steele] And that's the card of Mr. Lynn Dager [sic]?

A. Yes, sir.

Q. And it's dated 7/18 and you received it on or about . . . ?

A. On the 20th, it came in with the other cards.

Q. Upon the driver?

A. On the other driver.

I find that the italicized portion of this testimony makes no sense and was apparently incorrectly transcribed.

<sup>17</sup>The Union sought recognition as the representative of a unit consisting of all truckdrivers employed by the employer but excluding all office clerical employees, guards and supervisors, as defined in the Act. There does not appear to be any dispute but that this constitutes the appropriate bargaining unit.

<sup>18</sup>Although at the hearing the Respondent's counsel stipulated that there were 21 drivers in the unit, in his brief he contends there were 22. The difference may result from the Respondent's view as to the status of Harrel Lanier Jr., a mechanic who apparently sometimes drives a truck. Regardless of whether Lanier is included in the unit, the Union had more than a majority on July 25.

flagrant forms of interference and "are more likely to destroy election conditions for a longer period of time than are other unfair labor practices because they tend to reinforce the employees' fear that they will lose their employment if union activity persists." The effects of the threats made here in dissipating support for the Union could hardly have been more dramatic. On Monday, July 25, all but 2 of the 21 drivers agreed to strike for recognition and appeared on the picket line on Tuesday. By the time of the Respondent's deadline for returning to work on Wednesday afternoon, all but two of the striking drivers had left the picket line and had agreed to return to work. The Respondent immediately followed up with a promise of additional insurance benefits but then, at the August 2 meeting where the benefits were to be announced, it informed the drivers that it could provide such benefits until the union problem was solved. Not surprisingly, this resulted in 12 drivers signing a purported resignation from the Union on August 3. On August 31, the Respondent did implement the additional insurance benefits it had promised but then withheld. As counsel for the General Counsel points out, such a grant of benefits is likely to have a long-lasting effect not only because of its importance to the employees but because the Board's traditional remedies do not require the withdrawal of such benefits. *Color Tech Corp.*, 286 NLRB 476, 477 (1987). Consequently, if an election were to be held while the employees were the beneficiaries of the employer-paid insurance programs, it would "serve as a constant reminder to employees of the Respondent's use of economic weapons to defeat the Union." *Red Barn System*, 224 NLRB 1586 (1976). Also significant in considering whether a bargaining order remedy is appropriate is whether similar violations are likely to occur. The most significant violations were committed by Yoder who remains the president and co-owner of the Company. In its brief, the Respondent contends that a bargaining order should not be entered here because there was none in certain other Board cases it has cited which allegedly involved unfair labor practices of greater number and severity.<sup>19</sup> A reading of those decisions shows no evidence that a bargaining order was requested, let alone rejected, and no evidence that the unions involved ever had a card majority.

Given the nature of the Respondent's unlawful conduct and its impact on all employees in the bargaining unit, I find that it is unlikely that its effects would be erased or that a fair election could be ensured by the use of traditional remedies. I conclude that a bargaining order is necessary to protect the free expression of employee sentiment as evidenced by the authorization cards and shall recommend the issuance of an order requiring the Respondent to recognize and bargain with the Union.

#### CONCLUSIONS OF LAW

1. The Respondent, Gerig's Dump Trucking, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Section 8(a)(1) of the Act by threatening employees with business closure and loss of em-

<sup>19</sup> *Medical Center of Ocean County*, 315 NLRB 1150 (1994); and *Teksid Aluminum Foundry*, 311 NLRB 711 (1993).

ployment if they did not return to work, telling an employee he could not return to work unless all the employees abandoned the strike and returned to work, promising employees additional benefits to discourage their support for the Union, and informing an employee that selecting the Union as a bargaining representative would be futile.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by granting employees increased benefits in order to discourage support for the Union.

5. All full-time truckdrivers employed by the Respondent at its Yoder, Indiana, facility; but excluding all mechanics, office clerical employees, professional employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act.

6. At all times since July 25, 1994, the Union has been the exclusive representative of all employees in the above-described unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, within the meaning of Section 9(a) of the Act.

7. The Respondent violated Section 8(a)(5) and (1) of the Act by refusing on and after July 25, 1994, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the above-described unit.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

9. The Respondent did not engage in the unfair labor practices alleged in the consolidated complaint not specifically found here.

#### THE REMEDY

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

Having found that the Respondent has engaged in substantial and pervasive unfair labor practices which were calculated to destroy the Union's majority status, that traditional remedies for such unfair labor practices are unlikely to eliminate their lingering and coercive effects, and that the chances of holding a fair election are slight, I shall recommend that the Respondent be required to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>20</sup>

#### ORDER

The Respondent, Gerig's Dump Trucking, Inc., Yoder, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

<sup>20</sup> 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.

(a) Threatening employees with business closure or loss of employment because of their support for the Union or any other labor organization.

(b) Telling employees they cannot return to work unless all the employees abandon a strike and return to work.

(c) Promising employees benefits in order to discourage support for the Union.

(d) Telling employees that their support for the Union is futile.

(e) Granting employees increased benefits in order to discourage support for the Union.<sup>21</sup>

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

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

(a) On request, recognize and bargain with the Union as the exclusive representative of the employees in the appropriate unit concerning rates of pay, wages, hours, and other

terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Post at its facility in Yoder, Indiana, copies of the attached notice marked "Appendix."<sup>22</sup> Copies of the notice, on forms provided by the Regional Director for Region 25, 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) 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 consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found.

<sup>21</sup> Nothing in this Order shall be construed as requiring the Respondent to withdraw the employer-paid insurance benefits granted to employees on August 31, 1994, without a request from the Union. See *Elias Mallouk Realty Corp.*, 265 NLRB 1225 fn. 3 (1982); and *Taft Broadcasting Co.*, 264 NLRB 185 fn. 6 (1982).

<sup>22</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."