

Traction Wholesale Center Co., Inc. and Teamsters Union Local No. 115 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. Cases 4-CA-25952, 4-CA-26007, 4-CA-26194, and 4-RC-19107

July 28, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On September 25, 1998, Administrative Law Judge George Aleman issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel filed an answering brief in response to the Respondent's exceptions and cross-exceptions to the judge's decision; and the Respondent filed a reply brief in support of its exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, and to adopt the recommended Order² as modified and set forth in full below.

¹ 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.

To the extent the Respondent has alleged bias on the part of the judge, we find no merit to such an allegation. On our full consideration of the record, we find no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias in his credibility resolutions, analysis, or discussion of the evidence.

In adopting the finding that the Respondent violated Sec. 8(a)(3) by refusing to grant a wage increase to employee Tryon following his first 30-60 days of employment, we rely on the judge's finding that Store Manager Adams promised Tryon such an increase. We do not rely on the judge's discussion of any Respondent policy concerning this type of increase.

In adopting the finding that the Respondent's unfair labor practices at the Philadelphia store were disseminated among employees at the other locations, we do not rely on the judge's supposition that the Respondent's top officers likely engaged in similar conduct at the other stores.

We shall modify the judge's recommended Order and notice to include reference to the 8(a)(1) solicitation of grievances and promise to remedy those grievances, which the judge inadvertently failed to mention in the conclusions of law, the recommended Order, or the notice.

² The Respondent, citing the dissent in *Somerset Welding & Steel*, 304 NLRB 32 (1991), remanded 987 F.2d 777 (D.C. Cir. 1993), argues that an effective alternative to a bargaining order in this case would be for a Respondent representative to read the notice to affected employees prior to the running of a second election. As did the *Somerset Welding* majority, we reject the reasoning in the *Somerset Welding* dissent and find such a remedy is insufficient to cure the gross interference with free choice in the election in this case.

1. Contrary to our dissenting colleague, we agree with the judge that the Respondent's vice president, Cohen, unlawfully solicited and implicitly promised to remedy grievances during his April 23, 1997 remarks to employees. Based on the credited testimony, Cohen told employees during the April 23 meeting that the Respondent could offer more than the Union. He asked employees what the Company had done to cause them to bring in a union, and told them that management was always there to help them if they had any personal or job-related problems. The judge found that, by requesting that employees bring their problems to him or other management staff for possible resolution, Cohen was "clearly attempting to solicit and remedy employee grievances." Further, absent evidence that the Respondent had in the past solicited and resolved employee grievances, the judge found that "Cohen's attempt to do so just one week after Respondent learned of the Union's organizational campaign was clearly coercive and designed to show that the Respondent alone had the wherewithal to address and resolve employee problems."

When an employer undertakes to solicit employee grievances during an organizational campaign, there is a "compelling inference," which the Board can make, that the employer is implicitly promising to correct the grievances and thereby influence employees to vote against union representation. Such conduct violates the Act. *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), enfd. 457 F.2d 503 (6th Cir. 1972). Our dissenting colleague acknowledges this principle, but nonetheless declines to make the "compelling inference" in this case. In his view, Cohen was simply explaining the Respondent's past practice when he stated that "if there ever was a problem, whether it be personal or job-wise, Traction was always there to help, [that] somebody from management or through the Company was always willing to help or lend a hand." The dissent rejects any notion that Cohen was expressing a current, or future, willingness or offer to "help or lend a hand." We reject this strained reading of Cohen's remarks.

As noted by the judge, there is no evidence here of a past practice of soliciting grievances from employees. Absent evidence of a past practice of holding grievance meetings prior to the institution of a union organizing campaign, the Board finds such meetings during the

While the judge addressed the unilateral changes in the cease-and-desist portion of the recommended Order, the General Counsel has excepted to the judge's failure to provide for the rescission of the Respondent's unilateral changes in the lunchtime "punch in and out" policy and the practice of allowing Philadelphia store employees to take company vans home with them after work. We agree with the General Counsel that such rescission is the customary remedy for the violations found in this case, and we will provide for such rescission. Accordingly, we shall modify the affirmative action portion of the recommended Order to require rescission of the unilateral changes in the lunchtime policy and the van policy.

campaign to constitute solicitation of grievances *and* an implied promise to remedy those grievances. See *New Life Bakery*, 301 NLRB 421, 427 (1991), *enfd. mem.* 980 F.2d 738 (9th Cir. 1992).

Moreover, in our view, Cohen was not merely relating a *former* willingness to help out. Were it solely a matter of describing a past practice, without the suggestion that it was *now* willing to “lend a hand or help,” there would have been no reason for Cohen to mention it. In emphasizing the Respondent’s willingness to help, Cohen was plainly sending the message that a union was not necessary because the Respondent was now (and would continue to be) willing “to lend a hand or help” with any problems employees might have.

Accordingly, and absent evidence of a past practice here of soliciting grievances, we are not persuaded that Cohen’s phraseology referred simply to the past, and we find the violation as alleged.

2. In recommending a *Gissel*³ bargaining order in this case, the judge found that the union had obtained majority status on the basis of 11 signed authorization cards. Our dissenting colleague challenges the authenticity of the authorization card of one employee, James P. Michener. He argues that the holding of the Fourth Circuit Court of Appeals in *Be-Lo Stores, Inc. v. NLRB*, 126 F.3d 268, 279–280 (1997), is “dispositive” and “requires reversal of the judge’s finding that Michener’s card was authenticated.” We disagree. Our colleague’s position is contrary to longstanding precedent.

A Board judge, as the trier of fact, may authenticate an authorization card by comparing the card signature with an authenticated specimen. See *Action Auto Stores*, 298 NLRB 875, 879 (1990), *enfd. mem.* 951 F.2d 349 (6th Cir. 1991); *Ken’s IGA*, 259 NLRB 305 fn. 2 (1981), modified on other grounds 697 F.2d 798 (7th Cir. 1983).

For many years, the Board has treated employee-signed documents subpoenaed from a respondent’s personnel files as being genuine specimens for purposes of comparison with authorization card signatures. See *Aero Corp.*, 149 NLRB 1283, 1287 (1964), *enfd.* 363 F.2d 702 (D.C. Cir. 1966); *Heck’s Inc.*, 166 NLRB 186 fn. 1 (1967), *enfd. sub nom. NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In *Aero*, the Board upheld the authentication of 12 cards by a handwriting expert who testified that the signatures on the cards matched signatures on papers subpoenaed from the respondent’s personnel files. The respondent in that case refused to stipulate to the authenticity of the handwriting samples in its files and argued that, since the General Counsel did not otherwise establish the genuineness of the standard writings on which the expert based his opinion, the cards were not properly authenticated. The Board rejected the argument, holding that “[b]oth the source of the handwriting specimens and the nature of the documents involved are

strong evidence of the genuineness of the handwriting thereon.” *Id.* at 1287. The handwriting samples included a W-4 form as to which the Board stated, “[t]he employee himself is required by statute to sign this certificate. The Respondent has relied on the authenticity of the signatures on these forms in withholding Federal income tax from employees’ salaries. If Respondent wished to attack the genuineness of the signatures on these forms, it could have come forward with some evidence indicating that they are not genuine. Respondent has not done this.” *Id.* The respondent had also supplied, pursuant to subpoena, one of its own job application forms, an application for testing and certification, and an employee resignation form. The Board concluded that since “[a]ll of these came from Respondent’s own personnel files and are documents on which Respondent has relied in the course of its business[,] [t]he Trial Examiner correctly inferred from both the source and character of the documents that the handwriting samples were genuine, and properly relied upon these cards as evidence of the Union’s majority status.” *Id.* at 1287–1288.

This case presents the same basic facts as *Aero*. The judge compared Michener’s authorization card signature to signatures found on Michener’s employment application and work rules forms. These personnel records were kept and relied on by the Respondent in the ordinary course of business and produced by the Respondent pursuant to subpoena. The judge found that both sets of signatures were Michener’s.

While the Respondent admits its employment relationship with Michener and acknowledges the authenticity of the subpoenaed documents, it nonetheless seeks to disavow the signatures on the employment application and work rules forms. The judge properly rejected the Respondent’s purported lack of knowledge about the authenticity of the signatures on these business records which it maintains and relies on in connection with its employment relationship with Michener. We therefore adopt the judge’s findings regarding the signatures on those three company records and find them to be genuine specimens.

Also produced pursuant to subpoena was Michener’s W-4 tax withholding exemption form. The Respondent offered the W-4 into evidence, claiming that the signature differs from the authorization card signature. In finding that the authorization card signature was genuine, the judge did not compare it with the W-4 signature. We have compared the W-4 signature with the others in evidence and reject the Respondent’s claim that the W-4 detracts from the authenticity of the authorization card.⁴

We also reject the Respondent’s challenge to the authenticity of the W-4 signature which the Respondent

³ *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

⁴ We find that all five signatures in the record are Michener’s. All five are quite similar, with a varying degree of distinctness of the individual letters in the surname. The W-4 signature simply has the least distinct individual letters in the surname.

was *required* by Federal law to obtain from Michener upon his employment. Remarkably, the Respondent acknowledges that the W-4 form is authentic but, to quote the dissenting circuit judge in *Be-Lo Stores*, with “unfathomable logic” (126 F.3d 305 (dissent)) declares that the signature on that form was not. “What was being stipulated to be authentic if not the signed W-4 [form] which came from the *company’s* files?” *Id.* The signed W-4 was kept, in the ordinary course of business, in Michener’s personnel file along with his employment application and signed work rules form. The Respondent has obviously relied on the authenticity of the signature on the W-4 to withhold Federal income tax from Michener’s salary, and demonstrates its belief in the genuineness of the signature by making the withholdings in accordance with the document. As we stated in *Aero*, 149 NLRB at 1287 (footnote omitted), “[I]f Respondent wished to attack the genuineness of the [signature] on [the W-4 form], it could have come forward with some evidence indicating that [the signature is] not genuine. Respondent has not done this.” Accordingly, we find that the W-4 was a genuine specimen for purposes of comparison with the authorization card signature.

Citing *Be-Lo Stores*, our dissenting colleague argues that Michener’s card was not properly authenticated because the signature on the comparison documents subpoenaed from the Respondent were not properly authenticated. We do not agree that *Be-Lo Stores* is “dispositive of the issue presented here.” Significantly, the finding in *Be-Lo*, *supra*, on which the dissent relies was not critical to the result in that case and may be characterized as dictum because the court found that the General Counsel had not established majority status for several other independent reasons. To the extent the *Be-Lo* court’s opinion is contrary to the finding we make in this case, we respectfully disagree with the court. Our finding is consistent with longstanding Board practice and court precedent. See, e.g., *Local 707 Motor Freight Drivers*, 196 NLRB 613, 625 (1972), as well as cases cited above.

We conclude that the judge properly compared the signature on Michener’s authorization card to the exemplars contained in the Respondent’s personnel records. Because the judge found the signatures were made by the same individual, employee Michener, we agree that Michener’s card should be counted. This conclusion is reinforced by our independent comparison of the signature on Michener’s W-4 form with the other signatures in evidence. Accordingly, we adopt the judge’s findings and conclusions regarding the Union’s majority status, as well as the appropriateness of a bargaining order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set in forth in full below and orders that the

Respondent, Traction Wholesale Center Co., Inc., Trenton, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with Teamsters Union Local No. 115 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America AFL–CIO, which is the exclusive bargaining representative of its employees in the following appropriate unit:

All drivers, warehouse employees and assistant managers employed at Respondent’s Hainesport, New Jersey, Trenton, New Jersey, Philadelphia, Pennsylvania, and Wilmington, Delaware facilities, excluding all other employees, store managers, guards, and supervisors as defined in the Act.

(b) Unilaterally making changes in employee terms and conditions without first notifying and bargaining with the Union over any such changes.

(c) Discharging, or otherwise discriminating, against Charles Schiavone for his activities on behalf of the Union, and withholding a wage increase from Kevin Tryon in order to discourage support for the Union.

(d) Interrogating employees about their union activities and that of other employees, accusing them of disloyalty because they support the Union, threatening employees with job loss by stating it would close its facilities or subcontract out bargaining unit work if the Union were brought in, soliciting grievances from employees and promising to remedy those grievances and telling employees they would not receive uniforms or similarly related work clothes and promising to provide them with greater unspecified benefits in order to dissuade them from supporting the Union.

(e) In any like or related manner 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) Recognize and, on request, bargain with the Union as the exclusive bargaining representative of employees in the above-described appropriate unit and, if an understanding is reached, embody such understanding in a signed written agreement.

(b) To the extent it has not already done so, rescind its unilateral change in its lunchtime “punch in and punch out” policy.

(c) Rescind its unilateral discontinuance of its practice of allowing Philadelphia store employees to take company vans home with them after work.

(d) Within 14 days of the Order, offer Charles Schiavone immediate and full reinstatement to his former job or, if the position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed by him,

and grant Kevin Tryon the wage increase promised to him.

(e) Make Charles Schiavone and Kevin Tryon whole for any loss of earnings or other benefits suffered as a result of the discrimination practiced against them in the manner described in the remedy section of the decision.

(f) Within 14 days of the Order, remove from its files any and all reference to Charles Schiavone's unlawful discharge, and within 3 days thereafter, notify him in writing that it has done and that the discharge will not be used against him in any way.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back-pay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facilities in Trenton and Hainesport, New Jersey; Philadelphia, Pennsylvania; and Wilmington, Delaware, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 4, 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any or all of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 15, 1997.

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

3. The representation election conducted on June 13, 1997, in Case 4-RC-19107 is set aside and the petition is dismissed.

MEMBER BRAME, dissenting.

Because I dissented from the judge's finding that the Respondent violated Section 8(a)(1) by allegedly soliciting grievances from employees and promising to remedy

⁵ 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."

them, I therefore dissent from the modification of the Board's Decision and Order to include that violation.

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 refuse to recognize and bargain with Teamsters Union Local No. 115 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, which is the exclusive bargaining representative of our employees in the following appropriate unit:

All drivers, warehouse employees and assistant managers employed at our Hainesport, New Jersey, Trenton, New Jersey, Philadelphia, Pennsylvania, and Wilmington, Delaware facilities, excluding all other employees, store managers, guards, and supervisors as defined in the Act.

WE WILL NOT make changes in our employees' terms and conditions of employment without first notifying and affording the Union an opportunity to bargain over any such changes.

WE WILL NOT discharge Charles Schiavone or any other unit employee for engaging in union activities, and WE WILL NOT deny a wage increase to Kevin Tryon or any other employee in order to discourage their support for the Union.

WE WILL NOT interrogate our employees regarding their union activities or that of other employees, accuse them of disloyalty for supporting the Union, threaten them with a loss of jobs by telling them we will close the stores or subcontract out unit work if they bring in the Union, solicit grievances from them and promise to remedy those grievances, or promise them increased unspecified benefits in order to dissuade them from supporting the Union.

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 recognize and, on request, bargain with Teamsters Union Local No. 115 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, and shall embody any understanding reached regarding our employees' terms and conditions of employment in a signed written agreement.

WE WILL, to the extent we have not already done so, rescind our unilateral change in our lunchtime "punch in and punch out" policy.

WE WILL rescind our unilateral discontinuance of our practice of allowing Philadelphia store employees to take company vans home with them after work.

WE WILL, within 14 days from the date of the Order, offer Charles Schiavone immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL, within the above period of time, grant Kevin Tryon the wage increase that was unlawfully denied to him.

WE WILL make Charles Schiavone and Kevin Tryon whole for any loss of pay or benefits they may have suffered as a result of the discrimination practiced against them, with interest.

WE WILL, within 14 days from the date of the Order, remove from our files any reference to Schiavone's unlawful discharge, and within 3 days thereafter, notify him in writing that we have done so and that the discharge will not be used against him in any way.

TRACTION WHOLESALE CENTER CO., INC.

Margarita Navarro-Rivera, Esq., for the General Counsel.

Terrence Nolan Esq. (Collier, Jacob & Mills), for the Respondent.

Norton H. Brainard, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMÁN, Administrative Law Judge. A hearing in this matter was held before me in Philadelphia, Pennsylvania, on November 3-5, 1997,¹ following charges filed by Teamsters Union Local No. 115 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the Union), and issuance of a consolidated complaint by the Regional Director for Region 4 of the National Labor Relations Board (the Board) alleging that Traction Wholesale Center, Inc. (the Respondent) had violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).² The Respondent filed an answer on October 7, in which

¹ All dates are in 1997, unless otherwise indicated. Exhibits received in evidence are identified as follows: "GCX" represents a General Counsel exhibit, "RX" a Respondent exhibit, "CPX" a Charging Party exhibit. Reference to record testimony is identified as "TR" followed by the page number(s).

² The charge in Case 4-CA-25952 was filed April 15, and amended June 25; the charge in Case 4-CA-26007 was filed April 28, and amended May 7 and June 9 the third charge in Case 4-CA-26194 was

it admitted some, and denied other, allegations in the consolidated complaint, and specifically denied having committed any unfair labor practices.

All parties at the hearing were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce relevant evidence, and to argue orally on the record.

On the entire record in this proceeding, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is engaged in the wholesale distribution of tires and wheels from four facilities or stores located in Trenton, New Jersey (the Ewing store), its largest facility and which houses its corporate offices; Hainesport, New Jersey, Wilmington, Delaware, and Philadelphia, Pennsylvania. During the 12-month period preceding the issuance of the complaint, a representative period, the Respondent purchased and received goods valued in excess of \$50,000 directly from points and places located outside the Commonwealth of Pennsylvania. The complaint alleges, the Respondent admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It is further admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Allegations*

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating employees regarding their union sympathies or activities, threatening them with job loss and closure of its stores if they selected the Union to represent them, telling employees they could not receive certain benefits because of the Union and promising to provide them with greater benefits in order to dissuade them from supporting the Union, and accusing employees of disloyalty because of their activities on behalf of the Union. It further alleges that the Respondent violated Section 8(a)(3) and (1) by discharging employee Charles (Chuck) Schiavone for his union activities, withholding a wage increase from employee Kevin Tryon, retaliating against employees for engaging in union activities by discontinuing a practice of allowing employees to take company vehicles home with them and imposing a requirement that employees punch in and out during their lunch-break. Finally, the complaint alleges Respondent violated Section 8(a)(5) by refusing to bargain with the Union at a time when the union represented a majority of its employees, and by failing and refusing to bargain with the Union over the above changes.

B. *Factual Background*

The Respondent is owned and operated by Joseph O'Donnell, its president and CEO, and by Jeffrey Cohen, its vice-president and general manager. Each of its stores has a store manager. At all relevant times, Scott Adams, an admitted supervisor within the meaning of Section 2(11) of the Act,

filed June 23. On September 24, the Regional Director consolidated the above cases for hearing.

served as manager of the Philadelphia store.³ As of March 1, Respondent's complement of employees totaled approximately 36 employees that included drivers, warehouse employees, sales personnel, and nonsupervisory assistant store managers.

1. Schiavone's tire purchase

Schiavone was employed by Respondent for a period of 7 years before being fired from his warehouse job at the Philadelphia store on April 15. An incident occurred on April 9, which the Respondent claims was a factor in his termination. That day, Schiavone purchased four tires from Respondent, which employees were permitted to do at a discounted rate. In preparing the invoice, Schiavone, either through inadvertence, as he claims, or intentionally, as suggested by Respondent, used a customer's (Mike's Texaco) account to make the purchase, rather than using the Company's "miscellaneous" account intended for such in-house purchases (RX-3). Schiavone consequently received a greater discount (totaling \$6.59) usually reserved for customers only, instead of the lower employee discount. Schiavone does not dispute the incident, and agrees that Adams spoke to him about it the next day by asking him why he had purchased the tires under the Mike's Texaco name. He further admits that Adams told him that use of a customer's account for such purchases was not appropriate (Tr. 182; 187). However, Schiavone claims he was unaware that he had entered the purchase on a Mike's Texaco invoice until Adams brought it to his attention, and denies that he was ever asked by Adams or anyone else to return the \$6.59 discount he erroneously received.⁴

Not surprisingly, Adams had a different version of what occurred. He testified that during his review of the previous day's invoices early on April 10, he did not see an invoice reflecting Schiavone's purchase, and when he questioned Schiavone, the latter stated that the purchase was made under a Mike's Texaco invoice. On reviewing the invoice, Adams noticed the discount and when he brought it to Schiavone's attention, Schiavone simply exclaimed, "I didn't think you would notice" (Tr. 216). Adams claims he told Schiavone, "Chuck, I want the \$6.59. You know it's like stealing," and recalls that Schiavone simply "shook it off" and walked away (Tr. 284). The following day, according to Adams, he reported the incident to O'Donnell.

2. The Union's organizational campaign and demand for recognition

Approximately 1 month before being discharged, Schiavone became actively involved in trying to organize Respondent's employees. Schiavone testified, without contradiction, that in early March he was approached by several employees seeking guidance on how to form a union. Having acquired knowledge of the Union from his sister, Schiavone indicated he might be able to help them out but that they should first mull it over for a week. The employees returned to him 3 days later and reaf-

firmed their interest in organizing themselves. On March 24, Schiavone visited the Union's offices and spoke with Union Organizers Casey O'Bannon and Ernie Harris. After some discussion, Schiavone signed a union authorization card designating the Union "as my chosen representative in all matters pertaining to wages, hours, and working conditions" (GCX-3[a]). He also took blank authorization cards with him to distribute to other employees.

Schiavone testified to soliciting signed authorization cards from Hainesport employee Doris Nelson, and Trenton employees James Grey and Joseph Bullaro (Tr. 73). Bullaro testified at the hearing, but Nelson and Grey did not. Bullaro admits receiving an authorization card from Schiavone, and authenticated the card received in evidence as GCX-3(j) as the card he signed. While he claimed at the hearing not to have read the card before signing it, when shown a sworn affidavit he gave to the Board in which he admitted having read the card, Bullaro altered his testimony by stating, "I guess I probably read it; I don't know." (Tr. 75.)

As to the Nelson card, Schiavone claims he got Nelson to sign a card during a visit by the latter to the Philadelphia store on April 7, that she filled it out in his presence and returned it to him, commenting, "Yes, its about time." Nelson, according to Schiavone, asked him for additional cards so (Tr. 144). Regarding Grey's card, Schiavone testified he personally handed it to Grey and watched him fill it out and sign it in front of company truck parked outside the Philadelphia store (Tr. 145). The Nelson and Grey cards were admitted into evidence as GCX-3(i) and 3(k), respectively.

Philadelphia store employee David Kniese signed a card on March 25 (GCX-3[b]), and also actively engaged in soliciting cards from employees.⁵ He testified to having solicited signed cards from Philadelphia store employees John Dickson and Kevin Tryon, and from Trenton store employees James Michener, Rich Salamak, and Tom Klein (Tr. 89-90; 99). Dickson, Tryon, and Salamak all confirmed Kniese' claim that he solicited cards from them, and identified the cards received in evidence as GCX-3(c), (e), and (f) as their own. Michener and Klein did not testify. An 11th card was signed by Trenton employee Anthony Hess, although he could not recall who gave it to him (GCX-3[h]; Tr. 50-51).

From March 24 to April 14, Schiavone stayed in contact with the Union and kept it abreast of how the organizing campaign was proceeding. By April 14, the Union had received signed cards from 11 of the 20 employees it was seeking to represent. Armed with the cards and carrying a letter requesting recognition, O'Bannon and Harris on April 15 visited the Philadelphia store to declare its majority status and request recognition. On arriving, they entered an office and Harris asked to speak with the manager, but was told Adams was not immediately available. Adams did appear a short while later and identified himself as the store manager, at which point, according to Harris, he handed Adams the recognition letter and the authorization cards and asked Adams if the employees whose names were shown on the cards were his employees. Harris claims that Adams looked at the cards, acknowledged that some of the employees did work for him, but was not sure about others

³ The other store managers are Gary Blum at Trenton, Tom Schier at Wilmington, and Charlie Mothershead at Hainesport.

⁴ Employee purchases are usually made using a "miscellaneous account." According to Schiavone, when he was on the computer recording his purchase, he was speaking on the phone to someone named "Mike" and apparently punched in "Mike" by mistake on the computer, thereby bringing up the "Mike's Texaco" account on the screen. He recalls that at around that time, Adams reminded him to print out the invoice for the tires he was purchasing so that they would be deleted from the inventory stock, and believes this is how the purchase showed up, with the added discount, on a "Mike's Texaco" invoice (Tr. 181-182).

⁵ Kniese, who voluntarily left Respondent's employ sometime in May, did not recall if Schiavone gave him a card to sign or whether he got it directly from the Union.

because he was not familiar with all employees at the other stores.

O'Bannon essentially corroborated Harris' account of the meeting. He testified that when Adams showed up Harris did most of the talking, that they asked him if he was company president, Joe O'Donnell, and that Adams responded he was only the store manager. They then identified themselves as being from the Union, stated they represented a majority of Respondent's employees, and requested that Respondent grant the Union recognition and enter into prompt negotiations. Adams responded that he lacked the authority to do so, at which point they handed Adams the recognition letter and asked him to deliver it to O'Donnell. After Adams agreed to do so, they handed him the authorization cards and asked if the employees shown thereon were his employees. Adams, according to O'Bannon, looked over the cards one by one, and acknowledged that some were employees of his, while others were not, but that the latter may be employed at Respondent's other facilities. O'Bannon claims he and Harris then retrieved the cards and left.

Adams recalled the April 15 visit by the union organizers, and provided only a slightly different version of that meeting. He testified that as he entered the office O'Bannon and Harris were waiting to speak with him. When he asked how he could help them, O'Bannon and Harris identified themselves as being from the Union, threw the authorization cards in front of him, and asked if he recognized any of the names on the cards as his employees. Adams admits he looked at the cards, but for no more than 10 seconds, and, on direct examination, further admitted to seeing Schiavone's and Kniese's names, along with the names of some of the Trenton store employees. He also saw names he did not recognize, explaining he was not familiar with employees at the other stores (Tr. 266-267). On cross-examination, however, Adams changed his testimony to deny ever seeing Schiavone's card (Tr. 307). Although he claims he never read the wording on the cards, Adams believed them to be union cards (Tr. 268). Adams recalled O'Bannon and Harris stating that the Union represented Respondent's employees and requesting recognition, and claims he simply advised them they were asking the wrong person and should be addressing their request to O'Donnell at the Trenton corporate office.

3. Schiavone's discharge

a. *The alleged misconduct*

It is undisputed that Schiavone was discharged soon after Adams' meeting with O'Bannon and Harris. Adams, however, claims that while implemented on April 15, the decision to terminate Schiavone was made on April 11, during a phone consultation with O'Donnell. As to the reasons for the discharge, Adams testified that for about a month prior to terminating him, he had noticed a change in Schiavone's attitude, as if he no longer wanted to work for Respondent, a change he claims manifested itself in three separate incidents of misconduct that Adams avers was the catalyst for the discharge decision.

The most significant of the three incidents, according to Respondent, was Schiavone's previously discussed use of the Mike's Texaco account to purchase his tires, and his unauthorized receipt of the additional discount. Another incident cited by Respondent involved Schiavone's purported failure to call in on April 8 to report he would not be in. The record reflects that Schiavone called in on April 7 to say he would be late, but did

not report for work the next day, April 8. There is disagreement between Adams and Schiavone on this issue, with Adams claiming Schiavone never called in, and Schiavone asserting he did call in late April 8, and indeed spoke with Adams about a set of tires he was purchasing from Respondent. Adams, according to Schiavone, gave his approval and simply asked him how things were going (Tr. 502). Schiavone claims he went to the Philadelphia store later that day and picked up the tires, and that the invoice was prepared the next day. Adams testified that Schiavone picked up the tires on April 9.

The third asserted incident involved some writing that Schiavone admits having placed on two separate locations in the Philadelphia warehouse. In one location, Schiavone wrote "CHUCK" in large letters with pink chalk on a wall separating two sections of the warehouse (RX-4). The second writing contained the words "CHUCK'S COOL" and was placed by Schiavone at the top landing of some stairs leading to an upper section of the warehouse (RX-9). Schiavone testified that he made the markings about a month before his discharge, and believes that within a day or so after he put it up the "CHUCK" writing, Adams asked him to remove it (Tr. 504). No such request was made about the "CHUCK'S COOL" writing. Schiavone stated that except for that one time Adams has never discussed the writing with him or asked him to remove it (Tr. 496).

Adams testified that he first noticed the "CHUCK" writing on April 10, and became very upset because "there's no writing in the whole warehouse on the walls or anything like that." He claims he instructed Schiavone to remove it not only because Adams did not like it, but also because Cohen was a stickler for cleanliness and would "go nuts" or "ballistic" if he were to see the writing during one of his visits to the store. Adams admits telling Schiavone the writing was not a big deal, but that he should nevertheless remove it. He claims, however, that Schiavone simply walked away without saying anything. When he checked back later that day, Adams found that the writing had not been removed (Tr. 223-224). As to the "CHUCK'S COOL" writing, Adams claims he discovered it between 11:30 a.m.-12:30 p.m. on April 15, not long before Schiavone was terminated (Tr. 259).

Adams, as noted, claims he and O'Donnell agreed to discharge Schiavone on April 11. Thus, according to Adams, O'Donnell called him that day to ask if employees were taking Company vans home at night and, on learning employees were doing so, instructed Adams to end the practice immediately. Adams claims that during the conversation, he told O'Donnell that Schiavone's work performance had declined, informed him of Schiavone's invoicing incident, the writing found on the wall, and his alleged failure to call in on April 8, and stated he intended to fire Schiavone the following Monday, April 14, for these three incidents.⁶

O'Donnell also testified to having had a phone conversation with Adams on April 11, asserting it was prompted by a parking ticket he received in the mail issued by the State of New York to a company vehicle normally driven by Schiavone. On April 11, he presumably called Adams to ascertain if employees at the Philadelphia store were being allowed personal use of company vehicles, a practice he claims had been prohibited by Company policy for at least 8 years. When Adams admitted

⁶ Adams claims that he put off firing Schiavone until April 15, because he was short-staffed on Monday, April 14.

that employees were indeed being permitted to take company vans home to protect them from being vandalized, O'Donnell purportedly informed him the practice was against company policy, that the Company's insurance policy did not cover the personal use of the vehicles, and that Adams should immediately end the practice. O'Donnell claims he was unaware that the policy prohibiting personal use of company vehicles was not being followed at the Philadelphia location.

O'Donnell further claims that Adams then brought up the subject of Schiavone's work performance, mentioning that Schiavone's "attitude had gone sour, had really turned bad," and that from one day to the next Schiavone had gone from a good employee to a bad one. He testified that Adams also told him of the invoicing incident, and of the "CHUCK" writing found on the wall. O'Donnell, however, made no mention of being told by Adams of Schiavone's alleged failure to call in on April 8. According to O'Donnell, Adams went on to state that he had decided to fire Schiavone the following Monday, April 14. However, O'Donnell claims he had already decided to fire Schiavone before Adams told him of the termination decision, explaining that he did so because "thievery" is something he does not tolerate. Asked to state precisely why he had decided to discharge Schiavone, O'Donnell cited the two incidents described to him by Adams, but added, somewhat ambiguously, that the parking ticket also factored into the decision. While he admitted not knowing for sure if Schiavone was responsible for the parking ticket, O'Donnell nevertheless suspected that Schiavone was the culpable driver (Tr. 404-405; 475).⁷

b. The discharge conversation

Schiavone's discharge, as noted, was carried out within minutes of the union organizers' visit to the Philadelphia store. It would appear from Adams' own testimony that Adams did not initially provide Schiavone with a reason for the discharge, and that, according to Adams' version of the conversation, he did so only after Schiavone requested an explanation.⁸ Thus, in response to Schiavone's alleged inquiry, Adams purportedly replied, "I think you know why. It's all over the place. It's in your pocket. You fired yourself" (Tr. 259). Adams claims he went on to explain to Schiavone what he meant by his above remarks, telling him that the "it's all over the place" statement referred to the writing Schiavone had placed on a wall and in the roof area of the Philadelphia facility, while the "it's in your pocket" comment was a reference to Schiavone's use of a customer's account to obtain an unauthorized discount. Adams further testified to having told Schiavone that the discharge was also based, in part, on his alleged failure to notify Respondent that he would not be in to work on April 8. This initial conversation, according to Adams, lasted some 3 minutes. Adams,

however, claims that Schiavone again asked why he was being fired, and that he again repeated the above reasons to him. He then allowed Schiavone to make a phone call, after which Schiavone purportedly mentioned that he had just called the union hall. Adams claims it was at this point that he first learned of Schiavone's involvement with the Union. After some further conversation between the two, which Adams claims lasted some 10-15 minutes, he instructed Schiavone to leave the premises (Tr. 259-260).

Schiavone told a much different story. Thus, he testified that on April 15, while at work in the warehouse, he observed Adams in the office talking to the union organizers, and that within 2 minutes of their departure, Adams yelled at him to stop what he was doing, leave his keys, and go home. Instead of leaving, Schiavone went to the office to ask Adams for an explanation, at which point Adams explained that two union representatives had just visited him and claimed to represent Traction's employees, that the representatives had shown him some signed authorization cards signed by employees, and that one such card contained Schiavone's signature. When Schiavone asked what other employee names he might have seen on the cards, Adams responded, "Oh, I saw more than the majority," stating that the union organizers "pretty much opened up the file [containing the cards] right in front of him to show him that there was more than enough to make the place go union." Adams then asked Schiavone who had given him the card, and if he knew who had started "this whole thing." When he feigned ignorance, Adams remarked to Schiavone, "You've always had a union mentality" (Tr. 155). Adams denied having made any mention during his conversation with Schiavone of his meeting with the union organizers or of seeing the authorization cards (Tr. 345).

Adams, according to Schiavone, further stated that he was upset to learn of Schiavone's involvement with the Union since he believed they had become friends, and felt hurt that Schiavone did not notify him in advance. Schiavone explained that he would not have felt comfortable informing Adams of employee efforts to organize themselves. Adams then stated that he had no real objections to a union as he had worked with unionized companies before, and there were some benefits in having a union. However, he went on to say, "Well, we'll just close the Company, or hire outside contractors to make the deliveries, will change the Company's name, and will do whatever it takes to keep the Union from getting in here" (Tr. 150-151). Adams further stated that he believed he was doing the right thing by sending Schiavone home, and that if Schiavone "wanted to be a union thug like other union supporters who destroy people's property," then he should go right ahead.

Schiavone claims the conversation lasted some 45 minutes and ended with Adams telling him to call somebody and "get the fuck out of here" (Tr. 149-153). He recalls that during the conversation, employee Mark Quattrone, and Cohen's mother, a volunteer worker, were in the office. Schiavone claims he made two calls, one to his brother-in-law, and then his mother, in an effort to get a ride home, and that while doing so, he observed Adams on another extension presumably listening in on his conversation.

On leaving the Philadelphia store, Schiavone was uncertain if Adams had actually fired him by sending him home. Schiavone claims that a short while later, he phoned O'Bannon and reported what had happened. O'Bannon assured him he would file an unfair labor practice charge with the Board over the

⁷ O'Donnell's testimony on the role played by the parking ticket in the discharge was vague and ambiguous. Thus, in describing what led up to the discharge, O'Donnell initially stated, "the parking ticket and all these things," meaning the improper invoicing, the graffiti, and his generally poor attitude. (Tr. 404.) However, when I sought to clarify if the parking ticket was one of the reasons for Schiavone's discharge, O'Donnell stated, somewhat ambiguously, "The parking ticket was questionable. I couldn't prove it. But, you know, it put doubt in my mind. And then the graffiti and all these other things that added to it, it just seemed like that his attitude had changed, that he was—he had another job." (Tr. 405.)

⁸ Thus, when Respondent's counsel asked Adams "What did you say to Mr. Schiavone when you discharged him," Adams responded, "He asked me why." (Tr. 259.)

the discharge, but suggested that Schiavone call Adams the next day to ascertain if his job was still available. That same day, O'Bannon and Harris filed a charge with the Board alleging Schiavone's discharge to be unlawful, as well as a petition seeking to represent certain of Respondent's employees at all four stores (GCX-1[a], 1[b]).⁹ Schiavone claims he called Adams the next day, April 16, at around 7 a.m., to as if he still had a job, and that Adams told him, "You're fired. No, your job is not available, you're fired" (Tr. 158).

4. Tryon's alleged conversation with Adams

Tryon testified that soon after the union organizers left the Philadelphia store on April 15, Adams asked him if he had signed a union card. While Tryon denied having done so, Adams nevertheless stated he had seen Tryon's name on a card and knew he had signed one (Tr. 100-101). Nothing else was said and Tryon went to lunch at that point. Later that day, however, on returning to the store following some deliveries, employee Dickson mentioned to him that Schiavone had been fired earlier that day, and a short while later Adams said he wanted to speak to both of them on why they wanted to bring in a union.

Tryon recalls that Adams told him and Dickson that "if you guys are going to start being like a union, then we're going to start acting like a union now," and that employees would now have "to start punching in and out for lunch" and would no longer be allowed to take company vans home at night. Adams further stated that he had been in contact with O'Donnell and Cohen and that the latter discussed "bringing in a delivery service" if the employees "were to go with the Union." Tryon claims that Adams went on to say that he would "rather pay niggers \$5.00 an hour" than have to work with a union, and further commented, "we're not afraid to close down, if that's what it takes, we'll close down." Adams, however, also mentioned that Respondent was "going to look into getting a uniform service company to come in and get everybody uniforms," and that O'Donnell and Cohen "were willing to take care of us at any expense."

Tryon claims that starting that day, he and other employees were required to punch in and out for lunch, but that after a week Adams informed them they no longer had to do so (Tr. 103-106). The record reflects that Respondent had permitted the practice at the Philadelphia store of allowing employees to take Company vehicles home after work, but that as of April 15, they were told they could no longer do so.

Dickson was unable to recall the conversation Tryon claims they had with Adams on April 15, but did recall Adams stating employees would have to start punching in and out during lunch, and that the practice was stopped about a week or two later. He further testified that Adams called him at home one day after work and asked, "What's going on? What is this Union thing?" Dickson purportedly told Adams that employees "wanted the Union to make things better for ourselves." Adams at that point responded, "all right," and then instructed Dickson to bring in the company van. Dickson did as in-

structed and has not, since then, been permitted to take a company van home (Tr. 79-81).

Adams did not specifically refute either Schiavone's or Tryon's above testimony. Rather, on direct examination, Adams was simply asked if he had had any conversations with employees regarding the union campaign. His response was somewhat vague and ambiguous. Thus, he answered, "Myself, No. You know, I may have asked why or something like that. It was like a shock to me but it might have been on that day of the 15th, you know, nothing specific, nothing" (Tr. 264-265). On cross-examination, however, he admitted asking employees why they had gone to the Union, and while unable to recall who he might have spoken to, admits Tryon might have been one of those individuals. Adams explained that he did so because he felt betrayed by their actions, admitting at one point that he became "particularly angry" on seeing that his employees at the Philadelphia store had signed authorization cards (Tr. 306-308; 346.)

Adams also admitted that on April 16, he began requiring employees to clock in and out during lunchbreaks. He explained that he did so because since early April, one employee, Kniese, had been abusing his lunchbreak by occasionally over-extending his one-half hour lunchbreak by some 5 to 8 minutes, and that he discontinued the practice after Kniese quit his employment (Tr. 263-264, 305). Regarding the company vans, Adams testified the practice at the Philadelphia store was to allow employees to take the vans home overnight to protect against vandalism and theft, and was not sure what the practice was at the other stores, but that after being told by O'Donnell on April 11, to end the practice, he proceeded to inform employees on April 15, that the practice was being discontinued. Adams, however, further testified that the practice was, in fact, not discontinued (Tr. 314). Adams claims O'Donnell twice told him to end the practice, first on April 11, and again on April 15, and that while he attempted to convince O'Donnell the vans would be better protected by having employees take them home, O'Donnell insisted the practice had to end because it was prohibited by the insurance policy (Tr. 325).¹⁰

Schiavone testified, without contradiction, that following his discharge he told other employees, including Tryon, Dickson, Nelson, Bullaro, Grey, and Hess, what had happened (Tr. 159). He specifically recalls his conversation with Nelson occurred 3 days later and lasted some 15 minutes. During that conversation, Schiavone generally told her about his meeting with Adams, including the latter's threats to close the facility and to hire contractors to do the work in order to prevent the Company from going union, and urged her and other employees to remain strong and not fear for their jobs because of what happened to him. He told Nelson it was unlawful to fire employees for their union activities, and that he would appreciate it "if they were to hold strong and still try and see this thing through." Schiavone recalled that the employees main concern was losing their jobs. (Tr. 160-162.) The conversations he had with the others basically tracked the one he had with Nelson.

⁹ The employees sought to be represented by the Union included

All drivers, warehouse employees and Assistant Managers employed at Respondent's Hainesport, New Jersey, Trenton, New Jersey, Philadelphia, Pennsylvania, and Wilmington, Delaware facilities, but excluding all other employees, store Managers, guards, and supervisors as defined in the Act.

¹⁰ Adams initially claimed on cross-examination that O'Donnell had sent him a copy of letter from the insurance company on the issue of the personal use of vans. However, on further examination by the General Counsel, Adams changed his answer by stating he could not recall if O'Donnell ever sent him such a letter (Tr. 326-328).

5. The employee meetings at the Philadelphia store

The record reflects that O'Donnell and Cohen met with Philadelphia store employees on two separate occasions to discuss the Union's campaign. O'Donnell claims that before speaking to employees, he consulted with his attorney and a labor consultant on what to say, and was advised not to make any promises or threats to employees. He purportedly received an outline containing talking points on what to tell employees and avers he followed that script during the two meetings, and during similar meetings held at the other stores.¹¹

The first meeting took place on or about April 23, and was attended by employees Tryon, Dickson, Quattrone, and Bill Murray. O'Donnell testified he simply told employees at the meeting what their rights were under the Board's Rules, that Respondent intended to protect those rights, and explained what Respondent could legally do and not do. He does recall telling employees that because of "what was happening," referring to the union campaign, Respondent could make no changes in employee working conditions, no matter how small and, consequently, could not distribute to them some embroidered staff T-shirts Respondent had purchased for them before the Union had come on the scene because it might be construed as a bribe. The shirts, O'Donnell testified, were bought as part of Respondent's practice of periodically purchasing items for employees, such as sweat shirts, caps, and jackets (Tr. 412-413). O'Donnell claims that both he and Cohen were quite careful on what they said to employees, and that neither he nor Cohen interrogated employees about their card-signing activities, made any promise of benefit or threats to employees, or promised they would be taken care of if the Company wins the election (Tr. 411).

Regarding the second meeting, O'Donnell testified it occurred 1 week later, in April, and that the purpose of the meeting was to provide employees with answers to questions they had on how a union functioned, on the amount of dues they would have to pay, and when an election might be held, explaining that employees had been asking these questions but were receiving no answers. O'Donnell told them he did not know the date of the election and that they were under no obligation to the Union, and furnished them information on the Union's dues rates. O'Donnell denied asking employees at this meeting whether they supported the Union or had signed cards, and claims he simply did not care about such matters, and was interested only in giving employees the facts about the Union as he had received them from the labor consultant (Tr. 419).

Cohen recalled being at the April 23, meeting, but his account of what transpired was, at best, sketchy. He testified to visiting the store with O'Donnell that day to discuss the Union's campaign, and to generally find out if employees had questions. Cohen, however, was not clear on the extent of his involvement at that meeting, stating first that he and O'Donnell both spoke to the group, then claiming O'Donnell did most of the talking and that he was there only for support, but subsequently admitting he too spoke and that he and O'Donnell followed a script prepared for them by the labor consultant. He recalled asking employees if they had any questions he and O'Donnell might be able to answer, and assured them he and O'Donnell "would be in front of them instead of them having to contact us or call us" Asked if he could recall anything more

¹¹ O'Donnell testified to meeting with employees at the other store locations (Tr. 410).

specific on what he might have said to employees, Cohen conceded he could recall "absolutely nothing" of what he or O'Donnell said (Tr. 368-369). Despite this apparent lapse in memory, Cohen nevertheless generally denied on direct examination having asked employees if they supported the Union and why, telling them the store would close if the Union came in, or promising to help them "in any way" (Tr. 364). Cohen was never asked about, and consequently did not testify, about the second meeting.

Tryon testified the first employee meeting occurred on April 18, and that Cohen and Adams were present, along with employees Quattrone and Dickson. He claims that during the meeting, Cohen asked employees "what it was that the Company did wrong . . . to bring somebody from the Union into the Company," and that "if there was ever a problem, whether it be personal or job-wise, Traction was always there to help, [that] somebody from management or through the Company was always willing to help or lend a hand." At one point in the meeting, Adams told Tryon that while he was due for a raise, he would not be getting it because "it would look like they were trying to buy my vote." Tryon claims that when Adams hired him on March 3, he assured Tryon that new employees usually got a raise between 30 and 60 days of employment. Tryon never received the raise (108-111).

The second employee meeting, according to Tryon, was held June 3, with O'Donnell, Cohen, and Adams present. Tryon recalls that Cohen did most of the talking. He claims Cohen told employees the Company had purchased some shirts and hats for them but would not distribute them because it might be construed as an attempt to buy their vote, and promised that "once we get past this thing," referring to the union campaign, "maybe we can move on to something bigger and better." He further recalls that Cohen presented employees with the Union's financial sheet to show the amount of dues the Union collected from employees, how much would be coming out of their paychecks, and informed them that without the Union they would not have to pay dues (Tr. 111-112, 122).

6. The representation election

On April 15, the Union, as noted, petitioned for an election among Respondent's employees. An election was held June 13, which the Union lost by a vote of 16 to 2 (GCX-1[s]). On June 19, the Union filed objections to the election alleging that the Respondent had interfered with the employees' free choice in the election by discharging Schiavone, interrogating employees about their union activities, threatening them with closure of its stores and reopening under a new name, and with other reprisals, using racial threats, changing employee terms and conditions of employment by making employees punch in and out during their lunch breaks, and eliminating the practice of allowing employees to take company vehicles home (GCX-1[n]). Those objections, as noted, are before me for resolution as they parallel the unfair labor practice allegations in the complaint.

C. Analysis and Findings

1. Credibility issues

Before addressing the merits of the complaint allegations, certain conflicts in testimony must be resolved for, as shown above, there is disagreement between Adams and Schiavone on what was said during the April 15, discharge conversation, and between Tryon on the one hand, and O'Donnell, Cohen, and

Adams on the other, on what employees were told during the two employee meetings. At the outset, it should be pointed out that the government and company witnesses both had difficulty recalling events with any degree of precision. However, from a demeanor standpoint, I was more favorably impressed by the General Counsel's witnesses and am convinced that, notwithstanding any shortcomings found in their testimonies, they answered the questions put to them by both sides in an honest, forthright, and truthful manner.

The Respondent's witnesses on the other hand, Adams more so than others, were not so convincing. Adams' testimony, for example, was self-contradictory and filled with inconsistencies. Thus, while initially admitting that he saw Schiavone's authorization card on April 15, he subsequently changed his testimony to deny that he had seen Schiavone's card. I am convinced that Adams changed his testimony on realizing that his admission on direct examination would be harmful to Respondent's case. Adams was also inconsistent in explaining when he first learned of Schiavone's prouion sympathies, stating initially on direct examination that he learned of Schiavone's involvement on the first day of the hearing, but subsequently admitting on cross-examination that he knew on April 15, that Schiavone "had something to do with" the Union (Tr. 310). Both dates given at the hearing, while inconsistent in and of themselves, are also at odds with his statement in a May 25, sworn affidavit given to the Board in which he averred that he first learned of Schiavone's involvement with the Union during a representation hearing held on May 1, in Case 4-RC-19107 (Tr. 312). Adams was also inconsistent regarding his receipt of an insurance letter from O'Donnell, asserting at first that he received such a letter, but then claiming he had not received it. It was patently obvious to me that Adams could not keep his story straight on several matters, and that much, if not, all of his testimony was simply fabricated to suit Respondent's case. Thus, I reject his testimony as simply not credible.

O'Donnell was equally unpersuasive. There are sufficient inconsistencies in O'Donnell's and Adams' version of their alleged April 11, phone conversation to raise doubts that any such conversation in fact occurred, or if it did take place, that the subject of Schiavone's discharge or the use of company vans, were ever discussed. For example, Adams, in his version, makes no mention of having discussed the parking ticket with Schiavone, or questioning him about it, despite O'Donnell's claim that he overheard Adams doing so over the phone (Tr. 430). In fact, Adams testified only that O'Donnell asked him if a particular company van was being driven by Schiavone (Tr. 230). Further, while O'Donnell mentioned that the parking ticket factored into the decision to terminate Schiavone, no such claim has been made either by Adams or the Respondent.

I further doubt that Adams and O'Donnell would have discussed the Philadelphia store employees' personal use of company vehicles. Thus, I find it unlikely that O'Donnell, a part owner of the Company, would not have known if Respondent's restriction on the personal use of company vans was being followed at that store. O'Donnell, as noted, admits to being solely responsible for insurance matters pertaining to company vehicles for approximately 7 years. Therefore, if, as claimed by Adams, he had been permitting employees to take the vans home with them because the vans had previously been vandalized, e.g., stolen batteries, tires, etc., it is reasonable to assume O'Donnell would have been notified of any such damage or loss, and that he would have discussed with Adams ways of

avoiding any such further losses, including the option of allowing employees to keep the vans home overnight. Nor do I find credible Adams' claim that he was unaware of any such policy prior to the April 11, phone call, for GCX-13 reflects that employees were asked to sign a list of company rules which, *inter alia*, sets forth the policy. It simply makes no sense to believe that employees would have known of the policy, but that Adams, a store manager for 7 years, would not. Nor do I believe that, had O'Donnell, in fact, instructed Adams to adhere to company policy and discontinue the practice of allowing company vans to be used for personal use, Adams would have ignored O'Donnell's directive, as he claims to have done (Tr. 314).

Assuming, therefore, that Adams and O'Donnell spoke on the phone on April 11, I am not convinced, given the inconsistencies in their testimony, Adams' total lack of credibility, and their poor testimonial demeanor, that the Schiavone's conduct and discharge, and the personal use of company vans, were ever discussed. Rather, I am inclined to believe that Adams and O'Donnell scripted the conversation so as to support Respondent's theory that the decision to end the practice of allowing employees to take vans home, and the reasons for discharging Schiavone, as well as the decision itself, all were made before it first acquired knowledge of Schiavone's and other employees' union activities on April 15.¹² Accordingly, I find that O'Donnell and Adams both were not being truthful in their description of the alleged conversation they purportedly had on April 11.

Cohen's testimony, as previously noted, was vague and at times inconsistent. For example, while he generally denied on direct examination questioning employees at the April 23, meeting about their union sympathies, or stating the stores would close if the Union came in, on cross-examination Cohen initially recalled asking if employees had any questions and assuring them Respondent would be "in front of them," but then admitted he could recall "absolutely nothing" of what he and O'Donnell may have said. His admission on cross-examination to recalling "absolutely nothing" of what he and O'Donnell told employees leads me to doubt his initial denials on direct examination.¹³ Moreover, Cohen, as noted, was also vague on the extent of his participation at that meeting. Accordingly, I give no weight to Cohen's testimony regarding the April 23 meeting.

2. The 8(a)(1) conduct

a. Applicable legal principles

The complaint alleges numerous violations of Section 8(a)(1) stemming from certain store closing statements and interrogations alleged to have been made by Adams to Schiavone and Tryon, and by O'Donnell and Cohen at employee meetings. Before addressing the particular allegations, it is well worth noting the applicable legal principles controlling here. First, Section 8(c) of the Act provides that the expression of any views, argument, or opinion will not be evidence of an unfair

¹² I find it strangely coincident that both Adams and O'Donnell used the identical phrase, e.g., "blew it off," to describe Schiavone's reaction to Adams' query regarding the invoicing incident (Tr. 336, 404).

¹³ Although Tryon testified that the first employee meeting took place on April 18, Cohen and O'Donnell both testified it occurred on April 23. I accept the latter's testimony as to the date of this meeting and am convinced Tryon was simply mistaken as to the date. His error in this regard, however, does not affect his overall credibility.

labor practice so long as the expression contains no threat of reprisal or force, or promise of benefit.¹⁴ This right of free expression includes the right of an employer to “make a prediction as to the precise effects he believes unionization will have on his company,” provided, however, that any such prediction “must be carefully phrased on the basis of objective fact to convey [the] employer’s belief as to demonstrably probable consequences beyond his control.” *Gissel Packing*, supra. “If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessity and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion” outside the protective ambit of Section 8(c). *Id.*

Regarding the questioning of employees, the Board has held that interrogations of employees are not per se unlawful, but must be evaluated under the standard of “whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act.” *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In making that determination, the Board considers such factors as the “background, the nature of the information sought, the identity of the questioner, and the place and method of interrogation” as relevant, as well as whether or not employee being questioned is an open and active union supporter. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); also, *Eaton Technologies*, 322 NLRB 848, 850 (1997), *Tony Silva Painting Co.*, 322 NLRB 989 (1997). With these principles in mind, I turn now to the particular allegations.

b. Adams’ unlawful remarks to Schiavone

Schiavone, as noted, testified that as he was being discharged on April 15, Adams, whom he described as a friend, stated that he was upset and hurt that Schiavone had not let him know in advance about his decision to become involved with the Union, and then questioned him on who had given him an authorization card and who was responsible for starting “this whole thing.” He then went on to threaten that Respondent would close its stores or subcontract out bargaining unit work, and thereby put employees out of work, and emphasized that Respondent would do whatever it took to keep the Union out, even changing its name if need be.

Although Adams generally denied making any such remarks, as found above, Adams was anything but a credible witness. I do not credit Adams’ denial that he made any such remarks. Thus, I reject his denials and find that he indeed made the remarks attributed to him by Schiavone. I note in this regard that Adams, consistent with Schiavone’s description of him as being upset and hurt, admitted to feeling betrayed and angry that his employees would bring in a union, lending an air of credibility to Schiavone’s version.

Adams’ store closing threat was clearly unlawful. While the free speech proviso of Section 8(c) permits an employer to make “a prediction as to the precise effects he believes unionization will have on his company,” any such prediction must be based on objective facts designed to convey the “employer’s belief as to demonstrably probable consequences beyond his control.” *NLRB v. Gissel Packing*, supra at 618. Nothing in

Schiavone’s description of this conversation can be read to suggest, nor indeed does the Respondent contend,¹⁵ that in making his store closing remarks Adams was merely expressing a personal belief, based on objective facts, of the economic consequences unionization would have on Respondent’s business. Accordingly, I find that Adams’ store closing and subcontracting remarks were coercive and violative of Section 8(a)(1) of the Act. *Complete Carrier Services*, 325 NLRB 565 (1998), *Almet, Inc.*, 305 NLRB 626 (1991).

Adams questioning of Schiavone as to who gave him his card and who might be responsible for the organizing drive also amounted to an unlawful interrogation. While Schiavone and Adams may have been friends, Adams’ interrogation occurred while he was in the process of firing Schiavone, and clearly was not part of a friendly or casual conversation between the two. Nor would Schiavone have viewed it as such, for the fact that he was being relieved of his duties and being sent home would surely have convinced him he was being disciplined, and that Adams was speaking to him in an official capacity, not as a friend. Further, while Schiavone was largely responsible for the organizational drive conducted by the Union among Respondent’s employees, Schiavone was not open about his activities and indeed sought to conceal them from Adams. Respondent’s interrogation of Schiavone, therefore, was not of the kind that would be permissible under *Rossmore House*, 269 NLRB 1176 (1984).¹⁶ Rather, there is no question that the interrogation, which was conducted by a high level store manager and was accompanied by threats of plant closure, accusations of disloyalty, and derogatory descriptions of union supporters as thugs and vandals, was coercive and violative of Section 8(a)(1) of the Act. I so find. *Reeves Bros., Inc.*, 320 NLRB 1082, 1084 (1996); *Matheson Fast Freight*, 297 NLRB 63, 67 (1989); and *Café La Salle*, 280 NLRB 379 (1986). Finally, given the circumstances in which it was made, I agree with the General Counsel that Adams’ accusation of disloyalty was also coercive and violative of Section 8(a)(1) of the Act. *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 493 (1995).

c. Adams’ unlawful remarks to Tryon

The complaint alleges, and the General Counsel contends, that the Respondent violated Section 8(a)(1) when Adams, on April 15, made an implied promise of benefit to Tryon in order to discourage his and other employees support for the Union, and threatened that Respondent would close its stores and employees would lose their jobs if the Union were brought in (GCB: 18–19). The Respondent denies that Adams made any such remarks to Tryon, and argues that even if Adams had threatened to “outsource Philadelphia store employee jobs if they voted for the Union,” the remark would not be violative of the Act (RB:20).¹⁷ I find merit in the complaint allegation.

¹⁵ The Respondent simply denies that Adams made the remarks attributed to him by Schiavone, a claim I have already rejected.

¹⁶ The Board in *Rossmore House*, supra, stated that “it would weigh the setting and nature of interrogations involving open and active union supporters when applying the test of whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.” *Stoody Co.*, 320 NLRB 18 (1995).

¹⁷ Respondent’s suggestion on brief (p. 20) that Adams was a “minor supervisor” is without merit. Adams was solely responsible for the operation of the Philadelphia store and answered only to Respondent’s owners O’Donnell and Cohen. In these circumstances, Adams hardly fits the description of a “minor supervisor.” Thus, *Sturgis-Nuport*

¹⁴ 29 U.S.C. §158(c). Also *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618–619 (1969); *Feldkamp Enterprises*, 323 NLRB 1193 (1997).

Initially, despite Respondent's denial on brief that Adams made any of the remarks attributed to him by Tryon, Adams himself never specifically denied the remarks. Adams, for example, did not deny asking Tryon if he had signed a union authorization card. While he did deny ever using the pejorative term, "niggers", at the workplace, he did not deny telling Tryon that if employees voted to bring in the Union Respondent would be willing to bring in other employees to do their work for lower pay, using a delivery service to perform their work, or threatening to close its stores. In fact, Adams was never asked by Respondent's counsel to contradict Tryon's above claims. Rather, on direct examination, Adams was simply asked in very general terms if he had had any conversations with employees regarding the union campaign. His response to this particular query—"you know I may have asked why or something like that"—hardly qualifies as a refutation of Tryon's testimony. Tryon's testimony as to what Adams said to him on April 15, therefore, has not been refuted, and is accepted as true. Adams, in any event, was not credible, and to the extent his testimony can be construed as conflicting with Tryon's, it is rejected.

Thus, I find that on April 15, Adams, as he did moments earlier with Schiavone, interrogated Tryon regarding his card signing activities, and threatened him with store closure and the subcontracting of unit work if the Union were brought in. For the reasons set forth above regarding the Adams-Schiavone conversation, I find that the interrogation and plant closing threats directed at Tryon also violated Section 8(a)(1) of the Act.

In so doing, I reject as without merit Respondent's contention on brief that Tryon's testimony should be rejected allegedly because it was elicited through leading questions. Initially, I do not agree that Tryon's answers came in response to leading questions. Rather, the General Counsel, having exhausted Tryon's general recollection of his meeting with Adams, merely attempted to jog Tryon's memory with more specific, non-leading questions, a clearly permissible means of examination. Further, at no time during the General Counsel's direct examination of Tryon did the Respondent object to any question posed to Tryon because of its alleged "leading" nature. Rather, the record reveals that the only two objections raised by Respondent's counsel during Tryon's examination, which were overruled, pertained to questions Respondent's counsel believed had previously been "asked and answered" (Tr. 104, 105). It is, in any event, too late in the game for the Respondent to now raise objections that should have been, but were not, raised at the hearing. Finally, despite some minor flaws in his testimony, I am convinced Tryon testified honestly, truthfully, and completely to the best of his ability, and consequently find his testimony reliable. Indeed, Tryon's testimony is entitled to added weight as he was still in Respondent's employ when he testified adverse to Respondent's interest. *Mr. Z's Food Mart*, 325 NLRB 871 (1998).

d. Cohen's unlawful remarks at employee meetings

The complaint alleges, and the General Counsel contends, that at the April 18 employee meeting, Cohen unlawfully prom-

ised to improve its employees' terms and conditions of employment by telling them Respondent "would be able to offer" the employees more than the Union, and solicited and promised to remedy their grievances by asking what it was the Company had done wrong for employees to bring in the Union, and stating that if employees had a personal or job-related problem, Respondent or someone from management "was always willing to help or lend a hand." It also alleges that at the June 3, meeting, Cohen unlawfully promised employees unspecified benefits to dissuade them from voting for the Union by stating that Respondent "would give them more than the Union" and that once they "got past this thing, we can move on to something bigger and better."

The Respondent denies that Cohen or any other management official made such remarks at any of the employee meetings. It argues that Cohen, O'Donnell, and Adams agree in their testimony that no "improper statements" were made by any of them, and that Tryon, on whose testimony these allegations rest, should not be credited as his testimony was elicited through leading questions rendering it unreliable. On the question of Tryon's credibility, I have, as noted, found nothing inappropriate in the way he was examined by the General Counsel, and am convinced he testified truthfully and honestly. As to Respondent's former assertion, the record does not support Respondent's claim that the testimony of its witnesses on what was said at the meetings is mutually corroborative. Adams, for example, was never questioned about either the April 23 or June 3 employee meeting, or on what he may have heard Cohen and/or O'Donnell tell employees. Cohen, as noted, was not questioned about the June 3 meeting. As to the April 23 meeting, Cohen, while generally denying making any unlawful remarks, also admitted to recalling "absolutely nothing" of what he or O'Donnell may have said. Given these facts, there is simply no basis for Respondent's assertion that Adams and Cohen corroborated each other, or O'Donnell for that matter. Cohen's general denials, as noted, were found not to be credible given the inconsistent and vague nature of his testimony.

O'Donnell, however, did testify that Cohen did not make any of the remarks attributed to him by Tryon (Tr. 411). As previously discussed, I was not overly impressed with O'Donnell's testimony, and do not credit his above claim as to what Cohen may or may not have said to employees, particularly since Cohen himself had no such recollection. Rather, I accept Tryon's account of what Cohen told employees at both meetings. Accordingly, I find that at the April 23 meeting Cohen told employees that Respondent would be able to offer its employees more than the Union, asked employees what Respondent had done to cause them to bring in the Union, and assured them that if they had any personal or job-related problem, Respondent's management team was there to help them. I further find that at the June 3 meeting, Cohen told employees Respondent "would give them more than the Union" and once they "got past this thing, we can move on to something bigger and better."

Standing alone, Cohen's April 23 remark that Respondent was able to offer employees more than the Union could, would appear to be nothing more than a statement of opinion as to which of the two, the Respondent or the Union, could better serve the employees' needs. The remark, however, was not made in isolation but was instead accompanied by Cohen's request that employees bring their personal or job-related problems to him or other management staff for possible resolution.

Business Forms, 227 NLRB 1426 (1977), cited by Respondent (RB: 20), wherein the Board found comments made by a "minor supervisor" not to be coercive, is factually distinguishable and therefore not controlling. Accordingly, its argument that the "outsourcing" remark would not violate the Act because of the alleged "minor" supervisory status is rejected as without merit.

By his latter comment, Cohen was clearly attempting to solicit and remedy employee grievances. As there is no evidence that the Respondent had in the past solicited and resolved employee grievances, Cohen's attempt to do so just one week after Respondent learned of the Union's organizational campaign was clearly coercive and designed to show that the Respondent alone had the wherewithal to address and resolve employee problems. Cohen's remarks, for which no business justification was given, were therefore coercive in that they clearly were designed to undermine employee support for the Union by suggesting that the Union would be unable to properly represent them, and thereby inducing their withdrawal of support for the Union. Accordingly, I find Cohen's April 23 remarks were indeed unlawful and violative of Section 8(a)(1) of the Act, as alleged in the complaint. *House of Raeford Farms*, 308 NLRB 568, 569 (1992); *New Life Bakery*, 301 NLRB 421, 427 (1991).

On June 3, Cohen continued his efforts to undermine the Union by refusing to give them the shirts it had bought for them while at the same time stressing that employees could expect "bigger and better" things once the union matter was behind them. Cohen's message to employees was clear: continued support of the Union meant a loss of benefits, while withdrawal of support would result in bigger and better benefits. In these circumstances, I find Cohen's June 3 comments were coercive and violative of Section 8(a)(1) of the Act. *Gerig's Dump Trucking*, 320 NLRB 1017, 1022 (1996); *Triec, Inc.*, 300 NLRB 743, 747 (1990).¹⁸

3. The 8(a)(3) conduct

a. *The Schiavone discharge*

The complaint alleges, and the General Counsel contends, that Schiavone was discharged for activities in violation of Section 8(a)(3) and (1). The Respondent denies the allegation and avers that Schiavone was discharged for stealing, for defacing company property, for failing to call in on April 8, and generally for having a poor work attitude.

The analytical framework for determining when a discharge or some other adverse action violates Section 8(a)(3) was set forth by the Board in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Under *Wright Line*, the burden of proof rests with the General Counsel to make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the Respondent's decision to terminate Schiavone. To meet her burden here, the General Counsel must show that Schiavone engaged in union or some other protected concerted activity, that Respondent knew of such activity, and that it harbored antiunion animus. If the General Counsel is able to make such a showing, the burden will then shift to the Respondent to demonstrate by a preponderance of the evidence that it would have taken the same action even if Schiavone had not engaged in any protected conduct.

The General Counsel, I find, has made a strong prima facie showing that Schiavone's discharge may have resulted, at least in part, by his union activities. Schiavone's role as leading union adherent is well-established in the record, for it was he who brought the Union to the employees' attention when they expressed an interest in organizing themselves, who visited the Union and who first signed a union card, who solicited cards

from other employees and returned them to the Union (Tr. 24), and who, along with Kniese, made up the in-house organizing committee (Tr. 37). Further, notwithstanding Respondent's protestations to the contrary, I am convinced, based on the credible evidence of record, that Respondent knew of Schiavone's involvement with the Union before firing him. Thus, Schiavone credibly testified that right before terminating him, Adams admitted seeing his signed authorization card during the organizers' visit, a claim initially corroborated by Adams. While Adams subsequently changed his testimony, I reject his denial as not worthy of belief. I am convinced from the above facts, and Adams' further remark about knowing that Schiavone possessed a "union mentality," that Adams must have known or, at a minimum, suspected that Schiavone was somehow responsible for the appearance of the union organizers at the Philadelphia store that day. Finally, evidence of Respondent's antiunion animus can be found in the numerous Section 8(a)(1) conduct directed at employees which included unlawful interrogations, threats of store closure or the subcontracting of unit work, promises of benefits, and retaliatory changes in employee terms and conditions. In sum, the above evidence, and the timing of Schiavone's discharge just minutes after Respondent learned he had signed a union card, supports a finding that the discharge was motivated by antiunion considerations. Accordingly, the burden shifts to the Respondent to show that Schiavone would have been discharged notwithstanding his union activity. The Respondent, I find, has not met its burden.

The Respondent contends that it lawfully discharged Schiavone for engaging in three specific acts of misconduct: using the Mike's Texaco account to obtain an unauthorized discount on his tire purchase, defacing company property, and failing to call in when he was absent from work on April 8. I reject Respondent's defense on several grounds.

First, Schiavone's credited version of the April 15, discharge conversation reflects that Adams simply called out to him to drop what he was doing, turn in his keys, and go home, and never mentioned the above incidents as the reasons for his termination. While Adams, according to Schiavone's account, did not come right out and say that the discharge was motivated by his union activity, Adams conveyed that message loud and clear by stating he had seen Schiavone's signature on a union card, was upset that Schiavone, a friend, had not come to him first, suggested he was becoming a union thug, by unlawfully interrogating him about the union activities of other employees, and by threaten that such activities would cause Respondent to close the stores or subcontract out unit work. Schiavone's testimony that he called the next day to find out if he still had a job was not disputed by Adams, and supports Schiavone's testimony that on April 15, Adams simply instructed him to go home, creating uncertainty in his mind as to whether he in fact had been fired. There would have been no need for Schiavone to call Adams the day following his termination to inquire whether he still had a job if, as stated by Adams, he specifically told Schiavone he had been fired. Based on Schiavone's testimony alone, a finding is warranted that he was discharged for his union activity, and not for the reasons proffered by Respondent, which, as shown below, constitute nothing more than pretexts designed to mask its unlawful conduct.

Regarding his improper use of the Mike's Texaco account and receipt of an added discount, Schiavone explained, credibly I find, that it occurred through inadvertence, and was not inten-

¹⁸ As the failure to distribute the shirts to employees is not alleged as an 8(a)(3) violation, no such finding is made here.

tional, and that he was unaware of the mistake until Adams called it to his attention the next day.¹⁹ While the Respondent claims that no employee had ever previously made a mistake that resulted in receipt of an unauthorized discount, O'Donnell did admit that billing errors by employees, including using incorrect pricing codes and billing one customer under another's account, occur regularly and that he does not view such mistakes as a big deal (Tr. 443-444). Such mistakes, according to O'Donnell, are typically handled by informing the employee of his mistake, and allowing him to correct it. Schiavone, however, was not afforded such an opportunity. O'Donnell, for example, further admitted that he never bothered to ask Schiavone to return the \$6.59 discount he received, and thereby correct the mistake, because it would have been useless to do so.²⁰

Although Adams claims he did ask Schiavone for the money, Schiavone, as noted, credibly testified that no such demand was ever made of him. In rejecting Adams' assertion, I find implausible his assertion that Schiavone responded by ignoring him, issuing a "vague" laugh, turning his back, and walking away. From my observation of his demeanor on the witness stand and throughout the hearing, Schiavone did not strike me as someone who would behave in such an insubordinate manner towards his superior, nor as someone who would risk losing his job of 7 years for a meager \$6.59. Rather, I credit Schiavone and find that Adams, like his superior, O'Donnell, never

¹⁹ Adams' suggestion that Schiavone implicitly admitted to intentionally taking the discount when he purportedly stated, "I didn't think you would notice," is not credited. As a 7-year employee, Schiavone, in all likelihood, would have known of Adams' daily practice of reviewing the previous day's invoices, and would reasonably have believed that Adams would uncover any improprieties contained in the invoices. In these circumstances, I doubt Schiavone would have made the "I didn't think you would notice" remark attributed to him by Adams.

²⁰ O'Donnell offered no clear explanation on why he believed it was useless to ask Schiavone to return the \$6.59. His attempt at doing so consisted of testimony describing a conversation he had with Schiavone following the discharge about the latter's final paycheck. He claims that Schiavone was screaming at him throughout the phone conversation, and that it was this conduct by Schiavone that made it difficult for him to ask for the \$6.59. However, according to O'Donnell, Schiavone called back a short while later at which point they were able to converse in a more civil tone. Clearly, if, as O'Donnell claims, he was interested in recovering the \$6.59, he could have asked Schiavone to return the money during this latter conversation inasmuch as Schiavone was no longer "screaming." Schiavone was not asked about this purported conversation with O'Donnell. While I have my doubts, given O'Donnell's poor testimonial demeanor, that any such conversation took place or, if it did, that it occurred as described by O'Donnell, the fact remains this alleged conversation obviously took place after Schiavone was fired, and consequently cannot serve to explain why O'Donnell did not seek reimbursement of the \$6.59 prior to the discharge. Asked why he did not simply deduct it from Schiavone's final pay, O'Donnell explained that state law prohibited him from doing so without first obtaining permission from Schiavone. Assuming, arguing, that O'Donnell is correct in his reference to the state law prohibition, O'Donnell, as noted, never asked Schiavone to return the \$6.59 in the first place, and nothing in his testimony suggests that he sought permission from Schiavone to deduct that amount from his final paycheck. In sum, O'Donnell's entire explanation for why he did not seek reimbursement from Schiavone when he admittedly was interested in recovering the \$6.59, is found not to be credible. In fact, O'Donnell's testimony serves only to corroborate Schiavone's assertion that he was never asked to return the \$6.59 discount.

never asked him to return the \$6.59. In light of O'Donnell's testimony that employees are generally allowed to correct their mistakes, the failure to permit Schiavone to do so suggests that he was disparately treated. Such disparity in treatment, and the fact that no employee had previously been discharged for any such mistake, supports an inference that Respondent was using the incident as a pretext to mask the true reason for discharging Schiavone—his union activity. *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 551 (1995).²¹

Respondent's other stated reason for the discharge—the "CHUCK" writing Adams says he first noticed on April 10—is likewise a mere subterfuge. Initially, I credit Schiavone's testimony that the "CHUCK" writing was put there by him 1 month before his discharge. No evidence was produced to contradict his claim in this regard. Adams' assertion that he first discovered the writing on April 10, does not contradict Schiavone's testimony as to when he first made the writing. I do not, in any event, believe Adams' claim that he first noticed the writing on April 10. Rather, I credit Schiavone that a day or so after he wrote "CHUCK" on the warehouse wall, Adams asked him to remove it, thereby establishing that Adams would have known of the writing's existence almost a month before discharging Schiavone. Yet, he never issued Schiavone a warning or disciplined him in any way for the writing. It strains credulity to believe that Adams, having declined to take action against Schiavone when he first observed the writing sometime in March, would decide one month later to discharge Schiavone, in part, for such activity. Nor do I believe that it was Schiavone's failure to remove the writing that prompted Adams to discharge him. Rather, I believe Schiavone that, except for the one time soon after he made the writing, when Adams asked him to remove it, he was never again asked to remove the writing. Respondent's rather abrupt decision to discharge Schiavone for, *inter alia*, writing "CHUCK" on the warehouse wall, immediately after learning of his union involvement, when it had ignored the writing for almost a month without disciplining Schiavone for it, provides strong evidence that the writing on the wall, in fact, had nothing to do with the discharge, and is instead being used by the Respondent as a post hoc attempt to justify its discriminatory discharge of

²¹ Respondent has only fired a handful of employees in the past. One employee, Al Lewis, was purportedly fired several years earlier by Cohen for stealing a large number of tires (Tr. 446). Adams recalled discharging only three individuals in an 8-year period, one for drinking or using drugs on the job, the other two for problems related to absenteeism and lateness (Tr. 287-288). Although Respondent characterizes Schiavone's conduct as theft, other than the fact that Adams called it to his attention, there is no indication that Adams or O'Donnell made any further inquiry into the matter to determine if Schiavone intended to obtain the unauthorized discount, or whether he unknowingly and mistakenly received the discount through a careless entry into the computer. Indeed, O'Donnell admits he made up his mind to discharge Schiavone after being told of the incident, but before Adams had even suggested Schiavone's termination. It is clear, therefore, that O'Donnell, as well as Adams, never bothered to investigate, even in a cursory fashion, how Schiavone obtained the discount before agreeing to have him fired. Their failure to adequately investigate Schiavone's alleged misconduct before imposing the severest form of discipline on him further supports an inference that the discharge was discriminatorily motivated. *Washington Nursing Home*, 321 NLRB 366, 375 (1996); *Paper Mart*, 319 NLRB 9, 10 (1995).

Schiavone. *Scott Lee Guttering Co.*, 295 NLRB 497, 507 (1989).²²

Respondent, as noted, further claims to have relied on Schiavone's alleged failure to call in on April 8, as grounds for discharging him. However, as credibly explained by Schiavone, he did call in around 4 p.m. that day and spoke with Adams. Adams' denial that he spoke to Schiavone that day is not credited. The inconsistencies in the latter's testimony regarding this incident simply render Adams' denial unworthy of belief. Adams, for example, vacillated on whether Schiavone was required to call in, stating at first that he expected a call as a matter of courtesy, and then claiming that calling in was indeed a requirement (Tr. 298). Further, Adams testified he told Schiavone when he next saw him on April 9, that any further violations of the "call-in" policy would lead to punishment, testimony that strongly suggests that Adams had no intentions of disciplining Schiavone for his alleged failure to call in on April 8, but would do so for any future violation. However, despite assuring Schiavone that he would be subject to discipline for any future breach of the call-in policy, Adams proceeded to discharge him, in part, for this very incident.²³ Adams' testimony in this regard is simply too outrageous to be given any serious consideration, and is rendered even more absurd by Adams' admission that he gave Schiavone the option of having his April 8, absence treated as a sick day (thereby getting paid for the day) or as a day off without pay, despite Company rules which state clearly that employees who fail to call in are not paid for the day (GCX-13). The contradictions in, and absurdity of, his testimony regarding this incident warrant its rejection. I instead credit Schiavone that he did call in on April 8, and spoke with Adams and that nothing else was said about his being off on April 8. Like the other explanations proffered by Adams, this April 8, incident is likewise found to be nothing more than a pretext aimed at occulting the true motive for Schiavone's discharge: his union activity.

As the reasons given by Respondent for discharging Schiavone have been shown to be pretextual, that is to say, they were not in fact relied on, it follows that the Respondent has not met its *Wright Line* burden of proof and that General Counsel's prima facie case remains intact. Accordingly, I find that Schiavone's discharge was indeed unlawful and violative of Section 8(a)(3) and (1) of the Act, as alleged.

b. The denial of a wage increase to Tryon

b. The denial of a wage increase to Tryon

It is further alleged that Tryon was unlawfully denied a wage increase in order to discourage him and others from supporting the Union. In support of the allegation, the General Counsel points to Tryon's testimony that when first hired on March 3, Adams told him the Company "usually give[s] raises between 30 and 60 days of employment" (Tr. 110). Tryon testified he did not receive a raise either after 30 days or before his 60th day of employment but was told after Respondent learned of the union campaign that while due a raise, he could not receive it "because of the Union" (Tr. 110; 121). Adams recalls discussing with Tryon what his hourly rate would be and telling him his medical benefits would kick in after 90 days of employment, but denied ever discussing the subject of raises with Tryon during the hiring interview. He did, however, admit to telling Adams at some point after learning of the Union's campaign, and in response to Tryon's request for a raise, that he was not allowed to give him a raise or provide any other benefits to employees because of the Union (Tr. 262). Relying on Adams' above testimony, the Respondent denies that Tryon was ever promised a raise, or that it had a practice of giving newly hired employees raises within 30–60 days of employment.

As between Tryon and Adams, I credit the former and find he was indeed told by Adams to expect a raise within 30–60 days of his hire date. Thus, I find it more likely than not that the subject of raises would have come up during the interview when, as admitted by Adams, he discussed what Tryon's wage rate would be. I further accept his assertion of being told that while due for a raise he would not be getting one because of the Union. While different in the sense that he claims Tryon asked for a raise, Adams' version of his subsequent conversation regarding the raise agrees with Tryon's account in that it reflects that Tryon was denied a raise not because he was not yet entitled or eligible for one, or because Respondent had never intended to give him one in the first place, but rather because of the Union's arrival on the scene. If Tryon was not yet eligible for a raise or if no such raise was in the works, the Respondent I am certain would have made that known to Tryon. The fact that it did not do so, and that it declined to grant the raise because of the Union, supports a finding, which I make here, that Tryon was indeed eligible for and scheduled to receive a raise as promised to him by Adams during the hiring interview.

Applying a *Wright Line* analysis, I find that the General Counsel has made a prima facie showing that the refusal to grant Tryon a wage increase was discriminatorily motivated. The Respondent clearly knew of Tryon's involvement with the Union inasmuch as Adams saw Tryon's signature on one of the authorization cards shown to him by the union organizers on April 15. Further, Respondent's assertion on brief (Br. 33), that following Schiavone's discharge "Tryon assumed inside control of the organizing drive," reflects its belief that Tryon may have taken on the mantle of union organizer after Schiavone's departure. As previously found, Respondent's antiunion animus is well established in the record. Indeed, Respondent readily admits that the denial of the wage increase to Tryon was motivated solely by union considerations.

The Respondent offers little in the way of a defense to the allegation that its refusal to grant the wage increase was unlaw-

²² The fact that the writing was still on the wall as of the date of the hearing, some 7 months after the discharge, further serves to undermine Respondent's claim that the writing was a factor in the termination decision. Adams, as noted, testified to becoming very upset at finding the writing on the wall because no such writing can be found anywhere else in the warehouse, and was concerned that co-owner, Cohen, whom he described as a "stickler for cleanliness" would "go nuts" if he were to see the writing on one of his visits to the Philadelphia store. Despite his own alleged personal dislike of the writing and concern over how Cohen might react, Adams made no effort to remove the writing after discharging Schiavone, admitting that he no explanation for not removing it and that it was probably due "laziness" on his part (Tr. 305). Adams' willingness to ignore the writing after Schiavone's discharge is consistent with his willingness to ignore it for a month before the discharge, and makes clear that the writing was of no real concern to Respondent, and only became important after it learned of Schiavone's support for, and possible activities on behalf of, the Union.

²³ The record reflects that 2 weeks prior to the hearing, another employee, William Stuccold, received only a written warning, and was not discharged, for failing to call in when absent from work, suggesting the likelihood that Schiavone, even if discharged, in part, for not calling in, was treated in a disparate manner in comparison to Stuccold (Tr. 319).

ful. Its principal argument, previously rejected, is that Adams, not Tryon, is the more believable witness and should be credited. It, argues, in any event, that it has no policy or practice of granting new employees raises within 30 to 60 days of their start date, suggesting implicitly that Tryon could not have been told this by Adams. However, whether or not it has such a policy is not particularly relevant, for I have found that Adams indeed told Tryon to expect a raise during that period of time. I am, in any event, convinced that Adams would not have given Tryon such assurances if indeed it had not been Respondent's practice to do so. The fact that no such policy or practice can be found in the company rules furnished to employees, while other fringe benefits are listed, does not, ipso facto, establish that it has no such policy or practice, for there may be any number reasons why Respondent would not want to do so.²⁴ The Respondent could have laid to rest any doubts in this regard by showing through company documents, e.g., payroll records, that its current or past employees did not receive raises on completion of their 30–60 days of employment. It also could have elicited denials from O'Donnell and Cohen as to the existence of any such practice. Respondent did neither, and opted instead to rely only on Adams' unconvincing denial that he made the "30–60 day" remark to Tryon. Significantly, while Adams denied making the above remark, he was not asked if any such policy or practice existed. Finally, if Respondent did not have a practice of granting raises to new hires after 30–60 days of employment and, consequently, had no intentions of awarding one to Tryon, it simply could have told him that he was either not yet due for a raise or was not entitled to one. Instead, Adams declined to grant the raise only because of his purported belief that it would have been "improper" to do so with the Union on the scene.

In short, the Respondent has failed to provide a legitimate, nondiscriminatory reason for not granting Tryon the raise promised him by Adams. I note in this regard that despite Adams' assertion that Tryon did not receive a raise because of the Union's presence, the Respondent, on brief, does not argue that the raise was withheld so as to avoid the perception that it was seeking to influence the employees into voting against the Union.²⁵ Rather, it defends against this allegation by asserting only that Tryon was never promised a raise and that it has no practice of giving raises within 60 days of employment. As noted, its arguments are rejected on credibility grounds and as lacking evidentiary support. As the Respondent has not rebutted the General Counsel's prima facie case, I accordingly find that

²⁴ Thus, the Respondent may not want to commit itself to giving a raise to an employee who has not performed to its satisfaction during the first 30–60 days of employment, preferring instead to defer any such raise until the employee satisfies its performance expectations. I do not suggest that this is why the practice is not listed in the company rules. Rather, I cite it only to demonstrate that there could be reasons to explain its omission.

²⁵ In any event, having assured Tryon a raise within 30–60 days of being hired, the Respondent was not at liberty to deny him the raise simply because of the Union's arrival on the scene, for it is well settled that during the course of a union campaign an employer is required to proceed with an expected wage or benefit adjustment as if the union were not on the scene. *United Methodist Home of New Jersey*, 314 NLRB 687 (1994); *Borman's, Inc.*, 296 NLRB 245, 247 (1989). There is no indication that Tryon received assurances from Adams that the raise promised him was only being suspended until after the Union's campaign so as to avoid the appearance that Respondent was seeking to influence the election. *Id.*

Respondent's refusal to grant Tryon a promised wage increase violated Section 8(a)(3) and (1) of the Act.

c. The retaliatory change in policies and practices

(1) The lunchtime "clocking in/out" requirement

The complaint alleges that the Respondent violated Section 8(a)(3) when on April 16, it began requiring employees at the Philadelphia store to clock in and out during their lunchbreak. The General Counsel, I find, has made a prima facie showing that Respondent imposed this requirement because of its employees support for the Union. Thus, there is no question, given Adams' admission that on April 15, he saw which employees had signed authorization cards for the Union,²⁶ that Respondent was fully aware of the degree of support enjoyed by the Union among the Philadelphia store employees when it imposed the lunchtime clocking in/out requirement. Further, as mentioned above in the discussion of Schiavone's unlawful discharge, there is ample evidence of antiunion animus on the part of Respondent. Finally, the timing of change in practice, just 1 day after Respondent learned of its employees' union activities, and after the discharge of Schiavone, the Union's leading adherent, gives rise to an inference that the imposition of the clocking in and out requirement was motivated by antiunion considerations and was retaliatory in nature. Adams' admitted anger and sense of betrayal at learning that the Philadelphia store employees were supporting the Union also weighs in favor of finding that his decision to require employees to clock in and out before and after lunch was done for purely retaliatory reasons. Accordingly, I find that the General Counsel has satisfied her initial *Wright Line* burden of proof that the new practice was discriminatorily motivated.

The Respondent defends its decision by claiming that the practice was lawfully instituted because one employee, Kniese, had been overextending his lunchbreak by some 5 to 8 minutes. The Respondent's defense is devoid of merit. First, the only evidence that Kniese had been abusing his lunchbreak and that the practice was instituted in response to that abuse came from Adams who, as found above, was not a credible witness. Consequently, I reject his testimony that Kniese' lunchtime problem was the reason he imposed the clocking in and out requirement on all employees. There is, in this regard, no evidence to corroborate Adams' assertion that Kniese was overextending his lunch hour. Thus, Kniese, who testified at the hearing, was not questioned on the matter, and other than Adams' claim that he spoke Kniese about the problem, no other evidence, such as a written warning, was produced to substantiate the existence or seriousness of any such problem. Moreover, Adams, as noted, testified that Kniese' alleged problem of overextending his lunchbreak had been ongoing since early April. Adams offered no explanation for why, if he knew of Kniese' problem in early April, he waited until April 16, to address it. The answer, I find, is fairly obvious: there was no problem to speak of.

There is yet another reason for rejecting Adams' stated reason for imposing the lunchtime "clock in/out" requirement. Adams, as noted, claims that the new policy was instituted in response to Kniese' abuse of his lunchbreak. Yet, the record reflects that Kniese was on vacation from April 14 through 19,

²⁶ Adams, for example, admits seeing the cards of "my employees," referring to the Philadelphia store employees under his supervision (Tr. 347).

and would not have been affected at all by the April 16, policy, despite the fact that the policy was implemented with him in mind and prompted only by his alleged abuse of the lunchbreak. It simply strains credulity to believe that Adams would have implemented his policy on April 16, when he knew full well that the individual at whom the policy was aimed would be on vacation and not be affected by the new requirement. Thus, even if I were to believe, which I do not, that Adams was having a problem with Kniese overextending his lunchbreaks, the fact that the “clocking in and out” requirement was implemented during Kniese’s vacation strongly supports an inference that the restriction was imposed for a reason other than Kniese’s lunchtime problem. Further support for this inference is found in Adams’ admission that Kniese’s problem was in reality a “minor” one (Tr. 335).

In sum, I find Respondent’s explanation for imposing the lunchtime “clock in and out” requirement to be nothing more than a pretext intended to mask its true purpose: retaliation against employees for supporting the Union. As it has failed to present credible evidence to rebut the General Counsel’s prima facie case, I find, as alleged in the complaint, that the Respondent violated Section 8(a)(3) and (1) of the Act when on April 16, it began requiring employees at the Philadelphia store to clock in and out during their lunchbreak.

(2) The change regarding use of company vans

The complaint also alleges, and the General Counsel contends, that Respondent violated Section 8(a)(3) and (1) when it discontinued the practice at the Philadelphia store of allowing employees to take Company vans home after work. Respondent disputes the allegation claiming that it has always prohibited the personal use of Company vans (RB:16). According to O’Donnell, he was unaware prior to April 11, that the Philadelphia store was not adhering to the policy and only learned of it during his April 11, phone conversation with Adams. The Respondent thus argues that as O’Donnell’s instruction to Adams to discontinue the practice on April 11, 4 days before it is alleged to have first learned of its union activities, that decision could not have been motivated by antiunion reasons. I find its argument to be without merit.

While there is evidence to support Respondent’s assertion that it had a rule prohibiting the personal use of company vans, it is undisputed that Adams had been ignoring the rule at the Philadelphia store for some time to protect the vehicles from being vandalized. For the reasons previously discussed in my credibility resolutions, I do not believe that O’Donnell was unaware that Adams was ignoring the rule, or that Adams did not know of the rule’s existence. Rather, as found above, Adams and O’Donnell simply concocted this explanation after the fact to justify their discontinuance of the practice at the Philadelphia store. Thus, I simply find incredible that Adams would have chosen to ignore O’Donnell’s specific instructions. Rather, the more credible scenario, and the one I accept as true, is that Adams never received any such instruction from O’Donnell in the first place, and imposed the ban only after learning that his Philadelphia store employees were supporting the Union. Tryon’s credible testimony, that Adams threatened not to allow certain employees to take vans home anymore because of the employees’ union activity, supports such a finding. Such testimony further makes clear that the ban was imposed only after Adams learned of his employees’ involvement with the Union. Along with the other evidence of antiunion animus, Adams’ threat provides clear evidence the motivation

for the ban was the employees’ union activities, not concerns over insurance coverage, as Respondent would have me believe.²⁷

In sum, I find that the General Counsel has made a strong prima showing that Respondent’s April 15 decision to discontinue the practice of allowing employees at the Philadelphia store to take vehicles home with them after work was discriminatorily motivated. Except for O’Donnell’s and Adams’ discredited testimony that a decision to end the practice was made on April 11, the Respondent has presented no credible evidence to refute the General Counsel’s prima facie case. Accordingly, the General Counsel’s case stands, and a finding is warranted, which I make, that the Respondent’s actions in discontinuing the above practice violated Section 8(a)(3) and (1) of the Act, as alleged.

4. 8(a)(5) and (1) allegations and related issues

The General Counsel contends that the Union became the chosen representative of a majority of Respondent’s employees in the above-described bargaining unit by virtue of having obtained signed valid authorization cards from 11 of the 20 employees in the unit, that the Respondent’s unfair labor practices committed by the Respondent interfered with the employees’ free choice in the election held in Case 4-RC-19107, requiring it be set aside, and that the unlawful conduct was so serious as to make the holding of a fair second election impossible. She argues that given these circumstances, the only appropriate remedy is the issuance of a *Gissel* bargaining order.²⁸ Finally, she contends that because the Union was the employees’ exclusive bargaining representative as of April 14, the Respondent was not free to unilaterally change its employees’ terms and conditions of employment by discontinuing the practice of allowing the Philadelphia store employees to take company vehicles home after work and by requiring employees to punch in and out during their lunch hour. By making such changes without first notifying and affording the Union an opportunity to bargain, the Respondent, the General Counsel alleges, violated Section 8(a)(5) and (1).

The Respondent disputes the General Counsel’s claim that the Union represents a majority of its employees, arguing that two of the authorization cards upon which the Union relies were not properly authenticated as having been signed by the individual whose name appears thereon, and that a third was obtained through misrepresentation. It further argues that even if the Union were found to have attained majority support, a *Gissel* bargaining order would not be appropriate, first, because it has not engaged in any unlawful or objectionable conduct,

²⁷ The record contains a letter (GCX-9) which purports to be from Respondent’s insurance company to O’Donnell stating that company vehicles should only be used for business purposes during normal business hours. That letter, however, is dated May 14, and does not serve to corroborate claims by Adams and O’Donnell that they discussed the issue of company vans during their alleged April 11 conversation.

²⁸ In *Gissel*, supra at 614-615, the Supreme Court identified two categories of cases in which the issuance of a bargaining order might be justified. Thus, it found that imposition of a bargaining order would be appropriate in cases where (1) the unfair labor practices were so outrageous and pervasive that they could not be cured by traditional remedies and a fair election was therefore impossible, or (2) where “the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedie . . . is slight and that the employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order.”

and second, because even if it were found to have engaged in improper conduct, said conduct was neither so egregious or pervasive as to justify the imposition of such an extraordinary remedy.

a. The authorization cards and alleged majority status

Of the 11 authorization cards obtained by the Union, only 3 (the Hess, Klein, and Michener cards) are contested by the Respondent (RB: 26). The Hess card, the Respondent claims, was obtained through misrepresentation and cannot be counted. The Klein and Michener cards, it further contends, have not been properly authenticated as having been signed by them and, likewise, cannot be counted. I disagree.

Hess, as noted, admits signing a card but claims not to have read it because it “didn’t seem important enough” to him, and that he signed the card so as to allow the Union to obtain an election and not for representation purposes (Tr. 52–56, 58). Hess, however, was not a credible witness. Thus, his testimony as to the reason for signing the card was ambiguous, and his claim of not having read it conflicts with a sworn affidavit he gave to the Board in which he acknowledged reading the card before signing it (Tr. 65). I accept Hess’ statement in his sworn affidavit that he read the authorization card over his denial at the hearing. I am convinced Hess testified as he did to avoid antagonizing, and possibly to curry favor with, the Respondent. In any event, the card signed by Hess, on its face, does not state that it was to be used to obtain an election, but rather makes clear that the signer was designating the Union as “my chosen representative in all matters pertaining to wages, hours, and working conditions.” It is well settled that “[a]uthorization cards that state clearly on their face that their purpose is to designate the union as collective-bargaining representative will not be denied their face value unless there is affirmative proof of misrepresentation or coercion.” *Goodless Electric Co.*, 321 NLRB 64, 66 (1996); *Action Auto Stores*, 298 NLRB 875, 881 (1990). Other than Hess’ discounted testimony, such proof is lacking here. I therefore find that Hess is bound by the card he read and signed, and accordingly reject Respondent’s claim that his card should not be counted.

Unlike Hess, Klein, and Michener did not testify. Kniese, however, testified he gave Klein a card to sign at the Trenton store and, while he did not actually see Klein fill out the card, the latter in fact returned it to him all filled out and signed (Tr. 92-93; GCX-3[f]). At the hearing, the Respondent expressed “doubts” as to the authenticity of the card solely because the “Trenton” notation found there was written in different colored ink from the other entries contained on the card. Kniese could not recall if, on receipt of the card from Klein, it already contained the “Trenton” entry and did not know who made the entry. While there is no disputing that the “Trenton” entry was made with different colored ink, that fact alone does not, in my view, affect the card’s authenticity, particularly since the Respondent at the hearing raised no objection to any other aspect of Klein’s card, including his signature or the date on which it was signed. See, e.g., *Sheraton Hotel Waterbury*, 312 NLRB 304, 346 (1993). Accordingly, I find that Klein’s card has been properly authenticated by Kniese, its solicitor, and can be counted.

Regarding the Michener card, Kniese testified to having distributed and received Michener’s card, but admits to never actually handing him the card or getting it back directly from Michener. Instead, he admits giving it to a third person to give

to Michener, and that he got the card back from someone other than Michener, possibly Dickson.²⁹ Such testimony from someone who neither witnessed the employee sign the card nor received it from the signer is inadequate to prove that the card was indeed signed by Michener. *Stop N’ Go, Inc.*, 279 NLRB 344 (1986).

However, in response to a subpoena, the Respondent produced a job application from Michener’s personnel file, along with a set of company work rules, containing signatures which are strikingly similar to the one found on the Michener card (GCX-8, 12, and 13). The Respondent does not dispute that the above application and company work rules containing what purports to be Michener’s signature are authentic business records that are maintained in the ordinary course of business. While claiming it has no way of knowing if the signature on the employment application indeed belongs to Michener, the Respondent does not question the authenticity of the application itself (Tr. 393–394). Having compared the signature on the Michener card with the signatures found on exemplars from Michener’s personnel file, I am satisfied that both sets of signatures were made by the same individual, employee Michener. The Respondent has neither alleged, nor presented evidence to show, that the employment application contained in Michener’s file does not belong to Michener, or that the signed work rules found in his file were not signed by him. In these circumstances, I find that the General Counsel has properly authenticated the Michener card as having been signed by, and belonging to, Michener.

In light of my above rulings that the Michener, Klein, and Hess cards were properly authenticated and are valid, I find, as alleged by the General Counsel, that as of April 14 the Union enjoyed the support of a majority of Respondent’s employees in the above-described bargaining unit by virtue of having obtained signed valid authorization cards from 11 of 20 employees in that unit.

b. The Objections to the election in Case 4-RC-19107

As indicated, the objections filed by the Union in Case 4-RC-19107 parallel the unfair labor practices alleged in the complaint. All of the unfair labor practices committed by the Respondent occurred during the “critical period,” e.g., between the filing date of the representation petition and the election date. The Board’s stated policy is “to direct a new election whenever an unfair labor practice occurs during the critical period since conduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammelled choice in an election.” See *Wellstream Corp.*, 313 NLRB 698, 712 (1994), and cases cited there; also *Pro/Tech Security Network*, 308 NLRB 655, 662 (1992); and *Gonzales Packing Co.*, 304 NLRB 805 (1991). Accordingly, I shall recommend that the election held on June 13, in Case 4-RC-19107, be set aside.

c. The propriety of a bargaining order

The General Counsel, as stated, argues for a bargaining order, claiming one is needed because Respondent’s unfair labor practices are sufficiently serious as to preclude the holding of a fair election, and asserting that the case falls within the second category of *Gissel*-type cases (see fn. 28, *infra*). The Respon-

²⁹ While called to testify, Dickson was not asked about, and consequently did not corroborate, Kniese’ claim of having received the card from him.

dent counters that even if it is found to have committed the unfair labor practices alleged in the complaint, its conduct was neither so egregious nor pervasive as to justify a bargaining order. I agree with the General Counsel that a bargaining order is warranted here.

As found above, by April 14, the Union enjoyed the support of a majority of Respondent's employees, and on April 15, demonstrated its support to Respondent by showing Adams the 11 authorization cards, and demanded recognition. Respondent's reaction to its employees' organizing drive was immediate, swift, and retributive. Within minutes of learning from the union organizers that its employees were seeking uni on representation and of Schiavone's involvement in such activities, the Respondent began a campaign of its own that was clearly designed to nip the Union's organizational drive in the bud. Thus, immediately following the departure of the union organizers on April 15, Adams summoned Schiavone to his office and interrogated him about his union activities and that of other employees, accused him of being disloyal to the Company and of becoming a union thug, threatened that Respondent would close its stores and put employees out of work, and finally discharged Schiavone without explanation. The Respondent, however, did not stop there. Rather, soon after discharging Schiavone, Adams interrogated Tryon, presumably believing he too was somehow involved in the organizational drive, repeated the store closing and job loss threat he earlier made to Schiavone, and threatened to retaliate against employees by discontinuing the practice of allowing employees at the Philadelphia store to take company vehicles home with them after work, and by requiring employees to punch in and out during their lunchbreaks, threats he proceeded to carry out that day and the next.

Nor was Adams alone in his efforts to undermine the employees' organizing campaign for, as found above, on April 23, Respondent's co-owner, Cohen, joined by Co-owner O'Donnell and Adams, held an employee meeting at the Philadelphia store during which he interrogated employees on why they had brought in the Union, attempted to solicit their personal and job-related grievances with a promise to resolve them, and denied Tryon a promised wage increase in retaliation for his union activities. On June 3, 10 days prior to the election, Cohen and O'Donnell, in an apparent last ditch effort to influence the upcoming election, again met with the Philadelphia store employees. This time, Cohen, using somewhat of a "carrot and stick" approach, first told employees that because of the Union's arrival on the scene they would not be receiving some work clothes it had purchased for them, but that they could expect bigger and better benefits once the union matter was resolved, conveying the clear message that the Union stood in the way of their receipt of the work clothes and other benefits.

The Respondent argues that even if it is found to have violated the Act as alleged in the complaint its conduct "does not rise to the level of egregiousness necessary for a bargaining order" (RB: 32). I disagree, for Respondent's unfair labor practices included "hallmark violations" of the most pernicious type—threats of plant closure and the discriminatory discharge of a leading union adherent. As the Board has noted on other occasions, these violations "are the most flagrant forms of interference with Section 7 rights 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 ac-

tivity persists." *A.P.R.A. Fuel Oil*, 309 NLRB 480, 481 (1992); See also *Adam Wholesalers*, 322 NLRB 313, 314 (1996); *Electro-Voice, Inc.*, 320 NLRB 1094, 1095 (1996). Further, the impact of Respondent's unlawful conduct is obviously heightened by the relatively small size of the bargaining unit, only 20 employees, and by the direct involvement of its co-owners, O'Donnell and Cohen, in the illegal activities. *Adam Wholesalers*, supra at 314; *Laser Tool, Inc.*, 320 NLRB 105, 114 (1995). Clearly, "when the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten." *Adams Wholesaler*, supra at 314; *Electrovoice*, supra at 1096.

The Respondent further claims that a bargaining order would not be appropriate because the unfair labor practices it is alleged to have committed were confined to the Philadelphia store, and no showing has been made that employees at the other stores were made aware of, and impacted by, the misconduct. Its claim is again without merit. Thus, Schiavone testified, credibly and without contradiction, that following his unlawful discharge he notified employees at the other stores of what had happened to him, of the threats made by Adams (Tr. 160). Tryon likewise testified to having discussed the Union and what happened to Schiavone with employees at other stores (Tr. 114). The Union, for its part, mailed flyers to unit employees at all stores which, inter alia, stated that Adams, O'Donnell, and Cohen had fired Schiavone for his union activities (GCX-4). Finally, O'Donnell admits that he met with employees at the other stores to convey the same message he gave the Philadelphia store employees. Having credited Tryon's testimony as to what Cohen and O'Donnell told employees at the Philadelphia store employees on April 23 and June 3, I find it more likely than not that employees at the other stores would have been subjected to the same unlawful interrogations and solicitation of grievances by Cohen and O'Donnell, told they would not be getting the work clothes Respondent had purchased for them, and promised increased benefits for not supporting the Union. Thus, while I am inclined to believe that Respondent's unlawful conduct was not restricted solely to the Philadelphia store, even if Respondent did not engage in any unlawful conduct at the other stores, I find that employees at the Trenton, Hainesport, and Wilmington stores were made by Philadelphia store employees and the Union of the unlawful conduct engaged in by Respondent at the Philadelphia store, and of its determination, as told to Schiavone by Adams, to do whatever it took to keep the Union out. The fact that the Union garnered only two votes in the June 13 election, when it previously enjoyed majority support, provides convincing evidence that Respondent's own campaign to undermine employee support for the Union through fear and intimidation had its intended effect.

For all of the above-stated reasons, I find that the possibility of erasing the effects of the Respondent's unfair labor practices on unit employees is slight, and that it is highly unlikely that a fair second election can be held. Thus, I find that the employees' desire for union representation, as reflected in their signed authorization cards, would on balance be better protected by a *Gissel*-bargaining order. While the Union achieved majority status on April 14, it did not demand recognition until April 15. Consequently, I find that Respondent's bargaining obligation began on April 15, when such demand was made. I further find, as alleged by the General Counsel, that given the Union's majority status, the Respondent was not at liberty to make changes to employees' terms and conditions of employment

without first notifying and bargaining with the Union, and that its failure to do so regarding the use of company vehicles, and the lunchtime punch in and out policy, constituted violations of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Traction Wholesale Center Co., Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union, Teamsters Union Local No. 115, a/w International Brotherhood of Teamsters, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

2. On April 14, 1997, the Union became the exclusive collective-bargaining representative of the Respondent's employees in an appropriate bargaining unit by virtue of having received valid signed authorization cards from 11 of the 20 unit employees. The bargaining unit includes:

All drivers, warehouse employees and Assistant Managers employed at Respondent's Hainesport, New Jersey, Trenton, New Jersey, Philadelphia, Pennsylvania, and Wilmington, Delaware facilities, excluding all other employees, store Managers, guards, and supervisors as defined in the Act.

3. By interrogating Schiavone and Tryon about their union activities, threatening that Respondent would close its facilities or subcontract out the unit work if employees brought in the Union, and accusing Schiavone of disloyalty and asking him to divulge the identity of union adherents, telling employees they would not receive certain work clothes because of their union activities, and promising them bigger and better benefits to dissuade them from supporting the Union, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discharging Schiavone, refusing to grant Tryon a promised wage increase, requiring employees at the Philadelphia store to punch in and out during their lunchbreak, and discontinuing the practice of allowing employees at the Philadelphia store to take company vehicles home after work, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

5. By refusing, since April 15, to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the bargaining unit described in paragraph 2, above, the Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act.

6. By unilaterally implementing its lunchtime "punch in and out" policy at the Philadelphia store and by unilaterally discontinuing the practice at that facility of allowing employees to take Company vans home with them after work, the Respon-

dent has changed the terms and conditions of employment of the Philadelphia store employees without first affording the Union an opportunity to bargain over said changes, and has thereby engaged in further unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

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 to effectuate the policies of the Act.

The Respondent shall be required to recognize and, on request, bargain with the Union as the exclusive representative of the employees in the appropriate unit concerning their terms and conditions of employment, and to embody any understanding reached in a signed agreement.³⁰ It shall also be required to offer Charles Schiavone, within 14 days of the Order, immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of wages and benefits he may have suffered due to his unlawful discharge. The Respondent shall also make Kevin Tryon whole by awarding him the wage increase that was withheld from him because of the Union's organizing campaign, retroactive to the date he would have received it but for Respondent's unlawful conduct. Any backpay due and owing to Schiavone and Tryon shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and shall include interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall, within 14 days of the Order, expunge from its files any and all reference to Schiavone's discharge, and shall notify him, in writing, that it has done so and that the discharge will not be used against him in any way.

[Recommended Order omitted from publication.]

³⁰ While it is generally appropriate to order an employer to rescind any unlawful unilateral changes made in employee terms and conditions of employment, I believe it would be improper to require Respondent to reinstate its practice of allowing employees at the Philadelphia store to take company vehicles home with them, to the extent such practice is prohibited by its insurance policy, as appears to be the case from GCX-9. Further, as the evidence makes clear that Respondent no longer requires the Philadelphia store employees to punch in and out during lunch, there is no need to direct Respondent to discontinue the practice.