

Gulf Caribe Maritime, Inc., a subsidiary of Foss Maritime Company and Seafarers' International Union, Atlantic, Gulf, Lakes and Inland Waters District, affiliated with the Seafarers' International Union of North America, AFL-CIO and Inlandboatmen's Union of the Pacific, Marine Division, AFL-CIO, affiliated with the International Longshoremen's and Warehousemen's Union, AFL-CIO. Cases 31-CA-23820, 31-CA-23918, and 31-CB-10449

March 2, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND HURTGEN

On September 30, 1999, Administrative Law Judge Frederick C. Herzog issued the attached decision. The General Counsel, Respondent Employer, and Respondent Union each filed exceptions and supporting briefs. The Charging Party Union filed a brief in opposition to the Respondents' exceptions and in support of the General Counsel's exceptions. The Respondent Employer filed a response to the General Counsel's exceptions and a separate reply to the Charging Party's brief. The Respondent Union filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this matter 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, as modified,² and to adopt the recommended Order as modified.³

¹ The parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We agree with the judge that this case does not raise an accretion issue. Accordingly, we do not rely on the judge's discussion of accretion doctrine. In addition, we disavow the judge's statement that Board policy disfavors contractual clauses in which an employer agrees in advance to recognize a union, based on a majority card showing, as representative of employees at a new facility. See *Kroger Co.*, 219 NLRB 388, 389 (1975).

We also affirm the judge's conclusion that the Union violated Sec. 8(b)(1)(A) by offering on March 12, 1999, to waive its \$600 initiation fee if all eight unit employees signed union authorization cards by March 15, 1999. See *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973), and *Teamsters Local 420 (Gregg Industries)*, 274 NLRB 603, 604-605 (1985). Contrary to the judge, however, the potential for disparate treatment of future employees is not the basis for finding this violation. Rather, the violation arises from the impact on current employees of conditioning their entitlement to a fee waiver on the execution of authorization cards by all of them prior to a date in advance of a Board election or of the Employer's voluntary recognition of the Union as the employees' collective-bargaining representative. This conditional offer had the "reasonable *tendency* to coerce those employees who desire to

ORDER

A. The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent Employer, Gulf Caribe Maritime, Inc., a subsidiary of Foss Maritime Company, Redondo Beach, California, its officers, agents, successors, and assigns, shall take the actions set forth in the Order as modified.

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

"(a) Recognizing Seafarers' International Union, Atlantic, Gulf, Lakes and Inland Waters District, affiliated with the Seafarers International Union of North America, AFL-CIO (SIU) as the exclusive collective-bargaining representative of its employees at its Redondo Beach, California facility, unless and until that labor organization has been duly certified by the Board as the exclusive representative of these employees."

2. Substitute the following for paragraphs 2(a) and (b).

"(a) Withdraw and withhold recognition from the Respondent SIU unless and until it shall have been duly certified by the Board as the exclusive bargaining representative of its employees at the Redondo Beach, California facility.

"(b) Cease giving effect to the collective-bargaining agreement between Respondent Employer and Respondent SIU, and to the addendum agreement executed by them on March 24, 1999, with respect to employees at the Redondo Beach, California facility, provided, however, that the Respondent Employer shall not be required to vary or abandon any wage increase or other benefit which may have been established pursuant to the performance of those agreements."

3. Substitute the attached notice marked "Appendix A" for that of the administrative law judge.

B. The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent Union, Seafarers' International Union, Atlantic, Gulf, Lakes and Inland Waters District, affiliated with the Seafarers' International Union of North America, AFL-CIO, its officers, agents, and representatives, shall take the actions set forth in the Order as modified.

1. Substitute the following for paragraphs 1(a) and (b).

"(a) Seeking or accepting recognition from the Respondent Employer as the collective-bargaining represen-

refrain from joining or assisting the union at a time when they were within their Section 7 rights to do so." *Gregg Industries*, 274 NLRB at 604.

³ We shall modify the recommended Order by deleting references to "interference" with Sec. 7 rights in injunctive language relating to violations by the Respondent Union, by deleting reference to Inlandboatmen's Union of the Pacific Marine Division in the paragraph providing for restoration of unit employees' benefits, and by requiring the Respondent Employer to withhold recognition from the Respondent Union unless and until that Union has been certified as the unit employees' collective-bargaining representative following a Board-conducted election.

tative of its employees at its Redondo Beach, California facility, until and unless the Respondent Union has been duly certified by the Board as the exclusive bargaining representative of these employees.

“(b) Restraining or coercing employees by threatening that employees have no choice but to go SIU, by implying or stating that the efforts of employees to look into or explore the possibilities of representation by other labor organizations is not possible or permitted, or by offering to waive initiation fees if all employees sign authorization cards for it by a date certain.”

2. Substitute the following for paragraph 1(d).

“(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.”

3. Substitute the attached notices marked “Appendixes A and B” for that of the administrative law judge.

APPENDIX A

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

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

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 recognize Seafarers’ International Union, Atlantic, Gulf, Lakes and Inland Waters District, affiliated with the Seafarers International Union of North America, AFL–CIO (SIU) as the exclusive collective-bargaining representative of our employees at our Redondo Beach, California facility, unless and until that labor organization has been duly certified by the Board as the exclusive representative of these employees.

WE WILL NOT enter into or give any force or effect to any agreement purportedly having been reached with SIU for our employees at our Redondo Beach, California facility.

WE WILL NOT discriminate or retaliate against you because you engaged in union activities or gave testimony under the Act.

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

WE WILL cease giving effect to our collective-bargaining agreement and March 24, 1999 addendum agreement with SIU, with respect to our employees at our Redondo Beach, California facility, provided, however, that we will not vary or abandon any wage increase or other benefit which may have been established pursuant to the performance of those agreements.

WE WILL withdraw and withhold recognition from the Seafarers’ International Union, Atlantic, Gulf, Lakes and Inland Waters District (SIU), affiliated with the Seafarers’ International Union of North America, AFL–CIO, until and unless it has been duly certified as your collective-bargaining representative by the Board.

WE WILL make whole our employees for all wages and benefits lost by you as a result of the “roll back” of May 26 and 27, 1999.

GULF CARIBE MARITIME, INC., A SUBSIDIARY
OF FOSS MARITIME COMPANY

APPENDIX B

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

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

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 seek nor accept recognition from Gulf Caribe Maritime, Inc. as the collective-bargaining representative of its employees at its Redondo Beach, California facility, unless and until we have been duly certified by the Board as the collective-bargaining representative of the employees there.

WE WILL NOT restrain or coerce you by threatening that employees have no choice but to go with us, or by implying or stating that the efforts of employees to look into or explore the possibilities of representation by other labor organizations is not possible or permitted, or by offering to waive initiation fees if all employees sign authorization cards for it by a date certain, or by any like or related means.

WE WILL NOT give any force or effect to our collective-bargaining agreement or the March 24, 1999 addendum reached with Gulf Caribe Maritime in March 1999.

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

SEAFARERS' INTERNATIONAL UNION, ATLANTIC, GULF, LAKES AND INLAND WATER DISTRICT, AFFILIATED WITH THE SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

Anne J. White, Esq., for the General Counsel.

Mark A. Hutcheson, Esq. (Davis, Wright, Tremaine, LLP), of Seattle, Washington, for Respondent Employer.

Lester Ostrov, Esq. (Fogel, Feldman, Ostrov, Ringler & Klevens), of Santa Monica, California, for the Respondent Union.

William H. Carder, Esq. (Leonard, Carder, Nathan, Zucker-man, Ross, Chin & Remar), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

FREDERICK E. HERZOG, Administrative Law Judge. These cases were heard by me in Los Angeles, California, on July 27-29, 1999, and are based on a charge filed in Case 31-CA-23820¹ by Inlandboatmen's Union of the Pacific, Marine Division, AFL-CIO, affiliated with the International Longshoremen's and Warehousemen's Union, AFL-CIO (the Charging Party or IBU), on April 2, 1999, against Gulf Caribe Maritime Inc., a subsidiary of Foss Maritime Company (the Respondent Employer or Gulf Caribe), alleging generally that Respondent Employer committed certain violations of Section 8(a)(1) and (2) of the National Labor Relations Act (the Act); and on a charge filed in Case 31-CB-10449² by the Charging Party on April 2, 1999, alleging generally that Seafarers' International Union, Atlantic, Gulf, Lakes and Inland Waters District, affiliated with the Seafarers' International Union of North America, AFL-CIO (the Respondent Union or SIU) committed certain violations of Section 8(b)(1)(A) of the Act. On May 12, 1999, the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued an order consolidating cases, consolidated complaint and notice of hearing alleging violations of Section 8(a)(1) and (2) of the Act against Respondent Employer, and of Section 8(b)(1)(A) of the Act against

Respondent Union. Respondent Employer and Respondent Union thereafter filed timely answers to the allegations contained within the consolidated complaint, denying all wrongdoing.

On May 27, 1999, an additional charge was filed, in Case 31-CA-23918,³ by the Charging Party against Respondent Employer, and on July 23, 1999, the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing in Case 31-CA-23918, alleging violations of Section 8(a)(1), (2), (3), and (4) of the Act against Respondent Employer. At trial, counsel for the General Counsel moved that I consolidate Case 31-CA-23918 for trial with Cases 31-CA-23820 and 31-CB-10449, and I ultimately granted that motion.

All parties appeared at the hearing, and were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. On July 29, 1999, this trial was adjourned to permit Respondent Employer to file its answer in Case 31-CA-23918. While these cases were adjourned the parties entered into certain stipulations of fact, filed certain declarations of fact, and rested their respective cases. Accordingly, I thereafter issued an order closing the trial and setting a date for filing of briefs.

Based on the record thus compiled, plus my consideration of the briefs filed by each of the parties, and my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The consolidated complaints allege, and all parties admit, that Respondent Employer is a Washington State corporation, with its principal place of business in Mobile, Alabama, and an office at Redondo Beach, California. Through its Redondo Beach, California office, at all times material, it has been engaged in the business of providing mooring launch services, passenger launch services, and line boat services at El Segundo, California moorings (the California facility); that during the 12-month period preceding the issuance of the consolidated complaints, in the course and conduct of its business operations, it purchased and received in the State of California goods valued in excess of \$50,000 directly from points outside the State of California; and that during the same 12-month period, in the course and conduct of its business operations, it had gross revenues in excess of \$50,000.

¹ The charge in Case 31-CA-23820 alleges that Gulf Caribe violated Sec. 8(a)(1) and (2) of the Act by, inter alia, forcing or requiring its California facility unit employees to sign cards authorizing SIU to represent them in collective bargaining, contributing financial and other support to the SIU, and agreeing to extend to its California facility unit employees the terms and conditions of its existing collective-bargaining agreement covering a unit of employees in Mobile, Alabama, at a time when SIU did not represent an uncoerced majority of Gulf Caribe's California facility unit employees.

² The charge in Case 31-CB-10449 alleges that SIU violated Sec. 8(b)(1)(A) of the Act, by, inter alia, coercing Gulf Caribe's California facility unit employees to sign cards authorizing SIU to represent them in collective bargaining with Gulf Caribe, and accepting recognition from Gulf Caribe and agreeing to extend its existing collective-bargaining agreement covering employees in Mobile, Alabama, to cover Gulf Caribe's California facility unit employees, at a time when SIU did not represent an uncoerced majority of Gulf Caribe's California employees.

³ The charge in Case 31-CA-23918 alleges that Gulf Caribe violated Sec. 8(a)(1), (2), (3), and (4) of the Act by, inter alia (1) reducing the wages, benefits, and working conditions of its California facility unit employees in retaliation against them because of: (a) their support for and union activities on behalf of the IBU and (b) their participation in filing unfair labor practices against Gulf Caribe and SIU, and their willingness to appear as witnesses for the General Counsel and to provide testimony in support of the complaint resulting from such charges; (2) reducing the wages, benefits, and working conditions of its California facility unit employees in an effort to coerce them into accepting the SIU as their exclusive collective-bargaining representative at a time when the SIU did not represent an uncoerced majority of the California facility unit employees; and (3) making written and verbal statements to its California facility unit employees calculated to create the impression that any efforts by the employees to bargain collectively through the IBU as the union of their choice, or to obtain a meaningful remedy from the Board for the unfair labor practices previously committed by Gulf Caribe and SIU, would not only be futile, but would result in a long-term freeze of their wages and benefits.

Accordingly, I find and conclude that Respondent Employer is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The consolidated complaints allege, the answers admit, and I find that the Respondent Union and the Charging Party are now, and at all times material have been, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Gulf Caribe Maritime, a corporation that provides marine transportation services,⁴ in March 1999, expanded its operations from Mobile, Alabama, to Southern California by purchasing some of the assets of Antone Sylvester Tug Service, Inc., a small tug company providing ship mooring and ship crew passenger launch services in El Segundo, California. Negotiations for the purchase had begun September 1998, and concluded in January 1999 with a decision to go forward with the purchase.

While employed by Antone Sylvester Tug Service, Inc., the eight employees involved here had been unrepresented for the purposes of collective bargaining.

On March 11, Pepper met with the eight employees of Antone Sylvester Tug Service, Inc., and told them that Gulf Caribe offered employment to all of Sylvester's employees. All eight accepted.

The SIU has represented Gulf Caribe employees in Mobile. On March 4, 1999,⁵ Pepper, Gulf Caribe's president and general manager, sent a letter to Tellez, a vice president of the SIU, informing him of Gulf Caribe's plans, and noting that the deal was expected to close on March 15.

The SIU approached the eight new employees about signing SIU authorization cards. After meetings between the employees and Marrone on March 12 and 13, all eight employees signed authorization cards which are facially valid designations of collective-bargaining authority, on March 13.⁶ However, within days, on March 23, the employees sought to rescind their authorization cards.⁷

⁴ As described at trial, Gulf Caribe's Mobile operations consist of operating two large seagoing tugs, one of which makes trips to and from Puerto Rico, and the other of which performs general towing and assistance in the Mobile area, and it never previously provided services, or used equipment, similar to those at the El Segundo facility. At El Segundo, the services done consisted of meeting arriving Chevron Oil Company tankers about a mile out in the harbor and mooring them securely, so that they could be unloaded, as well as getting them free when they were finished unloading and departed.

⁵ Hereafter, all dates refer to the calendar year 1999, unless otherwise shown.

⁶ At trial, it was stipulated that the cards read as follows: "I hereby designate, appoint and authorize the Seafarers, International Union of North America, AGLIWD, to represent me in any and all negotiations relative to collective bargaining with my present or any future employer. This authorization shall continue in full force and effect until have revoked same by written revocation to the secretary/treasurer of said union."

⁷ Other stipulated facts included:

1. Bobby Pepper and Matt Merrill have been agents of Gulf Caribe within the meaning of Sec. 2(13) of the Act and supervisors within the meaning of Sec. 2(11) of the Act.

The SIU-Gulf Caribe collective-bargaining agreement in Mobile contained an accretion clause, and, by letter dated March 11, the SIU asserted a claim to Gulf Caribe that it represented the employees at Gulf Caribe's new operation by virtue of that clause.

By a document bearing the date of March 17, 4 days after all the employees signed authorization cards. Gulf Caribe recognized the SIU as the exclusive bargaining representative of its new employees.⁸

Negotiations began shortly afterward and, on March 24, resulted in an addendum to the agreement that provided the new employees with a substantial increase in wages and benefits effective March 16 (the addendum). The eight affected employees sought to, and did, participate personally in the negotiations, as discussed more fully below.

Counsel for the General Counsel and IBU seek to show that the evidence in this case, largely undisputed, establishes that the employee authorization cards obtained by SIU on March 13, 1999, were tainted by unlawful conduct engaged in by representatives of both Gulf Caribe and SIU, and that, accordingly, SIU did not represent an uncoerced majority of the El Segundo employees at the time it accepted recognition from Gulf Caribe as the bargaining agent for those employees, and, as a result, both the recognition and the subsequent agreement extending the existing Gulf Caribe-SIU contract to the new operation were unlawful.

Counsel for the General Counsel and IBU further seek to show that Gulf Caribe's subsequent actions on May 26 and 27, 1999, when it announced and implemented a "rollback" of the then-existing wage and benefit levels for the eight El Segundo employees, back to the levels in effect prior to the Gulf Caribe-SIU contract, was on its face an act of retaliation against the eight employees for their support of IBU and their attempt to vindicate their Section 7 rights by resort to Board remedies. They also seek to show that Gulf Caribe's written statements to the employees regarding the "rollback" of existing wage and benefit levels, suggested that the wages and benefits would be restored if the employees abandoned their support for IBU, and withdrew their petition for a Board-conducted election⁹ and their unfair labor practice charges challenging the Gulf Caribe-

2. At all times material, Nicholas Marrone, Augustin Tellez, and John Cox have been agents of SIU within the meaning of Sec. 2(13) of the Act.

3. About March 16, 1999, Gulf Caribe commenced its operations at the California facility.

4. On or about May 4, 1999, Gulf Caribe received a copy of the Board's proposed settlement agreement.

5. On May 26 and 27, 1999, Gulf Caribe distributed to all its California facility unit employees two memoranda.

6. Gulf Caribe implemented the changes in wages and other terms and conditions of employment as described in its May 26 memoranda.

⁸ The Charging Party argues that I should infer that recognition was granted here before the cards were signed by the employees. However, there is no direct evidence that the March 17 date on the recognition document is inaccurate or false. Nor, having considered the various arguments advanced in the Charging Party's brief to the effect that recognition was, in fact, granted prior to the date when the employees signed the authorization cards, am I persuaded that there is any validity to this argument. At best, the arguments are based upon speculation and conjecture. I reject this proposed conclusion.

⁹ On March 23, a petition was filed by the IBU for an election at the Redondo Beach facility of Gulf Caribe. Of course, processing of that petition has been blocked by the pendency of the unfair labor practice charges which are at issue in this case.

SIU contract, constituted unlawful assistance to SIU in violation of Section 8(a)(2) of the Act as well as unlawful discrimination in violation of Section 8(a)(3) and (4).

Both Respondents deny all wrongdoing, and claim that all their actions were lawful.

B. Discussion

First of all, all parties recognize and concede that this case does not involve what is referred to as a traditional “community of interest” accretion issue, i.e., one where factors such as integration of operations, centralization of administration and management control, geographic proximity, similarity of working conditions and skills, labor relations control, common or separate supervision, and bargaining history, are examined in order to determine whether it is appropriate to extend a union’s representation rights at one location of an employer to employees at another location of the same employer. That theory is quite obviously inapplicable to this case, and could not be used to justify permitting the SIU to represent the eight employees at Gulf Caribe’s Redondo Beach facility.

Instead, this case involves the application of a whole set of rules laid down to govern just when, pursuant to provisions of a collective-bargaining agreement,¹⁰ a union entitled to recognition at one location of an employer may be validly recognized as the sole an exclusive collective-bargaining representative of the employees at another, subsequently obtained, location of the employer. See in general *Kroger Co.*, 219 NLRB 388 (1975). Over and over the Board has announced that it does not favor such actions, and

will not, under the guise of accretion, compel a group of employees, . . . who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election or by some other evidence that they wish to authorize the Union to represent them. [*Melbet Jewelry Co.*, 180 NLRB 107, 110 (1969).]¹¹

Rather, the Board’s policy is to be very restrictive when examining accretion issues. *Towne Ford Sales*, 270 NLRB 311 (1984); *Safeway Stores*, 276 NLRB 944 (1985).

However, the Respondents correctly point out that the Board does permit accretion provisions to be given effect where the union has demonstrated, through valid authorization cards or some other method, that it represents an uncoerced majority of the employees at the new facility. *Ladies’ Garment Union v. NLRB*, 366 U.S. 731, 738 (1961).

Thus, summarizing, I regard the law of this case to be that (a) I should be quite wary of compelling the Redondo Beach employees of Gulf Caribe to be part of the overall unit; (b) but should do so if I find that, prior to Gulf Caribe’s recognition of the SIU at Redondo Beach, the SIU obtained valid, uncoerced designations of bargaining authority from the affected employees.

This is so because the Board also finds that employees should be bound by the clear unambiguous language of what they sign unless that language is deliberately and clearly can-

celed by a union adherent with words calculated to direct the signer to disregard and forget the language above his signature. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 606 (1969); *DTR Industnes*, 311 NLRB 839 (1993).

Thus, while the Board does not favor accretion, neither, however, does it favor affording employees the right to back out on their own actions, if uncoerced. They cannot, without consequences of some kind, revoke the clear words of their authorization cards, and claim coercion, only after they have deliberately sat back to watch, encourage, and participate in negotiations with the employer to see what they would get I find, as I announced at trial that is precisely what the affected employees in this case did. Moreover this “wait and see” strategy was consciously adopted after one employee met with the rival IBU, and after employees met with the SIU to discuss negotiation demands. Accordingly, even though I commented at trial that I found that each of the employees appeared to be truthful persons, I cannot ignore their demonstrated penchant for changing their story and actions based upon their various perceptions of where their self-interest lay at any given moment. In short, I examine their versions of events with more than one grain of salt tucked firmly in my cheek.

Thus, I arrive squarely at the major issue in this case, i.e., did Gulf Caribe and/or the SIU coerce the employees into signing the cards?

It is part of counsel for the General Counsel’s burden of proving that recognition was granted at a time when the SIU did not represent an uncoerced majority of the employees to also prove that the eight employees either did not sign the authorization cards, or that they did so a result of coercion. Of course, as she correctly points out, she need not do so with mathematical precision; a pattern of illegal assistance or coercion, in the totality of the circumstances, may carry the day for her. *Amalgamated Local Union 355 v. NLRB*, 481 F.2d 996 fn. 8 (2d Cir. 1973); *SMI of Worcester, Inc.*, 271 NLRB 1508, 1520 (1984); *Siro Security Service, Inc.*, 247 NLRB 1265 (1980).

Counsel for the General Counsel cites *Windsor Castle Health Care Facilities*, 310 NLRB 579, 590 (1993), for the general proposition that once there has been a showing of “conduct of such a nature as leads employees to reasonably conclude that the employer favors their selection of the union, then any subsequent recognition is tainted and may not be supported by claimed majority support garnered as the fruit of such unlawful activity.”

She then points to Pepper’s meeting with the employees on March 11. She argues that the various comments that Pepper made, according to the testimony of the various employees who testified (Vera, Sellers, Palmer, and McMurray), amount to coercion.

Summarizing the testimony of the employees concerning this meeting, employee Vera testified that the employees had for months and months been concerned about the possibility that their jobs were at risk because of rumors concerning some impending change in the operation, including the possibility that the operation would be taken over by Foss, Gulf Caribe’s parent, or a subsidiary of Foss. On March 10 they learned from Bobby Sylvester, the general manager of their current employer, that the next day there would be a meeting. Next day, Sylvester called them together and told them that the new employer would like to talk to them. Pepper introduced Merrill as the new manager, and Merrill spoke a bit about his background.

¹⁰ Commonly referred to as “after acquired stores” provisions.

¹¹ The unit in issue seems generally to consist of all nonsupervisory employees engaged in the work of mooring and unmooring ships at the single facility which has been engaged in that business for over 40 years. Thus, it is a presumptively appropriate unit for collective bargaining.

Then Pepper said that Chevron, the client, had indicated that it was happy with all of them, and that they were all hired. After that, Pepper responded to repeated questions that the employees had. They asked him about some changes that had been on their minds, and he told them that things would be run exactly as they had been by Sylvester. He explained that Gulf Caribe had an operation in Mobile, that there it had a contract with the SIU, that among their benefits was that employees' needing to have their licenses upgraded could obtain schooling at the expense of the union and the company, that (responding to a question) he believed that the SIU had gotten the Mobile employees a pay raise, that (without elaboration) they had a very good relationship with the union, and that the SIU would probably be getting in touch with them and, "we might want to hear what they have to say." Vera recalled that one of the employees spoke and asked Pepper, "So you want us to sign with the SIU Union," and that Pepper responded, "I can't tell you what to do." After the meeting concluded, the employees wandered back to the working deck of the boat and, later, got together at the home of one of them. There, their consensus was that, though Pepper hadn't said so, he wanted them to go with the SIU.

Counsel for the General Counsel then went on with evidence of contacts between the SIU and the employees, in an effort to demonstrate that the authorization cards were tainted by coercion and invalid.

On March 12, Marrone went to the Redondo Beach facility and met employees Palmer and Sellars as they were finishing their work shift. He identified himself and told them he was trying to get all the employees to sign cards, so as to have a stronger bargaining position. When Palmer mentioned the possibility of "options" with other unions, or "shopping around," according to Palmer, Marrone told them that there was a contract, and they were going to be SIU, without choice. Marrone left some cards with them to get signed by other employees. Sellars recalled Marrone telling them he could get them a 20-percent pay increase.

Later that same day, since they'd told him that more employees would be there around midmorning, Marrone met again with Palmer and Sellars at their place of work. According to Sellars, the concept of "shopping around" was again raised, and Marrone again told them there'd be none of that, and that because of the accretion agreement they were going to be SIU whether they liked it or not. Additionally, he quoted Marrone as offering to waive the SIU initiation fee if they all signed cards. He could not be clear about whether or not Marrone also said that they had to join the SIU.

Evidently just minutes later, Vera was approached in the parking lot by Marrone. Vera recalled Marrone urging him to join, saying that time was of the essence, and that he wanted to get the cards signed by March 15. When Vera asked why he should not talk to some other unions, Marrone rejoined that there'd be none of that because the SIU had jurisdiction because of the accretion clause in the Mobile contract, and that he'd be SIU whether he liked it or not. Marrone explained that if all the employees signed authorization cards by March 15, the initiation fee of the SIU would be waived. There is no evidence that Marrone ever advised any employee that the reason why he wanted the authorization cards signed was to make the accretion clause operable.

Next morning, March 13, Vera telephoned Pepper and said he understood that employees had a choice, but that SIU repre-

sentatives were telling employees there was no choice due to an accretion clause. So, Vera asked Pepper if it was true that there was accretion language in the contract. Pepper confirmed that there was. Vera deduced from this that what Marrone had been saying was true.

On March 14, employee McMurray was met by SIU port agent Cox as he was on his way to work. Cox thanked him for signing a card. McMurray rejoined that he'd not signed to show support, but to retain his job, and that the way that employees had been forced into the SIU was BS. He asked why employees couldn't have had more time to consider what SIU had to offer, and what the hurry was. Cox brought up the waiver of initiation, but left McMurray with a feeling that his questions hadn't been answered.

Next morning, March 15, Vera contacted the IBU.

On the evening of March 16, the employees found out that the SIU intended to meet with Gulf Caribe to negotiate on March 17. However, they had never spoken to the SIU concerning the issues which concerned them. Thus, Vera telephoned Pepper, and after confirming that negotiations were going forward the next day, Vera stated that things were going too fast and that the employees did not want negotiations to go forward. Pepper said that they would.

On March 17, Sellars told Cox the same thing, i.e., things were going too fast. That same day, when Marrone telephoned Vera, Vera asked that negotiations be stopped.

However, when it became clear that negotiations would go forward, the employees insisted upon meeting with Marrone. At that meeting they gave him their demands, and selected employee Lund to participate for them at the negotiation meetings. They also asked for assurance that no contract would be signed without the employees being allowed to vote upon it. Marrone, but provided no written assurances, as he'd been requested to do.

Negotiations went forward on March 17 and 18, with Lund in attendance. A further session was set for March 24, not attended by Lund.

In the interim, on March 23, the employees signed IBU cards, as well as a letter purporting to revoke their SIU cards. Among other bases for their action, the letter made reference to the SIU offer to waive the initiation fees.

Later that same day, March 23, as mentioned above, the IBU filed a petition with the Board.

Next day, March 24, the parties met, agreed on, and signed a collective-bargaining agreement/addendum.

That same day, Marrone called employees, telling one (Sellars), that he'd made a "fucking mistake," and would regret his actions, and another (McMurray) that he knew he'd gone to sign a pledge card with the IBU and he'd made a big mistake.

On May 4, the Board sent it's proposed settlement agreement to Gulf Caribe.

On May 26, Gulf Caribe distributed a memo to employees "rolling back" wages and benefits to those in existence before March 15. On May 27, Gulf Caribe distributed to employees a memorandum entitled "Status of NLRB Action."

C. Conclusions

1. Pepper's meeting with employees on March 11

I regard counsel for the General Counsel's reliance on *Windsor Castle*, supra, as inapposite to this case. The general proposition cited therefrom, that "once there has been a showing of conduct of such a nature as leads employees to reason-

bly conclude that the employer favors their selection of the union, then any subsequent recognition is tainted and may not be supported by claimed majority support garnered as the fruit of such unlawful activity,” is obviously the current Board law. However, it fails the test of whether or not it applies to the facts of this case.

Here, the issue at hand is whether or not the employer “engaged in conduct of such a nature as leads employees to reasonably conclude that the employer favors the union.” I conclude that it did not in the meeting between Pepper and the employees on March 11. Where is the conduct that “reasonably” led employees to that conclusion? I see none. It was the consensus of employees,¹² according to Vera, that they were actually free to exercise their own option or choice regarding representation, and certainly no testimony has quoted Pepper as telling them differently. As employee Palmer acknowledged, Pepper never said anything that would give them reason to believe that the employees had no choice in the matter. There is no testimony that Pepper threatened employees, or that he offered or promised increased wages or benefits.¹³ Nor is there any testimony that Pepper so much as mentioned authorization cards, much less that he indicated to employees what Gulf Caribe’s wishes were with respect thereto. Nowhere is there any testimony that even suggests that Pepper said or hinted that there was any linkage between whether or not they would be employed and their choice of representation. To the contrary, it is clear that Pepper’s very first action in the meeting was to assure all the employees that they had been hired. Even when repeatedly invited to explain what they observed or heard that led them to their conclusion that Gulf Caribe wanted them to choose the SIU as their representative (even if it had been nothing more than a wink, a smile, a facial expression, or body language), the employees were unable to point to anything done or said by Pepper which might reasonably lead to that conclusion.

Accordingly, I find and conclude that the allegations regarding Gulf Caribe’s threats, and coercion at the March 11 meeting are unproven, and without merit. As a consequence, they should, and will, be dismissed, and I find and conclude that the employees’ authorization cards are not tainted by coercion on the part of Gulf Caribe.

2. Vera’s call to Pepper on March 13

I accept as law the principle from *Sav-On Drugs*, 267 NLRB 639 (1983), that coercive statements are no less coercive simply because they are couched in ambiguous or obscure language. However, I decline to apply it to these facts. In *Sav-On*, *ibid*, the employer did more than simply remain silent; he specifically told employees that they had no choice in whether to select the union, that a petition against a union would not work, and led employees to believe that they would be terminated if they did not sign for the union. That is a far cry, indeed, from the evidence in this case. So far as this record is concerned, on March 13 Pepper did nothing more than respond to a direct question with an equally direct, and truthful, answer, when he told Vera that yes, there is accretion language in the contract.

I am aware of no authority, and none has been cited to me, to support counsel for the General Counsel’s additional argument

¹² As employee Sellars put it, quoting employee Thomas, “Wow, do they want us to join this union (SIU) or what!”

¹³ Indeed, when the employees asked about getting paid for Sunday overtime, Pepper declined to promise anything, but simply said that things would be run exactly the same.

that Pepper owed Vera the duty to go further, and to explain things so that Vera understood the true state of affairs. First of all, it is unclear that Pepper, himself a layman, had any special or truer understanding of the ins and outs of the law of accretion than did Vera. Nor, based on Vera’s testimony, is it clear that, as asserted by counsel for the General Counsel, Pepper was made aware of any special ignorance on the part of Vera or the other employees. All that Vera disclosed to Pepper was that Marrone had been telling them some things, and then he asked whether or not the contract contained an accretion clause. Without more, I do not see Pepper’s action, or inaction, as rising to the level of deceit.

Accordingly, this allegation is found to be without merit, and shall be dismissed.

3. Marrone’s statements to employees

Unlike at trial, having now examined the evidence in detail, I find that Marrone’s statements to employees crossed over the line of legitimate opinion, and were coercive in some instances. I find merit in the argument of counsel for the General Counsel that, by continually telling employees that he wanted them to sign cards in order to demonstrate solidarity and to increase his bargaining strength, and by never telling them that, without such cards, he had absolutely no right to negotiate at all, whether from a position of strength or from a position of weakness, Marrone engaged in deceit. Such deceit, when combined with his repeated statements to employees that they had no right to look into representation by another union, and that they would be SIU whether they liked it or not, could do nothing but produce the feeling in the employees that it was futile to resist, and that they must sign the authorization cards which he sought from them.

Thus, I now find and conclude that by repeatedly telling employees that they had no choice, and that they would be SIU whether they liked it or not, while at the same time deceiving them about the reason why he needed or wanted the authorization cards, amounts to coercion in my opinion, and was violative of Section 8(b)(1)(A) of the Act. These violations, of course, have the effect of tainting the authorization cards which he obtained, and upon which recognition of the SIU was based.

4. The offer to waive initiation fees

Citing *Savair Mfg. Co.*, 414 U.S. 270 (1973), and *Gregg Industries*, 274 NLRB 603 (1985), counsel for the General Counsel argues that when Marrone explained to employees that if all the employees signed authorization cards by March 15, the initiation fee of the SIU would be waived, he was illegally inducing employees to sign the authorization cards.

Both Respondents argue vigorously and persuasively that those cases do not apply to this situation, where the promise was to waive the fee if all the employees signed cards by a certain date.

However, I am unable to make that distinction. The suggestion is that by virtue of its application to all employees the offer is shielded from having any discriminatory or coercive effect. There is no way of knowing that the employee complement will always remain as it is. And, where as here, it appears that at least some employees were wavering as to whether or not to sign the cards, I cannot see why the proscriptions of *Savair* and *Gregg* should not apply.

Accordingly I find and conclude that Marrone’s offer to waive initiation fees was violative of Section 8(b)(1)(A) of the Act, and tainted the employees’ authorization cards.

5. The “Roll Backs” in the latest complaint

Here the documentary evidence shows that in May Gulf Caribe notified employees that it was still involved in proceedings with the NLRB. On their faces, the memos of explanation which Gulf Caribe distributed to employees seem to advance the notion that it was merely acting reasonably, and that, in order to avoid further legal entanglements for itself, it had to roll back wages and benefits to the levels which existed before recognition was granted to the SIU.

Both Respondents argue that there is a complete absence of evidence of any actual intent to discriminate or retaliate against employees on account of, any union activities they may have engaged in, or on account of their participation in Board proceedings in an effort to vindicate their rights under the Act.

Indeed, Gulf Caribe has shown that at the time of the “roll backs,” the Board was engaged in settlement negotiations with it, and that, among other things, the Board sought to have Gulf Caribe restore the status quo which existed just prior to the grant of recognition. However, this showing ignores the fact that, in order to avoid having the blame for loss of wages or benefits placed upon the party who sought vindication for the employees’ rights, the Board’s orders to restore the status quo in such situations normally include provision that wages or benefits shall be reduced only if that party requests that it be done.

Here, there was no requirement, settlement pending or not, for Gulf Caribe to roll back wages and benefits. Only if there had been a finalized settlement, and only if requested by IBU, would that have occurred.

By taking the initiative and engaging in a unilateral roll back, Gulf Caribe made a vivid demonstration of power, and of the sorts of ill effects that might attend those who interfered in its affairs by seeking redress of rights by the Board. In doing so, in my opinion it furnished per se evidence of the intent to discriminate and retaliate.

Accordingly, I find and conclude that by publishing its memoranda of May 26 and 27, and by rolling back wages and benefits, Gulf Caribe has violated Section 8(a)(1), (3), and (4) of the Act.

Summarizing, in light of my findings, above, that the authorization cards of the employees were tainted by the unfair labor practices of the SIU, it follows that they may not stand as evidence of uncoerced majority support of the SIU at the time when Gulf Caribe granted recognition to the SIU at the Redondo Beach facility. As a result, I find and conclude that, by granting recognition to the SIU under these circumstances, and by announcing and engaging in a “roll back” of wages and benefits, Gulf Caribe violated Section 8(a)(1), (2), (3), and (4) of the Act.

Further, in light of my findings, above, I find and conclude that by coercing employees to sign authorization cards to support it, and by demanding and accepting recognition from Gulf Caribe based upon such tainted authorization cards, the SIU has violated Section 8(b)(1)(A) of the Act.

THE REMEDY

Having found that Respondents have violated the Act, I shall recommend that they be required to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

CONCLUSIONS OF LAW

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

2. Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Employer violated Section 8(a)(2), (3), (4), and (1) of the Act by granting recognition to Respondent Union at a time when Respondent Union did not represent an uncoerced majority of employees, and by discriminating and retaliating against employees because of their union activities and/or their having engaged in activities before the Board in an effort to secure redress of their rights under the Act, rolling back their wages and benefits to the level they were at before Respondent Employer granted recognition to Respondent Union. Respondent Employer has not violated the Act in any other respect.

5. Respondent Union violated Section 8(b)(1)(A) by demanding and accepting recognition as the exclusive collective-bargaining representative of Respondent Employer’s employees at a time when it did not represent an uncoerced majority of such employees, and by coercing such employees to designate and select it at their representative.

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

On the basis of the foregoing findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I issue the following recommended¹⁴

ORDER

A. Respondent Employer Gulf Caribe Maritime, Inc., a subsidiary of Foss Maritime Company, Mobile, Alabama, and Redondo Beach, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Recognizing Seafarers’ International Union, Atlantic, Gulf, Lakes and Inland Waters District, affiliated with the Seafarers, International Union of North America, AFL–CIO (SIU) as the exclusive collective-bargaining representative of its employees at its Redondo Beach, California facility, unless and until that labor organization has been duly certified by the Board as the exclusive representative of these employees.

(b) Giving any force or effect to any agreement purportedly having been reached with the labor organization regarding the employees.

(c) Discriminating or retaliating against employees because the employees have engaged in union activities or have participated in the Board’s processes by giving testimony under the Act, by reducing their wages or benefits, or by any other means.

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

¹⁴ The General Counsel’s motion to accept documents into the record is granted. All other outstanding motions inconsistent with this recommended Order are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the Board, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

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

(a) Withdraw and withhold recognition from the Respondent SIU unless and until it shall have been duly certified by the Board as the exclusive bargaining representative of its employees at the Redondo Beach, California facility.

(b) Cease giving effect to the collective-bargaining agreement between Respondent Employer and Respondent SIU, and to the addendum agreement executed by them on March 24, 1999, with respect to employees at the Redondo Beach, California facility, provided, however, that the Respondent Employer shall not be required to vary or abandon any wage increase or other benefit which may have been established pursuant to the performance of those agreements.

(c) Make whole the employees for all wages and benefits lost as a result of the "roll back" of May 26 and 27, by paying them for any loss of earnings and other benefits suffered as a result of the discrimination and retaliation against them.

(d) Preserve and, on 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 backpay due under the terms of this Order.

(e) Post at its facilities in Redondo Beach, California and Mobile, Alabama, copies of the attached notice marked "Appendix A."¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent Employer 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 Employer to ensure that the notices are not altered, defaced, or covered by any other material.

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

¹⁵ If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States court of appeals enforcing an Order of the National Labor Relations Board."

B. Respondent Union Seafarers' International Union, Atlantic, Gulf, Lakes and Inland Waters District, affiliated with the Seafarers' International Union of North America, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Seeking or accepting recognition from the Respondent Employer as the collective-bargaining representative of its employees at its Redondo Beach, California facility, until and unless the Respondent Union has been certified by the Board as the exclusive bargaining representative of these employees.

(b) Restraining or coercing employees by threatening that employees have no choice but to go SIU, by implying or stating that the efforts of employees to look into or explore the possibilities of representation by other labor organizations is not possible or permitted, or by offering to waive initiation fees if all employees sign authorization cards for it by a date certain.

(c) Giving any force or effect to the agreement or addendum reached with the Respondent Employer in March 1999.

(d) 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 actions necessary to effectuate the policies of the Act.

(a) Post at its facilities nearest Redondo Beach, California, and in Mobile, Alabama, in all places where notices to members are customarily posted copies of the attached notice marked "Appendix B."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent Union's authorized representative, shall be posted by the Respondent Union 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.

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

¹⁶ See fn. 15, above.