

Mar-Jam Supply Co. and Teamsters Local 331 a/w International Brotherhood of Teamsters, AFL-CIO and United Brotherhood of Carpenters and Joiners of America, Local 623, AFL-CIO. Cases 4-CA-27831 and 4-CA-27867

December 20, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN
AND WALSH

On March 17, 2000, Administrative Law Judge Earl E. Shamwell Jr., issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The Respondent also filed a reply brief.

The National Labor Relations 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 only to the extent consistent with this decision and to adopt the recommended Order as modified and set forth in full below.²

We find it unnecessary to pass on the judge's finding that Howard Motter is a supervisor within the meaning of Section 2(11) of the Act, because we agree with the judge's alternative finding that Motter acted as an agent of the Respondent within the meaning of Section 2(13) of the Act. We find that Motter's misconduct is attributable to the Respondent on that basis.

Motter, as the Respondent's witness, testified that he was the Respondent's operations manager, and that his duties included generally running the warehouse. Indeed, the Respondent's general manager, Scott Doyle, testified that Motter's duties were "pretty much like mine, but narrowed down to just people in the warehouse." According to Doyle, Motter routed the trucks, assigned the routes, and assigned warehouse tasks every day, and "was in charge of setting up people to receive all the material, pretty much the day to day activity of everybody in the warehouse, he tried to oversee." And,

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 Drywall 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 shall modify the judge's recommended Order to conform to the requirements of *Indian Hills Care Center*, 321 NLRB 144 (1996), as revised in *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall also modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). In addition, we have inserted the conventional reinstatement language.

as more fully discussed by the judge, the warehouse employees regarded Motter as their immediate supervisor.

In *Cooper Industries*, 328 NLRB 145 (1999), the Board stated:

The Board applies common law principles of agency when it examines whether an employee is an agent of the employer while making a particular statement or taking a particular action. Under these common law principles, the Board may find agency based on either actual or apparent authority to act for the employer. As to the latter, "[a]pparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question." The test is whether, under all the circumstances, employees "would reasonably believe that the [alleged agent] was reflecting company policy and speaking and acting for management." Thus, it is well settled that an employer may have an employee's statement attributed to it if the employee is "held out as a conduit for transmitting information [from management] to other employees." [Citations omitted].

Id.

Applying these principles to the facts here, we agree with the judge that Motter has been shown to be an agent of the Respondent within the meaning of Section 2(13) of the Act, and we find that Motter's misconduct is attributable to the Respondent on that basis.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Mar-Jam Supply Co., Inc., Pleasantville, New Jersey, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Interrogating employees concerning their union activities.

(b) Informing employees that it would terminate employees if the Company recognizes the Carpenters as the collective-bargaining representative of its employees.

(c) Promising employees wage increases and other benefits, including health insurance and profit sharing, if employees support the Carpenters instead of the Teamsters.

(d) Threatening to discharge all employees who support the Teamsters instead of the Carpenters.

³ Chairman Hurtgen finds, in agreement with the judge, that Motter is a statutory supervisor.

(e) Promising to increase employee wages by and through reimbursement of dues paid by employees to the Carpenters.

(f) Informing employees that they cannot wear, maintain, or distribute union paraphernalia or literature at its Pleasantville, New Jersey facility.

(g) Rendering support and assistance to the Carpenters by requiring employees to sign Carpenters' authorization cards.

(h) Rendering support and assistance to the Carpenters by distributing Carpenters' hats, paraphernalia, and literature to employees while they are working at the Respondent's Pleasantville facility.

(i) Rendering support and assistance to the Carpenters and discriminatorily encouraging support for the Carpenters and discouraging support for the Teamsters by granting wage increases to employees who sign with the Carpenters.

(j) Rendering support and assistance to the Carpenters by granting recognition to the Carpenters as the exclusive bargaining representative for its employees, notwithstanding the previous filing of a valid representation petition seeking an election by the Teamsters and the Carpenters' not representing an uncoerced majority of the appropriate unit.

(k) Discriminatorily discharging employees who support the Teamsters instead of the Carpenters.

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

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

(a) Within 14 days from the date of this Order, offer Arthur English 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, dismissing, if necessary, any employee hired to fill the position.

(b) Make Arthur English whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Arthur English, and within 3 days thereafter notify Arthur English in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel re-

ports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Pleasantville, New Jersey, copies of the attached notice marked "Appendix."⁴ 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 the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 14, 1999.

(f) 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.

CHAIRMAN HURTGEN, concurring and dissenting.

The General Counsel argued that the Respondent's recognition of the Carpenters was unlawful because (1) the recognition occurred after the filing of a rival petition by the Teamsters; and (2) the Carpenters did not have support of an uncoerced majority of the unit. The judge agreed with the General Counsel on both issues. However, as to the second point, the judge did not clearly address the issue of whether the relevant unit was a unit of 11 Labor Pool and Mar-Jam employees, or a unit of 3 employees who were deemed by the Respondent to be employees only of Mar-Jam.

The Respondent excepted to the judge's conclusion that "Mar-Jam rendered assistance and support to the Carpenters in violation of Section 8(a)(2) and (1) of the Act by granting recognition to the Carpenters." I conclude that the Respondent's exception is broad enough to cover both of the arguments made by the General Counsel and adopted by the judge. In light of my conclusion regarding the Respondent's exception, and because the

⁴ 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."

judge did not clearly address the composition of the unit, I consider it appropriate to address herein the scope of the unit.

I agree with the judge's findings that the Respondent violated Section 8(a)(1), (2), and (3) of the Act. With respect to the 8(a)(2) violations arising from the Respondent's recognition of the United Brotherhood of Carpenters and Joiners of America, Local 623, AFL-CIO (the Carpenters), I note particularly the following:

The judge found, *inter alia*, that the Respondent violated Section 8(a)(2) by granting recognition to the Carpenters as the exclusive collective-bargaining representative of the unit at a time when the Carpenters did not represent an uncoerced majority of the employees in the unit. An employer who grants exclusive recognition to a minority union "contribute[s] . . . support" to the minority union in violation of Section 8(a)(2), *Ladies Garment Workers (Bernhard-Altman Texas Corp.) v. NLRB*, 366 U.S. 731, 738 (1961), even if the employer believes in good faith that the union enjoys majority support. *Id.* at 739.

A determination as to whether the Carpenters Union was a minority union, and therefore whether the Respondent violated the Act by recognizing the Union, requires, *inter alia*, a finding as to the number of employees in the bargaining unit at issue. There is some question regarding this number. The Respondent used a company known as Labor Pool to recruit, train, oversee benefits for, and manage certain employees who worked at Mar-Jam. Most of the employees who performed work in or related to the warehouse were Labor Pool employees.¹ However, two of the warehouse employees worked directly for Mar-Jam.

At the time of the Respondent's grant of recognition to the Carpenters, there were 11 employees performing work in or related to the Respondent's warehouse. Two of those warehouse employees, Chuck Doerr and Jamre Miller, worked directly for Mar-Jam. The remaining warehouse employees were Labor Pool employees. The judge, however, found, and we agree, that the Respondent was the sole Employer of all of the warehouse employees.

At the time the Respondent recognized the Carpenters, the Carpenters had three signed authorization cards. The cards were signed by Chuck Doerr and by two Labor

Pool employees. In a January 7 letter from general manager Scott Doyle to the Carpenters, the Respondent agreed that upon receipt from the Carpenters of "a majority of signed authorization cards from amongst the three (3) [Mar-Jam] employees," the Respondent would "recognize [the Carpenters] as the collective-bargaining representative of *such three Mar-Jam employees.*" (Emphasis added.) The letter reiterated that "[t]hese three employees constitute all of Mar Jam's regular employees, in a unit of drivers, helpers, and yardmen."²

The Respondent expressly declared that recognition did not extend to "temporary employees, employees working for any subcontractor, or any supplier of labor" to the Respondent. The formal recognition agreement, signed January 22, contained similar language expressly referring to cards from "amongst the majority of the three employees presently employed by Mar-Jam."³ The unit was formally described as:

Regular full-time and part-time employees, drivers, forklift operators, boom operators, and yardmen, excluding temporary employees, casual employees, employees working for a subcontractor supplier of labor to the Company, office clerical employees, guards, and supervisors as defined in the [Act].

However, Manager Doyle at trial testified that there were 11 employees in the unit, which is the total number of warehouse employees, *i.e.*, including Labor Pool employees.

If the unit was comprised of the 11 warehouse employees, and the Carpenters had only three authorization cards, the Carpenters clearly did not represent a majority of the employees in the unit at the time it extended recognition.⁴ Further, assuming *arguendo* that the Respondent's intent was to recognize a unit, which included only Mar-Jam employees and excluded the Labor Pool employees, the Carpenters still represented a minority of the unit. Of the three men who signed Carpenters cards, only one—Doerr—was a Mar-Jam employee. The other two, Eric Fetrow and Dennis Buonfiglio, were both Labor Pool employees. Consequently, regardless of how the unit is defined, the Carpenters had cards from only a minority of the employees in the unit, and the Respon-

² Although the unit is described in this fashion, it was in fact a warehouse unit.

³ Contrary to the Recognition Agreement, however, Carpenters representative Eustace Eggie testified that he thought there were five employees in the unit.

⁴ In order to have a unit of 11 warehouse employees, Labor Pool and the Respondent would have to be joint employers or a single employer, and the unit would have to include both sets of employees. As noted *supra*, the judge found that the Respondent was the sole employer.

¹ The term "Labor Pool employees," refers to warehouse employees who were sent to the Respondent by Labor Pool. The Respondent distinguishes Labor Pool employees from "Mar-Jam employees," who are employees carried solely on the Mar-Jam payroll. Notwithstanding the Respondent's distinction, however, the judge found, and we agree, as discussed *infra*, that the Respondent Mar-Jam was the sole employer of *all* employees.

dent's voluntary recognition of the Carpenters therefore violated Section 8(a)(2) of the Act.⁵

The judge also found that at the time of the Respondent's recognition of the Carpenters, the Respondent knew that the Teamsters had filed a representation petition with the Board. An employer is prohibited from voluntarily recognizing a union once a rival union has filed a representation petition. *Bruckner Nursing Home*, 262 NLRB 955 (1982). Here, the Teamsters filed a representation petition with the Board on January 21, 1999. A copy of that petition was faxed to the Respondent on the same date. Yet on January 22, one day later, the Respondent voluntarily recognized the Carpenters, thereby violating Section 8(a)(2).

2. The judge and my colleagues find several 8(a)(1) violations, with which I concur. They further conclude that, in some instances, the same conduct violated Section 8(a)(2). I disagree with the latter conclusion, except as set forth below.

The judge found that the Respondent violated Section 8(a)(2) by unlawfully assisting the Carpenters in the following ways: (1) Manager Doyle's informing an employee that only a few of the current employees would be in the Carpenters unit, and the Respondent would terminate other employees (not identified) when it recognized the Carpenters; (2) Doyle's promising increased wages, benefits, and profit sharing to an employee if the employee supported the Carpenters instead of the Teamsters; (3) Doyle's threatening to discharge employees who supported the Teamsters; (4) Supervisor/Agent Motter's promising employees repayment or reimbursement by the Respondent for dues paid by them to the Carpenters if they signed with the Carpenters; (5) Motter's soliciting employees to sign authorization cards for the Carpenters; (6) Motter's distribution of Carpenters hats and literature to employees while they were working at the Respondent's facility; (7) the Respondent's granting recognition to the Carpenters as a collective-bargaining representative of unit employees, knowing and notwithstanding that the Teamsters had filed a valid representation petition with the Board; and (8) the Respondent's granting of recognition to the Carpenters when that union did not represent an uncoerced majority of unit employees.

Neither the text of Section 8(a)(2) of the Act nor the case law, support the proposition that every 8(a)(1) violation, in support of one union and/or against its rival, is necessarily a Section 8(a)(2) violation.⁶ Section 8(a)(2)

⁵ In addition, as discussed *supra*, the cards were coercively obtained.

⁶ See, e.g., *Redway Carriers*, 274 NLRB 1359 (1985) (violations of Sec. 8(a)(1) directed against particular labor organization not ipso facto

proscribes domination or interference with the formation or administration of a labor organization, or contributing financial or other support to it. The section is aimed at the evil of "company unionism."⁷ Concededly, a threat or a promise, designed to coerce employees to support a union, may indeed ultimately assist that labor organization's efforts to become the representative. However, such 8(a)(1) conduct is not itself the kind of "company unionism" to which Section 8(a)(2) is addressed. Thus, I am unwilling to find, without more, that all of the 8(a)(1) conduct set forth above is unlawful under Section 8(a)(2).

On the other hand, actual recognition extended to a minority union, such as the Respondent's recognition of the Carpenters, gives massive and improper support to the union itself, and is the kind of evil to which Section 8(a)(2) is addressed.⁸ Likewise, recognition of one union after a rival union has filed an election petition with the Board, as occurred here, is prohibited by Section 8(a)(2).⁹ Thus, the case law supports a Section 8(a)(2) violation for this conduct.

Finally, the judge concluded that the Respondent violated Section 8(a)(2) and (1) by "requiring employees to sign authorization cards for the Carpenters." I do not believe that the record supports a finding that employees were required to sign authorization cards. I would, however, find that the record supports a conclusion that the Respondent coerced the employees into signing cards. My conclusion would not affect the remedy recommended by the judge.

APPENDIX

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

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

Section 7 of the Act gives employees these rights
To organize
To form, join, or assist any union

violative of Sec. 8(a)(2) simply because a rival union is simultaneously seeking to organize or represent the employees).

⁷ See, e.g., *Miller Waste Mills, Inc.*, 334 NLRB 466, (2001) (the primary purpose of this Sec. 8(a)(2) is to eradicate company unionism); 78 Cong. Rec. 3443 (ed. 1934) (statement of Senator Wagner), reprinted in 1 Leg. Hist., 1935 at 15-16 (1985).

⁸ See generally *Ladies Garment Workers v. NLRB*, 366 U.S. 731 (1961) (employer's recognition of minority union violates Sec. 8(a)(2), despite good-faith belief of majority status).

⁹ *Bruckner Nursing Home*, 262 NLRB 955 (1982).

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 interrogate employees concerning their union activities.

WE WILL NOT inform employees that we will terminate employees if we recognize the United Brotherhood of Carpenters and Joiners of America, Local 623, AFL-CIO (the Carpenters) as the collective-bargaining representative of our employees.

WE WILL NOT render assistance and support to the Carpenters by promising employees wage increases and/or other benefits, including health insurance and participation in profit-sharing plans, if employees support the Carpenters instead of Local 331, a/w the International Brotherhood of Teamsters, AFL-CIO (the Teamsters).

WE WILL NOT render assistance and support to the Carpenters by threatening to discharge employees who supported the Teamsters instead of the Carpenters.

WE WILL NOT render assistance and support to the Carpenters by promising to increase employees' wages (by reimbursement of dues payable to a union) to encourage them to support the Carpenters and discourage them from supporting the Teamsters.

WE WILL NOT coercively inform employees that they cannot wear, maintain, or distribute union paraphernalia or literature at our Pleasantville facility.

WE WILL NOT render assistance and support to the Carpenters by coercing our employees to sign authorization cards of the Carpenters.

WE WILL NOT render assistance and support to the Carpenters by distributing Carpenters' hats, paraphernalia, and literature to employees while they are working at our Pleasantville facility.

WE WILL NOT render assistance and support to the Carpenters by granting wage increases to our employees because they sign authorization cards for the Carpenters.

WE WILL NOT discriminatorily grant wage increases to employees who sign authorization cards for the Carpenters to encourage their support of the Carpenters and discourage support of the Teamsters.

WE WILL NOT grant recognition to the Carpenters as the exclusive bargaining representative of our employees where a valid representation petition seeking an election has been filed with the Board and where the Carpenters do not represent an uncoerced majority of the employees of the appropriate unit.

WE WILL NOT discourage membership in the Teamsters or any other labor organization by discharging employees because of their union or other protected activity, or

by discriminating against them in any other manner with respect to their hours, wages, tenure of employment, or any other terms and conditions of employment.

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

WE WILL within 14 days from the date of the Board's Order, offer Arthur English full reinstatement to his former job or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any employee hired to fill the position.

WE WILL make Arthur English whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL within 14 days of the Board's Order, remove from our files any reference to the unlawful discharge of Arthur English, and WE WILL within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

MAR-JAM SUPPLY CO.

Bruce Conley, Esq., for the General Counsel.

Aaron C. Schlesinger, Esq. (Peckar and Abramson), of River Edge, New Jersey, for the Respondent.

Peter V. Marks Sr., Esq., of Northfield, New Jersey, for the Charging Party.

Howard Simonoff, Esq. (Tomar, Simonoff, Adourian, O'Brien, Kaplan, Jacoby & Graziano, P.C.), of Cherry Hill, New Jersey, for the Party in Interest.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. These consolidated cases were heard before me in Philadelphia, Pennsylvania, on September 27 and 28 and November 10, 1999,¹ pursuant to charges originally filed by Local 331, associated with the International Brotherhood of Teamsters, AFL-CIO (the Teamsters) in Case 4-CA-27831 against Mar-Jam Supply Company (the Respondent), on January 29, 1999. The Teamsters filed amended charges on April 26, 1999. On February 9, 1999, the Teamsters filed charges in Case 4-CA-27867 against the Respondent; and this charge was amended on April 26, 1999. On April 29, 1999, the Regional Director for Region 4 consolidated these cases and issued a complaint against the Respondent.² The consolidated complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Rela-

¹ On November 4, 1999, the hearing was resumed at the Bayside State Prison facility at Ancora, located in Hammonton, New Jersey, where an incarcerated material witness for the General Counsel provided testimony.

² The consolidated complaint also named the United Brotherhood of Carpenters and Joiners of America, Local 623, AFL-CIO as a party in interest.

tions Act (the Act) by interfering with its employees' Section 7 rights; Section 8(a)(1) and (2) by rendering unlawful assistance and support to a labor organization; and Section 8(a)(1) and (3) by discriminatorily discharging its employee Arthur English and granting a wage increase to its employee Charles Doerr. The Respondent thereafter timely filed an answer denying the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs and arguments of the General Counsel, counsel for the Charging Party,³ and counsel for the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New Jersey corporation, with an office and warehouse facility in Pleasantville, New Jersey, engages in the wholesale distribution and sale of building supplies and materials. During the 12-month period preceding the filing of the instant complaint, in conducting its business operations described above, the Respondent purchased and received at its Pleasantville facility goods valued in excess of \$50,000 directly from points outside the State of New Jersey. The Respondent admits, and I find, that at all times material, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

It is admitted, and I find, that at all material times, Local 331 a/w International Brotherhood of Teamsters (the Teamsters), AFL-CIO and Local 623 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (the Carpenters) are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Factual Background*⁴

The Respondent operates as a multistate wholesale purchaser and distributor of building supplies and materials such as sheet rock, roofing products, and synthetic stucco. One of its branches is located at and maintains offices and warehouse facilities in Pleasantville, New Jersey; it is this facility that serves as the focal point of the instant litigation.

Scott Doyle, the Respondent's general manager, has managed the Pleasantville facility for the past 2-1/2 years. Doyle exercised general supervisory authority over the work force at Pleasantville.⁵

³ Counsel for the Charging Party did not submit a brief but joined in the argument and brief submitted by Counsel for the General Counsel.

⁴ In this section, I have determined from the entire record—testimonial and documentary, and the reasonable and credible inferences drawn therefrom—certain matters to be proven as established fact, some of which are not controverted by the parties. To the extent the findings in this section conflict with other evidence of record, I have discredited such contrary evidence consistent with my findings here.

⁵ The Respondent admits, and I find, based on the duties and responsibilities associated with his position, that Doyle is a supervisor and

The Respondent employs approximately 20 employees who function as sales people, clerical office workers, and warehouse workers. The clerical office workers and sales personnel generally are administratively designated "Mar-Jam" employees; warehouse workers—laborers, forklift drivers, boom operators, and truck drivers—are designated Labor Pool workers. The Respondent's "labor pool" employees generally are obtained from a separate company—Labor Pool—with which the Respondent contracts for various employment services. Labor Pool serves as a clearinghouse of sorts for the Respondent's warehousemen and drivers. Labor Pool identifies potential employees, trains, assigns, and transfers them between the Respondent's various branches, and also handles payroll and employee benefits for the Respondent's employees. Although Labor Pool acted as an employment agent for the Respondent, the Respondent's Pleasantville management (Doyle) also directly hired and fired employees carried as Labor Pool and reserved to itself the designation of employees as Mar-Jam or Labor Pool. Moreover, the Labor Pool workers were considered a single unit and were not considered temporary employees by the Respondent.⁶ During the relevant period, the Respondent employed about 9-11 Labor Pool workers at the Pleasantville facility, all of whom worked under terms and conditions exclusively set by the Respondent and were solely accountable to the Respondent's onsite managers and supervisors for their work assignments, time and attendance, leave, and discipline, as well as compliance with company work rules and regulations.⁷ Labor Pool plays no part in the day-to-day operation of the Pleasantville facility and has none of its representatives onsite.⁸

agent of the Respondent within the meaning of Sec. 2(11) and (13), respectively, of the Act.

⁶ Doyle credibly testified about the Mar-Jam/Labor Pool designations. Essentially, the Mar-Jam employees were permanent sales and clerical workers who had access to the Company's computers and other aspects of the business that the Respondent deemed proprietary and/or security sensitive. However, even warehouse workers were carried as Mar-Jam although they were not privy to company records, did not have access to the computers, and performed no sales or clerical functions.

⁷ See GC Exh. 14, the Respondent's employee manual, and R. Exh. 1, drivers manual.

⁸ On occasion, the Respondent collaborates or consults with Labor Pool representatives regarding minor infractions by Labor Pool employees, and such incidents sometimes were recorded in the employees' personnel files. Other more serious disciplinary actions are generally handled solely by the Respondent's Pleasantville managers, namely Doyle, in consultation with the Respondent's operations manager at company headquarters in Brooklyn, New York. On this record, Labor Pool, to a certainty, has little or nothing to do with the development and implementation of the terms and conditions of employment of the Respondent's warehouse workers, and in matters of discipline acts purely in an advisory capacity. More to the point, Labor Pool has no final authority to issue discipline. Accordingly, I would find and conclude that the Respondent is the employer of its warehouse workers within the meaning of Sec. 2(2), (6), and (7) of the Act. Also, irrespective of the contractual relationship between the Respondent and Labor Pool, the evidence is insufficient to support a joint employer relationship between the two companies or that the warehouse workers were exclu-

Sometime in early January 1999,⁹ the Respondent determined that becoming unionized would enhance its prospects for business opportunities in Atlantic City, New Jersey. Consequently, on or about January 7, the Respondent wrote to the Regional Council of Carpenters and advised that it would recognize the Carpenters as a collective-bargaining representative for three of its “Mar-Jam” employees upon receipt of signed authorization cards from them.¹⁰ Then, on or about January 13 or 14, two representatives of the Teamsters came to the Respondent’s warehouse and solicited a number of the Respondent’s warehouse employees to sign union authorization cards and obtained signed cards from a number of the workers on that day; other cards were obtained anywhere from a day to 5 days later.¹¹ Around January 21–22, representatives from the Carpenters wrote to the Respondent’s management and demanded recognition as the employees’ collective-bargaining representative, basing its demand on signed authorization cards of three of the Respondent’s employees.¹² On or about January 22, the Respondent signed an agreement with the Carpenters recognizing the Union as the collective-bargaining representative for the Respondent’s employees.¹³ On January 21, 1999, the Teamsters petitioned the National Labor Relations Board (the Board) for certification as representative for collective-bargaining purposes of the Respondent’s employees based on the signed authorization cards previously secured by the Union.¹⁴ On January 29, the Teamsters filed an unfair labor practice charge against the Carpenters alleging, in essence, that the Carpenters unlawfully procured backdated authorization cards from the Respondent’s employees by threats of detriment and promise of benefit.¹⁵ On February 5, through counsel, the Carpenters notified the Board’s Regional Director for Region 4 by letter that the Carpenters disclaimed any interest in representing the Respondent’s employees and withdrew its claim of representing a majority of the employees.¹⁶ On February 8, the Teamsters

sively employees contracted out to the Respondent by Labor Pool. *Employee Management Services*, 324 NLRB 1051 (1997).

⁹ All events pertinent to this matter took place in 1999.

¹⁰ See GC Exh. 2. It should be noted that this letter was written to the business representative of the South Jersey Regional Council of Carpenters, which includes Carpenters Local 623, party in interest herein.

¹¹ The authorization cards obtained by the Teamster representatives are contained in GC Exhs. 9(a)–(h). Notably, two of the cards are undated; three are dated January 14; two are dated January 15; and one is dated January 19.

¹² See GC Exh. 5.

¹³ See GC Exhs. 6 and 6(a). It is to be noted that GC Exh. 6 is executed by representatives of both the Respondent and the Carpenters. GC Exh. 6(a) was made a hearing exhibit because of the poor copy quality of GC Exh. 6. GC Exh. 6(a) appears to be identical to GC Exh. 6 in its terms; however, it contains only the signature of the Respondent’s representatives. I have determined that the documents are interchangeable for evidentiary purposes.

¹⁴ See GC Exhs. 8(a)–(c), the Teamsters’ representation petition in Case 4–RC–19611.

¹⁵ See GC Exh. 7(a). This charge was captioned case 4–CB–8228 and is cross-referenced to one of the instant cases, case 4–CA–27831.

¹⁶ See GC Exh. 7(b).

withdrew the charges against the Carpenters and the Regional Director approved the withdrawal.¹⁷

B. The 8(a)(1) Allegations

1. The Scott Doyle incidents

The consolidated complaint (in part 5) alleges that admitted Supervisor Scott Doyle, on three occasions in January, violated Section 8(a)(1) of the Act¹⁸ essentially by interrogating, threatening termination of its employees, and promising them certain benefits. In support of these charges, the General Counsel produced two witnesses, Jamre Miller and Charles Doerr.

Miller has been employed by the Respondent since March 3, 1998, as a warehouse laborer¹⁹ and continues in that capacity as of the hearing date. According to Miller, Doyle told him in early January in the presence of Charles Chuck Doerr and his immediate warehouse supervisor, Howard Motter, that the Company was going to go union, but that he and Doerr were going to be the only employees to be made union members. Doyle did not, according to Miller, identify the specific union in this conversation. Later in the month, the Teamsters’ representatives came to the warehouse and identified themselves and their interest in organizing the workers. According to Miller, he filled out and signed a Teamsters’ authorization card and handed it back to a man named Joseph Yeoman.²⁰ Around 2 weeks later, Doyle called Miller to his office and asked him if he (Miller) had signed anything with the Teamsters and Miller told him yes. Miller then walked out of the office and nothing more was said by Doyle. There were no other witnesses to this conversation.

Charles (Chuck) Doerr was employed by the Respondent as a warehouse laborer from around June 2, 1998, until February 9, 1999, when he began serving a sentence for violation of New Jersey State criminal laws.²¹ Doerr was not terminated by the Respondent because of his conviction. When Doerr was first

¹⁷ See GC Exhs. 7(c) and (d), the letter from Teamster Counsel Peter V. Marks and Regional Director Dorothy L. Moore-Duncan, respectively.

¹⁸ These alleged violations in part also comprise alleged violations of Sec. 8(a)(2) and (3) of the Act, which will be discussed in separate sections of this decision.

¹⁹ Miller was initially carried by the Respondent as a Labor Pool worker for around 6 months. The Respondent then switched him to Mar-Jam although his laborer duties did not change.

²⁰ Miller identified Yeoman who was present in the hearing room as Miller testified. Yeoman is the president of Teamsters Local 331. Miller’s authorization card (GC Exh. 9(a)) was filled out but not signed; it is dated January 14, 1999. Miller said that he signed another Teamsters’ card on February 12. (See R. Exh. 2.) Miller indicated that he simply had forgotten to sign the earlier card.

²¹ Doerr was incarcerated at the Bayside State Prison in February 1999. Since then, he has been serving a 5-year sentence for a firearm violation (possession of gun). Doerr’s criminal history included a conviction for burglary (he was on probation for this charge when he was picked up due to the gun charge) and four driving-while-intoxicated charges. Doerr was not being held for any psychiatric evaluation or assessments and was not taking any medication that could affect his memory, judgement, or mood at the time his testimony was taken at the prison facility.

hired, he was carried as a Labor Pool employee but became a Mar-Jam worker within 4 months.

According to Doerr, on or about January 13, the Teamsters approached him as he was arriving for work and convinced him to sign an authorization card after touting the benefits of becoming a Teamster; he returned the card to a man named Lou.²² Around 2 days later, Doerr was called into Doyle's office by his immediate supervisor, Howard Motter. According to Doerr, Doyle told him he felt that the Respondent would benefit more by going with the Carpenters. Doyle thereupon told Doerr that if he signed with the Carpenters, he would try to get Doerr a raise and if Doerr stayed with the Company for 6 years, he would get \$5000 in profit sharing. Additionally, Doyle promised to try to get the Company to provide medical (insurance) coverage. Doyle also told Doerr that there would only be a few of the current employees in the union, that the others would be gotten rid of. According to Doerr, Doyle did not indicate in this conversation which employees would be retained or released, or in what way these employees would be eliminated. Doerr told Doyle "okay" as to the promises of benefit and returned to work.²³

On or about January 18, before his lunchbreak, Doerr said that a Teamsters' representative came to the facility and handed out pamphlets and stickers supportive of the Teamsters.²⁴ Doerr took some of the materials and as he was about to go back to his assignment, he saw Doyle and gave him a copy of the Teamsters' pamphlet indicating that the Teamsters' representative had just handed it to him. Then, according to Doerr, about 30 to 45 minutes later, a Carpenters' representative²⁵ appeared on the job and in fact asked Doerr if he had any additional matters he wanted to negotiate. Doerr responded no and the representative went into the office area. Later, on or about January 20-21, Doerr said he spoke to Doyle in his office and Doyle commented that the workers were arguing about the two unions and, in the same conversation, mentioned that any guys who signed Teamsters' cards were going to be gotten rid of. Doerr then told him that he had already filled out a Teamsters' card, to which Doyle made no response.²⁶ According to Doerr, he

²² According to Doerr, the group of five Teamsters included a man named Lou and unidentified men who worked for Fortune Gypsum, a company that the Teamsters had previously organized. Doerr's authorization card (GC Exh. 9(g)) is signed but not dated.

²³ Doerr testified that around 3 days before this meeting, Doyle told him that the Respondent had to become unionized with one union or another in order to obtain work out of Atlantic City and to get their goods off-loaded.

²⁴ Doerr noted that, on this occasion, a number of the Respondent's workers were there and employee Clarence Manyfield told the Teamsters' representative that he could not distribute the materials during work hours and asked him to leave the premises and the Teamsters left.

²⁵ Doerr did not know the Carpenters' representative' name but identified him as a tall, skinny guy with brownish hair wearing a raincoat and flat-type hat. Disregarding the clothes description, description fits Eustace Eggie—one of the Carpenters' representatives who visited the site and testified at the hearing.

²⁶ It should be noted that at this juncture Doerr had also filled out a Carpenters' authorization card on or about January 15, the same day that he said that Doyle made the promises of benefits to him. This matter will be further discussed in a separate section of this decision.

was never threatened with any loss of benefits, termination, or other discipline if he did not sign with the Carpenters.

Doyle testified and denied ever expressing any preference for one union over another, threatening anyone for signing on with one union over another, and promising any employee wage increases or other benefits for signing with any union. Doyle specifically denied having any conversations with Doerr prior to January 21 in which unions were discussed.²⁷ According to Doyle, after January 21, he had a brief discussion with Doerr, Eric Fetrow, and Dennis Buonfiglio, who had signed Carpenters' cards and, on instructions from the company officials, merely informed them that the Respondent knew they had signed and that the Carpenters and the Respondent were corresponding. Doyle claimed that he discussed no other matters pertaining to the Union.²⁸

2. The Howard Motter incidents

The complaint (in part 6) alleges that Howard Motter, an alleged agent of the Respondent, violated the Act on separate occasions in January by, first, promising wage increases to employees in order to encourage them to support the Carpenters over the Teamsters and, second, informing employees that they could not maintain or distribute Teamsters paraphernalia or literature at the Respondent's facility.²⁹ To establish this charge relating to promises of wage increases, the General Counsel called Dennis Buonfiglio.

Buonfiglio said that he was hired by the Respondent on or about December 14, 1998,³⁰ as a truckdriver and boom operator trainee by Howard Motter. Buonfiglio was carried as a Labor Pool employee. According to Buonfiglio, his immediate supervisor was Motter who gave him his assignments for the day and granted him time off upon request.

Buonfiglio related a conversation that he had with Motter around January 14 (or 15) near the end of the shift. According to Buonfiglio, at that time Motter asked Chuck (Doerr), Eric (Fetrow), and himself to "hang around" as there was to be a meeting with, as he described them, a couple of people from the Carpenters. Before the meeting, Motter told him that the Carpenters wanted to speak to them, that we should listen to what

²⁷ Doyle claimed that he saw Doerr's Carpenters' authorization card for the first time on January 21, when the Carpenters faxed him a recognition demand letter with three signed cards, including one from Doerr (see GC Exh. 5).

²⁸ However, Clarence Manyfield, another current Labor Pool forklift driver, testified that he and Doyle had several conversations about the Unions involved at the Respondent's facility. According to Manyfield, Doyle told him on different occasions (specific dates he could not provide) that the Company could not afford the Teamsters and might not be able to survive if that Union were chosen; and that he (Doyle) would fire anyone who signed with the Teamsters. Manyfield, however, testified that he did not feel threatened by Doyle's remarks and because he and Doyle joked a lot; he was not sure whether Doyle was being "sarcastic." In any event, Manyfield said that he took Doyle's remarks "lightly" and even told Doyle that he had signed with the Teamsters.

²⁹ The allegations in section 6 of the complaint relating to promises of wage increases are also alleged to be violative of Sec. 8(a)(2) of the Act.

³⁰ Buonfiglio no longer works for the Respondent, having been laid off sometime in August or September 1999.

they had to say. At that time, Motter asked him (and the others) to sign with the Carpenters.³¹

According to Buonfiglio, on that day union dues were discussed in the meeting with the Carpenters who informed him (and the others there) that dues would be \$8 per month or 2 percent of gross pay. However, Buonfiglio, Doerr, and Fetrow were doubtful about the benefits the employees would receive for these fees. According to Buonfiglio, in order to assuage their concerns, Motter, after the Carpenters briefly left the room, told the employees not to worry about dues, that the Respondent would reimburse them.³²

Regarding the distribution of literature charges, the General Counsel called Eric Fetrow.

Fetrow is currently employed by the Respondent as a boom operator in the warehouse. He has been so for about 20 years.

Fetrow testified that the next day following the meeting with the Carpenters, Motter gave Buonfiglio, Doerr, and himself a package containing information from the Carpenters.³³

According to Fetrow, for a time, the employees were allowed to display literature, put up stickers, and wear hats and pins of the union of their choice. However, after a while, tension developed on the job between the pro-Teamsters group and those supporting the Carpenters and some profanity was written on one of the Carpenters' stickers placed on the front door of the warehouse.³⁴ It was around this time that Motter emphatically informed the workers that no one could display any material from either union, and the restriction applied throughout the facility. However, according to Fetrow, even after the announcement, some Teamsters material remained on the dispatch (office) wall and also in the employees' lunchroom. However, the employees were told they could not wear any union paraphernalia anywhere onsite.

Doerr testified that around January 20, Doyle and he were discussing business in Doyle's office and Doyle mentioned that the guys were arguing about which union to choose between the Teamsters and the Carpenters. Then, around 1 to 2 days later, Motter, who according to Doerr had been "pushing" the Carpenters, announced to him with other workers nearby, "that no one was to have any union stuff" on the property because the guys were fighting and it (displaying or wearing union ma-

terial) would show favoritism by the Company. Motter said that there was to be no union paraphernalia or literature anywhere on the property. After this announcement, Fetrow said that union literature, stickers, posters, and pamphlets on the bathroom wall or near the employee breakroom, or wall outside Motter's office were all taken down.

Jamre Miller testified that during the organizing campaign, the Carpenters passed out stickers and other materials supportive of its cause. On one occasion, Motter placed a Carpenters' sticker on a forklift operated by another employee, Manyfield,³⁵ who took the sticker off the forklift. Motter and Manyfield had words over this. According to Miller, Motter later said to him that things were getting out of control and told the employees to leave all the union stuff alone, to stop talking about it, and stop putting up stickers and other materials. According to Miller, there was a lot of tension between the Carpenters supporters and supporters for the Teamsters, but that there were no real arguments between the employees, with the possible exception of the confrontation between Motter and Manyfield. Miller felt that Motter's placing the sticker on the windshield of the forklift obscured Manyfield's field of vision and that this was the real issue between the men.

The Respondent called Motter to rebut these allegations. By way of background, Motter testified that for the past 2 years, he has been the Company's Pleasantville operations manager whose duties include shipping and receiving, generally running the warehouse, hiring, and recommending employee discipline.³⁶

Motter generally denied telling any of the employees that they would receive any beneficial treatment from the Respondent for signing with the Carpenters or any union. However, Motter admitted that there came a time that the Respondent informed the employees that distributing union paraphernalia or literature would not be permitted. According to Motter, the workers were divided into pro-Teamster and pro-Carpenter camps; but, at first, this presented no problems on the job. However, things eventually got out of hand, and the controversy started to interfere with work productivity. Then the various union posters and stickers were defaced with the profane language. In fact, when a sticker located at an entrance used by customers was defaced with a profane remark, f—you, he went to Doyle and they both decided to restrict the union

³¹ Buonfiglio was not sure that Doerr and Fetrow were present when Motter made these comments.

³² Initially, Buonfiglio was not sure whether the discussion of dues with Motter occurred before or after the meeting with the Carpenters but later became more confident that the dues discussion with Motter took place after he and the others conversed with the Carpenters.

³³ Buonfiglio also confirmed that he received an envelope containing Carpenters' literature as well as a Carpenters' hat from Motter after the meeting with the Carpenters' representatives.

³⁴ According to Fetrow, there was what he described as a measure of verbal hostility between the two camps; that comments were even made about refusing to work with employees who signed with opposing unions. Fetrow knew of no employees who acted out on these threats. Fetrow noted that there were a couple of very pro-Teamster employees who had a hard time working with a couple of equally adamant pro-Carpenters workers, and vice versa. As to the profane remark, it was written on a sticker on the front door of the warehouse where customers could see it; however, it only stayed up for 1 day—the late afternoon—and was removed by the following morning.

³⁵ Manyfield was a Teamsters supporter, having signed a Teamsters' authorization card, and told Doyle of his signing around January 15. (See GC Exh. 9(e)). According to Manyfield, Motter was "pushing" (the signing of) Carpenters' authorization cards and putting up literature and stickers around the building and on his forklift. Manyfield acknowledged that he was removing the sticker when Motter approached him and asked if he had a problem with the sticker. Manyfield said that he did and removed it; and Motter apparently did not approve. On the next day, Motter told him (but also other workers) that literature of either union was not allowed on the premises and said that he was specifically told not to place union literature or other items in the employees' locker room. Manyfield confessed to having defaced the Carpenters' sticker on the warehouse with a profane remark.

³⁶ Motter said that he was carried as a Labor Pool employee. Motter said that he considered Labor Pool to be his employer because his paycheck and W-2 reflected Labor Pool and his benefits were paid through Labor Pool.

materials to the employee lunchroom and restrooms. Other areas, especially the sales room of the company facility, were placed off limits for these materials. Motter admitted that before the restrictions were imposed, the Carpenters had left information packets for all of the employees and he distributed them to each employee.³⁷ Motter claimed that he never expressed support for the Carpenters as he gave them out but did inform the employees they were from the Carpenters. Motter conceded also that he “might” have told the employees that if he had a choice, he would sign (go) with the Carpenters.³⁸

Discussion of the Doyle and Motter Incidents; Credibility Determinations

In order to resolve these charges, as in the usual case, the threshold issue of witness credibility must be resolved. In this regard, I would credit the testimony of Miller, Doerr, Buonfiglio, Fetrow, and Manyfield over that of Doyle and Motter. First, I note that Miller, Fetrow, and Manyfield are current employees of the Respondent and, as the Board recognizes, the testimony of current employees that contradicts or is adverse to statements of their supervisors is given at considerable risk of economic reprisal, including loss of employment, and for these reasons is not likely to be false; *Shop-Rite Supermarket*, 231 NLRB 500 fn. 22 (1977), and particularly reliable *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996).³⁹ However, I do not rest my crediting of their testimony on this fact alone. Observing these individuals, I noted that each employee seemed sincere and unhesitating in relating his version of events; and each employee testified in a forthright and honest fashion. Doerr and Buonfiglio also were impressive witnesses. Although Doerr was an incarcerated felon at the time of the hearing, he, nonetheless, answered all questions posed to him in a straightforward and unembellished fashion. His testimony was corroborated by other witnesses and generally had the ring of truth to it. Buonfiglio, in likewise, appeared to be telling his version of events truthfully. He fully answered all questions posed by all parties, even some against his interest.⁴⁰ Buonfiglio came off as very candid and truthful,

³⁷ According to Motter, these packets had the names of all employees on them.

³⁸ Interestingly, Motter claimed that he did not know what benefits either the Carpenters or Teamsters were offering the employees. (Tr. 428.)

³⁹ Clarence Manyfield on this point testified that when he filled out a Teamsters’ card, Motter was standing nearby and asked him what he was doing. Manyfield told Motter that he was going for the Teamsters. After that, according to Manyfield, Motter cut his hours and assigned him certain jobs that were unpleasant. Thus, the wisdom of the Board decisions is manifest and not based on pure conjecture or theory. Clearly, employees who go against their supervisor’s wishes take a chance and certainly this is a worthy consideration in determining whether current employees are telling the truth at trial.

⁴⁰ Buonfiglio appeared to be very concerned about having backdated his Carpenters’ authorization card, fearing getting in trouble for this. He also admitted that he refused to take a drug test for the Respondent and admitted he had eaten a few marijuana-laced brownies.

and he, like Doerr, never disparaged the Respondent or its supervisors.⁴¹

On the other hand, Doyle and Motter were not the equal of the General Counsel’s witnesses. Regarding their defenses to the allegations against them, notably, both men generally denied making the statements attributed to them.⁴² However, their denials were in the main “No” answers to leading questions posed by the Respondent’s counsel. There was no explanation of the denials, and they did not, in my view, effectively rebut the rather detailed versions of events provided by the General Counsel’s witnesses. Thus, on balance, as to the true version of events and circumstances pertinent to the 8(a)(1) charges, I have credited the General Counsel’s witnesses and accept their version of events and conversations as proven fact.

The Applicable Law Regarding the 8(a)(1) Violations

Employer interference, restraint, or coercion of employees who exercise their statutory right to form, join, or assist labor organizations are unlawful under Section 8(a)(1) of the Act. The test under Section 8(a)(1) does not turn on the employer’s motive or whether the coercion succeeded or failed. The test is whether the employer engaged in conduct, which it may be reasonably said tends to interfere with the free exercise of employee rights under the Act. *Gissel Packing Co.*, 395 U.S. 575 (1969); *Almet, Inc.*, 305 NLRB 626 (1991); *American Freightways Co.*, 124 NLRB 146, 147 (1959); Thus, it is violative of the Act for the employer or its supervisor to engage in conduct, including speech, which is specifically intended to impede or discourage union involvement. *F. W. Woolworth Co.*, 310 NLRB 1197 (1993); *Williamhouse of California, Inc.*, 317 NLRB 699 (1995). The test of whether a statement or conduct would reasonably tend to coerce is an objective one, requiring an assessment of all the circumstances in which the statement is made as the conduct occurs. *Electrical Workers Local 6 (San Francisco Electrical Contractors)*, 318 NLRB 109 (1995). *Rossmore House*, 269 NLRB 1166 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 706 F.2d 1006 (9th Cir. 1985).

It is well-settled Board law that an employer’s interrogation of employees concerning their union activities may be violative of the Act. *Hudson Neckwear, Inc.*, 302 NLRB 93 (1991). Among the circumstantial factors examined are the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985). The Board has also considered other factors such as whether the questioning was by an immediate supervisor who worked closely with the employee, whether it was made in a joking tone, and whether the employee was an open, active union supporter, *Raytheon Co.*, 279 NLRB 245 (1986); *Action Auto Stores*, 298 NLRB 875 (1990); *Dealers Mfg. Corp.*, 320 NLRB 947 (1996).

⁴¹ Doerr testified, without contradiction, that Doyle told him that depending on the length of his sentence, Doerr’s job was still available for him after his release. Thus, the Respondent is on weak grounds to discredit Doerr because of his conviction.

⁴² Doyle did not address his statements to Miller, so this charge stands rebutted.

Section 8(a)(1) may be violated where an employer links terminations of employees to their union activities. *Area Metal Forms*, 310 NLRB 397, 400 (1993); and in likewise an employer may violate the Act by linking promises of improved benefits and wage increases to the employees' selection of a particular union. *Christopher Street Corp.*, 286 NLRB 253, 254 (1987). Employer's promises to pay employees' union dues also pose a possible violation of Section 8(a)(1) of the Act.⁴³

In *Republican Aviation Corp.*,⁴⁴ the Supreme Court upheld as protected activity the right of employees to wear union buttons while at work. Consistent with that principle and established Board law, the general rule is that employees may wear not only union buttons but also other emblems of union support and membership such as badges, hats, and T-shirts to work. *Fairfax Hospital*, 310 NLRB 299, 307 (1993). However, this right is not without limitations, and employers may limit or ban the display or wearing of union insignia at work if special circumstances exist. *Mack's Supermarket*, 288 NLRB 1082 (1988). The Board, in attempting to strike a balance between the right of employees to express their support for unionism and that of employers to conduct their business in an orderly and efficient manner, allows the employer to promulgate and enforce rules against wearing union insignia and emblems. Example of special circumstances are maintenance of production and discipline,⁴⁵ safety,⁴⁶ preventing alienation of customers,⁴⁷ preventing discord and violence between competing groups of employees,⁴⁸ and promoting health and welfare of patients in a health care setting.⁴⁹ Absent such special circumstances, the Board has held that employer directives to employees to stop wearing emblems insignia and union paraphernalia may be violative of Section 8(a)(1). *Overnite Transportation Co.*, 254 NLRB 132 (1981); *Fieldcrest Cannon*, 318 NLRB 470 (1995).

Finally, while Section 8(a)(1) prohibits certain speech and conduct deemed coercive, employers are free under Section 8(c) of the Act to express their views, arguments, or opinions about and regarding unions as long as such expressions are unaccompanied by threats of reprisals, force, or promise of benefit. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).⁵⁰

With these principles in mind, we turn to the specific allegations as charged in the complaint.

⁴³ Employers' promises to pay the dues associated with membership in a particular union may also violate Sec. 8(a)(2) of the Act. *Baby Watson Cheesecake, Inc.*, 309 NLRB 417 (1992).

⁴⁴ 324 U.S. 793 (1945).

⁴⁵ *Midstate Telephone Corp. v. NLRB*, 706 F.2d 401 (2d Cir. 1983), enfg. in part and denying in part 262 NLRB 1291 (1982).

⁴⁶ *Fluid Packaging Co.*, 247 NLRB 1469 (1980).

⁴⁷ *Burger King Corp. v. NLRB*, 725 F.2d 1053 (6th Cir. 1984), enforcing in part and denying in part 265 NLRB 1507 (1982).

⁴⁸ *United Aircraft Corp.*, 134 NLRB 1632 (1961).

⁴⁹ *Mesa Vista Hospital*, 280 NLRB 298 (1986).

⁵⁰ Sec. 8(c) provides:

The expressing of any views, arguments, or opinion, or the dissemination thereof, whether in writing, printed, graphic, or visual form, shall not constitute or be evidence of any unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

Discussion and Analysis of the 8(a)(1) Allegations

Any discussion of these allegations must begin with two preliminary observations regarding the circumstances at the Respondent's Pleasantville facility during the relevant period.

First, during the period in question, the Teamsters and Carpenters were engaged in a fairly aggressive competition to win over the Respondent's employees to their respective organizations; and, second, the Respondent clearly and early on evinced its preference for the Carpenters as the employees' collective-bargaining representative during the rivalry.

The General Counsel contends that Doyle's conversations with Miller and Doerr were unlawfully coercive, pointing out that each man was called to Doyle's private office and interrogated and that both men were not known or open union supporters. Moreover, as to Doerr, the General Counsel submits that Doyle not only interrogated him but also expressed his preference for the Carpenters and intimated that those who did not share his sentiments would be dismissed. The General Counsel argues that Doyle compounded the situation by promising Doerr raises, possible participation in a profit-sharing program, and the Company's payment of his medical insurance. Doerr readily admitted these benefits were attractive to him as they were improvements over the present situation at the Company. The General Counsel submits that Doyle's statement to Doerr that Teamsters supporters would be gotten rid of, which was corroborated by Manyfield, and his interrogation of Miller as to whom he signed with, taken in total context, were plainly designed to coerce and influence the employees in their choice of a representative. The Respondent, however, argues generally that Doyle credibly denied the statements attributed to him and, in fact, denied any coercive conduct on his part.

The Respondent also asserts that any statements that Doyle may have made were protected speech, unaccompanied by any threats or promises of benefit.⁵¹

Regarding the Doyle incidents, I would agree with the General Counsel that under the circumstances, the statements made by Doyle were unlawfully coercive. I note that Doyle basically pulled both Doerr and Miller aside to acquire information (in Miller's case) about the employees' choice of representatives and to influence their decisions to choose one (Doerr's case). As noted, Doyle's actions in the context of the competition between the two Unions, along with the Respondent's clear preference for one over the other serve as a poignant and highly charged backdrop. Clearly, by any reasonable standard, in my view, the Respondent's behavior through Doyle reflected an unreasonable interference with the employees' Section 7 rights, and I would find and conclude that Section 8(a)(1) was violated.

The General Counsel also contends that the Respondent violated the Act through Motter. First, I have found that Motter did in fact make the statements attributed to him regarding the payment of union dues for the employees who signed with the

⁵¹ The Respondent, in its brief, cited and discussed *Gissel Packing Co.*, supra, and other cases dealing with protected employer speech. However, it should be noted that Doyle (and Motter) denied the allegedly unlawful statements attributed to them, so that the protected speech argument offered by the Respondent is inapposite.

Carpenters. I have also found—although its seems mainly uncontroverted—that Doyle ordered Motter to restrict the employees' right to wear union paraphernalia or display union literature or pamphlets. However, before deciding whether a violation is made out, there is a threshold issue as to Motter's status, i.e., whether he was an agent or supervisor of the Respondent by virtue of his duties and responsibilities as the warehouse supervisor, which finding would make the Respondent derivatively liable for any violations.⁵²

The Respondent argues that Motter was merely a lead employee during the material period, possessing only minimal supervisory authority. The Respondent contends that he did not possess the power to reward, retaliate, or otherwise adversely affect the Respondent's employees; and that he did not possess sole decision-making authority.⁵³ The Respondent further contends that Motter had no authority to hire, provide benefits, discipline, or terminate employees; that Doyle was the sole repository of powers. Thus, according to the Respondent, Motter was simply a low-level supervisor and any speech or behavior attributable to him cannot be considered unlawful employer conduct. In essence, the Respondent contends that Motter was neither a supervisor nor agent within the meaning of the Act.

The preponderance of the credible evidence indicates that the warehouse workers regarded Motter as their immediate supervisor. Second, by his own and Doyle's admission, Motter was responsible for the daily operation of the warehouse and its equipment, which included shipping and receiving, assigning employees various job tasks, and approving or disapproving time and leave requests. In my view, Motter used his independent judgment in the performance of his duties, especially with respect to assigning and responsibly directing employees. Contrary to the assertion of the Respondent, Motter also had the authority to hire and discipline employees, a fact confirmed both by Motter and Doyle.⁵⁴ While Doyle had the ultimate power to discipline employees or set company policy, he consulted and collaborated with Motter regarding the interpretation and implementation of policy and made recommendations regarding matters of importance to the Respondent's business. For instance, when the Carpenters' sticker was defaced with an obscenity, Motter testified he went to Doyle and *they* decided to restrict the distribution and placement and wearing of union materials because of the incident.

⁵² In its brief, the Respondent admits that Motter informed all Mar-Jam warehouse personnel that they were no longer permitted to wear, disburse, or post any union paraphernalia in the main work areas of the facility because of employee tension, customer complaints, and the Mar-Jam Company's inability to run the business in an orderly, harmonious fashion. R. Br. 24. The credible testimony, however, also indicates that the Respondent extended the prohibition to the nonwork areas of the warehouse.

⁵³ In its brief, the Respondent asserts that Motter was merely a Labor Pool employee holding the title of operations manager and that all major decisions had to be approved by Doyle.

⁵⁴ When asked what the duties of operations manager entailed, Motter responded "shipping, receiving, running of the warehouse . . . and hiring." (Tr. 424.) Doyle testified that Motter disciplined alleged discriminatee Arthur English on January 18 with a verbal warning (Tr. 179) and reported to him additional violations of company rules by English, all of which led to his decision to terminate English. (Tr. 135.)

Regarding agency, the Board stated in *Zimmerman Plumbing Co.*, 325 NLRB 106 (1997):

It is well established that apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for that party to believe that the principal has authorized the alleged agent to perform the acts in question. See generally *Dentech Corp.*, 294 NLRB 924 (1989); *Service Employees Local 87 (West Bay)*, 291 NLRB 82 (1988). Thus, in determining whether statements made by individuals to employees are attributable to the employer, the test is whether, under all the circumstances, the employees "would reasonably believe that the employee in question [alleged agent] was reflecting company policy and speaking and acting for management." *Waterbed World*, 286 NLRB 425, 426-427.

In short, as the Board stated more recently in *House Calls, Inc.*, 304 NLRB 311 (1991):

the test for agency is whether, under all the circumstances, an employee would reasonably believe that the alleged agent was speaking for management and reflecting company policy. *Lovilia Coal Co.*, 275 NLRB 1358, 1372 (1985). Further, elected or appointed officials of an organization are presumed to be agents of that organization [and] clothed with apparent authority. *Nemacolin Country Club*, 291 NLRB 456, 458 (1988), enf. 879 F.2d 858 (3d Cir. 1989).

Section 2(11) of the Act defines a supervisor as any individual who has the authority, acting in the interest of an employer, to cause another employee to be hired, transferred, suspended, laid off, recalled, promoted, discharged, assigned, rewarded, or disciplined, either by taking such action or by recommending it to a superior:

The possession of any one of the functions enumerated in Section 2(11) of the Act is sufficient to establish supervisor authority. Specifically listed in Section 2(11) are assignment and responsible direction of employees requiring the use of independent judgment.⁵⁵

In my view, Motter, as the Respondent's warehouse manager, by his own admission and the credible testimony of the several employees working under his supervision, clearly possessed significant supervisory functions, including hiring and disciplining of employees, assignment of work, and/or making recommendations regarding these functions to his immediate supervisor, Doyle, who in turn would act thereon.⁵⁶ Also, based on the credible evidence, Motter was clearly employed by Doyle to deliver messages and to meet with employees regarding terms and conditions of their employment.⁵⁷

⁵⁵ *Spring Valley Farms*, 272 NLRB 1323 (1984).

⁵⁶ On this point, for example, I note that Motter was asked to contact employees Doerr, Fetrow, and Buonfiglio to meet with the Carpenters; that he was asked to summon Miller to Doyle's office, and he, on Doyle's instructions, documented alleged discriminatee English's work performance.

⁵⁷ In *Masterform Tool Co.*, 327 NLRB 1071 (1999), regarding the authority of a statutory supervisor, the Board stated that the power must be exercised with independent judgment on behalf of management and

I would find that Motter was on this record a supervisor within the meaning of Section 2(11) of the Act. Recognizing, however, that the Board may disagree, I would find in the alternative that Motter at the least was an agent of the Respondent within the meaning of Section 2(13) of the Act as alleged. *Lavilia Coal Co.* 275 NLRB 1358 (1985).

Directing myself to Motter's conduct, I have previously found that he told Buonfiglio that the Respondent would pay his (and the other employees') union dues. With the issue of Motter's supervisor/agency status resolved, I would conclude, in agreement with the General Counsel, that Motter's statement was an unlawful promise of benefit violative of Section 8(a)(1). *Baby Watson Cheesecake*, supra.

Regarding the restrictions the Respondent (through Doyle and Motter) admits that it placed on the distribution and maintenance of union literature and paraphernalia, the issue redounds to whether the employer here has made out a case for the special circumstances exception to the rule allowing employees the right to wear and distribute and display union materials. A secondary issue is presented as to whether the Respondent imposed the restriction in all areas of the facility.

The Respondent correctly admits that the employees' right to display and distribute union related materials is not unlimited and must be balanced against the employees' countervailing right to maintain workplace discipline and production. *Mid-State Telephone Corp. v. NLRB*, 706 F.2d 401 (2d Cir. 1983).

In the instant case, the Respondent argues that after a time, tensions developed between the two camps of union supporters, such that workers refused to work with one another. Furthermore, a profanity was written on a Carpenters' sticker, which was observed by a customer who complained to management. Thus, based on those tensions and a customer complaint, Doyle and Motter determined that the business was in jeopardy and could not be run orderly and harmoniously. Accordingly, the Respondent claims that it issued a directive to all union adherents restricting the wearing, disbursement, and posting of union paraphernalia and materials to the employees' locker room, lunchroom, and dispatch area. Employees also were allowed to post the Teamsters' telephone number near telephones employees were permitted to use.⁵⁸

The General Counsel counters, arguing that the Respondent's statement of the degree and extent of employee tension and disruption of productivity during the organizational period is overstated and not supported by the record. For example, the General Counsel submits that the sticker with the profanity was hardly momentous to the Respondent and that Doyle in his testimony was not sure of the Union to which it belonged. In any event, the General Counsel asserts that none of the extant circumstances at the Respondent's facility during the organiza-

not in a routine manner. Thus, the exercise of some "supervisory authority" in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status. The burden of proving supervisory status is on the party alleging that supervisory status exists.

⁵⁸ The Respondent asserts that its directive was nondiscriminatory, applying equally to both unions. However, it should be noted that allowing the Teamsters' number and not the Carpenters' undercuts this position somewhat.

tional campaign warranted such an overly broad proscription against displaying and distributing union material.⁵⁹

I would agree with the General Counsel and find and conclude that the Respondent violated the Act by dint of an overly broad and restrictive rule against the display and distribution of union materials and paraphernalia. I note first and foremost that debate about the relative merits of union representation is probably inevitable, but especially is this so when not just one but, like here, two unions are vying for representation of the employees. On this record, furthermore, the Respondent did not demonstrate that the situation was "out of control" and that productivity was hampered by the distribution of union materials and wearing union gear so as to justify removal and restriction at the facility. Contrary to the assertion of the Respondent, the record is devoid of any credible evidence that the workers refused to work with one another because of union organizing activity. Notably, there were no physical confrontations or even definite or specific, undisputed, heated verbal confrontations adduced by the Respondent. In fact, the sole "confrontation" on the record occurred between Motter and Manyfield over the placement of the Carpenters' sticker by Motter on Manyfield's forklift. So it may be said that this bit of tension was fueled in part by the Respondent's agent and cannot and should not serve to justify the prohibition. Additionally, the Respondent's claim that "productivity" was hampered, in my view, was not established by the Respondent, either in terms of showing actual production figures other supporting data relating to inability to conduct business because of the materials displayed or worn. Regarding the Respondent's customer complaint, the Board has noted that neither the mere possibility that an employer's workers may come into contact with a customer, nor an employer's interest in avoiding controversy among its clientele that an expression of union membership or support might engender, outweighs the workers' Section 7 rights to wear emblems; the pleasure or displeasure of the employer's customers does not determine the lawfulness of banning the employees' display of insignia. *Inland Countries Legal Services*, 317 NLRB 941 (1995). Thus, although a customer may have seen the defaced sticker and complained to Doyle about it, this does not justify what I view as a rather summary decision to ban all union materials. Surely, the Respondent could have addressed the concern in ways far short of banning all union materials.⁶⁰ Accordingly, I would find and conclude that the Respondent did not establish by the prepon-

⁵⁹ The General Counsel argues that Motter and Fetrow's testimony indicating that the proscription was not facility-wide should not be credited. While Motter testified that union paraphernalia was allowed in the lunch and rest room—no other areas were allowed—Fetrow contradicted Motter, saying that the restriction was throughout the facility although there were some Teamster sheets on the dispatch (room) wall after the announcement. Fetrow was emphatic about the disallowance of wearing any union items presumably anywhere on site. (Tr. 330.) I would credit Fetrow's testimony over Motter's on this point.

⁶⁰ As the General Counsel argues, the Respondent certainly could have called the employees together and discussed the situation and perhaps made clear its concerns about the need for business decorum during the organizational effort.

derance of evidence that special circumstances existed during the relevant period to justify the restriction it placed on the wearing, displaying, and distribution of union material by its employees.⁶¹ I would find and conclude that the Respondent violated Section 8(a)(1) of the Act.

C. The 8(a)(2) Allegations

The complaint alleges in parts 7 and 8 that the Respondent rendered unlawful assistance and support to the Carpenters in the following manner.⁶²

- a. requiring employees to sign Carpenters' authorization cards;
- b. distributing Carpenters' literature and paraphernalia at its facility;
- c. granting a wage increase to an employee who signed a Carpenters' authorization card.⁶³
- d. Granting recognition to the Carpenters as the exclusive bargaining agent of an appropriate unit, when, in fact, a valid representation petition had been filed by the Teamsters and the Carpenters did not represent an uncoerced majority of the unit.⁶⁴

1. The signing of the Carpenters' cards

According to the complaint, on or about January 14 or 15, Motter required certain of the Respondent's employees to sign authorization cards for the Carpenters. The General Counsel called Fetrow, Buonfiglio, and Doerr as witnesses to support this charge. These men, with little variation, described their encounter with Motter. Acting on Doyle's instructions, Motter asked each near the end of his shift to be available for a meeting with two representatives (later identified as Harry Duffield and Eustace Eggie) from the Carpenters in Motter's office.⁶⁵

According to Doerr, Motter told him that Doyle wanted him to go to Motter's office and fill out a Carpenters' card. Doerr said that the three men eventually filled out a Carpenters' card

⁶¹ I would also credit the testimony of employees Miller, Manyfield, Doerr, and Buonfiglio that the proscription included all areas of the facility as opposed to the Respondent's claim that materials were allowed in certain designated employee areas.

⁶² As previously noted, the complaint also charges the Respondent with rendering unlawful assistance to the Carpenters by way of conduct on three separate occasions charged as violative of Sec. 8(a)(1), discussed earlier herein.

⁶³ The complaint also charges the Respondent with violating Sec. 8(a)(3) and (1) for the granting of a wage increase to an employee, namely, Charles Doerr. This allegation will be discussed later herein in a separate section.

⁶⁴ There is no dispute between the parties that the appropriate unit at the Respondent's facility is all full-time and regular part-time truck-drivers, forklift drivers, boom operators, laborers and yardmen, excluding casual employees, office clerical employees, guards and supervisors as defined in the Act. I would find and conclude that this unit is an appropriate unit within the meaning of Sec. 9(b) of the Act.

⁶⁵ Duffield was employed by the South Jersey Regional Council of Carpenters (includes Local 623) headquartered in Atlantic City as its business representative. Eggie was also employed by the Council as a business representative. Both Duffield and Eggie were involved in the Carpenters' organizing efforts at the Respondent's facility during the relevant period.

in Motter's office after having met with Duffield and Eggie who explained the benefits of signing with their Union. Eggie and Duffield, according to Doerr, Buonfiglio and Fetrow, asked them together to fill out the cards but to leave the date blank, but gave no reason for this request.⁶⁶ According to the three, the representatives took the cards, left the office for a few minutes, then returned and instructed the three to put January 11 on the cards. Each man testified that the date of signing of the cards was not January 11, but that Eggie and Duffield were adamant about affixing this particular date on the cards.⁶⁷ After signing and dating their respective cards, Buonfiglio and Fetrow separately asked Motter why the three of them were being asked to sign with the Carpenters, and Motter told each that the Company only planned to keep the three on in a long-term capacity.

Through a series of leading questions posed by the Respondent's counsel, Motter testified that he never told any employees to sign Carpenters' cards and was not aware of any such cards being backdated. In any event, he claimed to have had no part in any backdating or placing of dates on cards. In short, without elaboration, he denied the three workers' version of the card-signing incident.

Eggie and Duffield testified and both men confirmed that they met with the three employees at the Respondent's warehouse with the objective of obtaining their signatures on the authorization cards and did obtain their signatures.⁶⁸ However, both men denied that Motter (or Doyle for that matter) was present at the time; only they and the three employees were in the back of the warehouse. Eggie and Duffield maintained that no Mar-Jam supervisor told the employees to sign with them or to date or backdate the cards; and that they did not instruct any of the Respondent's workers to put no date, date, or backdate the cards. Both men acknowledged, however, that the signatures were obtained inside the Respondent's warehouse in the back of the facility, but that they and the three workers were the only ones present when the cards were signed.⁶⁹

I would credit the Buonfiglio, Doerr, and Fetrow's version of the events leading to their signing the Carpenters' cards. Notably, again these present and former employees testified forthrightly and sincerely about what happened. Motter, however, merely denied everything and did not account for or even acknowledge that the Carpenters were onsite in his office solicit-

⁶⁶ Fetrow testified that it was the Carpenters who requested that he fill out one of their cards; however, no one (including Motter) required him to sign a card. According to Fetrow, he was not in favor of either of the two Unions and did not care one way or the other about them.

⁶⁷ Doerr was positive that the actual date of signing his card was around January 15; Buonfiglio, likewise, was sure that the date was around January 14 or 15. Fetrow was of the opinion that he signed after January 19. According to Doerr, Motter told him not to put a date on his card. The cards of the three are incorporated in GC Exh. 4.

⁶⁸ According to Duffield, he (and Eggie) went to the Respondent to obtain signatures for the three employees they thought comprised the Respondent's entire work force on *January 7*. (Tr. 31.)

⁶⁹ Both Duffield and Eggie testified that at the time the signatures were given by the employees, neither Doyle nor Motter was present. However, Duffield admitted he conversed with Doyle briefly as he left the premises with the cards, but that all other conversation with the Respondent was by written correspondence.

ing his employees during worktime. Accordingly, I do not credit his denial of involvement in the matter. As to Duffield and Eggie, I found their denials self-serving and implausible. Clearly, they were given access to the office of one of the Respondent's supervisors and to solicit the signatures of what amounts to a captive group of employees gathered for that purpose. And yet, both Eggie and Duffield in their testimony implied that management knew nothing of their presence or purpose at the warehouse. Their denials of the backdating become highly suspect. Three employees to a man testified under oath that the date on a document was not valid or true, and yet again Duffield and Eggie insisted there was no backdating and that by implication the dates were accurate. This strains credulity, and I do not credit their denials regarding the involvement of the Respondent's supervisors (most likely Motter) in the obtaining of the signatures in question.

2. The distribution of Carpenters' literature

The complaint alleges that on or about January 21–22, Motter distributed a Carpenters' hat and literature to the employees working at its warehouse facility. According to Buonfiglio and Fetrow, the day after signing the Carpenters' cards, Motter gave them individual packets containing Carpenters' literature and a hat. Motter testified that "at one point the Carpenters Union left us packets for all the employees and I gave them out. That was the extent of it." (Tr. 427.) Motter, however, said he never expressed any support for the Carpenters when he handed out the packets. I would find and conclude that there is no factual dispute regarding this allegation although it seems that the materials were more likely distributed by Motter prior to January 21–22.⁷⁰

3. Doerr's wage increase as unlawful assistance

It is undisputed on this record that Charles Doerr received a \$1 (\$6.50–\$7.50) per hour wage increase on or about January 12 or 25 and that the wage was authorized by Motter and approved by Doyle.⁷¹ The complaint alleges, and the General Counsel argues, that Doerr's raise was simply part of the Respondent's continuing plan to assist the Carpenters in the competition with the Teamsters to organize the Respondent's employees. The Respondent counters, contending that Doerr's raise was based on his having been employed by the Respondent for 6 months and because he completed training for a specialized position—EIFS mixer.⁷² The allegations regarding Doerr's wage increase also form a separate 8(a)(3) charge in the complaint. To avoid repetition, the 8(a)(2) and 8(a)(3) charges will be resolved in my discussion of Doerr's raise in the 8(a)(3) discussion later herein.

⁷⁰ Evidently, the Respondent concedes that Motter did indeed distribute the Carpenters materials, as it does not address this issue in its brief.

⁷¹ See GC Exh. 10, the Respondent's pay roll status change form for Doerr. The effective date of the increase stated on the form is January 12; however, Doyle testified that he believed that the raise actually went into effect on January 25.

⁷² EIFS stands for Exterior Insulated Finishing System which basically entails an operator mixing colors with stucco, utilizing an electric mixing machine and other tools.

4. The Respondent's granting of recognition to the Carpenters

Preliminarily, it is undisputed that the Teamsters filed with the Board its petition for certification as collective-bargaining representative of the Respondent's unit employees on January 21 and represented therein that it had the support of 30 percent or more of the covered employees.⁷³ Moreover, it is clear that the Respondent, on January 21, received a letter of the same date from the Carpenters demanding recognition as collective-bargaining representative for unit employees and enclosing the three authorization cards of Buonfiglio, Fetrow, and Doerr. On January 22, the Respondent acceded to this demand and signed a recognition agreement with the Carpenters.⁷⁴ The charges of unlawful assistance emanate from these circumstances. In essence, the General Counsel contends that, at the time it granted recognition to the Carpenters, the Respondent knew not only that the Teamsters had filed the petition, but further that the Respondent knew that the Carpenters had not achieved majority status so as to warrant recognition by it. The General Counsel argues that the Respondent acted solely to support and assist the Carpenters because it preferred that Union over the Teamsters. The Respondent denies any violation of the Act, asserting that it simply did not know that the Teamsters had filed a petition at the time it recognized the Carpenters.⁷⁵

The General Counsel called Joseph Yeoman, president of the Teamsters, to explain his involvement in his Union's organizing effort at the Respondent's facility.

According to Yeoman, on the morning of January 14 around 6 or 7 a.m., he and Secretary-Treasurer Thomas Willard were at the Respondent's facility attempting to organize the employees. Around 9 or 10 that morning, Willard said that Doyle wished to see them. The three met in Doyle's office where Yeoman talked generally about the Teamsters and showed Doyle a copy of the Teamsters contract with another local building supply company—Fortune Gypsum—to illustrate what the Respondent could expect if it recognized the Teamsters. According to Yeoman, Doyle mentioned that the Carpenters had approached him about a contract but that the Carpenters contract was not suitable for the type of work the Respondent's warehouse employees performed. By the same token, Doyle seemed satisfied with the Teamsters contract and asked Yeoman to draw up a contract similar to the Fortune Gypsum contract for the Respondent. Yeoman returned to his office that day and prepared a contract⁷⁶ between the Respondent and the Teamsters and met

⁷³ See GC Exh. 8(a), (b), (c), and (d). These documents were produced by the Respondent pursuant to a subpoena duces tecum and reflect a fax notation on GC Exh. 8(b) of January 21 at 2:16 p.m., and 4:01 p.m. (GC Exhs. 8(c) and (d)). GC Exh. 8(a) contains no fax notation but lists the Respondent's fax number. I would conclude that these documents were faxed by Region 4 to the Respondent on the date and time noted.

⁷⁴ See GC Exh. 5. This exhibit, produced by the Respondent pursuant to subpoena, consists of two pages and the fax notation on page two indicates receipt by the Respondent at 3:40 p.m. January 21.

⁷⁵ The Respondent does not address in its brief the allegation regarding the Respondent's recognition of the Carpenters based on authorization cards signed by only 3 of the Respondent's 10–11 employees in the unit.

⁷⁶ The contract in question is contained in GC Exh. 14.

with Doyle once more at around 11 a.m. According to Yeoman, he and Doyle went over the contract in some detail⁷⁷ and Doyle told him that the contract was perfect for the Respondent's industry. Doyle said that he would send the contract to its New York headquarters for approval, as he (Doyle) did not have the final say. According to Yeoman, Doyle said that he anticipated no problem and he or the New York officers would again contact Yeoman the next day. However, having received no word from the Respondent the next day, Yeoman telephoned Doyle. According to Yeoman, Doyle was surprised that headquarters had not responded as the employees were upset and management wanted the matter straightened out.

Yeoman said he called Doyle two more times that day with no result. Then late in the day on January 15, Yeoman requested a meeting with Doyle and met with him. According to Yeoman, he had prepared a letter⁷⁸ (and a proposed recognition agreement) addressed to Doyle, advising him that the Teamsters had obtained majority status among the Respondent's employees as their collective-bargaining agent and seeking to commence negotiations about various terms and conditions of employment.⁷⁹ According to Yeoman, Doyle read the letter, expressed no personal concerns, and again intimated he felt that headquarters would not have a problem with the proposal. Doyle asked whether he could have company officials sign the agreement and fax it directly to the Teamsters.

According to Yeoman, he and Doyle discussed in these meetings the composition of the bargaining unit, which Doyle said included all yard employees and all truck drivers—around 11 employees. When Yeoman presented his recognition agreement to Doyle on January 15, he also showed him around seven or eight authorization cards he had previously obtained from the Respondent's workers. Doyle inspected these at least four to five times before at the meeting's end, telling him he would send the proposed agreement to the New York office and then fax a signed copy back to the Teamsters. However, Yeoman said he never received the promised fax and tried to contact Doyle again. Later, Yeoman discovered from the employees that Doyle was also talking to the Carpenters⁸⁰ and decided to file a petition with the Board.

Doyle's testimony regarding his dealings with the Teamsters was sparse and guarded, and, thus, not very revealing. Accord-

⁷⁷ According to Yeoman, he and Doyle discussed job classification, profit sharing, and the aspects of the contracts vis-à-vis the Respondent's needs.

⁷⁸ This letter is contained in GC Exh. 13. Yeoman testified that the letter is dated January 14 but was given to Doyle on January 15. Yeoman did not explain why the salutation states Mr. Dugan. This probably is a typographical error. GC Exh. 13 also contains the proposed recognition agreement as an attachment.

⁷⁹ Yeoman identified the Teamsters cards in GC Exh. 9 as copies of those he showed to Doyle on the occasions he met with him. Yeoman obtained some of the cards personally; some were obtained by Willard on January 14 at the Respondent's facility; and some were brought to the union hall by the employees. Yeoman noted that the card for Fetrow was not among those he showed Doyle.

⁸⁰ Yeoman said he and Doyle had discussed the Carpenters, and he told Doyle that the Respondent should not sign a recognition agreement with the Carpenters or any union after the Teamsters had made their intentions known. (Tr. 233.)

ing to Doyle, he had never seen the Teamsters petition⁸¹ to the Board, and he could not recall ever seeing a copy of the January 14 letter from the Teamsters, informing him, among other things, that the Union had obtained signatures from a majority of the unit employees. Doyle, however, acknowledged that the proposed contract between the Respondent and the Teamsters was dropped off by a "Teamster" at the first meeting as part of a basic information package he had requested. He forwarded this agreement to company headquarters. Doyle offered no testimony regarding any discussion between himself and the Teamsters regarding unit size.⁸²

I have considered the testimony of the main proponents regarding the charges in question, and I would credit Yeoman's version of events over Doyle. Notably, Yeoman's testimony was complete, plausible, and corroborated. On the other hand, Doyle offered very little to explain what happened in his dealings with the Teamsters and does not even mention Yeoman by name as the person or one of the persons from the Teamsters whom he dealt with on several occasions. Again, Doyle was guarded in his testimony. An example was Doyle's testimony about GC Exhs. 6 and 6(a) documents on which his signature is plainly evident; yet, Doyle says "if I signed it." (Tr. 124.) Also in describing this document, a clearly stated recognition agreement, Doyle somewhat disingenuously says that the Company was looking to discuss recognition of the Carpenters for a group of three people. (Tr. 125.) Doyle's denial of not having seen the Teamsters petition to the Board is also not believable. By contrast, Doyle acknowledged receiving by fax several documents from the Carpenters:

— a January 7 letter bearing his signature prepared by corporate [GC Exh. 2]

— a January 8 letter and draft recognition agreement [GC Exh. 3]

— a January 21 recognition demand letter from the Carpenters [GC Exh. 5]

Yet, Doyle claims that he did not receive the Teamsters petition by fax at his admitted fax number.⁸³ I would find and conclude that the Respondent did indeed receive the copy of the Teamsters petition on January 21, and that Doyle's denial of his having seen it is not credible. I would further find that Doyle knew of the filing of the petition by the Teamsters on January 21 and, nonetheless, granted recognition to the Carpenters with that knowledge on January 22.

The Applicable Legal Principles; Discussion and Conclusions

Regarding the 8(a)(2) allegations, the Act makes it an unfair labor practice for an employer "to dominate or interfere with

⁸¹ Regarding the petition (GC Exh. 8), Doyle acknowledged that the petition was indeed sent to his fax number.

⁸² Doyle acknowledged receiving the Carpenters January 21-recognition demand letter (which was faxed and sent by regular mail) and the three authorization cards enclosed. However, according to Doyle, there were no discussions with the Carpenters as to how many employees were needed to seek representation.

⁸³ I would also note that the fax transmission reports contained in GC Exhs. 8, 8(c), and (d) confirm receipt at the Respondent's admitted fax number.

the formation or administration of any labor organization or contribute financial or other support to it . . .”⁸⁴ In the instant case, the charges and dominant issues relate only to allegations of unlawful support of and assistance to the Carpenters by the Respondent and not domination or interference with the administration of that or any other union. My analysis will be predicated on this basis.

Section 8(a)(2) attempts to reach and reconcile essentially two legitimate but countervailing goals; first, the protection of employee’s freedom of choice and, second, the promotion of cooperation between employers and employees. *Electromation, Inc. v. NLRB*, 35 F.3d 1148 (7th Cir. 1996). In determining whether unlawful assistance has taken place, the Board looks to the totality of the circumstances to determine whether the employer’s (and sometimes the union’s) conduct tainted the union’s majority status. The totality of the circumstances consists of postrecognition and prerecognition conduct of a respondent viewed in the context of the entire case and, moreover, where an employer’s numerous acts may be construed as a single course of conduct comprising the circumstances of any given case. *Farmers Energy Corp.*, 266 NLRB 722–723 (1983).

While the Board directs that each case alleging unlawful assistance is to be examined circumstantially, it has determined that certain employer conduct with respect to unions goes beyond mere cooperation and falls squarely within the prohibition of the Act. For example, the Board consistently regards supervisory participation in the solicitation of authorization cards for a union, whether the solicitation is explicit or implicit, as unlawful because such conduct might well imply to the employees that the employer favors the union in question or might coerce the employees to sign out of fear of employer retaliation or reprisal. *Stevenson Equipment Co.*, 179 NLRB 865, 866 (1969); *AMA Leasing*, 283 NLRB 1017 (1987). Also, employers have been held to violate Section 8(a)(2) by requiring employees to sign cards while allowing union organizers unfettered access to employees as supervisors stood by watching in an approving manner. *Ryder Systems*, 280 NLRB 1026 (1986).⁸⁵ Additionally, an employer who promises benefits to induce employees to sign a preferred union’s cards violates Section 8(a)(2). *Midwestern Mining & Reclamation*, 227 NLRB 221 (1985).⁸⁶

⁸⁴ The remaining language of Sec. 8(a)(2) is as follows: “Provided that subject to rules and regulations made and published by the Board pursuant to [Sec. 6], an employer shall not be prohibited from permitting employees to confer with him during work hours without loss of time or pay.” 29 U.S. §158(a)(2). This part of the section has no relevance to this litigation.

⁸⁵ Not every evidence of supervisory participation is unlawful, as in the case of a low-level supervisor’s solicitation of cards. *Admiral Petroleum Corp.*, 290 NLRB 896 (1979). Also see where a mere statement of preference by a supervisor favoring a union is not in the circumstances of the case not coercive and, hence, not violative of the Act. *NLRB v. San Antonio Portland Cement Co.*, 611 F.2d 1148 (5th Cir. 1980) cert denied 449 U.S. 844 (1980); and a supervisor’s wearing a union button at a union meeting held not coercive for purposes of Sec. 8(a)(2).

⁸⁶ Thus, I would note that Motter’s offer to pay employees’ dues to the Carpenters—previously found to be an 8(a)(1) violation—may also

In resolving 8(a)(2) charges, the Board is at pains to distinguish between lawful cooperation and unlawful support.

Lawful cooperation has been described as activity, which does not have the effect of inhibiting self-organization and free collective bargaining. Thus, the Board has held that an employer violates the Act by arranging for a union representative to meet employees on the company’s property while employees were being paid, especially when the employer had reason to believe that the employees might support another union. *Windsor Place Corp.*, 276 NLRB 445 (1985). Notably, the Board generally finds in unlawful assistance cases that the Respondent engaged in affirmative acts of tangible benefit to a labor organization, not sufficiently serious to constitute illegal domination. *NLRB v. San Antonio Portland Cement*, supra. For example, an employer who simply provides clerical support to a union, unless tied into other support functions or is connected to a union’s quest for information does not render unlawful assistance. *Crumpton–Shenandoah Co.*, 135 NLRB 794 (1962). Thus, an employer which allows one of its supervisors to distribute authorization cards for a favored union to employees during the work hours at the worksite, *Baby Watson Cheesecake*, 320 NLRB 779 (1996); and an employer who permitted, among other things, union representatives to meet with its employees on company time and premises to solicit signing of cards and allowed a company agent to help employees to sign cards for the favored union, *Kosher Plaza Supermarket*, 313 NLRB 74 (1993), violate Section 8(a)(2).

Finally, there is the issue involving recognition by employers of competing unions. As a general proposition, it is clear that the Board will find a violation of Section 8(a)(2) in almost per se fashion where an employer recognizes a labor organization which does not actually have majority employee support. *Ladies Garment Workers (Bernhard-Altman Texas Corp.) v. NLRB*, 366 U.S. 731 (1961).

In cases involving rival unions, both known to be engaged in organizational efforts, the Board advises employers to follow the safe and cautious course and simply refuse recognition of either, which is authorized under *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974). In such a case, the unions in question or the employer could then file a representation petition.

In *Bruckner Nursing Home*, 262 NLRB 955 (1982), the Board enunciated certain principles to govern employer conduct in the context of rival union initial organizing situations. In *Bruckner*, the Board noted that it was not violative of Section 8(a)(2) in such situations for an employer to recognize a labor organization, which represents an uncoerced and unassisted majority of employees before a valid petition for election has been filed with the Board. However, once notified of a valid petition, an employer must refrain from recognizing any of the rival unions. The Board elaborated further in the holding by stating:

pose a violation of Sec. 8(a)(2)’s prohibition against employers’ contributing financial support to a labor organization. See *Business Envelope Mfrs.*, 227 NLRB 280 (1976); *Stockton Door Co.*, 218 NLRB 1053 (1975); *Dura-Vent Corp.*, 235 NLRB 130 (1978); *Heller Bros. Co.*, 7 NLRB 646 (1938); *G. L. Gibbon Trucking Service Inc.*, 199 NLRB 590 (1972); enf. without op. 85 LRRM 2303 (9th Cir. 1973), cert denied 417 U.S. 945 (1974).

Making the filing of a valid petition the operative event for the imposition of strict employer neutrality in rival union initial organizing situations will establish a clearly defined rule of conduct and encourage both employee free choice and industrial stability. Where one of several rival labor organizations cannot command the support of even 30 percent of the unit, it will no longer be permitted to forestall an employer's recognition of another labor organization, which represents an uncoerced majority of employees, and thereby frustrate the establishment of a collective-bargaining relationship. [Footnote omitted.] Likewise, an employer will no longer have to guess whether a real question concerning representation has been raised but will be able to recognize a labor organization unless it has received notice of a properly filed petition. [At 957.]

Thus, it is clear under Board precedent that in rival union, initial organizing situations, an employer's knowledge of the existence of a valid petition is crucial. Notably, even where there has been no valid petition filed but "[A]n employer is faced with the recognition demands by two unions, both of which claim to possess valid authorization card majority support, [the Board admonishes] the employer must beware the risk of violating Section 8(a)(2) by recognizing either union. In such a situation, there is a possibility that the claimed majority support of the recognized union could in fact be nonexistent." (*Bruckner* at fn. 13.) The employer in such case should not recognize either union—the safer course to avoid an 8(a)(2) violation.

Applying the aforementioned authorities and principles, and considering the totality of pertinent facts and circumstances presented in this litigation, I would find and conclude that the Respondent, through its aforementioned supervisors, violated Section 8(a)(2) by unlawfully assisting the Carpenters whom it knew, beyond a doubt, was in competition with the Teamsters for recognition as the employees' collective-bargaining representative in the following ways:

- (1) Doyle's informing an employee that the Respondent would terminate other employees if the Company recognized the Carpenters.
- (2) Doyle's promising increased wages, benefits, and profit sharing to an employee if the employee supported the Carpenters instead of the Teamsters;
- (3) Doyle's threatening to discharge employees who supported the Teamsters;
- (4) Motter's promising employees repayment or reimbursement by the Respondent for dues paid by them to the Carpenters if they signed with the Carpenters;
- (5) Motter's soliciting employees to sign authorization cards for the Carpenters;
- (6) Motter's distributing Carpenters' hats and literature to employees while they were working at the Respondent's facility;
- (7) The Respondent's granting recognition to the Carpenters as collective-bargaining representative of unit employees, knowing and notwithstanding that the Teamsters had filed a valid representation petition with the Board;

(8) The Respondent's granting of recognition to the Carpenters when the Union did not represent an uncoerced majority of unit employees.

D. The 8(a)(3) Allegations

1. The Doerr wage increase

The complaint alleges, in essence, that the Respondent, in violation of Section 8(a)(3) of the Act, discriminatorily granted Doerr a wage increase around January 21 or 22, to induce him to sign and/or reward him for signing with the Carpenters. As noted previously, granting this wage increase is also alleged to be an act of unlawful assistance to the Carpenters in violation of Section 8(a)(2). The two allegations will be discussed together in this section.

There is no dispute that Doerr received a \$1 raise during the time the rival unions were attempting to organize the Respondent's employees. Furthermore, I have previously found that Doerr was coerced (influenced) to sign a Carpenters' card with promise of benefits, including a wage increase by Doyle around January 13 or 14. Thus, it is clear in my view that Doerr was especially selected by the Respondent to further its plan to assist the Carpenters organizational drive and to discourage employees like Doerr from signing with the Teamsters. The General Counsel argues that the Respondent's conduct warrants a finding of a violation of Section 8(a)(3) of the Act.

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment, or any term of condition of employment, to encourage or discourage membership in any labor organization. 29 U.S.C. § 158(a)(3).

Thus, the essence of the charge here is that the Respondent increased Doerr's hourly wage rate to encourage his membership in the Carpenters and, on the other hand, to discourage his membership in the Teamsters.⁸⁷

In order to establish discriminatory motivation, the General Counsel bears the initial burden of persuasion to show that antiunion sentiment—the union here being the Teamsters—was a substantial or motivating factor in the challenged employer decision. *One Stop Immigration & Education Center*, 330 NLRB 413 (1999). If this is established, the burden then shifts to the employer to demonstrate by the preponderance standard that the employer's action would have occurred irrespective of whether the employer was engaged in protected activity, here making an unhampered, independent, and uncoerced decision to select his collective-bargaining representative. *Wright Line*, 251 NLRB 1083, 1089 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). It is also well settled, however, that when an employer's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the employer desires to conceal. This may serve as rebuttal by the General Counsel to show that the alleged discrimination would

⁸⁷ It bears recollecting that Doerr had already signed a Teamsters' card when Doyle approached him with promises of benefits to induce Doerr to sign with the Carpenters.

not have taken place in the absence of the protected activity. *Manno Electric*, 321 NLRB 278, 281 (1996). Based on this record and my previous findings, I would find and conclude that General Counsel has met its initial burden of establishing a violation of Section 8(a)(3).

The Respondent, while admitting that it granted Doerr a raise, asserts that the decision was not based on Doerr's signing with the Carpenters. Rather, the Respondent contends that Doerr was given a raise because of his seniority status and promotion to a skilled major position in the warehouse (R. Br. at 28).

Doyle testified about the circumstances surrounding his granting Doerr's raise. According to Doyle, Doerr received his raise because he demonstrated that he could perform the stucco/paint mixing process called EIFS (exterior insulating finishing system). Moreover, according to Doyle, Doerr never told him that he had signed with any union while Doerr was employed with the Company, and he (Doyle) never discussed union activity with Doerr, let alone told him or other employees that he favored the Carpenters over the Teamsters. Doyle could not remember whether he told Doerr in advance that he was to receive a raise and the reasons for his promotion. Doyle was able to recall, however, that Doerr at some point began asking him for a raise about once per week, claiming that he (Doerr) needed more money. Doyle said that he advised Doerr that newly hired laborers' wages were set, but, if Doerr could move to another position, his chances for a wage increase would improve. Then, just before Christmas (1998), the EIFS position became available and he believed Doerr was smart enough to do the job. Doyle said that he promised Doerr a raise if he successfully completed 3 weeks of EIFS training. Doerr succeeded and was given the EIFS position and a \$1 raise.

Doyle said that all raises are prospective (starting the next pay period) and, while the paperwork⁸⁸ for Doerr's raise is dated January 12, the raise in Doyle's view only became effective January 25. Doyle said that once Doerr became the EIFS mixer, he alone performed this function. However, according to Doyle, there is no mixer work in the winter so Doerr was not performing that function in January. (Tr. 126.)

I have previously found that Doyle promised Doerr he would try to secure a raise for him if he signed with the Carpenters. I have also found previously that Doerr told Doyle that he had signed with the Teamsters around January 15.

Doerr supplied additional background to his getting a raise. Doerr testified that prior to his actually getting the raise, he had been asking Doyle for a raise for about 1-1/2 to 2 months, as he felt that he was entitled to one after having worked 6 months on the job. According to Doerr, Doyle occasionally said he would put him in for a raise but nothing happened. Then, around the beginning of February, his raise appeared on his check. Doerr said that he had started doing the mixer function about 1 to 2 months before, as another man who did this work quit. Although Doerr was the only worker doing the mixing, he said

that he had no conversation with Doyle tying his promotion to the mixer job and was never told that he was being promoted because of the mixing. Doerr said that he never saw any paperwork advising that he was to receive a raise.

The General Counsel submits that Doyle's testimony is not credible and merely gives formal structure to a clearly pretextual reason for Doerr's promotion. As proof, he points out that Doyle himself admitted that laborers like Doerr are not given (6-month) periodic wage reviews as are the skilled workers, and that Doerr had been asking Doyle for a raise but had been ignored. The General Counsel submits that Doerr's entreaties were only honored when the Respondent needed his signature on the Carpenter card. Once it obtained his signature, then the Respondent gave Doerr the raise he was promised. Thus, the General Counsel argues, not only did the Respondent violate Section 8(a)(3) in granting the discriminatory wage increase, but also Section 8(a)(2)'s prohibition against unlawful assistance to a labor organization.

I agree with the General Counsel on both counts. First, I believe that Doerr testified credibly about the circumstances surrounding his being granted a raise, which clearly indicate that his ability to perform the mixing job was not the motivating factor in his promotion, as evidenced that he was not even told by Doyle or anyone in management that his promotion was going into effect or the reasons therefore. It seems, based on Doerr's demeanor at the hearing, that he was actually surprised to see the raise on his February check, although he had been promised one if he signed with the Carpenters. Doyle's explanation was implausible and incredible. First, it seems odd to me that an employer would pin an employee's promotion on work that he was not doing at the time because of seasonal concerns. Second, it only seems plausible and reasonable that an employer, if only to garner goodwill, loyalty, or simple appreciation, would tell the employee why he was getting promoted. This was not done in Doerr's case. So it seems to me that the Respondent, in order to make good on its promise to give Doerr a raise for signing with the Carpenters, and to disguise the unlawful nature of his promotion, cloaked the pay-back scheme in terms of Doerr's having earned a promotion because of his abilities with the mixing process. In short, the Respondent's reason for Doerr's promotion to me was an artifice, a pretext designed by the Respondent to assist unlawfully the Carpenters in his organizational drive and to discourage Doerr's membership with the Teamsters. Both actions are violative of the Act in my view, and I would so find.

2. The Arthur English termination

The complaint charges that another employee, a truckdriver, Arthur "Hawk" English, was terminated by the Respondent because he supported the Teamsters, in violation of Section 8(a)(3) and (1) of the Act. It is undisputed that English was terminated by the Respondent, but the actual date is controverted. The General Counsel essentially contends that English was fired unlawfully on January 18 because he had told Doyle that he was a Teamsters supporter and had signed one of its cards when Doyle was having trouble with the Teamsters. Further, Doyle, acting on the Respondent's preference for the Carpenters and its threat to fire or get rid of all such Teamsters

⁸⁸ GC Exh. 10 is the payroll status change form. Notably, Motter authorized it, and Doyle signed as having approved it. Doyle testified that Doerr was not given a copy of this as it is an internal document. Motter did not testify regarding Doerr's raise.

supporters, chose to rid itself of English because he was a relatively new employee and clearly did not fit in with the Respondent's plans. The General Counsel submits that the reason the Respondent gave to English to justify letting him go—downsizing—and the reasons presented at the hearing were all pretextual and, worse, fabrications. At the hearing, the Respondent principally argued that English was discharged because he failed to follow the Respondent's personnel policies and engaged in misconduct sufficient to warrant his termination and would have been let go irrespective of any arguable union animus on its part and union activity on his part.

English testified at the hearing about his employment with the Respondent and the circumstances of his being let go.

English began his employment at the warehouse around Thanksgiving 1998 as a flatbed truckdriver. He was interviewed and hired by Doyle and later immediately supervised by Motter, who dispatched him to various delivery sites and approved his time, among other functions.

According to English, whose nickname was Hawk, during his interview and before being actually hired, he apprised Doyle of his need to have 2 personal days for previously scheduled appointments with his doctor. According to English, Doyle did not object to this.

Regarding union activity at the facility, English first observed the Teamsters onsite around January 12 or 13 across the street from the warehouse early that morning (around 6:07–6:15 a.m.). English also saw Teamsters' literature on Motter's desk that morning and later talked to Motter about the materials. According to English, Motter said he did not especially care for unions, having belonged to the Pipefitters and was dissatisfied with the experience. Motter told him that he had not really paid much attention to the Teamsters materials. English then was dispatched for a delivery run but, later in the day, spoke to Doyle and mentioned that he had seen the Teamsters at the site. English queried Doyle as to what was going on, and Doyle responded that he would explain things to him and the others at a later date. In this conversation, English did not inform Doyle then that he had already signed a Teamsters' card, which he later dropped off at the Teamsters office.⁸⁹

On another subsequent occasion (about a week later), English asked Doyle what was going on with the Union and Doyle said that he was having some trouble with the Teamsters and the Carpenters; that some employees had signed with the former and some with the latter. On this occasion, according to English, he told Doyle that he had signed with the Teamsters, to which Doyle made no response. The next thing that happened, according to English, was his getting terminated. He explained the circumstances of his discharge.

English said that he came in to work around January 18 at his normal reporting time—6:30 a.m.—and, as he was about to sign in, Motter told him not to touch any truck or do anything but to go see Doyle. English proceeded to Doyle's office and was told by him that he was being let go because the Company was downsizing; that the Company was releasing one of its

⁸⁹ English signed but undated Teamsters card is contained in GC Exh. 9(d). According to English, he signed this card on the same day he first saw the Teamsters at the facility.

trucks (presumably back to corporate headquarters); that English's name had come up on the downsizing hit list.⁹⁰

According to English, he mentioned to Doyle that another driver, Buonfiglio, had been hired after him; thus, he was senior to at least one other driver. Doyle explained that Buonfiglio was being kept on because, in addition to driving, he had learned how to operate the boom truck. English told Doyle that Buonfiglio had received specific training on the boom truck's operations, while he was left to teach himself in spare moments. Therefore, Buonfiglio could learn quicker. Doyle said he could not do anything then but that he would get back with English in a couple of weeks should anything change. English said he left the facility that day but was upset because Doyle's reason made no sense to him and was to him unjust.

Doyle testified regarding English's termination. According to Doyle, on January 25 (a Monday), he left a note for Motter, telling him not to permit English to punch in before seeing him. According to Doyle, he decided to terminate English because of poor job performance. Doyle further explained that English was a probationary employee⁹¹ and, over about a 10-day period (around January 15–25), English's supervisor, Motter, and even other drivers reported one day after another different complaints about him. At the end of the week of his discharge, Doyle testified that he forwarded all of the complaints to his operations manager at headquarters and the decision to terminate him followed.

Doyle cited seven incidents (incorporated in a disciplinary report)⁹² involving English for which he was verbally disciplined by management from January 18 through 23, which led to his termination. Basically, according to Doyle, on January 18, English got lost on one of his deliveries (the Bricktown run) and failed to call in to get directions or apprise management of his problem. As a result, English took 9 hours to make one delivery, which should have taken 2 to 3 hours.⁹³ Doyle said the very next day (the disciplinary report indicates January 20), a customer (Ceiling Craftsman) complained that English cursed

⁹⁰ At the hearing, the Respondent stipulated that it was not asserting company downsizing or cutbacks due to economic necessity as justification for English's termination.

⁹¹ R. Exh. 3 is a document dated October 29, 1998, with no letterhead identifying it with the Company, that states (paraphrased) that as of November 1, 1998, any newly hired employee is on probationary status for 90 days and that if at any time (during the period), poor performance, among other deficiencies, will be grounds for termination. The notice closes with "Sincerely Howard/Scott." English testified he was not told he was on probationary status and he had never seen this probationary notice. (Tr. 368.) I will note at this juncture that the document, in my view, is of dubious authenticity and appears, because of spacing, to be redacted or altered.

⁹² English's separate disciplines are set out in R. Exh. 4 (identical to GC Exh. 11). Doyle testified that he prepared this document addressed to himself and from himself (an e-mail) on one day and sent it to a Labor Pool manager (Ron Braverman). This form is the only written documentation of English's claimed disciplinary problems. According to Doyle, Braverman from headquarters responded to him on February 10.

⁹³ Doyle said that drivers are issued cell phones to use to avoid these types of problem and all trucks had posted on them a copy of RULES FOR DRIVERS (R. Exh. 1), advising them to call in if lost.

at him and, because he was in a hurry, kicked the insulation being delivered off the truck. English then sped off and had an accident with the company truck.⁹⁴ The previous day, according to Doyle, English checked in at around 6:10 a.m. but left the job at 7:45 a.m. for breakfast (at a WAWA restaurant) but did not return until 10:30 that morning. Doyle said the WAWA was only 20 minutes away and English's truck was loaded and ready to go at 8:15 a.m. Doyle said he watched this truck himself from 8:30 until 9:30 a.m. Regarding English's tardy return from breakfast, Motter reported that English told him (Motter) not to worry about what he did when he (English) was not at work, not to get involved in his personal business. Doyle took Motter's report seriously. On January 21, according to Doyle, Fetrow told him he saw English in the Company's small flatbed truck with his wife and child, traveling away from the facility. English showed up for work a couple of hours later and explained that he had gone to the store for something.

Doyle said that on January 22, English simply did not report for work and did not call in.⁹⁵ On January 23, a Saturday, English did not attend a mandatory driver training session.⁹⁶ According to Doyle, driver training is mandatory in part to avoid incidents such as English's involvement with the Ceiling Craftsman customer. Doyle explained that the report's reference to English's having falsely turned in Delaware toll receipts (for reimbursement) came from Motter. Motter told him that sometime between January 15 and 25, English demanded a \$2 to \$3 reimbursement when he had not actually gone to Delaware for the run in question. Motter told him he confronted English and English returned the money.⁹⁷

According to Doyle, because other drivers were complaining about English regarding matters deemed not significant for writeups, he began more clearly observing English all of the last week of his employment. On about January 25, he decided to terminate him in his office on January 25 basically because he had become disgusted with him.⁹⁸

⁹⁴ Doyle noted that the accident was not a basis for English's termination and there was no documentation of the accident. English admitted he was in an accident on the day in question but provides another version of the incident. However, according to Doyle, the accident triggered his concern about the incident with the customer, that English was almost like a maniac, flying out in the street. (Tr. 140).

⁹⁵ Doyle could not say whether English was excused that day; that he was not aware of nor did he investigate any extenuating circumstances. As far as Doyle was concerned, English was simply an unexcused no-show that day.

⁹⁶ English, like most of the Respondent's drivers, normally did not work every Saturday because business is slow; they come in on alternate Saturdays. Mandatory training takes place on Saturdays for the drivers, but drivers are compensated for attending these sessions.

⁹⁷ According to Doyle, drivers are given \$20 to \$30 daily for various expenses, including tolls.

⁹⁸ Doyle noted that ordinarily, Motter was the one who would terminate employees. However, because he had received comments that English and Motter were not getting along, he decided to fire English personally. (Tr. 158.)

Doyle denied discharging English because of his union affiliation, saying that he did not know that English was a Teamsters supporter at the time he decided to discharge him.⁹⁹

Doyle explained why none of English's disciplines were in written form. According to Doyle, if a supervisor writes an employee up for an infraction but the employee refuses to sign it, the matter becomes a verbal warning and does not become part of the employee's file. Regarding English, he was written up once for not attending the mandatory driver training—but refused to sign—so the written discipline, according to Doyle, was not valid. (Tr. 142.) Doyle said that English was also verbally reprimanded twice during the period covering January 15–25.

Motter was called by the Respondent

According to Motter, English, like all warehouse employees, was told upon hire that he was a probationary employee, that the probationary period is "usually 90 days." Motter said that the Respondent did not have any written policy statement regarding probationary status. According to Motter, English became problematic to him when he demanded payment for the entire day although he wanted to leave early. Motter also recounted English's attempt to get a \$4 to \$5 reimbursement for an out-of-state trip. Motter felt that English was dishonest and trying to take company property, as he had no business out of state on the day in question. Motter wanted to get rid of him then.¹⁰⁰ Motter also related the time English was let go for breakfast (the WAWA incident) and he did not return until 4 hours later and a contractor's calling, saying that he saw English in a company truck with his family.¹⁰¹ Motter also said that he verbally disciplined English numerous times and advised him that repeated violations would result in his termination. However, English's response was to deny any wrongdoing, including the Ceiling Craftsman incident. Motter confirmed that Doyle told English that he was terminated but that he, too, recommended the action. According to Motter, he never told English that the Company was downsizing.

After his discharge, English testified that he began having doubts about his discharge, thinking it was not right. According to English, he felt that his discharge was suspicious because he had received no complaints about his work and Buonfiglio had been hired after him, so he reasoned business could not be bad enough to warrant a reduction of drivers. Accordingly, on February 10, 2 weeks after his termination, he called the Respondent's Brooklyn terminal and explained his position to a man named Norm. According to English, Norm put him on hold for 30 to 35 minutes and eventually he was told that he

⁹⁹ Doyle made this denial in direct response to a question posed by me (Tr. 160). Doyle denied that Yeoman had ever shown him any of the Teamsters' authorization cards, which would have included one signed by English, although as previously noted, Doyle met with Yeoman around January 12 through 15. (Tr. 173.)

¹⁰⁰ Motter said that he was not sure of the date of the toll receipt incident, saying that he did not keep track of this. Then he added that he wanted to keep the receipt but English snatched it out of his hand and would not give it back. Motter did not write English up but reported the matter to Doyle.

¹⁰¹ Note: Doyle testified that Fetrow reported this.

had been let go for poor job performance, not downsizing. Norm advised he could explain the matter no further. According to English, he told Norm that he was not going to let the matter rest, that he needed answers because he felt that his discharge was unjust.

According to English, around 2 days later, he again contacted Doyle and asked for his job back. Doyle said the matter was out of his hands because the Board and the Respondent's attorneys were now involved.¹⁰²

English denied ever receiving any complaint (verbal or written) about his work performance and, in fact, said management praised his work.

English said his attendance was perfect, except for the two dates for which he requested leave. English denied receiving complaints about taking too long to complete deliveries, getting lost,¹⁰³ and, in fact, he earned pay incentives for completing his runs early. According to English, the Company, on its own initiative, paid him for the entire day if he completed his deliveries early. English said that he made two deliveries to Bricktown. He could not recall any Ceiling Craftsman incident and denies cursing a customer and telling any customer that he was in a hurry or that any materials fell or were pushed off his trucks. English admitted that he was involved in an accident with a company truck but felt he was not at fault because the other driver was speeding and he was already in the intersection. He explained the incident to Doyle who said not to worry about it because the Company carried no-fault insurance. English also denied transporting his family in a company vehicle; and he denied ever being absent from work without reporting, again except for the 2 days he had requested. English said he called in the Friday before a Saturday mandatory meeting for drivers in the Brooklyn office and talked to Doyle and Motter that he may not have to attend. This was the weekend before January 18 when he was terminated. According to English, he was prepared to attend the meeting.

Regarding the Delaware toll receipts, English said he could not recall having made deliveries in Delaware, but that he never turned in receipts for places he did not go. However, English noted that any deliveries requiring a crossing of Providence River (New Jersey) and into Delaware is within the jurisdiction of the Delaware River Authority. A driver's toll receipt will

¹⁰² Doyle testified that English returned to the facility on two occasions after his termination and talked with him. According to Doyle, English did not like getting laid off and said he could make a big deal about it or let it go if the Respondent would give him 2 weeks' severance pay. Doyle said that he contacted corporate headquarters and could not arrange for severance in view of the circumstances of English's termination. According to Doyle, English, with this news, got "huffy" and said he would make things hard and again demanded 2 weeks' severance "to go away." English then, on the last occasion, said he was going to get a lawyer, that he was talking to people. By this time, Doyle had received (what he described as) stuff from the Board and his (Doyle's) name was listed. Doyle told English not to contact him directly any more and he had no further contact with him. English denied this categorically. (Tr. 379-380.)

¹⁰³ English explained that he was an experienced over-the-road driver, having driven motor coaches for 15 years and tractor-trailers for 2 years prior to his employment with the Respondent.

reflect this, although you may not have actually crossed into Delaware proper.

3. Credibility determinations regarding English's termination; conclusions

First, it must be noted at the outset that English's termination cannot be looked at as an isolated event and, thus, I have considered his discharge and the testimony offered by the parties to explain it in the context of the total circumstances of this case, which has been set out at some length herein.

Doyle asserts that basically over a 10-day period, English performed his job poorly and was let go for this reason and not because of economic necessity—downsizing—as maintained by English. I am not at all convinced that English was discharged for poor performance. First, there is the matter of documentation or, rather, the lack of it. Based on Doyle's (and Motter's) version, English committed serious violations of company policy, including cursing out a customer, failing to attend a mandatory meeting, failing to show up for work, and even attempting a petty theft. Yet, there is not one contemporaneous word in written form about those presumably serious infractions. I note that stealing (and certainly submitting a false claim for reimbursement is tantamount to theft) is in itself grounds for discharge. Yet, English was not, and no paperwork was generated to record his alleged transgression. Also, the only document outlining English's transgressions is a disciplinary report, a document Doyle put together after the events in question. Regarding this, I note that this document is dated February 10, and Doyle claims to have sent it along to corporate headquarters but prepared it 2 to 3 days prior to English's termination. Notably, English testified that he called the Respondent's corporate officer on February 10 and questioned his discharge by reason of downsizing. He was put on hold for about a half-hour and then told the real reason was his poor work performance. Given my prior findings that the Respondent was involved in backdating documents and unlawfully colluding with the Carpenters, I believe that the disciplinary report relied upon by the Respondent is, in all likelihood, a fabrication of Doyle's to justify English's discharge. In short, I do not credit the Respondent's reasons for discharging English. I note also that the very timing of the action is suspicious. Notably, English's so-called performance problems seemed to materialize coincidentally at around January 15, when Yeoman, the Teamsters' president, made his demand for recognition and showed Doyle the signed authorization cards, which included one from English. This is more than coincidence in my view. Then, there is the direct testimony of Doyle. I found Doyle's testimony to be not very consistent and even contradictory. For instance, Doyle testified at one point that English had been written up once for the infractions but refused to sign (Tr. 142) and then, a transcript page later, says that English was written up twice. (Tr. 143). Doyle also said employees caught stealing are terminated immediately. English evidently was caught submitting a false claim for reimbursement and yet was not terminated. In fact, it seems neither Doyle nor Motter knew when English attempted to get the undeserved reimbursement.

I also found the Respondent's disciplinary process, as explained by Doyle, to be confusing and actually somewhat self-

defeating. Doyle explained that a supervisor may write-up an employee for an infraction, but the employee may refuse to sign an acknowledgment, which then invalidates the discipline. The Respondent then converts the discipline from written to verbal, but maintains, according to Doyle, no record of the written discipline.¹⁰⁴ I note that section of the Respondent's employee manual,¹⁰⁵ dealing with employee conduct and disciplinary action does not address employee discipline in the fashion. In my view, Doyle fabricated this explication in an attempt to explain away the lack of written documentation for English's alleged misconduct.¹⁰⁶ Also, there is Doyle's denial of having seen the Teamsters' authorization cards and, hence, his denial of knowledge of English's having signed with that Union. I have previously determined that Yeoman, indeed, did repeatedly show Doyle these cards and he examined them. Therefore, I do not credit his denial of knowledge of English's signing with the Teamsters, a position neither he nor the Company desired.

I have previously found Motter's testimony in other respects not credible. In similar fashion, I found Motter's testimony regarding English's termination also to be not worthy of belief. As English's immediate supervisor, and clearly having problems with him, it seems that he would or should have documented English's many so-called infractions and especially with regard to the false claim for reimbursement. Yet, he made or kept no written record. In view of Motter's apparent willingness to collude with his supervisor for unlawful purpose, I do not credit his testimony regarding English's allegedly poor job performance.

On the other hand, I have fully credited English's version of events, including his denial of the commission of any infractions of company policy or actions deemed poor work performance. Before the Teamsters' arrival, English was regarded as a good worker by Doyle. English seemed to be sincere, and his story hung together. He rightly, under the circumstances, viewed his discharge as suspicious and concluded it was due to his signing with the Teamsters, with whom Doyle said he was having trouble. He convinced me that the original reason given him for his discharge was downsizing. However, when he challenged that with the Company, his work performance suddenly became the reason—a more shifting defense is not imaginable.

Thus, I would find and conclude that the General Counsel has met his burden under *Wright Line*, supra. I would also find that the Respondent failed to meet its burden in rebutting the General Counsel's case. In that regard, I would find and conclude that the reason given by the Respondent for English's discharge was not bona fide but pretextual and, in all likeli-

¹⁰⁴ This is not altogether true because in GC Exhs. 16(a) through (o), there are copies of unsigned disciplinary reports for various employees that were produced by the Respondent pursuant to subpoena duces tecum.

¹⁰⁵ An excerpted copy of the Respondent's employee manual is contained in GC Exh. 15.

¹⁰⁶ Based on my observation of Doyle, he seemed nervous and hesitant when asked questions. At various points in his testimony, he seemed to be making up responses as he testified, such as the inconsistency and vagueness of his responses.

hood, fabricated after discharge by Doyle, with Motter's assistance after English challenged Doyle's original reason for letting him go. Clearly, in my view, English was discharged because he chose the Teamsters and was simply the first of the Teamsters supporters slated for termination by the Respondent.

CONCLUSIONS OF LAW

1. The Respondent, Mar-Jam Supply Company, Inc., is now and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Unions, Teamsters Local 331 a/w International Brotherhood of Teamsters, AFL-CIO, and United Brotherhood of Carpenters and Joiners of America, Local 623, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. By interrogating an employee concerning the employee's union activities, the Respondent violated Section 8(a)(1) of the Act.

4. By informing an employee that it would terminate other employees if the Respondent recognized the Carpenters Union as the collective-bargaining representatives of its employees, and promising an employee a wage increase and other benefits, including health insurance and profit sharing, if the employee supported the Carpenters instead of the Teamsters Union, the Respondent coercively rendered support and assistance to the Carpenters in violation of Section 8(a)(1) and (2) of the Act.

5. By threatening to discharge all employees who supported the Teamsters instead of the Carpenters, the Respondent coercively rendered support and assistance to the Carpenters in violation of Section 8(a)(1) and (2) of the Act.

6. By promising to increase its employees' wages (by reimbursement of dues paid to the Carpenters) to encourage them to support the Carpenters and discourage them from supporting the Teamsters, the Respondent coercively rendered support and assistance to the Carpenters in violation of Section 8(a)(1) and (2) of the Act.

7. By informing employees that they could not wear, maintain, or distribute any union paraphernalia or literature at its facility, the Respondent violated Section 8(a)(1) of the Act.

8. By requiring employees to sign authorization cards for the Carpenters, the Respondent rendered assistance and support to the Carpenters in violation of Section 8(a)(2) and (1) of the Act.

9. By distributing Carpenters' hats and literature to employees while they were working at the Respondent's facility, the Respondent rendered assistance and support to the Carpenters in violation of Section 8(a)(2) and (1) of the Act.

10. By granting an employee, Charles Doerr, a wage increase because he signed an authorization card for the Carpenters, and discriminatorily discouraging his support for and of the Teamsters, the Respondent rendered support and assistance to the Carpenters and discouraged support of the Teamsters in violation of Section 8(a)(1), (2), and (3) of the Act.

11. The unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act at the Respondent's Pleasantville facility includes:

All full-time and regular part-time truck drivers, forklift drivers, boom operators, laborers and yardmen, excluding casual employees, office clerical employees, guards and supervisors as defined in the Act.

12. By granting recognition to the Carpenters as the exclusive collective-bargaining representative of the appropriate unit, notwithstanding that the Teamsters had previously filed a valid representation petition seeking an election in an appropriate unit, and the Carpenters did not represent an uncoerced majority of the unit, the Respondent rendered assistance and support to the Carpenters in violation of Section 8(a)(2) and (1) of the Act.

13. By discharging its employee, Arthur English, because he supported the Teamsters, the Respondent violated Section 8(a)(3) and (1) of the Act.

14. The unfair labor practices found above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1), (2), and (3) of the Act, I recommend that it be required to cease and desist and to take certain affirmative action de-

signed to effectuate the policies of the Act. Having found that the Respondent unlawfully discharged employee Arthur English on January 18, 1999, I shall recommend that the Respondent be ordered to offer him reinstatement to his former position, discharging replacement employees if necessary, without prejudice to his rights and privileges previously enjoyed. It is further recommended that he be made whole for any loss of earnings and other benefits he may have suffered, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).¹⁰⁷

I shall also recommend an expunction order and the posting of notices.

[Recommended Order omitted from publication.]

¹⁰⁷ Under *New Horizons*, interest is computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment), shall be computed in *Florida Steel Corp.*, 281 NLRB 651 (1977).