

Duane Reade, Inc. and Allied Trades Council

Local 340-A, UNITE, AFL-CIO and Allied Trades Council. Cases 2-CA-32871-1, 2-CA-33148-1, 2-CA-33177-1, 2-CA-33424-1, 2-CB-17982-1, 2-CB-18005-1, and 2-CB-18146-1

April 14, 2003

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND ACOSTA

On May 17, 2002, Administrative Law Judge Howard Edelman issued the attached decision. Respondent Duane Reade, Inc. (the Company) and Respondent Local 340, UNITE, AFL-CIO (UNITE) filed exceptions and supporting briefs. The General Counsel filed an answering brief to the other parties' exceptions. The Company filed a brief in reply.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified and to adopt the judge's recommended Order as modified and set forth in full below.²

As more fully set forth by the judge, the Company recognized two different unions, Allied Trades Council (ATC) and UNITE, as its employees' bargaining representatives at its various stores during the relevant time frame. The Respondents except to the judge's findings that the Company unlawfully assisted UNITE in its efforts to organize employees at company stores 192, 240, 241, 242, 252, 261, and 264 on the basis, inter alia, that the assistance was not coercive. In support, the Respondents cite to *Tecumseh Corrugated Box Co.*, 333 NLRB 1 (2001), in which the Board found no 8(a)(2) unlawful

assistance violation. However, we find that case is factually distinguishable from the instant cases.

In *Tecumseh*, the employer held an employee meeting for the purpose of discussing matters pertaining to the employer's acquisition of the predecessor company and to inform employees of changes that would be occurring as a result of the acquisition. The employer permitted the union to address the employees at that meeting, but the employer's supervisors left the meeting after introducing the union representatives. Before leaving the meeting, the employer's human relations vice president told employees that while the employer liked to work with unions, "it was their choice if they wanted to become union." *Id.* at 3. The union obtained signed authorization cards from a majority of the employees, and presented the cards to the employer who then granted the union recognition the same day after performing a card check. *Id.* at 3-4. Thus, the employer did nothing more than provide meeting space to the union to address and solicit signed authorization cards from employees on company time, and then recognize the union after conducting its own card check.

Unlike the employer in *Tecumseh*, the Company here did more than simply provide meeting space to UNITE on company time and voluntarily grant UNITE immediate recognition. The Company assisted UNITE in numerous ways.³ Despite its no-solicitation policy prohibiting union organizational visits, the Company invited UNITE into its stores for the purpose of organizing its employees either the day before the store opened (Stores 192, 241, 242, 261, and 264), a few days before it opened (Store 252), or the day after it opened (Store 240). The Company directed its employees to meet with UNITE representatives on store premises during paid worktime for the purpose of signing authorization cards. Significantly, the store managers were present during most of these meetings (Stores 241, 242, 252, 261, and 264). In

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

² In certain respects, the judge's numbered conclusions of law do not accurately reflect the findings delineated in the rest of his decision. For example, Conclusions of Law 1(a) and (b) and 2(a), (b), and (d) are supported by or reflected in the judge's findings, as acknowledged in the General Counsel's answering brief. We have therefore modified the judge's numbered conclusions of law, recommended Order, notice to employees, and notice to members to more accurately conform to the judge's findings and to the format typically utilized by the Board in these types of cases. See, e.g., *Windsor Castle Health Care Facilities*, 310 NLRB 579 (1993), *enfd.* as modified 13 F.3d 619 (2d Cir. 1994); *Vermiron Electrical Components, Inc.*, 221 NLRB 464 (1975), *enfd.* 548 F.2d 24 (1st Cir. 1977). The new notices also reflect modifications suggested by the Board's decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001).

³ Regarding the Company's reason for providing this assistance, the judge credited the testimony of John Morro, ATC president, that James Rizzo, the Company's vice president of human resources, informed Morro in a phone conversation that the Company decided to select UNITE as the collective-bargaining representative for certain stores because it "would be beneficial financially." The judge also credited Morro's testimony that during a subsequent meeting in Rizzo's office, Morro asked Rizzo "what was going on," and Rizzo repeated that "another Union has been brought in and that this would be beneficial financially," and that "the Employer had gotten a good deal." According to Morro, Rizzo explained that there would be some nonunion stores, that UNITE would get some stores and the Union would get some stores. Based on this credited testimony, the judge found that the Company "made a decision at the highest levels of management to select UNITE as the collective-bargaining representative for the stores set forth in this complaint because they could get a better deal with UNITE, a purely economic decision."

Store 252, the store manager was not only present, but informed the employees that UNITE was the only union with whom the Company was affiliated, that they had to sign UNITE's authorization cards, and that they were forbidden from signing with any other union. At two stores, UNITE representatives met with employees as the Company was handing out employment applications to those employees (Stores 261 and 264).

Moreover, with regard to at least two stores (Stores 192 and 241) UNITE submitted written demands for recognition based on a claimed majority even before it signed up any employees. As found by the judge, this premature demand further supports the finding of pre-recognition communication and collusion between the Company and UNITE. Based on the Company's failure to produce the letters it admittedly received from UNITE demanding recognition with regard to the other five stores (Stores 240, 242, 252, 261, and 264), the judge inferred that those letters would have revealed the same premature demand for recognition before any meeting between UNITE and the Company's employees. Similarly, with regard to one store (Store 240), the Company prepared a letter to an arbitrator requesting a card count verification to determine majority status the day before UNITE first met with employees at the store. The Company also attempted to conceal from ATC representatives its intended ownership of two stores in which UNITE obtained recognition (Stores 192 and 242). Finally, after performing these unlawful acts of assistance, the Company proceeded to deny ATC equal access to its employees in all seven stores, and in at least three stores (Stores 192, 240, and 261) it ordered ATC representatives to leave under threat of arrest.

The above acts of assistance at each of the stores, in combination, reasonably tended to coerce employees in the exercise of their free choice in selecting a bargaining representative.⁴ The Company provided the acts of assistance to UNITE described fully in the judge's decision, in contravention of its own no-solicitation policy, while denying equal access to ATC representatives. Accordingly, we affirm the judge's findings that the Company provided unlawful assistance and recognition to UNITE in violation of Section 8(a)(2) and (1) and UNITE violated Section 8(b)(1)(A) and (2) by accepting the same. We therefore also affirm the judge's findings that the Company and UNITE, by entering into, maintaining, and enforcing collective-bargaining agreements, including

⁴ Because we find that the combined acts of assistance provided to UNITE by the Company at each of the seven stores constitute unlawful assistance in violation of Sec. 8(a)(2) and (1), we find it unnecessary to pass on the judge's findings that certain of these acts, by themselves, constitute independent 8(a)(2) and (1) violations as well.

union-security clauses, have violated Section 8(a)(3) and 8(b)(2) respectively.

AMENDED CONCLUSIONS OF LAW

1. On June 17, 2000, the Company, by Frank Wilder at Store 252, directed employees not to speak with ATC representatives in violation of Section 8(a)(1) and (2) of the Act.

2. On June 21, 2000, the Company, by Frank Wilder at Store 252, engaged in surveillance of its employees' activities on behalf of and in support of UNITE, in violation of Section 8(a)(1) and (2) of the Act.

3. On April 24, 2000, the Company by Supervisor Enrico Moses at Store 247, in the presence of employees, confiscated and tore up an authorization card distributed by ATC in violation of Section 8(a)(1) of the Act.

4. With regard to Stores 192, 240, 241, 242, 252, 261, and 264, the Company engaged in unfair labor practices in violation of Section 8(a)(1) and (2) of the Act by unlawfully assisting UNITE in obtaining union authorization cards from its employees; by refusing ATC access to its premises and employees for organizational purposes while according such privileges to UNITE; and by recognizing UNITE as the exclusive bargaining representative of its employees.

5. With regard to Stores 192, 240, 241, 242, 252, 261, and 264, the Company engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by entering into, maintaining, and enforcing collective-bargaining agreements, including union-security clauses, with UNITE when UNITE did not represent an uncoerced majority of the Company's employees.

6. By accepting the Company's unlawful assistance and recognition, UNITE violated Section 8(b)(1)(A) and (2) of the Act.

7. By entering into, maintaining, and enforcing collective-bargaining agreements, including union-security clauses, with the Company when UNITE did not represent an uncoerced majority of the Company's employees, UNITE violated Section 8(b)(2) of the Act.

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

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 Respondents, Duane Reade, Inc. and Local 340, UNITE, AFL-CIO (UNITE), New York, New York, shall take the action set forth in the Order as modified.

A. Respondent, Duane Reade, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Directing its employees not to speak with representatives of Allied Trades Council (ATC).

(b) Surveilling its employees' activities on behalf of and in support of UNITE.

(c) Confiscating, in the presence of its employees, authorization cards distributed by ATC.

(d) Unlawfully assisting UNITE in obtaining union authorization cards from its employees, and refusing to provide equal access to ATC to its premises and employees for the purpose of organizing its employees while according such privileges to UNITE.

(e) Recognizing and bargaining with UNITE as the exclusive representative of its clerks, pharmacy clerks, and cashiers at Stores 192, 240, 241, 242, 252, 261, and 264, unless and until UNITE has been certified as their exclusive collective-bargaining representative by the Board.

(f) Maintaining and enforcing the collective-bargaining agreements with UNITE, dated April 1, 1999, to September 21, 2002, and from April 2001 to March 31, 2004, including the union-security clauses, or any extension, renewal or modification thereof; provided, however, that nothing in this Order shall authorize, allow, or require the withdrawal, or elimination of any wage increases or other benefits that may have been established pursuant to such agreements.

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

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

(a) Withdraw and withhold all recognition from UNITE as the collective-bargaining representative of its clerks, pharmacy clerks, and cashiers at Stores 192, 240, 241, 242, 252, 261, and 264, unless and until UNITE has been duly certified as the exclusive representative of such employees by the Board.

(b) Jointly and severally with UNITE reimburse all present and former employees covered by the aforesaid collective-bargaining agreements (see par. A(1)(f)) for all initiation fees, dues, assessments, or other moneys they may have paid or which were withheld from their pay pursuant to those collective-bargaining agreements together with interest on the moneys due, to be computed as set forth in the remedy section of this decision.

(c) 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, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the

amount of all initiation fees, dues, assessments or other moneys due under the terms of this Order.

(d) Post at the stores set forth above copies of the attached notice marked "Appendix A."⁵ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Duane Reade's authorized representative, shall be posted by Duane Reade 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 Duane Reade 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, Duane Reade has gone out of business or closed any of the stores involved in these proceedings, Duane Reade shall duplicate and mail, at its own expense, a copy of the notices to all current employees and former employees employed by Duane Reade at any time since February 29, 2000.

(e) Post at the same places, and under the same conditions as in the preceding subparagraph, as they are forwarded by the Regional Director, signed copies of UNITE's notice to members marked "Appendix B."

(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 Duane Reade has taken to comply.

B. Respondent Local 340-A, UNITE, AFL-CIO, its officers, agents, and representatives shall

1. Cease and desist from

(a) Accepting unlawful assistance from Duane Reade in obtaining authorization cards from Duane Reade's employees.

(b) Acting or claiming to act as the collective-bargaining representative of the clerks, pharmacy clerks, and cashiers, employed by Duane Reade, at Stores 192, 240, 241, 242, 252, 261, and 264, unless and until UNITE has been certified as the exclusive representative of such employees by the Board.

(c) Maintaining and enforcing the collective-bargaining agreements with Duane Reade, dated April 1, 1999, to September 21, 2002, and from April 2001 to March 31, 2004, including the union-security clauses, at Stores 192, 240, 241, 242, 252, 261, and 264, or any extension, renewal, or modification thereof.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

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

(a) Jointly and severally, with Duane Reade, reimburse all present and former employees described above for all initiation fees, dues, assessments, or any other moneys that may have been paid or which were withheld from their pay pursuant to the aforesaid collective-bargaining agreements, together with interest on the moneys due, to be computed as set forth in the remedy section of this decision.

(b) Post at its union offices copies of the attached notice marked "Appendix B."⁶ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by UNITE's authorized representative, shall be posted by UNITE immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by UNITE to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Forward to the Regional Director for Region 2 signed copies of the attached notice marked "Appendix B" for posting by Duane Reade, at its store locations, as set forth above in this Decision, for 60 consecutive days in places where notices to employees are customarily posted.

(d) 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 UNITE has taken to comply.

IT IS ALSO ORDERED that the complaint herein be dismissed insofar as it alleges violations of the Act not specifically found.

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on
your behalf

⁶ See fn. 5, supra.

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT unlawfully assist Local 340-A UNITE, AFL-CIO, herein called UNITE, in obtaining union authorization cards from our employees, and refuse to provide equal access to Allied Trades Council, herein called ATC, to our premises and employees for the purpose of organizing our employees while according such privileges to UNITE.

WE WILL NOT maintain or enforce our collective-bargaining agreements with UNITE, dated April 1, 1999, to September 21, 2002, and from April 2001 to March 31, 2004, including the union-security clauses contained therein, covering Stores 192, 240, 241, 242, 252, 261, and 264, or any extension, renewal, or modification thereof; provided, however, that nothing in this Order shall authorize, allow, or require the withdrawal, or elimination of any wage increases or other benefits that may have been established pursuant to such agreements.

WE WILL NOT direct our employees not to speak with representatives of ATC.

WE WILL NOT engage in any surveillance of our employees' activities on behalf of and in support of UNITE.

WE WILL NOT confiscate in the presence of our employees, authorization cards distributed by ATC.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL withdraw and withhold all recognition from UNITE as the collective-bargaining representative of all our clerks, pharmacy clerks, and cashiers at Stores 192, 240, 241, 242, 252, 261, and 264, unless and until UNITE has been duly certified as the exclusive representative of such employees by the Board.

WE WILL jointly and severally with UNITE reimburse our employees for all initiation fees, dues, assessments, or other moneys they may have paid or which have been withheld from their pay pursuant to the aforesaid collective-bargaining agreements, plus interest.

DUANE READE, INC.

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT accept unlawful assistance from Duane Reade in obtaining union authorization cards from its employees.

WE WILL NOT act or claim to act as the collective-bargaining representative of the clerks, pharmacy clerks, and cashiers, employed by Duane Reade, at Stores 192, 240, 241, 242, 252, 261, and 264, unless and until we have been certified as the exclusive representative of such employees by the Board.

WE WILL NOT maintain and enforce our collective-bargaining agreements with Duane Reade, dated April 1, 1999, to September 21, 2002, and from April 2001 to March 31, 2004, including the union-security clauses contained therein, or any extension, renewal or modifications thereof covering Stores 192, 240, 241, 242, 252, 261, and 264.

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

WE WILL jointly and severally, with Duane Reade, reimburse all present and former clerks, pharmacy clerks, and cashiers, employed by Duane Reade, at Stores 192, 240, 241, 242, 252, 261, and 264, for all initiation fees, dues, assessments, or any other moneys that they may have paid or which have been withheld from their pay pursuant to the aforesaid collective-bargaining agreements, plus interest.

LOCAL 340-A, UNITE, AFL-CIO

Bert Pearlstone, Esq., Suzannah Ringel, Esq., and Christian R. White, Esq., for the General Counsel.

Brent Garren, Esq., Daniel F. Murphy Jr., Esq., for UNITE, and *Sean H. Close, Esq.* (Putney, Twombly, Hall, & Hirson LLP), for the Respondent.

William K. Wolf, Esq. (Friedman, Wolf, & Grisi), for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me December 19 and 20, 2001, and February 5 and 6, 2002, in New York, New York.

Upon charges filed by Allied Trades Council (the Union), against Duane Reade, Inc. (the Employer), and against Local 340-A, UNITE, AFL-CIO (UNITE), a complaint and notice of

hearing issued dated August 22, 2001.¹ The complaint alleges various acts of assistance by the Employer to UNITE in violation of Section 8(a)(1), (2), and (3) and violation against UNITE in violation of Section 8(b)(1)(A) and (2) of the Act.

Based upon the entire record, including my observation of the demeanor of the witnesses and briefs submitted by counsel for the General Counsel, counsel for Respondent Employer, and counsel for Respondent Union, I make the followings of facts and conclusions of law.²

At all material times, the Employer has been a domestic corporation with an office and place of business at 440 Ninth Avenue, New York, New York, has operated retail drug stores throughout New York City, and Nassau County. The Employer, in the course and conduct of its business operations annually derives gross revenues in excess of \$500,000. The Employer also in the course and conduct of its business operations annually purchases and receives goods and supplies valued in excess of \$5000 directly from suppliers located outside of the State of New York. It is admitted, and I find that the Employer has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I find that the Union and UNITE are a labor organization within the meaning of Section 2(5) of the Act.

¹ During the trial of this case, counsel for the General Counsel moved to amend the complaint. Such motion was granted and counsel for the General Counsel thereafter submitted a conformed complaint which was admitted into evidence as GC Exh. 2.

² On April 23, 2002, counsel for the General Counsel made a motion to strike an attachment to counsel for Respondent Union's brief. Respondent Union included as Attachment 1 to its brief: (1) the notice of hearing on objections and the order consolidating Cases 2-RC-22403, 2-CA-34119-1, and 2-CA-34231-1; (2) Petitioner New York Joint Board, UNITE's objections and supplemental objections in Case 2-RC-22403; and (3) the consolidated complaint in Cases 2-CA-34119-1 and 2-CA-34231-1.

Respondent never introduced the above-cited documents at the instant trial and they were never made part of the record. Since they were never introduced, or received, or made part of a rejected exhibit file, they may not be appropriately considered. For this reason alone, I grant counsel for General Counsel's motion to strike. See *EDP Medical Computer Systems*, 284 NLRB 1286, 1287 (1987).

In addition, the documents attached to this brief are irrelevant. The attached objections and complaint concern Duane Reade Stores not named in the instant trial which constitute completely different bargaining units. They also allege violations concerning events occurring in the year 2001, over 1 year after the events occurring at the eight named stores in the instant proceeding.

Counsel for Respondent Union wanted me to consider as evidence in this case, the above complaints and objections against Allied Trade Counsel alleging at other store locations, not involved in the trial, that Allied Trades Counsel received assistance from Respondent Employer. (See p. 34 of the trial record.) I refused to take evidence in connection with these complaints and objections because they were not before me. (See p. 36 of the trial record.) That Respondent Employer may have assisted Allied Trades Counsel at other stores not involved in the complaints before me, is not relevant as to whether Respondent Employer assisted Respondent Union in the instant complaint before me.

Accordingly, I grant counsel for the General Counsel's motion to strike.

The Employer operates nearly 200 retail pharmacies in the New York City Metropolitan area. It was not disputed that at the time of the trial the Employer recognized two different Unions at various different stores: the Union which represented approximately 140 of the stores, and UNITE, which represented at least 40 stores as of May 2001. It was also undisputed that the two unions were and are actively competing to organize new stores in the chain. James Rizzo, Duane Reade's vice president, human resources, characterized the situation of the last 3 years since he became employed by the Employer as one of "continuing struggle between these two unions" to represent Duane Reade stores. There is also no dispute that the allegations in the instant case concern only eight of those stores, as set forth below and concern events that occurred during calendar year 2000.

Store 242

Store 242 was the first of the seven in the instant case to be visited by UNITE. UNITE representatives visited the store on February 29, 2000, the day before it opened to the public on March 1, 2000. Seventeen employees signed authorization cards for UNITE on February 29, 2000.

Alicia Alvarado and Jason Valentin, both former employees of Duane Reade at Store 242, credibly testified about the circumstances surrounding the card signings on February 29. Both credibly testified that the store manager, Gary Oberdecker, instructed all employees to come to the back of the store that day. Alvarado testified that Oberdecker first told the employees that there would be people coming in to tell them about a union and that they would have cards for the employees to fill out. Valentin recalled Oberdecker making only one announcement on the loudspeaker to order the employees to report to the back of the pharmacy. In any event, it is clear that most if not all of the employees present went to the back of the store as instructed. Once there, there was a "little meeting" for the purpose of telling the employees about the Union and passing out authorization cards. It is undisputed that the meeting occurred on worktime in the afternoon and that the employees were paid for the time spent at the meeting. Present at the meeting were Oberdecker, and at least two representatives from UNITE. Both employees testified that Oberdecker was present during the meeting where the employees signed cards. Valentin's recollection was that Oberdecker participated in distributing and collecting the cards. Alvarado had no such recollection although she was not asked specifically if Oberdecker actually handled any of the union authorization cards at the meeting. Oberdecker was not called to testify for Respondent Employer.

Bertha Wilson, UNITE representative, testified that she and two other union representatives, Guillermo Mayora and Pedro Galarza, visited Store 242 and approached workers and that she "thinks" this was at the end of February 2000. Wilson testified that Oberdecker told them they were not supposed to be talking to the employees while they were working. According to Wilson, she then asked Oberdecker if she could talk to the employees when the workers were on break. Wilson testified she also talked to some of the workers while they were on break. Wilson offered no further details to explain how they happened to be permitted into the store when it was closed to the public, or

how much time was spent in the store that day such that they were able to get 17 signed cards.

According to the credible testimony of Union Vice President Ray Rosado, the Employer's representatives concealed from him the fact that there even existed a Store 242 or that UNITE had signed up the majority of employees at that store. In this connection, Rosado testified that in late February or early March 2000, he was at the Employers headquarters at Ninth Avenue speaking to employees from stores represented by his union when Carol Baretto, a human resources manager told him to refer any employees from Store 242 to her. At that point in early 2000, the Union, represented the Employer's employees at some 140 stores. Rosado had never heard of any store numbered 242 and was curious as to whether Baretto had misspoken. He asked Human Resources Director Seymour Stein, and Stein replied that he did not know of any Store 242. Rosado testified that he did not press the matter further at that point, supposing that Baretto might have been mistaken as to the number. A few weeks later, in mid-March, union representatives learned, contrary to what Rosado had been told by Stein weeks earlier, Store 242 had in fact opened at 401 E. 86th Street and had already been "organized" by UNITE. At about this same time information about the existence of Store 241 also surfaced. On March 17, 2000, a day or two after the Union learned of these two stores, John Morro, president of the Union, visited Store 242, and Ray Rosado, vice president, separately visited Store 241.

Morro visited Store 242 on East 86th Street in Manhattan in the morning, and was approached by Store Manager Oberdecker. Morro identified himself and told the store manager he was there to sign employees up. Oberdecker responded that Jim Rizzo, employer vice president for human resources, had instructed him that Morro was not to be allowed to sign employees up. Oberdecker proceeded, apparently as per instructions, to telephone Rizzo while Morro was still in the store. Oberdecker then handed the telephone to Morro. Morro testified that Rizzo told him that he should not be in that store. Morro asked, "why" and Rizzo replied, "because it is another Union's store." Morro asked how that could be, and Rizzo replied that "Tony Cuti, CEO of the Employer had spoken to some representatives of UNITE and had invited them in to come to the store to sign people up." Morro protested that it should not have been another Union's store and asked Rizzo why the Employer had done this. Rizzo replied, "because it would be beneficial financially for Duane Reade." Morro then commented, "what did Tony Cuti do shop around?" At that point Rizzo invited Morro to come to his office in person to speak further. Morro proceeded to leave Store 242 and traveled across town to Rizzo's office at 440 Ninth Avenue.

At the office, Morro asked Rizzo "what was going on?" and Rizzo replied that "another Union has been brought in and that this would be beneficial financially." Morro protested that this was not right, but Rizzo said that "the Employer had gotten a good deal." Morro protested further, and Rizzo explained that there would be some nonunion stores, that UNITE would get some stores and the Union would get some stores. Rizzo specifically mentioned that there would be a store opening up at the Port Authority, Store 217, and that the Union would have

that store. Morro inquired if that meant that the Union would get the rest of the stores, but Rizzo said he did not say that. The conversation ended with Morro giving his opinion that the matter would probably end up at the National Labor Relations Board, and Rizzo agreed.

Rizzo did testify that he recalled a telephone conversation with Morro while Morro was in Store 242. However, Rizzo asserted that he did not recall the date or the day of the week of the call. According to Rizzo, he actually recalled two conversations the same day, with Morro telling him he had spoken to his attorney, Henry Hamburger, in between the two calls. Rizzo said he told Morro that the Employer had recognized UNITE in the first conversation. Rizzo denied telling Morro that CEO Cuti had invited UNITE into the store. Rizzo did admit asking Morro to leave the store in one of these phone conversations. According to Rizzo, he told Morro that Morro could stay as a customer but could not stay disrupting employees doing their job. Rizzo testified that Morro said he was not disrupting because it was early in the morning and there were no customers in the store. Rizzo claimed that he told Morro a second time that he had to leave and then invited Morro to his office. Rizzo testified that once Morro arrived at the office, the two simply "discussed what was going on," regarding the fact that there was another union that the employees wished to represent them. Rizzo testified that "I do not recall doing that and I would never do that" when asked if he in fact offered to give the Union recognition at a new Employer's store scheduled to open at the Port Authority.

It is my impression that the 13 employee or former employee witnesses, taken as a whole, testified forthrightly and obviously without guile. For the most part these witnesses were young, inexperienced, and spent only a short time with the Employer's employees. They were testifying pursuant to subpoena and it became necessary to seek enforcement of some of the subpoenas to secure the presence of several of the former employees. Thus they were not particularly eager to testify and did not have any personal interest or bias which would predispose them to color their testimony.

I take note that employee witness Milagros Guzman (Store 192) who is currently employed by the Union, was not hired by the Union until July 2001. She had cooperated with the Board's investigation by giving an affidavit on February 6, 2001, substantially before her employment with the Union. Moreover, no evidence was adduced at trial by either Respondent that her affidavit was inconsistent with her testimony at the hearing.

In addition to being relatively disinterested witnesses, the testimony of the employees as to the circumstances surrounding their signing of union authorization cards at each of the seven stores involved in this trial, was much more detailed than that of the Employer's witnesses present on those occasions. In some instances, Employer witnesses offered only general denials in response to leading questions. In other instances, the Employer witnesses present on the day cards were signed did not testify, justifying an adverse inference that such testimony would not have supported the contentions of the Employer. Where General Counsel put on more than one employee witness to the card signing meetings at the stores, such testimony

was mutually corroborative on the material points supporting the unfair labor practices, although there were inevitable minor discrepancies caused by normal memory differences as to events occurring 2 years ago. To the extent that two of the witnesses, Olivia Andre and Patricia Ramkirath (Store 264), are current employees of Duane Reade and thus testified against their current employer, I give their testimony additional weight. See *Natico, Inc.*, 302 NLRB 668, 689 (1991).

Moreover, the testimony of all General Counsel's witnesses establishes a clear pattern over a wide geographical area encompassing the seven store locations alleged in this instant complaint. There is no evidence that these employees knew one another, and therefore, I conclude there is no way they could have manufactured such consistent testimony. Accordingly, I conclude General Counsel's employees witnesses are 100-percent credible.

I credit Union President Morro's testimony in connection to his conversations on the telephone and thereafter at Rizzo's office, with Rizzo. In this regard his testimony had the ring of truth. It was very detailed, and explained totally why he and his representatives was not allowed to speak with the Employer's employees at Store 242 and the other stores in issue. Moreover, the credible testimony of the employees called by counsel for General Counsel virtually establish the truth of Morro's testimony.

The Employer's witnesses were not credible. They had an incredible lack of memory when asked about card signings and recognition, and Rizzo's lack of memory as to his conversation with Morro was a perfect example. Rizzo testified that during his office conversations with Morro they merely "discussed what was going on."

The Employer did not call Store Manager Oberdecker (Store 242), Husian (Store 241), or Alvarez (Store 240). As to these witnesses I draw an adverse inference that such testimony would not have supported the Employer's contentions.

I also find that UNITE's sole witness, Representative Bertha Wilson was not a credible witness. Of course my credibility conclusions, described above are sufficient to discredit Wilson's testimony. However, Wilson's testimony itself is simply not credible.

Bertha Wilson was present at each of the stores in this case when the majority of cards were signed. Wilson, when questioned by General Counsel chose not to attempt to explain the coincidence that she and the other union representatives who accompanied her seemed always to be signing up the majority of employees at one session either the day before the store opened (Stores 192, 241, 242, 261, and 264), a few days before it opened (Store 252), or the day after it opened (Store 240). In two of those cases, she and the other UNITE reps managed to be present at the exact time that Duane Reade was handing out employment applications to employees of the store it was buying (Stores 261 and 264). Clearly this was no coincidence. In Wilson's very vague testimony, she asserted in repetitive fashion that she and the others signed up employees individually at each of these stores without any assistance from managers. This testimony is diametrically at odds with the detailed and credible testimony of the employees about meetings called by

the store managers to meet the Union and sign cards, which meetings in most of the cases were attended by those managers.

The credible testimony in this case establishes that the Employer made a decision at the highest levels of management to select UNITE as the collective-bargaining representative for the stores set forth in this complaint because they could get a better deal with UNITE, a purely economic decision.

Counsel for General Counsel sets forth in his brief the applicable principles of law relating to the facts of this case.

The Board has long held that an employer violates Section 8(a)(2) of the Act if it renders unlawful assistance to the formation of a Union by its employees. In determining whether an employer has gone beyond lawful cooperation with a Union, the Board examines the totality of the employer's conduct to determine whether its support would tend to inhibit employees in their free choice regarding a bargaining representative or interfere with the representative's maintenance of an arms length relationship with it. In undertaking this analysis, the Board considers such indirect pressure such as directing and paying employees to attend union meetings during worktime, and direct pressures such as permitting the Union to solicit authorization cards in front of management representative. The Board looks to whether the quantum of these types of pressures would reasonably tend to coerce employees in the exercise of their free choice in selecting a bargaining representative. The Board in *Vernitron Electrical Components, Inc.*, 221 NLRB 464, 465 (1975), found a violation where both of the above factors existed, coupled with a rapid and unverified grant of recognition by the employer. In *Vernitron*, there was no other competing union involved seeking to organize the employees, but the Board found a violation nonetheless. The Board reasoned that the presence of the supervisors observing the execution of the authorization cards, coupled with almost instant recognition the same day, prevented employees who might have felt pressured by the presence of supervisors from having the opportunity to either revoke their authorizations or bring another union into the organizational campaign.

The Board has also viewed harshly and found unlawful 8(a)(2) assistance when a employer discriminates against one union in the face of a competing organizational campaign. So where, for example, an employer sponsors or permits a union to solicit cards on its premises and denies similar access to a competing Union, the Board has found unlawful 8(a)(2) assistance. *Ella Industries*, 295 NLRB 976, 979 (1989) (assistance found based on a second union's request for meeting with employees after it learned rival union had met with employees). Similarly, in *Price Crusher Food Warehouse*, 249 NLRB 433, 438-439 (1980), the Board found a violation where the employer summoned its employees to a meeting on its premises, which it turned over to the union for the purpose of soliciting union membership. In that case, the Board found that an additional element present there was also a violation: the employer's refusal to grant a second union the same opportunity to solicit membership on the store premises on working time. The Board noted, in that case, that there were no threats or promises and the employer did not directly inform the employees that they were required to join the favored union. But the Board stressed that the employer never informed the employees that they had

any choice in the matter, but instead created conditions leading the employees to believe that management expected them to sign cards for the favored Union and to do so promptly. In so finding, the Board noted that many of the employees were young and inexperienced in the working world.

In addition to sponsoring meetings on working time, directing employees to attend such meetings, having supervisors present while cards are solicited, granting hasty and almost instant recognition without independent verification, and treating competing unions disparately with respect to access, the Board has found the issuance of union authorization cards during the hiring process violated Section 8(a)(2). *Fountainview Care Center*, 317 NLRB 1286, 1289 (1995) (employees received union authorization cards along with applications for employment for the employer). In *Fountainview*, supra, the Board found that any union cards so obtained were tainted since the joining of the two forms was likely to give applicants the impression that there was a link between the signature on the card and the hiring process. In *Fountainview*, the union cards were given out by the security guards for the builder of the facility before *Fountainview* took possession of the facility from the builder. Nonetheless, the Board found that the employer in that case engaged in unlawful assistance at the early juncture.

Another important principle in this area applicable to the instant case is that in order to void recognition agreements based on any combination of factors discussed above, "the General Counsel need not prove with mathematical certainty that the union lacked majority support at the time of recognition where there is evidence that the employer unlawfully assisted a union's organizational campaign." *Fountainview Care Center*, supra at 1287, 1289, quoting *Siro Security Service*, 247 NLRB 1266, 1271 (1980). The Board and courts have made it clear that the General Counsel, in order to void a recognition as tainted and thus not based on an uncoerced majority, need only demonstrate a pattern of employer assistance. *Famous Castings, Corp.*, 301 NLRB 404, 408 (1991); *Amalgamated Local 355 v. NLRB*, 481 F.2d 996 fn. 8 (2d Cir. 1973).

Further, the Board has long held that in evaluating whether such a pattern of assistance exists, it will examine the totality of circumstances, including both prerecognition conduct and post-recognition conduct, to determine whether such conduct tainted the union's majority status. *Caldor Inc.*, 319 NLRB 728, 738 (1995), and cases cited therein. Finally, it is longstanding Board law that in order to establish an 8(a)(2) violation, it is not necessary to establish antiunion animus or a specific motive to interfere with employees' Section 7 rights or to probe for the employees' subjective reaction to the employer's support of the Union. *NLRB v. Newport News Shipbuilding Co.*, 308 U.S. 241 (1939); *Ladies Garment Workers (Bernhard Altmann Texas Corp.) v. NLRB*, 366 U.S. 731, 739 (1961).

A union that accepts unlawful assistance from an employer violates Section 8(b)(1)(A) of the Act. *Sweater Bee By Banff Ltd.*, 197 NLRB 805 (1972). Where an employer and a union are parties to a collective-bargaining agreement with a union security clause, and they enforce such a clause in the face of recognition tainted by unlawful support and assistance, they

violate Section 8(a)(2) and (3) and 8(b)(1)(A) and (2) respectively. See *Sav-On Drugs*, 267 NLRB 639 (1983).

In fashioning remedies for such violations, the Board generally issues a cease and desist order prohibiting the employer from recognizing the assisted union and from giving effect to any contract between it and the union unless and until the union is properly certified. *Safeway Stores*, 276 NLRB 944 (1985). But the Board has also provided that such orders should not be construed to authorize or require the elimination of wage increases or benefits established under the agreement. *Caro Bags*, 285 NLRB 656 (1987). In terms of make-whole relief, the Board will find the Union and employer involved jointly and severally liable to reimburse employees for any dues payments obtained under circumstances where recognition has been voided due to unlawful assistance and support. *Caro Bags*, supra.

Applying the applicable law to the credible testimony of union president, Morro, and the credible testimony of employees Alvarado, and Valentin, in connection with Store 242, I conclude that the Employer assisted UNITE by directing employees to a meeting on February 29, 2000, for the purpose of signing up with that particular Union. The meeting was mandatory and on paid worktime. Most significantly, Oberdecker remained present at the meeting while 17 employees, a majority, signed union cards for UNITE.

Further, his granting of this assistance while remaining present further constitutes just the kind of coercive atmosphere sufficient to taint the cards signed that day and hence the subsequent recognition of UNITE. This is especially true when one considers this assistance and coercion in combination with James Rizzo's subsequent conversation with John Morro on March 17, admitting the Employer invited UNITE in because it was in their financial interest; the Employer's actions in first concealing the existence of Store 242 from the Union, the Employer's subsequent refusal to grant access to the union representatives after its unlawful recognition of UNITE.

There is really no dispute that Morro visited Store 242 on March 17, and was completely denied access to the facility or to the employees. Contrast this with the preferred treatment of UNITE on February 29, where they were invited in for the express purpose of signing up employees and were accommodated by directing the employees to attend a meeting on worktime for that purpose. This disparate treatment in access to employees was quite stark, and as discussed below was repeated at the other stores in the instant case.

The Employer's "official" policy regarding solicitation for the purposes of organizing is stated very plainly and in fact was pled as an affirmative defense in the Employer's answer in the instant case:

Pursuant to its "no-solicitation" policy, Duane Reade does not permit any organizational visits to any Duane Reade Stores. After a valid recognition of representation of any labor organization by Duane Reade, Duane Reade permits a labor organization to monitor and enforce its collective bargaining agreement.

The only problem with this stated strict no-solicitation policy is that the policy was applied only to the Union with respect to

the stores at issue in this case. UNITE on the other hand, was clearly permitted, and was, as set forth below, specifically invited in for organizational visits inside the Employer's premises. The Employer sponsored these meetings is shown by the role of the store managers in calling the meetings and in most cases remaining present during the meetings.

With respect to Store 242 in particular, in addition to the denial of similar access to John Morro on March 17, James Rizzo admitted directly to Morro on that day that he invited in UNITE because the Employer felt it would be beneficial financially. As set forth above, Morro's quite detailed testimony of his conversations with Rizzo that day, on the phone and in person, was fully credited over Rizzo's more general denials. Not only did Rizzo speak about Store 242, but he went on to explain to Morro the Employer's apparent intent to pick and choose whether a particular store would have a union and if so which union would be "given" that store.

Given, what I have concluded to be the 100 percent absolute, unassailable credibility of the employees above, which reinforces Morro's credibility, I conclude the employer assisted UNITE, the six other stores as set forth in the complaint, in a similar manner as in Store 242, because it was economically desirable to do so.

Thus, with respect to the seven stores in issue, my findings of fact are based entirely on the credible testimony of the employees called by General Counsel and the testimony of the union representatives. To the extent that the testimony of the Employer's witnesses and UNITE's witness, Wilson, are contradictory, such testimony is not credited.

In summary, with respect to Store 242, I find the combination of; (1) the assistance in signing up workers on February 29; (2) the presence of manager while the cards were signed; (3) the initial concealment of the existence of this store from union representatives; (4) the disparate treatment of Union in denying that Union similar access on March 17; and (5) the expressed intent of the Employer's highest management to pick and choose which Union, if any would represent each of its stores, in violation of Section 8(a)(1) and (2).

Store 241

At Store 241, a majority of employees were signed up by UNITE in the same manner as in Store 242, above. In this regard, on March 16, Store Manager Zafar Husain instructed the employees to go to meetings in groups for the express purpose of signing UNITE cards. They were on paid company time. I conclude this is an independent act of 8(a)(2) assistance, though two of the three employee witnesses differed somewhat as to their memory of exactly how long Zafar stayed at those card signing meetings. The third witness thought it was a different Employer representatives, I conclude, the requisite element of coercion was present. When a manager directs employees to go to a meeting on paid worktime for the express purpose of signing cards for a particular union, and then accompanies them to the meeting for even a short period of time, such conduct is coercive. See *Famous Castings, Corp.*, supra at 406-407. This is especially true where such conduct assisting in the card signings on March 16, is compounded by the subsequent denial of access to the store to, another union, in

this case the union vice president, Rosado, was denied access the very next day. As with Store 242, I find this denial of access constitutes an independent violation of Section 8(a)(2). Moreover, at Store 241 there existed two additional factors evidencing a pattern of assistance and coercive atmosphere not present at Store 242: (1) a very hasty, “instantaneous” recognition agreement dated the same day (March 16) as the card signing meetings; and (2) a written demand for recognition by UNITE based on a claimed majority dated March 10, 2000—6 days before the Union signed up any employees!

General Counsel contends that the assistance and coercion on March 16, by the manager, coupled with the instant recognition dated the same day, and the next day’s blocking of any ability of the Union to have equal access to attempt to organize the employees is more than enough to find the recognition tainted. I agree. *NLRB v. Vernitron Electrical Components Inc.*, 548 F.2d 24 (1st Cir. 1977), enfg. *Vernitron*, supra at 221. NLRB 464.

The fact that the meetings occurred on paid worktime, as in *Vernitron*, would only tend to reinforce these findings. The presence of the managers at or in the vicinity of the meetings adds to the coercion. Finally, as in *Vernitron*, the instant recognition the same day as the coercive card signings served to lock in majority support which otherwise might have eroded after the employer-assisted organizing ceased. Thus, these factors present in *Vernitron* is also part present in the instant case at Store 241. Accordingly, I conclude, the recognition therefore, was thus based on a coerced majority in violation of 8(a)(1) and (2).

Another issue is the matter of UNITE’s premature demand for recognition dated March 10, 2000. I conclude that such letter supports an inference that UNITE expected to be recognized at Store 242, even before its representatives visited to sign up the employees. It suggests pre-recognition communication and collusion between the Employer and UNITE in an effort to keep the Union out of this particular store, and Rizzo’s admission to Morro. Such fraudulent or tainted demand for recognition, at a time when the Union had no support, is not an isolated instance. As set forth below, UNITE also submitted a demand for recognition dated March 16, 4 days before it was invited in to Store 192 on March 20. General Counsel contends that no further such “anticipatory” demands for recognition were introduced into evidence because the Employer refused to produce them, although General Counsel, subpoenaed them. General Counsel contends that an adverse inference is warranted that the rest of the written demands for the remaining stores would not support the Employer’s contentions in this case. The reason is that James Rizzo testified that he had received written demand letters for all of the seven stores involved in the instant case. Rizzo also admitted that he had those written demand letters in his possession. Pursuant to General Counsel’s subpoena, only two such letters covering three of the seven stores had been produced as of the time Rizzo testified that he in fact possessed the remainder of them. But the next day, pursuant to General Counsel’s request for production, the Employer claimed it could not locate the remaining demand letters. I conclude such nonproduction, after Rizzo’s admission that he did have possession of all seven de-

mand letters, results in the adverse inference requested, by General Counsel.

Store 192

As set forth above, the mutually corroborative and credible testimony of employees Milagros Guzman and Nadine Jones as to the circumstances of the card signings at this store is un rebutted. Store Manager Kevin Shields was not called to testify. I concluded that this warrants an adverse inference. Shield’s conduct the day before and the day of the meetings on March 20, 2000, where 19 cards were signed, clearly constitutes unlawful assistance to UNITE. In this connection Shields announced the day before the meeting that UNITE would be coming to sign them up, as if it were a fait accompli. The next day, when the UNITE representatives arrived, Shields announced to all the employees that they *had to go downstairs to sign up*. Shields arranged for the employee to go downstairs in groups of six. The involuntary nature of this became apparent when Guzman protested that she was not finished with her work and Shields instructed her to go down and that he would send someone to her workstation so she could be released. It is further undisputed that the organizational meeting took place on paid worktime. As was true of all the stores in this case except Stores 240, 261, and 264, UNITE’s organizational meeting took place on company premises at a time when the store was closed to the general public. So, not only did the Employer completely ignore its stated strict no-solicitation policy in order to assist UNITE, but it specifically permitted the representatives inside the store at a time when they could not have come in as customers. I find this conduct to be an independent violation of Section 8(a)(1) and (2) by providing meeting space to UNITE and requiring its employees to attend the meeting.

In addition to finding an independent violation described above, I also conclude that the totality of circumstances warrants a finding that the recognition so obtained at Store 192 was tainted and thus not based on an uncoerced majority. While not every factor present at Stores 242 and 241 was present at Store 192, the totality of factors, considered in connection with Rizzo’s store policy statement set forth above, show the Employer’s continuing pattern of conduct, at the named stores, to actively assist and prefer UNITE over the Union. In this regard, John Morro credibly testified about how he specifically asked, in late 1999 or early 2000, Director of Human Resources Seymour Stein if the Employer planned to take over the storefront which eventually became Store 192. At that time, Stein flatly denied the Employer had any interest in that store. This concealment of its intent to take over a store in an effort preclude the Union’s organization was not isolated. As discussed above, Stein was also untruthful to Ray Rosado about the existence of Store 242.

Another factor to consider in connection with Store 192, which was also present elsewhere among the stores in this case, is the premature, “anticipatory” written demand for recognition by UNITE, based on an asserted majority, albeit at a time when it had not yet visited that store. In the case of Store 192, the letter demanding recognition, was dated March 16, 4 days before the organizational meetings of March 20, where the vast

majority of employees signed 19 cards. Further, at Store 192 there exists another instant recognition, dated March 20, which served to lock in employee support and prevent employees pressured by the manager's order to attend the organizational meetings from having the opportunity to either revoke their authorizations or bring another Union into the organizational campaign. I conclude, that this combination of factors, based on the cases cited above, has been considered by the Board enough to invalidate a recognition so obtained *even where there was no other Union in the picture*. Where as here, there is clearly another, rival union on the scene trying to actively organize the same employees, and the Employer is taking conscious steps to block that union from organizing those workers, employee free choice is even more severely undermined. As in the other stores, John Morro, when he attempted to access Store 192 in late May 2000, was prevented from doing so on threat of arrest. I therefore conclude, the totality of circumstances support a finding that the recognition at this store was not based on an uncoerced majority and should be invalidated.

Store 240

In Store 240, Morro, without any assistance from the Employer, somehow got to the Employer's store on May 26, the day after the store opened. Initially, the store manager, Al Alvarez did not prevent Morro from soliciting the two or three employees present at that early hour. But his statement to Morro that he was "expecting" him, when Morro identified himself as from the Union, he did not state which union he represented, suggests a prior arrangement where UNITE must have been invited in that day to sign up employees. Alvarez was obviously confused and thought that Morro was from UNITE. Since there were only a few employees present in the early morning, Morro asked when the majority would be in and was told to come back in the early afternoon. By the time he got back to the store at 1 p.m., UNITE had been to the store already and had signed up 12 to 13 employees, a majority. By the time Morro got back, it was clear that the Employer's managers had figured out Alvarez' "mistake" that morning in permitting Morro to enter the store. At 1 p.m., Morro was greeted by the Employer's district manager, Vigliotti, who would not let him speak to any employees and threatened to have him arrested if he did not leave. That UNITE had been expressly invited into sign up employees at Store 240 is supported by Alvarez' reaction to Morro, cited above. But there is further documentary support for such a finding. If this had not been preplanned and the Employer had not already determined that Store 240 would be a "UNITE store," once again, consistent with Rizzo's March 17-policy statements to Morro, how else does one explain a May 25 letter from the Employer to an arbitrator setting up a card count verification for that store? The May 25 letter requests a card check to determine majority status *the day before* UNITE visited the store. It is indeed hard to imagine stronger evidence that the Employer planned to recognize UNITE at Store 240 even before the UNITE secured a majority. The Employer was sure that the UNITE would actually obtain a majority because they obviously had invited the UNITE in on company paid time to facilitate the card signings. Not only did they assist UNITE at Store 240, and prevent the

Union from securing a majority, but the stark contrast in treatment occurred on the same day within an hour or two. It is of no moment that there was not instant recognition at Store 240, it was in the bag anyway, in fact, the Employer did not sign the recognition agreement until June 2. The egregious disparate treatment and the absolute denial of equal access to premises to the rival Union completely undermined any employee free choice at this store. Additionally, Morro testified that he was ejected from the store in full view of employees present, which I find coercive.

I conclude the Employer denied equal access to the Union for the purposes of organizing its employees at Store 240, to be a violation of Section 8(a)(1) and (2) of the Act. In addition, the totality of its conduct in connection with that store warrants a finding that the recognition so obtained was tainted, and thus not based on an uncoerced majority, also in violation of Section 8(a)(1) and (2) of the Act.

Store 252

Latrice Jacobs a former employee was particularly forthright and credible on direct and cross examination. Her credible testimony establishes that store manager, Frank Wilder, called a meeting of all of the employees on paid worktime on June 17. Wilder introduced UNITE's representatives and remained at the organizational meeting as the organizers spoke about the Union and distributed authorization cards. The UNITE representatives were invited in, contrary to Duane Reade's professed strict no-solicitation rule referenced above. Moreover, they were permitted inside on a day that the store was not yet open to the general public. Wilder, however, was not content to just remain present at the meeting, he interrupted the UNITE representatives presentation at least once. He told the 15-20 employees present that UNITE was the only Union the Employer was affiliated with and that they had to sign the cards. He forbid the employees from signing with any other union. Seventeen employees signed cards at that meeting. Wilder's vague denials similar to all other Employer representatives, left no doubt whatsoever as to the truthfulness of Jacobs' account. Further, Bertha Wilson's equally disjointed and implausible version of how so many cards came to be signed in such a short time was laughable, not convincing, and as set forth above discredited. I conclude the blatant assistance by Wilder clearly is an independent violation of the Act, as is his coercive statements about UNITE being the only union, and his order to the employees not to sign up with other union. Morro's un rebutted and credible testimony that he was denied equal access 4 days later, June 21, and prior to any recognition, completes this unlawful picture. On that occasion, employer managers, Abrams and Wilder, followed Morro and attempted to surveil his attempts to speak to employees that day. I find such conduct, as alleged in the conformed complaint is an additional independent violation of the Act.

I also conclude the above-described assistance and coercion, in particular Wilder's presence at the card signing meeting and his coercive statements during that meeting, in combination with the denial of equal access to the Union 4 days later, taints the majority on which the June 22 recognition was based, such

that it was not based on an uncoerced majority, as alleged in the complaint.

Store 261

The mutually corroborative testimony of employees Jessica Durgha and Brendaliz Torres established that UNITE obtained its majority at the store on July 21, the day before the store officially opened to the public. Most significant, however, is that on July 21, a Friday, the union cards were solicited at the same time as employer director of human resources, Seymour Stein, was present handing the same their employees employment applications for employment. As noted above, the Board has held in *Fountainview Care Center*, 317 NLRB 1286, 1289 (1995), that union cards obtained during the hiring process in this manner are tainted because of the obviously coercive circumstances. Durgha gave vivid and clearly credible testimony of how she was in the same room with other employees filling out employment applications distributed by Seymour Stein and then proceeded to fill out the union card in the same room several feet away from Stein. Stein's vague memory, and totally untruthful and fabricated testimony as to the presence of union representatives that day is almost not significant, except as to his character, because Bertha Wilson, the UNITE representative admitted Stein was there the day the cards were signed, and she admitted that the employees were approached after the workers spoke with Stein. However, Wilson, an otherwise incredible witness, offered no convincing explanation of how she and the other UNITE representatives happened to be there on the exact day and at the precise time that Stein was handing out employment applications, or why it was that she was not accosted by managers and escorted out of the store pursuant to Duane Reade's professed strict no-solicitation policy, as were union representatives. Durgha's testimony in particular was detailed and had the "ring of truth." As set forth, in detail above, all the employee witnesses were in my view, 100-percent absolutely truthful.

General Counsel contends, and I conclude that the recognition at Store 261 would have been tainted based on the majority of cards signed that day in the presence of Seymour Stein and at the same time as Stein signed up the workers as the employer employees. However, the Employer engaged in further acts of assistance later in the week when it denied equal access to the Union. In this regard, Morro visited the store on July 24 or 25, a few days after the above-described card signings. He was told first by Store Manager, Victor Goriah how Seymour Stein had been in the store with representatives of UNITE when the union cards were signed, corroborating the testimony summarized above. Goriah then put Morro on the phone with Stein, who stated that the store was a UNITE store, which was not true, because the recognition was not accomplished until July 28, days later. Stein told Morro he had to leave or he would be arrested. Neither Goriah nor Stein made any real attempt to rebut this testimony of Morro. Thus this denial of equal access to the Union, at a time *prior* to recognition of UNITE, is a factor which further supports a finding that the July 28 recognition cannot be considered to have been based on an uncoerced majority, and is a further violation of Section 8(a)(1) and (2).

Store 264

The pattern of assistance and coercion at this store closely resembles that of Store 261 above. It is clear that the majority of UNITE cards were signed at that store during the hiring process, while two high ranking employer officials, Seymour Stein and District Manager Bill Farrington, were present in the same room. As set forth above, the mutually corroborative testimony of Emily Alvarez and current employer employee Olivia Andre was detailed and credited by me in its entirety. The hiring and union signings took place in rapid succession in the small "baler" room at the back of the pharmacy where boxes are crushed. Once again, the UNITE representatives were present handing out authorization cards while Stein and Farrington were in very close proximity, signing up as employer employees. These employees came down in a continuing stream, shepherded back to that room. Employee Andre described the UNITE officials as two, three steps away from the Employer's officials. For the same reasons discussed above with respect to Store 261, I conclude this highly coercive situation taints that any cards so obtained, approximately 17 cards. Moreover, just as with Store 264, the Employer did not give the Union a chance at equal access so as to facilitate employee free choice. When Union Representative Rosado, tried to gain access to the store to solicit employees on July 28, Store Manager Enrico Moses told Rosado that he was not allowed to be there or to talk to employees because the store "belonged" to another Union. The Employer had not yet recognized UNITE as of July 28, rather the recognition was dated July 31. Therefore, in no possible sense did that store "belong" to UNITE at that point. As with Store 261, I find this additional element of denial of equal access to the rival Union even before any recognition took place constitutes an additional act of assistance supporting a finding that the recognition was tainted at Store 264.

Store 247

Sometime in late April 2000, union officials Morro and Ray Rosado visited Store 247. The store manager at the time was Enrico Moses. Morro and Rosado entered the store and immediately began distributing union authorization cards. At some point, Moses accosted them and told them they could not speak to the employees and that they had to leave the store. Moses does not dispute this point. Rosado credibly testified that in addition, Moses went to the employees who had already received cards and demanded that they give him the cards because he was not supposed to have allowed them in the store, and they were not supposed to sign anything from the Union. Morro and Rosado credibly testified further that Moses took one of the cards he had confiscated and tore it in half. Moses admits that he took authorization cards, but only after they were given to him "voluntarily" after he came over and asked the employees "what are you doing?" when he saw Morro soliciting cards from them. He denied tearing up any of the cards he received. Morro and Rosado testified that they observed Moses tear up one of the cards and only taped it back together after Morro told Moses that it was illegal to do so. Morro produced the taped up card and it was introduced into evidence. I find this reinforces the union representative's credibility, and is

consistent with the Employer's policy to assist UNITE as admitted by Rizzo.

According to his own testimony, Moses accosted employees as Morro was soliciting them and stated, "What are you doing?" I conclude this was interference and coercion in and of itself under the circumstances. See *Service Employees Local 144 (Sands Point Nursing Home)*, 321 NLRB 399, 402 (1996). (Telling employees they were not allowed to sign cards for another union and that they should retrieve the cards deemed coercive.) I also find it is absurd to construe as voluntary, the employees' surrender of the cards to Moses, or his collection of them under those circumstances. Accordingly, I conclude such conduct violated Section 8(a)(1) of the Act.

As set forth above, the Board has consistently held that a labor organization commits a derivative violation when it accepts unlawful recognition based on a coerced or assisted majority, as is the case for the seven stores named in the instant complaint. UNITE accepted and continues to accept recognition at those locations, and thus has violated, and continues to violate Section 8(b)(1)(A) of the Act. As was noted during the trial, General Counsel has not pled each and every act of unlawful assistance by the Employer as an independent violation, although I conclude the totality of those acts does support findings of tainted recognitions at the seven of the stores named. Where, however, specific acts have been pled as independent violations, and were set forth as such in the sections above pertaining to each individual store, I conclude in receiving and accepting these independent acts of assistance and support, Local 340-A has also violated Section 8(b)(1)(A) of the Act.

As set forth above, where an employer enters into a collective-bargaining agreement with a Union which does not represent an uncoerced majority, and enforces the provisions of the agreement, including the *union-security provisions*, both the employer and Union have committed violations as a matter of law. In this case there is no dispute that the relevant contracts have been enforced, including but not limited to the union-security provisions. Hence, by so doing, both the Employer and UNITE violated Section 8(a)(3) and 8(b)(2) of the Act.

In summary, the Employer engaged in numerous acts of coercion, and unlawful assistance and support to UNITE at the stores enumerated in the conformed complaint. At seven of those stores, the pattern of assistance and coercion was sufficient to taint the recognitions obtained at those stores. In addition, I conclude the acts enumerated as such above constitute independent violations of Section 8(a)(1) and (2) of the Act. UNITE, as a party to these unlawful recognitions and independent acts of assistance, has coerced employees within the meaning of Section 8(b)(1)(A) of the Act. Both Respondents, by entering into the collective-bargaining agreements set forth above and enforcing such contracts, including the union security provisions have additionally violated the act by giving and receiving further assistance, and by discriminating within the meaning of Section 8(a)(3) and 8(b)(2) of the Act.

Conclusions

1. The Employer

1. The Employer, by the supervisors, at the locations, on or about the dates indicated below, directed employees not to

speak with union representatives, in violation of Section 8(a)(1) and (2) of the Act.

(a) By Zafar Husain at Store 241, on or about March 17, 2000.

(b) By Gary Oberdecker at Store 242, on or about March 17, 2000.

(c) By Frank Wilder, at Store 252, in or about mid-June 2000, prior to June 22, 2000, the exact date being presently unknown.

2. The Employer, by the supervisors, at the locations, on or about the dates indicated below, engaged in surveillance of its employees' activities on behalf of and in support of the Union, in violation of Section 8(a)(1) and (2) of the Act.

(a) By Gary Oberdecker at Store 242, on or about March 17, 2000.

(b) By Enrico Moses and Bill Farrington at Store 247, on or about April 24, 2000.

(c) By Frank Wilder, at Store 252, on or about June 21, 2000.

(d) By Victor Goriah, at Store 261, on or about late July 2000 prior to July 28, 2000, the exact date being presently unknown.

3. On or about April 24, 2000, the Employer by Supervisor Enrico Moses, at Store 247, in the presence of employees, confiscated and tore up an authorization card distributed by Allied, in violation of Section 8(a)(1) and (2) of the Act.

4. The Employer, at the locations, and on or about the dates indicated below rendered various assistance and support to UNITE:

(a) At Store 192, by supervisor, Kevin Shields, in or about mid-March 2000, prior to March 20, 2000, the exact date being presently unknown provided meeting space at its facility and required employees to attend organizational meetings conducted by UNITE.

(b) At Store 240, by supervisor, Lou Vigliotti, on or about May 26, 2000, provided meeting space at its facility for UNITE organizers and denied equal access to the Union for the purposes of organizing its employees.

(c) At Store 241, by supervisor, Zafar Husain, on or about March 17, 2000, provided meeting space at its facility and required employees to attend organizational meetings conducted by UNITE.

(d) At Store 241, by Zafar Husain, on or about March 17, 2000, denied equal access to Allied for the purposes of organizing its employees.

(e) At Store 241, by supervisor, Chris Foster, on or about March 17, 2000, denied equal access to Allied for the purposes of organizing its employees.

(f) At Store 242, by supervisor, Gary Oberdecker, on or about Mid-March 2000, provided meeting space at its facility to UNITE and denied equal access to Allied for the purposes of organizing its employees.

(g) At Store 242, by Gary Oberdecker and vice president, James Rizzo, on or about mid-March 2000, directed Allied organizers to leave the facility.

(h) At Store 252, by supervisor, Frank Wilder, on or about June 17, 2000, provided meeting space at its facility to UNITE

and denied equal access to the Union for the purposes of organizing its employees.

(i) At Store 264, by director of human resources, Seymour Stein, Bill Farrington, and Susan (LNU), on or about July 14, 2000, provided meeting space at its facility and required employees to attend meetings conducted by UNITE.

(j) At Store 264, by supervisor, Enrico Moses, on or about July 28, 2000, denied the Union equal access for the purposes of organizing its employees. Such conduct has unlawfully assisted UNITE in violations of Section 8(a)(1) and (2) of the Act.

5. (a) At all material times, the Employer and UNITE have been parties to successive collective-bargaining agreements, effective by their terms from April 1, 1999, to September 21, 2002, and from April, 2001 to March 31, 2004, which cover all clerks, pharmacy clerks, and cashiers employed by Respondent Duane Reade at various stores.

(b) Article 1B of the collective-bargaining agreement effective by its terms from April 1, 1999, to September 21, 2002, described above in subparagraphs (a) and (b) provides:

It shall be a condition of employment that all employees of the Employer covered by the Agreement, who are members of the Union in good standing on the effective date of the Agreement shall remain members in good standing, and those who are not members on the effective date of this Agreement shall on the 30th day following the effective date of this Agreement, or after the execution of the Agreement, whichever is later, become and remain members in good standing in the Union. It shall also be a condition of employment that all employees covered by this Agreement and hired on or after its effective date shall on the 30th day following the beginning of such employment become and remain members in good standing in the Union.

(c) Article 1B of the collective-bargaining agreement effective by its terms from April 2001 to March 31, 2004, described above in subparagraphs (a) and (b) provides:

It shall be a condition of employment that all employees of the Employer covered by this Agreement, who are members of the Union in good standing on the effective date of this Agreement shall remain members in good standing, and those who are not members on the effective date of this Agreement shall on the 60th day following the effective date of this Agreement, or after the execution of the Agreement, whichever is later, become and remain members in good standing in the Union. It shall also be a condition of employment that all employees covered by this Agreement and hired on or after its effective date shall on the 60th day following the beginning of such employment become and remain members in good standing in the Union.

(d) Article IX A of each of the collective-bargaining agreements described above in subparagraphs (a) and (b) provides:

During the second week of each and every month, the Employer agrees to deduct and remit to the Union the Union's regular membership dues and initiation fees, upon condition that the Union shall furnish the Employer with a lawful checkoff authorization form executed by the employee.

6. (a) Since on or about the dates listed below, the Employer, through its officers, agents, and representatives, has recognized UNITE as the exclusive representative for the purposes of collective bargaining of all clerks, pharmacy clerks, and cashiers at the stores identified below:

#192	March 20, 2000
#240	June 2, 2000
#241	March 16, 2000
#242	March 16, 2000
#252	June 22, 2000
#261	July 28, 2000
#264	July 31, 2000

(b) The Employer, on or about the dates, at the stores set forth above in subparagraph (a), applied the terms of the collective-bargaining agreements described above in Paragraph 5 to all clerks, pharmacy clerks, and cashiers.

7. Since on or about the dates, at the stores set forth above in paragraph 6 the Employer and UNITE have maintained and enforced the terms of the collective-bargaining agreements described above in paragraphs 5 and 6.

By the conduct described in paragraphs 5, 6, and 7, the Employer has unlawfully assisted UNITE in violation of Section 8(a)(1), (2), and (3).

8. The Employer and UNITE engaged in the conduct described above in paragraphs 5 and 7, even though UNITE did not represent an uncoerced majority of the clerks, pharmacy clerks, and cashiers employed at the stores identified above.

9. Since on or about the dates, at the stores set forth above, the Employer has rendered assistance and support to UNITE by deducting sums of money as union dues, initiation fees and assessments from the wages of all clerks, pharmacy clerks, and cashiers, pursuant to the collective-bargaining agreement as described above, and remitting the same to UNITE.

10. By the conduct described above in paragraphs 4 through 8, UNITE has received assistance and support from the Employer and has been restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(b)(1)(A) of the Act.

11. By the conduct described above in paragraphs 5, 6, and 7 UNITE has been attempting to cause and causing the Employer to discriminate against its employees in violation of Section 8(a)(3) of the Act, in violation of Section 8(b)(2) of the Act.

REMEDY

In summary, the Employer engaged in numerous acts of coercion, and unlawful assistance and support to UNITE at the stores enumerated in the instant conformed complaint. At seven of those stores, the pattern of assistance and coercion was sufficient to taint the recognitions obtained at those stores. In addition, the acts enumerated as such above constitute independent violations of Section 8(a)(1) and (2) of the Act. UNITE as a party to these unlawful recognitions and independent acts of assistance, has coerced employees within the meaning of Section 8(b)(1)(A) of the Act. Both Respondents, by entering into the collective-bargaining agreements referenced above and enforcing such contracts, including the union-

security provisions have additionally violated the Act by giving and receiving further assistance, and by discriminating within the meaning of Section 8(a)(3) and 8(b)(2) of the Act.

An appropriate remedy should be ordered, which in the instant case should include: (1) an order to cease and desist from giving effect to the recognition agreements or collective-bargaining agreements covering Stores 242, 241, 192, 240, 252, 261, and 264, unless and until Local 340-A becomes lawfully certified by the Board as the exclusive bargaining agent for the employees in the appropriate units at those stores; (2) a proviso that nothing in this Order shall be construed to authorize or require the elimination of wage increases or benefits established under the agreements; and (3) an Order that the Em-

ployer and UNITE shall be jointly and severally liable to reimburse employees for any dues payments obtained pursuant to the relevant collective-bargaining agreements.

Respondent Employer and Respondent Union shall be required to jointly and severally reimburse the employees (all clerks, pharmacy clerks, and cashiers) for all initiation fees dues, assessments, or other moneys they may have been paid or withheld from pursuant to the aforesaid collective-bargaining agreements, together with interest on the moneys dues, to be computed as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded* 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]